2021 LSBC 43
Decision Issued: October 26, 2021
Hearing File No.: 20180072
Citation Issued: September 4, 2018

LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

HONG GUO

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	May 12 and 13, 2021
Written submissions:	June 1, 2021
Panel:	Jennifer Chow, QC, Chair Ralston S. Alexander, QC, Lawyer John Lane, Pubic representative
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Gerald A. Cuttler, QC Kaitlin Hardy

BACKGROUND

[1] In our decision on Facts and Determination of November 4, 2020 (2020 LSBC 52), we found that the Respondent had committed professional misconduct arising from the theft of about $7.5 million of client trust funds by the Respondent's bookkeeper.

[2] The Citation covered five broad allegations of misconduct under the following general headings:

(i) failure to comply with trust accounting rules;

(ii) failure to supervise employees;

(iii) misappropriation of trust funds;

(iv) breach of an undertaking given to the Law Society (the "Undertaking"); and

(v) breach of a Law Society order.

[3] The specifics of the misconduct are particularized in our decision on Facts and Determination. Essentially, following the theft, the Respondent intentionally manipulated and "borrowed" trust funds from clients, without their knowledge or authorization, to replace funds missing from other clients' trust accounts required to complete pending real estate transactions.

[4] We also found that the Respondent facilitated her bookkeeper's theft by: (a) failing to appropriately supervise the bookkeeper; (b) failing to ensure strict compliance with Law Society trust accounting rules; and (c) leaving with the bookkeeper a series of blank, previously signed trust cheques, some of which were used in the theft.

[5] The Panel notes that the presumptive sanction for intentionally misappropriating client funds is disbarment, unless evidence of exceptional circumstances exists to explain or mitigate the misconduct. The key issues before the Panel are whether disbarment is the appropriate sanction and whether evidence of exceptional circumstances exists to explain or mitigate the Respondent's misconduct.

THE LAW SOCIETY'S POSITION

[6] The Law Society seeks an order that the Respondent be disbarred under section 38(5)(e) of the *Legal Profession Act*. The Law Society submits that, from a global perspective, nothing in the circumstances of this case justifies any outcome other than an order that the Respondent be disbarred.

[7] The Law Society's position is that the Respondent's steps to address the financial difficulties she found herself in following the theft do not justify her own misappropriation of trust funds. The Law Society emphasizes that the Respondent

"borrowed" trust funds from her clients to cover her losses, disregarded her undertaking to the Law Society and disregarded a Bencher Order put in place to protect the public. The Law Society also points out that some of the proven misconduct occurred prior to the bookkeeper's theft.

[8] The Law Society further submits that disbarment is not limited only to cases involving misappropriation, the most serious cases or the most serious offenders. That is because disbarment may be ordered when the panel determines that disbarment is the most appropriate order to be made to protect the public confidence in the legal profession, including the disciplinary process.

[9] In addition, the Law Society seeks an order that the Respondent pay costs in the amount of $57,200 and disbursements in the amount of $12,894, for a total of $70,094.

THE RESPONDENT'S POSITION

[10] The Respondent submits that an order of disbarment is not appropriate as the circumstances of this case fall into the category of extraordinary circumstances that would mitigate against such an order. The Respondent further submits that disbarment in these extraordinary circumstances would be unwarranted, unfair and contrary to the public interest.

[11] The Respondent's position is that she was dealing with a theft of unprecedented magnitude from a trust account by a trusted employee. The Respondent submits that her actions were focused on trying to protect her clients, not on exploiting her clients. This is a mitigating factor, the Respondent says, since exploitation, and not protection, of clients forms the basis of most misappropriation cases. The Respondent says she sincerely believed that completing the pending client transactions was the best option she had in the face of all the difficult choices. She submits that she did the best she could to eliminate the trust shortages.

[12] Following her discovery of the theft, the Respondent took various steps to respond to the consequences of the theft on her law practice. She notified both the Law Society and the RCMP of the circumstances of the theft. She deposited to her trust account, over several months, approximately $2.6 million of family money to ameliorate some of the short-term consequences of the theft. She intentionally manipulated her trust accounts to minimize the impacts of the missing funds on pending transactions that no longer could be funded from client trust accounts.

[13] Finally, the Respondent submits that the Law Society has not given her enough, or indeed any credit, for the fact that, at the end of the day, the entire amount stolen from the trust account was restored from a combination of funds from the Respondent's family and a third party theft insurance policy. The Panel is urged to provide the Respondent with some credit for that outcome.

DISCUSSION

[14] The modern approach to determining the appropriate disciplinary sanction is to apply only those *Ogilvie* factors that are relevant to the particular circumstances of the case: *Law Society of BC v. Ogilvie*, 1999 LSBC 17; *Law Society of BC v. Dent*, 2016 LSBC 05. We adopt the reasoning set out by the review board in *Law Society of BC v. Faminoff*, 2017 LSBC 04, at para. 84, that decisions on sanction are an "individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings."

[15] We agree with a simplified process to apply a consolidation of the *Ogilvie* factors as follows (*Dent*, paras. 19 to 23):

(a) the nature, gravity and consequences of conduct;

(b) the character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

Nature, gravity and consequences of conduct

[16] We find that the nature and gravity of the Respondent's misconduct viewed globally calls for a severe sanction. As discussed earlier, the Respondent's misconduct included: three instances of misappropriation; failure to comply with an undertaking for over 150 days; failure to comply with a Bencher Order; failure to properly supervise her staff by, among other things, leaving a large number of pre-signed blank trust cheques with her bookkeeper while the Respondent was on vacation; and other accounting breaches prior to the bookkeeper's theft.

[17] The failure of the Respondent to properly observe the Law Society trust accounting rules is a serious offence. In many ways, it is the foundational problem that led to the other difficulties described in the Citation. The failure to require monthly trust

account reconciliations allowed the theft to take place. It is clear that a trust reconciliation, properly conducted in either of the two months prior to the theft, would have alerted the Respondent to the fraudulently inflated trust account balance. A timely discovery should have interrupted the scheme of the bookkeeper and his accomplice.

[18] In addition, and as noted in our decision on Facts and Determination, the sheer magnitude of the Respondent's practice was such that proper supervision of the employees and the work product was simply not possible. The volume of work being performed by essentially unsupervised staff created an environment with increased risk for errors and in this instance, theft. The trust account overdrafts that resulted from a temporal misalignment of deposits into and withdrawals from trust are but one example of the type of problems created by a failure to properly supervise staff.

[19] The failure to reconcile the trust account on a monthly basis as required occurred a number of times. The mismatches of deposits and withdrawals from trust occurred many times over the two-year period leading up to April 1, 2016. We have noted that this behaviour was the result of a casual and careless approach by the Respondent and her bookkeeper. The bookkeeper was responsible for the entries and the Respondent was responsible through her failure to provide appropriate supervision.

[20] The Citation identifies three misappropriations. The failure to open the trust account as required by the Undertaking occurred only once, but it occurred on a daily basis for over 100 days. The deposit of funds to the tainted trust account occurred many times in contravention of the specific requirement of the Undertaking.

[21] Regarding the last two general categories of misbehaviour described in the Citation (breach of undertaking and failure to observe an order of the Benchers), we are essentially left on our own to find any explanation for this extraordinary result. We note that the Respondent was required to immediately open a new trust account and to immediately stop using the tainted trust account so as to isolate that tainted trust account from subsequent events. Without any satisfactory explanation, the Respondent did not open a new trust account until 100 days after being required to do so. When she finally opened the new trust account, the Respondent did not use it for its intended purposes until more than a month later. The Panel finds these delays amount to extremely negative and significant circumstances. All undertakings must be observed, especially an undertaking given to one's regulatory body. Equally, as a component of the Undertaking, the Respondent was required to

have all trust cheques countersigned by another signatory. The Respondent also ignored this component of the Undertaking. Accordingly, many trust cheques were issued with the single signature of the Respondent.

[22] For these last two described allegations in the Citation, we do not agree that the Respondent's explanation mitigates against the misconduct. The Respondent's explanation was that she was overwhelmed by circumstances, distracted by the magnitude of the problems created, and simply unable to comply within the time limits provided by the Orders. We have accepted that explanation as far as it goes and note that it does not excuse the failure to comply with either the Undertaking or the Order of the three Benchers.

Character and professional conduct record of the respondent

[23] The Respondent is 54 years old. She was called to the British Columbia Bar in May 2009 and the Saskatchewan Bar in 2000.

[24] In regard to her character, the Respondent submits that by 2016, she had developed a reputation for honesty, integrity and giving back to the community. In that regard, the Respondent submitted various letters of reference and media reports to attest to her character and community contributions. At the Hearing, the Panel was directed to those letters and media reports. The Law Society raised several concerns over the admissibility and weight to be given to that evidence. We agree with the review panel in *Law Society of BC v. Johnson*, 2016 LSBC 20, at paras. 45 and 46, that when there is a question of whether the authors knew all of the circumstances of the lawyer's misconduct or professional conduct record, the panel should not put too much weight on those letters since doing so would put the lawyer's friends and colleagues in the place of the panel and detract from the panel's duty to protect the public interest.

[25] Generally, we accept that the letters and media reports provide some indication of community support for the Respondent. However, we place little weight on those character letters and media reports. We note that most of the letters and media reports do not address the issue of the bookkeeper's theft or the Respondent's role in failing to properly supervise the bookkeeper. The few letters that do address the bookkeeper's theft also clearly state that the Respondent was the victim of theft rather than the lawyer who enabled the theft through her non-compliant trust accounting system.

[26] The Respondent's professional conduct record ("PCR") was admitted into evidence at the Hearing. Her PCR consists of: two referrals to the Practice Standards Department; two conduct reviews; an undertaking given during the course of the

investigation into the misconduct underlying this Citation; three Orders made by Benchers under Rule 3-10; and an administrative suspension imposed under Rule 3-6 of the Law Society Rules.

[27] Details of the Respondent's PCR are as follows:

(a) **Practice Standards Review 2013**: This practice review led to recommendations relating to the Respondent's real estate practice. The Respondent voluntarily agreed not to take on any new criminal law, family law or litigation files (except joint divorce petitions);

(b) **Conduct Review 2015**: This conduct review addressed the Respondent's conduct in breaching a trust condition imposed on her when she received $4,000 in trust as partial settlement of amounts owed to her client under a settlement agreement. The Respondent had released $3,000 to her client and had used the balance to pay her legal fees without complying with the trust conditions;

(c) **Conduct Review 2016**: This conduct review addressed the Respondent's conduct in presenting a release to a non-client who was not proficient in English and was unrepresented and opposed in interest. The release did not reflect what had been discussed between the parties;

(d) **Practice Standards Review 2016**: This practice review led to recommendations that the Respondent enter into a mentorship agreement;

(e) **Undertaking 2016**: As discussed during the Hearing, the Respondent entered into an undertaking on April 19, 2016, following the employee theft relating to her operation of her trust account. The Respondent failed to comply with her Undertaking;

(f) **Bencher Order August 2016:** As discussed during the Hearing, in August 2016, the Benchers made an order under Rule 3-10 relating to the Respondent's operation of her trust account. The Order was issued because of the Respondent's failure to comply with her Undertaking. The Respondent failed to comply with the Bencher Order;

(g) **Bencher Orders March and April 2017:** In December 2016, the Law Society sought a variation of the Bencher Order to address the Respondent's failure to comply with the 2016 Bencher Order and new evidence that the Respondent had misappropriated funds from her trust

account. The Benchers imposed further conditions on the Respondent's practice, including a provision that the Respondent not handle trust funds or operate a trust account, and that she practise only under the direction of a practice and trust supervisor.

Acknowledgment of the misconduct and remedial action

[28] The Law Society submits that the Respondent did not acknowledge her misconduct until the Hearing. Additionally, the Law Society submits that the Respondent denied the extent of her misconduct and attempted to downplay her role and responsibility for creating the circumstances that led to the bookkeeper's theft. Accordingly, the Law Society says that the Respondent should be given no credit for her "last minute" admissions of responsibility.

[29] The Law Society submits that the Respondent was required to eliminate the trust shortage and commends her efforts to do so. In regard to remedial action, the Law Society says that, in deciding the proper sanction, the Panel should remain focused on the misconduct that has occurred and not whether the Respondent has rehabilitated herself since the misconduct occurred. Rather, the Law Society submits, the issue of rehabilitation relates to the issue of conditions or limitations on a lawyer's practice or the amount of time for a suspension or the amount of a fine. The Law Society further submits that rehabilitation does not change the type of sanction that would be appropriate in all of the circumstances to protect the public.

[30] The Law Society relies on *Law Society of BC v. Lessing*, 2013 LSBC 29, paras. 57 and 60, for the principle that, where there is a conflict between the factors of rehabilitation of the lawyer and the protection of the public, the protection of the public must prevail.

[31] During this Hearing, the Respondent gave detailed testimony about the effect of the theft on herself and her family. We accept that the stress and financial impact of the theft is undeniable. However, we agree with the Law Society that the effect of the theft does not excuse the Respondent's misconduct. Viewing the events globally, that stress does not outweigh the financial impact and stress faced by the Respondent's clients and third parties. Until the excess insurer covered the missing $4 million, those clients and third parties were listed as unsecured creditors with little hope of recovery for at least 18 months.

[32] At this Hearing, the Respondent apologized for her breaches of undertaking and the Bencher Order. She submits that she has taken concrete steps to prevent similar events from recurring. The Respondent now practises under supervision and does

not operate a trust account. She further submits that she has taken complete remedial action to correct all of the misconduct and that she can and has been rehabilitated.

[33] We accept that the Respondent's misappropriation of trust funds from some clients to other clients was largely motivated by her desire to minimize the imminent collapse of pending transactions. However, the Panel notes that a number of lawsuits were commenced by realtors seeking their commissions and other parties who purported to suffer damages arising from delayed or missing payments by the Respondent. The eventual replacement of the stolen funds took years. In the interim, several parties were adversely impacted in terms of costs, stress and inconvenience by the Respondent's "borrowing" of client funds as not all payments in the pending transactions were paid in a timely manner.

[34] Additionally, we accept that over time, the Respondent was able to replace most if not all of the stolen funds through family funds and private insurance funds. It is in evidence that all trust shortages were ultimately covered by a combination of family funds and the proceeds of a $4 million employee defalcation policy. The funds from that policy were ultimately paid about 18 months following the discovery of the theft.

[35] We have found that the Respondent's decision to complete the transactions in the manner undertaken was a deliberate decision to ensure that pending transactions would complete in time and not default.

[36] We accept the Respondent's late admission of responsibility for the misconduct. However, we note that, for the most part, the Respondent continues to maintain that she was the victim of her bookkeeper's theft and continues to minimize her role in creating the environment that led to the theft, in particular by providing numerous pre-signed blank trust cheques to her bookkeeper while on vacation.

[37] We note that in her present practice circumstances, the Respondent has no access to a trust account and is practising under the supervision of a lawyer.

Public confidence in the legal profession, including public confidence in the integrity of the disciplinary process

[38] The Law Society submits that the Respondent's conduct in misappropriating trust funds on three separate occasions is extremely serious and shows a lack of integrity and trustworthiness that is incompatible with her professional duties. The Law Society further submits that the authorities support the proposition that disbarment is the appropriate sanction in such cases. Finally, the Law Society submits that the

Respondent has provided no exceptional evidence that would mitigate her misconduct.

[39] The Law Society emphasizes that the Respondent knew she had a large trust shortage and was initially told that her professional insurance would not cover the loss. She chose on three separate occasions to use other client funds in the hopes that she would be able to juggle her trust account and eventually cover the shortage in the future. The Law Society submits that the Respondent's conduct is inexcusable and she should not be permitted to continue in practice.

[40] Further, the Law Society points to our conclusion that the Respondent's misconduct was not restricted to the three separate incidents of misappropriation. We also found that the Respondent committed an array of professional misconduct spanning a two-year period, which the Law Society submits would cumulatively justify an order of disbarment or a very lengthy suspension.

[41] In *Law Society of BC v. Harder*, 2006 LSBC 48, at para. 9, the hearing panel quoted from MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Thomson Canada Ltd., 2005) at 26-1 as follows:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

[42] In *Law Society of BC v. Gellert*, 2014 LSBC 05, a lawyer misappropriated over $14,000 in client trust funds, made discourteous and threatening comments regarding a Law Society auditor, failed to respond to communications from the Law Society, and breached three Law Society rules by issuing trust cheques payable to "cash" and failing to maintain proper trust accounting records. The panel in *Gellert* found that disbarment was the only appropriate disciplinary action in the circumstances and no extraordinary circumstances existed to mitigate the misconduct.

[43] We agree with the panel in *Gellert* that the objective of public protection is the "prism" through which all of the *Ogilvie* factors should be applied. The panel explained at paras. 44 and 46 the grounds for an order of disbarment:

> Yet this sanction is usually imposed for deliberate misappropriation from a client – almost always where the amount is substantial … -- because in such cases disbarment is usually the only means of fulfilling the goal of the protecting the public and preserving public confidence in the legal profession. Deliberate misappropriation of funds is among the very most serious betrayals of a client's trust and constitutes gross dishonesty. Disbarment absolutely ensures no further recurrence of such conduct on the part of the lawyer. It also promotes general deterrence … And disbarring a lawyer who has deliberately misappropriated client funds is usually the only way to maintain public confidence in the legal profession.
>
> This is not to say that a deliberate misappropriation of client funds will invariably lead to disbarment. But as noted in *Blinkhorn*, 2010 LSBC 08, para. 8, disbarment can only be avoided where the respondent has presented "compelling evidence of extraordinary mitigating circumstances to satisfy the hearing panel that the protection of the public interest and reputation of the profession does not require disbarment."

[44] We agree that the circumstances of this case require us to ensure that public protection and maintaining public confidence in the legal profession are the primary goals. In our view, public confidence in the legal profession and the Law Society as a regulator must be maintained and only in exceptional circumstances should a lawyer be permitted to remain in practice after deliberately "borrowing" client trust funds to cover trust shortages.

[45] The Law Society submits that the "presumptive sanction" for the intentional misappropriation of client funds is disbarment, unless there are extraordinary circumstances to explore and possibly assist with an explanation for the misappropriation. The Law Society submits that there are no extraordinary circumstances.

[46] In *Law Society of BC v. Lebedovich*, 2018 LSBC 17, at para. 24, the panel noted that "… misappropriation … is the most serious misconduct a lawyer can commit." Similarly, in *Law Society of BC v. Tak*, 2014 LSBC 57, at para. 35, the panel explained that:

> … Wrongly taking clients' money is the plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship. The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. In the absence of multiple, significant mitigating factors, public confidence in the profession and its ability to regulate itself would be severely

> compromised if anything short of disbarment is ordered for misappropriation of client funds.

[47] Previous cases clearly establish that, absent rare and extraordinary mitigating factors, disbarment is the appropriate disciplinary action for the intentional misappropriation of client trust funds: *Law Society of BC v. Briner*, 2015 LSBC 53 ("*Briner* DA"), para. 69; *Gellert*, para. 42.

[48] In *Law Society of BC v. McGuire*, 2006 LSBC 20, at para. 30; aff'd 2007 BCCA 442, the panel characterized misappropriation in the following way:

> … the Respondent broke, not once but many times over a long period of time, the clearest, most basic rule of professional conduct: you do not ever, under any circumstances, help yourself to trust money that belongs to your clients. One can say in the Respondent's favour that he did not compound his wrongdoing by, say, falsifying his trust records or failing to cooperate with the Law Society's investigation. But the fact that he could have done worse things does not lessen the seriousness of what he did do.

[49] The cases of *McGuire* and *Law Society of BC v. Hammond,* 2004 LSBC 32, involved lawyers who used funds in their pooled trust account on a short-term basis to cover their operating costs. The funds were withdrawn and repaid on a revolving basis when needed. Both lawyers were found to have misappropriated client funds and were disbarred.

[50] In *McGuire*, the lawyer used his trust account to cover his personal expenses. He submitted 30 character reference letters attesting to his integrity. The panel noted the respondent's difficult personal circumstances, including separation, divorce, the death of a pet and large veterinarian bills. However, the panel, at para. 29, emphasized the seriousness of the misappropriation as misconduct:

> The Respondent is a good man, but at a time of great difficulty in his life he allowed himself to do what a lawyer, regardless of what strains or pressures he is under, must never do. The standard he broke was not one of unattainable perfection, which humans are expected to fall short of from time to time. On the contrary, it is an absolute standard. When it is deliberately broken, as it was here, the seriousness of the misconduct is, except in very unusual circumstances, impossible to mitigate. No case was cited to us in which the deliberate, repeated recourse to trust funds to ease the lawyer's personal cash flow problems was sanctioned with anything less than disbarment.

[51] The Court of Appeal in *McGuire*, at paras. 14 and 15, agreed that the panel made a reasonable decision in placing a high importance on the protection of the public given the Law Society's mandate to uphold and protect the public interest in the administration of justice.

[52] In *Hammond*, the lawyer misappropriated client funds (two allegations); failed to respond to inquiries from the Law Society (six allegations); breached undertakings (four allegations); failed to report a judgment against him (one allegation); engaged in the unauthorized practice of law (one allegation); and failed to remit tax withholdings deducted from employees (one allegation). The Law Society argued that the two allegations of misappropriation were sufficient to justify disbarment. At para. 23, the panel quoted with approval the passage from Gavin MacKenzie's publication quoted above at para. 41.

[53] The Law Society submits that, in this case, the Respondent was under financial hardship arising from the bookkeeper's theft. However, the Law Society emphasizes that the Respondent was partially responsible for her own misfortune: she circumvented the trust protections mandated by the Law Society that prohibited non-lawyers from accessing trust funds by leaving pre-signed blank trust cheques with her bookkeeper. Further, the Law Society submits that, after discovering the theft and the resulting significant trust shortage, the Respondent made the calculated decision to "borrow" funds from other clients to close three real estate transactions.

[54] The Respondent, on the other hand, submits that there are exceptional circumstances that explain and mitigate her misconduct. She submits that the cases relied on by the Law Society that imposed the sanction of disbarment are distinguishable. She says that none of the facts are similar to the Respondent's situation in which her motive to misappropriate client trust funds was to protect her clients' transactions from defaulting.

[55] The Respondent submits that the cases relied on by the Law Society show that the lawyers misappropriated client funds for their own personal use, such as paying for personal living expenses: *Harder*; *Lebedovich*; easing personal cash flow problems: *McGuire*; and supporting a wife's company: *Gellert*.

[56] We note, however, that this case draws some similarities to *Law Society of BC v. Briner*, 2015 LSBC 11 ("*Briner* F&D"). In her submissions, the Respondent admits that the *Briner* case showed that the lawyer had gained a personal advantage in manipulating his trust account. The panel found that the lawyer gained a clear advantage by using his client's trust funds to cover another client's overdraft in that trust account: ("*Briner* DA"), para. 64.

[57] In *Briner*, the lawyer was found to have misappropriated trust funds when he deposited client trust funds to his pooled trust account and did not allocate that amount to the client's trust ledger. Instead, the lawyer allocated the deposit to a different client account that was in an overdraft position. The allocation of the deposit into the different client's trust account took that ledger out of the overdraft position. The panel found that the lawyer was not authorized by the client to allocate the deposit to the other client or to make withdrawals from the trust account for the benefit of the other client or anyone else. Four days after the client's deposit, only a minimal amount remained in the trust account. The client's trust ledger showed no credits and no funds remained in the trust account when the custodian took custody of the lawyer's practice.

[58] In addressing the proper sanction to be ordered in *Briner* DA, the panel found that the lawyer demonstrated little appreciation of his misconduct or how it impacted his clients or the legal profession; the lawyer did not properly acknowledge the misconduct and had not apologized to his client. The lawyer had repaid the Lawyers Insurance Fund, but he had had much earlier opportunities to address the client's shortfall and repay his client directly. The lawyer was disbarred.

[59] However, in *Law Society of BC v. Lowe*, 2019 LSBC 37, the lawyer was found to have misappropriated $9,107.65 received from 43 clients in pre-billed estimated disbursements. He deposited the funds upon receipt into his general account and subsequently reclassified the funds as "disbursement revenue" for "administrative convenience." The lawyer was found to have gained a direct financial benefit through his misappropriation, and the impact on the clients was the deprivation of funds that were rightfully theirs. The panel found that exceptional circumstances existed as the conduct was grossly negligent as opposed to being knowingly intentional. The panel determined that disbarment was not required and ordered a five-month suspension.

DISCUSSION ON DISBARMENT

[60] In this case, the Respondent manipulated her clients' trust funds to cover shortfalls in other clients' trust funds that occurred due to the massive theft committed by her bookkeeper. We do not agree with the Respondent's submissions that she did not benefit financially (see *Briner; Lowe*) from her manipulation of her clients' trust funds. In our view, the Respondent clearly gained a direct advantage when she used her clients' trust funds to cover shortfalls in other clients' trust accounts that would otherwise adversely impact pending real estate transactions. In other words, the proceeds of the misappropriation were utilized to complete commercial transactions that would, but for the misappropriations, have collapsed as a result of

the theft from the Respondent's trust account. The Respondent made a deliberate decision to close the transactions in the only way possible by misappropriating funds from one client to facilitate a closing for another.

[61] We accept that the presumptive sanction of disbarment would at first glance apply to the Respondent. However, we agree with the Respondent that exceptional circumstances exist that explain and mitigate her misconduct.

[62] Specifically, we find that there are three circumstances that collectively amount to exceptional circumstances that mitigate against disbarment. First, the Respondent provided family funds of about $2.6 million to help eliminate the trust shortage caused by the theft, namely $1.69 million between April 5 to 13, 2016, about $219,000 by August 9, 2019, $370,000 in January 2017 and $300,000 in or about March 2018.

[63] Second, the Respondent was attempting to deal with a massive theft of about $7.5 million by a trusted employee. While we determined that the Respondent created the circumstances that led to the theft, we also find that the Respondent was essentially caught between a rock and a hard place. Whether she took any steps or not, many of her clients' pending transactions were adversely impacted by the massive theft. The clients who had pending transactions would bear the brunt of the theft so the Respondent deliberately manipulated her clients' trust funds to close pending transactions. We accept the Respondent's evidence that she believed that by manipulating her trust funds in the manner she did, she could minimize the global impact of the massive theft on her clients.

[64] Finally, we understand that, with some exceptions (i.e., parties who brought lawsuits claiming damages for delayed or missing payments), most, if not all, affected clients were eventually made whole through funds paid from family funds and the defalcation insurance.

[65] To be clear, we do not condone the Respondent's actions in this case. However, for the purposes of deciding whether the presumptive sanction of disbarment should apply in this case, we find that the three circumstances viewed collectively amount to exceptional circumstances that explain and mitigate against an order of disbarment.

CHARTER ARGUMENTS

[66] The Respondent also raised arguments based on the *Charter* to counter the Law Society's arguments urging disbarment of the Respondent. As we found that

exceptional circumstances exist to mitigate against an order of disbarment, it is not necessary for the Panel to address this novel argument. We thus decline to do so.

ABUSE OF PROCESS

[67] At the beginning of this Hearing, the Panel considered an objection from the Respondent that the Law Society had introduced material in its reply submissions that was prejudicial and inappropriate. The Law Society referred in its reply submissions to several pending or outstanding citations and conduct reviews involving this Respondent. The purported basis for the introduction of this material was to rebut evidence of any character evidence the Respondent advised it would seek to admit.

[68] The Panel considered the Respondent's objection and directed that no evidence of pending citations or conduct reviews be referenced in any way in the Law Society submissions on disciplinary action. The Panel was of the view that the submission of this material for any reason was highly irregular and its prejudice would outweigh its probative value.

DISCUSSION ON SUSPENSION

[69] We have found that an order of disbarment is not required for the protection of the public, given the exceptional circumstances, as discussed above. However, the Law Society and the Respondent have provided the Panel with submissions only on the issue of disbarment. Given the length of time taken to hear and determine this matter due to COVID-19 and other factors, we have decided that it would not be in the interests of justice to delay our decision further by seeking additional submissions from the parties.

[70] Instead, the Panel has reviewed the case law provided by the parties to discern a range of disciplinary sanctions other than disbarment for similar misconduct. We note that some of the cases provided address suspensions and fines in cases involving findings of misappropriation, lack of supervision over clients' trust accounts and breaches of undertaking. We have focused primarily on those cases that involved a finding of misappropriation from clients' trust accounts since those cases attract more serious sanctions and align closely with this case.

[71] In *Law Society of BC v. Andres-Auger*, [1994] LSDD No. 127, Discipline Case Digest 94/11, the lawyer mishandling of trust funds was held to amount to misappropriation of funds on several files. The lawyer breached Law Society accounting rules by failing to maintain the books, record funds received and

disbursed, maintain a general ledger, adequately account for bank deposits and keep records of the source of deposits. The lawyer had been out of practice for some time before the hearing and would be required to attend a credentials hearing before being readmitted. The panel imposed a fine of $1,750 rather than suspension.

[72] In *Law Society of Upper Canada v. Babij*, 2004 ONLSHP 24, the lawyer hired a new employee to assume day-to-day financial management over the lawyer's practice. The lawyer failed to oversee the financial side of his practice and signed trust cheques in blank form leaving it to his employee (later new wife) to complete them. The panel found there was substantial mishandling of, and misappropriation from, his trust accounts. The lawyer was suspended for 12 months.

[73] In *Law Society of BC v. Sarai*, 2005 LSBC 17, the lawyer was found to have committed more than 150 separate instances of either neglect, misconduct, breach of rules or breach of undertaking in his real estate practice. While not a misappropriation case, the lawyer was suspended for one year.

[74] In *Law Society of Alberta v. McGechie,* 2007 LSA 21, the lawyer failed to follow the Law Society's accounting rules, failed to render proper accounts, breached an undertaking, failed to respond promptly to the Law Society, failed to serve a client competently, breached a court order and failed to comply with statutory trust conditions. There was no intentional misappropriation, but rather the misappropriation was the result of careless behaviour. The lawyer was suspended for 18 months.

[75] In *Law Society of Saskatchewan v. Angus*, 2010 LSS 6, the lawyer through recklessness, misappropriated client funds, prepared false accounts, breached an undertaking that he provided to the Law Society, failed to respond substantively or at all to various Law Society inquiries, and generally did not properly maintain books and records. The panel found that the misappropriation was not intentional or dishonest. The lawyer was suspended for 12 months.

[76] In *Law Society of Upper Canada v. Ortega,* 2013 ONLSHP 91, the lawyer was found to have failed to be on guard in conducting various real estate transactions such that he was "duped" and fraud was committed under his watch. He admitted his liability to two banks, entered settlements with both and was repaying the owed amounts. The majority and the minority agreed on a six-month suspension but disagreed regarding whether the lawyer should be permanently prohibited from practising real estate law.

[77] In *Faminoff*, the lawyer was found to have committed professional misconduct by improperly handling clients' trust funds, failing to maintain proper accounting records, making intentional misrepresentations to the Law Society by backdating statements of account and breaching various undertakings. The Law Society sought a suspension order in the range of five to six months and an order that the respondent complete a remedial program prior to resuming practice. The hearing panel found that the respondent had not misappropriated funds and had not received a direct financial benefit from his misconduct and made an order for suspension of two months. The review board upheld the two-month suspension as falling within the appropriate range.

[78] In *Law Society of BC v. Sahota*, 2018 LSBC 20, the panel found that the lawyer's accounting practices were so inappropriate that they amounted to misappropriation of client funds. After a review, the lawyer was suspended for 90 days.

[79] In *Law Society of BC v. Gounden*, 2021 LSBC 07, the lawyer, as chief executor officer of a non-profit society, was found to have misappropriated funds from his employer by submitting false expense claims of about $3,500. Based on joint submissions, the panel imposed a 16-month suspension.

[80] We agree with the review boards in *Faminoff*, at paras. 84 and 85, and *Sahota*, at para. 53, that decisions on penalty are individualized processes that require a hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer including the misconduct. Additionally, we agree that similar types of misconduct should attract similar disciplinary sanctions since inconsistent sanctions for similar misconduct may undermine confidence in the disciplinary process.

[81] In reviewing the case law, we did not find any reported cases that were similar to this one. The circumstances of this case are distinctly unique and the closest case we have found is the *Ortega* case where the lawyer was "duped" and fraud was committed on his watch. In *Ortega*, the lawyer was suspended for six months. Here, the Respondent's employee committed a massive theft of client trust funds under the Respondent's watch, largely based on blank trust cheques being provided to her bookkeeper and the Respondent's failure to properly supervise him.

[82] The Respondent intentionally committed misappropriation to mitigate against the immediate impact of the bookkeeper's theft, which largely fell on her clients. The Respondent moved her client trust funds around without authorization to prevent the collapse of pending real estate transactions. If those pending transactions collapsed, the consequences would have been greater for those clients than arguably for her other clients or herself at that moment. The Respondent was

essentially caught between a rock and a hard place. If she had not intentionally misappropriated some of her clients' trust funds, the clients who needed the missing funds the most would have been affected the most. In our view, the public interest would favour a lawyer taking steps to minimize the overall adverse impacts on clients' trust funds, where possible. While we do not want to minimize the seriousness of the Respondent's misconduct, we do acknowledge that public interest concerns are not as prominent given the nature of the Respondent's mitigating actions.

[83] It is our view that the Respondent's intention of minimizing the adverse impacts on her clients was not contrary to the public interest, although her means of doing so by intentional misappropriation of trust funds constitutes professional misconduct. In other words, the Respondent's actions were largely an attempt to mitigate the financial harm that would have impacted those clients with pending transactions.

[84] We have considered the circumstances of this case on a global basis. We understand that the Respondent currently practises under supervision and does not currently operate a trust account. The Respondent's misconduct in creating the conditions that led to the massive employee theft is serious and warrants a suspension. However, since the Respondent did contribute family funds, took steps to restore the stolen trust funds and to prevent pending client transactions from failing, a lengthy suspension is in our view not warranted.

ORDER OF SUSPENSION

[85] Considering the exceptional circumstances of this case, the Panel orders that the Respondent be suspended from the practice of law for one year, commencing November 1, 2021 or on an alternative date agreed to by the parties in writing.

DISCUSSION ON COSTS

[86] The Respondent seeks to reduce the Bill of Costs from $70,094 to $46,979.44. The parties do not dispute that the Law Society is entitled to its costs and disbursements under the Tariff. However, they disagree on some of the units and disbursements claimed. The Law Society seeks costs totalling $70,094, consisting of $57,200 for 572 units plus $12,894 in disbursements.

[87] The Respondent submits that some of the items claimed on the Law Society's Bill of Costs are excessive or unwarranted as follows:

(a) Item 2: 120 units should be disallowed. The Respondent submits that this Panel does not have jurisdiction to award costs regarding Rule 3-10 hearings that took place in 2016 and 2017 or, alternatively, should decline to award such costs;

(b) Item 4: two units should be disallowed. The Respondent disputes serving an application for particulars or the Law Society providing particulars;

(c) Item 8: ten units should be disallowed. The affidavits were prepared regarding an application to exclude a member of the public. The affidavits were prepared by and supported by the Law Society. The affidavits were made in the interest of ensuring that the hearing was conducted without disruption;

(d) Item 9: five units should be disallowed. The Law Society's December 18, 2019 Notice to Admit was simple and short;

(e) Item 12: five units should be disallowed. The Law Society's main witnesses are employees who fully cooperated with the Law Society;

(f) Item 13: ten units should be disallowed. The application was supported by the Law Society. The Respondent should not have to pay for a hearing that was required to ensure that the hearing was conducted without disruption;

(g) Item 14: five units should be disallowed. The application was supported by the Law Society. The Respondent should not have to pay for a hearing that was required to ensure that the hearing was conducted without disruption; and

(h) Item 15: 30 units should be disallowed. The Respondent should not be required to pay for the preparation of a hearing that was required to ensure that the hearing was conducted without disruption.

[88] Thus, in regard to the Tariff units, the Respondent submits that the Law Society's claim for tariff units should be reduced from 572 units to 394 units (from $57,200 to $39,400). The Panel notes that the Respondent largely disputes having to pay for the preparation and attendance at the hearing of an application to exclude a member of the public who was disruptive to the hearing, the Rule 3-10 hearings, and for some of the other disputed items that fell within the average range of

difficulty. The Panel agrees with the Respondent's position that the claimed units should be reduced from 572 units to 394 units.

[89] Additionally, the Respondent submits that some of the disbursements claimed should be disallowed as follows:

(a) court reporter's fees for the Rule 3-10 hearings in 2016 and 2017: $777 should be disallowed;

(b) court reporter's fees regarding the application to exclude a member of the public: $472.50 should be disallowed;

(c) court reporter's fees for the Rule 3-10 hearings in 2016 and 2017: $3,718.06 should be disallowed; and

(d) claimed translator fees: $350 on the basis that translation services were not used during the hearing. The Panel recalls that certain evidence was translated and entered as exhibits. This claim will be upheld.

[90] Thus, in regard to the disbursements, the Respondent submits that the Law Society's claim for disbursements should be reduced from $12,894 to $7,576.44. Except for the $350 claimed translation fees, the Panel otherwise agrees with the Respondent's position and that the disbursements be reduced from $12,894 to $7,926.44.

ORDER ON COSTS

[91] The Panel orders that the Respondent pay to the Law Society its costs and disbursements totalling $47,329.44. The Panel also grants the Respondent a reasonable time to pay costs. Payment will be made by instalments of $1,000 per month commencing January 1, 2022 until the full amount is paid. This schedule may be altered by written agreement of the parties.