2014 LSBC 04
Decision issued: January 27, 2014
Oral Reasons on Facts and Determination: October 11, 2013
Citation issued: February 18, 2013

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

DOUGLAS EDWARD DENT

Respondent

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

Hearing date: October 11, 2013
Panel: Vincent Orchard, QC, Chair, Jennifer Chow, Lawyer, June Preston, Public representative

Counsel for the Law Society: Carolyn Gulabsingh
Counsel for the Respondent: Ravi Hira, QC and Michael Drouillard

BACKGROUND

[1] The Respondent is cited for professional misconduct for improperly withdrawing trust funds to pay fees and disbursements, contrary to Rule 3-57(7) of the Law Society Rules. The Respondent admits that his conduct constitutes professional misconduct under Section 38(4) of the *Legal Profession Act*. The Respondent's admission makes a separate decision on Facts and Determination, whether the impugned conduct referred to in the citation issued February 18, 2013, constitutes professional misconduct, unnecessary. The only issue is disciplinary action or penalty.

[2] Misuse of trust funds is a serious matter. Counsel for the Law Society submits that the appropriate disciplinary action is a suspension from the practice of law for one to three months plus costs of the hearing under Rule 5-9 in the amount of $4,720. Counsel for the Respondent submits that the appropriate disciplinary action is a reprimand, a small fine and costs.

[3] The hearing proceeded on the basis of an Agreed Statement of Facts and submissions of counsel. The Respondent also submitted a number of documents, letters and testimonials of good character and reputation.

[4] The Panel appreciates the prudence and cooperation of the parties in proceeding on the basis of agreed facts. It also appreciates that the Respondent has cooperated fully with the Law Society investigation. Counsel have provided thorough written submissions aided by able oral submissions. Counsel referred to more than 20 authorities and previous discipline decisions, all of which we have considered. While previous discipline decisions may be helpful, the inquiry and determination of penalty is very much a case-specific factual exercise. Not surprisingly, counsel for the Law Society pointed out that no authority was directly on all fours.

[5] In their submissions, counsel discussed and made submissions related to the non-exhaustive factors in assessing penalty as set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 ("*Ogilvie*"), as recently reviewed and discussed in the decision of the Benchers in *Law Society of BC v. Lessing*, 2013 LSBC 29

("*Lessing*"). Counsel made extensive submissions concerning each and every one of the non-exhaustive *Ogilvie* factors. We have considered all of those factors as they relate factually to the decision we must make.

[6] *Lessing* points out that *Ogilvie* emphasizes the importance of maintaining the public's confidence in the Law Society's disciplinary process and in the profession generally. Another important factor, along with public confidence, emphasized in the introductory words setting out the non-exhaustive relevant factors is the rehabilitation of the member. See *Lessing* paras [55] to [59]. The public interest is not entirely protected by specific deterrence; general deterrence and the message the Benchers are also sending to the professional and the public generally must be weighed in the balance: see *Law Society of BC v. Mastop* 2013 LSBC 37.

FACTS

[7] The essence of the Mr. Dent's professional misconduct, conduct that falls markedly below the standard expected of a lawyer , is his conduct in withdrawing funds in the amount of $2,000 from his trust account in order to pay fees and disbursements, without express authority to do so. He had received those funds for a specific trust purpose: to pay them to the client's spouse in accordance with a Separation Agreement (the "Agreement"), which Mr. Dent had assisted in drafting for the client. Mr. Dent, according to the Agreed Statement of Facts, says he did so acting on a mistaken but honest belief that he obtained the express consent of the client.

[8] The underlying events of importance occurred between May and July, 2011. The client and his wife entered into a Separation Agreement dated May 6, 2011. As part of the Separation Agreement, the client agreed to pay his spouse $5,000 by way of five instalments of $1,000 that were to be delivered as they came due by Mr. Dent. On June 18, 2011 the client attended Mr. Dent's law office and provided post-dated cheques, each in the amount of $1,000. The cheques were made payable to Mr. Dent. The monies constituted the equalization payments to be provided to the client's spouse under the Agreement. The equalization payments were to be deposited to Mr. Dent's trust account and then paid to the client's spouse as set out in the Agreement. A handwritten document signed by the client confirmed that the client delivered to Mr. Dent five cheques in the amount of $1,000 and that Mr. Dent was authorized to deposit the cheques in his trust account and to pay the proceeds, as required under the Agreement, to his spouse. Thus, the funds were impressed with a specific trust.

[9] The client had been slow in paying Mr. Dent's legal fees. At the meeting on June 18, 2011 the client also provided Mr. Dent with a cheque, payable to Mr. Dent, in the amount of $4.000.

[10] On June 19, 2011 Mr. Dent sent an email to the spouse's lawyer confirming that his client had attended his offices and provided the equalization payments in a series of post-dated cheques payable to Mr. Dent's law firm. He wrote to the effect that, assuming the cheques cleared, the funds would be forwarded to the spouse's lawyer on behalf of his client on a relatively timely basis. Mr. Dent deposited the first cheque of $1,000, dated June 1, 2011 so not actually a post-dated cheque, and the $4,000 for legal fees into his trust account on June 21, 2011.

[11] On July 4, 2011 Mr. Dent deposited the second equalization payment dated July 1, 2011, into his trust account. The same day, Mr. Dent also transferred $3,480.20 from his trust account in satisfaction of an invoice issued December 16, 2010 in the amount of $4,480.20. Accordingly, $2,519.80 remained in the trust account to the credit of the client.

[12] On July 14, 2011 Mr. Dent emailed the client that the first two of the five equalization payments had been deposited into his trust account and that he intended to provide the first equalization payment to his

spouse. However, Mr. Dent did not forward the first equalization payment to the client's spouse nor to her lawyer. In that same email, Mr. Dent referred to discussions with the client at their last meeting and his expectation that the client would forward cheques for $1,000 in mid-July and mid-August to cover legal work performed since his last account.

[13] On July 16, 2011 the client sent an email to Mr. Dent that indicated, inter alia, that he wished to receive a final statement and he would then send a single cheque.

[14] In an email dated July 18, 2011 from Mr. Dent to his client, Mr. Dent indicated, inter alia, that his firm would prepare a final statement and forward it to the client in the expectation of receiving immediate payment. There was further discussion in that particular email about accounts remaining outstanding for months at a time.

[15] On July 19, 2011 Mr. Dent issued two accounts by email to the client, noting that the funds held in trust had been applied to outstanding accounts with a balance owing to the law firm in the amount of $448.60. The accounts dated July 19, 2011 were in the amount of $1,714 and $1,254.40. By virtue of these accounts, the client owed Mr. Dent a total of $2,968.40. Payment of the outstanding account was requested along with an additional request for $2,000 to be forwarded to the client's spouse. At that time, Mr. Dent had in his possession three cheques for $1,000 each, dated August 1, 2011, September 1, 2011 and October 1, 2011. Nonetheless, Mr. Dent, contrary to the specific trust impressed upon the first two equalization payments, transferred $2,519.80 held in his trust account, which included $2,000 from the equalization payments, to partly satisfy the accounts of July 19, 2011 in the amount of $2,968.40. Mr. Dent said he did so acting on the mistaken but honest belief that he had obtained the express consent of the client orally on June 18, 2011 to do so. Nonetheless, Mr. Dent admits that there was no such express consent and, in applying his client's $2,000 that was to go to the client's spouse, his conduct was improper and amounts to professional misconduct.

[16] The Panel finds the conduct of the Respondent troubling. Five days before transferring his client's $2,000 to pay the Respondent's fees, the Respondent had indicated to the client that he was going to forward the first equalization payment of $1,000 to the client's spouse. There is no reference at all to a contrary understanding that he had the express consent of the client to divert the equalization payments to pay his account. Furthermore, on July 16, 2011 the client asked for a final statement of account which he would clear up by sending a single cheque. The Respondent responded within two days on July 18, 2011 and indicated he would prepare a final statement and forward it to the client in the expectation of receiving immediate payment. However, instead of waiting for a cheque from the client as discussed a few days earlier, on July 19, 2011, the Respondent, without further discussion with the client, transferred funds from trust, including the $2,000 representing the equalization payments, towards payment of his account.

[17] What is recorded in the Agreed Statement of Facts is not that the Respondent was indeed acting on the mistaken but honest belief that he obtained the express consent of the client to do what he did, but rather the Agreed Statement of Facts is a recording that the Respondent says that he did so. There is a difference. There is absolutely no record confirming the express oral consent of the client to what occurred and that it was given on June 18, 2011. From the evidentiary record it would appear that the client never acted as if there was such an understanding in place. The Respondent never referred to such an understanding when he transferred the equalization payment trust funds to his own account. The specific trust terms of the funds given for the equalization payments is documented under Tab 4 of the Agreed Statement of Facts as follows:

> I have delivered to you Doug Dent 5 cheques in the amount of $1,000 each. I authorize you to deposit them to your trust account and pay the proceeds thereof to [my spouse] as the settlement

proceeds payable under the settlement agreement dated for reference May 6, 2011.

[18] It is apparent to the Panel that the Respondent acted in haste to pay off his account and in doing so preferred his interests to those of his client. He benefited from his misconduct. We find that the purported agreement of the client allegedly given on June 18, 2011 is an unusual agreement in light of the factual record including the Agreement itself and the email from the Respondent to the client on July 14, 2011 indicating the Respondent's intention to forward the first $1,000 payment to the client's spouse. One would have expected that such a contradictory agreement would have been documented. The Respondent appears to be saying from his mistaken but honest belief that monies received impressed with a specific trust could be overridden by an undocumented oral agreement with the client. While we do not have to make a finding of fact on this point, it is surprising that such an agreement would not be documented. Furthermore, there is nothing in the record before the Panel that suggests that the client had any such understanding.

DISCIPLINARY ACTION

[19] The member is 65 years of age and has been practising law for over 37 years. He practised for many years in Vancouver and as a sole practitioner from approximately 1992 to 2003 except for a period of approximately one year when he had an associate lawyer assisting him. The Respondent experienced marital and financial difficulties in the late 1990s and early 2000s.

[20] In late 2003 the Respondent re-established himself in practice in 100 Mile House. He borrowed substantial funds and purchased the law firm in 100 Mile House he had joined in late 2003. The firm consists of the Respondent, two junior associates, one of whom is on maternity leave and six full-time support staff and three part-time staff.

[21] The Panel does not doubt that the Respondent has made a significant contribution professionally and through volunteer activities in 100 Mile House and the surrounding area. His community contributions are to be commended. Several character reference letters were submitted attesting to the Respondent's general good character and community contributions. It is clear that the Respondent has made a contribution to his community, has impressed many as a man and professional of good character. Nonetheless, the value of such testimonials must be placed in the context that it is this Panel that has the full record of this proceeding and is charged with the task of considering all the evidence before it. We do not doubt for a moment the credibility and good faith of the reference letter writers.

[22] While the above-noted character reference letters speak generally to the good character of the Respondent, *Ogilvie* (supra) suggests that as part of the consideration of the character of the Respondent one must consider details of prior discipline. The Respondent's discipline record is not unblemished. In 2001 the Respondent was given a one-month suspension for conduct in connection with the financing of a family home that put him in a conflict of interest with his client, due to a personal interest in the transaction. In essence, the Respondent admitted that he put his personal interests ahead of his client and admitted that his conduct constituted professional misconduct. The initial hearing panel decision is reported at [2001] LSBC 36, a single bencher panel decision issued December 3, 2001.

[23] There is no need to go into great length concerning the background of the matter, which involved borrowings from the complainant to consolidate debt. The events go back to the early to mid-1990s and concern the Respondent's family home. Reference was made earlier to the Respondent's matrimonial and financial difficulties overlapping with the events that led to the 2001 citation. The complainant in that citation was not well served by the Respondent and ended up losing her investment in a third mortgage on the Respondent's family home. As noted by the single bencher panel, the Respondent recognized that the

complainant needed independent legal advice in dealings with him and he failed to advise his client of a potential claim and failed to notify his insurer and therefore placed his interests ahead of those of the client. The effect upon the complainant resulted in her being foreclosed from title and effectively deprived her of insurance coverage. The single bencher panel noted that the Respondent then had no prior disciplinary record and that the balancing of the public interest and the private concerns of the Respondent would be served by a suspension of one month. The panel took into the account the responsible manner in which the Respondent cooperated with the investigation and steps taken to settle the debt with the complainant after the complainant had obtained judgment. Costs were also awarded.

[24] The Law Society appealed the one-month suspension and sought a review by the Benchers under Section 47 of the *Legal Profession Act*. The Benchers on the review affirmed the decision of the single bencher panel [2002] LSBC 1.

[25] Mr. Hira submits that the Professional Conduct Record is dated and arose in circumstances of extreme personal stress due to matrimonial and financial difficulties. Ms. Gulabsingh submits that the previous citation and professional misconduct involved, as the initial panel described, are matters "of the gravest concern".

[26] When the earlier discipline matter occurred, the Respondent had been practising between 15 and 20 years. It is true that there has been a significant passage of time between the professional misconduct giving rise to the previous citation. Ms. Gulabsingh, on the other hand, submits that we should have regard to the theory of progressive discipline. The Panel is not inclined to apply to the facts before it, the concept of progressive discipline. However, the Panel finds it troubling that in both matters the Respondent preferred his own interests to that of his client.

[27] The Panel has had regard to Rule 3-57(7) and Chapter 1, Rule 3(a) of the *Professional Conduct Handbook*. In addition, Chapter 6, Rule 1, of the *Professional Conduct Handbook* requires lawyers to provide undivided loyalty to every client. Rule 7(c), Chapter 11, of the *Professional Conduct Handbook* requires lawyers to "scrupulously honour any trust condition once accepted".

[28] We agree with counsel for the Law Society that proper handling of trust funds is at the heart of the fiduciary duties lawyers owe to their clients. We agree that lawyers' misuse of trust funds diminishes public confidence generally in the profession.

[29] Mr. Hira strenuously argues that a suspension will have a detrimental effect on the Respondent's reputation and that of his firm in a small community. He submits that the firm and the firm's ability to retain staff will be affected. Furthermore, any suspension of the Respondent will seriously affect the level of legal services available to the community served by the law firm. That may or may not be true. Such factors have influenced some disciplinary panels: for example, see *Law Society of BC v. Strandberg*, [2001] LSBC 26.

[30] A different perspective was offered by another disciplinary panel in *Law Society of BC v. McCandless*, 2003 LSBC 44. In that decision, Gordon Turriff, QC, sitting as a single bencher observed at para. [11]:

> It was suggested by counsel for the Law Society that what I will describe as a lighter suspension is appropriate in a case involving a sole practitioner. Other Benchers may be influenced by such a consideration. I hope they are not. In my view, we cannot have members thinking that they will be treated differently just because they happen to choose a particular practice arrangement. The overriding consideration must be protection of the public.

[31] In addition, in *Law Society of BC v. Bauder*, 2013 LSBC 07, the hearing panel stated at paragraph [19]:

> The overriding sanctioning principles in cases involving dishonesty are specific deterrence,

> general deterrence and public confidence in the Law Society's ability to regulate the profession in the public interest. Although hearing panels have given some weight to the impact a suspension may have on a sole practitioner and his family, they have still imposed significant periods of suspension on sole practitioners where the facts otherwise warrant this (cf. *Law Society of BC v. Tak*, 2011 LSBC 05 – four months, and *Law Society of BC v. Basi*, 2005 LSBC 01 – four months). A suspension is not, by definition, more serious for a sole practitioner than for a lawyer who practises in a large law firm. Cf. *Law Society of Upper Canada v. Lachappelle*, [1999] LSDD No. 90.

[32] Indeed, the Respondent himself argued in *Law Society of BC v. Dent*, [2001] LSBC 36, that a significant suspension would have a devastating effect:

> The Respondent is a sole practitioner. A significant suspension will have devastating financial consequences for him. He estimates that he will lose perhaps 20 to 30 significant commercial clients to a competitor firm. He will be unable to pay spousal support, child support or his debt to [E] for the term of the suspension and for some time thereafter.

[33] In *Dent*, (supra), Bencher Peter Keighley, QC, sitting by consent as a single bencher panel stressed that Law Society disciplinary proceedings must focus on the public interest, not on punishment or retribution. He cited with approval the words of Sir Thomas Bingham, MR in the case of *Bolton v. Law Society*, [1994] 2 All ER 486 at p. 492:

> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation and punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to reestablish his practice when the period of suspension is past. If that proves, or appears likely to be so, the consequences for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.

[34] We have weighed with care all of the *Ogilvie* factors, the evidentiary record and the submissions of counsel. We accept that there are mitigating factors, including the cooperation of the Respondent in the matter of this complaint and citation, the Respondent's age and experience, the significant gap of time between this citation and the citation discussed above, that the Respondent has clearly and fully acknowledged the misconduct, the potential effect upon the Respondent's law practice and his professional reputation and the likelihood that the Respondent will not reoffend.

[35] However, we must have due regard for the public interest and the need to ensure the public's confidence in the integrity of the profession generally. We also place importance upon the concept of

general deterrence in the context of a lawyer whose conduct has twice constituted professional misconduct. We conclude that, in all the circumstances, a suspension of 45 days is appropriate.

ORDER

[36] We order that the Respondent

(a) is suspended for a period of 45 days commencing February 10, 2014, and

(b) pay costs in the amount of $4,720 in accordance with the draft bill of costs presented at the hearing, on or before June 30, 2014.