2013 LSBC 24
Report issued: August 30, 2013
Citation issued: December 20, 2012

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

DOUGLAS WARREN WELDER

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: June 27 - 28, 2013
Panel: Lee Ongman, Chair, Jasmin Z. Ahmad, Lawyer, Jory C. Faibish, Public represenatative

Counsel for the Law Society: Geoffrey B. Gomery, QC
Appearing on his own behalf: Douglas Welder

Background

[1] The Respondent, Douglas Welder, was called and admitted as a member of the Law Society of British Columbia on May 12, 1981. He has been in private practice as a sole practitioner in Kelowna, B.C. since 1991.

[2] HH is a jeweller by trade and the owner and sole director of H Company that owns and operates a retail jewellery business in Kelowna, BC.

[3] Between May 10 and December 20, 2011, each of HH and H Company (together, the "Former Clients") retained the Respondent to act on their behalf for the defence of several claims against them, including, but not limited to, foreclosure proceedings that had been commenced in July 2011.

[4] In or about the end of February 2012, the Former Clients had re-negotiated the terms of a loan with FW, pursuant to which HH granted a mortgage over her personal residence to FW. The Respondent did not represent either of the Former Clients in respect of that loan or mortgage.

[5] On April 5, 2012 the Respondent accepted a retainer from FW to foreclose on a mortgage granted over HH's personal residence and for judgment against each of the Former Clients.

[6] This hearing was directed to be heard pursuant to a citation (the "Citation") authorized by the Discipline Committee of the Law Society of British Columbia on December 6, 2012 and issued on December 20, 2012.

[7] The Respondent admits that, on December 28, 2012, he was served with the Citation. He has waived the requirements of Rule 4-15 of the Law Society Rules.

[8] In the Citation, it is alleged that the Respondent acted in a conflict of interest by representing FW in the foreclosure proceedings against the Former Clients contrary to Chapter 6, Rules 1 and 7 of the *Professional Conduct Handbook* (the "Handbook"), which was in effect at the time.

ISSUE AND SUMMARY OF DECISION

[9] Chapter 6, Rule 7 of the Handbook provides as follows:

> Acting against a former client
>
> Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
>
> > (a) The former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or

(b) The new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.

[10] In this matter, there is no dispute that:

(a) The Respondent did, in fact, represent FW in foreclosure proceedings against the interests of the Former Clients; and

(b) The Respondent did not obtain the consent of the Former Clients to do so.

[11] The issue before the Panel is the application of Chapter 6, Rule 7(b) of the Handbook to the facts of this matter. In particular:

(a) Was the Respondent's new representation of FW substantially related to his representation of the Former Clients?; and

(b) Was the Respondent in possession of confidential information arising from the representation of the Former Clients that might reasonably affect his representation of FW?

[12] If the answer to either of the above considerations is "yes", this Panel must conclude that the Respondent's conduct contravened Chapter 6, Rule 7(b) of the Handbook.

[13] Having considered the law and evidence before it, for the reasons set out below, this Panel has determined that neither of the conditions required by Chapter 6, Rule 7(b) was satisfied to allow the Respondent to represent FW against the interests of the Former Clients without their consent. As a result, he acted in a conflict of interest by representing FW in foreclosure proceedings against the Former Clients.

[14] The Panel has concluded that the Respondent's conduct constituted professional misconduct.

EVIDENCE BEFORE THE PANEL

Agreed Statement of Facts and Documents

[15] Counsel for the Law Society and the Respondent filed an Agreed Statement of Facts that appended various documents, only some of which were marked as exhibits at the hearing of this matter, being those documents that were referred to in the oral evidence of the witnesses.

[16] For the purposes of this decision, the Panel only considered those documents in the joint book that were marked as exhibits at the hearing.

[17] In addition, other documents not included in the joint book, were also marked as exhibits at the hearing.

Witnesses

[18] In addition to the Agreement Statement of Facts and exhibits, the Panel also heard evidence from HH and DD, who was employed as the bookkeeper for H Company at the relevant time.

[19] The Respondent gave evidence on his own behalf.

CHRONOLOGY OF EVENTS AND SUMMARY OF EVIDENCE

Background

[20] HH is a jeweller by trade and the owner and principal of H Company that owns and operates a retail jewellery business in Kelowna, BC

[21] The jewelry business operated by H Company had been established by HH's grandfather in the 1920's and had remained in the H family since its inception.

[22] In 1997, HH succeeded her father as H Company's principal and has operated all aspects of H Company's business operations since then.

[23] DD was employed as H Company's internal bookkeeper for the period July 2010 to May 2012.

[24] During the course of Mr. Welder's retainer with the Former Clients, he obtained instructions from both HH and DD. DD estimated that, as between him and HH, he provided instructions to Mr. Welder "at least 75 per cent" of the time.

[25] In addition, Mr. Welder also spoke with H Company's external accountant, JM, who provided the Respondent with, and discussed, draft copies of H Company's 2010 and 2011 financial statements. JM did not give evidence at the hearing.

The HH Retainers

The O Inc. Action

[26] On April 4, 2011, O Inc. commenced an action against the Former Clients in the Supreme Court of British Columbia (the 'O Inc. Action'). The amount claimed was $428,896.40 plus interest and costs.

[27] On May 10, 2011, the Former Clients retained Mr. Welder to defend the O Inc. action. On May 12, 2011, he filed a response in the O Inc. action on behalf of the Former Clients.

[28] On June 16 and September 30, 2011, Mr. Welder issued to the Former Clients accounts for services rendered through June 21, 2011 in connection with the O Inc. Action.

The Tax Assessment

[29] On May 4, 2011, the BC Ministry of Finance issued a notice of assessment in the amount of $512,747.46 against HH as a director of the H Company in respect of unremitted tax under the Social Service Tax Act (the 'Tax Assessment'). Mr. Welder became aware of the Tax Assessment in late July 2011, when he was retained by HH to prepare a tax assessment appeal.

[30] Mr. Welder was instructed by HH to appeal the Tax Assessment and on July 26, 2011 he delivered a notice of appeal to the Appeals Section of the Minister of Finance.

[31] On August 5, 2011, a court bailiff executed a Writ of Seizure and Sale at H Company's business premises to recover money owing in respect of the Tax Assessment. The seizure resulted in the temporary closure of H Company's business operations.

[32] On August 10, 2011, H Company suffered a further setback when its retail premises suffered water damage from a thunderstorm. As a result, its business operations were closed until March 2012.

The S Ltd. Action

[33] On May 18, 2011, S Ltd commenced an action against H Company in the Provincial Court of British Columbia (the 'S Ltd. Action'). The amount claimed was $25,176.

[34] On August 3, 2011, H Company instructed Mr. Welder to respond to the S Ltd. Action.

The Bank Foreclosure Proceedings and Financing Issues

[35] In or about December 2004, the Former Clients had entered into a loan agreement with a chartered bank (the "Bank") pursuant to which HH granted a mortgage (the "Bank Mortgage") over her personal residence (the "Personal Residence") to the Bank.

[36] In June 2011, the Former Clients were in default of their obligations under the loan and the Bank Mortgage, then owing the Bank approximately $1.18 million. They retained Mr. Welder to represent them in negotiations with the Bank.

[37] FW held a fourth mortgage over the Personal Residence.

[38] As of June 2011, the total owing on all of the mortgages granted against the Personal Residence exceeded $2.5 million.

[39] On July 14, 2011, the Bank commenced foreclosure proceedings (the "Bank Foreclosure") against the Former Clients in respect of the Bank Mortgage.

[40] FW was named as a respondent in the Bank Foreclosure as the fourth mortgagee of the Personal Residence.

[41] On August 15, 2011, Mr. Welder filed a response in the Bank Foreclosure on behalf of the Former Clients.

[42] The Bank set its application for order nisi for hearing on August 26, 2011. However, on the basis of two affidavits prepared by Mr. Welder and sworn by HH on August 10, 2011 and August 26, 2011, Mr. Welder succeeded in obtaining an adjournment of that hearing to September 19, 2011.

[43] On September 19, 2011, Mr. Welder prepared a third affidavit for HH's execution in support of a further adjournment of the Bank's application to obtain order nisi.

[44] Although Mr. Welder did not succeed in obtaining the further adjournment of the application for order nisi, the order did not take effect until October 11, 2011. The redemption period expired on March 19, 2012.

[45] Prior to the commencement of the Bank Foreclosure, HH had attempted to obtain re-financing for the Personal Residence, both on her own behalf and with the assistance of a mortgage broker.

[46] Mr. Welder was not directly involved with those attempts at re-financing.

[47] Details of HH's attempts to secure re-financing were set out in each of the affidavits prepared by Mr. Welder in support of the Former Clients' application to adjourn the Bank's application for order nisi.

[48] After the pronouncement of the order nisi, HH continued her attempts to secure re financing for the Personal Residence.

[49] Although he continued to be aware that she was doing so, and even encouraged her mortgage brokerage firm to continue to act for her to do so, Mr. Welder was not directly involved with any of those attempts.

[50] On November 15, 2011, Mr. Welder issued to the Former Clients accounts for services rendered in connection with the Bank Foreclosure, the appeal of the Tax Assessment, refinancing matters, the O Inc. Action and related matters.

[51] By mid-December, the Former Clients had not yet paid Mr. Welder the full amount owing on the November 15, 2011 accounts.

[52] By appointments dated December 20 and December 28, 2011, Mr. Welder sought the review of those accounts, thereby effectively bringing his retainer with the Former Clients to an end.

[53] On March 1, 2012, Mr. Welder entered judgment against the Former Clients for the amount owing on one of his accounts.

[54] By the end of February 2012, HH had succeeded in concluding the re-financing of the Personal Residence, the proceeds of which were sufficient to satisfy the Bank's claim against each of the Former Clients.

[55] On or about February 28, 2012, the Former Clients also concluded an agreement with FW pursuant to which his original mortgage was paid in full and the terms of a new loan were negotiated. The new loan was secured by a new mortgage granted by HH against the Personal Residence.

[56] Mr. Welder did not negotiate the Former Clients' agreement with FW or attend to registration of the new mortgage in favour of FW.

[57] On or about March 1, 2012, HH and Mr. Welder reached an agreement regarding the payment of his outstanding account, pursuant to which Mr. Welder's judgment was satisfied.

The FW Retainer

[58] On April 5, 2012, Mr. Welder accepted a retainer from FW to foreclose on the new mortgage granted by HH to FW on February 28, 2012 and to execute on further security documentation granted at that time. In respect of that retainer, Mr. Welder:

(a) issued a demand letter to HH;

(b) commenced foreclosure proceedings (the "FW Foreclosure") against the Former Clients in the Supreme Court of British Columbia, Kelowna Registry; and

(c) caused a demand letter and the petition to be served on the Former Clients on the same afternoon.

[59] Mr. Welder did not request, nor did either of the Former Clients provide, consent to allow Mr. Welder to act for FW in the FW Foreclosure against them.

[60] The Former Clients retained the law firm, Pushor Mitchell LLP to defend the FW Foreclosure.

[61] On April 10, 2012, HH complained to the Law Society that Mr. Welder was suing her and H Company.

[62] On May 10, 2012, another lawyer assumed conduct of the FW Foreclosure on behalf of FW, thereby ending Mr. Welder's involvement in the matter.

DISCUSSION AND ANALYSIS

[63] The principle underlying the general rule prohibiting a lawyer from acting against the interest of a former client was considered by the Supreme Court of Canada in the seminal decision of *MacDonald Estate v. Martin*, [1990] 3 SCR 1235. In that case, Mr. Justice Cory stated:

> Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before courts and tribunals. In preparing for the hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.

[64] Indeed, without the security that the conflict rule set out in Chapter 6, Rule 7 of the Handbook provides, a client would not be able to provide his or her lawyer with documents or other information, or otherwise be candid in his or her communications with the lawyer, without fear that doing so will be revealed or used against the client in a subsequent matter.

[65] As succinctly and articulately stated by counsel for the Law Society, the conflict rule "grounds the relationship of trust and confidence subsisting between lawyer and client."

[66] It is the context of that underlying principle governing lawyers' conflicts that this Panel must consider whether the Respondent's representation of FW in the FW Foreclosure against the Former Clients was contrary to Chapter 6, Rule 7 of the Handbook.

Was the new representation "substantially unrelated"?

[67] In order to conclude that the Respondent's representation of FW did not contravene Chapter 6, Rule 7(b), this Panel must firstly conclude that the representation was "substantially unrelated" to the representation of the Former Clients.

[68] In this case, between May 10 and December 20, 2011, the Respondent represented the Former Clients in respect of at least four separate matters being:

(a) the defence of the O Inc. action;

(b) the appeal of the Tax Assessment;

(c) the defence of the S Ltd. Action; and

(d) The Bank Foreclosure.

[69] Of those retainers, the fourth, the Bank Foreclosure, is the most significant for the determination of this preliminary issue.

[70] Notwithstanding the extraordinarily similar nature of the Bank Foreclosure and the FW Foreclosure (both being foreclosure proceedings in respect of a loan to the Former Clients secured by a mortgage on HH's Personal Residence), the Respondent took the position that his representation of FW in the FW Foreclosure was unrelated to his representation of the Former Clients in the Bank Foreclosure.

[71] Specifically, he argued that HH's success in obtaining re-financing of the Personal Residence and in negotiating the terms of a new mortgage with FW effectively cleared the slate and allowed him to act for FW against the Former Clients.

[72] It was the Respondent's position that his representation of FW concerned a new mortgage because: (a) he had no involvement in the negotiations for the new mortgage; and (b) the terms of the new mortgage were concluded after his retainer with the Former Clients had ended and after (or concurrently with) the conclusion of the Bank Foreclosure in which he represented the Former Clients. He argued that, in those circumstances, the representations were "substantially unrelated".

[73] This Panel rejects that argument. To the contrary, we conclude that the Respondent's representation of FW was, in fact, substantially (if not wholly) related to his representation of the Former Clients in several significant and meaningful ways:

> (a) Each of the representations involved a loan of a significant amount of money to the Former Clients;
>
> (b) The Former Clients were (arguably) in default of the loans in each of the Bank Foreclosure and the FW Foreclosure;
>
> (c) The loans in respect of each the representations were secured by a mortgage on HH's Personal Residence;
>
> (d) Foreclosure proceedings had been commenced against the Former Clients in each of the representations;
>
> (e) The Former Clients' financial ability and access to financing was crucially important in the outcome of each of the representations; and
>
> (f) The successive representations were separated by a matter of a few months.

[74] Especially in light of the overriding principle for the conflict rule set out in *MacDonald Estate*, this Panel has no difficulty concluding that, on the basis of our consideration of the Bank Foreclosure alone, the Respondent's representation of FW in the FW Foreclosure was not "substantially unrelated" to the representation of the Former Clients so as to relieve the Respondent from the overriding prohibition from acting in conflict with his Former Clients without consent.

Possession of "confidential information"

[75] As both of the conditions set out in Chapter 6, Rule 7(b) must be satisfied before a lawyer can act against the interest of a former client without consent, this Panel's finding that the Respondent's representation of FW was not "substantially unrelated" to his representation of the Former Clients is wholly determinative of the matter raised in the Citation.

[76] In addition, and in any event, the Panel has also concluded that the Respondent did possess confidential information arising from his representation of the Former Clients such that the second condition of Chapter 6, Rule 7(b), too, has not been satisfied.

[77] Firstly, the invoices produced by the Respondent indicate that, during the course of the seven-month retainer with the Former Clients, he had at least 44 meetings with HH totalling, in conjunction with other activities in the same entries, 40.7 hours of the 110.8 hours of time billed by the Respondent.

[78] In addition to those meetings with HH, the Respondent also met with DD on a frequent basis in respect of the Respondent's representation of the Former Clients. He also discussed H Company's financial statements with JM.

[79] Given the highly similar nature of the retainers (again, both involving foreclosure proceedings in respect of a loan to the Former Clients secured by a mortgage on HH's Personal Residence) and the critical importance of the Bank Foreclosure to HH personally and to H Company's business operations, it seems unlikely that none of those representatives imparted any information (financial or otherwise) on the Respondent that could be relevant to the FW Foreclosure.

[80] Secondly, the Respondent was, in fact, in possession of confidential information from the Former Clients that "might reasonably affect" his representation of FW.

[81] For example, in his attempts to obtain an adjournment of the Bank's application for order nisi in the Bank Foreclosure, the Respondent obtained information and documents from HH regarding her efforts and ability to obtain re-financing for the Personal Residence. Those information and documents included the terms that she had negotiated with potential lenders, her ability (or inability) to obtain alternate financing and two appraisals in respect of the Personal Residence. In this Panel's view, that financial information was relevant to the FW Foreclosure and, in particular, FW's ability to collect the debt owing to him.

[82] Furthermore, by his own admission, by reason of his representation of the Former Clients (and, in particular, H Company), the Respondent was in possession of H Company's draft financial statements for 2010 and 2011. He even had the opportunity to discuss the specific line items of those statements with each of DD and JM, who as the accountants for H Company would have intimate knowledge of H Company's financial affairs.

[83] Again, without a doubt, those financial statements, even in draft, would be relevant to the FW Foreclosure and, in particular, FW's ability to collect the debt owing to him.

[84] Not only was the Respondent in possession of H Company's private financial statements, he also had information that DD, H Company's internal bookkeeper, believed those financial statements to be false.

[85] The Respondent took the position that his (and DD's) belief that the financial statements were false meant that they could not be considered "confidential information" for the purpose of Chapter 6, Rule 7(b).

[86] This Panel does not accept that position. Notably, other than the view of DD, the Respondent had no personal knowledge whether the financial statements were accurate or not. (Note that this Panel was not asked to, nor do we, make any finding with respect the accuracy of H Company's financial statements that were marked as an exhibit in this proceeding.) However, he did have personal knowledge of DD's view.

[87] Regardless of the veracity of the financial statements, in the Panel's view, that knowledge, in and of itself, constitutes "confidential information" in that it disclosed a vulnerability of H Company (and perhaps HH) that could very well be used to assist FW in the FW Foreclosure.

[88] Indeed, on cross-examination, the Respondent appeared to concede that his knowledge of DD's view of the accuracy of the financial statements constituted confidential information that "might reasonably affect" his representation of FW against the Former Clients. The evidence was as follows:

> Q Is it your position that what DD had told you about the statements was not confidential information?
>
> A I hadn't really thought of it that I way. What he told me led me to the conclusion that the statement that I was given was phony.
>
> Q Your view is that because it's not confidential you could have told FW about it?
>
> A I would not have told anybody else about it.
>
> Q Because you would consider it as confidential?
>
> A I hadn't really thought of it that way.
>
> Q I'm inviting you to think about it now.
>
> A I don't know as I'm prepared to answer that right now.
>
> Q Certainly if the answer is "yes," you have a problem because you are then in possession of confidential information, correct?
>
> A I may have.
>
> Q And the fact that a debtor has false financial statements is certainly something that would be useful for a creditor to know; you agree with that?
>
> A It may be useful.

[89] Finally, it is significant that the confidential information contemplated by Chapter 6, Rule 7(b) is not limited to information contained in documents. Rather, a client's attitude, approach to litigation and vulnerabilities are also information of a confidential nature that might reasonably affect a new representation.

[90] In *Skjerpen v. Johnson*, 2007 BCSC 1290, the Supreme Court of this province summarized a former client's evidence as follows:

> Mr. Skjerpen deposes that during the course of the various retainers with the law firm, its lawyers came to know him quite well; his temperament and personality, his attitude to risk in general and litigation risk in particular, and his ways of planning strategy and tactics. He claimed that he had frank, unguarded discussions with Mr. Burke in which he disclosed details of his business and his financial affairs.

[91] In consideration of whether the former lawyer had obtained confidential information, the Court noted as follows:

> The law firm does not deny that during those retainers Mr. Skjerpen revealed an aspect of his character that was relevant to the conduct of that litigation, including his temperament and personality, his attitude toward litigation risk, planning strategy and tactics. These discussions were relatively recent to the commencement of this litigation. In my view, although not directly related to the facts and issues of within action, the disclosure falls within a category of confidential information that might permit the law firm to take advantage of him in the current litigation.

A similar type of disclosure was found by Saunders J. (now J.A.) in *Burgess v. Burgess*, [1997] BCJ No. 2563 (SC), to conclude at para. 11 that:

> [I]n my view, there is a real possibility that in providing advice to Mr. Burgess in May 1997, Mr. Louis gained insight into Mr. Burgess's character which he did not previously have and acquired knowledge of his approach to financial issues. Mr. Louis certainly is privy to information that may be relevant or useful in the matrimonial litigation which has been commenced by his firm.
>
> In this case, I find that the insight acquired by the law firm into Mr. Skjerpen's character and litigation strategy in actions involving the breakdown of a close business relationship, is confidential information that could create a real possibility of "mischief" if the law firm acted against Mr. Skjerpen in a similar type of litigation. By reason of their past retainers, the law firm has acquired knowledge of that aspect of Mr. Skjerpen's character which governs how he is likely to conduct this type of litigation. That knowledge, in my view, gives the law firm an advantage on how it plans, strategizes and conducts the litigation on behalf of the defendants.

[92] As did the lawyers in the *Skjerpen* and *Burgess* decisions, the Respondent in this matter also acquired insight into HH's character and litigation strategy that went beyond any documentary information she could have provided (and did provide) to him.

[93] In particular, as a result of his representation of the Former Clients, not only in the Bank Foreclosure, but also in the O Inc. Action, the S Ltd. Action and the appeal of the Tax Assessment, the Respondent was aware of, among other things:

(a) HH's attitude and approach to litigation;

(b) HH's and H Company's financial vulnerabilities;

(c) HH's emotional vulnerabilities;

(d) The emotional and financial effect the execution of the Writ of Seizure and Sale of H Company's business assets in respect of the Tax Assessment had on HH; and

(e) What steps taken by the Bank in the Bank Foreclosure upset her the most.

[94] As was the case in the *Skjerpen* and *Burgess* decisions, all such information constituted "confidential information" that could "reasonably affect" the conduct of the FW Foreclosure. In particular, it could most certainly affect and influence the manner in which FW sought to enforce the debt owing to him by the Former Clients.

[95] On the basis of the evidence before it, this Panel concludes that, as a result of his representation of the Former Clients particularly in (but not limited to) the Bank Foreclosure, the Respondent came into possession of confidential information that could reasonably affect his representation of FW in the FW Foreclosure, being:

(a) The information and documents that the Respondent obtained in order to prepare the three

affidavits sworn by HH in the Bank Foreclosure;

(b) H Company's draft 2010 and 2011 financial statements;

(c) DD's view that those financial statements may contain false information; and

(d) The information and insight into HH's character, emotional state, vulnerabilities and litigation strategy.

[96] As a result, the second condition set out in Chapter 6, Rule 7(b) was not satisfied. Therefore, the Panel finds that the Respondent was not relieved from the overriding prohibition against acting in conflict with his Former Clients without consent.

CONCLUSION AND ORDER

[97] Having considered the law and evidence before it, this Panel has determined that in April and May 2012, the Respondent acted in a conflict of interest by representing FW in the FW Foreclosure against the Former Clients contrary to Chapter 6, Rule 7 of the Handbook.

[98] The Panel concludes that, in doing so, the Respondent has committed professional misconduct. This matter will now be set down for a further hearing to consider the appropriate disciplinary action under section 38(5) of the *Legal Profession Act*.