

2012 : No. 1

Brian John Kirkhope

Nanaimo, BC

Called to the bar: August 31, 1990

Discipline hearing : October 25, 2011

Panel : Leon Getz, QC, Chair, Gregory Petrisor and Alan M. Ross

Oral reasons: October 25, 2011

Report issued : January 31, 2012 (2012 LSBC 05)

Counsel : Jaia Rai for the Law Society and Henry Wood, QC for Brian John Kirkhope

Facts

Brian John Kirkhope was retained by a client in a matrimonial dispute against his wife. The primary asset in the dispute was the family home.

On May 5, 2005, Kirkhope and counsel for his client's wife appeared in court and consented to an order restraining both parties from alienating title to any family asset until further order of the court. Kirkhope drafted the restraining order, which was executed by all parties.

In February 2006, Kirkhope's client indicated he did not have funds to pay for his legal services. At Kirkhope's suggestion, the client executed a \$20,000 mortgage in favour of Kirkhope's law firm to secure legal fees. The law firm mortgage was registered by Kirkhope against the undivided one-half interest of the ex-husband in the family home.

In August 2006, Kirkhope ceased representing his client and, 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 client to Kirkhope.

Kirkhope's former client retained another lawyer to represent him in the family law action.

In March 2007, Kirkhope was apprised that the wife of his former client was seeking a division of assets, including a 100 per cent reappportionment of the family home. The family home was subsequently listed for sale in October 2007; however, when it did not sell, the mortgagor commenced foreclosure proceedings.

At a November 2009 court hearing, counsel for the wife took the position that the law firm mortgage was invalid and should be declared null and void. 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 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. The court ultimately declared and ordered the law firm mortgage null and void.

Admission and disciplinary action

Kirkhope admitted 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. He further admitted that his conduct constituted professional

misconduct.

The panel noted that Kirkhope was an experienced family law lawyer, and a restraining order was not unusual in this practice area. Kirkhope said 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, was a marked departure from what the Law Society expects of its members.

Further, after taking steps to partially rectify the potential problem, Kirkhope 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.

Kirkhope has a professional conduct record for dishonourable conduct in accepting and making use of a tape recording made by another matrimonial client of privileged telephone conversations between the client's wife and her counsel. The panel considered that, although this prior offence may not be directly related, it was a close cousin of the current offence.

The panel accepted Kirkhope's admission and ordered that he pay:

1. a \$4,500 fine; and
2. \$3,000 in costs.