2010 LSBC 02

Report issued: January 05, 2010

Citation issued: February 5, 2008

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

Re: Lawyer 10

Applicant

Decision of the Benchers on Review

Review date: December 10, 2009

Benchers: **Majority decision**: James Vilvang, QC, Chair, Carol Hickman, Ronald Tindale, Herman Van Ommen **Minority decision**: Barbara Levesque, Peter Lloyd, David Renwick, QC

Counsel for the Law Society: Gerald Cuttler
Counsel for the Applicant: George Macintosh, QC and Craig Dennis

Majority Decision of James Vilvang, QC, Chair, Carol Hickman, Ronald Tindale and Herman Van Ommen

Introduction

[1] In a decision on Facts and Verdict issued on February 11, 2009, the Applicant was found by a Hearing Panel to have committed professional misconduct as alleged in a citation issued February 5, 2008. In a subsequent decision issued on September 9, 2009, the Hearing Panel ordered the Applicant to pay a fine of $1,500 plus costs and refused his application pursuant to Rule 4-38.1 that there be anonymous publication.

[2] The Applicant seeks a review, pursuant to Section 47 of the *Legal Profession Act*, of the finding of professional misconduct, the penalty imposed, and the refusal to order anonymous publication. The effect of section 47(5) of the *Legal Profession Act,* considered in the light of a well-developed body of jurisprudence that we do not need to canvass, is that if a review panel such as this is satisfied that a challenged decision of the Hearing Panel is correct, it must confirm that decision; and if it is not so satisfied it must substitute some other decision that the Hearing Panel had the power to make.

[3] The threshold question that must be answered is whether the conclusions of the Hearing Panel were correct.

Issue

[4] The primary issue in this Review is whether an " honest mistake" ought to be considered professional misconduct. Counsel for the Applicant characterized his conduct as an " isolated, innocent, honest mistake" . Counsel for the Law Society, while not necessarily accepting that characterization, submitted that an honest intention does not insulate a lawyer from a finding of professional misconduct. Intention is but one of

the factors to consider. He submitted that the Applicant's failure to fulfill his duty to ensure that his sworn statement was accurate was a marked departure from the norm.

Background

[5] The Applicant swore an affidavit on March 14, 1996 in which he swore in paragraph 5 as follows:

> ... Mr. Justice S, by order of this Honourable Court, ordered that the sum of $554,879.34 together with accruing interest occurring since the 16th day of March, 1993, be paid out of the trust account of [law firm N] to the Petitioners. The order of Mr. Justice S was entered on September 24, 1993. *The funds were not paid to the Petitioners*.
>
> [empahsis added]

[6] The affidavit started with the usual first paragraph which states:

> I am ... and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where such facts and matters are stated to be based on information and belief, and where so stated I verily believe the same to be true.

[7] As a result, the statement " the funds were not paid to the Petitioners" was sworn to be on personal knowledge, not information and belief. It is common ground that this statement was false. N had in fact paid the funds to the Petitioners in 1993.

[8] How the Applicant came to make that inaccurate statement under oath is set out in the Hearing Panel's decision in paragraphs 7 to 39. On this Review the Applicant does not disagree with the findings of fact made by the Hearing Panel. We will set out in summary form the salient facts.

[9] In 1992, N, acting for the Petitioners EA and C Ltd. obtained a Court Order permitting the sale of certain lands. Those lands were subject to numerous encumbrances. The Order obtained from Mr. Justice D on November 17, 1992 directed the sale take place, part of the sale proceeds be paid to chargeholders whose entitlement was not in dispute, and the balance be paid into N's trust account pending further order.

[10] On March 16, 1993, N, acting for the Petitioners, obtained an Order granting the Petitioners judgment in the amount of $554,879.34.

[11] On July 30, 1993, N, acting for the Petitioners, obtained an Order directing them to pay the sum of $554,879.34 plus interest to their clients, the Petitioners.

[12] On January 24, 1994, N obtained a further order directing them to pay the remaining funds into court. N paid the sum of $551,858.60 into Court on February 24, 1994.

[13] The initial Court Order does not state how much money would remain in N's trust account after payment of the undisputed encumbrances. It is not possible to infer from the Court records whether the sum of $551,858.60 paid into Court by N on February 24, 1994 was the amount remaining after payment to the Petitioners of $554,879.34 plus interest or whether that sum had not yet been paid.

[14] The Applicant's firm, W, was retained by a shareholder of C Ltd., GQ, in 1993 in respect of a shareholder dispute with EA, one of the Petitioners who had been instructing N on behalf of C Ltd. in respect to the litigation referred to above. On completion of the shareholder's dispute, W (not the Applicant) acted for C Ltd. on GQ's instructions reviewing N's accounts.

[15] W commenced acting for C Ltd. in the litigation sometime after N paid the remaining funds into Court on

February 24, 1994. The lawyer responsible for the litigation at W was AC.

[16] AC made the decision, on the client's instructions, to apply for payment out of the balance of funds in Court on an *ex parte* basis. The basis of this application was that N had never paid the Petitioners the sum of $554,879.34 as ordered on July 30, 1993. GQ instructed them on behalf of C Ltd. and confirmed that C Ltd. had not received the funds.

[17] The affidavit that the Applicant swore was prepared by a junior lawyer working under the guidance of AC. When the Applicant swore the affidavit, he was told by his client, GQ, that N had not paid the funds and by AC, that he had reviewed the file and Court Orders and that it appeared that funds had not been paid to the Petitioners.

[18] It was discovered much later during the course of the Law Society investigation that in W's file, there was a memo dated March 17, 1994 from another associate working under AC to AC, stating that the funds had been paid. There is no evidence that the Applicant was ever aware of this memo.

[19] It is also not known whether AC was aware that he was asking the Applicant to swear a false affidavit or that he had forgotten the memo from a year earlier. AC was not available to give evidence. He ceased to be a member of the Law Society on January 1, 2003, and was, at the time of the hearing, to the best of anyone's knowledge, residing in Asia.

Professional Misconduct

[20] The Hearing Panel found professional misconduct. They relied on the marked departure test set out in *Law Society of BC v. Martin*, 2005 LSBC 16, [2005] L.S.D.D. No. 118. The key paragraphs of the Hearing Panel's decision on professional misconduct are set out in paragraphs [50] to [53] as follows:

> [50] This Panel adds that a lawyer is an officer of the Court and when that lawyer is the deponent to an Affidavit (a sworn statement) that will be relied on in Court, the lawyer must conform to the highest standard of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.
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> [51] The Respondent swore in the Affidavit that he had personal knowledge of the fact that the funds had not been paid out. He acknowledged that:
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> (a) he read the Affidavit before swearing it; and
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> (b) he understood the difference between a statement made on personal knowledge and one made on information and belief. The words of the Affidavit are clear, and there is no necessity to be familiar with how the form of an Affidavit is drafted to reflect that difference.
>
> [52] When the Respondent chose to swear the Affidavit on personal knowledge, then in order to meet the standard expressed in paragraph [40] of these reasons, the Respondent must personally have made all of the inquiries that were available to him in order to be able to make this statement.
>
> [53] The Respondent cannot rely exclusively on the inquiries of, or the information supplied by other third parties. In particular, the Respondent cannot rely upon the information of third parties (in this case GQ) who had a financial interest in the result of the Application.

[21] The Hearing Panel noted the oral evidence given by the Applicant. The key findings for our purposes are as follows:

When he swore the Affidavit, he had no intention to mislead anybody. (para. [26](9))

It was a mistake that the statement in paragraph 5 was not expressed to be on information supplied by GQ and not something he deliberately left out of the Affidavit. (para. [26](21))

At the time he swore the Affidavit, he was aware of the distinction between facts and matters based on personal knowledge and facts and matters based on information and belief. (para. [26](22))

[22] The findings concerning the Applicant's credibility were as follows:

The Panel was impressed by the Respondent. (para. [35])

The evidence of the Respondent was, in every respect, given in a candid, straightforward and honest manner. (para. [36])

His evidence was not self-serving. He readily admitted the mistake that he made. (para. [37])

[23] It is clear that the inaccurate statement was made by mistake and not with any intent to mislead. That a finding of professional misconduct does not require proof of a dishonest intent is settled law in Law Society decisions. What is not settled is whether a mistake, without dishonest intent, is sufficient to find professional misconduct.

[24] The " marked departure" test was first set out in *Law Society of BC v. Hops*, [1999] LSBC 29, [2000] L.S.D.D. No. 11. In that case, a hearing panel had found that Mr. Hops' failure:

... to advise the unrepresented depositors that their interests were not being protected by the lawyer and that he would deal with the funds received from that person only in accordance with the instructions of his client (Jones), constituted professional misconduct. (para. 16(i))

[25] The Benchers on review framed the issue as follows:

The initial question to be determined on the review is whether the conduct of the Member, in the context of the transactions under consideration in relation to count three, meets the professional standards required by the Benchers. The second question is if the Member is found to not have met the standard expected, is the conduct sufficiently deviant to be considered professional misconduct. (para. 23)

[26] Counsel for the member in *Hops* argued that a finding of professional misconduct required proof of conduct that was " dishonourable or disgraceful" . The Benchers on review disagreed. They wrote:

The Benchers are of the opinion that the Member's contention that he acted improperly out of carelessness or ignorance cannot excuse him if the actions or inactions of the Member amount to professional misconduct. Otherwise, negligence would amount to a defence to almost any allegation of professional misconduct. (para. 35)

[27] In considering whether the conduct in question was sufficiently deviant from the norm to constitute professional misconduct, the Benchers considered the following:

This conduct crosses the line in part because the scheme in which the Member's client was engaged did not make any real business sense. The Member ignored signs of trouble with the corporate capacity of his client to issue the bonds which were the supposed raison d'ê trefor the deposits to the member's trust account ... (para. 53)

> Perhaps the most significant fact leading to the finding of misconduct is that there was no rational explanation provided for the use of the Member's trust account in the manner indicated. The explanation that it was done to facilitate orderly payments on account of an increasing deposit does not stand up to close scrutiny. The need to avoid cheque certification was suggested. This also doesn't provide a viable explanation in the circumstances as bank drafts could have been obtained by the client from funds deposited to his own account. In fact, some of the money deposited to trust was paid out directly to the client and used for other, unrelated purposes. The fact is that the only value added to the transaction by the use of the Member's trust account was a credibility factor. (para. 58)

[28] The Benchers on review held that making a finding of professional misconduct in relation to conduct that would not normally be considered as dishonourable or disgraceful was justified because:

> ... From the legislative development, the definitions set out above from Oxford and the decisions of the Benchers, it can only be concluded that the Benchers have recently determined it to be appropriate to broaden the scope of professional misconduct in order to more closely regulate the activities of its members. These developments also allow less draconian punishments from those which were available when the standard of disgraceful or dishonourable conduct was required for a finding of professional misconduct. If the standard for professional misconduct still requires " disgraceful" or " dishonourable" conduct the Benchers have lowered the level of impropriety to attract those descriptions. ...It is clear that conduct matching those descriptive adjectives is no longer required for a finding of professional misconduct. (para. 45)

[29] The definition and parameters of professional misconduct was further considered in *Law Society of BC v. Martin, supra*. In that case, the Hearing Panel referred to *Law Society of BC v. Hops*, *supra*, and agreed that conduct need not be disgraceful or dishonourable to be considered professional misconduct. They wrote:

> The words " dishonourable" and " disgraceful" imply moral turpitude of an intentional nature even though the definition cited above could conceivably cover many forms of conduct which are simply negligent. para. 153)
>
> ...
>
> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer. (para. 154)

[30] The Hearing Panel set out the issue to be decided as follows:

> 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.
>
> In the circumstances, the Respondent's non-review of the accounts amounted to acting in a manner that was a marked departure from the standard expected of a competent solicitor; it is professional misconduct, because it was conduct which constituted gross culpable neglect in his duties as a lawyer, in particular, his duty to the public funder in this extraordinary case. (paras. 171-2)

[31] The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the

conduct in question was a marked departure from the norm and that the member was culpable. To put it more precisely, it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.

[32] A respondent must be culpable in order to have committed professional misconduct. The conduct must not only be a marked departure from the norm, but must also be blameworthy.

[33] In order to determine whether the Applicant's conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.

[34] If the Applicant had stated, " I am informed by GQ, and my partner, AC, based on his review of the file, and verily believe, that the Petitioners were not paid," he would be blameless.

[35] The Hearing Panel found that, because the statement in the Applicant's affidavit was on personal knowledge, he was obliged to have made enquiries of N to verify whether the funds had been paid or not. The problem with this analysis is twofold. First, he would never, even after making inquiries, have personal knowledge of whether those funds were paid or not. If he had made inquiries of N, he would then only have personal knowledge of their response, not the truth of whether the funds had in fact been paid. He could only ever have sworn to what he was told by N or what the documents prepared by others revealed to him.

[36] Secondly, the Agreed Facts make it clear that, when swearing the Affidavit, he meant to swear it on information and belief. The facts agreed upon are:

> At the time the Respondent swore the Affidavit, he believed that the statement in paragraph 5 of the Affidavit that the " funds were not paid to the Petitioners" was true. His belief was based on (1) the advice of GQ, a representative of his client C Ltd., that the Petitioners had not received the funds and (2) AC's advice, and possibly [junior lawyer]'s, that they had reviewed the file and the court orders. The Respondent did not review the file in connection with his swearing of the affidavit.
>
> (para. 24 of the Agreed Statement of Facts)

[37] Further, the Applicant's evidence, accepted by the Hearing Panel, was that " it was a mistake" (para. 26(21) of the Reasons).

[38] The Applicant should not now be faulted for not verifying the truth of facts that he meant to swear on information and belief. The Hearing Panel proceeded on the basis that, because the statement was sworn to be on personal knowledge, his conduct ought to be measured on the basis that he intended to make the statement based on personal knowledge. That is not the case; he intended and should have sworn that statement on information and belief.

[39] If he had sworn the funds were not paid, based on information and belief, he could not be faulted unless it could be said that it was unreasonable for him to " verily believe" the source. There is no suggestion that it was unreasonable for him to believe the statement he made.

[40] To ask whether this was an honest mistake or not is asking the wrong question. Dishonesty is not a necessary component of professional misconduct. The proper question to be asked is whether this mistake was innocent or culpable.

[41] Every lawyer must be taken to know the difference between sworn statements based on personal knowledge and those based on information and belief. Further, every lawyer who swears an affidavit is responsible for ensuring that it is accurate and truthful. In this case, the Applicant ought to have been more careful and ensured that the statements not based on personal knowledge were clearly identified as being

based on information and belief.

[42] However, although the Applicant's conduct fell short of what should be expected of a lawyer, after carefully considering all of the circumstances, we have concluded that the conduct was not such a marked departure from the norm that it should be held to be professional misconduct. It would be impossible to present a comprehensive list of the features of conduct that could convert an innocent mistake into a culpable mistake, but the complete absence in this case of features such as gross neglect, recklessness, and any element of dishonesty, lead us to conclude that this member's conduct is not professional misconduct. We would therefore dismiss the citation.

[43] We are of the view that a conduct review would have been appropriate in this case, but it is beyond the jurisdiction of this review panel to order a conduct review, except perhaps as part of a penalty following a finding of professional misconduct or another adverse determination under section 38 of the *Legal Profession Act*.

[44] As a result of our findings, it is unnecessary to deal with the application regarding anonymous publication.

Minority Decision of Barbara Levesque, Peter Lloyd and David Renwick, QC

[45] This is a review pursuant to Section 47 of the *Legal Profession Act* (the " *Act*" *)*, by the Applicant, a member of the Law Society of British Columbia (" LSBC").

[46] A citation was issued to the Applicant on February 5, 2008 (the " Citation") that authorized the Panel to enquire into the conduct of the Applicant, namely:

> In the course of your representation of C Ltd. and EA, you swore on personal knowledge an Affidavit on March 14, 1996 without ensuring the accuracy of the information sworn in the Affidavit.

[47] On September 18, 2008, a hearing was held to enquire into the Applicant's conduct.

[48] On March 14, 1996, the Applicant swore an Affidavit in the matter of *EA & C Ltd. v. Number Co. Ltd.* (the " Foreclosure Action"). In the Affidavit, the Applicant stated:

> 5. On July 30, 1993, Mr. Justice S, by order of this Honourable Court, ordered that the sum of $554,879.34, together with interest accruing since the 16th day of March, 1993, be paid out of the trust account of [law firm N] to the Petitioners. The order of Mr. Justice S was entered on September 24, 1993. *The funds were not paid to the Petitioners*.
>
> [emphasis added]

[49] On February 11, 2009, a decision on Facts and Verdict was issued by the Hearing Panel.

[50] The Hearing Panel found that the Applicant's conduct in swearing the Affidavit constituted professional misconduct.

[51] It is common ground that the Applicant did not personally know whether or not the funds were paid to the Petitioners in the Foreclosure Action. In fact, they had been paid to the Petitioners on or about August 5, 1993 pursuant to the Order of Mr. Justice S.

Issues

[52] Did the Hearing Panel err in finding that the Applicant's conduct in swearing the Affidavit constituted

professional misconduct?

[53] Did the Hearing Panel err in not ordering anonymous publication?

[54] The Applicant withdrew his ground of appeal that the Hearing Panel declined to rely on the hearsay evidence of AM, who testified at the hearing, and we therefore have not considered that ground of appeal.

Standard of Review

[55] Pursuant to Section 47(5) of the *Act* after the hearing, the Benchers may:

(a) confirm the decision of the panel, or

(b) substitute a decision the panel could have made under this *Act.*

[56] The test to be applied by the Benchers on review under Section 47 is that of " correctness" , (cf. *Law Society of BC v. Dobbin*, [1999] LSBC 27, *Law Society of BC v. McNabb*, [1999] LSBC 02, *Law Society of BC v. Hops* [1999] LSBC 29 and *Law Society of BC v. Hordal*, 2004 LSBC 36).

[57] The Benchers must determine if the decision of the Hearing Panel is correct, and if not, the Benchers may substitute their own decision.

Analysis

[58] The Applicant's position is that an innocent, honest mistake, where there is no intention to mislead, ought not amount to professional misconduct.

[59] We take issue with the characterization of the mistake as being an innocent one. Although the Hearing Panel was " impressed by the Respondent" and recognized that he readily admitted the mistake for which he is genuinely remorseful, it can't be characterized that this mistake was " innocent" .

[60] Innocence suggests a lack of fault. The Applicant must take responsibility for swearing a false Affidavit.

[61] The position of the LSBC is that, in the particular circumstances of this case, the conduct of the Applicant in swearing the Affidavit without having personal knowledge falls short of conduct that the LSBC expects of its members. Here, the Applicant made an inaccurate, sworn statement in circumstances where it is his duty, as a solicitor and officer of the court, to accurately ascertain the facts and state them correctly.

[62] Section 3 of the *Act*, sets out the objects and duties of the LSBC:

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

Section 3 requires that the paramount duty of the LSBC is to uphold and protect the public interest.

[63] The Supreme Court of Canada had the opportunity to opine on what constitutes professional misconduct. In *Pearlman v. The Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, it approved of a decision in the Manitoba Court of Appeal in *Law Society of Manitoba v. Savino* (1983), 1 DLR (4th) 285:

> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

[64] In *Hops*, *supra*, a decision of the Benchers on review, the test of professional misconduct was expanded to go beyond the finding of " disgraceful or dishonourable conduct," and therefore professional misconduct may arise even if the behaviour cannot be characterized as disgraceful or dishonourable.

[65] In *Law Society of BC v. Martin*, 2005 LSBC 16, the citation alleged that Martin was " reckless and careless or wilfully blind ... or [was] grossly negligent or negligent in aggravated circumstances." The Panel found that the allegation had been made out and that his conduct in reviewing and approving Reyat's children's' accounts was a " marked departure from the standard expected of a competent solicitor acting in the course of his profession." This is the appropriate test.

[66] It is important to keep in mind that the panel in *Martin* extensively reviewed the evidence to see whether or not the citation could be proven. The decision doesn't suggest that, in all instances, you need recklessness, wilful blindness or gross negligence to find professional misconduct.

[67] In the case of *Purewal v. Law Society of Upper Canada*, 2009 ONLSAP 0010, the Benchers of that Law Society stated at paragraph [34]:

> Sometimes, there is a mistaken impression that if the Society fails to prove knowledge, willful blindness or recklessness, there can be no professional misconduct. This is not so.

[68] In *Martin* the Panel further noted, (para 154):

> ... The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[69] In *Martin*, there were a number of specific instances, or " red flags" that Martin ought to have been aware of and that his failure to review the accounts amounted to gross culpable neglect. However, that case does not stand for the proposition that you need to have a number of red flags before you can have gross culpable neglect.

[70] A single action, such as the breach of an undertaking, may result in a finding of professional misconduct.

[71] In *Martin*, that Panel looked at a number of cases discussing gross negligence, which they felt were " helpful" , but not " determinative" .

[72] The Panel cited at para. 157 the definition of " gross negligence" in *Black's Law Dictionary* :

> The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.

It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. ... It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure. ...

[73] Therefore one does not require an intentional act for conduct to amount to gross negligence.

[74] In this case, the relevant factors to be considered by us in evaluating the conduct complained of include:

(a) The Applicant was called to the bar in 1988, and at the time that he swore the Affidavit, he had been practising continuously for approximately eight years.

(b) The Applicant's practice was confined to solicitor's work in securities, buying and selling of businesses, real estate and commercial lending. This area of practice requires accurate and meticulous drafting of documents.

(c) The Applicant has always practised in a firm of lawyers, as opposed to being a sole practitioner.

(d) Initially, the Applicant had been retained by GQ regarding a shareholder dispute involving EA. The shareholder dispute resolved in or around the time the money was paid out.

(e) Although the Applicant spoke with his client, GQ, who told him that the funds had not been paid to GQ, he also relied on the information provided to him by his partner, AC, and his associate, DM, that they had reviewed their file and their review of the file led them to believe that the funds had not been paid to the Petitioners. As well, AC had spoken with EA, who advised him that C Ltd. had not been paid. However, the Applicant did not contact anyone at N who would have been able to provide him with the information that in fact the funds had been paid to the Petitioner, three years earlier.

(f) Neither the Applicant, nor his firm had been involved in the Foreclosure Action. Therefore, they did not know the true state of affairs regarding payments to the Petitioners in the Foreclosure Action. Therefore any review of their file, which was one of the factors noted by the Applicant in satisfying himself that the Affidavit was correct, could not on any reasonable basis establish the status of payment of monies. Further, a thorough review of their file would have noted the memo dated March 17, 1994, which indicated that the funds had been paid earlier.

(g) The Applicant knew that GQ was not in control of C Ltd. in 1993 when the Order was made, and therefore the advice provided by GQ as to whether the Petitioners had received the monies could not have been verified by GQ.

(h) Although he did not draft the Affidavit, this factor should have made the Applicant more diligent in ascertaining the true facts. Although he read the Affidavit, he did not know for sure whether or not the funds had been paid to the Petitioners. In fact, had he made the appropriate enquiries, he would have found that the funds in fact had been paid to the Petitioners some three years earlier.

(i) The Applicant knew that the application was going to be made *ex parte*, and that he found it " surprising, in light of the fact that there were a number of other parties to the litigation." (pg. 112 of the Transcript).

(j) The Applicant reviewed the initial draft and also reviewed the final form before signing the Affidavit.

(k) The Applicant's law firm was the Registered and Records office for C Ltd. at the time the Affidavit was sworn.

(l) The Applicant, with his experience, appreciated the distinction between facts and matters based on personal knowledge and facts and matters based on information and belief and the importance of properly characterizing that information in an affidavit.

(m) The Order of Mr. Justice S dated July 30, 1993 ordered that the sum of $554,879.34 together with interest be paid out of the trust account of N to the Petitioners. Any reasonable inquiry or investigation would have focused on whether or not the terms of the Order had been followed; and if not, why not?

(n) The Applicant felt that, when he swore the Affidavit, it was a " bizarre state of affairs," and he stated that:

> It was a bizarre state of affairs to me that there would be half a million dollars sitting waiting to be escheated to the Crown when somebody had a claim to it. (pg. 180 of the Transcript)

(o) In his conversation with GQ, the Applicant was told that the reason they never pursued payment out of the mortgage was that there were so many claims against the amount that the company would not receive any proceeds. This directly contradicts the order of Mr. Justice S dated July 30, 1993 and ought to have been a " red flag" . (pg. 183 of the Transcript)

[75] The Applicant went out of his way to try to verify the fundamental aspect of the Affidavit; namely whether the Petitioners had been paid. He knew or ought to have known that the Court would want to know if the Petitioners had been paid or not. Therefore, he had a duty to get it right.

[76] The Applicant made two mistakes. Firstly, he provided false information to the Court. Secondly, he failed to provide the source of his information.

[77] The Canons of Legal Ethics states, in Chapter 1 of the *Professional Conduct Handbook*:

> 2(3) A lawyer should not attempt to deceive a court ... by offering false evidence or by misstating facts ...

[78] It is a fundamental tenet that the Judges or Masters can rely on what is said in an affidavit and how it is framed. They should not have to second guess or ask if the affidavit meant " on information and belief" as opposed to personal knowledge.

[79] In *Re: Lawyer 3*, 2005 LSBC 35 the Panel noted with approval the comments of the Benchers:

> [30] ... The Courts are entitled to be ensured to the highest degree possible that matters being placed before them as evidence are done so with maximum certainty.

[80] In *Law Society of BC v. Hart*, 2007 LSBC 50:

> [9] It must be understood by all members of the profession that great care must be taken in preparing affidavit [sic] and making representations to the Court to ensure accuracy. ... The Courts and the public must have confidence that lawyers are scrupulously fulfilling their duties in this regard. ...

[81] In reviewing the decision of the Panel, we note and adopt the following:

[50] This Panel adds that a lawyer is an officer of the Court and when that lawyer is the deponent to an Affidavit (a sworn statement) that will be relied on in Court, the lawyer must conform to the highest standard of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.

[51] The Respondent swore in the Affidavit that he had personal knowledge of the fact that the funds had not been paid out. He acknowledged that:

(a) he read the Affidavit before swearing it; and

(b) he understood the difference between a statement made on personal knowledge and one made on information and belief. The words of the Affidavit are clear, and there is no necessity to be familiar with how the form of an Affidavit is drafted to reflect that difference.

[52] When the Respondent chose to swear the Affidavit on personal knowledge, then in order to meet the standard expressed in paragraph [40] of these reasons, the Respondent must personally have made all of the inquiries that were available to him in order to be able to make this statement.

[53] The Respondent cannot rely exclusively on the inquiries of, or the information supplied by other third parties. In particular, the Respondent cannot rely upon the information of third parties (in this case GQ) who had a financial interest in the result of the application.

[82] The Applicant says he made an innocent mistake. Another way to characterize this position is that it was an error without fault.

[83] But who in the end must take responsibility for the swearing of the false Affidavit? It must be the Applicant.

[84] Is this culpable neglect? Culpability derives from the Latin concept of fault (culpa). There are degrees of culpability from purposeful, to knowing, to reckless and finally to negligence (a gross deviation from the standard of care that a reasonable person would expect).

[85] In these circumstances, we are satisfied that the Applicant's failure to properly frame the Affidavit (on information and belief), which resulted in the Petitioner getting paid twice, was culpable neglect. He had the responsibility to ensure that the Court was aware of the true state of affairs, particularly in an *ex parte* application. The standard that the profession expects is nothing less.

[86] To say that if he would have sworn the Affidavit on information and belief he would have been blameless does not deal with the issue. The Affidavit wasn't sworn on information and belief.

[87] The Applicant went out of his way to try to verify the fundamental aspect of that Affidavit (ie, whether the Petitioners had been paid). He did not do enough.

[88] To dilute the responsibility to an " innocent, honest mistake" is to minimize the Applicant's involvement.

[89] This conduct was not simple inadvertence, or failure to exercise ordinary care. It was an omission of an aggravated character respecting a legal duty.

[90] Therefore we are satisfied that the Applicant's conduct was a marked departure from the standard expected of a competent solicitor; because, to paraphrase *Martin*, *supra*, it was conduct that constituted culpable neglect in his duties as a lawyer, in particular, his duty to the Court in not presenting a false affidavit.

[91] We agree with the majority of the Panel that there should not be anonymous publication. The Applicant has not established grievous harm as required under Rule 4-38.1.

Conclusion

[92] The Panel did not err in finding that the Applicant's conduct was professional misconduct.

[93] The Panel did not err in not ordering anonymous publication.