2011 LSBC 31
Report issued: September 23, 2011
Citation issued: October 18, 2010

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

Deepak Azad Chodha

Respondent

Decision of the Hearing Panel

Hearing date: May 12, 2011
Panel: Carol Hickman, QC, Chair, David Mossop, QC, Gregory Petrisor

Counsel for the Law Society: Jean Whittow, QC
Counsel for the Respondent: Henry Wood, QC

Background facts

[1] The citation in this matter was issued October 18, 2010. The citation alleges that the Respondent, in the sale of real property, received net sale proceeds subject to a trust condition or undertaking, set out in a letter from other counsel, to, inter alia, pay sufficient funds to obtain a discharge of a claim of builders lien registered on the title to property, file that discharge in the Land Title Office and provide a filed copy to other counsel on a specific date. It is alleged the Respondent breached the undertaking when he received the net sale proceeds but did not discharge the lien and/or provide a filed copy of the discharge of lien within the prescribed time frame.

[2] The hearing proceeded on evidence given through an agreed Statement of Facts, which reads in part as follows:

> 1. Deepak Azad Chodha (the "Respondent") was admitted to the bar of British Columbia on February 20, 1998.
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> 2. Counsel for the Respondent accepted service of the citation on behalf of the Respondent, and he waived the requirements for service of the Law Society Rules.
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> 3. At all material times, the Respondent practised in the area of litigation and residential real estate. He practised with the firm of CGM Lawyers in Vancouver, BC.
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> 4. In about June, 2009 Raziya Sattar, a lawyer and member of the Law Society, represented the purchasers in a residential real estate transaction. The purchasers were taking title to a property subject to a builders lien (the "Lien").
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> 5. The Respondent represented the sellers.
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> 6. The real estate transaction was to complete July 14, 2009.

7. On July 10, 2009 Ms. Sattar wrote to the Respondent and proposed the following undertaking as regards the Lien:

> We also undertake to:
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> … retain in trust the Builders Lien Holdback (the "Lien Holdback") in the amount of $17,500 until the earlier of (i) the date on which the time for filing a claim of lien under the Builders Lien Act expires; and (ii) the 56th day after the completion date (the "Material Date") and release the holdback as follows:
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> • to you, in trust for the Seller, if there are no lien claims registered on title to the Property on the Material Date
>
> • by agreement of the parties
>
> • by court order directing me to deal with the holdback
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> • If there is a dispute regarding the holdback, I will pay the holdback into court in exchange for a release of any claims registered against title to the Property.

8. By letter dated June 19, 2009, (which should have been dated July 13, 2009), the Respondent wrote:

> With respect to the Claim of Builders Lien, please be advised that we are already on an undertaking with the Bank. We are holding sum [sic] of $51,219.51 in our trust account. We enclosed [sic] copy of the letter (sent to the Bank) for your record; and we trust this will meet your requirement.
>
> Please be advised that the Builders Lien Holdback period has expired. Accordingly, Builders Lien holdback in [sic] not required.

9. On July 14, 2009, Ms. Sattar delivered the closing proceeds to the Respondent along with a letter in which she imposed upon the Respondent the following undertaking:

> To pay sufficient funds to obtain a Discharge of [the Lien] … which Discharge you must file at the appropriate [Land] Title Office and provide me with a filed copy within 60 days of the Completion Date. If, due to extenuating circumstances, you have not been able to obtain a discharge of the Lien Claim within 60 days, you may request an extension from my office for a period of a further 15 days.

10. The Respondent did not perform the undertaking with 60 days.

11. On September 16, 2009, Ms. Sattar contacted the Respondent by telephone and he advised that the Lien had not been resolved and a 21 day notice had been filed. He advised Ms. Sattar that she was harassing him and that she should not be worried. When pressed for further information by Ms. Sattar, the Respondent abruptly terminated the call and said he would call back the following day. He did not call back the following day.

12. On September 18, 2009 Ms. Sattar wrote to the Respondent to explain that he was in breach of his undertaking and requested that he contact her as soon as possible. Ms. Sattar confirmed with the Respondent's office that the fax was received.

13. When Ms. Sattar did not receive a reply, she sent the same fax a second time on September 24, 2009.

14. When Ms. Sattar did not receive a reply she telephoned the Respondent on September 29, 2009.

The Respondent advised Ms. Sattar that he had received her faxes and calls, had not responded as he was working on removal of the Lien, and was not required to communicate with her in any event. On September 29, 2009, Ms. Sattar wrote again to the Respondent, noting that he was in breach of the undertaking.

15. On October 1, 2009, Ms. Sattar made a written report to the Law Society regarding the breach of undertaking.

16. The undertaking was addressed as follows:

(a) On October 19, 2009, Ms. Sattar wrote again to the Respondent regarding the undertaking.

(b) On October 20, 2009, Rudi Gellert, another member of the Respondent's firm, wrote to Ms. Sattar and advised that an agreement had been reached with the Lien holder in order to permit the discharge of the Lien in the "next day or two".

(c) On October 27, 2009, Mr. Gellert sent Ms. Sattar a copy of a letter to the solicitor for the holder of the Lien, following up on the signed discharges.

(d) On October 30, 2009, Ms. Sattar sent Mr. Gellert a letter by fax (dated October 19, 2009) stating that "you continue to be in breach of undertakings. Kindly reply as soon as possible regarding when you expect to have discharges filed."

(e) On October 30, 2009, Mr. Gellert sent Ms. Sattar a letter indicating he had received the signed discharge of Lien, but was of the view it contained a defect that required correction before filing.

(f) On October 30, 2009, Ms. Sattar then sent a return fax.

(g) On November 2, 2009, Mr. Gellert sent a fax to Ms. Sattar advising that the discharge had been corrected and was not filed and registration was "pending".

(h) On November 6, 2009, Mr. Gellert sent a fax to Ms. Sattar explaining that a search that morning showed the discharge was still pending and that there was no defect notice.

(i) On November 10, 2009, a legal assistant from the Respondent's firm sent a fax to Ms. Sattar showing that the pending discharge had been finalized.

17. On January 11, 2009 [2010], Ms. Sattar wrote to the Law Society enclosing the above noted correspondence and advising that she was "prepared now to waive the breach of undertaking which had occurred."

18. The Respondent admits that he committed professional misconduct by receiving the net sale proceeds but failing to discharge the Lien and/or provide a filed copy of the discharge of the Lien to Ms. Sattar within 60 days of July 14, 2009.

Determination

[3] It is of course well established that the Law Society must prove on a balance of probabilities:

(a) that the conduct of the Respondent is a marked departure from conduct that is expected of a member of the Law Society; and

(b) that the conduct is culpable.

[4] This principle is expressed in *Law Society of BC v. Martin*, 2005 LSBC 16 and *Re: Lawyer 10*, 2010 LSBC 02.

[5] The facts as alleged by the Law Society and agreed to by the Respondent clearly establish that the Respondent gave his undertaking, and subsequently failed to discharge it. No suggestion was made of the Respondent being unable to fulfill the undertaking by reason of any incapacity, and accordingly his conduct is culpable in the circumstances. Accordingly, the allegation of professional misconduct as set out in the citation is made out against the Respondent.

Disciplinary Action

[6] Counsel for the Law Society submits that the Respondent should be ordered to pay a fine in the amount of $5,000. Counsel for the Respondent submits that the Respondent should be ordered to pay a fine in an amount of approximately $3,500.

[7] The giving and fulfillment of undertakings are a cornerstone of the legal profession. The ability of other solicitors and of the public to rely on undertakings given by members of the Law Society is critical to normal operation of real estate transactions. In *Law Society of BC v. Heringa*, 2004 BCCA 97 at para. [10], the Court of Appeal approved these words of the hearing panel:

> [37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
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> [38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

[8] Further, as is set out in *Law Society of BC v. Goddard*, 2006 LSBC 12:

> [11] The Law Society of BC has recently taken a much sterner approach to breaches of undertaking due to the catastrophic results of the actions of one member who defrauded clients of millions of dollars using undertakings as a tool for his dishonesty. It must be clear to the Law Society's members that if they breach their undertakings, there will be serious consequences. …

[9] Counsel for the Law Society referred to a number of decisions in her submissions. She relied on the decision *Law Society of BC v. Epp*, 2006 LSBC 21, in which a fine of $5,000 was ordered. In that case, the hearing panel noted the breach was relatively minor and noted the respondent's positive professional reputation and conduct history. In that case, the lawyer had previously been the subject of a conduct review regarding compliance with undertakings. Law Society counsel also relied on *Law Society of BC v. Clendening*, 2007 LSBC 10, a case in which the respondent was ordered to pay a fine of $7,500. In that case, the hearing panel characterized the lawyer's breach of undertaking as relatively minor on the spectrum, but noted a previous discipline history regarding compliance with undertakings.

[10] Counsel for the Respondent, in his submissions, referred to the decision of *Law Society of BC v. Lee*, [2002] LSBC 29. In that decision, the hearing panel ordered the lawyer to pay a fine of $2,000. It should be noted that, in paragraph [19] of that decision, the hearing panel states:

> Both counsel support the conditional admission on the basis that the Respondent's breach was not deliberate.

That comment distinguishes the facts underlying that decision from the facts of the matter before us.

[11] As set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, factors that we have considered are as follows:

> (a) The nature and gravity of the conduct proven:
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> As stated above, the Law Society and the Courts recognize that the fulfillment of undertakings is critical to the manner in which real estate conveyances are completed in this province, and is critical to the public confidence in the legal profession. It follows that breach of an undertaking is extremely serious.
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> (b) The age and experience of the Respondent:
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> The Respondent has been a member of the Law Society since February 20, 1998. It is not alleged that inexperience contributed in any way to this matter coming before us. The Respondent's primary area of practice is litigation and residential real estate. The Respondent certainly had within his knowledge the means to choose a better course of action and avoid the breach of undertaking that he ultimately committed.
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> (c) The previous character of the Respondent including details of prior discipline:
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> The Respondent has been the subject of a conduct review arising from the failure to comply with an undertaking in 2008. The Law Society submits that the earlier breach of undertaking by the Respondent was inadvertent, and once he learned of it, he dealt with the matter fully and apologized to other counsel. While that circumstance is substantially different than the circumstances of the current case, the importance of the fulfillment of undertakings, and the serious nature of any breach of undertaking, should have been underlined to the Respondent during his previous experience. The conduct review and the relatively close proximity in time between that occurrence and the occurrence giving rise to this proceeding are important aggravating factors.
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> (d) The impact upon the victim:
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> It was submitted by counsel for the Law Society that the impact of the Respondent's breach in this instance was relatively minor and may have resulted in some inconvenience and increased legal costs.
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> (e) Advantage gained or to be gained by the Respondent:
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> It is apparent that the Respondent believed it was preferable, at least to his client, if not all parties, to have the builders lien removed through negotiation. There is no suggestion or evidence that the Respondent expected any personal benefit from the breach of his undertaking.
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> (f) The number of times the offending conduct occurred:
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> The Respondent's breach was a single occurrence, although it persisted for approximately two months.
>
> (g) Whether the Respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and presence or absence of other mitigating circumstances:

The Respondent did not immediately acknowledge his misconduct, although he did so prior to the date set for hearing, and agreed to the finding of professional misconduct. The Respondent, through counsel, acknowledged the gravity of his conduct and assured this hearing panel that he regrets his actions.

(h) The possibility of remediating or rehabilitating the Respondent:

This factor is not applicable.

(i) The impact on the Respondent of criminal or other sanctions or penalties:

This factor is not applicable.

(j) The impact of the proposed penalty on the Respondent:

No evidence was presented to the Panel that any particular penalty to be imposed by the Panel would have any specific impact on the Respondent. Presumably, the publishing of the decision, and the public recording of that, impact every lawyer.

(k) The need for specific and general deterrence:

As has been stated above, the importance of undertakings, and the seriousness of a breach of undertaking, needs to be emphasized to the Respondent and all lawyers of the profession. Particularly in a situation such as this, where the Respondent has already been brought to account for breach of an undertaking, any penalty imposed must be meaningful.

(l) The need to ensure the public's confidence in the integrity of the profession:

It must be obvious to the public that undertakings are properly regarded, and breaches of undertakings are appropriately dealt with. Sanctions for breach of an undertaking must be significant to ensure the public will continue to have confidence in transactions based upon undertakings, confidence in the profession as a whole, and confidence in the self-regulation of the legal profession.

(m) The range of penalties imposed in similar cases:

Based on the authorities provided by counsel, penalties ranged from a reprimand at the low end, to fines between $2,000 and $7,500, and to suspension and disbarment at the extreme end.

[12] The factors that are most significant in this case are as follows:

(a) The Respondent has been a member of the Law Society of British Columbia since February 20, 1998.

(b) The Respondent has previously gone through a conduct review relating to compliance with an undertaking.

(c) While it seems apparent the Respondent felt the undertaking imposed upon him was unreasonable and unnecessary in some respects, he accepted the undertaking and failed to comply with it. Counsel for the Respondent submitted that the subject property was one of a number of lots involved in a development in which the Respondent acted for the seller. The undertaking imposed by other counsel in respect of the sale of this subject property differed from the undertakings used in the other transactions, and the Respondent was reluctant to upset potentially delicate negotiations by taking formal action to remove the builders lien. Those circumstances are not mitigating in our view. The Respondent could have refused to accept the

undertaking as worded, or could have complied with the undertaking by taking formal steps to remove the Lien and paying funds into Court. The breach of the undertaking was not the only course of action available to the Respondent, and that being the case, his actions were deliberate rather than inadvertent. This deliberate breach of an undertaking is of particular concern, given the Respondent's relatively recent involvement in a conduct review for the breach of an undertaking.

(d) The Respondent's breach was ongoing and continued for a number of months. The Respondent and another solicitor within the Respondent's firm did work toward discharging the builders lien and eventually did so, but there was a period of approximately two months during which the breach was outstanding.

[13] There is a wide disparity in the penalties imposed for breach of undertaking, but there is also a wide disparity in the circumstances of the cases cited. Those cases that perhaps provided the most guidance in this case are *Law Society of BC v. Epp* and *Law Society of BC v. Clendening*. In those cases, fines of $5,000 and $7,500 respectively were imposed.

[14] The Respondent, through his counsel, made submissions regarding his own circumstances at the time of the breach of the undertaking. The Respondent described difficult circumstances connected to the health of his wife that impacted his resilience, patience and judgment. Those circumstances are of course a basis to have sympathy for the Respondent, but none of those factors can be taken to have contributed to the Respondent's breach of undertaking. He was obviously not incapacitated from acting, as it appears he and another lawyer in his firm worked towards, and eventually accomplished, the discharge of the builders lien from title of the subject property.

[15] In all of the circumstances, we order that the Respondent pay a fine in the amount of $5,000.

COSTS

[16] Counsel agreed that costs in the amount of $2,500, being one-third of the actual total of approximately $7,500, are appropriate. We do not find any basis to depart from the submissions of counsel in respect of costs, and accept the recommendations of counsel.

ORDER

[17] Accordingly, this Panel orders that the Respondent forthwith:

(a) pay a fine in the amount of $5,000; and

(b) pay costs to the Law Society in the amount of $2,500.