2009 LSBC 07
Report issued: February 11, 2009
Citation issued: April 12, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 review concerning

John Owen Richardson

Applicant

Decision of the Benchers on Review

Review date: October 17, 2008

Quorum: G. Glen Ridgway, QC, Chair, Joost Blom, QC, Kathryn Berge, QC, Leon Getz, QC, William Jackson, Barbara Levesque, Dr. Maelor Vallance

Counsel for the Law Society: Maureen S. Boyd
Counsel for the Applicant: Terrence L. Robertson, QC

Introduction

[1] On April 12, 2006, the Law Society issued a citation (the " Citation") against John Owen Richardson (the " Applicant") alleging the following:

> In representing your client, SA, you were bound by an undertaking contained in a letter from opposing counsel as follows:
>
> The above funds are forwarded to you on your undertaking to make no use of the funds until such time as:
>
> (a) you provide this office with a filed copy of the Divorce Order;
>
> (b) you provide this office with a filed copy of the Separation Agreement;
>
> (c) you provide confirmation of the transfer of the half interest in the RRSP to [Ms. A.] pursuant to paragraph 7(b)(iii) of the Separation Agreement;
>
> (d) you provide your client's 24 post-dated cheques pursuant to paragraph 5(a) of the Separation Agreement.
>
> You breached that undertaking when you released the funds without first complying with all of the terms of the undertaking.

[2] In a decision issued January 10, 2007, a Hearing Panel of the Law Society (the " Hearing Panel") found

the Applicant guilty of professional misconduct and ordered that he pay a fine in the amount of $2,500 and costs in the amount of $4,500 (the " Hearing Decision").

[3] On March 23, 2007, the Applicant filed a Notice of Review seeking a reconsideration of some of the facts found by the Hearing Panel, as well as its finding of professional misconduct.

[4] The Applicant did not seek a reconsideration of the penalty imposed by the Hearing Panel, and no submissions were made on this subject.

[5] The central issue before us is whether the Applicant breached an undertaking. The relevant provisions of the *Professional Conduct Handbook*, Chapter 11 (the *" Handbook"*) that govern the proper use of undertakings by counsel are as follows:

> 7. A lawyer must
>
> (a) not give an undertaking that cannot be fulfilled,
>
> (b) fulfil every undertaking given, and
>
> (c) scrupulously honour any trust condition once accepted.
>
> 7.1 Undertakings and trust conditions should be
>
> (a) written, or confirmed in writing, and
>
> (b) unambiguous in their terms.
>
> 10. A lawyer must not impose on other lawyers impossible, impractical or manifestly unfair conditions of trust.
>
> 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 be amended in writing on a mutually agreeable basis.

Scope of Review by the Benchers

[6] Section 47 of the *Legal Profession Act* provides a review panel with a broad power of review, with discretion to substitute its own decision for that of the Hearing Panel. The relevant provision of Section 47 states:

> (5) After a hearing under this section, the benchers may:
>
> (a) confirm the decision of the panel, or
>
> (b) substitute a decision the panel could have made under this Act.

[7] The test to be applied by the Benchers on a review under Section 47 has been stated to be " correctness" (*Law Society of BC v. Dobbin*, [1999] LSBC 27), *Law Society of BC v. Hops*, [1999] LSBC 29, *Law Society of BC v. Hordal*, 2004 LSBC 36. See also the more recent confirmation in *Law Society of BC v. Geronazzo*, 2006 LSBC 50.

[8] In *Hops*, while considering the appropriate scope of review for " findings of proper standards of professional and ethical conduct," the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971), 19 DLR (3d) 446 (BCCA), at 452:

> The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is " contrary to the best interests of the public or of the legal profession . . ." .

[9] There is a qualification to the general application of the correctness test. In cases in which the hearing panel has had the benefit of the viva voce testimony of witnesses and an opportunity to assess their credibility, a review panel ought to accord some deference to the hearing panel on matters of fact. We have been mindful of this.

Facts

[10] The Hearing Panel found that the Applicant had received funds subject to a four-part trust condition, that he had accepted the condition by his conduct in " making use of the funds" and breached this undertaking by disbursing the funds to his client when only one of the four parts the undertaking had been met.

[11] The facts in this matter are significant, and a summary of them is required to provide a context to this discussion:

> (a) Another lawyer, JC, represented a spouse in a matrimonial matter. In the course of that representation, pursuant to a court order he received the net sale proceeds from the sale of the matrimonial home in his trust account in June, 2003. The court order provided that JC was to hold these funds in this trust account until there was either " an agreement of the parties or an order of the court regarding a division" ;
>
> (b) At the time that JC received the net sale proceeds, various issues between the parties remained unresolved, including the division of the matrimonial home sale proceeds, RRSP division and spousal support;
>
> (c) Negotiations between the parties were difficult and the Applicant and JC continued to negotiate for almost two years prior to settlement. JC attempted, unsuccessfully, on behalf of his client to obtain certain security for his client. At one point, by agreement, $10,000 was released by JC to each client;
>
> (d) Finally, on April 14, 2005, a Separation Agreement was entered into by the husband and wife. Certain steps remained in order to fulfill various provisions of the Separation Agreement;
>
> (e) On April 15, 2005, JC sent a number of documents to the Applicant, including original copies of the fully-executed Separation Agreement, a consent order and his trust cheque for one-half of the net proceeds of the sale of the former matrimonial home. The trust funds were forwarded to the Applicant on his undertaking to " make no use of the same" until such time as he took each of the four steps set out in the Citation;
>
> (f) Without fulfilling this trust condition, on April 21, 2005, the Applicant deposited JC's trust cheque

into his trust account;

(g) An exchange of correspondence between the Applicant and JC regarding these trust conditions then ensued. The Applicant wrote JC on April 22 and May 9, 2005, strenuously objecting to JC's imposition of any trust conditions upon the funds terming them to be " unilaterally imposed conditions" . The Applicant made it clear he did not consider himself to be bound by them. He made the further point that the conditions in respect of the granting of the Divorce Order and the finalization of the RRSP division were not within the power of his client to fulfill. The Applicant advised JC that he " propose[ed] to release the funds once all possible steps have been taken by me on [my client's] behalf to satisfy those obligations which flow from the Separation Agreement, not from any improperly imposed undertaking by you." No amendment of the undertaking was proposed by the Applicant;

(h) JC's correspondence in reply and follow-up dated April 25, May 9, and May 12, 2005 asserted his objections to the release of the funds to the Applicant's client if all requirements of the undertaking were not going to be fully complied with. In his May 12, 2005 letter, JC advised the Applicant that " whether or not you are happy with the undertaking which I have placed upon you, I would reiterate that there are only two choices that you have - you either comply with the undertaking or you return the funds. The risk is that, once the funds are released to [your client], there is no *practical* remedy for [my client] if [your client] refuses to carry through with his obligations under the Agreement" ;

(i) On May 12, 2005, without advising JC, the Applicant disbursed to his client half of the monies held in trust and retained the balance for his account;

(j) In subsequent letters dated July 13 and 15, 2005, JC continued to enquire as to what happened in relation to the trust funds and continued to request that they be returned to him. He did not receive a reply, nor were the trust funds returned. On July 18, 2005 JC reported the matter to the Law Society;

(k) It was always open to both counsel to apply to the court for determination of the proper terms for release of the funds, but neither availed himself of this option.

[12] The Hearing Panel found the relevant portions of the Applicant's evidence to be as follows:

(a) The Applicant was called to the Bar on May 15, 1972 and had practised law for 33 years at the time of the events set out in the Citation;

(b) He was adamant that he had never in the past broken his word or breached any undertakings. He was proud of his reputation within the profession and felt quite strongly that the position he held from the outset was valid. He indicated that he had never had anyone impose improper undertakings in the past;

(c) He was aware of the significance of undertakings in legal transactions but was unaware of Chapter 11, Rule 11 of the *Handbook* in April and May of 2005;

(d) Although, in all of his correspondence to JC, he had indicated that he was not accepting the undertaking, he did not propose any amendments to try to resolve the matter because he felt that there was no undertaking. The Applicant considered that JC's undertakings were posturing and

that he was seeking to impose conditions over and above what he had been able to negotiate by way of the Separation Agreement;

(e) Nowhere in the Applicant's correspondence to JC did he suggest that the conditions were " impossible or impractical" . He did not just reject the terms of the undertaking; he was not prepared to accept its terms at any time;

(f) He had every intention of abiding by the conditions of the Separation Agreement but considered that it was inappropriate for JC to deny payment of the monies that were due to the Applicant's client by imposing further conditions.

[13] The Hearing Panel found that JC's evidence was as follows:

(a) The sale proceeds from the matrimonial home were placed into his trust account on an undertaking that they only be disbursed by him upon the agreement of the parties or by way of Court Order;

(b) In spite of his efforts to obtain provisions for a penalty and/or holdback in the Separation Agreement in the event that [the Applicant's client] failed to make maintenance payments, these efforts were rejected by the Applicant on behalf of his client;

(c) Once the Separation Agreement was signed, JC confirmed that he was obliged to disburse the proceeds from the sale of the matrimonial home;

(d) The term of the undertaking requiring the Applicant to " provide confirmation of the transfer of the half-interest in the RRSP" to [JC's client] went beyond the provisions of the Separation Agreement;

(e) At all times the Applicant rejected the terms of the undertaking.

Issues to be Determined

[14] The Applicant asserted that the Hearing Panel:

(a) applied the incorrect test to determine what constitutes an undertaking and a breach of it and, in this case, erred by failing to find the undertaking to have been " unlawful" ;

(b) made errors of fact and in concluding that an undertaking had been given and that it was breached;

(c) erred by finding that any breach of an undertaking is professional misconduct;

(d) erred by finding that, in this case, the Applicant's conduct amounted to professional misconduct;

(e) erred in failing to find that, if indeed there was a breach of an undertaking, that breach constituted a breach of the *Professional Conduct Handbook*, analogous to a breach of the Law Society Rules (the " Rules), rather than professional misconduct.

[15] The Law Society asserted that the Hearing Panel was correct in its determination on each of these

issues.

[16] The issues to be determined in this Review are:

(a) Can an undertaking be " unlawful" ? If so, what constitutes an unlawful undertaking, and did this undertaking qualify under that definition?

(b) What is the correct test to determine what constitutes an undertaking and a breach of it?

(c) In both fact and law, did the Applicant accept and breach an undertaking?

(d) If there was a breach of an undertaking by the Applicant, did the breach constitute professional misconduct or an offence analogous to a breach of the Rules under section 38(4)(a)(iii)?

Discussion

" Unlawful" Undertakings

[17] The Applicant urged upon the Review Panel that not all undertakings should be guarded with the same protection. Through counsel, he asserted that the undertaking sought to be imposed upon him in this matter was " illegal, immoral or contrary to public policy" insofar as it was contrary to the terms of the Separation Agreement and contained terms seeking security for performance of terms in the Separation Agreement. Such security for performance of contractual terms had been expressly rejected by the Applicant and his client. It was argued that such a trust condition seeking such security constituted theft by conversion.

[18] Case law was cited in support of this proposition, including *Bursey v. Bursey* (1999), 47 R.F.L. (4th) 1 (Nfld. CA), which found that a provision in an agreement that was designed to prevent the reporting of tax evasion was contrary to public policy and would not be enforced. No precedent was provided, however, that held an undertaking to be unlawful. All of them sought to protect parties to contracts from enforcement of agreements that would perpetrate fraud or a criminal offence.

[19] Without deciding the general question of whether there are any circumstances in which an undertaking might be held to be unlawful, the Review Panel finds that the undertaking sought by JC in this instance did not have a purpose contrary to the public interest in the orderly and amicable settlement of legal disputes. Unlike *Bursey*, no crime was sought to be protected, nor was the undertaking designed to perpetrate any fraud. The undertaking imposed by JC did seek to ensure that his client, in an expeditious manner, obtained the relief to which she was entitled under the Separation Agreement. The argument that the undertaking was illegal or unlawful does not succeed in these circumstances.

[20] Further, the Review Panel notes that similar " executory" steps required to give effect to contractual terms in family law and other contractual and litigation matters are, on occasion, organized between counsel by way of the sort of undertaking imposed by JC upon the Applicant, and such an approach is not considered to be improper. Certainly it was open to the Applicant to have rejected the undertaking on behalf of his client on the basis that it over-reached the Separation Agreement, was impractical, or any other basis. He did not do so.

[21] Acceptance of the Applicant's argument would mean that he was free to decide whether the undertaking was lawful by virtue of his own interpretation of his client's contractual rights. If it did not meet that test, he was entitled to retain the property that had been delivered to him in reliance upon the expectation that the undertaking would be honoured. This Review Panel disagrees with the Applicant's

contention. It is neither reasonable nor in the public interest to have counsel free to unilaterally determine the " legality" or general appropriateness of an undertaking and, if it is not deemed to be acceptable by that counsel, to dismiss or breach it. In this instance, having made his own determination of the validity of the undertaking, the Applicant did not even reply to the other counsel in response to his enquiries as to the whereabouts of the funds delivered three months earlier. This approach urged upon the Review Panel by the Applicant does not serve the public interest in the orderly settlement of legal disputes by counsel.

What Constitutes an Undertaking?

[22] As to what constitutes an undertaking, the Hearing Panel relied upon the established law regarding undertakings:

> (a) An undertaking may be imposed through the imposition of trust conditions. They are not restricted to those voluntarily given (*Witten v. Leung* (1988), 148 DLR (3d) 418 (Alta. QB); *Carling Development Inc.* v. *Aurora River Tower Inc.*, 2005 ABCA 267);
>
> (b) " Undertakings take precedence over any dispute that has developed between the parties." (*McCarthy Té trault v. Lawson Lundell* (1991), 58 BCLR (2d) 310 (SC) at para. 13);
>
> (c) A court will enforce an undertaking regardless of any contractual defence on the merits between the parties (*Carling Development Inc.* v. *Aurora River Tower Inc.* at para. 13). This reflects the court's interest in ensuring the honesty of its officers.

[23] In summary, the combined effect of the written ethical guidelines for lawyers together with the case law is that no distinction can or should be drawn between the effect of an imposed trust condition and a solicitor's undertaking; they are equivalent. An undertaking is not a contract. It need not be supported by consideration; it cannot be overridden by instructions from the client; and it remains binding and enforceable until satisfied or until the parties mutually agree to modify the undertaking or it is otherwise withdrawn. The lawyer cannot reject or repudiate an undertaking while retaining or using the subject of it. The Review Panel approves the Hearing Panel's view of the law surrounding undertakings and trust conditions and its application to these circumstances.

If an Undertaking was Imposed, Did the Applicant Breach It?

[24] As is clear from the *Handbook* provisions set out at the beginning of this decision, it would have been proper for the Applicant to clarify with JC that the Applicant could not control the ultimate granting of the divorce by the court, nor the ultimate completion of the RRSP division by the investment agency, and confirm that he could not take personal responsibility for these steps. He could then have attempted to negotiate an amended undertaking upon acceptable terms. If such an amendment was not possible, return of the funds and an application to the court would have been the practical and proper course of action.

[25] It should be remembered that JC remained bound by his original undertaking that he could not release the funds to either client " without agreement of the parties or order of the court." Had the Applicant followed the proper course of action during the period of negotiations between counsel regarding an amended undertaking or prior to the court's determination, the clients of both JC and the Applicant would have continued to be on an even footing until there was a resolution by agreement or the court; neither would have been entitled to their portion of the funds.

[26] The Hearing Panel found at paragraph [30] of its decision that JC's conduct was disturbing insofar as he " clearly, by imposing the trust conditions, was attempting to unfairly impose a term that he knew or

ought to have known was not set out in the Separation Agreement. This was done to gain an unfair advantage over [the Applicant's client] and to tie up the settlement proceeds." Whether or not his conduct violated the *Handbook*, Chapter 11, Rule 10, is not the question in these proceedings, nor was it a question for the Applicant to answer and then determine that he was, therefore, relieved of all of the other provisions of Chapter 11.

[27] In the view of this Review Panel, the Hearing Panel properly took all of these factors into account in reaching its determination that the Applicant did breach the trust condition imposed upon him with respect to the trust funds.

Did the Breach of the Undertaking Constitute Professional Misconduct?

[28] The *Legal Profession Act*, s. 38 sets out the options available to a hearing panel. The relevant portions are:

> (4) After a hearing, a panel must do one of the following:
>
> (a) dismiss the citation;
>
> (b) determine that the respondent has committed one or more of the following:
>
> (i) professional misconduct;
>
> (ii) conduct unbecoming a lawyer;
>
> (iii) a breach of this Act or the rules;
>
> (c) make any other disposition of the citation that the panel considers proper.

[29] The Applicant asserted that, if there was any breach of an undertaking, it should constitute what was said to be the lesser offence of a breach of the Rules under s. 38(4)(b)(iii). By this it was meant that the Applicant's breach of the Chapter 11 provisions of the *Handbook* would be equivalent to a breach of the Rules and similar consequences would flow. On that basis, we were urged to another disposition of the citation under s. 38(4)(c).

[30] Given our conclusion below that the Applicant's conduct did constitute professional misconduct, it is not necessary to decide that question. However, we note that the Benchers determined in *Law Society of BC v. Dobbin*, *supra*, that " [t]he law which binds the Benchers of this Province is that a " mere" breach of the *Professional Conduct Handbook* does not constitute professional misconduct." To be professional misconduct the conduct in question must meet the appropriate test.

[31] The Hearing Panel's decision does not set out the test or authorities upon which it relied in its determination that the Applicant's conduct constituted professional misconduct. The proper test is that set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171, " whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[32] In making the determination as to whether or not the Applicant's conduct amounts to professional misconduct, a breach of the Rules or otherwise, we are mindful of the fact that the burden rests with the Law

Society to establish its case to a higher standard than a balance of probabilities. Clear and cogent evidence must be produced, falling short of a criminal standard, with a weight proportional to the serious consequences for the professional person's career and status in the community that a finding of professional misconduct or incompetence carries (*Martin, supra,* at paras. 134 to 137).

[33] Although the Applicant was unaware of Rule 11 of Chapter 11 of the *Handbook* at the material time, he had been practising for 33 years and testified that it was " not uncommon" for him to deal with undertakings in his practice. On two occasions prior to the Applicant releasing a portion of the funds to his client, JC wrote to put the Applicant on notice that he must either accept the undertaking or return the funds. The Applicant did not even attempt to resolve what was clearly a critical issue between himself and JC, nor did he reply to the latter's enquiries about the disposition of the trust funds. It is a fundamental requirement of professional legal practice that there be certainty that undertakings will be honoured or, where not acceptable, be worked out between counsel. The Applicant's failure to take any of these steps falls short of the conduct that the Law Society expects from its members and, as such, constitutes professional misconduct.

[34] The fact that a consequence of the Applicant's breach of the trust condition was that he was able to pay his own account due from his client adds to the seriousness of the misconduct as it adds an element of conflict of interest as between his own interests and those of his client in the resolution of his legal affairs.

[35] It was suggested by the Applicant that the Hearing Panel found that every breach of an undertaking constituted professional misconduct. This Review Panel disagrees that this can be concluded from that Panel's decision.

Conclusion

[36] The Hearing Panel's decision is correct in fact and in law, and this Review Panel confirms that decision.

[37] Given that neither the Law Society nor the Applicant questioned the penalty imposed by the Hearing Panel and the fact that this Review Panel considers the penalty to be appropriate under all of the circumstances, we order that, as a consequence of his professional misconduct, the Applicant pay:

(a) the Hearing Decision fine of $2,500 and costs of $4,500;

(b) costs of the Review.

[38] The Review Panel directs counsel to confer regarding the quantum of the costs of this Review and the timing for payment of all costs due. In the event of failure to agree, an application should be made to us for a decision on the unresolved points.