

2011 LSBC 02

Report issued: January 19, 2011

Oral Reasons: November 24, 2010

Citation issued: June 24, 2009

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

Sanjeev Sanj Rai

Respondent

Decision of the Hearing Panel

Hearing date: November 24, 2010

Panel: David Mossop, QC, Single Bencher Panel

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: William S. Clark and Scott Marcinkow

Background

[1] The Panel gave an oral decision on this matter on November 24, 2010. That decision suspended the Respondent for three months starting December 6, 2010 and ordered him to pay costs in the amount of \$11,500 according to a payment schedule. These are the written reasons.

[2] The decision of a panel is usually delivered along with the reasons. However, in this case, the decision was given before the reasons because the Law Society and the Respondent agreed that his suspension should start December 6, 2010. The Respondent needed to advise his clients of his suspension and make other arrangements to fulfill his responsibilities as a suspended member.

[3] The citation particularized 11 real estate transactions. The citation was amended on October 21, 2010 to include, *inter alia*, a 12th transaction. The Respondent admits notice and delivery of the amended citation through his counsel. Reference to the citation in these reasons means the citation, as amended.

[4] The Respondent admits that, on June 25, 2009, he was served through his counsel with the original citation and waives the requirements of Rule 4-15 (as it then read) of the Law Society Rules.

[5] The evidence is set out in detail in the Agreed Statement of Facts and proves all of the allegations in the citation. In summary, the evidence establishes that the Respondent represented multiple parties to 12 real estate transactions (the "Transactions") involving mortgage financing, referred to him by the same realtor over a one-year period from February 2004 to February 2005. The Transactions were fraudulent and part of a scheme designed by the realtor to obtain mortgage proceeds under false pretences. The Respondent failed to make any inquiries to assess the *bona fides* of the Transactions or his purchaser clients, who were not at arm's-length from the realtor. He failed to recognize the fraudulent nature of the scheme and Transactions notwithstanding the many red flags raised by the characteristics of the Transactions. In addition, he failed to disclose material facts to his lender clients, and failed to provide adequate legal advice

to and protect the interests of his purchaser and lender clients. He also abdicated his professional responsibility, by improperly delegating tasks to support staff and failing to supervise them, and represented various parties while in a conflict of interest.

[6] This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.

[7] This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

[8] This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

[9] The Panel finds, in this case, that the conditional admission is appropriate. In addition, the Panel finds that the proposed disciplinary action, including costs, is within the range of a fair and reasonable disciplinary action.

Agreed Statement of Facts

[10] The parties filed an 88 page Agreed Statement of Facts. The Panel has edited it to a summary form.

[11] Sanjeev Sanj Rai (the "Respondent") was admitted to the Bar of Province of British Columbia on May 23, 2001. He is no relation to the counsel for the Law Society.

[12] From May 2001 to July 2002, the Respondent practised law primarily as a criminal defence lawyer with Russell Chamberlain, QC, where he had completed his articles. In October 2003, the Respondent opened his own law firm in Surrey, British Columbia, and commenced practising real estate law.

[13] The Respondent is currently a practising member without any restrictions on his practice.

[14] However, from November 29, 2004 to May 3, 2007, the Respondent was under the jurisdiction of the Practice Standards Committee and subject to practice restrictions, details of which are set out below, as a result of a previous citation that was authorized on October 28, 2004 (the "2004 Citation").

[15] The 2004 Citation was authorized following the investigation of a complaint made by a mortgage company on February 13, 2004 alleging that the Respondent, who was representing the mortgage company in connection with the registration of a mortgage, disbursed funds advanced by the mortgage company without ensuring the borrowers had good and marketable title and that the mortgage company would have a valid first charge registered against the property.

[16] At the time the 2004 Citation was authorized, the Discipline Committee also referred the matter to three Benchers pursuant to Section 39 of the *Legal Profession Act* to consider whether the Respondent should be suspended or conditions imposed on his practice pending disposition of that citation.

[17] On November 25, 2004, a panel of three Benchers imposed the following conditions on the Respondent's practice:

1. We order that the Respondent, from and after December 6, 2004, and until relieved of this condition by the Practice Standards Committee, be required to conduct his real estate practice under the supervision of a practice supervisor who must be approved by the Practice Standards Committee and who must supervise the Respondent's practice pursuant to the terms and conditions of a Practice Supervision Agreement in the form of Exhibit 2 to these proceedings, as that Exhibit has been amended. We note that Mr. Ravinder Binpal is approved as a practice supervisor on an interim basis subject to the approval by the Practice Standards Committee in the normal course of its deliberations.
2. It is a further consent condition of the Respondent's continued practice that he submit to the jurisdiction of the Practice Standards Committee for a practice review or such other process as that Committee may decide.

[18] A Practice Standards file was subsequently opened. A Practice Supervision Agreement was entered into between the Respondent and Mr. Binpal, subject to approval by the Practice Standards Committee.

[19] At their meeting on December 2, 2004, the Practice Standards Committee ordered a practice review, ratified the Practice Supervision Agreement and approved Mr. Binpal as the practice supervisor.

[20] Mr. Binpal was not able to act as practice supervisor, and the Respondent entered into another Practice Supervision Agreement with another lawyer, Rand Buckley, dated December 6, 2004, subject to approval by the Practice Standards Committee.

[21] At their meeting on February 3, 2005, the Practice Standards Committee approved Mr. Buckley and ratified the Practice Supervision Agreement subject to various amendments required by the Committee.

[22] The Practice Supervision Agreement was accordingly revised and the revised Agreement dated February 28, 2005 was entered into by the Respondent and Mr. Buckley, as practice supervisor, on February 28, 2005 (the "PSA").

[23] The PSA contained, *inter alia*, the following terms:

- (a) The Respondent and the practice supervisor will review each real estate file that is uncompleted as of December 6, 2004 prior to final execution of documents to ensure the suitability of the documents and completeness of the preparation for the transaction.
- (b) The Respondent agrees to follow the advice of the practice supervisor on the conduct of his real estate files.
- (c) After the completion of each real estate transaction, the file shall be reviewed again by the practice supervisor within ten days of the completion date.
- (d) The practice supervisor will meet the Respondent to review post-completion files until the file is closed at least every ten days or more frequently at the discretion of the practice supervisor.
- (e) The Respondent will permit additional file reviews at any other time for any purposes connected

with the Respondent's practice as the practice supervisor may, in his discretion, request.

[24] The practice review ordered by the Practice Standards Committee was held on February 17, 2005, and a written report setting out various recommendations to improve the Respondent's standard of practice was issued on March 16, 2005. At their meeting on May 5, 2005, the Practice Standards Committee accepted the recommendations, which included the continuation of practice supervision, and ordered a follow-up practice review.

[25] The hearing of the 2004 Citation was held on August 24, 2005, at which time the hearing panel considered a Rule 4-22 conditional admission and consent to specified disciplinary action. The panel rendered its decision and issued its report on September 9, 2005 (see 2005 LSBC 37). The panel accepted the Rule 4-22 proposal and imposed a fine in the amount of \$3,000 and ordered costs payable in the amount of \$4,000. The panel also imposed conditions that mirrored the conditions previously imposed by the three Benchers:

[13] It is accordingly ordered that the Respondent:

...

c) until relieved of this condition by the Practice Standards Committee, is required to conduct his real estate practice under the supervision of a Practice Supervisor (Rand Buckley or any other Practice Supervisor approved by the Practice Standards Committee) who must supervise the Respondent's practice pursuant to the terms and conditions of a Practice Supervision Agreement in the form of the interim Supervision Agreement already executed by the Respondent;

d) until relieved of this condition by the Practice Standards Committee, remain under the direction of the Practice Standards Committee;

...

[26] The follow-up practice review ordered by the Practice Standards Committee was held on March 23, 2006, and a written report setting out various recommendations to improve the Respondent's standard of practice was issued on May 10, 2006. At their meeting on July 13, 2006, the Practice Standards Committee accepted the recommendations, released the Respondent and Mr. Buckley from the terms of the PSA, and ordered a further follow-up practice review.

[27] The further follow up practice review was held on February 22, 2007 and a written report setting out various recommendations to improve the Respondent's standard of practice was issued on March 16, 2007. At their meeting on May 3, 2007, the Practice Standards Committee accepted the recommendations and directed that the Respondent's practice standards file be closed.

Investigation and Citation

[28] The present citation was authorized following an investigation by the Law Society's professional conduct department that commenced as a result of:

(a) information received by the Law Society on May 9, 2005 from counsel to former clients of the Respondent that the Respondent was the solicitor involved in real estate transactions allegedly designed to perpetrate mortgage fraud; and

(b) a complaint dated October 4, 2005 from KB, a former client of the Respondent (see

Transaction #11 described below), alleging that the Respondent did not adequately advise or represent him in connection with a property purchase and acted for multiple parties to the transaction in a conflict of interest.

[29] The Law Society's investigation included an investigation of the Respondent's books, records and accounts conducted under an order made on May 13, 2005 by the then Vice-Chair of the Discipline Committee of the Law Society (the "4-43 Investigation"). The 4-43 Investigation was carried out by William Kinsey, an external auditor retained by the Law Society.

[30] The citation was authorized by the Discipline Committee on April 2, 2009 and issued on June 24, 2009.

Real Estate Transactions - Background Facts

[31] SK was a licensed real estate agent employed by a realty company in Surrey, British Columbia at all material times.

[32] From February 2004 to February 2005, SK referred to the Respondent the 12 Transactions, 11 of which completed, that involving the sale of seven units in two apartment buildings. SK referred to the Respondent a 13th real estate transaction, which related to a different unit and was initially scheduled to complete on August 17, 2004. This transaction was canceled and is not the subject of the citation.

[33] At around the time SK referred the first of the Transactions, SK requested that the Respondent represent him in connection with the incorporation of a numbered company, which the Respondent did. The numbered company was incorporated by the Respondent in the Province of British Columbia on or about May 4, 2004 with a registered and records office SK's residence in Surrey, British Columbia. SK was the sole director and officer of the numbered company at all material times.

[34] The Transactions were not *bona fide*. The Transactions were part of a scheme designed by SK to obtain mortgage proceeds under fraudulent pretences.

Summary of Real Estate Transactions and Admissions

[35] SK was the sole real estate agent involved in all of the Transactions with the exception of Transaction #7. SK's associate was the real estate agent involved in that transaction, and SK was one of the two purchasers.

[36] SK referred each of the Transactions to the Respondent after the respective Contracts of Purchase and Sale and Addendums, where applicable, had already been purportedly executed by the parties.

[37] All of the properties that were the subject of the Transactions were condominiums. On SK's instructions, the Respondent did not take any instructions from his purchaser clients to perform any strata specific searches.

[38] The Transactions can be grouped into the following categories:

- (a) Transactions #1, 2, 4, 9, 10 and 12 involved a single Contract of Purchase and Sale, the parties to which were not arms length from SK (the "Single Contract Sales").
- (b) Transaction #3 involved a single Contract of Purchase and Sale and SK was a party to the Contract as one of two purchasers (the "SK Sale").
- (c) Transactions #5, 6, 7, 8, and 11 involved two Contracts of Purchase and Sale. The second

contract price was significantly higher than the first contract price. The numbered company was the purchaser in connection with the first contract and vendor in connection with the second contract and the original vendor and ultimate purchaser were not arms length from SK. The Respondent treated these transactions as sales between the original vendor and ultimate purchaser on the basis of a purported assignment, although there were no standard written assignment agreements prepared (the "Purported Assignments").

[39] In all of the Single Contract Sales, the Respondent represented the purchaser and lender (Transactions #1, 9 and 12) or the vendor, purchaser, and lender (Transactions #2 and 4) with the exception of Transaction #10 for which the Respondent represented the vendor only. Transaction #12 was the only transaction that the Respondent did not complete as he ceased acting for his purchaser and lender clients prior to closing.

[40] The Single Contract Sales that completed and in which the Respondent represented multiple parties (Transactions #1, 2, 4 and 9), shared the following characteristics, which the Respondent was aware of:

- (a) The property had been owned by the vendor only a short time and was being flipped for a significantly greater amount than the assessed value of the property. Accordingly, there was a significant escalation in price in a relatively short time period.
- (b) The contracts had short closings.
- (c) The contracts did not contain any subject clauses, notwithstanding the fact that the purchasers required financing in order to complete the purchase.
- (d) The mortgages sought and obtained by the purchasers were double the assessed value of the property and were high ratio mortgages based on the contract price.
- (e) The contracts stipulated that the deposit amounts were to be paid directly to the vendor. The Respondent did not make any inquiries as to why the deposits were being paid directly to the vendors or whether they were in fact paid.
- (f) The only funds that the purchasers purported to contribute towards the purchase of the properties were the deposits that were purportedly paid directly to the vendors. However, the Respondent made no inquiries as to whether the deposits were in fact paid. In many cases, the deposits were not paid.
- (g) If the deposits were not paid by the purchasers and the purchasers did not otherwise contribute any funds towards the purchase of the properties, the purchase price of the contract was effectively reduced and the mortgage ratio increased to over 100 per cent.
- (h) Real estate commissions were paid in amounts that the Respondent ought to have known were significantly greater than industry standard, and the commissions were funded from the mortgage proceeds. SK was the beneficiary of these commissions.

[41] The SK Sale had the same characteristics as the Single Contract Sales described above, with the exception that no real estate commission was paid. However, since SK was one of the purchasers, he received the benefit of the resulting excess mortgage proceeds.

[42] With respect to three of the Single Contract Sales and the SK Sale (Transactions #1 through 4), the Respondent did not prepare all of the relevant documentation, meet with all of the clients, or oversee all of

the closings, because he was in India for approximately three weeks in February 2004. Instead, he improperly delegated various duties to his staff who worked on these Transactions unsupervised for the most part. The closing documents required to be executed by his clients were executed before another lawyer or notary public.

[43] With respect to the Purported Assignments, the Respondent represented the original vendor, ultimate purchaser and lender in Transactions #5, 6 and 7. SK was one of the ultimate purchasers in Transaction #7. The Respondent represented the ultimate purchaser and lender in Transactions #8 and 11. Mortgages were obtained by the Respondent's purchaser clients in all of the Purported Assignments on the basis of the second contract purchase price.

[44] The Respondent prepared the closing documents for execution by the original vendors and ultimate purchasers in connection with all of the Purported Assignments. He prepared the vendor's closing documents, including the Vendor's Statement of Adjustments, on the basis of the first contract purchase price. He prepared the purchaser's closing documents, including the Purchaser's Statement of Adjustments, on the basis of the second contract purchase price. As a result and since the mortgage obtained was based on the purchase price set out in the second contract, the mortgage proceeds were in excess of the amount required to satisfy the obligations owed to the vendor. The ultimate beneficiary of the excess mortgage proceeds was SK.

[45] The Purported Assignments shared the following characteristics, which the Respondent was aware of:

- (a) The property had been owned by the vendor only a short time and/or was being flipped for a significantly greater amount than the assessed value of the property and/or when the property was purchased by the vendor. Accordingly, there was a significant escalation in price in a relatively short time period.
- (b) The contracts had short closings (except Transactions #8 and 11).
- (c) Two contracts were purportedly executed at around the same time; the first contract was purportedly executed by the registered owner as vendor and the numbered company as purchaser, and the second contract was purportedly executed by the numbered company as the vendor and by an ultimate purchaser who was not at arm's length from SK.
- (d) Both contracts had the same completion date, and the transaction was treated as a sale between the original vendor and ultimate purchaser without the standard written assignment agreement.
- (e) The purchase price set out in the second contract was significantly higher than the purchase price set out in the first contract, and the ultimate purchaser obtained a mortgage in order to complete the purchase based on the inflated purchase price set out in the second contract. The mortgage amount was significantly greater than the assessed value of the property or what was needed to complete the initial contract.
- (f) The contracts did not contain any subject clauses, notwithstanding the fact that the purchasers required financing in order to complete the purchase.
- (g) The second contracts stipulated that the deposit amounts were to be paid directly to the numbered company. The Respondent did not make any inquiries as to why the deposits were being paid, why they were being paid directly to the numbered company or whether they were in fact paid.

(h) The only funds that the purchasers purported to contribute towards the purchase of the properties were the deposits that were purportedly paid directly to the vendors. However, the Respondent made no inquiries as to whether the deposits were in fact paid. In many cases, the deposits were not paid.

(i) Even on the basis of the second contract purchase price, the mortgage was a high ratio mortgage. If the deposits were not paid by the purchasers and the purchasers did not otherwise contribute any funds towards the purchase of the property, the purchase price of the second contract was effectively reduced and the mortgage ratio increased to over 100 per cent.

(j) The vendors swore statutory declarations that the Respondent ought to have known were false or misleading with respect to the amount of the purchase price.

(k) The purchasers swore statutory declarations that the Respondent was not in a position to determine were false or misleading with respect to statements asserting that the purchaser provided some funds towards the purchase of the property because the Respondent had made no inquiries to determine whether the statements were truthful (Transactions #5 and 6 only).

(l) The Form A Transfers executed by the vendors and registered in the Land Title Office contained false information regarding market value and consideration.

(m) Real estate commissions and/or assignments fees that were funded from the mortgage proceeds were paid. SK or his associate was the beneficiary of these commissions or fees.

(n) The closing documents prepared for execution by the vendor were based on the initial contract price and made no reference to assignment fees paid.

[46] The Respondent admits that, by representing the various parties in connection with all of the Transactions, he assisted SK and/or others in a scheme in which mortgage funds were obtained from his lender clients and disbursed when he ought to have known that the scheme was fraudulent, as particularized in paragraph 1 of the citation.

[47] The Respondent admits that he acted for more than one party with different interests in Transactions #2, 3, 4, 6, 7, 9, and 10 despite being in a conflict of interest as particularized in paragraph 2 of the citation. In particular, he admits that he:

(a) could have better explained to the parties in Transactions #2, 3, 4, 6, and 7 the issues involved in joint representation in the circumstances;

(b) could have better explained the need for the parties to obtain independent legal advice in Transactions #2, 3, 4, 6, and 7;

(c) failed to give undivided loyalty to his clients and preferred the interests of one client over the interests of other clients in Transactions #2, 3, 4, 6, and 7;

(d) treated Transactions #3, 6, and 7 as simple conveyances when they were not because:

(i) Transactions #6 and 7 were not simple conveyances because of the purported assignments, and

(ii) Transactions #3 and 7 were not simple conveyances because SK was a party; and

(e) acted for a client against the interest of the opposing party in Transaction #10 when the opposing party was a current client with respect to Transaction #9 without obtaining the informed consent of both clients.

[48] The Respondent admits that he failed to disclose material facts to his lender clients in Transactions #1 through 9 and 11 as particularized in paragraph 3 of the citation.

[49] The Respondent admits that he failed to serve his lender clients in Transactions #1 through 9 and 11 in a conscientious, diligent and effective manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. He admits that, in particular, he failed to provide adequate legal advice and/or failed to protect his clients' interests, as particularized in paragraph 4 of the citation.

[50] The Respondent admits that he failed to serve his purchaser clients in Transactions #1 through 9 and 11, in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. He admits that, in particular, he did not advise them of the legitimacy of the Transactions, including the purported assignments and mortgages obtained, and safeguard the clients from becoming dupes of SK, and thereby failed to provide adequate legal advice and failed to protect his clients' interests, as particularized in paragraph 4 of the citation.

[51] The Respondent admits that he abdicated his professional responsibility by failing to maintain responsibility for the conduct of files, improperly delegating tasks to staff, and/or failing to adequately supervise staff, in connection with Transactions # 1 through #4, as particularized in paragraph 5 of the citation.

[52] The Respondent further admits that he engaged in professional misconduct in respect of his conduct.

[53] The mortgages obtained by the Respondent's purchaser clients in connection with the following Transactions went into default, resulting in foreclosure proceedings commenced by the lender clients and/or civil proceedings commenced by the purchaser clients:

(a) Transaction #7, the registered owner of which and mortgagor was HG along with SK. The Bank commenced foreclosure proceedings, and the property was sold with sale proceeds going to the Bank. The Bank obtained a further judgment against HG and SK in the amount of approximately \$60,000. HG commenced a civil action against various parties including SK and the Respondent. As of September 3, 2010, this action was inactive.

(b) Transaction #8, the registered owner of which and mortgagor was RP. The Bank commenced foreclosure proceedings, and the property was sold with sale proceeds going to the Bank. The Bank obtained a further judgment against RP in the amount of approximately \$80,000. RP commenced a civil action against various parties including SK and the Respondent. As of September 3, 2010, this action was inactive.

(c) Transaction #9, the registered owner of which and mortgagor was NB. The Bank commenced foreclosure proceedings, and the property sold with sale proceeds going to the Bank. The Bank obtained a further judgment against NB in the amount of approximately \$28,000.

(d) Transaction #11, the registered owner of which and mortgagor was KB. The Bank

commenced foreclosure proceedings and the property was sold with sale proceeds going to the Bank. There was a shortfall of approximately \$67,000. KB also commenced a civil action against various parties including SK and the Respondent. As of September 3, 2010, this action was inactive .

[54] In addition, the mortgage obtained by the purchaser in connection with Transaction #10, in which the Respondent represented the vendor, went into default and the Bank commenced foreclosure proceedings against the purchaser, NB. The property was sold with the sale proceeds going to the Bank.

[55] With respect to Transaction #2, in which the Respondent represented the vendor, purchaser and lender, the registered owner and mortgagor was RP. The mortgage did not go into default as RP continued to make the mortgage payments until October 2009, at which time he sold the property and paid out the mortgage.

[56] With respect to Transaction #6, in which the Respondent represented the vendor, purchaser and lender, the registered owner and mortgagor was GD. No foreclosure proceedings were commenced and GD sold the property in October 2007.

Analysis

[57] The Respondent admits the underlying facts in this case, as set out in the Agreed Statement of Facts. He admits each of the allegations contained in the citation and that his conduct in respect of each is professional misconduct. With respect to the mortgage fraud allegation, he admits that he ought to have known the scheme was fraudulent. He does not admit to knowing participation in, or facilitation of, mortgage fraud. The Law Society accepted that this admission is consistent with the evidence and did not pursue a finding that the Respondent knew at the time that the transactions were fraudulent.

[58] The disciplinary action consented to by the Respondent and the Law Society consists of:

- (a) a three month suspension, commencing on December 6, 2010; and
- (b) costs in the amount of \$11,500 payable in four equal instalments, with the last payment to be made on or before March 24, 2012.

[59] At its meeting on November 4, 2010, the Discipline Committee considered and accepted this proposal. Pursuant to Rule 4-22(4), counsel for the Law Society was instructed to recommend the acceptance of the proposal to this Hearing Panel.

Discipline Violations

[60] The cumulative effect of all of the Respondent's shortcomings with respect to the Transactions was that he facilitated the perpetration of mortgage fraud. His conduct in respect of each allegation is a marked departure from that conduct the Law Society expects of its members and, accordingly, meets the test for professional misconduct set out in *Law Society of BC v. Martin*, 2005 LSBC 16. See also *Law Society of BC v. Nielsen*, 2009 LSBC 08 at paras. 15-23 and *Purewal v. Law Society of Upper Canada*, 2009 ONLSAP 10 at para. 34.

Appropriateness of Disciplinary Action

[61] The proposed disciplinary action is appropriate in this case, bearing in mind the purpose of discipline

proceedings, which is not to punish offenders, but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession, and having regard to the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17:

- (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.

Nature and Gravity of Misconduct

[62] The misconduct in this case is extremely serious, notwithstanding the Respondent did not knowingly facilitate mortgage fraud. The public relies on members of the profession to be vigilant and guard against becoming dupes of fraudsters.

Respondent's Background and Prior Discipline

[63] The Respondent was called to the Bar in British Columbia in May 2001. For approximately one year after his call, he practised law primarily as a criminal defence lawyer with Russell Chamberlain QC, with whom he had articulated. In October 2003, the Respondent opened his own law firm and commenced practising in real estate law. This may be the start of his problems. It is very difficult for a recently called lawyer to switch from a firm doing primarily criminal law to setting up his own practice doing real estate law.

[64] The Respondent has a Professional Conduct Record that consists of seven entries, all of which relate to disciplinary and remedial action taken as a result of a citation issued in October 2004 (the "2004 Citation"). The particulars of his Record are summarized below:

- (a) The 2004 Citation was authorized following the investigation of a complaint made by a mortgage company on February 13, 2004 alleging that the Respondent, who was representing the mortgage company in connection with the registration of a mortgage, disbursed funds advanced by the mortgage company without ensuring the borrowers had good and marketable title and that

the mortgage company would have a valid first charge registered against the property.

(b) At the time the 2004 Citation was authorized, the Discipline Committee also referred the matter to three Benchers pursuant to section 39 of the *Legal Profession Act* to consider whether the Respondent should be suspended or conditions imposed on his practice pending disposition of that citation.

(c) On November 25, 2004, three Benchers imposed conditions on the Respondent's practice, including practice supervision, practice reviews or other process as required by and under the jurisdiction of the Practice Standards Committee.

(d) The hearing of the 2004 Citation, which proceeded on a conditional admission under Rule 4-22, was held on August 24, 2005, and the panel issued its report on September 9, 2005 (2005 LSBC 37). The panel accepted the Rule 4-22 proposal, imposed a fine in the amount of \$3,000 and imposed conditions mirroring those ordered by the three Benchers on November 25, 2004.

(e) As a result, the Respondent was under the jurisdiction of the Practice Standards Committee from November 29, 2004 to May 3, 2007. His practice was supervised by another lawyer from December 6, 2004 to July 13, 2006. He was the subject of a practice review on February 17, 2005, follow-up review on March 23, 2006 and further follow-up review on February 22, 2007. Following each practice review, the Practice Standards Committee adopted various recommendations made by the practice reviewers aimed at improving the Respondent's standard of practice. His Practice Standards file was closed on the Committee's direction on May 3, 2007.

Range of Sanctions Imposed in Similar Cases

[65] In British Columbia, the only prior discipline decision concerning a lawyer unknowingly facilitating mortgage fraud is *Law Society of BC v. Nielsen*, 2009 LSBC 08. In that case, the respondent admitted that he ought to have known that the transactions were fraudulent and his conduct in that regard constituted incompetent performance of duties. He also admitted professional misconduct in respect of allegations of acting in a conflict of interest and failing to advise lender clients of material facts and further admitted breach of various accounting rules. The hearing panel accepted a Rule 4-22 conditional admission and imposed a six-month suspension. In doing so, the panel considered relevant authorities (from other jurisdictions for the most part) and noted that the range of sanctions for this type of misconduct is a suspension of from three to twelve months.

[66] In *Law Society of BC v. Bohun*, [2003] LSBC 08, the respondent was duped by a client who was soliciting money from third parties for a fraudulent investment scheme. The respondent did not know the scheme was fraudulent. However, he made representations to the third parties that were reckless. The panel imposed a 12 month suspension.

[67] Cases from other jurisdictions involving unknowing facilitation of mortgage fraud or other fraudulent schemes have resulted in suspensions ranging from one to twelve months. The cases are set out below, in ascending order of length of suspension imposed:

(a) In *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD No. 44, the respondent allowed himself to become a tool or dupe of his unscrupulous client by allowing money obtained through a fraudulent scheme to pass through his trust account and other accounts he controlled. By doing so, he facilitated money laundering. He was suspended for one month.

(b) In *Law Society of Manitoba v. Ward*, [1997] LSDD No. 60, the respondent failed to disclose to his lender client, a trust company, relevant particulars of a real estate transaction which was a property flip, in which he also acted for the purchaser. He was suspended for 60 days.

(c) In *Law Society of Upper Canada v. Peddle*, [2001] LSDD No. 64, the respondent failed to be on guard against becoming the tool or dupe of his client while acting as an escrow agent for a group of investors. He was suspended for three months and ordered to pay a fine of \$5,000.

(d) In *Law Society of Upper Canada v. Verbeek*, [2007] LSDD No. 121, the respondent, who was cited for four allegations, one of which alleged that he knowingly participated or assisted in dishonest or fraudulent conduct to obtain mortgage funds under false pretences in connection with 16 real estate transactions. The respondent denied knowing participation and admitted two of the allegations that related to his acting in a conflict of interest, failure to disclose facts to his lender clients and failure to serve his lender clients. The hearing panel accepted the respondent's evidence and held that two of the allegations were proven. The panel dismissed two allegations, including the allegation that the respondent knowingly assisted or participated in the fraud. The panel ordered a three month suspension and practice review upon resumption of practice. The panel's decision dismissing the two allegations was upheld on appeal: See [2008] LSDD No. 54.

(e) In *Law Society of Upper Canada v. Senjule*, [2008] LSDD No. 15, the hearing panel held that several allegations were proven arising out of the respondent's representation of various parties in 27 real estate transactions in which mortgage funds were obtained fraudulently, including acting in conflict of interest, failing to disclose material facts to her lender clients and failing to serve the lender clients. The panel dismissed allegations that she knowingly participated in mortgage fraud and failed to be honest and candid with her lender clients when advising them in connection with the transactions. The panel suspended the respondent for five months and ordered conditions upon her return to practice and made other remedial orders.

(f) In *Law Society of Upper Canada v. Tucciarone*, [2005] LSDD No. 55 and [2005] LSDD No. 88, the respondent represented multiple parties, including lenders, in 16 real estate transactions in which mortgage proceeds were obtained fraudulently. He failed to recognize various red flags that should have alerted him to the fraudulent scheme to defraud the bank. However, the panel could not conclude on the evidence that the respondent was a knowing participant in the fraudulent scheme. The panel imposed a six month suspension.

(g) In *Yungwirth v. Law Society of Upper Canada*, [2004] LSDD No. 11, the respondent appealed the decision of the hearing panel ordering a 12-month suspension and practice supervision for a two-year period following his return to practice. The respondent represented multiple parties, including lenders, in nine residential real estate flip transactions in which mortgage funds were obtained based on inflated prices set out in the second contracts. The respondent was not a knowing participant in the fraud. However, he made knowing misrepresentations to and purposely sought to mislead clients. He failed to follow specific instructions from the lender clients and knowingly participated in the swearing of false affidavits. The 12-month suspension was upheld. However, the practice supervision order was overturned.

Conclusion

[68] Given the nature of the misconduct and number of Transactions, the appropriate disciplinary response

is a suspension.

[69] With respect to the length of suspension, the authorities establish a broad range. The three-month suspension proposed by the Respondent and the Law Society falls at the lower end of that range. In other circumstances, the Panel would have rejected the proposed suspension of three months, as this length of time would not be in the range of a fair and reasonable penalty, considering the seriousness of the violations and previous discipline decisions. A more appropriate suspension would have required a suspension much longer than three months. However, the Panel accepts the proposed penalty of three months for the following reasons.

[70] First, the Transactions occurred in a rising real estate market and at a time when there was minimal, if any, publicity or information about fraudsters targeting lawyers to facilitate mortgage fraud. The earliest Law Society publication located alerting the profession specifically to mortgage or "value" fraud was in the April-May 2005 issue of the *Benchers' Bulletin*, after the Transactions in question. The *Professional Conduct Handbook* provision (Chapter 4, Rule 6) that states that a lawyer must not engage in activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, and the related footnote referencing a lawyer's duty to be on guard against becoming the tool or dupe of unscrupulous persons, were added in March 2005.

[71] Although the present Chapter 4, Rule 6, was not in force at the relevant time, there were other general provisions of the *Professional Conduct Handbook* in force at the time that caught the above Transactions. These include:

Chapter 1, Rule 3(5):

(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

Chapter 1, Rule 5(4):

(4) No client is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the state, or disrespect for the judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

Chapter 2, Rule 1:

1. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.¹

Chapter 4, Rule 6:

6. A lawyer shall not knowingly assist a client to make, receive or participate in a fraudulent conveyance, preference or settlement.

Chapter 8, Rule 1(b) from "The Lawyer As Advocate"

1. A lawyer shall not:

- (b) knowingly assist the client to do anything or acquiesce in the client doing anything which is dishonest or dishonourable,

Chapter 10, Rule 1:

1. A lawyer shall sever the solicitor-client relationship or withdraw as counsel if:
 - (a) discharged by the client,
 - (b) instructed by the client to do something inconsistent with the lawyer's duty to the court,
 - (c) the client is taking a position solely to harass or maliciously injure another,
 - (d) the lawyer's continued involvement will place the lawyer in a conflict of interest, or
 - (e) the lawyer is not competent to handle the matter.

[72] Second, prior discipline decisions, especially those from other jurisdictions, are not always easily reconciled, nor are they binding on this Panel. However, they do provide some guidance. The cases referred to herein that resulted in suspensions of less than three months are less egregious than the misconduct in the present case. In reconciling the suspension proposed in this case with that ordered in *Nielsen, supra* (six months), it is accepted that some of the aggravating factors that were present in *Nielsen* are not present in this case. In particular, Mr. Nielsen turned his mind to some of the red flags present and made inquiries with a Law Society Practice Advisor yet failed to act on the advice given.

[73] Third, while the Respondent has a Professional Conduct Record, that Record is also a mitigating factor in the circumstances of this case. As described above, the Respondent was under the jurisdiction of the Practice Standards Committee from November 29, 2004 to May 3, 2007 and was subject to practice supervision and practice reviews. The Transactions that are the subject of this citation occurred between February 2004 and February 2005, thereby overlapping with the period of supervision. The Respondent's involvement in Practice Standards supports disciplinary action at the lower end of the range for the following reasons:

- (a) A number of the Transactions took place while the Respondent was under the jurisdiction of the Practice Standards Committee.
- (b) The misconduct in this case occurred between 2004 and 2005. As in the 2004 Citation, the misconduct stems from the Respondent's inexperience in the area of real estate law. As a result of Practice Standards involvement, the Respondent has improved his standard of practice. By closing its file, the Practice Standards Committee has indicated it has no further concerns about the Respondent's ability to practice in the area of real estate law.

[74] Fourth, the Respondent has acknowledged the misconduct and cooperated with the Law Society's investigation from the outset. He indicated his willingness to admit the misconduct at the earliest opportunity and has saved the Law Society considerable resources, including Benchers' time, that otherwise would have been required to prove the allegations.

[75] Fifth, a lengthier suspension is not required for specific deterrence and the suspension proposed gives appropriate weight to and recognition of the Respondent's remedial efforts. The Respondent continues to practise real estate law, and the Law Society has not received any further valid complaints concerning his

practice.

[76] Sixth, the misconduct was not motivated by greed or personal gain and did not result in any financial benefit to the Respondent beyond the modest fees billed for the work performed.

[77] Next, it appears that the lenders who may have suffered any loss as a result of the Respondent's conduct have recovered their losses. None of the lenders made a complaint to the Law Society against the Respondent. It is unknown to what extent any clients have suffered a loss as a result of the Respondent's conduct. Many of the clients did not make a complaint to the Law Society and chose not to cooperate with the Law Society's investigation.

[78] Finally, counsel for the Respondent categorized this mortgage fraud scheme as a sophisticated one. He stressed that the fraud took place over a 12-month period (approximately) and multiple parties were involved. The scheme also took place during a rising real estate market. In addition, he categorized the realtor who perpetuated the fraud as experienced and sophisticated. The Law Society did not object to this characterization.

Costs

[79] An order of costs in the amount of \$11,500 is reasonable in this case, having regard to the factors set out in *Law Society of BC v. Racette*, 2006 LSBC 29 at paragraphs 13 and 14. Those factors are:

- (a) the seriousness of the offence;
- (b) the financial circumstances of the Respondent;
- (c) the total effect of the penalty, including possible fines and/or suspensions; and
- (d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[80] The costs amount represents approximately 25 per cent of counsel and Rule 4-43 investigation fees and is appropriate given that costs are currently sought and generally ordered on the basis of recovery of 30 to 40 per cent, and the reduction to 25 per cent is appropriate in recognition of the Rule 4-22 conditional admission, which significantly reduces the amount of Benchers resources required for this hearing, as well as the fact that the Rule 4-43 investigation was broader than the matters the Respondent was ultimately cited for.

[81] The Respondent should be permitted a reasonable amount of time to pay the costs. The parties have submitted a fair and reasonable payment schedule.

Protection of the Public

[82] Fraudsters have always existed. Fraudsters will also attempt to use lawyers in their schemes. Lawyers have an obligation to be vigilant. The mortgage fraud scheme described above has been brought to the attention of the profession since April, 2005. This decision and reasons are another educational notice to the profession. If a member of the profession, in the future, gets involved in a similar mortgage fraud scheme, he or she will be required to give a full explanation. That same lawyer may face an even longer suspension than the one imposed here.

[83] If one member of the public suffers a financial loss on account of a mortgage fraud scheme, it is a tragedy. However, the Law Society discipline procedure is not the forum to seek compensation. The Lawyers Insurance Fund is the proper forum for those who suffer financial loss. If a member of the public

suffers financial loss on account of the misbehaviour of a lawyer involved in a fraudulent scheme, that member of the public may have a financial claim against the offending lawyer. All lawyers in British Columbia are covered by a mandatory insurance scheme. Millions of dollars have been paid out of the Lawyers Insurance Fund because lawyers have made mistakes. In many cases, such payments have been made without the matter going to trial. This is an added protection for the public.

[84] To sum up, the Law Society of British Columbia has three distinct ways of protecting the public from fraudsters using the services of lawyers. The first and most important is an educational function. The Law Society is constantly advising lawyers about any fraudulent schemes. Secondly, the Law Society disciplines lawyers who are not vigilant. This action can include reprimands, fines, suspensions and even disbarment. Thirdly, the Lawyers Insurance Fund ensures there is money available in appropriate cases to members of the public who suffer financial loss because of the actions of lawyers who do not live up to their legal responsibilities.

[85] Finally, the Panel believes all of us have to be vigilant about fraud. Fraudsters are like computer hackers. They are constantly looking for ways to get around security systems.

summation of the Orders Made

[86] The Panel orders as follows:

- (a) a three-month suspension commencing on December 6, 2010;
- (b) costs in the amount of \$11,500 payable in four equal installments with the last payment to be made on or before March 24, 2012.

[87] Costs are ordered to be paid according to the following schedule:

1. The first payment of \$2,875 to be paid on or before March 24, 2011.
2. The second payment of \$2,875 to be paid on or before July 24, 2011.
3. The third payment of \$2,875 to be paid on or before November 24, 2011.
4. The fourth and final payment of \$2,875 to be paid on or before March 24, 2012.

[88] The Executive Director is instructed to record the Respondent's admissions on his professional conduct record. Publication of the circumstances summarizing the admissions will be made under Rule 4-38, and such publication will identify the Respondent.