

2006 : No. 06-02

## **Kenneth Joseph Spears**

West Vancouver, BC

Called to the bar: September 25, 1987

**Discipline hearing** : February 27, 2006

**Panel** : Gavin H.G. Hume, QC, Chair, Thelma O'Grady and Dirk J. Sigalet, QC

**Report issued** : March 10, 2006 (indexed as 2006 LSBC 09)

**Counsel** : Gerald Cuttler for the Law Society, and Mr. Spears on his own behalf

## Facts

### *Accounting breaches*

Between 1999 and 2002, Mr. Spears breached a number of Law Society accounting rules, which were subsequently disclosed in an audit. In particular, he failed to deposit trust funds as soon as practicable as required by Rule 3-51(1), withdrew trust funds for fees without first preparing and delivering a bill as required by Rule 3-57(2), failed to record trust and general transactions in accordance with Rules 3-59(3) and 3-63(1)(a) and (b) and failed to prepare monthly trust reconciliations as required by Rule 3-65(1).

There was no evidence, from the Law Society's audit, of any dishonest conduct on his part, such as theft of trust funds or billing for work not done.

### *Conflict of interest with clients*

Mr. Spears acted for the owner of a vessel in claiming \$450,000 in damages against a bailiff and credit union for losses arising from wrongful seizure of the vessel and consequent damage to the vessel. In 2000 Mr. Spears was also retained by the vessel's insurer to pursue its subrogated claim of \$20,000 relating to repair of the vessel. It was agreed that his legal fees would be limited to 30% of the insurer's recovery, but there was no discussion on how the insurer's recovery would be calculated.

In December 2000 the owner's claim settled for close to \$74,000, significantly less than the owner had claimed but sufficient to pay out the insurer's subrogated claim. Mr. Spears did not consult with the insurer or obtain its agreement to this settlement. In the circumstances, there was clearly potential for a conflict between the insurer and the owner over sharing the proceeds.

In July 2001 Mr. Spears disbursed \$33,000 to the owner and \$40,000 to himself for legal fees. He believed the \$6,900 remaining in trust (with his former law firm) would be sufficient to pay the insurer its portion of the settlement. He did not inform the insurer of the settlement until March 2003, despite the insurer's requests for a status update. At that point, he advised the insurer it was entitled to \$2,770.54, being its "prorated portion of the claim." The insurer rejected this position and demanded \$14,400 (its full claim of \$20,000 less legal fees). As it turned out, Mr. Spears' former law firm had already applied the \$6,900 in trust to the owner's accounts to the firm, so Mr. Spears had no funds to pay the insurer. The insurer began an action, which settled in late 2005.

Mr. Spears admitted that he had failed to explain his duties to his clients or to secure their informed consent to a course of action in the event of a conflict between them. He had acted for the clients while in a conflict as to the duties owed each of them. He failed to inform the insurer of a settlement proposal or to seek

instructions prior to settling the matter, paid settlement funds out to the owner and to himself but not to the insurer (without this latter's authorization or consent), failed to keep the insurer reasonably informed, failed to respond to the insurer's requests for information and failed to candidly advise the insurer of its position. He admitted that his conduct was contrary to Chapter 1 of the *Professional Conduct Handbook* (Canons of Legal Ethics), as well as Chapter 3, Rule 3(a),(b),(c),(f),(j),(k) and (l), Chapter 6, Rules 1, 2, 4(a), (b) and (d) and 5 and Chapter 10, Rule 1(d).

#### *Failing to respond to the Law Society*

While reviewing a complaint with respect to these matters in 2003, the Law Society requested that Mr. Spears provide certain information, but he gave no substantive reply. On another complaint in March 2004, the Society again asked Mr. Spears for his response, but he did not respond to the substance of the complaint. He also failed to respond substantively to Law Society correspondence in relation to the audit of his practice.

Mr. Spears admitted that he had failed to respond promptly to the Law Society on matters requiring his response, contrary to Chapter 13, Rule 3 of the *Handbook*.

#### **Admission and penalty**

Mr. Spears admitted to the Discipline Committee that his conduct constituted professional misconduct. Under Rule 4-22, the Committee and the discipline hearing panel accepted Mr. Spears' admission and his proposed penalty. The hearing panel accordingly ordered that he:

1. be suspended for 60 days, effective March 13, 2006;
2. be reprimanded;
3. pay an \$8,500 fine; and
4. pay \$10,000 as costs of the discipline proceedings over 24 months, beginning one month after the end of his suspension.