2010 LSBC 17
Report issued: July 27, 2010
Citation issued: October 10, 2008

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

Randall Keith McRoberts

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: November 20, 2009 and February 1, 2010

Panel: Richard Stewart, QC, Chair, Kathryn Berge, QC, David Mossop, QC

Counsel for the Law Society: Maureen S. Boyd
Counsel for the Respondent: Henry Wood, QC

The Citation

[1] The citation against Randall Keith McRoberts (the "Respondent") was issued on October 10, 2008. The Respondent has admitted service of the citation.

[2] The citation directs this Hearing Panel to inquire into the Respondent's conduct. We must decide whether, in the circumstances described, the Respondent professionally misconducted himself, contravened the *Legal Profession Act* or a rule made under it (a "Rule"), or neither.

[3] The citation sets out the following allegation:

> In representing your client, [the "Club"], in a land development matter, you gave an undertaking to unrepresented parties, JL and LL in your letter to them dated August 30, 1995, in which you enclosed for execution a form of easement in favour of your client and wrote:
>
> > I would then ask that you return both [executed] documents to me on my undertaking not to use the document or register same unless the "golf course" development is actually going to proceed and I have your written permission to register the easement.
>
> You were bound by that Undertaking and breached it when in or about June, 1996 you caused the easement to be registered in the Land Title Office without obtaining the written permission of JL and LL to do so.

Admission and Facts

[4] Prior to the hearing, counsel for the Law Society and counsel for the Respondent came to a written agreement as to the evidence that would be presented to the Panel regarding the facts leading to the issuance of the citation, pursuant to Law Society Rule 4-15. No other evidence was called by either party.

[5] Therefore, the Panel's deliberations are restricted to the evidence presented, which can be summarized as follows:

Respondent's Background

1. The Respondent was admitted to the Bar of the Province of British Columbia on September 16, 1974. He practises law as a sole practitioner in a small town and has done so at that location for most of his career.

Breach of Undertaking

2. In or about 1994, the Respondent's client, a non-profit service club, (the "Club"), was the owner of real property (the "Club Property") located in a small community in British Columbia. The Club was given ownership of the Club Property on the condition that it be used for a golf course or some other community purpose.

3. At all material times, the Respondent represented the Club, and did so on a *pro bono* basis.

4. LL is the owner of real property (the "L Property") which is located adjacent to the Club Property. LL is married to JL.

5. In or about 1993, RH, a representative of the Club, spoke with JL about the possibility of JL and LL giving an easement over the L Property to the Club to enable it to draw water from a nearby lake.

6. By letter dated April 22, 1994, the Club proposed terms by which JL and LL would provide an easement over the L Property to the Club, which provided in part that:

> The easement will be registered by the Club as soon as the water line is required for its development; provided that in the event the Club does not complete its golf course, then the easement will automatically terminate and the Club will remove, at their expense, all lines installed on [the L Property], and shall restore the lands to a reasonable level or repair, unless an alternate consideration can be provided by the Club.

7. By letter dated May 6, 1994, LL agreed to grant the easement over the L Property on the terms and conditions set out in the April 22, 1994 letter.

8. On August 30, 1995, the Respondent, as solicitor for the Club, wrote to JL and LL and enclosed for execution two copies of a Land Title Form C and an easement over the L Property in favour of the Club. In this letter, the Respondent set out instructions for the execution of the Form C easement by LL before a lawyer, and further wrote:

> I would then ask that you return both documents to me on my undertaking *not* to use the document or register same *unless* the "golf course" development is actually going to proceed and I have your written permission to register the easement (the "Undertaking")
>
> [emphasis reflects the original correspondence]

9. On October 10, 1995, LL executed the Land Title Form C and attached easement (the "Easement")

before the Respondent.

10. On May 21, 1996, RH and another representative of the Club executed the Easement as authorized signatories of the Club. The Respondent witnessed the execution of the Easement by them.

11. If called to give evidence, RH would testify that he believes that he advised JL and LL in the spring of 1996 by telephone that the Easement would be registered, and he believes that he had their consent to do so. In 1996, RH was not aware that the Respondent had given the Undertaking to LL and JL.

12. If called to give evidence, JL and LL would testify that each of them believes that they did not give their consent to RH to file the Easement. They did not give written permission to the Respondent to file the Easement nor did they do so orally in any conversation with him.

13. Sometime before June 19, 1996, RH attended at the office of the Respondent and instructed him to register the Easement. RH told the Respondent that JL and LL had consented to the registration of the Easement.

14. On June 19, 1996, following receipt of the instructions from RH, the Respondent filed the Easement in the Land Title Office. At that time, the Respondent did not have the written permission of JL and LL to register the Easement as required by the Undertaking and *did not remember that he had given the Undertaking*.

[emphasis added]

The Complaint

15. On June 4, 2004, another member of the Law Society, Larry Schafer, made a complaint to the Law Society about the Respondent on behalf of JL and LL.

16. In the course of the investigation of this matter, counsel for the Respondent provided responses dated July 14, 2004, and December 3, 2004.

17. In or about 2004, JL and LL commenced an action in BC Supreme Court against RH, the Club, the Respondent and others. Due to this litigation, in or about February 2005, the investigation of the complaint was placed into abeyance at the request of counsel for the Respondent.

Admission

18. The Respondent admits that he gave the Undertaking and that, at all material times, he was bound by it and that he breached the Undertaking when he registered the Easement without obtaining the written permission of JL and LL to do so.

General Principles Regarding Undertakings

[6] The Respondent has admitted that he breached the Undertaking. The relevant provisions of the *Professional Conduct Handbook*, Chapter 11, that govern the ethical obligations of lawyers in respect of undertakings are as follows:

7. A lawyer must

(a) not give an undertaking that cannot be fulfilled,

(b) fulfil every undertaking given, and

(c) scrupulously honour any trust condition once accepted.

7.1 Undertakings and trust conditions should be

(a) written, or confirmed in writing, and

(b) unambiguous in their terms.

11. If a lawyer is unable or unwilling to honour a trust condition ... the subject of the trust condition must be immediately returned ... unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[7] Chapter 13 provides in Rule 1(a) that a lawyer must report to the Law Society another lawyer's breach of undertaking that has not been consented to or waived by the recipient of the undertaking.

[8] All of these provisions, and particularly the obligation to report a breach of an undertaking, illustrate the importance that the Law Society and the legal profession put upon undertakings.

[9] It is well-established that the *Handbook* principles apply to governing undertakings given by a lawyer to members of the public (such as JL and LL), and not only to undertakings provided to other lawyers (*Hammond v. Law Society of BC*, 2004 BCCA 560). In paras. 55 and 56 of *Hammond*, this principle is emphasized as well as the overall critical importance of undertakings generally:

55. The heading of Chapter 11 [Responsibility to Other Lawyers] might suggest that the Law Society is concerned only with undertakings given by one lawyer to another and not with undertakings given by lawyers to members of the public. Neither counsel suggested that such a restrictive interpretation was warranted. This is not surprising given the paramount responsibility of the Law Society to the public ... and the primary importance which the Law Society and its members attribute to lawyers' undertakings. These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.

56. When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. ...

[10] Numerous other decisions underscore the importance to be placed upon undertakings and why they are critical to the proper functioning of legal transactions, particularly in respect of land. The well-accepted case of *Witten, Vogel, Binder & Lyons v. Leung* (1983), 148 DLR (3d) 418 (Alta. Q.B.) at p. 422 quotes the British case of *United Mining & Finance Corp., Ltd. v. Becher*, [1910] 2 K.B. 296 in the following manner:

> ... those undertakings are given in their capacity as solicitors, and money is entrusted them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust.

Burden of Proof, Issues and Applicable Test

[11] It is the responsibility of the Law Society in these circumstances to prove the allegations set out in the citation. The civil standard of proof is to be applied (*F.H.* v. *McDougall*, 2008 SCC 53; adopted by Law Society tribunals in *Re. Lawyer 9*, 2009 LSBC 19 and various other decisions). The Panel is mindful of the comments of the Supreme Court of Canada in *F.H. v. McDougall* set out at para. 40, regarding the overall correct approach to the matter:

> ...there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ...

[12] The central issue to be decided is whether or not the Respondent's admitted breach of undertaking because he "did not remember about the Undertaking" constitutes professional misconduct within the meaning of the *Act*, s.38(4)(a).

[13] The established test for whether or not a lawyer has committed professional misconduct is set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171:

> ....whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[14] The decision in *Martin* has recently been somewhat elaborated upon by a decision of the Benchers on Review in *Re: Lawyer 10,* 2010 LSBC 02, which says the following in regard to the applicable test for professional misconduct:

> [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 [on review] conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.

[15] As discussed, a breach of undertaking is a breach of the *Handbook* guidelines. As is often said, a "mere" breach of the Handbook does not necessarily constitute professional misconduct. (*Law Society of BC v. Richardson,* 2009 LSBC 07 at para. [30]).

[16] To be professional misconduct, it must meet the test already discussed, set out in *Martin* and interpreted in *Lawyer 10*.

[17] The determination of whether the Respondent's conduct in this case constitutes professional misconduct is a decision uniquely within the Panel's jurisdiction, as it is settled law that practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity. This was observed by the Court of Appeal in *Hammond* (*supra*) where the Court said at para. 29:

> ... The ultimate issues in this case were whether Mr. Hammond was guilty of professional misconduct and/or breaches of undertakings. Those issues have been recognized as being within the particular expertise of the Law Society, whose mandate is the governance of the profession in the public interest. As Mr. Justice Iacobucci, speaking for the Court, stated at para. 31 of *Ryan v.*

> *Law Society (New Brunswick)*, 2003 SCC 20: "Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity." ...

[18] A similar statement was made by the Supreme Court of Canada in *Pearlman v. Law Society of Manitoba*, [1991] S.C.R. 896, which is cited in *Martin*, *supra*.

Discussion

[19] Both counsel frankly admitted that the limited facts presented in evidence arose because all other circumstances surrounding the breach of the Undertaking remained in dispute at the time of the hearing. The Panel is mindful of this restriction of the evidence to the admitted facts. We accept that the Respondent's explanation for the breach was he did not remember that he had given the Undertaking and that there is nothing more than that we may consider in coming to our decision.

[20] As a consequence, no evidence regarding the circumstances that gave rise to the Respondent forgetting about the Undertaking was provided. As is set out in the citation, the professional misconduct allegedly occurred in June, 1996 when the instrument was registered.

[21] The Law Society put forward its view that the Respondent's conduct amounts to professional misconduct. Law Society counsel argued that JL and LL were provided with a written undertaking that they felt they could rely upon. It was made by an individual who they felt they could trust because of his status as a solicitor. They entrusted the Respondent with an executed Land Title instrument as a consequence of his solemn promise that he would use it under extremely limited circumstances. The instrument conveyed a significant right to enter into the lands registered in the name of LL and install water lines. The registration of the instrument occurred in violation of the Undertaking made by the Respondent that there would be no such registration without the written consent of JL and LL.

[22] The Law Society argues that the responsibilities imposed upon solicitors arising from undertakings are so significant that to forget about them may be professional misconduct.

[23] In contrast, the Respondent argues that, in the context of no other evidence of wrongdoing, to forget about an undertaking in these circumstances might possibly be construed as negligence, but it is not professional misconduct. In argument, Respondent's counsel admitted that the Respondent's conduct was negligent but that this negligence was a single instance of negligence, insufficient to constitute a finding of gross negligence, which might support a finding of professional misconduct.

[24] In the view of the Panel, whether or not negligence existed and the degree of that negligence is beside the point. In this instance, the Respondent breached a solemn promise made in a matter of utmost importance and did so where the surrounding circumstances support his responsibility for the breach of this promise.

[25] Numerous cases were cited by the Law Society where a single breach of an undertaking was held to be professional misconduct including:

> (a) a lawyer acted honestly on a mistaken belief that he was released from an undertaking: *Law Society of BC v. Jeletsky,* 2004 LSBC 17;
>
> (b) a lawyer breached his undertaking by leaving certain proceeds of sale in his pooled trust account rather than investing them according to the terms of his undertaking: *Law Society of BC v. Martin,* [1999] LSBC 34;
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> (c) a lawyer breached his undertaking unintentionally and mistakenly believed that the underlying

obligation to pay the taxes had been fulfilled: *Law Society of BC v. Hill*, 2007 LSBC 02;

(d) a lawyer acted on information conveyed by his legal assistant who wrongly misunderstood from the mortgage broker that further advances of funds had been approved by the lender, when they had not: *Law Society of BC v. Shojania*, 2004 LSBC 25; and

(e) in *Law Society of BC v. Heringa*, 2004 BCCA 97, a lawyer failed to comply with an undertaking to discharge a mortgage where the lawyer had failed to give any reasonable explanation of his failure. In that case the British Columbia Court of Appeal approved the decision of the hearing panel, finding that an implied term that the undertaking would be completed within a reasonable period of time could be inferred by the panel from the surrounding circumstances.

[26] In many of these cases the respondents voluntarily made an admission of professional misconduct. That is not the case here. However, in the contested case of *Law Society of BC v. Heringa*, both the hearing panel and the Court of Appeal again found that a single breach of an undertaking could constitute professional misconduct. Therefore, there is precedent for finding professional misconduct when there is evidence of the breach of a single undertaking, and we are not constrained by the Respondent's argument on this point.

[27] The Respondent's counsel further urges upon the Panel that, for the Respondent to forget about the Undertaking, in the absence of any other evidence of wrongdoing under these circumstances, is insufficient to establish professional misconduct. It is argued that *Lawyer 10* (*supra*) requires that the act of forgetting must be demonstrated to be "culpable" to support such a finding and that, here, there are no facts of the Respondent's culpability. The Respondent asserts that because the evidence is not before us to "consider precisely what he did wrong" (because there are no details of the chain of events leading to the breach), the Law Society has not met its burden of establishing professional misconduct.

[28] The comments in *Lawyer 10* regarding the necessity of determining that conduct was "culpable; blameworthy" were considered by the hearing panel in the *Law Society of BC v. McCandless*, 2010 LSBC 03. Para. [74] of that decision says:

> [74] That circular logic makes each ruling dependent on its own facts. In the *Lawyer 10* case above, the respondent had relied on his partner and made an error in not adding that his statement was on information and belief in a supporting affidavit to an application of which his partner had carriage. It is distinguishable from the case before this Panel on its facts. In the within case, the Respondent had complete carriage of the matter and moreover, took active steps such as lending money and receiving JC's deposit, which the Panel finds to be blameworthy.

[29] This Panel adopts the *McCandless* view that the test set out in *Lawyer 10* may result in a circular and highly subjective analysis, making each ruling dependent upon its own facts. We distinguish this matter from *Lawyer 10* on the facts, as in that case the error made originated with the respondent's reliance upon an error made by another lawyer.

[30] The focus of our inquiry must remain on the conduct itself. A solicitor is peculiarly responsible for the fulfillment of his or her undertaking and certainly is responsible for directing the registration of Land Title instruments. There is no evidence that anyone but the Respondent had carriage of the registration of the Easement against LL's property and, given the importance of the matter, it is a reasonable inference to assume he took responsibility for it. Indeed, he has not attempted to deflect blame on to anyone else and admits that he forgot about the Undertaking.

[31] Counsel for the Respondent further asserts that the Respondent made an innocent mistake when he

forgot about the undertaking to JL and LL, and this should exculpate him. However, the analysis required is whether conduct that is a marked departure from conduct the Law Society expects of lawyers is "blameworthy". The innocence of the mistake is not the question.

[32] There is no question that a breach of undertaking is a marked departure from the conduct that the Law Society expects from lawyers. Given that, we must then confine our consideration to the actual facts in evidence to determine if the conduct is blameworthy:

> (a) the Respondent made a solemn promise (for indeed this is what an undertaking is) not to register the Easement except with the written permission of JL and LL;
>
> (b) he did not advise his client about the Undertaking;
>
> (c) he forgot about the Undertaking, and the Easement was registered eight months after he provided the Undertaking;
>
> (d) the rights of the unrepresented party, LL, who relied upon the Respondent, were damaged significantly.

[33] The gravity of these facts establishes that the Respondent's conduct was blameworthy.

[34] As a further point, we are satisfied that the Respondent's conduct would constitute professional misconduct whether or not LL was represented. In this instance, the responsibilities of the Respondent were somewhat heightened by virtue of the fact that he had witnessed the signature of an unrepresented party, directly provided the Undertaking to her and, most significantly, accepted the advice of a third party that JL and LL's consent to the registration had been obtained. He was aware that the normal safeguards were not present to ensure that the Undertaking was not registered without the consent of JL and LL.

[35] Counsel for the Respondent also urged upon the Panel that, because the Easement registration was taken on by the Respondent on a without-fee basis, in the context of a small community and in support of a worthy community project, the breach of the Undertaking was more understandable and that the Respondent's conduct should be viewed with greater latitude than in an ordinary commercial land transaction.

[36] The Panel cannot accept that this is a relevant consideration. The registration of a charge against a piece of real property is of prime significance. The public has a right to expect that all undertakings regarding the registration of instruments affecting land will be treated by members of the Law Society with utmost seriousness and attention to detail, irrespective of surrounding circumstances, including how they came to be signed or the worthiness of a public project. In deciding whether professional misconduct is established in respect of the breach of an undertaking, the underlying concerns are reliance and the consequences of the breach. In this case JL and LL placed the same sort of reliance upon the Respondent's undertaking that they would upon an undertaking given in relation to real property by any other lawyer in any other transaction. The consequences to them of the breach of the Undertaking have been significant.

[37] In short, the issue, as stated by the Respondent, is whether or not the "forgetting" is culpable. Our answer in this instance is "yes", although there may be circumstances where forgetting about an undertaking is not culpable. Here, no such circumstances are provided by the agreed facts.

[38] Further, consistent with *Law Society of BC v. Richardson* at para. [35], this Panel is not deciding that every breach of an undertaking constitutes professional misconduct. However, in the circumstances of this case, the Law Society has met its burden of showing that there was a marked departure from the standard of conduct expected of members of the legal profession that was blameworthy.

Conclusion

[39] The Panel is fully mindful of the seriousness for the Respondent of a finding of professional misconduct. That being said, given all of the considerations, the responsibility rests with the Respondent to ensure that he does not forget his professional obligations. Adherence to these responsibilities is the foundation upon which the legal profession is able to offer protection to the public in the weighty matters that are involved in almost all legal transactions. Fulfilling responsibilities in respect of undertakings is amongst the chief of these. JL and LL had every right to expect that the Undertaking provided by the Respondent would be honoured by him. This expectation was made all the more understandable by the fact that the Respondent underlined the key points of it for emphasis and provided it only eight months before it was breached.

[40] We find that the Respondent's conduct is of a serious nature that goes to the heart of his obligations as a lawyer. In these circumstances, it is clearly a marked departure from the standard expected of a lawyer.

[41] Therefore, we find that professional misconduct within the meaning of the *Legal Profession Act*, s. 34(4)(a) is made out on the balance of probabilities and is well-supported by previous decisions where a single breach of an undertaking also constituted professional misconduct.

[42] We therefore determine that the Respondent has committed professional misconduct.