2007 LSBC 57
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Sabrina Ali

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: November 30, 2007

Panel: David M. Renwick, QC, Chair, Brian J. Wallace, QC, Robert D. Punnett

Counsel for the Law Society: Maureen Boyd
No-one appearing on behalf of the Respondent

Background

[1] On April 11, 2007 the Panel concluded that the Respondent was guilty of professional misconduct and breach of the Law Society Rules. The facts are set out in our Decision on Facts and Verdict (2007 LSBC 18).

[2] There were a total of 13 counts. We concluded in paragraph [107] (as revised by Corrigendum issued June 14th, 2007) of our report on Facts and Verdict that:

> [107] The Respondent had a very small practice. There is no reasonable explanation for her failures to properly deal with her trust account and trust funds. We find that the Respondent has, by the conduct described in each of Counts 1 to 6, misappropriated client trust funds and professionally misconduct herself. We also find that her failure to pay practice debts, as set out in Counts 7 and 13 and her personal use of funds held for payment of GST, PST and employee income tax, as set out in Counts 8 and 9 exhibited a disregard for her professional obligations, amounting, in all the circumstances, to professional misconduct. We find as well, that the pattern of conduct reflected in the failure of the Respondent to keep adequate trust records as described in Count 10, her failure to respond to the Law Society as described in Count 11 and her conduct relating to a monetary judgment described in Count 12 was professional misconduct, as well as being a breach of the Law Society Rules. Her failure to keep adequate records led to other trust shortages and created a situation in which it was not possible for the Law Society to quickly audit her books and records to determine the cause of each trust shortage. A complete reconstruction of the Respondent's trust records was necessary to determine what had occurred.

[3] The hearing on penalty was originally scheduled for August 16, 2007. At the request of the Respondent, the hearing was adjourned to November 30, 2007. On November 29, 2007 the Law Society

received a letter from the Respondent advising that she was not able to attend the hearing. She did not request an adjournment. She did express regret for " the many mistakes" she had made.

[4] In her letter she advised as well her decision to resign from the Law Society of British Columbia.

[5] The Respondent in fact had ceased to be a member on January 1, 2007 for failure to pay her fees.

Position of the Law Society

[6] The Law Society submitted that the appropriate penalty is:

(a) Disbarment;

(b) Costs in the amount of $33,989.00; and

(c) Costs of the publication that is required pursuant to Rule 4-37 of the Law Society Rules.

Analysis and Discussion

[7] There is strong authority that in cases of misappropriation, disbarment is the appropriate remedy. *Bolton v. Law Society* [1994] 2 All E.R. 486 (C.A.) set out this general principle at 491:

> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. ... The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.

This was cited with approval in *Law Society of BC v. Harder,* 2006 LSBC 48, para. 7

[8] Similarly, in *Lawyers and Ethics: Professional Responsibility and Discipline[1]* the author observed, at p. 26-1, that:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

[9] The following passage from *Lawyers and Ethics* further underscores this point:

> Discipline hearing panels have frequently held that acts of misappropriation should result in disbarment unless exceptional extenuating circumstances exist. An order of disbarment in such cases is made to preserve public confidence, to protect the public, and to deter other lawyers from breaching the trust of their clients. [2]

[10] The principle that disbarment is the appropriate penalty for a misappropriation in most circumstances has been accepted in British Columbia on the basis that it is the only effective means by

which the public can be protected from further misconduct. In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Panel stated at para. 18 that:

> The ultimate penalty of disbarment is reserved for those instances of misconduct of which it can be said that prohibition from practice is the only means by which the public can be protected from further acts of misconduct. This is such a case. There is nothing before the panel to suggest that any penalty, other than disbarment, will ensure that the public is protected from future acts of misconduct on the part of Mr. Ogilvie. Nothing divulged about the circumstances of the misconduct, or Mr. Ogilvie's personal circumstances, suggest that disbarment is inappropriate.

[11] This view was recently affirmed by the Court of Appeal in *McGuire v. The Law Society of British Columbia*, 2007 BCCA 442, in which a disbarred lawyer appealed to the Court of Appeal. The Court of Appeal did not accept the argument that disbarment in circumstances of misappropriation is only appropriate where no other means will effectively protect the public. It dismissed the appeal, observing at para. 13 that, in the disbarment cases considered:

> ... the court or panel was struggling with whether the individual circumstances before them justified a departure from the " obvious conclusion" that a lawyer who intentionally takes funds from trust for his own purposes is not fit to practice. That in fact is the question the panel had to ask: was the member fit to practice?

[12] In *McGuire* (*supra*), at para. 14, the Court of Appeal also observed that " general deterrence can be an important means of protecting the public." At para. 15, it expressly rejected the argument that the Hearing Panel had placed too much emphasis on protection of the public.

[13] A panel may decline to disbar where there is evidence that suggests that disbarment is not required to protect the public. In *Law Society of BC v. Hammond*, 2004 LSBC 32, the Panel reviewed a number of authorities and concluded at para. 25 that:

> A careful review of the authorities with respect to instances of misappropriation which did not lead to disbarment indicates that in each such case there were exceptional circumstances.

[14] These exceptional circumstances included extreme psychological stress due to marriage break-up coupled with depression and a case where the misappropriation was characterized as " another instance of the member's pattern of a conflict of interest in dealing with his client's affairs" (rather than a theft) coupled with the member's impressive record of public service.

[15] The Panel also commented in *Hammond* on the failure of the respondent to give evidence. Although the panel noted that no negative inference can be drawn from the fact that the respondent did not testify on his own behalf, it did conclude at para. 33 that:

> It is, however, obvious that in the absence of evidence from the Respondent or from others on his behalf, that we can have no evidence of mitigating circumstances to explain the troubled behaviour of the Respondent. We have no mitigating facts before this Panel and we accordingly must analyze the facts of this case without any ameliorating considerations as to what might have caused this conduct by the Respondent, including that we have no information as to his intent in the circumstances.

[16] Disbarment has been imposed even in cases involving a small amount of money. In *Hammond (supra*), the respondent had, in two instances, misappropriated funds totalling $5,000. Fifteen allegations were proven against the respondent, including four breaches of undertaking and six failures to respond to the Law Society. Of some weight was the fact that the respondent had undergone three Conduct Reviews,

which the panel found " reinforced" the view that he was incapable of regulating his affairs to be a responsible and appropriate member of the Society. Accordingly, the panel concluded that there was no public interest served in " restoring this member to a position where his practice can again disintegrate to the detriment of the various clients he would be serving at that time." (*supra*, para. 37)

[17] Similarly, in *Law Society of BC v. Peters*, [1999] LSBC 38, the respondent had misappropriated a total of $7,000 in seven instances occurring over a seven-week period and was also found to have professionally misconducted herself with respect to three counts of failure to respond. There was mitigating evidence that she had suffered from depression with an underlying substance abuse problem and had taken steps to rehabilitate herself. She admitted wrongdoing, but had taken no steps to restore the trust funds she had taken. She was disbarred, a penalty which was upheld on review.

[18] At the initial hearing in *Peters*, the panel stated at paragraph 49 of the Penalty Decision that:

> The ultimate penalty of disbarment is reserved for those instances of misconduct of which it can be said that prohibition from practice is the only means by which the public can be protected from further acts of misconduct. This is such a case. There is nothing before me which suggests that any penalty, other than disbarment, will ensure that the public is protected from future acts of misconduct on the part of Ms. Peters.

[19] On review, the Review Panel upheld the disbarment, and observed at paragraph 15 that:

> The cases of *Martin*, *Reuben*, *Volrich*, and *Ranspot* all involved misappropriations in which penalties less than disbarment were imposed. The cases of *Bjorkman*, *Currie*, *Donald* and *Ogilvie* involved misappropriations which resulted in disbarment. What these disparate cases reflect is that misappropriation always attracts a serious penalty and the circumstances of the individual case dictate whether the Hearing Panel or Benchers may impose a suspension or whether they must disbar.

[20] Disbarment was not imposed as a penalty in *Law Society of BC v. Gellert*, 2005 LSBC 15, in which the respondent was found to have failed to remit GST and PST, failed to serve two different clients in a conscientious, diligent and efficient manner, breached an undertaking, and failed to respond to communications from the Law Society (six counts), as well as from another lawyer, and misappropriated $182 from estate funds held in trust. He was suspended for 18 months (commencing from the date of an interim suspension under s. 39) and placed on two conditions: to obtain a psychiatric evaluation satisfactory to the Practice Standards Committee prior to reinstatement, and to practise only as an employee until relieved of that condition by the Practice Standards Committee. However, the key factor in the penalty imposed was the mitigating circumstance that the root of the member's dysfunctional behaviour was untreated depression, for which he had received treatment, coupled with the fact that he had not gained any advantage for himself through his conduct.

[21] In most cases where disbarment is not imposed, there is a significant mitigating factor, usually either an absence of any dishonest intent[3] or an underlying medical problem (for example, *Ranspot*, [1999] LSBC 09, where there was depression, substance abuse and marital break-up).

[22] With respect to Ms. Ali, she was found to have misappropriated funds from six clients in a period between January 2002 and February 2004. She was also found to have professionally misconducted herself in respect of seven other allegations, which included failure to pay practice debts, failure to remit funds collected for GST, breach of the trust accounting rules set out in Part 3, Division 7 of the Law Society Rules, and failure to respond to the Law Society.

[23] The troubling aspect of this matter is that this Panel has no evidence before it of mitigating

circumstances that would explain the conduct of the Respondent. The Respondent's explanations offered in the course of the investigation were primarily that her actions were the result of " mistakes" .

[24] We have neither evidence respecting the cause of the Respondent's conduct nor any evidence that the Respondent has taken steps to rehabilitate herself by addressing the cause or causes of her conduct.

[25] In the *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Panel set out factors to be considered in disciplinary matters, acknowledging that the list was not exhaustive nor that all of the factors would be appropriate in all cases. The listed factors are:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[26] The Respondent misappropriated funds from six clients over a period of two years. As we noted in the Facts and Verdict decisions at paras. 104 and 105:

> A fundamental principle that governs the conduct of lawyers is that trust funds are sacrosanct. The Respondent has breached that principle repeatedly and over a significant period of time. The fact that the amounts involved were relatively small is irrelevant.
>
> The Respondent's conduct, whether deliberate or a matter of incompetence or negligence, is so gross as to prove a sufficient mental element of wrongdoing. The Respondent has shown a remarkable disregard and lack of attention to her obligations.

[27] The Respondent has no prior discipline record.

[28] The Respondent's decision not to participate in either the hearing on Facts and Verdict or this Penalty hearing means we have no evidence, no explanations and nothing from which we can draw comfort that the conduct will not occur again. The possibility of remediation or rehabilitation of the Respondent cannot be assessed.

[29] As noted above, in cases of misappropriation, disbarment is normally the appropriate remedy unless there is evidence (normally of exceptional circumstances) that this penalty is not required to protect the public.

[30] The lack of any such evidence leads us to the conclusion that disbarment of the Respondent is necessary to protect the public interest, maintain the public trust and maintain the reputation of the profession. In *Lawyers and Ethics*, the author states:

> It would be a mistake, however, to assume that disbarment is a penalty reserved for cases that combine the worst imaginable offence with the worst imaginable offender. In cases involving fraud or theft, in spite of evidence of prior good character and financial or other pressures, lawyers are almost certain to be disbarred. In one such case, a discipline hearing panel held that " disbarment is as much required for the lawyer who throws away a hard-earned reputation for integrity as it is for the scoundrel who caps a disreputable career with more of the same." Thus the profession sends an unequivocal message in the interest of maintaining public trust and the reputation of the profession.

[31] We note that disbarment does not preclude reinstatement of the Respondent at some future date, should she apply for reinstatement. We acknowledge that it raises a very high standard for the Respondent to meet and would require that she explain her conduct and satisfy a credentials Hearing Panel that, at that time, she was suitable to practise law.

[32] We find therefore that the Respondent must be disbarred.

Costs

[33] The Law Society seeks full indemnification for its costs. As stated in the *Law Society of BC v. Edwards*, 2007 LSBC 04, at para. 33:

[33] In this connection, the following propositions are now well-established:

> (a) the successful party, in this case the Law Society, is entitled to a full indemnity for its costs (*Law Society of BC v. McNabb,* [1999] LSBC 02); and
>
> (b) the costs ordered must, as a whole, be reasonable (*Law Society of BC v. Basi*, 2005 LSBC 01).

[34] The Bill of Costs presented by the Law Society has been prepared in accordance with Section 46(1) of the *Legal Profession Act* and Rule 5-9(0.1) and (1) of the Law Society Rules.

[35] The amount claimed is $33,989, of which $16,646.50 relates to the in-house Law Society audit. That audit was necessary, as noted in the decision on Facts and Verdict, because a complete reconstruction of the Respondent's trust records was necessary to determine what had occurred.

[36] The awarding of full indemnity of costs is not automatic. As stated in the *Law Society of BC v. Racette*, 2006 LSBC 29, at paras. [13] and [14]:

> This Panel has previously held that any order for costs should be based on a careful consideration of all relevant factors including:
>
> (a) the seriousness of the offence;
>
> (b) the financial circumstances of the Respondent;

(c) the total effect of the Penalty, including possible fines and/or suspensions;

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

Full indemnity for costs should never become " automatic" . In every case the total penalty, including costs, should " fit the crime" .

[37] We have no request from the Respondent to reduce any award for costs. The only information we have as to her financial circumstances is that, at the time of the offences, she was running a marginal practice and was in financial difficulty. The fact that she is no longer a member and what little evidence we have of her personal financial circumstances make it probable that her financial circumstances are poor.

[38] Should the Respondent at some point apply for reinstatement, any award made for costs must be paid and cannot be reduced by any Credentials Committee or hearing panel. Full indemnity would possibly be an insurmountable impediment to reinstatement, assuming the Respondent was at that time found to be fit to be admitted to practice.

[39] Taking these factors into account, we fix costs at $2,500.

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[1] MacKenzie, Looseleaf ed., Toronto: Thomson Canada Ltd. 2005

[2] Supra, pp. 26-46 to 26-47

[3] *Law Society of BC v. Andres-Auger*, 94/11