2007 LSBC 06
Report issued: January 17, 2007
Citation issued: October 5, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Jonathan Lewis Oldroyd

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: October 3 and 4, 2006

Panel: G. Glen Ridgway, Q.C., Chair, Leon Getz, Q.C., Ronald Tindale

Counsel for the Law Society: Brian McKinley
No-one Appearing on behalf of the Respondent

[1] We were empanelled to consider a citation that was issued on October 5, 2005, and was duly served upon the Respondent. At the outset of the hearing we were advised by Mr. McKinley that neither the Respondent nor his counsel, Mr. Margetts, would be participating in the proceedings. It is unnecessary for any present purpose to explore the reasons for this, except to say that they appeared to us perfectly intelligible. We draw no adverse inferences from the Respondent's non-participation.

[2] The citation requires us to consider whether the Respondent:

(a) professionally misconducted himself;

(b) conducted himself in a manner unbecoming a member of the Law Society;

(c) contravened the *Legal Profession Act* or a rule made under it; or

(d) incompetently carried out duties undertaken by him in his capacity as a member of the Society.

[3] The Schedule to the citation makes very serious allegations against the Respondent, namely, that he:

1. Wrongfully converted trust funds belonging to his clients T.M. and J.A.M., E.H.L.N., H.B., the R.T. Estate, and the R.P.W. Estate from his pooled trust account.

2. Misled another lawyer, William Randall, by letters dated February 9, 2004 and March 22, 2004 in which he indicated that the funds held for clients T.M. and J.A.M. remained in his trust account when he had previously disbursed those funds.

3. Breached an undertaking to another lawyer, James Pasuta. The undertaking was contained in a letter dated September 17, 2003 from Mr. Pasuta to Mr. Oldroyd and required Mr.

Oldroyd to retain sufficient funds in trust from certain sale proceeds received by him on behalf of his client H.B. to satisfy obligations to the Canada Customs and Revenue Agency (" C.C.R.A.") and to obtain and provide to Mr. Pasuta a Clearance Certificate from the C.C.R.A before releasing those funds. It is alleged that the Respondent breached that undertaking by releasing the funds without obtaining and providing a Clearance Certificate to Mr. Pasuta.

4. Misled his client E.H.L.N. by letter dated January 12, 2004 in which he confirmed " that the RRSP money was received and paid out to the Bank of Montreal pursuant to [his] instructions" when he knew that the money had been otherwise disbursed.

5. Failed, contrary to Rule 4-43(2)(b) of the Law Society Rules, to produce his trust accounting records for the years 1995, 1996, 1997, 1998 and 1999 to a person designated to conduct an investigation of his books, records and accounts, when those records were required for the purpose of the investigation.

[4] At the hearing, counsel for the Law Society abandoned Count 4, which was accordingly dismissed.

INTRODUCTION AND BACKGROUND

[5] The Respondent became a member of the Law Society on July 10, 1980. From about the beginning of 1984 until April 2004, he conducted a general practice as a sole practitioner from his home on Salt Spring Island. For at least some of this time, his wife assisted him as the bookkeeper for his practice.

[6] On March 19. 2004, following complaints from charitable organizations that were the residual beneficiaries of three estates administered by him, an order (the " Investigation Order") was made pursuant to Rule 4-43 of the Law Society Rules for an investigation of the Respondent's books, records and accounts. The Investigation Order became effective on March 23, 2004, and was personally served on the Respondent the next day. Mr. Gerry Payne, CGA, was appointed to conduct the investigation.

[7] On April 14, 2004, the Respondent resigned his membership in the Law Society and consented to the appointment of a custodian of his practice. On the same day, Mr. Dale Henley, of Sidney, B.C., was appointed Custodian.

[8] Most of the matters that gave rise to the citation occurred in 2003 and early 2004.

Evidence

[9] At the hearing, we heard oral evidence from a number of witnesses, among them the investigator, Mr. Payne and the Custodian, Mr. Henley. We also received evidence from a number of members of the Law Society who had dealings with the Respondent in respect of various of the matters referred to in the Schedule to the citation, including Mr. Pasuta and Mr. Randall. Mr. N., whose late wife, referred to in paragraphs 1 and 4 of the Schedule as " E.L.H.N" , was a client of the Respondent, also testified, as did several others.

[10] We have also had the benefit of the Audit Report prepared by Mr. Payne and several investigation reports prepared by Mr. Paul Willms, of the Law Society's Department of Audit and Investigations.

[11] We shall deal separately with each of the allegations made in the citation.

Evidentiary Burden and Standard of Proof

[12] The relevant principles here are by now well known and do not require extensive citation of authority. They are succinctly stated in the recent decision of the Benchers in *Law Society of BC v. Martin,* 2005 LSBC 16, paragraph [137]:

> (a) The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct;
>
> (b) The standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

[13] In assessing the evidence we have borne these principles in mind.

Wrongful Conversion of Trust Funds

[14] Count 1 of the Schedule identifies five unrelated instances of alleged wrongful conversion of client trust funds. It is not necessary, in our opinion, to embark on any extended discussion of the meaning of the expression " wrongful conversion" . The jurisprudence indicates that the questions to be answered in this case are whether the Respondent knew the purposes to which his clients' funds were supposed to be applied and whether he knowingly, and without mistake, applied the money to different purposes. See *R. v. Skalbania,* [1997] 3 S.C.R. 995 at paragraph 7. Against this background we turn to the particular instances of alleged wrongful conversion identified in Count 1.

T.M and J.A.M.

[15] The Respondent acted for T.M. and J.A.M. in connection with their purchase of certain real estate from T.L. Corporation in early 2003. The evidence establishes that, on February 24, 2003, the Respondent received $181,819.51 from T.M. to complete the purchase, and these funds were deposited into his trust account. On February 28, 2003, the Respondent drew, and on the same day cancelled and reissued, a trust cheque for $179,045.83 payable to a law firm, solicitors for the vendor. The same day he forwarded that cheque to the law firm.

[16] A dispute arose concerning certain matters relating to the terms of the conveyance and, pending its resolution, the Respondent's cheque was not cashed. The funds accordingly remained in his trust account.

[17] On October 9, 2003 however, the Respondent used $133,762.59 of the trust funds to purchase a bank draft payable to " K.C., in trust" from the Bank of Montreal; and on October 29, 2003, a further withdrawal of $48,717.85 was made from the trust funds and wire transferred to an account with a bank in Florida in the name of S. Consulting Ltd.

[18] The evidence indicates that the $133,762.59 paid to K.C. (who testified) was for the purpose of satisfying obligations in that amount due from a company, C.W. Corp. (" C.W.") under mortgages held by clients of K.C. on certain property in Ucluelet. The Respondent and his wife are, respectively, the President and the Secretary of C.W. No connection is apparent between C.W. and T.M. and J.A.M.'s purchase from T.L. Corporation.

[19] There is no evidence before us of the relationship, if any, between the Respondent and S.

Consulting Ltd. No connection is evident, however, between S. Consulting Ltd. and the purchase by T.M. and J.A.M. from T.L. Corporation.

[20] In our opinion, the evidence establishes to the requisite standard that the Respondent wrongfully converted trust funds belonging to T.M. and J.A.M., his clients.

The N. Estate

[21] Mr. N.'s wife died on December 1, 2002. Following her death, he retained the Respondent to obtain transfer into his name of the proceeds of realization of two RRSP accounts in his late wife's name. The aggregate amount of the funds was approximately $45,283 and they were held at two different banks. The funds were delivered to the Respondent, in one case in the form of a draft payable to Mr. N. " re" the estate; and in the other case of a cheque payable to the Estate, on December 4, 2003 and January 5, 2004, respectively. These funds were deposited into the Respondent's pooled trust account and recorded in the name of Mr. N. in trust.

[22] Mr. N. testified that he did not receive any funds from the Respondent. The documentary record provided to us, while somewhat intricate and the details of which need not be rehearsed here, clearly demonstrates that, in substance, on January 5, 2004 the proceeds of the RRSPs (together with certain other funds apparently provided by one of the Respondent's companies) were wired to a bank account at a bank in Florida for credit to the account of S. Consulting Ltd. The requisition for the wire transfer was signed by the Respondent as the " customer" , and the purpose of the transfer is stated to be " proceeds from sale of house" .

[23] There is no evident connection between S. Consulting Ltd., Mr. N. or the N. Estate.

[24] We are satisfied to the requisite standard that the Respondent wrongfully converted funds received by him in trust for his client, Mr. N.

H.B.

[25] The Respondent acted for Ms. B., a non-resident, in connection with the sale by her of property she owned on Salt Spring Island. The Respondent was apparently retained on behalf of Ms. B. by her son, Mr. T., who provided all the relevant instructions. Neither Ms. B. nor Mr. T. testified, though there is in evidence some material provided to Mr. Willms by Mr. T. This material includes a communication from Mr. T. dated June 18, 2004, in which he asserts that " Mr. Oldroyd has paid no funds to Ms. B." A Statutory Declaration made by Ms. B. in connection with an application for payment from the Special Compensation Fund essentially repeats this allegation.

[26] At all events, on October 8, 2003, the transfer having been registered, the buyer's solicitor sent the Respondent a cheque for $70,167.65, being the amount indicated on the statement of adjustments as being due to Ms. B.

[27] Also on October 8, 2003, the Respondent issued a cheque for $48,000 against the funds received for remittance to Ms. B. The cheque was payable to the Bank of Montreal. The evidence establishes that it was used to purchase a bank draft for $48,000 payable to " D.L. in trust" .

[28] D.L. testified. It is not necessary to review the details of his evidence. The substance of the matter is that C.W. was indebted to D.L.'s client under a loan secured by a mortgage on land in Ucluelet. C.W. went into default, and D.L. commenced foreclosure proceedings, which were concluded on October 8, 2003, with a payment of the outstanding amount of $48,124.40 in the form of a bank draft for $48,000 and

the Respondent's trust cheque for the balance.

[29] While the evidence is strongly suggestive of the fact that Ms. B. never received any of the funds due to her in respect of the sale of her Salt Spring Island property, we reach no definitive conclusion on this point.

[30] The evidence does, however, establish to our satisfaction and the requisite standard that the Respondent wrongfully converted to the use of C.W., a company seemingly directed by him, the sum of $48,000 held by him in trust for Ms. B.

[31] The evidence also shows to our satisfaction and the requisite standard that on February 6, 2004, the Respondent used some $21,131 of the remaining funds held in trust for Ms. B. to purchase a second bank draft from the Bank of Montreal. These funds were deposited into an account at CIBC. The account holder of that account is not known but it is not a trust account of the Respondent.

[32] Accordingly, we are satisfied to the requisite standard that the Respondent wrongfully converted funds held by him in trust for his client, Ms. B.

T. Estate

[33] The Respondent was the solicitor and a co-executor of the estate of R. T., who died in January 2002. The estate had a gross value at probate of approximately $234,000. Approximately $122,000 consisted of funds on deposit in bank accounts and the balance was made up of personal property, including a manufactured home that was subsequently sold.

[34] The evidence indicates to our satisfaction and to the requisite standard that $200,000 of the assets of the estate held by the Respondent in trust were used by him to purchase a draft from the Bank of Montreal and that these funds were then used by him to make a payment in that amount to the beneficiaries of an entirely unrelated estate.

[35] Accordingly, we are satisfied to the requisite standard that the Respondent wrongfully converted funds held by him in trust for his client, the T. Estate.

W. Estate

[36] The Respondent was the solicitor for the estate of a Ms. W., who died in December 2002. Her estate had a value for probate purposes of approximately $300,000, consisting almost exclusively of cash and realizable securities.

[37] In March 2004, the executor of the estate discharged the Respondent as its solicitor and replaced him with Mr. George Easdon, of Victoria. Mr. Easdon testified before us. The substance of his evidence was that while, upon his appointment as replacement solicitor, he received from the Respondent the latter's files relating to the estate, he did not receive any of the funds held by the Respondent in trust for the estate.

[38] The evidence establishes that on October 3, 2003, $70,000 of the trust funds belonging to the estate were used by the Respondent to make a payment to the executor and one of the beneficiaries of an entirely unrelated estate, and that on October 8, 2003, a further $100,000 was used to cover a trust shortage in another entirely unrelated estate.

[39] The evidence also establishes that the aggregate $170,000 withdrawn from the trust funds belonging to the W. estate have not been replaced.

[40] We are satisfied to the requisite standard that the Respondent wrongfully converted funds held by him in trust for his client, the W. Estate.

Summary

[41] In summary, we have concluded that each of the five instances of conversion of trust funds referred to in Count 1 of the Schedule to the citation is established.

Misleading Another Lawyer

[42] Count 2 of the Schedule alleges that the Respondent, while acting for T.M. and J.A.M. in connection with their purchase of land from T.L. Corporation (see paragraphs 15 to 20 above), misled William Randall, the seller's solicitor. Simply put, it is alleged that in his capacity as a solicitor the Respondent lied to Mr. Randall in two letters, one on February 9, 2004, and the other on March 22, 2004. In each case, the Respondent said, in substance, that the funds that had been provided to him by T.M. and J.A.M. for the purpose of completing the purchase were held by him in trust.

[43] This was a lie. As we have explained (paragraph 17, above), those funds had previously been withdrawn from the Respondent's trust account (and converted to other uses) in two instalments almost six months earlier, in October 2003.

[44] Count 2 in the Schedule is made out.

Breach of Undertaking

[45] Count 3 of the Schedule to the citation alleges that, in connection with his representation of Ms. B. in relation to the sale of her property (see paragraphs 25 to 32, above), the Respondent breached an undertaking to another lawyer, Mr. James Pasuta, who acted for the purchasers, and who gave evidence before us. The terms of the undertaking are sufficiently set out in the citation, and we do not repeat them here. As the citation indicates, they were contained in a letter from Mr. Pasuta to the Respondent dated September 17, 2003. They were confirmed by the Respondent in a letter to Mr. Pasuta dated October 6, 2003, and reconfirmed by the latter in a letter to the Respondent on October 8, 2003.

[46] As we have indicated (paragraphs 28 and 31 above), on two separate occasions, on October 8, 2003 and again on February 6, 2004, the Respondent disbursed funds sent to him by Mr. Pasuta on undertakings, in breach of those undertakings.

[47] In our opinion, the evidence establishes the breach of undertaking to the requisite standard and, accordingly, Count 3 is made out.

Failure to Produce Trust Accounting Records

[48] Rule 4-43(2)(b) of the Law Society Rules requires a member to immediately produce to an investigator appointed under Rule 4-43(1) and permit the copying of all files, vouchers, records, accounts, books and any other evidence that the investigator may require for the purpose of the investigation. Count 5 alleges that the Respondent failed to make such production when requested.

[49] As we have noted (paragraph 6, above) Mr. Payne was appointed as an investigator pursuant to Rule 4-43(1). The evidence establishes beyond doubt that, despite repeated requests by Mr. Caldwell, a

staff lawyer in the Professional Conduct Department of the Law Society, by Mr. Willms, by the Custodian, Mr. Henley and notwithstanding a search of the Respondent's premises conducted by Messrs. Henley, Payne and Willms pursuant to an order of the Supreme Court made on August 4, 2004, complete records for the period from 1995 to 1999 have not been produced nor, the evidence indicates, have they been found. Rule 3-68(0.1) of the Law Society Rules requires, among other things, that a lawyer must keep records for at least ten years at his or her chief place of practice.

[50] In our opinion the evidence establishes the breach of Rule 4-43(1) to the requisite standard and, accordingly, Count 5 is made out.

Other Matters

[51] In addition to the matters that we have referred to above, but in connection with them, the documentary evidence introduced at the hearing reveals a consistent pattern of the Respondent creating seemingly legitimate records - for example, cheque stubs and entries in client ledgers - that had the effect of concealing the true uses to which trust funds were put and that those uses were illegitimate and unauthorized.

Verdict

[52] In the light of the facts as we have found them, we cannot think of any sensible understanding of the expression " professional misconduct" that could lead a panel of reasonable Benchers - or indeed a panel of reasonable persons who are not Benchers - to conclude that the Respondent has not been guilty of professional misconduct. In our view, the Respondent is guilty of professional misconduct whatever meaning may be attributed to that expression. *Cf. Law Society of BC v. Martin*, 2005 LSBC 16, paragraphs [144] et seq.

[53] We express our appreciation to Mr. McKinley for the fair-minded and careful way in which he presented the Law Society's case.