2009 LSBC 19
Report issued: June 17, 2009
Citation issued: May 11, 2007

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

Vivian Chiang

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: October 7 and 8, 2008

Panel: **Majority decision**: Thelma O'Grady, Chair, Karl F. Warner, QC **Minority decision**: Ralston S. Alexander, QC

Counsel for the Law Society: Maureen Boyd
Acting on her own behalf: Vivian Chiang

Majority Decision of Thelma O'Grady, Chair, and Karl F. Warner, QC

Background

[1] On May 11, 2007 a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society on a direction from the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct as follows:

1. Your conduct on March 11, 2005, when you appeared before Madam Justice Gill in Supreme Court Chambers in Vancouver Registry Action No. S051013 on behalf of F Inc. in respect of its Notice of Motion dated March 11, 2005, and did not inform her that you were appearing as counsel or were a member of the Law Society of British Columbia, which omission was contrary to your duty as a officer of the court, or may or did have the effect of misleading the court, or both.

2. Your conduct on March 15, 2005, when you appeared before Madam Justice Smith in Supreme Court Chambers in Vancouver Registry Action No. S051013 on behalf of F Inc. in respect of its Notice of Motion dated March 11, 2005 and did not inform her that on March 11, 2005 short leave had been granted only with respect to the claim for injunctive relief, and further made submissions with respect to all three claims for relief set out in the Notice of Motion, contrary to the leave granted by Madam Justice Gill on March 11, 2005. This conduct was contrary to your duty as an officer of the court, or may or did have the effect of misleading the court, or both.

3. Your conduct on June 15, 2005, when you filed a praecipe in Court of Appeal Action No. CA032912 to adjourn an application on behalf of your client F Inc. when you had asked for, but did not have consent of counsel for the respondents, to such an adjournment.

4. Your conduct on June 16, 2005, when you appeared in Supreme Court Chambers in Vancouver

Registry Action No. S051013 on behalf of F Inc. and advised the court that Brook Greenberg, counsel for one of the defendants, had consented to an adjournment, when he had not, which may or did have the effect of misleading the court.

[2] The citation was admitted to have been duly served on the Respondent.

[3] The hearing took place on October 7 and 8, 2008 before us with the Respondent serving as her own counsel. The Law Society withdrew the third allegation above at the time of the hearing, and these proceedings went forward with respect to allegations 1, 2 and 4.

Facts

[4] The facts in this matter are relatively simple to state in that, for the most part, the underpinning evidence, except for that providing context, is to be found in the transcripts of the proceedings before both Madam Justice Gill, Madam Justice Lynn Smith, and Mr. Justice Cullen, as well as the evidence given *viva voce* essentially by the Respondent, all of which is summarized in the following several paragraphs.

[5] The Respondent was the majority shareholder of a company called F Inc., which company operated a wholesale business dealing with fresh produce. Disputes in the wholesale produce business in Canada are governed in part by an entity known as The Fruit and Vegetable Dispute Resolution Corporation (the " DRC").

[6] In the fall of 2004 F Inc. was involved in a dispute with several other produce companies regarding the delivery of a shipment of mangos, the condition of the mangos when delivered, and the responsibility to pay for the same. By the rules of the DRC, of which F Inc. was a member, a mandatory arbitration process organized by the DRC was commenced in Ontario to resolve the dispute.

[7] An Ontario arbitrator ordered F Inc. to pay approximately $13,000 US to an aggrieved supplier. F Inc. did not pay the sum awarded and was suspended from membership in the DRC after the lapse of a 30 day notice period. Notice of the suspension was circulated to the membership of the DRC and that notice allegedly had a significant negative impact on the business of F Inc. as DRC members were reluctant to do business with a suspended member.

[8] The Respondent then set out on a long procedural path to have the arbitration award and the suspension of F Inc. set aside. The Respondent alleged throughout the hearing before this Panel that F Inc. had been abused by the DRC and that the outcome of the arbitration proceeding was unjustified and contrary to law.

[9] The events which are the subject matter of these proceedings occurred in the course of the Respondent seeking the assistance of the British Columbia Courts to set aside the suspension of F Inc. as a member of the DRC.

[10] The Respondent commenced proceedings in British Columbia by way of a Writ of Summons naming a variety of defendants, including the DRC and an American Corporation with offices in Arizona, MAP Produce LLC (" MAP").

[11] The Respondent brought an *ex parte* application seeking to set aside the suspension order of the DRC on the basis that it was a wrongful interference with the business of F Inc., as well as requiring DRC to issue a public apology to the shareholders of F Inc., and retract the March 2nd notice of suspension and restraining the DRC from issuing further notices regarding F Inc.

[12] The *ex parte* application was heard in Chambers by Madam Justice Gill on March 11, 2005. During the course of the proceedings, Madam Justice Gill advised the Respondent that she ought to seek legal advice

in respect of the subject matter of her application. During the proceedings the Respondent did not advise Madam Justice Gill that she was herself a lawyer but continued in that proceeding as an officer of F Inc.

[13] Moreover, at all times relevant to this citation the Respondent was enrolled as a part-time member of the Law Society of British Columbia, although not practising as a lawyer but instead as a businesswoman whose primary focus was with the conduct of the business of F Inc.

[14] In the course of discussion regarding F Inc.'s motion described above, Madam Justice Gill advised that she was unable to grant the relief sought since none of the Defendants were before the Court, as, inter alia, they had not been served with the Notice of Motion. She accordingly turned the hearing before her into a " Short Leave" application.

[15] Madam Justice Gill advised the Respondent in any event that the only part of her Notice of Motion that could be considered on Short Leave in a Chambers hearing was the plea for injunctive relief restraining the DRC from making further allegedly defamatory publications about F Inc. Madam Justice Gill, *inter alia*, advised the Respondent that, without a trial of the matter, she could not bring the application to set aside the suspension, she could not bring the application to have a direction to make the DRC publish an apology to F Inc. and she could not have an order requiring the DRC to retract the notice of suspension that it had circulated.

[16] In particular, Madam Justice Gill advised the Respondent that the first two orders that she was seeking were not orders that the Supreme Court could grant on an interlocutory basis. She advised that the order directing a declaration that the DRC suspension order was a wrongful interference with the business of F Inc. and the order directing a retraction of the notice of suspension were matters that needed to be dealt with by way of a final order of the Court which could only happen following a full hearing of the evidence.

[17] Mr. Brook Greenberg of Fasken Martineau DuMoulin LLP had at some time earlier appeared to the Writ of Summons on behalf of the DRC.

[18] At the March 11, 2005 ex parte hearing, Madam Justice Gill provided, with the assistance of the Court Clerk, a Notice of Short Leave and directed the Respondent to serve the Notice of Short Leave with the Notice of Motion and the Affidavit material in support upon Mr. Greenberg before 5:00 p.m. on that same day, Friday March 11, 2005. The Respondent attended personally on Fasken Martineau offices in order to serve Mr. Greenberg at or about 5:00 p.m. on March 11, 2005 with the Court ordered material as endorsed but did not speak to him.

[19] The Short Leave Requisition, endorsed by the Court, was silent on the subject of which parts of the Motion of the applicant was approved for short leave. There was no indication on the face of the document that only the application for injunctive relief was to be heard on the basis of short leave.

[20] The Order for Short Leave endorsed by Madam Justice Gill further provided that any material produced by the DRC in response to the Notice of Motion was to be delivered to the Respondent before 6:00 p.m. on Saturday March 12, 2005. However, the material in response from Mr. Greenberg was not served until late in the day on March 14, 2005, at which time the Defendant's affidavit was served unfiled.

[21] In the material that the Respondent served upon Mr. Greenberg there was no indication provided by the Respondent as to the limitations placed upon the application to be made by Madam Justice Gill and Mr. Greenberg prepared for and responded to all three claims for relief set out in the Notice of Motion in his prepared material.

[22] The parties appeared in Chambers on March 15, 2005 before Madam Justice Lynn Smith. Mr. Alan Dabb of Fraser Milner Casgrain LLP appeared at this hearing on behalf of MAP as Mr. Greenberg had

referred MAP to him as a client. After the identification of the parties present, Mr. Greenberg then acknowledged to the Court that he had not complied with the service requirements of the Short Leave application. He went on to explain that he was unable to comply because the Defendant, DRC, was in Ontario and the intervening weekend had prevented him from taking instructions and putting appropriate materials together until that morning.

[23] Accordingly, at the beginning of the hearing, Mr. Greenberg sought leave of the Court to introduce and rely upon the un-filed affidavit on the basis that the original was en route from Ontario and would be filed when received. The Respondent agreed to proceed on that basis.

[24] The hearing was then adjourned by Madam Justice Smith for approximately 15 minutes to allow the Respondent to complete her review of the affidavit.

[25] When the Court reconvened after the adjournment the Respondent laid out by way of background the facts relating to the application in summary as follows:

> (a) The Respondent made reference to her concerns that the Motion brought was urgent in nature due to the deteriorating nature of the produce;
>
> (b) The Respondent stated her views that the DRC had no jurisdiction to arbitrate issues relating to fraud and collusion. Fraud and collusion was the subject of the arbitration and accordingly, the DRC ought not to have ruled upon it. F Inc. was objecting to the jurisdiction of the DRC. Due to the threat of losing its ability to carry on business, F Inc. had accordingly obtained a licence from the Canadian Food Inspection Agency.
>
> (c) The Respondent then advised that the DRC published a notice of a suspension of F Inc. to its members on March 2, 2005, and by circulating that notice of suspension it implied that the suspension was proper and appropriate. F Inc. was seeking from the British Columbia Supreme Court a declaration that the notice of suspension was a wrongful interference with the applicant's business, an order that DRC issue an apology and retraction, and finally, an injunction against further notices regarding F Inc. since F Inc. was being defamed by the notice of suspension. At the same time, the arbitration award was being attacked in the Ontario Courts.
>
> (d) In the event, F Inc.'s position was that the publication of the suspension was defamatory because it implied that the arbitration award was, in the words of the Respondent, " fair, was right, and that F Inc. was wrong."
>
> (e) Relying upon the provisions of the *Libel and Slander Act*, F Inc. was seeking a Court Order of retraction and a judicially ordered apology.

[26] Mr. Dabb, as stated above, appeared on the motion to state his concern of ensuring that MAP was not attorning to the jurisdiction of the Supreme Court of British Columbia by his appearance to the Motion and to ensure that factual allegations essentially alleging fraud as against MAP or one of its officers were not to be relied upon in the application and that no relief be granted against MAP as it had not had an opportunity to respond to the allegations made.

[27] The Respondent agreed that the application could proceed before Madam Justice Smith without the need to rely upon any allegations of fraud against MAP or any of its officers.

[28] Mr. Greenberg's submission in response to the facts advanced by the Respondent then went forward.

[29] Madam Justice Smith gave Reasons for Judgment on the Respondent's Notice of Motion on March 16,

2005 dismissing all applications for interlocutory relief and, in a subsequent application, costs in any event of the cause to the DRC and costs in the cause to MAP.

[30] The Respondent filed a Notice of Application for Leave to Appeal the decision of Madam Justice Smith in the British Columbia Court of Appeal on April 25, 2005, and on or about April 29, 2005, the DRC filed a Notice of Motion in Supreme Court seeking, inter alia, a dismissal of F Inc.'s action in its entirety, which subsequently was scheduled to be heard June 23, 2005.

[31] The Respondent next filed a comprehensive Statement of Claim dated May 29, 2005 and, on June 1, 2005 again filed a Notice of Motion for Leave to Appeal, Stay of Execution and Leave to Add a Party in the Court of Appeal returnable June 17, 2005, as well as an Amended Notice of Application for Leave to Appeal in the same terms and outlining, inter alia, the underpinning grounds of appeal.

[32] A series of email exchanges occurred in which the Respondent sought consent of counsel for each of DRC and MAP to adjourn the previously scheduled hearing set for June 23, 2005 in Supreme Court Chambers regarding the application of DRC and MAP to dismiss F Inc.'s claim. The thrust of this application was to dismiss the claim of F Inc. as without merit, frivolous and vexatious, and outside the jurisdiction of the British Columbia Courts.

[33] On June 16, 2005 the Respondent appeared in Supreme Court Chambers, without notice to any party, and made an application for an adjournment or, in the alternative, for short leave on a motion to adjourn the hearing set for June 23, 2005. Short leave was granted and the adjournment application was heard on June 17, 2005. During the short leave application, the Respondent advised the Court that " one counsel is agreeable with this adjournment and, unfortunately, another opposing counsel ... has not agreed." In response to the Court's direct question, " They're opposed to the application for the adjournment; is that right?" the Respondent replied, " Okay. Yes."

[34] In the emails referred to in paragraph [32] above, Mr. Greenberg stated that he would agree to adjourn the hearing on the motion striking the proceedings, upon acceptance by F Inc. of certain conditions and, if so, advised he would agree to an adjournment of the June 23, 2005 hearing to the week of August 8, 2005. The Respondent did not communicate her acceptance of Mr. Greenberg's conditions to him before the hearing and made the initial representation to the Chambers Judge as outlined in paragraph 29.

[35] The conditions upon which the other counsel, Mr. Dabb, was prepared to agree to an adjournment were more onerous, and he would not consent to an adjournment as so described. The Chambers Judge was told this directly. Accordingly, the Chambers Judge ordered the matter over to the next day, and on June 17, 2005 in the presence of all counsel, Mr. Justice Cullen ordered that the Defendants' striking application be heard on August 8, 2005, along with certain other conditions.

[36] The matter ultimately came before Mr. Justice Macaulay on August 8, 2005, and after a hearing, he dismissed the action against all defendants in a Judgment filed October 20, 2005.

Burden of Proof

[37] With respect to the burden of proof and the standard to be met in disciplinary matters, the Panel was guided by a recently released judgment of Mr. Justice Rothstein in *F.H. v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193. Although not a discipline case, this judgment affirms that the burden of proof throughout these proceedings rests on the Law Society to prove with evidence that is sufficiently clear, convincing and cogent the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. In considering the findings in this matter, the Panel has applied that test.

First Allegation

[38] That said, with respect to the first particular, when she appeared before Madam Justice Gill, it is clear that the Respondent did not identify herself as a member of the Law Society of British Columbia, licensed and insured to practise part-time. When invited, she properly identified herself as the owner of the Plaintiff F Inc. and then, on the invitation of the Court, went on to describe the requests F Inc. was making to the Court. The transcript and the Respondent's evidence as it unfolded demonstrate that, from that initial appearance and from that first invitation by the Court, the Respondent was confused, distracted and inexperienced in Chambers practice.

[39] Moreover, there was no satisfactory or convincing evidence of any advantage being sought by the Respondent in failing to additionally inform the Court that she also had the status of a part-time practising member of the Law Society of British Columbia. Nor was there any evidence advancing support for the proposition that the Respondent, by failing to specifically add her status, could or did receive any advantage by assuming the mantle of essentially a lay litigant.

[40] In addition, the Panel is unable to find authority for the proposition that, when a lawyer appears in Court on behalf of a company of which the lawyer is a principal, that the lawyer is obliged to advise the Court of the fact that he or she is a lawyer and that the failure to do so indicates a lack of candour on the part of the member.

[41] Accordingly, this Panel declines to make a finding of professional misconduct with respect to allegation 1 on the Schedule to the citation.

Second and Fourth Allegations

[42] Nor is there any evidence that has sufficient clarity or cogency with respect to the other allegations upon which professional misconduct might be successfully advanced. While the Order granted by Madam Justice Gill was limited to one aspect of the motion requested to be heard, the Order made by the Court and endorsed on the Short Leave Requisition form contained no limitation at all except as to service and required the Respondent to serve all materials with the Requisition essentially forthwith. The evidence of the Respondent, which was not successfully challenged in cross-examination, explained that her actions thereafter were taken as a result of her perceived need for haste, her high anxiety consequent upon her involvement in a process substantially unfamiliar to her, her lack of experience, the impact of the emotions arising from circumstances of having a very ill parent in Taiwan and upon whom she wished to quickly attend, and most importantly, her attempt to advance in a matter that was misconceived from the outset. All the foregoing was consistent from the material and the Respondent's concessions.

[43] As proper practice, the Respondent should have addressed Madam Justice Smith outlining first the relief requested of the Court on this occasion, but mistakenly she did not and instead embarked on the underpinning facts of the case. All of the facts that the Respondent recited to the Court were relevant as background for injunctive relief and were therefore properly before the Court. The Respondent went wrong, however, in not ensuring that the limitation of the Short Leave Order was clear. This should have been done at the outset of the hearing. This she did not do, and that is the nub of allegation 2 brought against her. However, we can find no instance in the transcript that the Respondent did not respond otherwise than truthfully when asked a question by the Court.

[44] As well, with respect to allegation 4, while the Respondent was not as clear as she should have been with respect to her acceptance of the conditions upon which Mr. Greenberg's consent would be given, she was very clear that she did not have the consent of at least one counsel for the adjournment request. Again,

her lack of clarity can be seen from the transcript, but it does not display an intended desire to mislead anyone.

[45] We must add that Law Society counsel did her best in casting the best light on the evidence available from the Law Society's perspective, but we are unable to accept it as sufficient to support a finding that the Respondent's statements in Court or her failure to disclose the limitations on the Short Leave Order were deliberate or culpable as professional misconduct. Accordingly, without straining the matter further, we cannot find professional misconduct arising out of any of the other particularized events set out in allegations 2 or 4.

Incompetency

[46] With respect to the matter that the Law Society puts forward as an alternative plea, the included " offence" of incompetence, putting aside any potential issues that might have arisen as to the sufficiency or otherwise of the citation as pleaded, we have struggled to find a definition of incompetency that would capture within it the actions of the Respondent in this matter.

[47] Cases such as *Law Society of BC v. Goldberg*, 2007 LSBC 03 and *Law Society of BC v. Eisbrenner*, [2003] LSBC 03, support a finding of incompetence based on a pattern over a number of cases involving delay, lack of knowledge over wide areas of law, severe problems of substance abuse, emotional or psychiatric difficulty, consistent abusive language, or consistent disrespect for the Courts.

[48] There has been no such egregious behaviour or instances of repetitive behaviour deserving of sanction shown here in the evidence before us. We were presented with a practitioner who appears otherwise bright, able and emotionally stable but also with an instance of a lawyer who practises part-time in what charitably may be seen as a very specific area of corporate or commercial law, if law practice in the circumstances is descriptive of her practice at all. Her primary and specific experience may be perfectly adequate to allow her to continue as a solicitor in a specific area (the Panel cannot tell because the Law Society tendered no evidence on the point). In the event, it can be observed from the evidence produced that the Respondent was a part-time practitioner who was out of the jurisdiction for a substantial part of her practising life, practising law in Asia and who, while a member of this Bar, had very limited mentoring in British Columbia.

[49] Upon review of the evidence before us, we are unable to find incompetence. Based upon that evidence, we can only observe that the Respondent here began a single action, which was mistakenly conceived from the outset, jurisdictionally with little or no apparent merit, and motivated by concerns of immediacy driving her to push hard in her request for the British Columbia Supreme Court's assistance in the matter.

[50] In the one matter that is the subject of this hearing, the Respondent has demonstrated a serious lack of judgement in undertaking a matter clearly beyond her ability and experience. In our view, however, a single mistake of that sort does not amount to incompetent practice, particularly if the lawyer subsequently either rectifies the inadequacy or avoids the area of practice concerned. Incompetence consists of repeated errors and a failure to learn from experience.

[51] Finally, we are quick to add that Law Society intervention may be appropriate when a single instance rises to demonstrate a potential lack of judgment. This intervention is most frequently manifested through early intervention by the Law Society by way of Conduct Review or through a recommendation to seek the assistance and guidance of senior counsel with the result that such concerns are corrected as early as possible .

[52] For the forgoing reasons we do not find incompetence on the part of the Respondent and trust that the Respondent, by going through this serious process, has been sufficiently admonished to never allow her

judgment to be clouded again and that she will never find herself practising in an area of the law so apparently foreign to her.

[53] We therefore dismiss the citation.

Minority Decision of Ralston S. Alexander, QC

[54] With respect to allegations 1 and 4 of the citation, I agree with the disposition advanced in the majority decision of this Panel. In dealing with allegation 1, I specifically agree with the majority that there is no obligation on a member of the Law Society to identify himself or herself as such when appearing in Court as a representative of a company in which the lawyer is a principal, director or officer.

[55] In dealing with allegation 4, I would dismiss that allegation on the basis that the Law Society has not met the required burden of proof that requires cogent evidence of professional misconduct on a balance of probabilities.

[56] For me it is a near thing, but I am moved to agree with the majority on this allegation in part on the basis that no negative consequences followed the Respondent's misleading statement to the Court in respect of the position of opposing counsel on the question of the proposed adjournment. Her explanation of the basis upon which she made the suggestion that one counsel " is agreeable" is difficult to reconcile with the array of negative comments that she made throughout the conduct of this lengthy and difficult matter. At no other time did she indicate an acceptance of the propriety of the positions taken by Mr. Greenberg and, to the contrary, attributed many personal and inappropriate motives to his behaviour from time to time.

[57] It is with respect to allegation 2 of the citation that I disagree with the opinions and outcome adopted in the majority decision. The majority decision provides the following:

> Nor is there any evidence that has sufficient clarity or cogency with respect to the other allegations upon which professional misconduct might be successfully advanced. ....

[58] I disagree and I will set out in this dissent the basis upon which I have developed the contrary view. The Law Society alleged in a citation that certain conduct of a Respondent amounts to one or more of a possible array of outcomes, including " professional misconduct" . The hearing panel was charged with responsibility to determine first whether the facts as alleged were proven on a balance of probabilities, and then the panel must determine whether the conduct as alleged amounts to, for example, professional misconduct or one of the other headings of misbehaviour identified in section 38(4)(b) of the *Legal Profession Act*, SBC 1998, c.9.

[59] With respect to professional misconduct, the authorities clearly state that professional misconduct is what the Benchers determine it to be, from time to time. In that regard, a panel of the Benchers in *Law Society of BC v. Martin*, 2005 LSBC 16, completed an extensive review of the authorities on the subject of the constituent elements of professional misconduct. At the conclusion of the review the panel adopted the following as the appropriate test of what constitutes professional misconduct. The Panel determined that:

> The test that this Panel finds is appropriate is 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.

[60] The decision of the panel was reviewed by the Benchers and, although the penalty imposed was amended (reduced), the Benchers did not disagree with the test for professional misconduct adopted by the

panel. I note that this test for professional misconduct has been adopted in a number of discipline decisions of the Benchers of the Law Society of British Columbia since it was published in the *Martin* decision. I have applied that test for professional misconduct in my deliberations on the matters before me.

[61] With respect to the burden of proof that rests upon the Law Society, I have adopted the standard described in the majority decision, namely that the Law Society must prove the case against the Respondent on the balance of probabilities with cogent and convincing evidence. As will be evident from what follows, it is my opinion that the Law Society has met this burden with respect to allegation 2 of the citation.

[62] It seems to me that, in order to determine whether the behaviour of the Respondent in misleading the Court with respect to the basis upon which the short leave application was granted amounts to professional misconduct depends upon her " intent" in misleading the Court in the way that she did.

[63] To be absolutely clear on this issue, there is no debate on the issue of whether or not the Court was misled. Even the evidence of the Respondent is consistent on the issue of her lack of entitlement to speak to all three paragraphs in her Notice of Motion seeking relief. As indicated in paragraphs 11 and 12 of the recitation of the facts in the majority decision, Madam Justice Gill clearly indicated that the only part of her Notice of Motion that could be considered on short leave in a Chambers hearing was the plea for injunctive relief restraining the DRC from making further defamatory publications about F Inc.

[64] In the hearing before the Panel, under cross-examination by the Law Society, the Respondent was asked:

> Q Well, my question is did you understand when you left the Courthouse that you had not been granted short leave on all three grounds?
>
> A Yes.
>
> Q And you understood that you had been granted leave only on the third ground?
>
> A Yes.

[65] The majority have characterized this misleading behaviour by the Respondent as being a result of:

> ... her perceived need for haste, her high anxiety consequent upon her involvement in a process substantially unfamiliar to her, her lack of experience, the impact of the emotions arising from circumstances of having a very ill parent in Taiwan and upon whom she wished to quickly attend, and most importantly, her attempt to advance in a matter that was misconceived from the outset.

[66] It is not clear to me that, if that were the only explanation for the misbehaviour, it would, in any event, be a sufficient excuse to avoid a finding of professional misconduct. It is important to bear in mind that we are dealing here with a very serious allegation ? namely that a member of the Law Society, on an application before a Judge of the Supreme Court, acted in a manner where the only possible conclusion of the events is that the Judge was materially misled by the Respondent as to the basis upon which the Respondent was entitled to be heard on the subject of the application. It is possible that the facts, as found by the majority, without more could support a finding of professional misconduct. That behaviour may well demonstrate a marked departure from conduct that the Law Society expects of its members. It is not necessary for me to comment further on this aspect of the decision of the majority because I have identified several characteristics of the matter that lead me to conclude that there is a different explanation for the conduct of the Respondent in this matter.

[67] I must first supplement the facts as detailed in the majority decision with the recitation of several additional facts not covered in their summary.

[68] The exchange between Madam Justice Gill and the Respondent on the subject of orders that can be made without a full hearing is not fully captured in the summary provided by the majority in paragraphs [15] and [16] of their facts. A portion of the transcript from the Chambers hearing that deals with this issue is reproduced here. Although somewhat lengthy, it is important to understand what the Court said to the Respondent and what the Respondent said to the Court.

> THE COURT: [Name], over the noon hour I had a chance to read the affidavit and the exhibits, so I have a better understanding of what this is about. Now, I'm not ? I can't give you an order when you have not served any parties that declares the notice of suspension to be wrongful. I simply don't have the ability to do that. Whether it is wrongful or not, I can't do that without ? the court can't do that without someone else being here. The only thing that the court could grant you on this kind of motion is an injunction, and, in fact, I see that your application refers to our Rules of Court and it refers to Rule 45, which is the rule that deals with injunctions.
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> RESPONDENT: Thank you.
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> THE COURT: Now, I don't know whether you actually think that the DRC is going to issue any further notices. I suspect that, from your perspective, the damage is done and you're not concerned with what they're going to do in the future, but you're concerned with what they've already done in the past.
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> RESPONDENT: Yes.
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> THE COURT: Now, I don't know ? I appreciate that this has a significance to your business and it's very important, but I think, [name], that in order to get your matter before the court in a way that the court can deal with it, it would be very helpful if you could just get some advice from a lawyer. Are you able to do that? Because that is really what you need and very quickly. I, as I have said, I cannot simply declare conduct as wrongful, and the court, you're going to have some difficulty getting that kind of a declaration unless you bring the matter on for a final kind of determination.
>
> RESPONDENT: Okay.
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> THE COURT: As I read the materials, I couldn't help but think that you might be well served to find someone to speak to, find a lawyer to speak to about this matter, to see whether they can put you on track. If it's not your intention to have someone represent you, at least I think it would be very wise for you to take some legal advice. I'm note [sic] sure what you should be best doing in these circumstances. I'm not entirely clear why you even have all of these defendants in the action. I appreciate that there is some involvement that they have, but why ? I'm not even sure why they're all here.
>
> Now, I know that it's not a very good thing to be leaving here by my telling you that I can't really make the first two orders and the third one is one you don't really need, but that is, in fact, what I'm going to have to tell you.
>
> Now, if you do want to ? if you are concerned that DRC is, in fact, going to issue further notices, then what I would suggest that you do is to bring on your motion after you served the lawyers for DRC, who

seem to be in Vancouver.

RESPONDENT: Yes.

THE COURT: It's Fasken Martineau here, and if you feel there is an urgency about it, then what you can do is to ask the court for what we call short leave, which allows you to bring that motion on quickly. But I'm not sure that you're really concerned about what will happen in the future. My sense is you're concerned about what has happened in the past; is that correct?

RESPONDENT: Yes, but I am also concerned about what will happen in the future, because I have perishable products on hand, and as each day that passes, they spoil.

THE COURT: Yes.

RESPONDENT: So it's crucial that I obtain some sort of resolution because I have employees ...

THE COURT: That's the very reason why I suggest to you that you ? it would be well worth your while to get some help from a lawyer. It's not immediately apparent to me what kind of application you should be bringing, or what kind of approach you should be taking to what the ? this is a little out of the ordinary. So it's a matter that really requires some thought about how to bring the matter forward, but I cannot declare something to be wrongful on this kind of application.

RESPONDENT: Okay.

THE COURT: I simply can't, because I can't do that without hearing from the other party. The court can only give some temporary form of relief, which allows the action to proceed to its resolution. And this is really asking the court to adjudicate on the wrongfulness of someone's conduct when they're not even in front of the court, and that can't really happen.

RESPONDENT: Would it be possible to obtain relief on the second and third?

THE COURT: Not on the second. The third aspect of your notice your notice of motion is, in fact, injunctive relief, and if you are concerned that the DRC, that there will be further notices, then I will give you short leave to bring that application forward, but I don't ? what is your concern about what further notices will be issued or what is ? what further steps will be taken to - that might impact upon your business? What kinds of things are we talking about?

RESPONDENT: Well, there's the notice of suspension and I presume that the last one would be the notice of expulsion.

THE COURT: I see.

[69] I particularly focus on several of the points made by Madam Justice Gill ? she said that she was unable to make the kind of order sought by the Respondent unless she (the Respondent) brought it on in some form for a final determination. The only thing the Court could do in these circumstances was consider the injunction relief, and Madam Justice Gill inquired as to whether that was something that was really useful or necessary in the circumstances. Madam Justice Gill said that it was not a very good thing for the Respondent to leave Court being told that she could not have the two orders that she wanted and getting an

order that she didn't need, but Madam Justice Gill said that was exactly what the Respondent must be told.

[70] The Respondent persisted and asked ? may I have the second and third claims for relief? Madam Justice Gill replied ? again ? " Not the second." Madam Justice Gill told the Respondent that she could not have short leave permission to speak to the claim for a cancellation of the DRC suspension order.

[71] The reference to the " second" in the request and the response from the Court was to the second item in the Respondent's Notice of Motion, which was a request for an order:

> 2. Requiring DRC to issue:
>
> (a) a public apology to the shareholders of the applicant namely the Respondent and RL, of the applicant for defaming them;
>
> (b) a retraction of the March 2, 2005 DRC notice of suspension.

[72] For the reasons that follow, it is my view of this matter that the Respondent was determined to obtain the order described in 2(b) of her Notice of Motion, and that she was seeking that order in Chambers on the morning of March 15, 2006, despite the fact that Madam Justice Gill had specifically refused her request for relief by way of Short Leave in respect of the " second" item in her Notice of Motion.

[73] It is my view that the Respondent was singularly focused on her need for a retraction of the March 2, 2005 order of the DRC and that she was prepared to proceed to speak to that application, even when she knew that she was not permitted to do so.

[74] The majority recitation of the facts is further deficient in that it does not describe the decision of Mr. Justice Macaulay and the views that Mr. Justice Macaulay developed with respect to the conduct of the Respondent. On August 8, 2005 Mr. Justice Macaulay heard the parties in Chambers in respect of the application of the DRC and other defendants to have the claims of F Inc. dismissed. On October 20, 2005 Mr. Justice Macaulay issued a comprehensive judgment dealing with all outstanding matters, 2005 BCSC 1485.

[75] In his judgment Mr. Justice Macaulay wrote:

> [58] The defendants further assert that other conduct of counsel for F Inc. raises concerns about whether F Inc. asserts legitimate rights. They say that [name] [the Respondent] has brought ill-founded applications without notice or on short notice and taken steps in the proceedings that were contrary to the directions of the court. In the first proceeding before Gill J., [name] did not inform the court that she was appearing as counsel. In the proceeding before Smith J., [name] did not disclose the limited basis on which Madam Justice Gill granted short leave and proceeded on all interlocutory applications contrary to the direction. Contrary to the directions of Cullen J., [name] filed further affidavit material without first seeking leave. Contrary to the stay, she filed amended pleadings. [Name]offered no explanations for any of this conduct.
>
> [59] [Name] also refused to sign an order, forcing an unnecessary appearance before the Registrar to settle the form. Finally, according to counsel for the defendants, she improperly attempted to communicate directly with the court, including by letter to the Registrar requesting a payment schedule for the outstanding cost order.
>
> [60] I do not, in any way, minimize these criticisms of the conduct of counsel for F Inc. Some of her conduct appears deliberate. [Name] is also an officer of F Inc. and should not be appearing

> as counsel. One effect of her unnecessary and inappropriate conduct is to put the defendants to significant additional expense within the proceeding. Another is to create a risk that the court may make orders that later have to be set aside potentially bringing the administration of justice into disrepute. I am not persuaded however that the conduct of counsel is a significant factor in deciding whether the proceedings are vexatious or an abuse of process. Such behaviours are better considered, in my view, on the question of costs.

[76] The next required elaboration of the facts is to note that the Respondent was asked by the Law Society to respond to a complaint by Mr. Greenberg. The Respondent replied to Mr. Greenberg's complaint about her conduct in speaking to all three matters in her Notice of Motion when her Short Leave Order granted authority only to speak to the injunction remedy.

[77] The Respondent's response to the Law Society on this point is reproduced here in its entirety. This response is contained in a letter to the Law Society dated March 21, 2006. In this dissent I will call this the " March 21st Response" :

> The proceeding before Madam Justice Smith is under appeal. In my Affidavit #3 [Exhibit 1] Mr. Greenberg contravened an Order of Madam Justice Gill and served my client at the wrong location and at separate times with materials the evening before our application before Madam Justice Smith was to be heard. I was forced to spend the whole night preparing for the application and could not adjourn because of the urgency of the matter. As evident in the transcript of proceedings before Madam Justice Gill, my client had several hundreds of thousands of dollars of perishable produce in inventory. Each day's delay had very grave consequences. I did not deliberately withhold information from Madam Justice Smith. The urgency of the situation required more attention on my client rather that waste court time on a distraction concerning unsatisfactory representation by previous outside counsel.

[78] Upon receipt of the March 21st Response, the Law Society sought further clarification of the reasons for the Respondent's behaviour. In a letter dated April 6, 2006, the Law Society asked:

> Mr. Greenberg alleges, and Mr. Justice Macaulay stated in paragraph 58 of his decision dated October 20, that " In the proceeding before Smith, J., [name] did not disclose the limited basis on which Madam Justice Gill granted short leave and proceeded on all interlocutory applications contrary to that direction." Please explain why, when you were granted short leave to proceed only to apply for an injunction, you did not advise Smith J. of that limited leave, but proceeded with the applications for declaratory relief for which no short leave had been granted.

[79] The Respondent replied to this question in a letter dated July 14, 2006. In this dissent I will call this the " July 14th Response" :

> My client is appealing the rulings of Justices Smith and Macaulay. With respect to the Order of March 11, 2005 by Justice Gill [Exhibit #2], the terms applied only to DRC who was required to respond by March 12, 2005 for a hearing scheduled for March 15, 2005.
>
> DRC did not comply with the Order of March 11, 2005. It failed to deliver its response until close of business on March 14, 2005 when voluminous materials were delivered to the wrong location on two separate occasions. Because of the urgency of the situation, I was forced to stay up all night to prepare for the hearing the next morning. Upon attendance at Court, counsel for DRC hands me

further materials and advises that he had enlisted Mr. Dabb to be joined in the application even though Map was not named in our motion, and the March 11, 2005 Order did not apply to Map. It should be noted that Justice Carnwath of the Ontario Divisional Court rejected a similar attempt at joinder by Map.

My client had complied with the terms of the March 11, 2005 Order but neither DRC nor Map appeared to be held to those terms. I did not willfully or deliberately refrain from repeating what Justice Gill had said. The inadvertent slip was caused by stress and fatigue induced by the late service of Mr. Greenberg's materials.

It was not apparent to me if Justice Smith was following anything set forth by Justice Gill since Justice Smith allowed DRC to be excused for its extremely late response the eve before and morning of the hearing, then allowed Map to be joined. This selective application of the terms of the March 11, 2005 Order was favourable to the respondent(s) and prejudicial to my client. Now, Mr. Greenberg is complaining that I failed to advise Justice Smith about what Justice Gill said when neither Map nor DRC complied with a Court Order.

In contrast, Justice Carnwath not only found that Map had no business seeking to be joined to my client's application in Ontario but that such an attempt by Map was " strange." [Exhibit #3] Here, I am being pursued to explain why I did not repeat Justice Gill's statements while none of the other parties followed her Ladyship's Order. Other than my client, no one in British Columbia appears to be similarly disturbed by the acceptability of such a " strange" application by Mr. Dabb or his former client, Map, nor does anyone appear concerned that the " possible" conversion by Coosemans has yet to be reported by DRC. The absence of repeating what Justice Gill [sic] appears to be a more serious offence than conversion or non-compliance with Court Order.

[80] Dealing first with the March 21st Response, I find that it discloses much about the underlying motivation of the Respondent in this matter. She says that she could not adjourn " *because of the urgency of the matter. As evident in the transcript of proceedings before Madam Justice Gill my client had several hundreds of thousands of dollars of perishable produce in inventory. Each day's delay had very grave consequences.* " (emphasis added). The problem for the Respondent with this response is that it confirms that the motivation for the application was the inventory of perishing produce. " Each day's delay had very grave consequences." However, the only relief that she was permitted to seek on short leave was an injunction against further negative publications by the DRC. Even if granted, this injunctive relief could do nothing to save the perishing inventory. What the Respondent needed to save the inventory was an order directing DRC to retract the notice of suspension ? the relief sought by her under heading #2 of her Notice of Motion ? that was however, the relief that she had specifically been denied permission to seek on short leave.

[81] The Respondent concluded this response by saying, " I did not deliberately withhold information from Madam Justice Smith. The urgency of the situation required more attention on my client rather that waste Court time on a distraction concerning unsatisfactory representation by previous outside counsel." This second reference to the urgency of the situation reinforces my belief that it was the urgency of the situation around the deteriorating inventory that was dictating the actions of the Respondent. Although she states that she did not deliberately withhold information from Madam Justice Smith, it is my opinion that all of the surrounding facts and circumstances at the time point to the opposite conclusion.

[82] The July 14th Response provides a second or " new" explanation for the impugned behaviour of the

Respondent. While the paragraphs are not as clearly written as would be ideal, it appears that the Respondent was seeking to justify her non-compliance with the Short Leave Order of Madam Justice Gill on the basis that none of the other parties followed the Order either. She detailed several instances in which the defendants were themselves in breach of the Order. She provided examples such as late service of materials, service at the wrong location, the addition of another of the parties to the matter where that had not been requested by her.

[83] In the July 14th Response, the Respondent said that her client " had complied with" the terms of the March 11th Order of Madam Justice Gill. This is only partly true ? her client did accomplish the service requirements of Madam Justice Gill's Order, but it was at that point that the compliance ended. She did speak to all three matters set out in her Notice of Motion when she had been granted short leave only in respect of one of the three claims. This was not compliance with the Order of Madam Justice Gill by her client.

[84] The July 14th Response continued with the observation, " It was not apparent to me if Justice Smith was following anything set forth by Justice Gill ..." . The Respondent went on in that paragraph to essentially argue that the Order was " selectively applied" by Justice Smith to the detriment of her client, and she concluded this argument by noting that Mr. Greenberg was now complaining that she failed to comply with a Court Order in which his client was also in breach.

[85] In this regard I should note in passing the circumstances surrounding the non-compliance by DRC with the terms of the Short Leave Order. At the outset of the March 15th Chambers application, Mr. Greenberg acknowledged to the Court that he had not complied with the service requirements of the Short Leave Order. He advised the Court that he was unable to comply with the requirement to provide materials in response within the 25 hour turn-around time required by Madam Justice Gill because the defendant DRC was in Ontario and by the time the materials were served upon him it was already 8:00 p.m. on Friday night in Ontario and he was not able to contact his client due to the intervening weekend. Mr. Greenberg noted in Chambers that he felt that there were issues about proper service, but he stated that, rather than rely upon technical arguments, they did their best to provide a substantive response. That response was in the form of an unfiled affidavit from the DRC that had been assembled by Mr. Greenberg on Monday, March 14th and introduced to the Court on the morning of March 15th with the advice that the original was en route from Ontario and would be filed upon arrival. The Respondent agreed to proceed that morning on the basis of the unfiled affidavit.

[86] The final factual clarification required is to report some of the Respondent's answers to questions asked of her during the hearing of this matter. Particularly, the Respondent was asked in cross examination:

> Q. Now, you'll agree that you made submissions on all three grounds when you appeared in Court on March 15th?
>
> A. Yes.
>
> Q. And you did not advise the Court that short leave had been granted only with respect to the third ground?
>
> A. I'd forgotten, actually, by then. Just looking at the short leave itself, I ? that was what was imprinted on my mind was service, the times when the parties had to serve each other with their documents, and that was the overriding concern that I had was that we comply with the timeframes of getting ? of completing this order.

[87] And later in the cross-examination, the Respondent was asked the following with respect to the March

17th hearing, and she answered as indicated:

> Q After the lunch break, you didn't advise the Court that Short Leave had not been granted on all three grounds?
>
> A As I mentioned, I'd forgotten, and after I left the Court, I was preoccupied with delivering the documents, and then once I got to Mr. Greenberg's office, I was very worried that he wouldn't be properly served because people couldn't track him down; they didn't know where he was.
>
> Q And you made submissions with respect to all three grounds yourself?
>
> A I believe some of them might have been rolled together, but I think they ? there were submissions made, yes. Some of the issues may have been presented together.

[88] This is the third explanation offered by the Respondent for her misleading the Court as to the basis upon which she was entitled to be heard. She expected the Panel to believe that by Tuesday morning (March 15), she had forgotten that Madam Justice Gill, on the previous Friday (March 11), had specifically refused her request to seek the only relief sought that would do something to preserve several hundred thousand dollars worth of the deteriorating inventory of produce. This " forgetting" took place despite the fact that " each day's delay had very grave consequences."

[89] With respect, this explanation is not credible. It loses credibility in part because it is the third explanation for the impugned behaviour. At no time in her earlier responses to the Law Society did the Respondent suggest that she had " forgotten" that she did not have Court approval to speak to all three of the matters set out in her Notice of Motion. In her earlier responses she offered other explanations, including the fact that no one else was abiding by the Court Order, and that the urgency of the preservation of the inventory had distracted her from complying with the terms of the Order.

[90] The balance of her answers as reproduced at paragraphs [88] and [89] above were not responsive to the questions asked. The Respondent suggested that in the Chambers Hearing on March 15 she did not abide by the restrictions imposed by Justice Gill because she was preoccupied with service of the documents. That cannot be the case. All required documents had been served four days earlier and the parties were before the Court. No issues had been raised in the hearing on March 15 about the propriety of the service ? it was by then a non-issue.

[91] One final point. The majority decision contains the following statement.

> All of the facts recited to the court were relevant as background for injunctive relief and therefore properly before the court.

[92] The inference that is suggested by this sentence is that the Respondent was arguing only the injunctive relief that the short leave order permitted. The inference is favourable to the Respondent but is not supported by the transcript of the Chambers proceedings.

[93] I will reproduce several excerpts from the Chambers transcript that indicate that the Respondent was reciting facts in support of her application to retract the suspension order of F Inc. by the DRC. As indicated above, the injunction remedy that the Respondent was entitled to pursue provided no relief for the deteriorating produce. What the Respondent needed was a retraction of the order suspending F Inc. from the DRC.

> In, sorry, March 2nd of 2005, the DRC distributed notice of suspension to its members in Canada,

> United States and Mexico.....by issuing this notice of suspension, the implication is that F Inc. is operating without a licence, it is implying that the arbitration award is meritorious and is valid, and F Inc. vehemently denies that the DRC even had jurisdiction and that the Arbitration was given [sic] remotely fair. (Page 8, Line 34 et seq.)
>
> Furthermore, between February 28th and March 6th, I was out of the country and never received those letters which SW of the DRC had faxed to F Inc. threatening suspension and going through with the suspension. Upon return to the office on March 7th, I repeatedly sent emails and faxes to DRC requesting an immediate retraction of that notice of suspension. In addition to that, in conversations with customers I was advised that no business would be conducted with F Inc. if the notice of suspension was not removed or resolved. (page 9, line 1 et seq.)
>
> The -- sorry. The president of DRC, SW, never responded to the - the matters which I raised in my emails and faxes of March 7. He just sent me one email that simply said that all future communications should be directed to Brooke Greenberg, counsel here today for the Respondent. I then sent emails to Mr. Greenberg requesting a retraction of the notice of suspension and Mr. Greenberg refused to retract anything. (page 9, line 14 et seq.)

[94] In response to the following question from the court, " All right. So you're seeking a declaration that the notice of suspension is a wrongful interference with the applicant's business?," the Respondent replied, " Yes." (page 9, line 44 et seq.).

[95] The Court asked, " Mm-hmm. And an order that the DRC issue an apology and retraction, and you're also seeking a restraining order?" The Respondent replied, " Yes. Well the injunction against further issuance of notices regarding F Inc. by the DRC." She continued, " I will focus on the second and third items; in particular the issuance of a public apology and the - and a retraction." (page 10, line 1 et seq.).

[96] There are other examples from the transcript where the Respondent is not speaking to the Injunction application.

> ... and I am trying to emphasize the substantive rights we have lost in the arbitration hearing, as well as by virtue of the issuance of this notice of suspension which has caused us a lot of harm. (page 12, line 40 et seq.)
>
> ... we don't have any purchase orders, so our employees are standing idle, so at this point we - will probably have to let some go. We have hundreds of thousands of dollars worth of perishable commodities. We cannot move those if our customers are under the impression that we are operating without a licence or we are suspended, or if there is any taint from such a notice. (page 13, line 10 et seq.)
>
> As - it's --that is why we brought the notice of motion before the court last week, because of urgency of the situation. (page 14, line 5 et seq.)

[97] And in the summation of her submission the Respondent said to the Court:

> My Lady, I - I come here today because the matter is extremely urgent for us, and we are at a loss at this point as to how we can ever regain our business, which has been lost, and the goodwill

> which we worked so hard to build over the years has, in one instant, just been completely destroyed. We understand that the remedies which we're seeking -

Then the Court asked, " Understand what?" and the Respondent answered:

> That the remedy that we - that we are seeking are interim, but they are critical to our company's ability to survive. We cannot continue to have our perishable products sit and our employees not work and continue to pay out our operating costs without some relief from the court and some action taken in this matter. In terms of the arbitration that was conducted by the DRC, we've already objected to the manner in which we were compelled to participate, the proceedings and all the irregularities and unfairness that has - that we've suffered in the arbitration proceeding, and it is imperative that justice be brought in this situation and that we obtain some relief from the unusual force which we have been subjected to by the DRC. (page 18, line 14 et seq.)

> ... we need the court to bring the - this abuse of power - to an end. It's - it's untenable for us to continue to be injured in the way that the DRC has - has caused since September of last year, and it's for those reasons that I - I pray that My Lady would award the injunction and mandatory order. (page 19, line 1 et seq.)

[98] It is my view that the positive inference urged by the majority decision is not supported by the transcript.

[99] I must reject the explanations offered by the Respondent for her failure to observe the limitations imposed by Madam Justice Gill. None of the explanations offered demonstrate an honest attempt to comply with the Order.

[100] Her explanation to the Law Society for not complying was that she was forced to spend the whole night preparing for the application that she could not adjourn because of the urgency of the matter. She was concerned with the several hundreds of thousands of dollars of perishable produce in inventory and each day's delay had severe consequences. It must be noted, at the same time, that there was no urgency about preventing the DRC from further negative publications ? the DRC had not indicated any inclination to publish further and in fact, had nothing more to say about F Inc. When Madam Justice Gill denied the application to have the DRC suspension lifted, the urgency of all remaining issues disappeared.

[101] By the morning of March 15, the only Order that would have provided relief to F Inc. was an order setting aside the suspension of F Inc. by the DRC. Despite the specific refusal of Madam Justice Gill to permit that application on short leave, the Respondent proceeded to seek that relief. In my opinion, all available evidence points overwhelmingly to the fact that the Respondent proceeded to seek relief on all grounds set out in her Notice of Motion in an attempt to save her company from the consequences of losing the warehouse full of deteriorating produce. In doing so, I am of the view that the Respondent acted wilfully and knowingly and without regard for her professional responsibilities to the Court and the Law Society.

[102] I would find that the Respondent intentionally, and in the face of the specific Order of Madam Justice Gill to the contrary, proceeded to seek relief in respect of a portion of the Notice of Motion for which short leave had not been granted. With the exception of her stated desire to respond to the urgent need to preserve the inventory of produce, all explanations offered by the Respondent are inadequate to explain the behaviour.

[103] It is my view that the Respondent allowed her personal financial interest in F Inc. to overcome her professional judgment and in the result of that lapse she attempted to obtain an Order from Madam Justice Smith which she knew she did not have approval to seek. Misleading the Court in this manner represents a

marked departure from behaviour that the Law Society expects of its members, and so, in that regard, I would have found that the Respondent has committed professional misconduct.