2011 LSBC 04
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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

Hearing date: November 2, 2010

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

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

Background

[1] In our decision on the Facts and Verdict, *Law Society of BC v. McRoberts* 2010 LSBC 17, (the "Decision"), we determined that the Respondent breached an undertaking and therefore engaged in professional misconduct.

[2] During the disciplinary action phase of the hearing, counsel for the Respondent brought to our attention paragraph 36 of the Decision. The Panel wishes to clarify its expression in paragraph 36:

> The consequences to them of the breach of the undertaking have been significant.

[3] The expression means nothing more and nothing less than that the finding that the registration of a charge on the title is a significant consequence, in and of itself.

[4] The Panel will state the position of the Law Society and then the position of the Respondent on disciplinary action. We will then give our analysis.

Executive Summary

[5] The Law Society submitted that the appropriate disciplinary action in this case is a fine of $2,500. The Law Society also sought an order of costs payable by the Respondent in the amount of $4,000, payable on such reasonable terms as the Respondent may request.

[6] The Respondent's position was the fine should be $1,000 and that the $4,000 costs award should be reduced, as a significant portion of the hearing focused upon matters important not only to the Respondent but to the profession generally.

[7] The Panel has decided to impose a fine of $1,000 and costs in the amount of $2,000.

Submissions of the Law Society

Factors in Determining Penalty

[8] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. This purpose is recognized in the following often-cited passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, Toronto: Carswell, 1993 at p. 26-1:

> The purpose of the law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve the public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[9] The decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 sets out a non-exhaustive list of factors that may be considered by a hearing panel in determining the appropriate disciplinary action. They need not be repeated here.

Factors Related to the Misconduct

[10] A breach of undertaking is considered a serious form of misconduct. In *Law Society of BC v. Lee*, [2002] LSBC 29, the hearing panel commented that (para. 21):

> Undertakings ensure that members of the public, may, through their counsel or otherwise, freely surrender control over their affairs to an adversary, confident in the knowledge that the lawyer who has assumed the obligation will keep his or her promise. The beneficiary of an undertaking is entitled to require strict compliance with the terms imposed, and it is no answer to such a person that the lawyer forgot, misunderstood or otherwise failed to comply.

[11] The Law Society submitted that there are some aggravating factors in this case:

(a) The undertaking was offered, not imposed: Decision, para. [5](8);

(b) The undertaking was given to unrepresented parties in circumstances in which they were entitled to rely on it: Decision, paras. [32] and [36];

(c) The Respondent relied on the advice of his client that LL and JL had consented to registration of the easement: Decision, para. [34].

[12] The Law Society submitted that the following factors related to the misconduct ought to be regarded as neutral, being neither aggravating nor mitigating:

(a) The fact that the Respondent did not seek to rectify the breach should be treated as a neutral factor. In this case, the evidence suggests that he was not asked to remove the easement from title, and his ability to do so may have been circumscribed by the subsequent commencement of a legal action by LL in 2004: Decision, para. [20];

(b) The fact that the Respondent did not admit that his breach of undertaking constituted professional misconduct should be treated as a neutral factor, as he is entitled to defend the allegation

against him.

Factors Related to the Respondent

[13] The Law Society submitted that the following were mitigating features in this case in relation to the Respondent:

(a) The Respondent made admissions of fact, and in particular, he admitted that he gave the undertaking, was bound by it and that he breached it: Decision, paras. [5](18) and [30];

(b) The Respondent did not intend to avoid or evade the undertaking he gave; he breached the undertaking because he forgot he had given it: Decision, para. [19].

[14] The Respondent has a Professional Conduct Record, which consists of:

(a) a Conduct Review in December 1996 related to a letter the Respondent wrote to a newspaper, which "contained ill considered criticism of a Judge and another lawyer";

(b) a Conduct Review in January 1998 regarding his failure to consider a potential conflict of interest at the commencement of a joint retainer and his intemperate language in correspondence related to that matter; and

(c) a referral to the Practice Standards Committee resulting in that Committee making a number of recommendations in 2002. The Practice Standards Committee closed the file in 2005.

[15] The Law Society submitted that the Respondent's Professional Conduct Record is not a significant aggravating factor for the following reasons:

(a) The misconduct is not of the same kind as occurred in this matter; and

(b) The breach of undertaking in this matter occurred in June 1996 and therefore occurred prior to any of the disciplinary or remedial action in the Professional Conduct Record.

[16] The Respondent tendered a number of letters in the nature of character references. The Law Society submitted that little weight should be put on these references in determining the appropriate disciplinary action because his good character and trustworthiness do not distinguish him from other respondents. See *Law Society of BC v. Richardson*, 2008 LSBC 05, and *Re: Lawyer 7*, 2008 LSBC 06. Both respondents in these cases had been practising for decades without prior discipline.

[17] For example, in *Re: Lawyer 7*, the hearing panel accepted the proposed disciplinary action of a fine of $3,000 and commented (at paras. [10]-[11]):

> ... aside from this single incident, the Respondent's Professional Conduct Record over a period of almost 30 years is unblemished; and he seems well regarded among his peers, not only for his skill, but also for his adherence to high professional standards.
>
> Cumulatively, these considerations suggest that the Respondent's breach was relatively technical - an uncharacteristic aberration, the product, perhaps, of a misapprehension concerning the facts.
> ...

[18] Similarly, in *Richardson* (*supra*), the hearing panel imposed a fine of $2,500, stating (at para. [5]) that:

> A number of written references were provided by the Respondent. They all attested to his high ethical standards and found the circumstances to be out of character.

[19] The Law Society submitted that the focus of this Panel in determining the appropriate disciplinary action should be:

> (a) the discipline imposed in prior similar cases, and
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> (b) the need for general deterrence to safeguard the fundamental nature of undertakings to the practice of law and to ensure that all lawyers use serious and diligent efforts to meet undertakings.

Range of Penalties in Similar Cases

[20] The Law Society submitted that the fine sought by the Law Society is squarely in the range of the penalties imposed in similar cases. In *Re: Lawyer 7*, (*supra*) the panel observed at para. [11]:

> Little is to be gained from a detailed critical examination and analysis of those decisions. It is sufficient for our purposes to note that they illustrate a range of fines between $2,000 and $5,000 in analogous circumstances.

[21] In *Law Society of BC v. Richardson*, (*supra*) the hearing panel stated (at para. [12] and [13]):

> The recent decisions suggest that a fine is the more appropriate penalty, rather than a reprimand. It is the Panel's view that the public interest is best served by imposing a penalty similar to those imposed in other cases. As noted in *Epp* [2006 LSBC 21], the Panel concluded at paragraph [13]:
>
> > ... The public interest is served by the penalty, as pronounced below, being in keeping with penalties imposed in similar situations. The effect of this penalty, with respect to this Respondent, is it safeguards the fundamental nature of undertakings to the practice of law and preserves the requirement of all lawyers to make certain that serious and diligent efforts are made to meet all undertakings. Undertaking compliance is an essential ingredient in maintaining the public credibility and trust in lawyers.
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> In this case, the Panel was of the view that there was no real victim. The Respondent's conduct was "not cavalier", but was "misguided at best". There was no element of dishonesty. . . .

[22] The cases relied upon by the Law Society show that the range of penalties is between $1,000 and $3,000. Of the penalties in nine cases, five were fines of $2,000 or less, two were fines of $2,500 and two were fines of $3,000. Most of the cases proceeded pursuant to Rule 4-22, where the admission of misconduct may be treated as a mitigating factor. As well, the lower fines are mostly earlier cases, whereas the higher fines tend to be more recent cases.

[23] The Law Society submitted that this case is not particularly distinguishable from *Re: Lawyer 7* or *Law Society of BC v. Richardson*, where:

> (a) Both the Respondents had practised law without incurring discipline for 30 or more years, so the breach of undertaking was uncharacteristic (*Re: Lawyer 7* (*supra*) at para. [10] and *Richardson* (*supra*) at paras. [2] and [3]);

(b) There was no evidence of any prejudice as a result of the breach (*Re: Lawyer 7* (*supra*) at para. [10] and *Richardson* (*supra*) at para. [13]);

(c) There was no element of dishonesty (in *Re: Lawyer 7*, the only explanation offered for the breach was "oversight" at para. [7](20), and in *Richardson* (*supra*) he was "misguided at best" at para. [13]).

The most notable distinguishing factor between those cases and this one is that the Respondent has been subject to prior disciplinary action.

[24] For all of the foregoing reasons, the Law Society submitted that the appropriate disciplinary action is a fine of $2,500.

Costs

[25] The Law Society sought costs of $4,000, including disbursements and counsel time, which is discounted to approximately 30 per cent of the actual amount.

[26] As noted in *Law Society of BC v. Racette*, 2006 LSBC 29 (at para. [13]), the following factors may be considered in determining what costs are reasonable:

(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 suspension;

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[27] The Law Society submitted that the costs claimed of $4,000 are reasonable in the circumstances, given the number of days over which this matter was heard. While these costs may be higher than in other breach of undertaking cases, it is important to note that the Respondent has advanced a vigorous defence in an area in which the applicable law is well established.

Submissions of the Respondent

Cases on Penalty

[28] Counsel for the Respondent submitted that, generally speaking, the fines imposed upon lawyers in cases of the sort referred to by counsel for the Law Society have increased with time. In this context, it is important to note that the Respondent's breach occurred in June, 1996 - over 14 years ago. The complaint itself was not lodged until 2004. In these circumstances, and others to be addressed, it was submitted that a fine at the lower end of the range is appropriate, namely $1,000.

[29] In the case of the *Law Society of BC v. Hordal*, 2004 LSBC 36, at para. 51, the Benchers on review stated:

> 51. We adopt the view expressed in a recent hearing panel decision (*Law Society of BC v. Hammond*, 2004 LSBC 32) where it was noted:
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> We are mindful of the requirement imposed upon the Benchers of the Law Society by Section

3 of the *Legal Profession Act* which requires that the legal profession be governed in the best interests of the public. We note in Gavin MacKenzie's publication *Lawyers and Ethics*, (Scarboro: Carswell 1993) under the general heading "Purposes of Discipline Proceedings", the following appears:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. If a lawyer has committed a criminal offence it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessarily have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, non-punitive.
>
> The seriousness of the misconduct is the prime determinant of the penalty imposed. ...

[30] Counsel for the Respondent submitted that several circumstances warranted placing this particular matter at the lower end of any penalty range.

Nature of Retainer

[31] First, in the Respondent's situation, it must be remembered that this was a community project being undertaken with the utmost goodwill by a community organization. It was not of a commercial context. Everyone appeared to be acting with good will and in good faith, and this set the tone for the Respondent's loss of sensitivity to his undertaking.

Easement Agreement

[32] Second, the agreement signed by JL and LL with the Club was entered into by direct negotiation between the parties. It contemplated registration of the easement at any time when the Club deemed it necessary, and also contemplated deregistration and removal of any waterline, if necessary. This was the very heart of the matter. Because of this agreement, JL and LL were never at any significant risk. In return for allowing an unobtrusive waterline to be buried at the periphery of their acreage, JL and LL received free golfing privileges, which have come to have considerable value. The nature of the parties and of the project in question, and the fact that the parties had been content to negotiate the deal on their own throughout, made it reasonable for the Respondent to conclude that, when RH instructed him that the easement could be registered and that JL and LL had agreed, that was entirely as he would have expected. There had never been any hint of adversity or animosity, nor of anyone being placed significantly at risk in the matter. It was against this background, combined with his client's instructions and the passage of time since his undertaking had been given, that the Respondent simply forgot about the undertaking.

[33] Third, it is also part of the relevant context that RH, a volunteer member of the Club who maintained regular contact with JL and LL over this project, asserts that JL and LL indicated knowledge of the

registration of the easement in a conversation with him in the spring of 2002 - before the waterline was installed. Two more years passed before this complaint was initiated, during which time, they endeavoured to negotiate greater golfing privileges. This is important background when assessing the significance of the consequences resulting from the breach.

[34] Fourth, it is also important to note that, following the installation of the line in 2003, JL and LL never asked that the line or the easement be removed.

Respondent's Circumstances

[35] Fifth, the Respondent has been practising for 36 years with an admirable record of respect in his community and by his colleagues. There is absolutely no suggestion that there should be any concern over a repetition of behaviour of this sort.

[36] Next, the Respondent was doing precisely what the Law Society encourages all lawyers to do, providing pro bono legal services to a community charitable organization.

[37] Finally, the undertaking had not been requested of him. He had volunteered the undertaking simply because he thought that JL and LL (who were not his clients) should be given the comfort of it. In fact, the agreement did not require the Club to have permission to register the easement.

Letters of Reference

[38] Counsel for the Respondent put in a great number of letters of reference from various lawyers within the local Bar. Counsel for the Law Society drew to the Panel's attention the following quotation from *Law Society of BC v. Hordal*, [2004] LSDD No. 93 at paras. 68 and 69:

> 68. We note that this Respondent produced at the Hearing an unprecedented array of letters of support from his colleagues at the Bar in the community in which he practises. The support was characterized as coming from virtually every lawyer of significance in the community in which this member conducted his practice. It is also true that these letters of support were generated from members of the Bar who were fully apprised of the circumstances of the Respondent's misconduct. It is clear that this significant outpouring of support for the Respondent had a bearing upon the Hearing Panel as well it should have done.
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> 69. It is however improper to confuse popularity with probity. Most letters of support noted that this conduct was out of character for this Respondent. The apparent inconsistency of that observation appeared to be lost on many of the members providing letters of support. They were faced with two essentially identical and concurrent events of misconduct within twelve months of each other, and in those circumstances it must be difficult to suggest that this conduct is out of character. It is clear that this is a very popular member of the community Bar in which he practises. It is however also true that he has significantly impaired the reputation of the legal profession in that community by this conduct. That misconduct must be identified, criticized and penalized in an appropriate manner.

[39] We will be saying more about these letters later.

[40] As to costs, counsel for the Respondent brought to the attention of the Panel the case of the *Law Society of BC v. Jeletzky*, 2005 LSBC 2. That case makes clear that the Panel has discretion in regards to costs. In particular, a Panel must look at the issue of costs in relation to the penalty and the costs must be

reasonable in the circumstances. Counsel for the Respondent argued that part of this case was taken up with an issue that was important not only for the Respondent, but the profession as a whole, namely whether the conduct in the instant case met the test for professional misconduct as set out in the recent case of *Re: Lawyer 10,* 2010 LSBC 02.

Analysis

[41] The Panel, after considering all the submissions of counsel and the case authority, finds the following factors weigh in favour of a fine of $1,000:

(a) the breach occurred in June, 1996, over 14 years ago. The original complaint was launched in 2004. Counsel for the Respondent submitted that we should look at the penalties imposed at that point in time. The Panel is not prepared to accept this as a general proposition. However, in these circumstances we are. The Respondent has never denied the breach. He has never put the Law Society to unnecessary proof. He signed an Agreed Statement of Facts to expedite the hearing.

(b) The subject matter of the complaint was a community project. The Respondent had provided his legal services on a pro bono basis.

(c) He had registered the easement in circumstances in which his client had indicated to him that it was permissible to register the easement.

(d) His client still supports the Respondent despite all the events since the original registration of the easement. This is no doubt, in part, due to the other pro bono legal services he had provided to the Club.

(e) The letters of support from his fellow lawyers are numerous. There is mention in these letters that the Respondent has given many undertakings and fulfilled all of them. He is highly regarded by his peers in his community. These letters are of some importance. This case can be distinguished from *Hordal* (*supra*). In that case, the lawyer committed two similar breaches of undertaking within about a year. In that case, there was a disconnect between the letters of reference and the actual breach of undertakings found. There is no such disconnect in the case at bar.

(f) There is a conduct record, but none deal with undertakings. The Law Society admits the infraction is at the lower end of the range of seriousness of breaches of undertaking.

(g) The Respondent is at the end of a distinguished legal career and, if possible, he would like to retire.

(h) The Respondent admitted he had made a mistake in the Agreed Statement of Facts. The Respondent did not testify. However, the Panel noted his demeanour throughout these proceedings. We are convinced that he is truly sorry for the past events. The Panel sees no need for a specific deterrent in this case. A general deterrent can be satisfied by a small fine. Such a fine will also satisfy the need to educate the profession.

[42] The Panel expresses no opinion on the merits of the lawsuit still pending between the Club and JL and LL. Neither of them (JL and LL) gave evidence to this Panel. In addition, the submissions of counsel for the Respondent on what was the agreement are just that, submissions. The civil courts are best able to deal with what was the total agreement between the parties. There may or may not be any merit in this civil case, though it is of some significance that the case has not been quickly brought to trial.

[43] The remaining issue is one of costs. The Law Society seeks 30 per cent of the actual costs, which works out to be $4,000. This method of calculation is the usual method employed by the Law Society. The Panel feels this is reasonable in normal circumstances. However, a significant amount of time in this case was taken up with the proper interpretation of the "marked departure test" in the context of a lawyer forgetting about an undertaking and whether this conduct met the test for professional misconduct as set out in the recent case of *Re: Lawyer 10,* (*supra*). This point was not settled at the time of the hearing. This part of the hearing benefited not only the Respondent, but also the profession generally. Additionally, this point was argued on an Agreed Statement of Facts in a fast and efficient manner.

[44] The Panel feels for these reasons that it is an appropriate case to share the costs between the Respondent and the membership generally. We set costs at $2,000.

Conclusion

[45] The Panel orders the Respondent to pay:

(a) a fine of $1,000; and

(b) costs of $2,000.

[46] The Respondent will have one year from the date of this decision to pay these sums.