2007 LSBC 11
Report issued: March 2, 2007
Citation issued: April 12, 2006

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

John Owen Richardson

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: January 10, 2007

Panel: David A. Zacks, Q.C., Chair, Thelma J. O'Grady, David M. Renwick, Q.C.

Counsel for the Law Society: Maureen S. Boyd
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] On April 12, 2006, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct respecting the following:

> 1. In representing your client, L.A., you were bound by an undertaking contained in a letter from opposing counsel dated April 15, 2005, as follows:
>
> The above funds are forwarded to you on your undertaking to make no use of the funds until such time as:
>
> (a) you provide this office with an entered copy of the Divorce Order;
>
> (b) you provide this office with a filed copy of the Separation Agreement;
>
> (c) you provide confirmation of the transfer of the half interest in the RRSP to [Mrs. A.] pursuant to paragraph 7(b)(iii) of the Separation Agreement;
>
> (d) you provide your client's 24 post-dated cheques pursuant to paragraph 5(a) of the Separation Agreement.
>
> You breached that undertaking when you released the funds without first complying with all of the terms of the undertaking.

[2] A Statement of Agreed Facts was entered as Exhibit 1 (" Agreed Facts"). In the Agreed

Facts, the Respondent admits that he was served with a true copy of the citation in accordance with Rule 4-15 of the Law Society Rules.

[3] The Respondent was retained by Mr. A. in a matrimonial proceeding against his wife. The wife was represented by J.C., a lawyer.

[4] J.C. testified at the hearing, as did the Respondent.

[5] A summary of the Statement of Agreed Facts and evidence provided by the Respondent and J.C. is as follows:

1. On May 15, 1972, the Respondent was admitted to the Bar of British Columbia. He is an experienced counsel, practising in the areas of criminal law, civil litigation and family law.

2. The Respondent was retained as counsel by Mr. A. in June, 2003 (the Respondent believes the 24th). He assumed the file from other counsel.

3. The matrimonial home sold in June, 2003, and the net sale proceeds were held in J.C.'s trust account. Family assets included the matrimonial home proceeds, personal property, an RRSP of approximately $3,000 held by the wife with CIBC and an RRSP of approximately $14,000 held by Mr. A. with C. Funds.

4. The RRSP in Mr. A.'s name could not be disbursed until he reached the age of 55 years.

5. From the time the Respondent became involved in the file, he attempted to negotiate a settlement of the issues arising from the acrimonious separation of the respective parties.

6. Between March 1 and April 8, 2005, there were several letters exchanged between the Respondent and J.C. J.C. attempted to secure an agreement for the payment of a penalty and/or holdback of funds in trust to ensure that his client was paid bi-weekly maintenance. These efforts were resisted by the Respondent on behalf of his client. Under no circumstances was Mr. A. prepared to agree to a penalty and/or holdback for such payments. This position was ultimately accepted by J.C.

7. On April 8, 2005 a Separation Agreement was entered into between Mr. A. and Mrs. A.; executed by Mr. A. on April 8, 2005, and executed by Mrs. A. on April 14, 2005. The Separation Agreement resolved all outstanding issues between the parties and provided, *inter alia*:

(a) Mr. A. was to pay to Mrs. A. spousal maintenance in the amount of $1,000 per month, payable in two instalments of $500, on the 1st and 15th of every month. Mr. A. agreed to send to Mrs. A., by regular mail, 24 post-dated cheques in the amount of $500 each prior to May 1, 2005, and every year thereafter while maintenance remained payable;

(b) Mr. and Mrs. A. agreed that the net sale proceeds from the sale of the matrimonial home, which proceeds were being held in trust by J.C., " shall be divided equally between the parties" ;

(c) The RRSPs in the name of Mr. and Mrs. A. were to be divided equally. As the RRSP in Mr. A.'s name was locked in with C. Funds, it was agreed that:

> The Husband and the Wife agree that the Husband's C. Fund RRSP's shall henceforth be owned equally by them and the Husband shall forthwith make every effort to have the said RRSP fund divided equally between them at source. Otherwise the fund will be divided equally between them at maturity (when Mr. A. reaches the age of 55).

The Agreement provided full and final satisfaction and discharge of all claims that each had against the other. No part of the agreement was found to be illegal or unenforceable, void or voidable or had been varied by a Court Order or Agreement prior to the hearing.

8. Mr. A. was to proceed with the divorce by way of his counterclaim. Mr. A. also agreed to retain $2,500 in the Respondent's trust account pending completion of the divorce; which was done.

9. On April 15, 2005, J.C. sent a number of documents to the Respondent, including three fully-executed Separation Agreements, a Consent Order and his trust cheque payable in trust in the sum of $19,480.54, which represented one-half of the net proceeds of the sale of the former matrimonial home. Previously by agreement, $10,000 had been equally distributed between Mr. and Mrs. A. The trust funds were forwarded to the Respondent on his undertaking to make no use of same until such time as:

(a) you provide this office with an entered copy of the Divorce Order;

(b) you provide this office with a filed copy of the Separation Agreement;

(c) you provide confirmation of the transfer of the half-interest in the RRSP to Mrs. A. pursuant to paragraph 7(b)(iii) of the Separation Agreement;

(d) you provide your client's 24 post-dated cheques pursuant to paragraph 5(a) of the Separation Agreement.

10. On April 21, 2005, the Respondent deposited the trust cheque he had received from J.C., in the amount of $19,480.54, into his trust account.

11. On April 22, 2005, the Respondent faxed a letter to J.C. confirming receipt of the documents and trust funds. The Respondent stated in the letter:

> I do not accept any of the undertakings you unilaterally imposed upon me. At one point you attempted to withhold $2,500 of my client's funds pending his obtaining the Divorce Order. My client and I specifically rejected that and your client agreed. My client is required to fulfill the conditions pursuant to the Separation Agreement without any holdbacks and he will fulfill those agreed terms.
>
> We will not be withholding the funds but will follow through with the items set out paragraph 2(a), (b), (c), and (d) of your letter. We are attending to those matters forthwith. My client just received a note from C. Funds that he is able to divide the RRSP's but it will take a while.

I trust you will agree with my position once you review it.

12. On April 25, 2005, J.C. faxed a letter to the Respondent acknowledging receipt of his letter dated April 22, 2005. J.C. stated:

> I do not agree with your view of the matter. If you are not prepared to accept the undertaking, you must return the funds. All of the items that I have requested to be done to fulfill the undertaking are obligations that must be assumed by your client. Preventing the release of the funds is the only means I have of ensuring Mr. A. will perform his obligations.
>
> Kindly confirm whether you will be returning the funds or abiding by the undertaking which I have placed upon you.

13. On May 9, 2005, J.C. faxed a letter to the Respondent indicating that he had not received a response to his letter of April 25, 2005 and wanting to know whether the Respondent would be returning the funds forthwith or complying with the undertaking that had been placed on him.

14. On May 9 2005, the Respondent faxed a letter to J.C.. In that letter he advised that he had been sick for seven weeks. The Respondent testified that he had suffered from pneumonia. In the letter he stated:

> I still do not share your view that the house sale proceeds are subject to your unilaterally imposed conditions. However, I have not released the funds yet but do not intend to hold them until a copy of the Divorce Order is received by you.
>
> What I do propose to do is to release the funds once all possible steps have been taken by me on Mr. A.'s behalf to satisfy those obligations which flow from the Separation Agreement, not from any alleged improperly imposed undertaking by you.

The Respondent also advised J.C. that he had applied for a Desk Order Divorce; the documents had been sent to the Prince George Registry for filing on April 29, 2005 by courier together with two copies of the Separation Agreement. He also sent the " first 14 pages of the Separation Agreement to C. Funds in order to effect an immediate equal division at source" of the RRSP and advised that Mr. A. had sent 24 post-dated cheques to Mrs. A. directly via Registered Mail (these were sent on April 25, 2005) The Respondent went on to state in the letter:

> In my view, I am now, pursuant to the Separation Agreement, entitled to disburse Mr. A.'s half share of the house proceeds.
>
> I cannot control how long the Court will take to grant the divorce or return the filed Separation Agreement or how long it will take for C. to confirm the equal division of Mr. A.'s RRSP. When these events occur and we obtain the final documents, we will send them to you. It is not within your authority or power to impose unilaterally a further delay of the release of funds to my client.
>
> ... A fortiori you cannot now unilaterally impose the conditions that all funds are to be withheld until

the Divorce Order has been obtained and a copy given to you or your other conditions which depend on the Court or other third parties to complete. In addition, my client needs those funds now to meet his maintenance obligations under the Separation Agreement.

The Respondent attached a copy of the letter that he sent to C. Funds, which enclosed the Separation Agreement, together with a copy of the Registered Mail acceptance receipt relating to the post-dated cheques that were sent by Mr. A.

15. On May 12, 2005, J.C. faxed a letter to the Respondent acknowledging receipt of the letter dated May 9, 2005, which he said he received on May 11, 2005. J.C. stated:

> I reject your contention that there was anything improper about the undertaking imposed by me on the funds forwarded to your office. There were a number of conditions that had to be fulfilled by Mr. A. as a consequence of the Agreement that was reached. The only control that Ms. A. has in ensuring that Mr. A. carries through with his commitments is to ensure that the monies are not released until such time as he has fulfilled the requirements of the Agreement. The risk is that, once the funds are released to Mr. A., there is no practical remedy for Ms. A. if Mr. A. refuses to carry through with his obligations under the Agreement.
>
> Whether or not you are happy with the undertaking which I have placed upon you, I would reiterate that there are only two choices that you have - you either comply with the undertaking or you return the funds.

16. The Divorce Order was entered on May 24, 2005 and forwarded by fax to J.C. on May 30, 2005. The Separation Agreement was filed on May 3, 2005 and sent to J.C. on May 30, 2005.

17. On May 12, 2005, the Respondent disbursed one-half of the monies held in trust to Mr. A., while the balance was retained for his account, which was rendered at some later date, particulars of which the Respondent was unable to provide.

[6] The evidence was unclear as to whether the disbursement of funds took place before or after the Respondent received the May 12, 2005 letter from J.C.. That timing is inconsequential to our decision.

18. By letters dated July 13 and 15, 2005 sent by fax by J.C. to the Respondent, he, in each instance, asked that the trust funds be returned to him.

19. On July 18, 2005, J.C. reported the matter to the Law Society of British Columbia alleging that the Respondent had breached the terms of the undertaking. J.C., in his letter to the Law Society, indicated that, " Mr. Richardson purported to reject the terms of the undertaking in a letter of April 22, 2005."

[7] Not only did the Respondent purport to reject the terms of the undertaking, it is clear on the evidence that the Respondent was not prepared to accept the terms of the undertaking at any time.

20. On July 20, 2005, the Respondent faxed a letter to J.C. advising that he had received advice from the Law Society and stated, *inter alia*:

> ...I was in error in not strictly complying with the terms of the undertaking imposed by you in your letter of April 15, 2005, or in not returning the funds to you if I did not accept those terms, even if

the Separation Agreement did not impose those conditions on the release of the funds from you.

As a result of my honestly held but mistaken view that I was not bound by the undertaking terms imposed by you, I did disburse those funds after I had taken all steps I thought necessary to fulfill those terms but before actually having those terms completed. I therefore sincerely apologize to you for my error in releasing those funds prematurely.

In the letter, he confirmed that three of the four terms of the undertaking had been fulfilled, although only one had been fulfilled prior to disbursing funds. The only term of the undertaking that remained outstanding related to the locked-in RRSP fund with C. Funds. The Respondent attached a fax that he had received from W.N. of C. Funds who set out the requirements to have the pension divided. C. Funds required that the Form T2220 be completed and signed by both parties and that a Letter of Direction from Mrs. A. stating where she wished her half of the funds to be sent by C. Funds. The Respondent attached the various documents. It appeared that Mr. A. had completed what he was required to and the Respondent asked that J.C. complete the balance of the documentation and forward same to C. Funds.

[8] The evidence provided at the hearing suggested that the necessary documentation still had not been sent to C. Funds, nor had J.C. returned it to the Respondent for the Respondent to forward to C. Funds.

[9] J.C. testified at the hearing and agreed that he was aware of the Canons of Ethics and other provisions in the *Professional Conduct Handbook* (" *Handbook*"), including Chapter 1, Sections 4(1), (2) and (3) and Chapter 11, Section10.

[10] J.C. testified that the sale proceeds from the matrimonial home were placed into his trust account on an undertaking that they only be disbursed by agreement of the parties or by way of Court Order.

[11] J.C. agreed that, in spite of his efforts to obtain provisions for a penalty and/or holdback in the Separation Agreement in the event that Mr. A. failed to make maintenance payments, these efforts were rejected by the Respondent. J.C. agreed that, once the Separation Agreement was signed, he was obliged to disburse the proceeds from the sale of the matrimonial home.

[12] J.C. agreed that the term of the undertaking requiring the Respondent to " provide confirmation of the transfer of the half-interest in the RRSP to Mrs. A. pursuant to Clause 7(b)(iii) of the Separation Agreement" went beyond what the Separation Agreement provided for. J.C. agreed that he had no right to withhold the sale proceeds. J.C. agreed that the Respondent at all times rejected the terms of the undertaking and provided the editorial comment " that is why we are here."

[13] The Respondent testified on his own behalf and provided his view of the events leading up to the letter dated April 15, 2005. It was clear that the Respondent had attempted throughout to try to obtain a settlement as soon as possible. It is clear from the evidence that all, or most of his efforts to come to a reasonable solution were frustrated by J.C.. The Respondent was adamant that, under no circumstance was he prepared to provide any holdback or penalty provisions in the event that Mr. A. did not meet his maintenance obligations. The effective result of the trust conditions imposed by J.C. resulted in such a holdback.

[14] The Respondent indicated that, when he received the letter of April 15, 2005, which included the trust cheque together with the undertakings, he was of the " firm view" that J.C. had no right to impose the undertakings and he was not going to agree to them. The Respondent felt that, as the Separation

Agreement had been signed, Mr. A. was entitled to his share of the proceeds from the sale of the matrimonial home.

[15] The Respondent stated that, when he provided his letter of July 20, 2005 to J.C. acknowledging that he breached the undertaking, he did so on advice given to him by an advisor at the Law Society. In spite of the fact that he had never given an undertaking nor accepted it, he felt that J.C. had no right to impose such an undertaking. It was suggested to him that if he admitted his error the matter would likely be over. He had not sought legal advice himself, and since receiving legal advice, he was now of the view that he in fact was not in breach of an undertaking.

[16] The Respondent was quite adamant that he had never in the past broken his word or breached any undertakings. He was proud of his reputation within the profession and felt quite strongly that the position he held from the outset was valid.

[17] In cross-examination, the Respondent acknowledged that he was unaware of Chapter 11, Section 11 of the *Handbook* in April/May, 2005. The Respondent agreed that, in all of his correspondence to J.C., he had indicated that he was not accepting the undertaking. However, he did not propose any amendments to try to resolve the issue of the undertaking because he felt that there was no undertaking. The Respondent indicated that he had never had anyone impose improper undertakings in the past, and he acknowledged that he appreciated the significance of undertakings in legal transactions. The Respondent felt that J.C.'s undertakings were posturing and that he was seeking to put conditions over and above what he was able to negotiate by way of the Separation Agreement. Further, nowhere in his correspondence did the Respondent suggest that the conditions were " impossible or impractical." He had every intention to abide by the conditions of the Separation Agreement and felt that it was inappropriate for J.C. to deny payment of the monies that were due to Mr. A. by imposing further conditions.

Discussion

[18] Law Society counsel forcefully argued that the Respondent was in breach of his undertaking by releasing the funds to his client without completing the terms that had been imposed upon him. She relied on the case of *Witten v. Leung* [1983] A.J. No. 883 (QB). In that case, the plaintiffs (lawyers) sent the defendants (lawyers) documents on certain trust conditions, which included that the documents were to be returned unused in the event that they could not provide executed copies of the documents within 10 days of being signed. The defendants were not prepared to return the executed documents, and the plaintiffs were successful in obtaining an order that they be delivered to the plaintiffs unconditionally.

> 4 It is of overarching importance to the practice of law as an honourable profession, that solicitors comply, without reservation or question, with the trust conditions upon which documents have been entrusted to them by other solicitors. Unless the solicitors who have sent documents to other solicitors on trust conditions can rely with absolute confidence upon those trust conditions being observed, the edifice of trust between solicitors, upon which so much of the efficient service to the public depends, will crumble. It is in the public interest that this confidence be maintained. This concern merits paramountcy over any effect that judicial measures taken to ensure maintenance of that confidence may have upon the legal or equitable rights and obligations of the solicitors' clients or those of other persons.

[19] Mr. Justice McDonald went on to state:

> 9 ...When the receiving solicitor receives documents under trust conditions, if he does not forthwith return the documents he impliedly undertakes to comply with the trust conditions."

[20] Ms. Boyd also relied upon *McCarthy Tetrault v. Lawson, Lundell, Lawson & McIntosh* [1991] B.C.J. No. 1010. In that case, the plaintiff's solicitors applied for interpleader relief to pay money into Court. The money had been received as a deposit during the negotiation of a Letter of Intent to develop and lease a particular property. The funds were provided pursuant to a letter which stipulated that:

> This amount will be returned to the Tenant if the transaction does not proceed . . .

The transaction did not proceed, and the solicitors for the Tenant demanded return of the funds. The Court concluded that the undertaking took precedence over any dispute that had developed between the parties and that the funds had to be returned.

[21] In *Andrusiak v. Wiederspiel*, 2005 BCSC 875, plaintiff's counsel in a matrimonial matter sought and obtained an Order for special costs against plaintiff's counsel on the basis of her conduct, in particular with respect to breach of an undertaking. The Order was appealed to the Supreme Court where it was reversed. The Supreme Court felt that the wording in the undertaking did not specifically prohibit the defendant's lawyer from using the release prior to the completion date for the sale of the property and that, by taking matters into her own hands to rectify the situation, plaintiff's counsel had effectively released defendant's counsel from the undertaking.

[22] Ms. Boyd submitted, collectively, these cases provide that:

(a) an undertaking is not a contract and need not be supported by consideration;

(b) an undertaking need not be given, but may be imposed by opposing counsel;

(c) the obligation of a lawyer to respect and observe the terms of an undertaking cannot be overridden by instructions from the client;

(d) an undertaking remains binding and enforceable until satisfied or until the parties mutually agree to modify the undertaking or the undertaking is otherwise properly withdrawn; and

(e) a lawyer cannot reject or repudiate an undertaking while retaining or using the subject of it.

[23] Chapter 11, Section 11 of the *Handbook* states that, if a lawyer is unable or unwilling to honour a trust condition, " the subject of the trust condition must be immediately returned to the persons imposing the trust condition" unless the terms can be amended in writing on a mutually agreed basis.

[24] In *Law Society of BC v. Heringa* 2004 BCCA 97, the Court of Appeal noted with approval the comments made by the Hearing Panel (cited at paragraph 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.

[25] Ms. Boyd also suggested that the decision in the *Law Society of BC v. Lee* [2002] LSBC 29 was analogous to the situation at hand. In *Lee* the lawyer admitted that her failure to provide the post-dated cheques by the required date and her failure to send a filed copy of the Notice of Withdrawal constituted a breach of her undertaking and amounted to professional misconduct. This case is significantly different from that case. There is no admission by the Respondent that he was in breach of the undertaking. In fact, the Respondent maintains that there was no undertaking entered into.

[26] Mr. Hinkson submitted that the conduct of J.C. was such that J.C. should be the one to be cited. He argued that J.C. had no right to impose the conditions on the sale proceeds and that the Respondent was correct in his position. Mr. Hinkson suggested that J.C.'s conduct protracted the litigation, was cheap and was such that he tried to take paltry advantage of the Respondent's client, contrary to provisions of the *Handbook* (Chapter 1, Section 4(1) and (3)). He also imposed new terms that he knew would not be acceptable. He tried to tie up the monies to secure payment in the event that Mr. A. failed to meet his maintenance obligations, contrary to Chapter 11, Section 10 of the *Handbook*.

[27] Mr. Hinkson submitted that placing of the monies into a trust account did not amount to making use of the funds. The Panel agrees with that position.

[28] Mr. Hinkson also argued that as the citation against the Respondent was for breach of an undertaking and not for failing to return the money, the case against the Respondent had not been made out. The Respondent could not be in breach of the undertaking, as he did not accept the undertaking.

[29] Mr. Hinkson stressed the view that, once the Separation Agreement had been signed, Mr. A. had an unrestricted right to his share of the sale proceeds. Once the Respondent received those funds, he was duty-bound to disburse them to his client; regardless of the terms under which they were provided.

[30] The Panel was disturbed by the conduct of J.C. J.C. clearly, by imposing the trust conditions, was attempting to unfairly impose a term that he knew or ought to have known was not set out in the Separation Agreement. This was done to gain an unfair advantage over Mr. A. and to tie up the settlement proceeds. Although the conduct of J.C. may deserve a citation, it was not his conduct that was the subject of the complaint; it is the conduct of the Respondent.

[31] The passages from *Heringa*, referred to in paragraph [24] bears repeating:

> [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.

[32] The Panel is of the view that the Respondent's approach as to whether there was or was not an undertaking was not cavalier, but it was misguided at best. The Respondent was unaware of the provisions of Chapter 11, Section 11 of the *Handbook*. In the Panel's opinion, he knew or ought to have known that if he was unwilling to honour a trust condition, even if it was impossible or impractical or manifestly unfair to his client, he was under a duty to return the monies if he could not abide by the terms on which they had been provided to him.

[33] His argument that he never accepted the trust conditions would have had some validity had he not utilized funds, which were the subject of the trust conditions. Once he used the funds by disbursing them to his client, he is deemed to have accepted the trust conditions that were imposed on him.

Decision

[34] A lawyer cannot impose on another lawyer " impossible, impractical or manifestly unfair conditions of trust." A lawyer who does this may well be cited for professional misconduct. Even so, this does not give the lawyer upon whom the undertaking or trust conditions were imposed the right to ignore or reject the undertaking and to keep the subject matter of it.

[35] When a lawyer receives property from another person, whether or not that person is a lawyer, on an undertaking or trust condition to use or not to use the property except on certain trust conditions, the lawyer has **only two options** [emphasis added]. The lawyer may either accept the undertaking on those conditions, or the lawyer may reject the undertaking and return the property. If this were not the case, then, as Mr. Justice McDonald stated in *Witten* (supra):

> ... the edifice of trust between solicitors, upon which so much of the efficient service to the public depends, will crumble.

[36] The Panel finds that the Respondent was in breach of his obligations to abide by trust conditions and as such is guilty of professional misconduct.