

2010 LSBC 21

Report issued: September 9, 2010

Oral Reasons: July 21, 2010

Citation issued: November 20, 2009

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

**Donald Alexander Boyd**

Respondent

### **Decision of the Hearing Panel**

Hearing date: July 21, 2010

Panel: David Renwick, QC, Single Bencher Panel

Counsel for the Law Society: Maureen Boyd

Counsel for the Respondent: Leonard Doust, QC

## **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 I gave my oral decision to accept the admission and impose the disciplinary action. These are my reasons.

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

1. In the course of your representation of both a financial institution ("the Bank") and your ex-wife, JB, in connection with a mortgage provided by the Bank to JB, you released mortgage funds advanced by the Bank on or about March 10, 2008 without first obtaining and registering a mortgage against the property of JB as security, contrary to instructions from the Bank.

2. In the course of your representation of both the Bank and your ex-wife, JB, in connection with a mortgage provided by the Bank to JB, you failed to report to the Bank that you had not secured its position by releasing the mortgage funds advanced by the Bank on or about March 10, 2008 without first obtaining and registering a mortgage against the property of JB.

[3] Service of the citation was admitted both before me 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 British Columbia on December 19, 1985. He was first called in Alberta in 1976.

2. The Respondent practises primarily in the area of insurance and family law. He has never practised real estate law.
3. On or about February 13, 2005, the Respondent's adult son entered into a contract to purchase a condominium in a development in Vancouver. The purchase price was \$212,900.
4. On or about February 25, 2008, the vendor notified the son that the purchase of the condominium would complete on March 10, 2008. At this time, the son was residing in Europe, which complicated the completion of the purchase of the condominium. In particular, the son was unable to obtain a mortgage. As a result, the son arranged that his mother, who was the former wife of the Respondent, would handle the purchase for him and on March 5, 2008, the son assigned his interest in the contract of purchase and sale of the condominium to her.
5. In or about early March 2008, the former wife JB arranged to obtain financing for the purchase of the condominium by obtaining a mortgage from the Bank on her own property (the "Existing Property"). As there was a mortgage in favour of the Bank registered on the Existing Property (the "Prior Mortgage"), it was intended that the Prior Mortgage would be discharged and replaced by a new first mortgage for a larger amount.
6. The Respondent represented his former wife JB in the purchase of the condominium and the mortgage of the Existing Property. The Respondent also represented the Bank. The Respondent did not represent his former wife JB until after the arrangements referred to in paragraph 5 were made.
7. On March 6, 2008, the Bank sent mortgage instructions to the Respondent. In these instructions, the Bank instructed the Respondent to prepare and register a first mortgage on the Existing Property in the principal amount of \$304,900 (the "New Mortgage"). The Respondent received and read these instructions.
8. The completion date for the purchase of the condominium was moved to March 12, 2008.
9. On March 10, 2008, the Respondent received a bank draft from the Bank in the amount of \$304,900 (the "Mortgage Proceeds"), which the Respondent deposited to his trust account.
10. On March 13, 2008, the Respondent submitted the executed Form A Freehold Transfer of the condominium to the Land Title Office for registration, to transfer ownership from the vendor to his former wife.
11. On March 26, 2008 and March 28, 2008, the Respondent wrote to the Bank to request the amount required to payout the Prior Mortgage.
12. The Respondent disbursed a total amount of \$195,941.34 in order to complete the purchase of the condominium. The Respondent paid to the Bank \$85,821.38 in order to pay out the outstanding amount of the Prior Mortgage. On March 31, 2008, the Respondent paid \$13,615.19 from trust to his former wife JB. A balance of \$9,522.09 from the Mortgage Proceeds remained in his trust account.
13. At some point in or about the end of March or the beginning of April 2008, the Respondent ceased to act for the Bank in respect of the New Mortgage, without carrying out the instructions of the Bank. At that time, the former wife JB had not executed any documents with respect to the New Mortgage, nor had the Respondent taken any steps to register the New Mortgage or otherwise secure the Mortgage Proceeds advanced by the Bank.
14. Further, the Respondent did not advise the Bank at any material time that:

(a) he was withdrawing his services;

(b) his former wife JB had not executed any documents with respect to the New Mortgage, including a Form B; and

(c) the Respondent had disbursed most of the Mortgage Funds advanced by the Bank.

15. On April 28, 2008, a discharge of the Prior Mortgage was registered. This discharge was prepared, executed and submitted for registration by the Mortgagee Bank.

16. In December 2008, the former wife JB died under tragic circumstances. Prior to her death, she made all required payments on the New Mortgage.

17. On each of February 3, 2009 and March 11, 2009, the Bank wrote to the Respondent requesting a title report and duplicate registered mortgage. The Respondent did not reply to these letters.

18. On March 25, 2009, a representative of the Bank spoke by telephone with the Respondent, who by email on March 25, 2009 advised her that he would provide a letter later that day, but he did not.

19. On April 17, 2009, the Bank wrote to the Respondent to advise that it was investigating his failure to register the New Mortgage and requested that he forward a copy of his entire file. The Respondent did not reply to this letter.

20. There has been no financial loss to any party involved in this matter.

## Admission

[5] The Respondent admits that in the course of representing both the Bank and his former wife JB in connection with a mortgage provided by the Royal Bank to JB, he released the mortgage funds without first obtaining and registering a mortgage against the property of JB as security, contrary to the instructions of the Bank. The Respondent further admits that he failed to report to the Bank that he had not secured its position, by releasing the mortgage funds without first obtaining and registering a mortgage against the property of JB.

[6] The Respondent admits that his conduct constitutes professional misconduct.

## Issue

[7] 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 \$3,500 and pay costs in the amount of \$2,000, both of which amounts are to be paid by September 30, 2010.

## Discussion

[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 its members." This test has been relied upon and adopted in subsequent discipline cases and is accepted by this Panel as the appropriate test.

[9] In the recent review decision of *Re: Lawyer 10*, 2010 LSBC 02, the review panel further articulated the applicable test for professional misconduct established in *Martin* by stating at paragraph 31 that:

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 made findings that the conduct in question was a marked departure from the norm and that the member was culpable.

[10] In this case the Respondent failed to complete his obligations to his client the Bank, or even to advise it that he was withdrawing his services in circumstances in which he had disbursed the Mortgage Proceeds but not taken any steps to secure the Bank's interests.

[11] The mortgage instructions sent to the Respondent on March 6, 2008 set out the Bank's expectation that the Respondent was acting on its behalf to prepare and register the mortgage:

We confirm our engagement of your services for the preparation and registration of the following mortgage ... (the "Mortgage"), as indicated by the X:

X a first mortgage in accordance with the attached Approval of Mortgage and Cost of Borrowing Disclosure Statement ...

[12] The Respondent received the Mortgage Proceeds of \$304,900 four days later, on March 10, 2008. He disbursed \$195,941.34 of the Mortgage Proceeds on March 13 and 14, 2008, and paid \$85,821.38 back to the Bank to pay out the outstanding amount of his former wife JB's Prior Mortgage.

[13] However, the Respondent then ceased to act in the matter because of difficulties with his former wife JB. However, he did not advise the Bank that he was withdrawing his services, that the former wife JB had not executed any documents with respect to the Mortgage, or that he had disbursed the Mortgage Proceeds.

[14] Chapter 3 of the *Professional Conduct Handbook* sets out the standards of service of a lawyer. Rule 2 requires a lawyer to be "satisfied that he or she has the ability and capacity to deal adequately with any legal matters to be undertaken." Rule 3 requires a lawyer to keep the client reasonably informed, answer reasonable requests from the client for information, do the work in hand in a prompt manner so that its value to the client is not diminished or lost, and disclose all relevant information to the client.

[15] In this case, the Respondent failed to take any step to protect the legal position and interest of his client the Bank, even the relatively simple step of advising that he was withdrawing and the Bank would have to take steps to protect its own interests. The Respondent then compounded this abandonment of his client's interests by failing to respond to letters from the Bank dated February 3, 2009, March 11, 2009 and April 17, 2009.

[16] The case law shows that a failure to provide a reasonable quality of service to a client constitutes professional misconduct: *Law Society of BC v. Plested*, 2007 LSBC 45, *Law Society of BC v. Rai*, 2005 LSBC 37 and *Law Society of BC v. Williamson*, 2005 LSBC 04 and 2005 LSBC 19. In this case, the Respondent failed to provide any service to his client, the Bank, which is a marked departure from the standard expected of lawyers, and conduct for which the Respondent is culpable.

[17] The factors to be considered in assessing penalty are set out in the 1999 decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, 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] The misconduct in this case ultimately caused no financial harm, but did create a significant risk of harm for one of the Respondent's clients. The Respondent abandoned his client the Bank and the obligations he owed to it as its solicitor, which conduct may undermine the confidence of the Bank in the integrity of the profession.

[19] Further, there was a continuing nature to the misconduct as, when the Bank attempted to communicate with the Respondent in the early part of 2009, the Respondent did not respond to its letters. However, the Respondent did not receive any gain or benefit from his misconduct.

[20] The Respondent has been a lawyer in British Columbia for 25 years, and approximately nine years prior to that in Alberta.

[21] This citation is his first disciplinary hearing.

[22] The Respondent recognizes that he should not have acted for his former wife JB, but did so out of a sense of loyalty to his son to allow for the purchase of the condominium to proceed.

[23] Furthermore, there is little likelihood of any reoccurrence as he did not practise in the area of real estate law. His involvement was unique to the circumstances and therefore there is no need to deter him. The public humiliation of this matter being published is significant enough deterrence.

[24] The Respondent's Professional Conduct Record consists of two Conduct Reviews in 1993 and 2006, and a referral to the Practice Standards Committee in 2006.

[25] The Respondent's Professional Conduct Record is an aggravating factor.

[26] The case law shows that on a first citation for failing to perform legal services, a "small" fine is the appropriate disciplinary response.

[27] The case that is most similar to this matter is *Law Society of BC v. Rai*, 2005 LSBC 37, in which the respondent acted for a mortgagee and disbursed the funds without ensuring he could comply with the

mortgagee's instructions to obtain a valid mortgage registrable against the property as a first charge. He obtained a signed Form B, but the parties who signed it did not have a registrable interest in the property, and he did not have sufficient funds to pay out two prior mortgages in order to give his mortgagee client its required security interest. He then compounded this failure by not disclosing to the mortgagee client that he was in a conflict of interest when he became aware that he had insufficient funds to pay out both prior mortgages. Although the matter was resolved without loss, the hearing panel noted that a "troubling aspect of this case is that Mr. Rai did not appear to recognize that [the mortgagee] was his client." He was fined \$3,000 and referred to the Practice Standards Committee. Although there was an added element of conflict of interest that is not present in this matter, Mr. Rai did not have a professional conduct record.

[28] Similarly, in *Law Society of BC v. Campbell*, [1997] LSDD No. 58, the respondent delayed over a four-year period to obtain court approval of a personal injury settlement on behalf of an infant and also failed to respond reasonably promptly to communications from opposing counsel on that matter and on another matter. A fine of \$3,000 was accepted.

[29] *Law Society of BC v. Clendening*, 2007 LSBC 10, was provided both because it involves a similar element of delay (in the context of fulfillment of an undertaking) and because of the weight given to the prior conduct review concerning compliance with undertakings that the panel found was "unquestionably an aggravating factor". A fine of \$7,500 was ordered.

## Decision

[30] The Panel accepts the admission that the Respondent's conduct amounts to professional misconduct, and I also accept the proposed disciplinary action and impose the following:

1. a fine in the amount of \$3,500 payable by September 30, 2010; and
2. costs in the amount of \$2,000 payable by September 30, 2010.

[31] The Executive Director is instructed to record the Respondent's admission on the Respondent's Professional Conduct Record.