2012 LSBC 26
Report issued: July 20, 2012
Citation issued: November 8, 2011

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

David Harvey Stoller

Respondent

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

Hearing date: June 13, 2012
Panel: Thelma O'Grady, Bencher, Chair, John Lane, Public representative, Sandra Weafer, Lawyer

Counsel for the Law Society: Carolyn Gulabsingh
Counsel for the Respondent: Henry Wood, QC

BACKGROUND

[1] A citation was authorized on October 20, 2011 and issued on November 8, 2011 alleging that David Harvey Stoller, while acting for the vendors of real property breached an undertaking given to the purchaser's lawyer on August 26, 2009 to discharge the mortgage registered against the property. The Respondent has admitted that he breached the undertaking, and admitted that this conduct constitutes professional misconduct.

FACTS

[2] In this hearing, none of the salient facts were in dispute. An Agreed Statement of Facts was tendered as an Exhibit. In addition, the Respondent filed an affidavit in the proceeding, and was cross-examined on that affidavit. The Panel finds the following facts:

1. David Stoller was called and admitted as a member of the Law Society of British Columbia on January 13, 1981. He has been a sole practitioner since 1987, and a significant portion of his practice is in real estate.

2. In a real estate transaction in which Mr. Stoller acted for the owners of two properties, he inadvertently registered a mortgage against the wrong property.

3. As a result, the vendor's property was subject to a mortgage at the time of the sale. Mr. Stoller gave his undertaking to discharge the mortgage in a letter to the purchaser's lawyer dated August 26, 2009.

4. Beginning in November, 2009, the purchaser's lawyer made numerous inquiries of Mr. Stoller's office seeking the discharges pursuant to the undertaking.

5. By March 22, 2010 the purchaser's lawyer still had not received the discharge. As a result, he filed a complaint with the Law Society.

6. The mortgage was ultimately discharged on November 23, 2010.

DECISION

[3] The Respondent admits the breach of undertaking and admits that this constitutes professional misconduct. The Panel accepts these admissions.

[4] Although "professional misconduct" is not defined in the *Legal Profession Act*, it is well accepted that the question is 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" (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171).

[5] The importance of undertakings was set out in the written submissions of the Law Society:

> The unequivocal expectation (at least since 1995) is that a lawyer will "fulfill every undertaking given", which is an expression by the Benchers of the standard expected of lawyers. There is no exception or limitation in this expectation. The importance of undertakings is further underscored by the requirement in Chapter 11, Rule 7.1 [of the *Professional Conduct Handbook*], that undertakings be confirmed in writing, which is further evidence of their importance and the formality surrounding them.

[6] As the BC Court of Appeal stated in *Hammond v. Law Society of BC*, 2004 BCCA 560 at para. 56:

> When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. …

[7] As the Panel indicated at the conclusion of the facts and determination phase of the hearing, we have no trouble accepting the Respondent's admission that his failure to discharge the mortgage for almost 15 months constitutes professional misconduct.

PRIOR PROFESSIONAL CONDUCT RECORD

[8] The Respondent's prior Professional Conduct Record is not relevant to whether his conduct in this instance constitutes professional misconduct. A single breach of undertaking is professional misconduct even in the absence of any prior dealings with the Law Society.

[9] The Panel notes that the Respondent has no prior conduct history for breaches of undertaking. However, his prior conduct record sets out two earlier matters relating to delay and procrastination, as well as failing to document files appropriately. The Respondent's breach of undertaking in this case was not the result of dishonesty or failure to understand his obligations. His conduct in this matter, like the earlier matters, demonstrates an underlying element of delay and procrastination. As such, it is a relevant consideration to both disciplinary action and costs.

DISCIPLINARY ACTION

[10] Counsel for the Law Society submitted that an appropriate disciplinary action in this case is a fine of $3,000 payable by October 31, 2012. The Respondent does not oppose the fine proposed. A review of relevant case law for similar breaches of undertaking, including *Law Society of BC v. Linge*, 2008 LSBC 07, and *Law Society of BC v. Plested*, 2012 LSBC 10, reveals that this is an appropriate fine. The Panel accepts the recommendation of the Law Society and imposes a fine of $3,000 payable by October 31, 2012.

COSTS

[11] In this case the citation was issued in October, 2011. In April of this year Rule 5-9 of the Law Society Rules was amended to indicate that the Panel must have regard to the tariff of costs in calculating the costs payable in respect of a hearing on a citation. Counsel for the Law Society has prepared a Bill of Costs in the amount of $3,324, inclusive of counsel fees and disbursements. The Law Society seeks this amount either as an application of the new tariff, or as a reasonable amount pursuant to the factors enumerated in *Law Society of BC v. Racette*, 2006 LSBC 29. That case set out the following factors which may be considered in determining what costs are reasonable:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the penalty, including possible fines and or suspension;

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[12] The Respondent argues that costs should not be awarded pursuant to the new tariff as it was not in effect at the time of the citation. He argues instead that the proper range of costs, pursuant to the *Racette* factors and prior precedent, is $2,500.

[13] We do not need to determine whether the tariff applies in a mandatory way to citations issued before it came into effect. However, on the facts of this case, we consider the amount suggested by the Law Society to represent a reasonable amount of cots under the *Racette* factors.

[14] We note that one of the cases relied on by the Respondent is the *Law Society of BC v. Clendenning*, 2007 LSBC 10. It was factually quite similar and concerned the late discharge of a mortgage. The discharge was registered approximately 18 months after the transaction completed. In that case, costs of $2,500 were awarded.

[15] *Clendenning* was decided in January, 2007 – over five years ago. If $2,500 in costs was a reasonable amount in January, 2007, then the $3,100 amount suggested by the Law Society, is surely within a reasonable amount range five years later.

[16] Accordingly, the Panel imposes a fine of $3,000 and costs of $3,100 plus disbursements of $224 payable by October 31, 2012.