

2003 LSBC 40

Report issued: November 12, 2003

Oral Reasons: October 29, 2003

Citation issued: December 10, 2002

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

DONALD DOUGLAS MCLELLAN

Respondent

Decision of the Hearing Panel

Hearing date: October 29, 2003

Panel: Margaret Ostrowski, Q.C., Single Bencher

Counsel for the Law Society: Luisa Hlus

Counsel for the Respondent: Albert M. Roos

Background

[1] On December 10, 2002, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 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 Hearing Panel inquire into the Respondent's conduct as follows:

1. That you breached undertakings extended to Georgiale A. Lang, a fellow member, as follows:

(a) "If your client is successful in arranging alternate mortgage financing (the "Private Mortgage") pursuant to which our client will receive payment from the sale of each such property in accordance with paragraph 13 of the Minutes of Settlement, you may discharge the Westminster Mortgage and allow the Private Mortgage to rank in priority to your collateral mortgage only after all documents regarding the Private Mortgage have been delivered to the writer and she has delivered to you her approval in writing of all such terms." and,

(b) "In respect of a sale of any of the Corporate Properties, you may discharge either the Westminster Mortgage or the Private Mortgage and the Collateral Mortgage from title to any such property only after you have delivered to the writer and she has delivered to you her approval in writing of the Contract of Purchase and Sale, Statement of Adjustments, and Direction to Pay."

[2] Count 1(b) of the Schedule to citation was rescinded on September 4, 2003.

[3] The Respondent acknowledged proper service of the citation and waived the requirements of Rule 4-15 of the Law Society Rules. The Respondent agreed that the matter could be heard before a single Bencher

Panel.

[4] The citation comes before this Panel as a conditional admission of a disciplinary violation and a consent to specific disciplinary action pursuant to Rule 4-22. By letter dated August 21, 2003 the Respondent consented to the following disciplinary action:

- i) a reprimand;
- ii) a fine of \$3,000; and
- iii) costs in the amount of \$1,000.

and this outcome was recommended to the Panel by counsel for the Law Society on the instructions of the Discipline Committee.

[5] An Agreed Statement of Facts was filed in a Book of Documents marked as Exhibit 2 in these proceedings. It provides as follows:

- (a) Donald Douglas McLellan was admitted to the bar of the Province of British Columbia on May 17, 1971.
- (b) From November 26, 1990 to the present, Mr. McLellan has operated as a sole practitioner under the name Donald D. McLellan Personal Law Corporation in New Westminister.
- (c) Mr. McLellan represented Mr. S in a matrimonial matter. Georgiale Lang represented Mrs. S in this matter.
- (d) The matrimonial matter was resolved by a Consent Order on July 5, 1999 which incorporated Minutes of Settlement. Part of this settlement was that Mrs. S was to receive funds from the sale of properties owned by M. Co, a company owned by Mr. S and Mrs. S.
- (e) The properties belonging to M. Co were to be sold when a subdivision of certain of the properties was completed.
- (f) As part of the arrangements involving the sale of the properties, a mortgage (the "collateral mortgage") was to be registered against the properties owned by M. Co to protect the interests of Mrs. S. This collateral mortgage was registered on December 29, 1999 against the properties.
- (g) It was also part of the arrangements that a mortgage from a new lender, (the "private mortgage"), would be sought and registered against the properties owned by M. Co. This private mortgage was to pay out the existing mortgage on these properties to Westminster Savings Credit Union.
- (h) As part of the arrangements between counsel regarding the new mortgages and the sale of the properties belonging to M. Co, certain undertakings were imposed by Ms. Lang on Mr. McLellan in a letter dated July 5, 1999.
- (i) Undertaking number 2 imposed upon Mr. McLellan by Ms. Lang was as follows:

"If your client is successful in arranging alternate mortgage financing (the "Private Mortgage") pursuant to which our client will receive payment from the sale of each such property in accordance with paragraph 13 of the Minutes of Settlement, you may discharge the Westminster Mortgage and allow the Private Mortgage to rank in priority to your collateral mortgage only after all documents regarding the Private Mortgage have been delivered to the writer and she has delivered to you her approval in writing of all such terms."

(j) Undertaking number 4 imposed upon Mr. McLellan by Ms. Lang was as follows:

"In respect of a sale of any of the Corporate Properties, you may discharge either the Westminster Mortgage or the Private Mortgage and the Collateral Mortgage from title to any such property only after you have delivered to the writer and she has delivered to you her approval in writing of the Contract of Purchase and Sale, Statement of Adjustments, and Direction to Pay."

(k) Mr. McLellan admits that he was bound by these undertakings imposed by Ms. Lang.

(l) Mr. McLellan was successful in obtaining new financing and in having the private mortgage registered against the lands belonging to M. Co on September 1, 1999.

(m) However, in contravention of undertaking number 2, Mr. McLellan discharged the Westminster Savings Credit Union mortgage on December 12, 1999 without having delivered all documents regarding the private mortgage to Ms. Lang and having received her approval.

(n) Mr. McLellan admits that his breach of undertaking number 2 constitutes professional misconduct.

(o) Mr. McLellan explains his breach of undertaking no. 2 was motivated by a desire to protect the interests of Mrs. S. by avoiding the bankruptcy of Mr. S. and receivership for the private company which held title to the relevant properties. It was Mr. McLellan's belief that had the bankruptcy and receivership occurred, there would have been no funds available for payment to Mrs. S.

(p) Ms. Lang complained that Mr. McLellan had breached undertakings number 2 and 4 in a letter to the Law Society dated February 9, 2000. Specifically, Ms. Lang alleged that Mr. McLellan had breached undertaking number 2 through his discharge of the Westminster Mortgage and that he had breached undertaking number 4 through sale of the properties belonging to M. Co without her approval.

(q) As of February 9, 2000 Mr. McLellan had not sold any of the properties belonging to M. Co.

(r) As of February 9, 2000, Mr. McLellan had not discharged either the private mortgage or the collateral mortgage from the properties owned by M. Co.

[6] The Panel considered the submissions of counsel for the Law Society and for the Respondent. Counsel for the Law Society tendered a Book of Authorities which included the following cases: **Berna** [1993] LSBC 16, **Morrison** [2001] LSBC 02, **Barron** [1998] LSBC 5, **Ghag** [1999] LSBC 29, **Price** [1998] LSBC 11. In two of these cases, the penalty included a term of suspension as well as a fine. Counsel for the Law Society submitted that the facts in those cases were more serious than those herein. Both counsel agreed: 1) that the breach of undertaking by the Respondent appears not to be intentional but inadvertent; 2) that Ms. Lang's client was not prejudiced; and 3) that the Respondent had not anticipated a benefit by his actions. The Respondent stated that he will refrain from practising in the family law area of law.

[7] After considering the circumstances as set out in the Agreed Statement of Facts, and having heard the submissions of counsel, the Panel finds that the Respondent professionally misconducted himself.

[8] The Panel further finds the penalty proposed by the Respondent and recommended by the Discipline Committee to be appropriate in all of the circumstances.

[9] It is accordingly ordered that the Respondent be reprimanded, that he pay a fine of \$3,000 and costs of the hearing in the amount of \$1,000. Both sums are to be paid within thirty days.

[10] The Executive Director is instructed to record this finding of professional misconduct on the Respondent's Professional Conduct Record.

[11] Publication of this finding is to be made to the profession in the normal course.