

2012 LSBC 05

Report issued: January 31, 2012

Oral Reasons: October 25, 2011

Citation issued: October 25, 2010

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

Brian John Kirkhope

Respondent

**Decision of the Hearing Panel
on Facts, Determination and Disciplinary Action**

Hearing date: October 25, 2011

Panel: Leon Getz, QC, chair, Gregory Petrisor, Alan Ross

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: Henry Wood, QC

preliminary matters

[1] The citation in this matter was authorized by the Discipline Committee on September 30, 2010 and issued on October 25, 2010 (the "Citation").

[2] Mr. Kirkhope admits that, on October 27, 2010, he was served with the Citation by registered mail in accordance with the requirements of Rule 4-15 of the Law Society Rules.

[3] The Citation was amended on August 25, 2011 pursuant to Rule 4-16.1(1)(a) of the Law Society Rules (the "Amended Citation"). Mr. Kirkhope acknowledges delivery of the Amended Citation.

Background

[4] The facts are set out in detail below. In short, to secure his fees, Mr. Kirkhope registered a mortgage in favour of his law firm against property then owned by a client and his estranged wife. At the time, there was an outstanding court order in the client's matrimonial dispute enjoining both parties from further alienating title. Mr. Kirkhope's mortgage was in clear breach of that order.

[5] The Law Society and Mr. Kirkhope reached an Agreed Statement of Facts, which is paraphrased below.

[6] Mr. Kirkhope admits that the facts set out in the Agreed Statement of Facts occurred and that they constitute professional misconduct.

ONUS AND STANDARD OF PROOF

[7] It is well established that the onus is on the Law Society to prove the allegations.

[8] The standard of proof in this hearing is the balance of probabilities.

[9] Mr. Kirkhope does not take issue with the Law Society's enunciation of either the onus or the standard of proof.

Facts

[10] As noted, there is an Agreed Statement of Facts. The Panel accepted those facts in coming to its decisions on facts, determination and disciplinary action. The facts set out below are copied or paraphrased from the Agreed Statement of Facts.

[11] Brian Kirkhope was called and admitted as a member of the Law Society of British Columbia on August 31, 1990.

[12] At the material times, he was practising law in Nanaimo, BC through a law corporation (the "Law Corporation") in association with John R. Manning who was also practising law through a law corporation (the "Manning Law Corporation"), (collectively referred to as the "Law Corporations").

[13] Mr. Kirkhope was retained by a client (the "Husband") in a matrimonial dispute against his wife (the "Wife"). The primary asset in the dispute was the family home (the "Family Home").

[14] On May 5, 2005, Mr. Kirkhope and counsel for the Wife, Paul Armstrong, appeared before Master Patterson. The parties consented to an order restraining both parties from further alienating title to any family asset until further order of the court (the "Restraining Order").

[15] The Restraining Order was drafted by Mr. Kirkhope, who caused it to be entered on September 1, 2005.

[16] At the time the Restraining Order was made, Mr. Kirkhope knew that, as a family asset, the Family Home was subject to that Order and that the Husband was enjoined from further encumbering the Family Home, beyond a mortgage already existing (the "Bank Mortgage").

[17] On February 3, 2006, at the request of Mr. Kirkhope, the Husband executed a mortgage in the principal amount of \$20,000 against the Family Home in favour of the Law Corporations for purposes of securing legal fees (the "Law Firm Mortgage").

[18] The Law Firm Mortgage was registered by Mr. Kirkhope on February 7, 2006 against the undivided one-half interest of the Ex-Husband in the Family Home.

[19] Mr. Kirkhope explained to the Law Society that he had forgotten about the Restraining Order at the time the Law Firm Mortgage was registered. In his response to the Law Society dated March 4, 2010 during the investigation of this matter, Mr. Kirkhope stated:

In February, 2006, [the Husband] indicated he did not have funds to pay for my services and so in order to be able to assist him, my firm took out a mortgage to secure fees. Unfortunately, I had forgotten about the order.

[20] In or around August 2006, Mr. Kirkhope ceased representing the Husband. As of that date, the family law action was outstanding, the Law Firm Mortgage was on title to the Family Home, and legal fees were owed by the Husband to Mr. Kirkhope.

[21] Subsequently, the Husband retained David Lobay to represent him in the family law action.

[22] On March 8, 2007, Mr. Armstrong wrote to Mr. Kirkhope stating that his office had now discovered that Mr. Kirkhope registered the Law Firm Mortgage against the Family Home despite the Restraining Order. Mr.

Armstrong stated that he intended to apply to reapportion the Family Home 100 per cent in favour of the Wife.

[23] On March 9, 2007, Mr. Armstrong filed a Notice of Motion dated February 22, 2007 on behalf of the Wife seeking a division of assets, including a reapportionment of the Family Home 100 per cent in favour of the Wife (the “March 2007 Application”).

[24] The March 2007 Application was served on Mr. Kirkhope and Mr. Lobay.

[25] Mr. Kirkhope says that he did not realize the Husband was in breach of the Restraining Order until his office was apprised of the March 2007 Application.

[26] The March 2007 Application resulted in an order made on October 1, 2007, the terms of which were by consent, with the exception of the term relating to the granting of the divorce (the “October 2007 Order”). The terms of that Order are discussed below.

[27] There were numerous telephone calls, letters and emails between the parties, including Mr. Kirkhope, between the date of service of the March 2007 Application and the October 2007 Order. In summary, Mr. Kirkhope took the position that the Law Firm Mortgage should survive to the extent of the Husband’s interest in the Family Home. Mr. Kirkhope also took steps to ensure that the Law Firm Mortgage did not affect any potential sale of the home by providing signed discharges. However, those discharges were sent to Mr. Lobay with conditions to which Mr. Lobay could not agree. Mr. Kirkhope continued to attempt to enforce his rights under the mortgage as against the Husband. He did this with the knowledge that the mortgages were filed in breach of the Restraining Order.

[28] The hearing of the March 2007 Application, which resulted in the October 2007 Order, commenced in late September 2007 and continued on October 1, 2007. In the course of the negotiations leading up to the application, counsel for the Wife and counsel for the Husband reached an agreement on a term whereby the Law Firm Mortgage would only apply against the Husband’s interest in the Family Home, should any such interest ultimately be awarded.

[29] The October 2007 Order further required the parties to list the Family Home for sale, allowed the Husband to live in the Family Home and required the Husband to pay the Bank Mortgage.

[30] After the October 2007 Order, the Husband lived in the Family Home. However, he did not make the Bank Mortgage payments as required.

[31] Although it was listed for sale in October, 2007, the home did not sell. As a result, the lender commenced foreclosure proceedings on the Bank Mortgage (the “Foreclosure Action”). The defendants named in the Foreclosure Action were the spouses and the Law Corporations.

[32] On March 30, 2009, the court approved the sale of the Family Home and ordered that the Bank Mortgage be paid and that any balance from the sale proceeds be paid into court to the credit of the family law action and not be paid out until further order of the court.

[33] A balance from the sale proceeds was paid into court to the credit of the family law action.

[34] The Wife and the Law Corporations subsequently applied to court for payment out of court of the balance of proceeds from the sale of the Family Home.

[35] The cross-applications were heard on November 2, 2009 before Mr. Justice Truscott (the “November 2009 Hearing”). Reasons for Judgment were issued on December 16, 2009.

[36] The Husband did not appear at the November 2009 Hearing. He had filed for bankruptcy on November

25, 2008.

[37] At the November 2009 Hearing, counsel for the Wife took the position, firstly, that the Law Firm Mortgage was invalid and should be declared null and void. His second position was that the effect of the Husband's failure to make the Bank Mortgage payments in breach of the October 2007 Order was to increase the mortgage amount and reduce the value of the Wife's 70 per cent interest in the net sale proceeds. He submitted that the Husband's 30 per cent interest should be used to offset the additional mortgage amounts he allowed to accumulate after November 6, 2007, thereby reducing his interest in the funds down to nil.

[38] At the November 2009 Hearing, Mr. Kirkhope advised the court that he had forgotten about the Restraining Order when the Law Firm Mortgage was registered. He stated that upon realizing, in or about March 2007, that the Law Firm Mortgage had been filed in violation of the Restraining Order, he prepared a discharge of that mortgage and sent that discharge to the Husband's new lawyer, Mr. Lobay. He stated that Mr. Lobay could have filed the discharge, but the parties agreed to resolve matters, including the Wife's application for 100 per cent reapportionment of the Family Home in her favour, on the basis that the Husband would receive 30 per cent of the proceeds from the sale of the Family Home. Mr. Kirkhope took the position that the Wife consented to dealing with the Law Firm Mortgage as set out in the October 2007 Order and could not now take the position that it is invalid.

[39] Mr. Justice Truscott declared and ordered the Law Firm Mortgage null and void and of no force and effect. He further held that the Wife was entitled to the full amount of the funds held in court as a result of the Husband's failure to pay the Bank Mortgage, which had the effect of reducing the Ex-Wife's 70 per cent interest. Both parties were ordered to bear their own costs on the basis that the Wife's counsel had consented to deal with the Law Firm Mortgage in the October 2007 Order.

ADVERSE DETERMINATIONS PURSUANT TO SECTION 38(4) AND THE APPLICABLE TESTS

[40] Section 38(4) of the *Legal Profession Act* sets out the four adverse determinations available to a hearing panel: professional misconduct, conduct unbecoming a lawyer, breach of the Act or rules, and incompetent performance of duties undertaken in the capacity of a lawyer.

[41] As noted above, both the Law Society and Mr. Kirkhope agree that his conduct in this matter constitutes professional misconduct.

TEST FOR PROFESSIONAL MISCONDUCT

[42] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Professional Conduct Handbook*.

[43] The leading case concerning the test for professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16. The hearing panel in that case reviewed the law concerning what constitutes professional misconduct and characterized the test as "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct." *Martin*, supra, at 16 (para. 171).

[44] On these facts, there is no issue of honest mistake that would require a discussion of the *Re: Lawyer 10*, 2010 LSBC 02 and *Re: Lawyer 12*, 2011 LSBC 11 decisions.

POSITION OF THE PARTIES

[45] The Law Society submits that Mr. Kirkhope's conduct constitutes professional misconduct.

[46] Mr. Kirkhope admits that he caused and permitted the execution and registration of the Law Firm Mortgage for purposes of securing his legal fees when he ought to have known that the registration of the mortgage was in violation of the Restraining Order, as set out in the Amended Citation.

[47] Mr. Kirkhope further admits that his conduct constitutes professional misconduct.

DISCUSSION

[48] Members of the Law Society are officers of the court and owe a duty to maintain the integrity of the legal system.

[49] Mr. Kirkhope is an experienced family law lawyer. The Restraining Order is not unusual in this practice area. He says that he forgot about that Order, despite the fact that he consented to it, drafted it and filed it. Forgetting about the Order in these circumstances and permitting the execution and registration of the Law Firm Mortgage in breach of the Order is a marked departure from what the Law Society expects of its members.

[50] Further, after being informed of the problem with the mortgage, Mr. Kirkhope took steps to partially rectify the potential problem, but continued to attempt to enforce the Law Firm Mortgage as against his former client's interest in the Family Home, despite his knowledge that the mortgage was in breach of the Restraining Order. Those acts were deliberate.

[51] On these facts the Panel has no difficulty in accepting the admission that Mr. Kirkhope's conduct was professional misconduct.

Determination

[52] The Panel finds that Mr. Kirkhope's actions in permitting the execution and registration of the Law Firm Mortgage constitutes professional misconduct.

Disciplinary Action

[53] We have reviewed the prior decisions included in the Law Society's brief and considered the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17. We also note that, although breach of a court order constitutes serious misconduct, prior panels have ordered a wide array of disciplinary action for lawyers found in breach ranging from a reprimand to a one-month suspension. The more recent cases tend to favour a suspension or a fine as the appropriate penalty. (See e.g. *Law Society of BC v. Scholz*, 2009 LSBC 33 and *Law Society of BC v. Saini*, 2006 LSBC 35.)

[54] Mr. Kirkhope has a Professional Conduct Record consisting of a \$10,000 fine for dishonourable conduct in accepting and making use of a tape recording made by his matrimonial client of privileged telephone conversations between the client's wife and her counsel in violation of s. 193(1)(a) of the *Criminal Code of Canada* and the concept of solicitor client privilege. That portion of his record is not directly related to the current hearing, but it is troubling given the duty of lawyers in upholding the integrity of the legal system. The prior offence may not be directly related, but it is a close cousin of the current offence.

[55] As noted above, Mr. Kirkhope is an experienced family law lawyer. He breached a standard term of an order in matrimonial proceedings.

[56] As mitigating factors, Mr. Kirkhope's counsel notes that:

- (a) Mr. Kirkhope intended that the Law Firm Mortgage would only encumber the Husband's interest in the Family Home;
- (b) when notified of the problem, Mr. Kirkhope immediately drafted releases of the Law Firm Mortgage and sent them to the Husband's counsel (although the releases were sent with conditions);
- (c) although he continued to pursue his rights under the Law Firm Mortgage until Mr. Justice Truscott's order, his mortgage could never have had priority over the rights of the Wife. No party suffered financially;
- (d) his prior disciplinary record is, he says, unrelated.

[57] The Law Society submits that the appropriate disciplinary action is a fine in the amount of \$4,500 payable by April 30, 2012.

[58] Mr. Kirkhope agrees with the disciplinary action and the award of costs sought by the Law Society.

[59] We accept the agreement of the parties and impose a fine of \$4,500 payable by April 30, 2012.

COSTS

[60] Rule 5-9 of the Law Society Rules provides that this Panel can award costs against the Respondent. The custom is that the Law Society seeks to recover a percentage of the actual time spent by counsel in prosecuting the citation.

[61] The Law Society seeks costs in the amount of \$4,500 payable by April 30, 2012.

[62] We are informed by counsel for the Law Society that the total amount of costs incurred in this case was approximately \$13,000 of which \$12,000 was for counsel fees. The Law Society seeks \$3,000 representing 17 per cent of that figure.

[63] Mr. Kirkhope agrees with that assessment of costs.

[64] We accept the agreement of the parties and award costs to the Law Society in the amount of \$3,000 payable by April 30, 2012.

ORDER

[65] The Panel finds that Mr. Kirkhope has committed professional misconduct and we order that he:

- (a) pay a fine in the amount of \$4,500 by April 30, 2012; and
- (b) pay the Law Society costs in the amount of \$3,000 by April 30, 2012.