2012 LSBC 20
Report issued: June 01, 2012
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 section 47 review concerning

Leonard Thomas Denovan Hill

Applicant

Decision of the Benchers on Review

Review date: March 28, 2012
Benchers: **Majority decision:** Thelma O"Grady, Chair, Rita Andreone, QC, David Crossin, QC, Nancy Merrill, Lee Ongman, David Renwick, QC, Catherine Sas, QC, Barry Zackarias **Minority decision:** Vincent R.K. Orchard, QC

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

introduction

[1] This is a Review concerning Leonard Thomas Denovan Hill (the "Applicant") pursuant to s. 47 of the *Legal Profession Act*.

[2] On September 23, 2010, a citation was issued against the Applicant that directed a hearing panel (the "Panel") inquire into the Applicant's conduct as follows:

> 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 hearing was held on January 20, 2011. On March 3, 2011, the Panel issued written reasons finding that the Applicant had breached the undertaking as alleged and the circumstances of the breach amounted to professional misconduct.

[4] On June 2, 2011, the Panel convened for the purpose of determining the disciplinary action to be taken in relation to the matter. The Panel issued oral reasons on that day and ordered that the Applicant be suspended from the practice of law for 30 days; the period of suspension to commence on August 1, 2011; and the Applicant, on or before April 30, 2012, pay the Law Society $4,000 by way of reimbursement of costs that it incurred in connection with the proceedings. On June 29, 2011, the Panel issued written reasons confirming the decision of June 2, 2011.

[5] The Applicant seeks a Review of the decision of the Panel on facts and determination pursuant to s. 47 of the *Legal Profession Act*. The Notice of Review is dated June 29, 2011 and is reproduced below:

> 1. This is an application to review the Decision of the Hearing Panel dated March 03, 2011 by the Benchers of the citation issued September 23, 2010 and heard on January 20, 2011 and June 2,

2011.

2. The order sought is to dismiss the citation.

3. The issues are whether mistakes can be made by a lawyer in and about complying with undertakings that do not amount to professional misconduct including:

- Whether the proper test was employed by the panel hearing the citation as to what constitutes professional misconduct.
- Whether a single act of negligence can contribute [sic] professional misconduct.
- Whether the panel was correct in its approach of assessing credibility and in concluding that credibility or the evidence led by the Respondent was irrelevant.
- Whether the panel erred in overlooking credible evidence of the Respondent's assistant.
- Whether the panel applied the correct burden of proof.

THE SCOPE OF REVIEW BY THE BENCHERS

[6] A review by the Benchers is governed by section 47 of the *Legal Profession Act*. These are the relevant provisions:

> Review on the record
>
> 47 (1) Within 30 days after being notified of the decision of a panel under section 22 (3) or 38 (5), (6) or (7), the applicant or respondent may apply in writing to the benchers for a review on the record.. . .
>
> (5) After a hearing under this section, the benchers may
>
> (a) confirm the decision of the panel, or
>
> (b) substitute a decision the panel could have made under this Act.

[7] The nature and extent of the authority and discretion reposed in the Benchers is anchored in the principle that the Benchers are charged with the ultimate responsibility of assessing the conduct of the members of the Law Society. The existence of this broad discretion and its importance to the legal profession has been recognized in Canadian courts for decades. The seminal articulation of this principle is set out by Mr. Justice Branca in *Re Prescott* (1971), 19 DLR (3d) 446, at 452:

> The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this Province.

[8] This obligation remains unfettered. In embarking upon a Review, the Benchers must determine whether the decision of the Panel was correct and, if it finds that it was not, then the Benchers must substitute their own judgment for that of the Panel.

[9] The approach to a "correctness" analysis is also well entrenched in our jurisprudence. In *Dunsmuir v.*

New Brunswick, 2008 SCC 9 at para. 50, the Supreme Court of Canada held as follows:

> … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision makers; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[10] This is the principle and approach clearly provided for in s. 47(5) of the *Legal Profession Act*.

THE FACTS AND CIRCUMSTANCES

[11] There is agreement between the parties concerning the essential facts leading to the receipt and dispersal of the funds by Mr. Hill.

[12] At all material times Mr. Hill represented A Ltd. (the "Client"), which was the plaintiff in a builder's lien action. At all material times, Mr. Colin Campbell represented the owners of the property, CY and JC.

[13] The builder's lien claim was filed in the Land Title Office on March 18, 2008, and on March 13, 2009 Mr. Hill commenced an action on behalf of the Client in New Westminster Supreme Court in respect of a builder's lien claim on the particular property. Also on March 13, 2009, Mr. Hill registered in the Land Title Office a Certificate of Pending Litigation on behalf of the Client against the title to the property.

[14] In or about July 2009, the parties to the action reached a settlement. On July 27, 2009, a representative of the Client executed a Form C Release of the lien claim.

[15] On July 28, 2009, Mr. Campbell wrote to Mr. Hill:

> Once we have agreed on the form of release, I will send the funds to you on your undertaking not to release it 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 LTD documents showing the registration numbers.
>
> … please send me a copy of the form or release you propose to have your client sign releasing my clients.

[16] In or about September or October 2009, the parties to the action agreed on the form of release, on October 5, 2009 the Client executed a general release (the "Release"), and on October 13, 2009 Mr. Hill wrote to Mr. Campbell enclosing a copy of the executed Release and requesting that Mr. Campbell forward the funds.

[17] On October 19, 2009, Mr. Campbell sent Mr. Hill a letter enclosing a trust cheque in the amount of $11,500 payable to Mr. Hill on his undertaking:

> … not to release any part of those funds from trust, except to return them to Chee Dusevic [Mr. Campbell's law firm] 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 [sic] to take 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 (which I

have now drafted to assist in concluding this matter), 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. …

[18] Mr. Hill admits he received the undertaking letter on October 22, 2009 and the cheque for $11,500 attached to it.

[19] On October 22, 2009, Mr. Hill deposited the $11,500 to his trust account and on October 23, 2009, withdrew $840 from trust to pay his outstanding account. He also withdrew the balance of the funds, the amount of $10,660 and paid this money to his client.

[20] When Mr. Hill released the funds from his trust account on October 23, 2009:

(a) he had not submitted a discharge of the lien claim or the Certificate of Pending Litigation to the Land Title Office; and

(b) he had not submitted for filing the consent dismissal order of the Action.

[21] Mr. Hill ultimately attended to the required filing:

(a) the discharge of the Certificate of Pending Litigation was registered in the Land Title Office on January 14, 2010;

(b) the discharge of the Lien Claim was registered in the Land Title Office on January 25, 2010; and

(c) the consent dismissal order was submitted for filing in the New Westminster Registry on January 19, 2010.

[22] The sequence of events that led to the filing of the required documentation was as follows:

1. On December 28, 2009, Mr. Campbell wrote to Mr. Hill:

… I note that we have not received, among other documents, the discharges of the claim of lien and certificate of pending litigation.

Please confirm that you have filed them and send us filed copies immediately, with the original executed release. If you have not yet received a copy of the entered consent dismissal order to send us, please let us know when it was submitted.

2. On January 14, 2010, Mr. Hill sent Mr. Campbell a fax enclosing a copy of the following documents that had been submitted for registration at the Land Title Office that day; a Form 17 Application to cancel the Certificate of Pending Litigation; a Form C Release of the Lien Claim; and a letter dated July 10, 2009 from Mr. Hill authorizing the cancellation of the Certificate of Pending Litigation. In this fax, Mr. Hill told Mr. Campbell that the Consent Dismissal Order would be faxed to Mr. Campbell once it was returned by the registry.

3. On January 15, 2010, Mr. Campbell sent Mr. Hill a letter, in which he wrote:

… The copy of the discharge of the claim of builder's lien enclosed was not registered. Please send me a copy of the registered discharge showing the registration particulars.

Do you continue to hold in trust the $11,500? If not, on what date did you pay out of trust?

4. On January 15, 2010, Mr. Hill sent a fax (dated January 14, 2010) to Mr. Campbell in which he wrote:

> We refer to the above matter and your letter dated January 15, 2010. Please be advised that we did confirm with the Land Titles office at New Westminster and they told us that it's the release of the CPL and the Lien under the [number].

5. On January 15, 2010, Mr. Campbell then wrote to Mr. Hill:

> I have received a telephone message from Anita of your office.
>
> She did not address one issue in particular, to which I demand your immediate written reply.
>
> Do you continue to hold in trust the $11,500? If not, on what date did you pay out of trust?

6. On January 15, 2010, Mr. Campbell sent to Mr. Hill a further letter, in which he wrote:

> You are also on an undertaking to have irrevocable instructions from your client before releasing funds to, among other things deliver the original release to me along with the consent dismissal order. Please confirm that you have the original release, and will send it (not fax it) to me with a copy of the entered consent order when the latter is available, at the latest.
>
> I repeat: do you continue to hold in trust the $11,500? If not, on what date did you pay out of trust?

7. Mr. Campbell did not receive a response from Mr. Hill regarding the trust funds during the day on January 15, 2010. Late in the afternoon of January 15, 2010, Mr. Campbell sent Mr. Hill another letter, in which he wrote:

> Inform me in writing by noon on Monday, January 18, 2009, whether or not you continue to hold in trust the $11,500, and if not, on what date you paid the funds out of trust.

8. On January 18, 2010, Mr. Hill sent a fax to Mr. Campbell, in which he wrote:

> We refer to the above matter and write to advise you that the funds were disbursed on October 23, 2009. 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. …

9. Also on January 18, 2010, Mr. Campbell reported the matter to the Law Society.

10. On February 10, 2010, the consent dismissal order was entered. On February 17, 2010, Mr. Hill delivered a copy of it to Mr. Campbell.

[23] These are the critical facts that formed the foundation of the allegation before the Panel and are before us upon Review.

FINDINGS AND CONCLUSIONS OF THE PANEL

[24] The facts are straightforward and are in large measure uncontested.

[25] On October 22, 2009, the office of the Applicant received a letter from Mr. Campbell enclosing a trust cheque in the amount of $11,500 impressed with an undertaking concerning the Applicant's ability to deal with the funds.

[26] On October 23, 2009, the cheque was deposited to the Applicant's trust account. The same day, the Applicant prepared his account for services rendered, authorized withdrawal of the funds from his trust account to pay his account, and released the balance of the funds to his client.

[27] He did this without complying in any way with the undertaking.

[28] On the face of it, the allegation appears indefensible.

[29] The Applicant, however, took the position before the Panel that he did not see the letter imposing the undertaking upon its arrival in his office on October 22, 2009, and erroneously believed that the required documentation that was necessary to be filed in order to comply with the undertaking had, in fact, previously been filed. In essence, the Applicant says the release of the funds was a result of an honest but mistaken belief and, in the circumstances, ought not to give rise to a finding of professional misconduct.

[30] In opening before the Panel, counsel on behalf of the Law Society fairly and succinctly articulated the issue as follows:

> As I understand it, the Respondent's defence is he did not see the undertaking letter. The issue in this case is, the Law Society says, whether in all of the circumstances the Respondent's unawareness of the undertaking constitutes professional misconduct. The Law Society's position is it does because the Respondent failed to take reasonable steps to ascertain the terms under which he received the funds.

[31] The Applicant gave evidence in support of his position. Generally speaking, the evidence addressed the circumstances surrounding the admitted failure of the Applicant to abide by the undertaking. The purport of the Applicant's position is fairly captured in the extracts of evidence contained in the paragraphs that follow.

[32] The Applicant testified at the hearing:

> What happened after that was that he sent -- I readily admit that he sent the funds to me and he sent the letter with the undertakings that you can see in here. The problem was that the letter -- I didn't see the letter. Somehow because of the time that had gone by since July in drafting up the form of the release in October, I thought that all these matters had been filed that had to be filed in the land title office which was -- and all the documents were dealt with. This was a mistake, it was wrong, because it hadn't been done.

[33] And further:

> So that's what happened. I attribute this to -- I mean, there's some things I should have done here as I can see them. One is I shouldn't have just gone on my memory as to what had happened and thought that these documents were filed. I should have opened the file and I realize that, then none of this would have happened.

[34] In cross-examination, the Applicant offered this evidence:

> Q In your experience do you usually receive cheques without covering letters?
>
> A No, there's usually something attached to them. I can't think of any example where you just get a cheque -- unless maybe it's somebody that doesn't have a lawyer.
>
> Q So for you to have a cheque without a covering letter was unusual?
>
> A It would have been, yeah, from a lawyer anyway.
>
> Q Did you take any steps to locate the covering letter in October of 2009?
>
> A I don't remember any of this actually, what happened on October 22nd or October 23rd. So I would have to say I don't know the answer to the question, and the answer is probably no, I didn't.

[35] And finally:

> Q Then you wrote: “I believe that the filing had been done at the time I disbursed the money.”
>
> A Right.
>
> Q On what did you base that belief?
>
> A Well, memory, a false memory but a memory. I thought it had been done.

[36] The Applicant’s legal secretary, PK, also gave evidence. PK began her employment with the Applicant in November 2009.

[37] PK could not provide evidence concerning the circumstances of the receipt and disbursement of the funds. Her testimony largely consisted of confirmatory evidence relating to the Applicant’s efforts to set matters straight after the critical timeframe in October 2009.

[38] The Panel concluded:

> [16] In our view, the Respondent’s contention that he was unaware of the fact that he was subject to an unfilled undertaking stretches credulity. … 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.
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> …
>
> [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.
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> …
>
> [22] …The Respondent’s failure to make any inquiries 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” (Law Society of BC v. Martin, 2005 LSBC 16), and cannot seriously be contended to have been “the product of events beyond [his] control or of an innocent mistake.” (Re: Lawyer 10, 2010 LSBC 02)
>
> …
>
> [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.

ANALYSIS

[39] On October 22, 2009, the Applicant found himself in possession of a cheque representing settlement funds relating to litigation in a builder’s lien claim. The Applicant has an active practice in this area and testified it is not uncommon that these cases are resolved and funds exchanged based upon undertakings.

[40] In any event, the Applicant knew that settlement funds would be sent to him on an undertaking. The letter from Mr. Campbell in July 2009 advising the Applicant of this was in the Applicant’s file. The Applicant assumes he had seen and read this letter.

[41] On October 23, 2009, the Applicant released the funds without complying with the undertaking that was contained in the letter forwarding the funds. He did so without making inquiries of Mr. Campbell, or anyone else, concerning the circumstances of the receipt of the cheque in his office. He did so without retrieving and looking in the file. He released the funds based upon "a memory" that the required undertaking had been previously complied with.

[42] His evidence before the Panel is that he could provide no factual basis upon which his memory of compliance rested. In his submissions before the Benchers on Review, he conceded there was no evidentiary foundation or circumstance that would support a reasonable belief he had in fact complied with his obligations prior to releasing the funds.

[43] In our view, his course of conduct in his dealings with the cheque was unacceptable conduct on the part of any lawyer, much less a lawyer of the Applicant's experience.

[44] We have no hesitation in concluding the Panel correctly found the Applicant's actions amounted to professional misconduct.

THE APPLICANT'S NOTICE OF REVIEW

[45] We have assessed the evidence in this matter and concluded the Panel was correct in finding that the conduct of the Applicant constituted professional misconduct. In light of this finding, it may well be unnecessary to address the particular complaints of the Applicant contained in the Notice of Review and amplified in submissions before us.

[46] The Applicant and counsel on behalf of the Law Society took care in addressing the particular complaints in both written and oral submissions. In these circumstances, we are of the view it is appropriate to address the concerns raised and argued before us.

THE PARTICULAR COMPLAINTS

The Proper Test for Professional Misconduct

[47] The Applicant submits that the Panel erred in failing to apply the appropriate legal test in determining the nature of the conduct that constitutes professional misconduct.

[48] The Panel relied upon the test set out in *Law Society of BC v. Martin*. The Panel referenced this test at paragraph [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.

[49] Ultimately the Panel articulated the assessment of the evidence in this way:

> … 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*) ….

[50] In our view, there is no doubt the Panel appreciated the appropriate test and applied it properly to the

facts.

A Single Act of Negligence as Professional Misconduct

[51] The Applicant list as an issue for the Review "Whether a single act of negligence can contribute [sic] professional misconduct. This submission, as we understood it, is closely linked to the general position taken by the Applicant that the act of releasing the funds in the particular circumstances should not, or could not, amount to professional misconduct.

[52] We have made it clear the circumstances before us do amount to professional misconduct. Whether the conduct and circumstances should be properly described as a single act or a series of acts misses the point. The issue is whether the conduct, in all the circumstances, demonstrates a marked departure from the conduct the Law Society expects from its members (as articulated in *Martin*). We have found that the conduct of the Applicant does, in fact, demonstrate such a departure.

The Issue of the Application of the Correct Burden of Proof

[53] It is the position of the Applicant that the Panel erred in not appreciating and applying the correct burden of proof. In other words, the Panel failed to apply the correct standard of proof and/or erred in determining the evidence was capable of proving the allegation of misconduct.

[54] The onus and burden of proof in Law Society hearings is well known and consistently applied. The onus is on the Law Society to prove on the balance of probabilities that the respondent conducted himself in such a way that it amounted to professional misconduct.

[55] There was nothing in the decision of the Panel that indicted that the Panel applied a standard of proof other than the appropriate one. It is simply not reasonable to conclude the Panel failed to appreciate the appropriate burden of proof. There was a body of evidence before the Panel that, if accepted, was capable of proof on the balance of probabilities that the Applicant was bound by and breached the undertaking; and did so in circumstances that amounted to gross culpable neglect of his duties as a lawyer.

[56] In addition, applying the appropriate standard of proof, we have concluded the Panel did correctly find professional misconduct on the part of the Applicant.

The Issue of a "Culture" Regarding Undertakings

[57] The Applicant urged us to find that the Panel erred in relying on the existence, or at least the notion of a "culture" regarding undertakings that was not in evidence before the Panel.

[58] This submission arises from the finding of the Panel as follows:

> 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 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.

[59] In our view, this observation, characterized as a "culture", is simply a recognition by the Panel of the importance undertakings play in the practice of law and the obligations of lawyers to fulfill every undertaking given and trust condition accepted. The ethical obligations of our profession make this quite clear.

[60] There can be no doubt that the critical importance of undertakings in the context of the practice of law is well known to the profession. The Applicant knows this. The Benchers do not require evidence to recognize

and rely upon this fundamental principle.

The Assessment of Evidence and the Adequacy of the Reasons

[61] The Applicant raises the issue as to whether the Panel properly assessed the evidence, including the issue of credibility. This is coupled with the particular complaint that the Panel overlooked the evidence of the Applicant's legal secretary, PK. This is expressed in the Applicant's written submissions in the following way:

> … except to express disbelief, the Panel gives me no reasons why the Respondent's evidence was disbelieved. There needs to be articulation of why the evidence was disbelieved. *R. v. R.E.M.*, [2008] SCJ No. 52.

[62] The Applicant submitted that the Panel failed to properly consider the evidence and properly express their reasoning concerning the findings against the Applicant. This is fundamentally a complaint concerning the adequacy or sufficiency of reasons.

[63] Procedural fairness generally requires tribunals to provide reasons for its decision. This is particularly so when it comes to findings concerning professional misconduct. The Law Society is a self-governing profession. It is important from the perspective of both the public and lawyers that the circumstances and the reasoning concerning matters of professional conduct be comprehensible and transparent.

[64] In addition, in circumstances where a Review is available from the decision of a tribunal, it is necessary that the reasons allow for an effective and meaningful Review to take place.

[65] In *R. v. Gagnon*, [2006] 1 SCR 621 the Court expressed the issue and its approach in terms of common sense, tempered with reasonable deference at paragraph 19:

> This Court has consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court. Having encouraged these expanded reasons, it would be counterproductive to dissect them minutely in a way that undermines the trial judge's responsibility for weighing all of the evidence. A trial judge's language must be reviewed not only with care, but also in context. … The task is to assess the overall, common sense meaning, not to parse the individual linguistic components.

[66] And further at paragraph 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[67] And finally, at paragraph 22:

> In this case, looking at the trial judge's reasons as a whole, they were sufficient. While yielding a result with which the majority in the Court of Appeal disagreed, the reasons nonetheless adequately demonstrated the rationale behind the trial judge's conclusions on credibility and reasonable doubt.

[68] There were two witnesses in this case: the Applicant and PK.

[69] The Panel was alive to the evidence of PK; in fact, she was questioned extensively by members of the

Panel.

[70] In the particular circumstance, there is no reasonable basis to believe the failure to discuss her evidence impacted the conclusions of the Panel.

[71] The test for the adequacy of reasons was confirmed by Mr. Justice Donald, for the Court of Appeal in *K (KL) v. K (EJ)*, 2011 BCCA 276, 19 BCLR (5th) 320:

> [31] … It was not, in my view, necessary for "intelligibility" to have a full recital of the evidence. A trial judge is not required to exhaustively survey every piece of evidence offered at trial. As this Court stated in *Marois v. Pelech*, 2009 BCCA 286, 95 BCLR (4th) 243 at para. 46:
>
> > The failure of the trial judge to discuss the evidence in detail is not sufficient reason for this Court to re-examine it unless it gives rise to a "reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion": *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 SCR 1014 at para. 15, aff'd *Housen v. Nikolaisen*, 2002 SCC 33, [2002] SCR 235 at paras. 39, 72.

[72] In our view, the decision of the Panel amply demonstrates the reasoning in arriving at its decision. The reasons of the Panel adequately and properly describe both what was decided and why the decision was made.

[73] While we are not in agreement with the Applicant's submission on this point, the finding of the Panel relating to the Applicant's credibility raises a different concern.

[74] The Panel rested the finding of professional misconduct on two foundations. The Panel concluded the Applicant was not credible in his assertion that he was unaware he was acting in violation of the undertaking. In addition, the Panel concluded that even accepting his evidence, his actions nevertheless amounted to professional misconduct due to his failure to take any steps to ascertain the true state of affairs before releasing the funds.

[75] It was, as the Panel concluded, " … 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."

[76] As previously referenced, counsel on behalf of the Law Society opened the case as follows:

> As I understand it, the Respondent's defence is he did not see the undertaking letter. The issue in this case is, the Law Society says, whether in all of the circumstances the Respondent's unawareness of the undertaking constitutes professional misconduct. The Law Society's position is it does because the Respondent failed to take reasonable steps to ascertain the terms under which he received the funds.

[77] The concern we have is that the allegation or suggestion that the Applicant intentionally breached the undertaking was not put squarely in issue in the case brought by the Law Society. The Applicant, in answer to the citation, took the position that his failure was a result of neglect.

[78] Thereafter, a fair reading of the Record demonstrates that the issue that was struck between the Applicant and the Law Society was based upon this singular foundation. The Law Society pursued this position against the Applicant throughout the course of the hearing, and the Applicant defended the matter upon the same basis.

[79] In this regard, counsel on behalf of the Law Society extensively cross-examined the Applicant. It was not put to the Applicant that he was being untruthful or that he had knowingly or intentionally breached the undertaking.

[80] The theme of the cross-examination was, in fact, consistent with the position the Law Society had taken in its opening, namely: the liability of the Applicant rested on the proposition that the failure of the Applicant to take appropriate steps to ascertain the circumstances surrounding the receipt of the cheque was culpable neglect.

[81] Consequently, in submissions to the Panel, counsel on behalf of the Law Society quite properly did not argue or frame its case on the footing that the Applicant had intentionally breached the undertaking; or that the Applicant was being untruthful concerning his knowledge.

[82] The position of the Law Society is captured in the following submissions.

> The question in this case is really whether the Respondent being unaware of the undertaking at the time he breached it, whether that is sufficient for a finding of misconduct or not. The Law Society says the question isn't really whether he was unaware of the undertaking but why he was unaware of it.

And further:

> Simply on the basis of these facts the Law Society submits this is not a case where the Respondent was unaware because in circumstances where he had exercised reasonable diligence, and in fact we say he did not, the fact of the matter is he did not look at the file. …
>
> I submit this culture about undertakings is extremely important in assessing whether the Respondent's unawareness of the undertaking was a marked departure from the standard expected of lawyers. The preponderance of case law from the case [sic] Law Society establishes that a breach of undertaking constitutes professional misconduct even when the lawyer does not intent [sic] to breach the undertaking or knowingly act contrary to it.
>
> … and I would say here where I would say the Respondent did not take any reasonable steps to check the file, to check the awareness, to check the basis on which he received those funds, the evidence shows that he received the funds from opposing counsel but he did not see the covering letter which was of course the undertaking letter.

[83] The Law Society was consistent in its approach upon Review:

> The main issue on this review is whether it is professional misconduct for a lawyer to breach an undertaking, where he has not read the letter that contains the undertaking and so is unaware of it, and when the lawyer receives and disburses trust funds without taking any steps to ascertain whether the funds are subject to an undertaking or to otherwise check the status of the matter or look at his file.

[84] An allegation of intentional wrongdoing against a lawyer is a serious charge. The moral turpitude associated with such a finding has significant impact. In the event such a finding is also coupled with the rejection of evidence under oath; it can prove fatal to one's professional reputation.

[85] The fact that the allegation of intentional wrongdoing was not argued by the Law Society in the prosecution of the case against the Applicant, naturally raises a concern the Applicant did not have an informed opportunity to fully answer and defend the allegation. In fact, it is clear the parties litigated the case on a different basis.

[86] In the circumstances, we confirm the finding of professional misconduct against the Applicant. We decline to endorse the finding of the Panel relating to the credibility of the Applicant, and we make no finding the Applicant intentionally breached the undertaking.

MINORITY DECISION OF VINCENT ORCHARD, QC

[87] I have had the opportunity of reading the decision in draft form concerning this s. 47 Review. I have no hesitation in agreeing with the conclusion that the hearing panel (the "Panel") correctly found the Applicant's actions amounted to professional misconduct in breaching an undertaking. However, I respectfully do not agree with my colleague's comments, which I consider more in the nature of obiter, concerning the factual finding by the Panel rejecting the Applicant's explanation that he was unaware of the undertaking imposed upon him in Mr. Campbell's letter of October 19, 2009. While I may or may not have reached the same conclusion as the Panel on that point, the Panel is owed a degree of deference sufficient to dissuade me from interfering in a factual finding. In my view, it was open to the Panel on the case as presented to reject the Applicant's testimony that he was unaware of the undertaking.

FACTUAL BACKGROUND

[88] The factual background to the citation is comprehensively summarized in the Panel's decision and in the decision on Review. There is no need to repeat in detail the primary facts.

DISCUSSION

[89] I agree that the standard of review is one of correctness. Nonetheless, on findings of fact, which include the weighing of evidence and assessing internal and external consistencies and inconsistencies in testimony, a review on the record should be restrained unless it can be shown that the original trier of fact has committed a palpable and overriding error. I am not satisfied that palpable and overriding error has been shown on this Review and accordingly I feel bound to defer to the findings of fact of the Panel.

[90] I have reviewed the Record of the hearing, and I do not consider that the cross-examination of the Applicant by counsel for the Law Society and the questioning of the Applicant by the Panel members were such that the Applicant was unaware that his explanation for the breach of undertaking was being scrutinized. There was extensive questioning on the primary facts and their inconsistency with his explanation. In my view, the Applicant was left in no doubt that his testimony to the effect that he was unaware of the undertaking was being challenged and might well be rejected by the Panel. I fail to see any patent unfairness on the basis of the Record.

[91] The Panel was aware that the Applicant had no actual memory at all of the events in his office on October 22 and 23, 2009 when he disbursed funds to his client and transferred funds in payment of his account contrary to the terms of the undertaking imposed by Mr. Campbell's letter of October 19, 2009. He candidly admitted he was reconstructing his explanation that: (i) he must not have seen the letter of October 19, 2009; and (ii) he believed that all the undertaking conditions had previously been met.

[92] As I noted, facts were certainly put to the Applicant in cross-examination that ran contrary to his explanation. Those primary facts included his acknowledgement of Mr. Campbell's letter of July 28, 2009 noting that funds would be sent to him on various undertakings. Also, the Applicant was experienced in the area of builder's liens, and he was very familiar with the customary practice of resolving such litigation on undertakings. In addition, the Applicant was questioned concerning his explanation that he thought his office had already satisfied the undertaking conditions by filing a consent dismissal order in the Court Registry and filing discharges in the Land Title Office prior to October 22, 2009 when Mr. Campbell's letter of October 19, 2009 arrived in the Applicant's office. That counsel for a plaintiff lienholder would dismiss a client's action by filing a consent dismissal order and would discharge other security documents without obtaining funds in trust or undertakings to protect the client was certainly a concern for the Panel.

[93] Furthermore, I am not troubled by the approach of counsel for the Law Society. Counsel's approach seemed consistent both at the hearing level and on this Review. Counsel for the Law Society supported the factual conclusions of the Panel. Indeed, on this Review counsel for the Law Society stated in her written submissions:

> 50. The Hearing Panel found implausible the Respondent's contention that he was unaware of the Undertaking for the reasons set out at paragraph 16 of the F&D Decision. Each of those reasons is based on the testimony or admission of the Respondent:
>
> (a) In the 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" … . The Respondent confirmed this statement in his testimony … .
>
> (b) 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 on [sic] before funds can be disbursed" … . The Hearing Panel referenced the Respondent's evidence that it is common in builders' lien practice for documents or funds to be exchanged on undertakings and that he had an active practice in that field … .
>
> (c) The Respondent was advised in July 2009 that the funds in settlement of the lien claim would be delivered to him on undertakings … . He received this letter and understood that the funds would be sent to him on an undertaking and this letter was in his client file … .
>
> 51. The Law Society submits that the Hearing Panel's decision is correct and supported by the evidence. *The Hearing Panel was entitled on the evidence before it to conclude that it was not sensible or credible for the Respondent to assert he was unaware of the Undertaking, when in all of the circumstances he was clearly aware of the possibility or likelihood that he was subject to an undertaking and the Undertaking Letter itself has been received in his office and a copy was accessible on the computer.* Moreover, the enclosures to the Undertaking Letter were received and handled in due course: the Cheque was deposited the same day and the consent dismissal order was placed in the file where it was found in January 2010. On October 13, 2009, approximately nine [days] before receiving the Undertaking Letter and Cheque, the Respondent sent the executed release to Mr. Campbell and requested that he forward payment in due course.
>
> …
>
> 52. The Hearing Panel had the opportunity to observe the Respondent when he gave evidence, and deference should be given to its findings of fact and assessment of credibility.
>
> [emphasis added]

[94] I agree with counsel for the Law Society that deference must be given to the Panel's findings of fact and assessment of credibility.

[95] It is trite law that a trier of fact may accept all, part, or none of a witness's testimony: *R. v. François*, [1994] 2 SCR 827 at 837. Moreover, I do not view the comments of the Panel in paragraph 16 of its decision as amounting to a finding that the Applicant was a dishonest and insincere witness. Credibility involves consideration of a number of factors including the honesty and sincerity of a witness but more importantly, "the real test of the truth of the story of a witness … must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.": *Faryna v. Chorny* (1951), 4 WWR (NS) 171 at pp. 174-175. In *Faryna v. Chorny*, O'Halloran, JA did not accept a witness's testimony because it was "equivalent to asking it to place its

stamp of approval upon a proposition that places too great a strain upon one's sense of the realities of life." It seems to me that the Panel had in mind Justice O'Halloran's "real test".

[96] Logic and experience supports appellate deference to factual conclusions of the primary trier of fact. The Supreme Court of Canada has on a number of occasions confirmed that the findings of fact, the weighing of evidence, and the drawing of inferences of fact are the province of the trier of fact, not the appellate tribunal: *Housen v. Nikolaisen*, supra, following *Toneguzzo-Norvell (Guardian ad Litem of) v. Burnaby Hospital*, [1994] 1 SCR 114. In *Housen* the Supreme Court observed that "the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses … " . (pp. 255-256).

[97] Many years ago, Lord Shaw in *Clarke v Edinburgh & District Tramway Co., Ltd.*, [1919] S.C. (H.L.) 35 at p.. 36-37 discussed the rationale for deferring to a trial judge, the trier of fact, on such matters:

> In my opinion, the duty of an appellate court … is for each judge of it to put to himself, as I do in this case, the question, am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that a judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to be my duty to defer to his judgement.

[98] It is clear to me that the Panel in this case simply did not find the Applicant's memory and explanation reliable. But, they did not find him dishonest.

[99] Recently in cases such as *Mariano v. Campbell*, 2010 BCCA 410 and *R. v. Sue*, 2011 BCCA 91, the Court of Appeal has confirmed the importance of first hand appreciation of testimony and the restricted role of appellate courts in reviewing findings of fact.

[100] In *R. v. Sue* the Court of Appeal reviewed more recent authority in line with *Faryna v. Chorny* that places greater emphasis on the substance of the evidence and its relationship to reason and common sense, although recognizing demeanour of a witness may be a factor.

CONCLUSION

[101] In conclusion, I am not satisfied that the Panel's factual finding rejecting the Applicant's explanation that he was unaware of the undertaking was a palpable and overriding error. Having found that the Applicant was aware of the undertaking, the Panel's conclusion that the Applicant knowingly breached the undertaking naturally followed.