

2008 LSBC 08

Report issued: March 10, 2008

Citation issued: June 19, 2007

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

Barry Joseph Promislow

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: January 22, 2008

Panel: Richard N. Stewart, QC, Chair, Kathryn A. Berge, QC, Leon Getz, QC

Counsel for the Law Society: Jaia Rai

Appearing on his own behalf:

The Citation

[1] The citation against the Respondent was issued on June 19, 2007, and was amended on November 16, 2007, pursuant to Rule 4-31(2)(a) of the Law Society Rules. The Respondent has admitted service of the amended citation.

[2] The amended citation directs us to inquire into certain conduct of the Respondent, and to determine whether, in the circumstances described in the Schedule to citation, he:

- (a) professionally misconducted himself;
- (b) conducted himself in a manner unbecoming a lawyer;
- (c) contravened the *Legal Profession Act* or a rule made under it;
- (d) incompetently carried out duties undertaken by him in his capacity as a member of the Law Society.

[3] The circumstances giving rise to the amended citation are described in the Schedule in the following words:

In representing your clients, RP, EG, and GD, you received a cheque from opposing counsel along with a letter dated December 28, 2006, which contained the following trust condition:

This payment is provided to you on your undertaking to forthwith execute, file, and deliver to us an Acknowledgment of Payment in Form 50. Otherwise you will return the cheque to us unprocessed.

You became bound by and breached that undertaking when you processed the cheque, or alternatively

released the funds, without complying with all the terms of the undertaking.

Background

[4] We were provided with a Statement of Agreed Facts. On the basis of that Statement and the attachments to it, the following are the material facts:

1. In October, 2006 certain individuals (the " Clients") who had initiated some litigation involving the *Strata Property Act*, terminated the engagement of their then counsel, Matthew Fischer and in his place engaged the Respondent.
2. On November 7, 2006, the Respondent wrote to Mr. Fischer advising him, among other things, that it was his intention on behalf of the Clients to seek a review Mr. Fischer's accounts.
3. The review took place on December 5 and 7, 2006. The Registrar ordered that the fees be reduced, which together with costs, prejudgment interest, and a conceded reduction in disbursements, amounted to a judgment for \$3,675.36 payable by Mr. Fischer's firm to the Clients.
4. A number of practical considerations led the Respondent to invite Mr. Fischer to pay the \$3,675.36 to him in trust, on his undertaking to obtain from all three Clients confirmation of same before disbursement from trust.
5. In a letter dated December 11, 2006 Mr. Fischer wrote:

With respect to the payment of the amount ordered by the Registrar, we ask that you provide us a copy of the Certificate by fax. We confirm that you have asked us to provide the cheque for \$3,675.36 to you in trust on your undertaking not to deal with the funds until you have consistent instructions from all three clients with respect to how to deal with those funds. I am informed that we can provide you with a cheque made out to you in trust, only after you have provided us the assurances that you have received consistent instructions to deposit the funds in your trust account from all three clients.

6. On December 19, 2006, the Respondent faxed to Mr. Fischer copies of the Registrar's Certificate and the Clients' written authorization and direction to pay the funds to the Respondent in trust. The Registrar's Certificate was misdated September 7, 2006.
7. On December 21, 2006, Mr. Fischer telephoned the Respondent and recalls advising him that because both the firm's office manager and the partner in his firm were out of the Province, there was nobody in the office authorized to write a cheque on the general account until their return on December 28, 2006. The Respondent's recollection is that Mr. Fischer did not specify the date of their return.
8. Later that day Mr. Fischer sent the Respondent an email in which he: (i) confirmed that the matter would be attended to by the partner upon her return on December 28; (ii) expressed his view that the Respondent's " demeanour [was] unnecessarily provocative and discourteous" ; and (iii) instructed the Respondent not to contact his office prior to December 28.

9. On December 28, 2006, Mr. Fischer forwarded a cheque for \$3,675.36 to the Respondent. Mr. Fischer's covering letter contained the following trust condition:

This payment is provided to you on your undertaking to forthwith execute, file and deliver to us an Acknowledgment of Payment in Form 50. Otherwise, you will return the cheque to us unprocessed.

10. On December 28, 2006, the Respondent delivered an executed, but unfiled, Acknowledgement of Payment, together with the original Registrar's Certificate to Mr. Fischer. The Respondent's covering letter stated, *inter alia*:

Further to your letter imposing terms not agreed nor for that matter discussed we are nonetheless enclosing herewith an Acknowledgment of Payment duly executed.

We are delivering the same to you together with the original Registrar's Certificate and you can if you wish attend and file them both. As we did not file the Certificate we are not in a position to file the Acknowledgment.

11. The Respondent did not file the executed Acknowledgment of Payment or deliver a filed copy to Mr. Fischer. As a result, on January 2, 2007, Mr. Fischer wrote to the Respondent reminding him of the terms of the undertaking imposed on the processing of the cheque, noting that those terms had neither been waived nor complied with and continuing:

In order to resolve this problem, we have taken the step of enclosing for return to you the original Registrar's Certificate and Acknowledgment of Payment so that you can file and deliver the Acknowledgment of Payment to our office forthwith, and thereby comply with the terms of the undertaking.

The original forms are available for pickup at our office along with the original of this letter. We assume that you will arrange to have your agent attend to collect them immediately ...

12. Between January 2 and January 5, 2007, there was a somewhat dyspeptic exchange of letters and emails between Mr. Fischer and the Respondent.

13. The originals of the Acknowledgment of Payment and Registrar's Certificate were not delivered to the Respondent and he did not pick them up.

14. The Respondent processed the cheque for \$3,675.36 by depositing it into his trust account. As of January 30, 2007, the date of his response to the Law Society concerning Mr. Fischer's complaint, he had not disbursed the funds to the Clients. The \$3,675.36 was subsequently disbursed.

Discussion

[5] The Respondent's position, expounded both in correspondence with Mr. Fischer and before us, had three elements:

(a) The subject matter of Mr. Fischer's cheque was the amount of a judgment. The Respondent's view of the law is that " you cannot impose terms on payment of the judgment," and it was improper for Mr. Fischer to attempt to attach such terms through trust conditions. (Letter from the Respondent to Mr. Fischer dated January 2, 2007).

(b) Under Rule 42(19) of the Rules of Court, which is the basis for the Acknowledgment of Payment, it is the judgment debtor who must provide the Form 50 to the judgment creditor, who must then " sign and file and deliver" . But Mr. Fischer did not do this. Instead he left it to the Respondent to do so. The Respondent did so. Since, however, the Respondent had not filed the Registrar's Certificate as he was required to do by the trust condition (i.e. a judgment had been obtained but not registered) " I left it to you to decide if you didn't want it registered but along with the same drew and executed a Form 50 acknowledgement." (Letter from the Respondent to Mr. Fischer dated January 4, 2007).

(c) The Respondent testified that his letters were motivated in part by a wish to give Mr. Fischer a signal that it might not be in his best interests as a professional were a judgment to be registered against his firm, and that he might prefer to avoid any possible embarrassment arising from such registration.

[6] Reduced to its essentials, the Respondent's contention is that, having regard to these three elements, Mr. Fischer's imposition upon him of these trust conditions was legally improper and, in any event, quite possibly unwise.

[7] We do not need to decide whether the Respondent was correct in his views. The situation is governed by Chapter 11, Rule 11 of the *Professional Conduct Handbook*:

11. If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition must be immediately returned to the person imposing the trust condition unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[8] As explained by the hearing panel in *Law Society of BC v. Richardson*, 2007 LSBC 11, at paragraph [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. ...

[9] The Respondent did neither of these things. Instead, he deliberately ignored the trust condition. In doing so, he failed to comply with Chapter 11, Rule 11 of the *Professional Conduct Handbook*.

[10] The importance of complying with trust conditions and undertakings has repeatedly been emphasized. As the panel in *Law Society of BC v. Heringa*, [2004] B.C.J. No. 377, 2004 BCCA 97, said at para. 10 compliance with undertakings (and we add, trust conditions) 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" .

Conclusion

[11] There is precedent for finding that a breach of Chapter 11, Rule 11 is professional misconduct. We refer, for example, to the Decision on Facts and Verdict in *Law Society of BC v. Richardson, supra*, at paragraph [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*" (our emphasis); and *cf.* the reasons for judgment of McDonald J., of the Alberta Court of Queen's Bench, in *Witten v. Leung*, [1983] A.J. No. 883.

[12] In our view, the Respondent's conduct in the circumstances fell below the standard that the Law Society expects from its members in respect of undertakings and trust conditions, as set out in Chapter 11 of the *Professional Conduct Handbook*. We accordingly find that in respect of the matters identified in the Schedule to the amended citation, the Respondent committed professional misconduct.