

2007 LSBC 50

Report issued: November 21, 2007

Oral Reasons: November 1, 2007

Citation issued: May 16, 2007

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

David Donald Hart

Respondent

Decision of the Hearing Panel

Hearing date: November 1, 2007

Panel: Anna Fung, Q.C., Chair, James Vilvang, Q.C., Thelma O'Grady

Counsel for the Law Society: Maureen Boyd

Counsel for the Respondent: Dennis Quinlan

Background

[1] On May 16, 2007, 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, as amended, directed that there be an inquiry into the conduct of the Respondent regarding the following:

1. In the course of representing your client, E.N., you permitted her to swear, or did not correct, an affidavit which she advised you contained inaccurate statements. You relied upon this affidavit in an application in British Columbia Supreme Court on or about October 20, 2005 knowing it was false and did not advise the Court of the inaccuracies, despite the fact that you had advised your client that you would do so.

[2] The Respondent admitted that the citation was properly issued and served pursuant to the requirements of Law Society Rule 4-15.

Statement of Agreed Facts

[3] Counsel submitted a Statement of Agreed Facts, which was filed as Exhibit 1. The Statement of Agreed Facts set out the following.

1. On or about August 16, 2005, the Respondent was retained by E.N. (the " Client"), who was the defendant in a matrimonial action commenced by her husband (the " Husband"). The Client and the Husband were married October 7, 1969 and separated in 1993. The Husband commenced divorce proceedings in August, 2004.

2. The Client retained the Respondent to bring an application to Court to enable a mortgage from HSBC in the amount of \$90,000 (the " Mortgage") to be registered on a residential property located at [address], Clearbrook, British Columbia (the " Property"), in priority to a Certificate of Pending Litigation (the " CPL") filed by the Husband. This Property was the former matrimonial home of the Client and the Husband. It was intended by the Client and the Respondent that the Respondent would take all necessary steps to effect the registration of the Mortgage in priority to the CPL and to " process" the Mortgage.

3. It was further intended by the Client and the Respondent that proceeds of the Mortgage would be used to pay out an existing mortgage in the amount of \$40,000 and to pay \$10,000 to the Respondent's firm in trust as a retainer in respect of legal fees and disbursements.

4. The Respondent prepared a Notice of Motion seeking to bring about the above intentions.

5. On or about September 28, 2005, the Client attended at the offices of the Respondent for the purpose of swearing an affidavit (the " Affidavit") in respect of the Motion. The Respondent prepared the Affidavit in advance of this meeting. During the meeting the Respondent read the Affidavit to the Client, and then she swore it in front of him.

6. At some point during this meeting and prior to leaving his office, the Client advised the Respondent that the Affidavit was incorrect in two respects:

(a) in paragraph 3 the date of the separation was incorrect and should be October 15, 1993 and not October 7, 1993; and

(b) in paragraph 4 the Property was transferred to the Client on October 2, 1997 from Ernst & Young Inc. and not from joint tenancy with the Husband.

7. The Respondent did not take any steps to correct the Affidavit prior to the Client leaving his office on September 28, 2005, nor did he take any steps thereafter.

8. On October 15, 2005, the Respondent caused the Motion and Affidavit to be filed without corrections.

9. On or about October 19, 2005, the Client spoke by telephone with the Respondent to review the affidavit of the Husband and in the course of that discussion she reminded him of the errors in her Affidavit.

10. On October 20, 2005, the Motion was heard, at which the Respondent relied upon, and referred to, the Affidavit. The Respondent did not advise the Court of either of the errors in the Affidavit. Counsel for the Husband advised the Court in her reply submissions that " This property was never registered in joint tenancy, as my friend's affidavit says it was." The Motion was dismissed on the basis that the case law did not permit the Court to grant on an interim basis the right to the applicant to mortgage the Property for the payment of legal fees in the matrimonial action.

11. The errors in the Affidavit were inconsequential and had no effect on the outcome of the application. There was no intention to further his client's or his own position. The Respondent received

no personal gain from his actions.

[4] The Respondent has admitted the facts alleged in the amended citation and admits that his conduct constitutes professional misconduct. The Panel accepts this admission of professional misconduct.

Discussion

[5] The Respondent was called to the Bar in British Columbia on May 15, 1961. He is currently 70 years of age, in good health with no plans to retire.

[6] The Respondent's Professional Conduct Record includes Conduct Reviews in 1978, 1980 and 1999. He has also had two citations authorized against him: the first time in 1980 when he was reprimanded, fined \$1,000 and ordered to pay costs; the second time was in 1996, and again he was reprimanded, fined \$1,000 and ordered to pay costs.

[7] Since the Respondent has had no transgressions since 1999 and since he has forthrightly acknowledged responsibility for his conduct on this occasion, the Panel concludes that previous disciplinary measures have had the desired effect of remediating and rehabilitating his conduct and serve their specific deterrent effect.

[8] Since the errors were inconsequential, gave no benefit to the Respondent or his client, and could easily have been corrected, the question of why this would happen has arisen. The only explanation was that the Respondent did not think these errors were important.

[9] It must be understood by all members of the profession that great care must be taken in preparing affidavit and making representations to the Court to ensure accuracy. All errors are important and must be corrected. The Courts and the public must have confidence that lawyers are scrupulously fulfilling their duties in this regard. Failure to correct an error, even if the error was initially unintentional and inconsequential to the outcome of the case, is a serious matter. However, this is not as serious as deliberately attempting to deceive the Court.

[10] The cases *Law Society of BC v. Ogilvie*, [1999] LSBC 17, *Law Society of BC v. Foo*, Hearing [1997] L.S.D.D. No. 197, *Law Society of BC v. Levin*, Hearing [1998] L.S.D.D. No. 134, *Law Society of BC v. Cranston*, 2006 LSBC 36, and *Law Society of BC v. Walters*, 2005 LSBC 39 were provided. They provided valuable guidance in determining the appropriate penalty.

Decision

[11] After consideration of the agreed upon facts, the background of the Respondent and the submissions of counsel, we conclude that the appropriate penalty is:

- (a) the Respondent pay a fine in the amount of \$2,000;
- (b) the Respondent pay costs of these proceedings in the amount of \$1,500.

[12] The Respondent will have three months to pay the fine and costs.

[13] We have not ordered that the Respondent be reprimanded as it is the view of this Panel that a reprimand is implicit in the imposition of a fine. It is our view that a reprimand should only be used as a stand-alone form of penalty.

[14] The Panel thanks both counsel, Ms. Boyd and Mr. Quinlan, for the way they have carried out this particular hearing. We really appreciate the fact that they have managed to work together to get an agreement on facts as well as the joint submissions, and we found them very helpful and even-handed.