

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

Stuart Clendening

Respondent

Decision of the Hearing Panel

Hearing date: January 16, 2007

Panel: John J.L. Hunter, Q.C., Chair, David A. Zacks, Q.C., Ross D. Tunnicliffe

Counsel for the Law Society: Maureen S. Boyd

Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] This matter concerns a breach of undertaking to provide a discharge of mortgage in a real estate conveyance. The citation was issued on May 23, 2006. Two grounds were pursued at this hearing:

- (a) that the Respondent, as part of his representation of the vendor in a real estate transaction, gave an undertaking to " use diligent and commercially reasonable efforts to obtain the Discharge [of the Mortgage] in a timely manner" ; and
- (b) that the Respondent failed to respond to several communications with respect to this undertaking from the notary public who was acting for the purchaser in the transaction.

[2] This hearing proceeded on an Agreed Statement of Facts, which are summarized below.

Agreed Statement of Facts

1. The Respondent was admitted to the Bar of British Columbia on May 17, 1971. For the past 17 years he has practised as a sole practitioner.
2. In July 2004, the Respondent was retained to represent J.M. (the " Vendor") in the sale of a residential property to J.D. (the " Purchaser"). W.W., a notary public, represented the Purchaser in this transaction.
3. Two mortgages were registered against the property:
 - (a) A mortgage in favour of London Life Insurance Company registered as No. BG224769 (the " London Life Mortgage"); and

(b) A mortgage in favour of Trans Canada Credit Corporation registered as No. BJ40951 (the "Trans Canada Mortgage").

4. By letter dated July 23, 2004 to the Respondent, W.W. enclosed documents for execution by the Vendor and set out the undertakings upon which the sale proceeds would be paid to the Respondent in trust, which included:

(a) To remit sufficient funds to London Life Insurance Company and Trans Canada Credit Corporation (the " Existing Mortgagee") the amount required by its written statement on the trust condition to pay out and legally obligate the Existing Mortgagee to provide the Respondent with a registrable discharge of Mortgage Nos. BG224769 and BJ40951, respectively (the " Existing Financial Charge") within a reasonable period of time;

(b) To provide to W.W.'s office within five business days of the Completion Date, copies of the following:

i) the Respondent's transmittal letter to the Existing Mortgagee;

ii) the Existing Mortgagee's written statement of amount owing or letter from the Existing Mortgagee acknowledging receipt of sufficient funds;

iii) the Respondent's payout cheque;

iv) evidence of delivery or receipt of the payout cheque(s) at the Existing Mortgagee's place of business; and

(c) "[T]o use diligent and commercially reasonable efforts to obtain the Discharge in a timely manner."

5. On July 27, 2004, the Respondent forwarded the executed documents to W.W. and advised W.W. by letter that:

... We hereby confirm our undertaking that we will attend to payout and discharge of the Mortgage in favour of London Life Insurance Company registered under No. BJ40951 and to advise you of the discharge in due course.

The Trans Canada Mortgage was not specifically referred to, but No. BJ40951 is the Land Title registration number for the Trans Canada Mortgage.

6. On July 27, 2004 the transaction completed.

7. On July 27, 2004, W. W. forwarded by letter the sale proceeds to the Respondent on the same undertakings as set out in her letter dated July 23, 2004, which included the undertaking " to use

diligent and commercially reasonable efforts to obtain the Discharge in a timely manner."

8. By letter dated October 13, 2004, W.W. wrote to the Respondent with respect to the discharge for the Trans Canada Mortgage and the London Life Mortgage and stated that:

... I note that you have not yet provided us with the Discharge Particulars for Mortgage Nos. BG224769 in favour of London Life Insurance Company and BJ40951 in favour of Trans Canada Credit Corporation, which your firm undertook to payout and discharge ...

As it has been over 60 days, it is my obligation to report this matter to the appropriate law society.

9. On November 22, 2004, the Respondent provided to W.W. confirmation that the London Life Mortgage had been discharged.

10. In December 2004, the secretary who had been assisting the Respondent with this matter left his employ and the Respondent did not delegate this matter to any other employee.

11. On June 3, 2005, W.W. and the Respondent spoke by telephone regarding the Trans Canada Mortgage. By fax dated June 3, 2005, the Respondent provided to W.W. a letter dated July 20, 2004 from Trans Canada Credit confirming that the Trans Canada Mortgage was paid in full and which requested a Form C be forwarded to it. The Respondent's fax cover sheet stated:

Further to our tel. discussion on today's date, this will confirm that we apologize for our delay. We enclose a copy of a letter from TC Credit. We will finalize this shortly.

12. On June 21, 2005, W.W. by fax asked the Respondent for " an update as to what is going on with the discharge." The Respondent did not respond to this fax.

13. On July 8, 2005, W.W. re-faxed the June 21, 2005 fax with the notation " 2nd Request" .

14. On August 10, 2005, W.W. faxed the Respondent as follows:

Further to your fax of June 3, 2005, I confirm that I have faxed you twice trying to obtain an update as to where you were in regards to obtaining the discharge from Trans Canada Credit. This matter has dragged on for longer than a year, and needs to be resolved. My client's lender is desperately trying to obtain the STC and is threatening to take this matter to court. Kindly advise my office immediately of the status of the discharge.

The Respondent did not respond to this fax.

15. On January 10, 2006, W.W. complained to the Law Society in writing with respect to this matter.

16. On February 8, 2006, the Respondent responded to the Law Society as follows:

We did forward to [W.W.] a fax in which we confirmed that our client had already paid out the loan

(copy enclosed).

He, however, failed to follow up and obtain the discharge in a timely manner.

The writer's only explanation for the delay is that due to certain medical issues he has not dealt with this in a timely fashion.

17. On February 10, 2006, the Discharge of the Trans Canada Mortgage was executed by the mortgagee (then Wells Fargo Financial Corporation).

18. On February 22, 2006, the Respondent filed the discharge of the Trans Canada Mortgage in the Land Title Office and advised the Law Society by letter. The period of time from closing to the date the discharge was filed was approximately 18 months.

19. The Respondent attributes the delay in obtaining the discharge of the Trans Canada Mortgage to the fact that he did not delegate this matter to any other employee and his medical condition.

DECISION ON FACTS

[3] Before us, the Respondent admitted:

(a) that he had failed to use diligent and commercially reasonable efforts to obtain the discharge in a timely manner and thereby failed to comply with the undertaking; and

(b) that he received communications sent by facsimile on June 21, 2005, July 8, 2005 and August 10, 2005 from W.W., a notary public, that those communications required a reply, and that he failed to respond to those communications.

[4] The Respondent further admitted that his failure to comply with the undertaking and to respond to these communications constituted professional misconduct.

[5] The Hearing Panel accepts these admissions and finds that both the failure to comply with his undertaking to provide a Discharge of Mortgage in a timely way and the failure to respond to communications from the notary public constituted professional misconduct.

Penalty

[6] The Respondent and the Law Society have made a joint submission on penalty, proposing that a fine of \$7,500 and an obligation to pay costs of \$2,500 would be an appropriate penalty for these two matters.

[7] In assessing this submission, the Hearing Panel wishes to emphasize once again the importance of compliance with undertakings. Our Court of Appeal has recently reinforced the fundamental nature of this obligation by reference to principles articulated by an earlier Hearing Panel in *Law Society of BC v. Heringa*, 2004 BCCA 97, at para. 10:

[37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises

provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

[38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

[8] The requirement to deliver a Discharge of Mortgage in a timely way has assumed particular importance as a means of ensuring that purchasers of real estate are protected against error or misdeed. In March of 2003, the Law Society adopted a specific rule of conduct, Rule 3-89, requiring members to advise the Law Society if they have not received a discharge of mortgage from the mortgagee within 60 days after the closing date of a transaction in which funds are advanced to obtain such a discharge. It is imperative that lawyers practising in this field be alive to the requirement to obtain a discharge of mortgage expeditiously, all the more so when an undertaking has been given to provide such a discharge in a timely way.

[9] Penalties for breach of undertaking alone have ranged from fines of \$2,000 to \$12,000, including in serious cases suspension of the lawyer.

[10] In this case, the Mortgage had in fact been paid out, but the Purchaser had no means of knowing that absent a discharge from the financial institution. The Law Society accepts that the effect of this breach of undertaking is at the lower end of the spectrum, but points out that the breach was aggravated by the failure to respond to communications from the notary public concerning the undertaking. The Law Society also points out that the Respondent has previously been the subject of a Conduct Review concerning his compliance with undertakings in his practice. That is unquestionably an aggravating factor.

[11] In the circumstances, the Hearing Panel is prepared to accept the penalty proposed by the Law Society and the Respondent. Accordingly the Panel orders that the Respondent pay:

- (a) a fine of \$7,500; and
- (b) the costs of the Law Society in the amount of \$2,500.

[12] The Respondent requested time to pay the fine and costs. The Panel directs that the fine and costs must be paid by December 31, 2007.