2011 LSBC 08
Report issued: March 03, 2011
Citation issued: September 23, 2010

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

Leonard Thomas Denovan Hill

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: January 20, 2011

Panel: Bruce LeRose, QC, Chair, Leon Getz, QC, Benjimen Meisner

Counsel for the Law Society: Maureen Boyd
Appearing on his own behalf:

Introduction and Background

[1] The citation against the Respondent was authorized by the Discipline Committee on July 8, 2010 and issued on September 23, 2010. The Respondent has admitted that he was properly served with the citation.

[2] The Schedule to the citation sets out the nature of the conduct to be inquired into:

> While acting for your client A Ltd., you breached a trust condition or undertaking (the "Undertaking"), imposed on you by letter dated October 19, 2009 from opposing counsel Colin Campbell (the "Letter"), by disbursing from trust the funds enclosed with the Letter in breach of the terms of the Undertaking, contrary to Chapter 11, Rules 7 and 11, of the *Professional Conduct Handbook*.

[3] The evidence is set out in detail in an Agreed Statement of Facts. The essential elements follow.

[4] On March 13, 2009 the Respondent commenced an action on behalf of a client in respect of a builder's lien claim on certain property located in Burnaby. The same day, he registered a Certificate of Pending Litigation against the property. The owners were represented by Mr. Colin Campbell. The action was settled in July 2009.

[5] On July 28, 2009 Mr. Campbell wrote to the Respondent saying that, as soon as the form of release of the lien claim had been agreed, "I will send the funds to you on your undertaking not to release it [sic] until you have submitted these for filing, and to take all reasonable steps to rectify any defects that the Land Title Office may notify you of, and you have a full release in approved form of my clients executed by your client with irrevocable instructions to forthwith deliver it to me along with copies of the registered LTO documents showing the registration numbers. To that end, please send me a copy of the form of release you propose to have your client sign releasing my clients."

[6] Sometime in September or October 2009, the form of release was settled. It was executed by the Respondent's clients on October 5. On October 13 the Respondent sent Mr. Campbell a copy of the

executed release and asked that Mr. Campbell forward payment "in due course".

[7] On October 19, 2009, Mr. Campbell sent the Respondent a trust cheque for $11,500 payable to the Respondent in trust. The cheque was sent under cover of a letter (the "Undertaking Letter") that explained that it was being sent on the Respondent's undertaking

> not to release any part of those funds from trust, except to return them to [Mr. Campbell] on demand if you are unable to comply with this undertaking within a reasonable time, until:
>
> 1. you have submitted the discharges of the claim of lien and certificate of pending litigation for filing, and to take [sic] all reasonable steps to rectify any defects that the Land Title Office may notify you of,
>
> 2. you have endorsed and submitted for filing the enclosed consent dismissal order ... , and
>
> 3. you have received irrevocable instructions from your client to promptly deliver the entered consent dismissal order to me it to me [sic] along with copies of the registered discharges [sic] documents showing the registration numbers, and the original executed release. ...

[8] The Respondent admits that he received this letter and the cheque. On October 22, 2009 he deposited the cheque into his trust account, and on October 23, 2009 he withdrew $840 to pay his account and paid the balance of $10,660 to his client. When he did this, he had not complied with any of the conditions referred to in Mr. Campbell's letter of October 19. In fact, they were not complied with until various dates in January, 2010.

[9] In late December 2009 and early January 2010 there were various written exchanges between Mr. Campbell and the Respondent. On January 15, 2010 Mr. Campbell asked whether the Respondent still held the $11,500 in trust and, if not, when the funds had been paid out. He repeated that enquiry on two separate occasions later the same day, on the last of these demanding a response by noon on January 18. On January 18 the Respondent responded with the advice that the funds had been disbursed on October 23, 2009. He added: "Sorry this escaped my attention. The Release of the lien discharge, Certificate of Pending Litigation discharge letter and the Consent Dismissal *were all ready to be filed*." (emphasis added)

[10] Mr. Campbell reported the matter to the Law Society on January 18, 2010.

The Position of the Respondent

[11] The Respondent does not dispute any of the facts recited above. He admits that the cheque and the Undertaking Letter were received in his office and that he disbursed the funds on October 23, 2009 when none of the terms of the undertaking imposed upon him had been fulfilled.

[12] On the face of it, the Respondent's agreement to these facts seems to make the conclusion inescapable that he committed a breach of his undertaking.

[13] The Respondent, however, denies this. He says that, when he disbursed the funds on October 23, he was unaware of the Undertaking Letter or its contents. Although the Undertaking Letter was received in his office (and he had previously been advised - (see paragraph [5] above) - that it was coming) he did not in fact know anything about it. His evidence to us on this point is succinctly summarized in a letter that he wrote to the Law Society on March 2, 2010.

[14] After noting that, when the funds were disbursed the documents required to be filed to satisfy the terms

of the undertaking were "all ready and sitting in the file," although they had not been filed, the Respondent said that he "believed that the filing had been done." He continued:

> The problem in complying with undertakings [sic] seems to have been that when Mr. Campbell's letter of October 19, 2009 came in, it was scanned but the original letter was misplaced so was not in the file when the cheque was cut. So I did not see it.

[15] The Respondent's contention, as we understand it, is that he cannot be found to have committed a breach of an undertaking of which he was unaware. His contention is a novel one.

Discussion

Is the Respondent's claim credible that he was unaware of the undertaking?

[16] In our view, the Respondent's contention that he was unaware of the fact that he was subject to an unfulfilled undertaking stretches credulity. In his March 2, 2010 letter to the Law Society, the Respondent said: "I did know what had to be done in terms of documents to be filed in a case of this nature." In a subsequent letter to the Law Society, dated April 6, 2010, he noted that "I do this kind of work all the time and pay close attention to what opposing counsel's requirements are one [sic] before funds can be disbursed." In giving evidence before us he agreed that it is quite common in builders' lien practice for documents or funds to be exchanged on undertakings, and he testified that he has an active practice in this field. He had been advised in July 2009 that a cheque would be delivered to him on undertakings. In these circumstances the Respondent's contention that he was unaware of the existence of the undertaking or that its terms were unfulfilled, seems to us simply implausible. We give it no credence.

[17] If we are right about that and the Respondent knowingly committed a breach of undertaking, it seems to us to follow, having regard to a very well established line of authority, including such cases as *Law Society of BC* v. *Richardson*, 2009 LSBC 07, that he is guilty of professional misconduct.

Does it make any difference if the Respondent was in fact unaware of the undertaking?

[18] But even if we are wrong and the Respondent's claim of ignorance is taken at face value, we do not think that this changes the result.

[19] In *Law Society of BC v. Martin,* 2005 LSBC 16 the hearing panel said that the test of whether there has been professional misconduct is:

> whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[20] In *Re: Lawyer 10,* 2010 LSBC 02 a review panel said (at paragraphs [31]):

> The formulation of the marked departure test developed in *Hops*, [1999] LSBC 29 and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the conduct in question was a marked departure from the norm and that the member was culpable. To put it more precisely, it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.

[21] It is possible - though it is unclear - that these observations were intended in some sense to modify the *"Martin test"* by raising the threshold for a finding of professional misconduct. If that was the intent or even if, whether intended or not, that is the effect of the language we have quoted, we respectfully disagree with it. In this case, however, it is not necessary to come to any conclusion about that since we think that on either analysis the result is the same.

[22] There is an abundance of material - which we do not think it is helpful to review in these reasons - that supports the existence of what counsel for the Law Society described in her written submissions as an "exacting and well-established legal culture regarding undertakings." That culture defines the conduct that the Law Society expects from its members in respect of undertakings. In our view, given that culture, the Respondent's failure to make any enquiries as to whether the conditions of his undertaking had been fulfilled before he disbursed the funds is in and of itself a "marked departure from that conduct the Law Society expects from its members," reflects "gross culpable neglect of his duties as a lawyer" (*Martin*), and cannot seriously be contended to have been "the product of events beyond [his] control or of an innocent mistake." (*Lawyer 10)*

[23] We have little hesitation in concluding that, on any view of the facts, the Respondent is, in respect of the matter for which he has been cited, guilty of professional misconduct. It is irrelevant to our conclusion whether the Respondent committed his admitted breach of undertaking intentionally or, as he claims, unintentionally because he was unaware of it.