2010 LSBC 14
Report issued: May 18, 2010
Oral Reasons: March 25, 2010
Citation issued: September 23, 2009

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

Fiesal Ebrahim

Respondent

Decision of the Hearing Panel

Hearing date: March 25, 2010

Panel: Gavin Hume, QC, Chair, Bruce LeRose, QC, Thelma O'Grady

Counsel for the Law Society: Eric Wredenhagen
Counsel for the Respondent: Richard Fernyhough

Background

[1] This matter comes before the Panel by way of a conditional admission of a disciplinary violation and consent to disciplinary action, which has been accepted by the Discipline Committee pursuant to Rule 4-22. At the hearing we gave our oral decision accepting the admission and the consent to disciplinary action. These are our reasons.

[2] The Schedule to the citation reads as follows:

> 1. In 2008, while acting for your clients NH and JP with respect to their purchase of three residential strata lots (the " Lots") and their proposed assignment of the contract for one of the Lots to a third party, RD, you:
>
> (a) failed to advise RD, an unrepresented person, that you were not protecting his interests in the transaction, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*;
>
> (b) committed a breach of trust by improperly, without RD's authorization, releasing the sums of $45,700 and $19,750 from trust funds provided to you by RD, which amounts were then applied on your clients' behalf and for their benefit to the purchase of the two Lots in which RD had no interest;
>
> (c) in the alternative to the allegation in subparagraph (b), above, you breached the provisions of Rule 3-56(1) and/or Rule 3-56(1.2) of the Law Society Rules.

[3] Service of the citation was admitted both before us and in the Agreed Statement of Facts.

Agreed Statement of Facts

[4] The Agreed Statement of Facts sets out the following:

1. The Respondent was admitted to the bar of the Province of British Columbia on May 21, 2003.

2. The Respondent practises law as a sole practitioner under the name Open Door Law Corporation in Vancouver. Since May 4, 2009, the Respondent has been practising with one other lawyer at one of his two Vancouver locations. The Respondent's practice comprises mostly corporate/commercial law, real estate law (residential) and family law, with some civil litigation as well.

Background to Citation

3. On or about April 22, 2008, NH and JP (collectively, the " Clients"), retained the Respondent to act for them in closing the sale of three strata properties that were being developed and sold by C Ventures Ltd. (the " Developer").

CONTRACT DATE	STRATA LOT AND ADDRESS	PURCHASER(s)
April 26, 2006	Strata Lot 21, [address]	JP
May 18, 2006	Strata Lot 50, [address]	NH
Sept. 26, 2006	Strata Lot 94, [address]	JP/NH

(the " Lot(s)")

4. The Clients purchased Strata Lot 94 (" Lot 94") as an investment property, which they were planning to " flip" .

5. The Developer went into receivership, and The B Group took over the project as receiver (the " Receiver"). Lawson Lundell LLP was counsel for the Receiver.

6. The Clients decided to assign their right to purchase Lot 94 to RD. RD was an unrepresented party who was known to the Clients and was living in Mexico. NH advised the Respondent that he (NH) had known RD since childhood, that he and RD were " like family" , and that RD was a wealthy and successful businessman.

7. Because the original purchase agreement for Lot 94 could not be assigned without the Developer's consent, in May 2008 the Respondent prepared a document entitled Agreement to Enter into an Assignment (the " Agreement"). The recitals to the Agreement recognized that: (1) the Developer's consent to any assignment was required; (2) the Developer had not consented at the time of the Agreement, but was expected do so in future; and (3) consent from the Developer was a " true condition precedent" to the Agreement, without which the Agreement would be terminated:

...

E. At this time, the Developer has not opened up the ability for any assignor to assign contracts in the Development however the Assignor and Assignee expect that this will occur shortly or at some point prior to the scheduled completion.

F. The parties acknowledge and agree with each other that the approval of the Developer to the assignment is a true condition precedent. If the Developer is unable or unwilling to consent to the assignment prior to completion (which is to be set by the Developer) the Assignor and Assignee agree that this transaction will be at an end without prejudice to both of the Assignor and Assignee. All funds held in trust will be returned promptly by Open Door law Corporation, less any legal fees, disbursements or other costs, including or not limited to courier and mailing costs.

G. On the basis of the foregoing, the Assignor and Assignee hereby agree that from and after execution, in accordance with this Agreement, the Assignor assigns all rights, title and interest in and to the Purchase Agreement to the Assignee as soon as practicable upon obtaining the consent of the Developer and upon the terms and conditions contained herein:

...

8. Section 1.3 of the Agreement provided that the total price of Lot 94 to RD would be $637,350, incorporating a profit or " lift" to the Clients of $63,000.

9. Section 1.3 of the Agreement also provided that RD would pay a deposit totaling $90,500 (the " Deposit") to the Respondent's firm in trust, as follows:

(a) Within 7 days of the Agreement: $27,500

(b) On or before May 31, 2008 $21,000

(c) On or before June 30, 2008 $21,000

(d) On or before July 31, 2008 $21,000.

TOTAL: $90,500

10. The understanding of the parties was that the amount of the Deposit was intended to cover both the initial deposit of $27,350 paid by the Clients to the Developer in respect of Lot 94, and their anticipated profit of $63,000 on the sale or assignment of Lot 94 to RD.

11. Section 3.5 of the Agreement constituted an acknowledgment or waiver of independent legal advice:

3.5 Independent Legal Advice - The parties acknowledge that they have either had the opportunity to have independent legal advice and provided to each other a Certificate of Independent Legal Advice or they have individually, waived their right to independent legal advice. All parties represent that they are sophisticated and commercially aware of the nature and effect of this Agreement.

12. On or about June 10, 2008, the Respondent received $48,500 from RD, which the Respondent deposited to his trust account.

13. On or about July 11, 2008, the Respondent received an additional $42,000 from RD, which he also deposited to his trust account. The Respondent now held $90,500 in trust from RD, representing the deposit that RD was required to provide pursuant to section 1.3 of the Agreement.

14. The Respondent was subsequently advised that the Receiver would not consent to assignments other than to family members or to corporations in which the individual purchasers were shareholders. The Respondent was instructed by NH to incorporate a company with the Clients as shareholders, with the intent that the company would take title to Lot 94 and the company shares would subsequently be transferred to RD. NH advised the Respondent that RD was agreeable to proceeding in this manner.

15. On October 24, 2008, the Respondent received a further $190,000 in funds from RD, which were deposited directly into the Respondent's trust account.

16. In total, RD provided the Respondent with the sum of $280,500, which was held in the Respondent's trust account.

17. On or about November 4, 2008, two days before the scheduled closing of Lot 94, the Respondent requested, on instructions from NH, an extension of the completion date for each of the three Lots, including Lot 94. He confirmed these instructions by an e-mail of November 4, 2008 to the Clients and to RD.

18. On November 5, 2008, the Receiver granted extensions of the scheduled completion dates, on the condition that the deposit on each lot be increased. The following additional amounts were payable to Lawson Lundell LLP, in trust, on or before November 6, 2008:

Lot 21 (5% of purchase price)	$19,750
Lot 50 (10% of purchase price)	$45,700
Lot 94 (10% of purchase price)	$54,700

19. On November 5, 2008, the Respondent's office sent e-mails to the Clients regarding Lot 21 and Lot 50, requesting a direction to execute the Receiver's letter and confirmation " **that we may take the additional deposit funds required from funds held in our solicitor's trust account**" [bold in original]. At the time, the Respondent did not have funds in trust from the Clients.

20. The Respondent's e-mails to the Clients regarding Lots 21 and 50 were not sent or copied to RD.

21. Also on November 5, 2008, the Respondent sent a further e-mail addressed both to the Clients and to RD regarding Lot 94, requesting confirmation and direction regarding the increased deposit required by the Receiver.

22. At the time the Respondent sought the direction to provide the additional deposit monies as detailed above, he had not advised RD that the Receiver had not consented to the assignment of Lot 94 to RD. The Respondent understood that the Receiver had consented to the assignment of Lot 94 to a corporation, the shares of which would initially be held by NH and JP and would be transferred to RD on completion.

23. NH responded by e-mail on November 5, 2008, instructing the Respondent to take $45,700 out of trust to cover the additional deposit for Lot 50.

24. JP responded by e-mail on November 5, 2008, instructing the Respondent to take $19,750 out of trust to cover the additional deposit for Lot 21.

25. RD also provided written authorization dated November 5, 2008 to the Respondent authorizing him to take $54,700 out of trust to cover the additional deposit for Lot 94.

26. At this time, the only funds held in trust by the Respondent in respect of the Lots were the trust funds that he had received from RD.

27. On November 6, 2008, the Respondent wrote a trust cheque payable to Lawson Lundell LLP for $120,150, representing additional deposits for the three Lots. The entirety of the $120,150 amount was taken from trust funds provided by RD.

28. A Trust Reconciliation Statement prepared by the Respondent showed that, of the $120,150 payment, the Clients NH and JP were credited $45,700 (Lot 50) and $19,500 (Lot 21), respectively, while RD was credited $54,700 toward the purchase of Lot 94.

29. RD was unaware that his trust funds had been paid out by the Respondent to the Receiver to the credit of the Clients' purchases of Lot 50 and Lot 21. At no time had RD provided authorization to the Respondent to use RD's trust funds for any purpose other than the purchase of Lot 94. The Respondent believed, however, on advice from NH, that RD was agreeable to his funds being used in this manner.

30. On or about November 12, 2008, James MacInnis (" MacInnis") contacted the Respondent and advised that he had been retained by RD.

31. On November 14, 2008, MacInnis requested an accounting of funds held in the Respondent's trust account. The Respondent e-mailed MacInnis that day with an accounting that showed that $159,850 remained in trust for RD and showing that the following payments had been made from trust:

To Receiver re: Lot 94	$54,700
To Receiver re: Lot 50	$45,700
To Receiver re: Lot 21	$19,750.

32. On November 14, 2008, the Respondent received a certified cheque from NH for $45,700 which he deposited to his trust account as a " reimbursement" .

33. On November 18, 2008, the Respondent e-mailed MacInnis an updated reconciliation of the trust funds, in which the payment of $45,700 for Lot 50 had been removed. He also advised MacInnis that he was no longer acting for the Clients.

34. MacInnis responded to the Respondent by e-mail of the same date, requesting an explanation of why RD's trust funds had been used as part of the deposit on Lot 21.

35. The Respondent self-reported a $19,750 trust shortage by letter to the Law Society dated November 18, 2008.

36. On November 19, 2008, MacInnis made a complaint about the Respondent to the Law Society.

37. The matter was ultimately resolved by the parties and the $19,750 trust shortage was eliminated.

Admissions

38. The Respondent admits that he committed a breach of trust by improperly releasing the sums of $45,700 and $19,750 from trust funds provided to him by RD and applying these amounts on the Clients' behalf and for their benefit to the purchase of two strata lots in which RD had no interest.

39. The Respondent admits that he breached the provisions of Rule 3-56(1) and/or Rule 3-56(1.2) of the Law Society Rules.

40. The Respondent admits that he failed to advise RD, an unrepresented party, that he was not protecting RD's interests in the transaction, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*.

41. In his letter to the Law Society dated April 3, 2009, the Respondent admitted that:

> ... I realized that I never should have paid out funds from RD's trust account on instructions from NH and that this would prejudice RD if the Agreement was not concluded... In retrospect, I recognize that I put myself in a potential conflict situation very early on in this matter. I should have ensured from the outset that RD understood that I was not representing his interests in this transaction. I also recognize that RD's trust funds should not have been released absent express instructions from RD.

42. The Respondent admits that his conduct constitutes professional misconduct.

[5] It is for this Panel to decide whether, in the circumstances, it accepts the recommendation of the Discipline Committee that the action of the Respondent constitutes professional misconduct. In addition, this Panel must decide whether it accepts the recommendation of the Discipline Committee that the Respondent be fined in the amount of $3,000 and pay costs in the amount of $1,500, both of which amounts are to be paid by July 31, 2010.

[6] It has been said on more than one occasion that not every breach of the rules of professional conduct and the Law Society Rules will necessarily amount to professional misconduct. In addition, not every act of professional misconduct will be specifically prohibited by the Rules. It is for the Benchers of the Law Society to decide when the conduct of a lawyer has crossed the line and constitutes professional misconduct. The Supreme Court of Canada has indicated that, in their view, nobody is better qualified to make that determination. See *Pearlman* v. *Law Society (Manitoba)*, 1991 2 SCR 869 and also see *Stephens* v. *Law Society (Upper Canada)* (1979), 55 OR (2d) 405.

[7] For the reasons set out below, the Panel accepts the admission that the conduct described above constitutes professional misconduct.

[8] The panel in *Law Society of BC* v. *Martin*, 2005 LSBC 16, considered in detail what constitutes professional misconduct. It concluded that the test is " whether the facts as made out disclose a marked departure from that conduct the Law Society expects of it members." This test has been relied upon and adopted in subsequent discipline cases and is accepted by this Panel as the appropriate test.

[9] The rules pertaining to withdrawals from trust accounts provide, in part, as follows:

> **3-56**(1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are
>
> (a) properly required for payment to or on behalf of a client or to satisfy a court order.

Subrule (1.2) provides in part as follows:

> (1.2) No payment from trust funds may be made unless ...

(b) there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid.

[10] As set out in the Agreed Statement of Facts, $120,150 was paid from funds held in trust on behalf of RD on August 6, 2008. That payment was made to the developer and was in breach of Rule 3-56(1). The payment was not for one of the permitted and specified purposes in that Rule.

[11] In addition, the use of RD's trust funds to increase deposits paid on strata units not belonging to RD but belonging to two clients of the Respondent, was a breach of sub-rule 3-56(1.2)(b).

[12] Chapter 4, Rule 1 of the *Professional Conduct Handbook* requires that a lawyer acting for a client in a matter involving an unrepresented person must advise, not only the client, but also the unrepresented person that the unrepresented person's interests are not being protected by the lawyer. This was not done, which was a breach of that provision of the *Handbook*.

[13] Despite the fact that RD was not a client of the Respondent, the Respondent nevertheless received a total of $280,500 from RD to be held in trust for RD's benefit with respect to the contemplated transaction involving RD.

[14] The Panel concludes that the Respondent was subject to an express or implied trust obligation to use RD's funds solely for the purpose for which they were provided and that he breached that obligation when he made the payment from RD's trust account, a portion of which was used solely for the benefit of his clients.

[15] For these reasons, the Panel accepts the admission of the Respondent and finds that the Respondent is guilty of professional misconduct.

[16] The disciplinary action proposed by the Respondent and accepted by the Discipline Committee was a fine of $3,000 and costs in the amount of $1,500, both of which were to be paid by July 31, 2010.

[17] *Law Society of BC* v. *Ogilvie*, [1999] LSBC 17, sets out the factors to be considered when determining whether or not a particular disciplinary action is appropriate. The complete list of those factors is as follows:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[18] It is not necessary to review all of the factors. We find the factors addressed in the following several paragraphs relevant in our considerations.

The nature and gravity of the conduct

[19] There was no evidence that the Respondent acted with dishonest intent in any sense with respect to the trust funds, nor is there any suggestion that he benefited or stood to benefit personally from any of the breaches which occurred. The Respondent's explanation during the course of the hearing was that his judgment was impaired by his desire to please his clients. As a result he did not stand back and look at the situation.

The range of penalties imposed in similar cases

[20] The Panel was provided with a number of authorities in similar cases. In particular, we considered *Law Society of BC* v. *Hart,* [1996] LSDD No. 110, *Law Society of BC* v. *Murray*, 2006 LSBC 47, *Law Society of BC* v. *Skogstad*, 2009 LSBC 16, *Law Society of BC* v. *Hops*, [1999] LSBC 29. While none of these cases were directly on point, they did provide guidance to the Panel.

The previous character of the respondent, including details of prior discipline

[21] The Respondent had no prior discipline record.

Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances

[22] When the Respondent realized his mistakes, he took immediate steps to rectify those mistakes and reported himself to the Law Society. In addition, he did not benefit in any way but instead acted, in his mind, in the best interests of his client and RD. In addition he co-operated in the investigation and has taken steps to ensure such mistakes will not be made again. He has taken a Conflicts course and the Sole Practitioner course. He has been involved in a practice review. He has upgraded his software. He has arranged for a senior practitioner to mentor him.

The age and experience of the respondent

[23] The Respondent was called on May 21, 2003. He had only practised law for five years when the conduct in question occurred. He was a relatively inexperienced sole practitioner.

[24] Having reviewed the factors from *Ogilvie*, the panel concluded that a fine in the amount of $3,000 was appropriate.

[25] The Law Society and the Respondent agreed that costs in the amount of $1,500 were reasonable. The Discipline Committee agreed with that. This Panel concludes that in the circumstances that was an appropriate amount.

[26] Therefore it is ordered that the Respondent pay:

(a) a fine in the amount of $3,000; and

(b) costs in the amount of $1,500.

Both fine and costs are to be paid by July 31, 2010.

[27] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.