

2008 : No. 1 March

John Owen Richardson

West Vancouver, BC

Called to the bar: May 15, 1972

Discipline hearing : January 10 (facts and verdict) and December 17, 2007 (penalty)

Panel : David Zack, QC, Chair, Thelma O'Grady and David Renwick, QC

Report issued : March 2, 2007 (2007 LSBC 11) and February 8, 2008 (2008 LSBC 05)

Counsel : Maureen Boyd for the Law Society and Christopher Hinkson, QC for the respondent at the discipline hearing and Terrence Robertson, QC for the respondent at the penalty hearing

Facts

In June 2003 John Owen Richardson was retained by Mr. A in a matrimonial proceeding against his wife, Mrs. A. She was represented by JC, a lawyer. That same month the matrimonial home was sold. JC held the net proceeds in his trust account. Other family assets included an RRSP in Mr. A's name that could not be disbursed until he reached age 55.

Between March 1 and April 8, 2005 Richardson and JC exchanged a series of letters, by which JC attempted to secure an agreement for a holdback of funds in trust or a penalty to ensure that his client was paid bi-weekly maintenance. Richardson resisted JC's attempt and ultimately JC accepted that Mr. A was not prepared to agree to a penalty or holdback.

A separation agreement between Mr. and Mrs. A in full and final satisfaction and discharge of all claims each had against the other was entered into on April 8, 2005.

On April 15, 2005 JC sent a number of documents to Richardson, including a trust cheque payable in trust for \$19,480.54 - representing one-half of the net proceeds of the sale of the matrimonial home. JC forwarded the trust funds to Richardson on his undertaking to provide JC with an entered copy of the divorce order, a filed copy of the separation agreement, confirmation of the transfer of the half interest in the RRSP to Mrs. A, and to provide Mr. A's 24 post-dated cheques for spousal maintenance pursuant to the separation agreement.

On April 21, 2005 Richardson deposited the trust cheque into his trust account. The next day Richardson faxed a letter to JC and said, "I do not accept any of the undertakings you unilaterally imposed upon me." Further, Richardson wrote, "at one point you attempted to withhold \$2,500 of my client's funds pending his obtaining the divorce order ... and I specifically rejected that and your client agreed." In the letter Richardson went on to say that he would "follow through" with the items requested to be done in JC's letter but would not withhold the funds.

On April 25, 2005 JC faxed a letter to Richardson saying he did not agree with Richardson's view and stated that, if Richardson was not prepared to accept the undertaking, then he must return the funds.

Richardson sent a letter to JC on May 9, 2005 advising that he had been sick for seven weeks and that he proposed to release the funds once he had taken all possible steps to satisfy the obligations flowing from the separation agreement, but not "from any alleged improperly imposed undertaking by you." Richardson further advised that he had sent documents to the Prince George Registry for a desk order divorce and that, in his view, he was now entitled to disburse Mr. A's half share of the house proceeds.

In a letter dated May 12, 2005 JC told Richardson that he had to comply with the undertaking or return the funds regardless of "whether or not you are happy with the undertaking which I have placed upon you." That same day Richardson disbursed one-half of the monies held in trust to Mr. A, while retaining the balance for his legal fees.

JC sent letters to Richardson dated July 13 and 15, 2005 asking for the trust funds to be returned to him. On July 18, 2005 JC reported the alleged breach of undertaking to the Law Society. Two days later Richardson wrote to JC stating that on advice from the Law Society he "was in error in not strictly complying with the terms of the undertaking imposed by you ... or in not returning the funds to you if I did not accept those terms." In the letter Richardson confirmed that three of the four terms of the undertaking had been fulfilled - the exception being the locked-in RRSP funds, which still required Mrs. A to complete her half of a document attached by Richardson with the letter.

At the hearing Richardson gave evidence that he only acknowledged in the July 20, 2005 letter that he breached the undertaking because of the advice he received from the Law Society and that since receiving independent legal advice he now believed he was not in breach of an undertaking.

The hearing panel noted the importance of emphasizing Chapter 11, Rule 10 of the *Professional Conduct Handbook* when the panel stated:

"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.

"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 v. Leung* [1983] A.J. No. 883 (QB): '... the edifice of trust between solicitors, upon which so much of the efficient service to the public depends, will crumble.'"

Verdict

The panel noted that it was disturbed by the conduct of JC, who was clearly trying to unfairly impose a term in the trust conditions that he knew or ought to have known was not set out in the separation agreement. The panel further stated that, while the conduct of JC may have deserved a citation, his conduct was not the subject of the complaint.

In the opinion of the panel, Richardson's actions regarding the undertaking were not cavalier, but misguided at best. The panel stated that Richardson should have been aware of Chapter 11, Rule 11 of the Handbook, which 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.

Further, the panel said Richardson's argument that he never accepted the trust conditions would only have had some validity had he not utilized the funds, because once he disbursed them to his client he was deemed to have accepted the conditions imposed on him. Thus, the panel found Richardson breached his obligations to abide by trust conditions and was guilty of professional misconduct.

Penalty

The panel noted that, despite practising for more than 35 years, this was Richardson's first discipline hearing and that there had never in the past been any suggestion that he had previously breached an undertaking.

The panel said they were of the view that in this case there was "no real victim" and no "element of dishonesty." Therefore the panel determined a fine would be an appropriate penalty and they ordered Richardson to pay by March 31, 2008:

1. a fine of \$2,500; and
2. costs of \$4,500.