2013 LSBC 11
Report issued: March 26, 2013
Oral Reasons: January 30, 2013
Citation issued: July 16, 2012

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

MILAN MATT UZELAC

Respondent

Decision of the Hearing Panel

Hearing date: January 30, 2013
Panel: Barry Zacharias, Chair, Woody Hayes, Public Representative, John Waddell, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Appearing on his own behalf: Milan M. Uzelac

BACKGROUND

[1] The citation was authorized by the Discipline Committee on June 21, 2012 and issued July 16, 2012. The Respondent admits that he was served with the citation pursuant to the requirements of Law Society Rule 4-15.

[2] The citation sets out the nature of the conduct of the Respondent to be inquired into:

> 1. In the course of representing your clients the Bank and JH in a mortgage transaction between the Bank, as lender, and JH, as borrower, you failed to protect the Bank's interests and failed to serve the Bank in a conscientious, diligent, and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rule 3 and 5 of the *Professional Conduct Handbook*, and in particular, you:
>
> > (a) on or about February 1, 2008, released mortgage funds advanced by the Bank without first obtaining and registering a mortgage as a first charge against the property of JH as security, contrary to either or both of the undertakings imposed on you in the Bank Instructions to Solicitor dated January 17, 2008 (the "Undertakings") and your instructions;
> >
> > (b) failed to report to the Bank on the status of the registration of the mortgage within 90 days contrary to either or both of your Undertakings and your instructions;
> >
> > (c) failed to candidly advise the Bank that you had not secured its position by releasing the mortgage funds advanced by the Bank on or about February 1, 2008 without first obtaining and registering a mortgage as a first charge against the property of JH; and
> >
> > (d) failed to answer within a reasonable time communications from the Bank that required a reply and in particular you failed to provide a substantive response to letters from the Bank dated January 30, 2009, September 30, 2010, October 28, 2010 and January 21, 2011.

[3] This citation came before this Panel as a conditional admission of a disciplinary violation and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The Respondent admitted that

he had professionally misconducted himself and consented to the following disciplinary action:

(a) a suspension from the practice of law for a period of six weeks;

(b) costs in the amount of $2,000.

FACTS

[4] An Agreed Statement of Facts was filed in these proceedings. That Agreed Statement of Fact sets out the following:

1. Mr. Uzelac was called to the Bar of British Columbia on June 26, 1975. Since his call to the Bar he has practised as a sole practitioner in Vancouver BC. He currently practises through his law corporation. During 2008 and 2009, 15 per cent of his practice was real estate.

2. In about January 2008 Mr. Uzelac was retained by JH in connection with an asset purchase of a business. Part of the broader transaction involved refinancing a residential property owned by JH. About January 17, 2008, Mr. Uzelac received mortgage instructions from the Bank to register a new mortgage (the "New Mortgage") in the amount of $700,000 in favour of the Bank. The New Mortgage was to form a first charge on the residential property.

3. At the time of the refinancing there were two pre-existing mortgages on the residential property:

a. a mortgage in the amount of $405,000 in favour of the same Bank (the "First Mortgage"); and

b. a mortgage in favour of a second bank (the "Second Mortgage") in the amount of $96,000.

4. In accepting the mortgage instructions Mr. Uzelac was agreeing to act on behalf of the Bank. He was also to ensure, as part of those instructions, that all prior non-permitted encumbrances were discharged from title as soon as possible. If the non-permitted encumbrances were not discharged within 90 days of the mortgage funds being advanced, he was to notify the Bank within 5 days. These instructions were part of an undertaking triggered by Mr. Uzelac negotiating the mortgage proceeds cheque from the Bank.

5. The Bank's instructions included that the Second Mortgage was to be paid out of the proceeds forwarded. The Bank retained the funds to pay out its own First Mortgage. Discharges for both the First and Second Mortgages were to be registered, leaving the New Mortgage as a first charge on the residential property.

6. On January 28, 2008, Mr. Uzelac met with JH and at that meeting the $700,000 mortgage in favour of the Bank and an equity power line agreement in the amount of $471,571.49 were executed. Mr. Uzelac received $191,700 from the Bank which was the mortgage proceeds net of the First Mortgage amount. The New Mortgage was registered on February 1, 2008. It was on title behind both the First Mortgage and the Second Mortgage. The mortgage proceeds, minus a small legal account, were in turn paid to the numbered company JH had established to do the asset purchase.

7. The Bank forwarded a discharge for the First Mortgage, but this was not registered. The Second Mortgage was not paid out or dealt with. No payout arrangements had been made. Mr. Uzelac did not notify the Bank of these inactions. He did not report out on the transactions to the Bank. Mr. Uzelac admits in the Agreed Statement of Facts that he had failed to note the existence of the Second Mortgage.

8. In January 2009, the Bank requested that Mr. Uzelac provide it with the original and signed Equity

Power Facility Letter; the original and signed Mortgage Loan Agreement for $191,700; the original and signed Registered mortgage; the signed Solicitor's Final Report and Opinion with fire insurance details; and an Updated State of Title Certificate showing the Bank on first rank of charge. He was requested to provide these by February 15, 2009. He did not do so.

9. On March 25, 2009 Mr. Uzelac wrote the bank that held the Second Mortgage. He enclosed a priority agreement that would have given the New Mortgage priority over the Second Mortgage. He proposed that the First Mortgage would also be discharged on the registration of the priority agreement. The bank holding the Second Mortgage did not sign the priority agreement.

10. On March 26, 2009, Mr. Uzelac forwarded the New Mortgage to the Bank. He did not disclose to the Bank that the Second Mortgage was not discharged nor that the New Mortgage did not have first priority.

11. The Bank wrote to Mr. Uzelac on September 30, 2010, October 28, 2010 and January 31, 2011 to clarify what had occurred. Mr. Uzelac did not reply.

12. On June 3, 2011 in-house counsel for the Bank made a complaint to the Law Society about the situation.

13. In subsequent correspondence to the Law Society, Mr. Uzelac noted in particular, that the payout contrary to the mortgage instructions was inadvertent, and that there may have been confusion in the checking of the priority following registration of the New Mortgage because there was already the First Mortgage on title in favour of the same Bank.

DISCUSSION

[5] Under Rule 4-22, a member of the Law Society may make admissions of disciplinary violations on the condition of a specified outcome. If the Discipline Committee accepts that proposal, discipline counsel is then directed to recommend the proposal to the Hearing Panel. The Hearing Panel may only accept or reject the proposal. In making the decision, the Panel must be satisfied that the admission on the alleged infraction is appropriate and that the proposed disciplinary action is within the range of a fair and reasonable disciplinary action in all of the circumstances.

[6] Counsel for the Law Society cites the test for professional misconduct as set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraphs [154] and [171]:

> … The real question to be determined is essentially 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. …
>
> The test that this panel finds appropriate 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.

[7] Ms. Kirby also cited *Law Society of BC v. Rai*, 2005 LSBC 37, *Law Society of BC v. Boyd*, 2010 LSBC 21 and *Law Society of BC v. Smiley*, 2006 LSBC 31. Each of these was a case in which the lawyer concerned had failed to observe the appropriate standards of action expected of a lawyer in a real estate transaction. The behaviours included disbursing funds prior to ensuring the mortgage was registered as instructed in first priority, and releasing mortgage funds without securing the bank's position and then failing to report that error to the bank.

[8] On the issue of disciplinary action, Ms. Kirby referred to, inter alia, the leading case of *Law Society of BC v. Ogilvie*, 1999 LSBC 17, which lists the following factors:

a) the nature and gravity of the conduct proven;

b) the age and experience of the respondent;

c) the previous character of the respondent, including details of prior discipline;

d) the impact upon the victim;

e) the advantage gained or to be gained by the respondent;

f) the number of times the offending conduct occurred;

g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

h) the possibility or remediating or rehabilitating the respondent;

i) the impact upon the respondent of criminal or other sanctions or penalties;

j) the impact of the proposed penalty on the respondent;

k) the need for specific and general deterrence;

l) the need to ensure the public's confidence in the integrity of the profession; and

m) the range of penalties imposed in similar cases.

[9] Counsel for the Law Society submitted that, in particular, the most relevant factors were the gravity of the offence, the need for general deterrence, the Respondent's conduct record, the need for specific deterrence, the range of similar penalties for similar misconduct and the need to ensure the public's confidence in the profession.

[10] The argument noted that the failure to follow instructions also included the breach of the undertaking terms by the Respondent and that the effect of such a breach is to undermine the public's confidence in the legal profession. Ms. Kirby also posited that the public's confidence is additionally undermined when lawyers do not candidly advise their clients of any errors the lawyer may have made, as happened here.

[11] The Respondent had previously been subject to three citations all heard together in September 2003. These related to failures of various accounting and record keeping obligations; breach of three practice conditions regarding trust accounting; and a Rules breach for failure to report unsatisfied judgments. The Respondent voluntarily withdrew from practice for nine months, which the hearing panel found vitiated the need for a suspension as a sanction.

DETERMINATION

[12] The Panel thanks Ms. Kirby and the Respondent for their preparation of the Agreed Statement of Facts and the able, thorough and helpful submissions provided.

[13] Based on the above, we find the allegations contained in the citation have been proven. We accept the Respondent's admission that he has committed professional misconduct.

DISCIPLINARY ACTION

[14] Counsel for the Law Society provided a number of decisions relating to the proposed disciplinary action. These were: *Law Society of BC v. Rai*, 2005 LSBC 37 ($3,000 fine, no suspension but practice supervision of real estate matters, $4,000 costs); *Law Society of BC v. Boyd*, 2010 LSBC 21 ($3,500 fine, no suspension, $2000 costs); *Law Society of BC v. Chodha*, 2011 LSBC 31 ($5000 fine, no suspension, $2,500 costs); *Law Society of BC v. Clendening*, 2007 LSBC 10 ($7,500 fine, no suspension, $2,500 costs); *Law Society of BC v. Smiley*, 2006 LSBC 31 (one month suspension, $2,000 costs); and *Law Society of BC v. Goddard*, 2006 LSBC 12 (two month suspension, $4,500 costs).

[15] Applying the relevant factors set out in the *Ogilvie* decision, based on the evidence and the submissions of counsel:

(a) the conduct to be sanctioned is inadvertence and a failure to meet the required standard, which cascaded into a failure to respond and a failure to act with candour as the error became known;

(b) the Respondent has a prior discipline history, although not directly involving real estate matters;

(c) the Bank has suffered no economic loss to this time but is left without a first priority for the full funds secured, and the discharge of the First Mortgage cannot be registered without seriously undermining its priority position;

(d) The Respondent gained no personal advantage from the transaction;

(e) While the offending conduct related to only one transaction, it continued over time as the details of the initial error became known to the Respondent;

(f) The Respondent has now acknowledged his conduct and sought to move forward by taking responsibility and agreeing to the Rule 4-22 resolution of matters;

(g) While there is no pattern of related misconduct, the prior conduct history means a strong sanction must be applied to provide deterrence as well as ensure the public's confidence in the integrity of the profession;

(h) As a result of the Respondent's prior discipline matter, he voluntarily withdrew from practice for nine months. He did not serve a suspension that was imposed on him based on prior case sanctions

(i) The proposed suspension and cost amount are within the range suggested by previous decisions and are reasonable in all of the circumstances.

ORDER

[16] The Panel orders that the Respondent:

(a) be suspended from practice for a period of six weeks commencing March 1, 2013;

(b) pay costs in the amount of $2,000 to be paid by April 30, 2013.

[17] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.

[18] Counsel for the Law Society requested and an order was made at the beginning of the hearing under Rule 5-6(1) that the public be excluded from the hearing. This was requested on the basis of an expressed concern that the particulars of the financing arrangements contained confidential business information, and should therefore not be accessible to the public on the basis of solicitor/client privilege and client confidentiality. The Respondent agreed to that order as well. The effect is to seal the transcripts and

exhibits. Those orders are made.