2014 LSBC 13
Report issued: March 7, 2014
Oral Reasons: December 12, 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

ALAN GORDON SHURSEN HULTMAN

Respondent

Decision of the Hearing Panel

Hearing date: December 12, 2013
Panel: Barry Zacharias, Chair, James E. Dorsey, QC, Lawyer, Patrick Kelly, Public representative

Counsel for the Law Society: Carolyn Gulabsingh
Counsel for the Respondent: Gerald Cuttler

BACKGROUND

[1] The citation was authorized by the Discipline Committee on January 24, 2013, and issued February 18, 2013. The Respondent was served through his counsel.

[2] The citation was amended pursuant to Rule 4-16.1(1)(a) October 10, 2013. The Respondent admits the amended citation was delivered in accordance with the Law Society Rules.

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

> 1. In or around October 2008 to February 2010, you assisted your client Client A to retain a lawyer, Lawyer H, to:
>
> (a) obtain an order in a foreclosure action commenced by C Ltd. that provided that the balance of the sale proceeds be paid into Lawyer H's trust account, and
>
> (b) pay some of Client A's creditors including yourself, from the balance of the sale proceeds held by Lawyer H,
>
> when you knew there was an unsatisfied judgment that had been registered against the property in priority over the other creditors and in priority to your interest, contrary to Chapter 4, Rule 6; Chapter 8, Rule 1(b); and Chapter 1, Rule (1)(a) of the *Professional Conduct Handbook* in force at the time.

[4] This citation came before this Panel as a conditional admission of a disciplinary violation with consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The Respondent admitted he had committed professional misconduct and consented to the following disciplinary action:

> (a) a suspension from the practice of law for a period of one month, commencing on January 1, 2014;
>
> (b) costs in the amount of $3,000, payable by April 30, 2014.

[5] At the conclusion of the hearing, the Hearing Panel gave an oral decision that it accepted the conditional

admission and finds the suggested discipline within the range of fair and reasonable discipline. It accepted and imposed the proposed disciplinary action.

FACTS

[6] The Agreed Statement of Facts filed in these proceedings includes the following:

> 1. Mr. Hultman was called to the Bar of British Columbia on June 13, 1986. Since his call to the Bar he has practised in various small law firms and then as a sole practitioner in Vancouver BC since 2002. He practises primarily in the areas of corporate, commercial and real estate. He also does some civil litigation.
>
> 2. Mr. Hultman had a long-time client, Client A, who owned a property in Langley, BC "the Property". In 2008 Mr. Hultman represented Client A on several matters including two foreclosure actions against the Property commenced in June 2008 ("Action B" and "Action C"), as well as an action for money owed by Client A to Creditor D on a promissory note ("Action D"). Action D was filed in November 2008. The plaintiff in Action D was represented by Lawyer E. Lawyer F was acting for the mortgagee in Action B, and Lawyer G was acting for the mortgagee in Action C. Certificates of pending litigation were filed by Lawyer F and Lawyer G against the Property.
>
> 3. On July 25, 2008 an order nisi was granted in Action C. On October 10, 2008, Mr. Hultman filed appearances on the two foreclosure actions. On December 29, 2008, Lawyer E obtained default judgment against Client A for $39,859.56, and this was registered against the Property on January 14, 2009.
>
> 4. On January 23, 2009 Lawyer E provided copies of the Action D judgment to Mr. Hultman as well as to Lawyers F and G. He inquired about refinancing, or possible orders for sale. That same day Mr. Hultman responded, asking Lawyer E about possibly removing the judgment so his client could refinance.
>
> 5. In February 2009, C Ltd. applied for an order of sale for the Property. Lawyer E, on behalf of his client in Action D, filed an appearance in Action C on February 2, 2009 and sent it to Lawyer G by email. That form of service was not permitted at that time. Lawyer G states he did not receive it.
>
> 6. On February 19, 2009, Lawyer E's office emailed Lawyer G's office to determine if the appearance had been received. No more steps were taken to confirm its receipt.
>
> 7. An order for sale of the property was obtained by C Ltd., and an order approving a sale was obtained in November 2009. Mr. Hultman was served with the sale approval order. The sale order enumerated some charges and encumbrances that were to be discharged and also had a clause noting all charges subsequent to the certificate of pending litigation were cancelled. The balance of the proceeds were to be paid into court under the terms of the order.
>
> 8. On December 17, 2009, Lawyer G wrote Mr. Hultman and informed him that the remaining proceeds were $31,438.19, which would be paid into court. Lawyer G did not advise Lawyer E of the sale order or that he held the sale balance in trust.
>
> 9. On December 20, 2009, Mr. Hultman spoke with Client A, who was recovering from bypass heart surgery. She stated she needed the balance of the sale proceeds to look after her immediate needs, including the move necessitated by the sale of the property. She noted she intended to satisfy the Action D judgment from funds from her mother's estate, which she said were expected shortly. She wanted the funds paid out of trust and told him not to disclose the existence of the Action D judgment.

10. Mr. Hultman told her he could not apply for a payout of those funds without disclosing the judgment. He then spoke with a senior litigator and concluded he could not act on the application for the payout of the funds due to Client A's instructions not to disclose the judgment. At Client A's request he then took steps to obtain another lawyer for her for the payout application.

11. After some inquiries, Mr. Hultman was referred to Lawyer H. Client A could not meet with Lawyer H because of her bypass surgery. Mr. Hultman prepared a "rough draft" affidavit, which was forwarded to Lawyer H. Lawyer H then prepared the affidavit materials and, after confirming his retainer, forwarded the documents to Client A, who swore them. Mr. Hultman did not review or provide comments to Lawyer H as to the draft affidavit Lawyer H prepared for Client A. As instructed, he did not disclose the existence of the Action D judgment to Lawyer H. Arrangements were made between Lawyer H and Lawyer G to amend the application so that the balance of the funds, which were still in Lawyer G's trust account, could be paid after some adjustments to Lawyer H instead of the court.

12. Client A swore the affidavit before a notary in Langley. Mr. Hultman was not provided a copy of Client A's affidavit by her or Lawyer H. On January 6, 2010, Mr. Hultman wrote Client A asking if a portion of his account could be paid from her proceeds if the application was successful. The varied order regarding the remaining proceeds of sale of the property was made January 7, 2010, and Lawyer H was sent funds. Through Mr. Hultman, Client A directed Lawyer H to pay his own account from those funds and send the balance to Mr. Hultman. Mr. Hultman was directed to pay $5,000 from the funds toward his outstanding account and forward the rest to her. He did so and forwarded the remaining balance of $22,196.69.

13. On February 19, 2010, Lawyer E wrote Mr. Hultman asking why he was not given notice of the sale or payout applications. Mr. Hultman noted he was not acting for IF on the court-ordered sale or application to vary the sale approval order. In March 2010, Lawyer E obtained a charging order against Client A's interest in her mother's estate.

14. Mr. Hultman admits that he assisted Client A to retain Lawyer H in order to obtain a variation of the sale order, knowing the judgment from Action D was unsatisfied. He also admits that he received the funds from the varied sale order, paid himself $5,000 on an account owed to him by Client A, and that he paid her the balance, when he knew the Action D judgment was unsatisfied.

DISCUSSION

[7] 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 accept or reject, but not vary, the proposal. In making the decision, the Panel must be satisfied the admission on the alleged infraction is appropriate. When considering the disciplinary response, the question for the Hearing Panel is not would it have imposed the proposed disciplinary action, but whether the proposed disciplinary action is within the range of a fair and reasonable disciplinary action in all of the circumstances. (*Law Society of BC v. Rai*, 2011 LSBC 2, para. [7])

[8] The test for professional misconduct is set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at paras. [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 is 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.

[9] The above test was recently reaffirmed at both the hearing and Review panel levels in *Re: Lawyer 12*, 2011 LSBC 11 and *Re: Lawyer 12*, 2011 LSBC 35.

[10] A more detailed comment of what constitutes professional misconduct is found at paragraph [67] in *Law Society of BC v. Gellert*, 2013 LSBC 22:

> Conduct falling within the ambit of the "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a member's duties as a lawyer also satisfies the test.

[11] At the time of these actions, the standards of conduct expected for lawyers were set out in the *Professional Conduct Handbook*. The sections applicable in this case are:

> Chapter 1, Rule 1(1): A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel, or assist any person to act in any way contrary to the law.
>
> Chapter 4, Rule 6: A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.
>
> Chapter 8, Rule 1(b): A lawyer must not knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable.

DETERMINATION

[12] It is clear that the Respondent's actions in assisting Client A in the way he did were contrary to and a marked departure from his obligations as a lawyer. Additionally, his actions in dealing with the sale proceeds when he knew of the unsatisfied judgment are a marked departure from those obligations. This Panel finds the Respondent has committed professional misconduct.

DISCIPLINARY ACTION

[13] On the issue of sanction, Ms. Gulabsingh referred to 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 of 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.

[14] The Respondent is experienced counsel. As discipline counsel submitted, the Respondent was not duped by his client but knew exactly the nature of his actions. Lawyer E's client was victimized by losing the protection of her registered judgment and had to pursue further legal remedies. The Respondent personally benefitted from his actions by having monies paid on his account.

[15] There is a need for both general and specific deterrence in this case so the public does not lose confidence in the legal profession, and all parties know the legal profession takes very seriously its duty to uphold the law and act with integrity.

[16] The Respondent has no prior discipline record. He was cooperative and admitted his misconduct. Despite the sequence of events, there was only one transaction extended over time, in circumstances in which he may have seen his client as being "in extremis", as Mr. Cuttler put it. The Respondent's compassion for Client A does not diminish his responsibility for his actions but, perhaps, makes them more understandable.

[17] Ms. Gulabsingh provided an assortment of disciplinary action cases with scenarios in which lawyers to varying degrees were "duped" or misled by others, often on behalf of clients for whom they were sympathetic. *Law Society of BC v. Chetty*, [1997] LSDD No. 47; *Law Society of Saskatchewan v. Segal*, [1999] LSDD No. 9; *Law Society of BC v, Rutley*, 2013 LSBC 16; *Law Society of BC v. Ross*, 2010 LSBC 24; *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD No. 44. The penalties ranged from high fines and reprimands to one-month suspensions. As noted by counsel, none of them is quite on point with the Respondent's actions. He clearly knew what he was doing and personally benefitted. His level of culpability is higher than in circumstances where a lawyer was duped. As proposed and recommended, the disciplinary action should be at the higher end of this range.

ORDER

[18] The Panel agrees the suggested disciplinary action and costs are within the range of a fair and reasonable disciplinary action in all of the circumstances and therefore the Panel orders that the Respondent:

(a) is suspended from practice for a period of one month commencing January 1, 2014;

(b) pay costs in the amount of $3000, to be paid by April 30, 2014.

[19] The Executive Director is instructed to record Mr. Hultman's admission on his professional conduct record.

[20] Finally, under Rule 5-6(2), the Panel may make orders that specific information not be disclosed "to protect the interests of any person." Confidential and privileged information regarding the transactions involved in this hearing has necessarily been part of the material considered by the Panel. The Panel therefore orders, pursuant to Rule 5-6(2), that the Agreed Statement of Facts, including any documents attached, not be disclosed.

[21] The Panel thanks Ms. Gulabsingh and Mr. Cuttler for their cooperation in producing the Agreed Statement of Facts and their able submissions.