2014 LSBC 18
Decision issued: April 17, 2014
Oral Reasons: January 15, 2014
Citation issued: August 12, 2013

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

AMARJIT SINGH DHINDSA

Respondent

Decision of the Hearing Panel

Hearing date: January 15, 2014
Panel: Thomas Fellhauer, Chair, Paula Cayley, Public representative, John Waddell, QC, Lawyer

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

Background

[1] The citation was authorized by the Discipline Committee on July 11, 2013 and issued August 12, 2013. 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 a company (the "Vendor") regarding the sale of real property in 2012, you failed to honour one or more of the trust conditions imposed by opposing counsel ("Counsel for the Purchaser") by:
>
> > (a) failing to provide Counsel for the Purchaser, within five business days, a copy of your letter to the lender, [the "Bank"], enclosing the payout monies; and
> >
> > (b) failing to use diligent and commercially reasonable efforts to obtain a discharge of a mortgage and an assignment of rents in a timely manner.
>
> This conduct constitutes professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.
>
> 2. In the course of representing the Vendor regarding the sale of real property, you failed to deliver a report to the Executive Director within five business days detailing that you had delivered funds to the lender and had not obtained discharges from the lender in respect of a mortgage and an assignment of rents within 60 days of the closing date of the transaction, contrary to Rule 3-89 of the Law Society Rules.
>
> This conduct constitutes professional misconduct or a breach of the Act or Rules, pursuant to s. 38(4) of the *Legal Profession Act*.
>
> 3. In the course of representing the Vendor regarding the sale of real property, you abdicated your

professional responsibility by some or all of the following:

(a) failing to maintain responsibility for the conduct of the file;

(b) improperly delegating tasks to your staff;

(c) failing to adequately supervise your staff.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[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. By a letter dated December 12, 2013 to the Chair of the Discipline Committee, the Respondent admitted that he had professionally misconducted himself by committing the disciplinary violations set out in allegations 1 and 3 of the citation and also admitted that he had breached the Law Society Rules by committing the violation set out in allegation 2 of the citation. The Respondent consented to the following disciplinary action:

(a) a fine in the amount of $5,000;

(b) costs in the amount of $2,500; and

(c) payment of the total of the fine and the costs in the aggregate amount of $7,500 to be in 15 equal instalments of $500 each, commencing February 28, 2014 and payable on or before the last day of each month thereafter.

[4] On December 18, 2013, the Discipline Committee considered and accepted this proposal. Pursuant to Rule 4-22(4), discipline counsel is instructed to recommend the acceptance of the proposal to this Hearing Panel.

Facts

[5] An Agreed Statement of Facts was filed in these proceedings. The Agreed Statement of Facts is quite lengthy but important to understand the details of the way in which the sale of the Property transpired and of what the Respondent undertook to do and failed to do, and the manner in which the Respondent failed to oversee his staff. Not every breach of an undertaking constitutes professional misconduct, and not every instance of failing to maintain responsibility for the conduct of the file, improperly delegating tasks to staff and failing to adequately supervise staff constitutes professional misconduct. Therefore, it is important for the chronology of events to be understood and the details of the Respondent's involvement in this transaction to be considered in detail as this was the basis of our decision.

[6] In light of the foregoing and our sealing order (paragraphs [25] to [32] of this decision), we have summarized the relevant portions of the Agreed Statement of Facts (with confidential information removed) as follows:

1. On or about February 2, 2012, Mr. Dhindsa was retained to act for the Vendor, which had entered into a contract for Purchase and Sale dated October 28, 2011 to sell real property (the "Property") to another company (the "Purchaser").

2. Mr. Dhindsa assigned primary responsibility for this transaction to a legal assistant he employs to act as a real estate conveyancer (Mr. Dhindsa's "Employee"). By February 2012, Mr. Dhindsa's Employee had approximately 15 years' experience working in law firms as a real estate conveyancer.

3. In February of 2012, Mr. Dhindsa's practice in conveyancing matters included the insertion of a

“Checklist” in each client file, in a form approved by the Law Society. It was not Mr. Dhindsa’s practice to review the Checklist on each file to ensure the steps listed in the Checklist had in fact been completed.

4. Prior to the time Mr. Dhindsa’s conveyancing file was opened, he had instructed his conveyancing staff, including his Employee:

(a) on the importance of diarizing and following up in order to fulfill the undertakings;

(b) to follow up and obtain discharges on a timely basis;

(c) to use the Checklist in order to follow up to ensure that the proper steps required in conveyancing matters were followed and to diarize the completion of such steps, including obtaining discharges;

(d) to bring any issues or problems that arose in connection with conveyancing matters to his attention in a timely manner.

5. While Mr. Dhindsa provided these instructions to his conveyancing staff, he did not review or audit files prior to closing of the file to ensure his instructions were followed.

6. By letter dated February 10, 2012, Counsel for the Purchaser set out the undertakings upon which he would send the net sale proceeds to Mr. Dhindsa in trust. These undertakings included:

(a) a requirement that Mr. Dhindsa pay to the Bank the amount legally required to pay out and discharge the mortgages (“Mortgage No. 1” and “Mortgage No. 2”) and assignments of rent (“Assignment of Rent No. 1” and “Assignment of Rent No. 2”) and two PPSA Security Base Registrations (collectively, the “Security”);

(b) a requirement that Mr. Dhindsa would:

Provide to Counsel for the Purchaser within five business days of the completion date, copies of the following:

i. Mr. Dhindsa’s letter providing the Lenders with the payout monies;

ii. The payout statement received by Mr. Dhindsa from the Lenders;

iii. Mr. Dhindsa’s cheque paying the monies owing to the Lenders as per the above payout statement; and

iv. Evidence of delivery or receipt of the payout cheque to the Lenders place of business.

(the “Five-Day Report”)

(c) a requirement that Mr. Dhindsa would:

use diligent and commercially reasonable efforts to obtain the Discharges in a timely manner and upon Mr. Dhindsa’s receipt of the Discharges, attend to the registration of same at the Land Title Office and provide us with registration particulars in due course.

(d) a requirement that Mr. Dhindsa would:

release the two PPSA Security Agreements Base Registration numbers, secured party, the Bank, and provide confirmation in due course.

7. Mr. Dhindsa reviewed the file with respect to this transaction, including Counsel for the Purchaser’s

letter dated February 10, 2012, prior to and during the time of a meeting with his client on February 24, 2012. He did not see any unusual or problematic aspects of the transaction. After that time, Mr. Dhindsa did not review the file again until he learned of the complaint to the Law Society in August of 2012.

8. At the conclusion of a meeting with his client on February 24, 2012, Mr. Dhindsa initialed the "Checklist" that was in the file next to the lines "Review Contract of Purchase and Sale", "Review Title Search", and "Lawyer to review undertaking letter from other side".

9. In anticipation of the transaction completing, by letter written under the name of Mr. Dhindsa on February 24, 2012 (incorrectly dated February 27, 2012), Mr. Dhindsa advised the Vendor that the transaction completed on February 29, 2012; that funds were received and disbursed in accordance with the Order to Pay; and that a trust cheque payable in the sum of "$___" was enclosed. This letter was not completed or sent to the Vendor until March 2, 2012, at which time it was completed by Mr. Dhindsa's Employee to indicate that "$0" was payable to the Vendor because all the proceeds of sale had to be used to pay out the Bank.

10. On February 29, 2012, Mr. Dhindsa's Employee provided Counsel for the Purchaser with conveyance documents executed by the Vendor under a cover letter dated February 27, 2012 written under the name of the Respondent. In Mr. Dhindsa's cover letter, he agreed that the documents were provided to Counsel for the Purchaser on the undertakings set forth in Counsel for the Purchaser's letter of February 10, 2012.

11. The Contract of Purchase and Sale did not complete on February 29, 2012. By agreement, it completed the next day, on March 1, 2012.

12. On March 1, 2012, Counsel for the Purchaser emailed a letter, addressed to "Dhindsa Law Corporation", to the email address for Mr. Dhindsa's Employee. No copy was sent to Mr. Dhindsa's attention. The letter confirmed the deposit of the sale proceeds to Mr. Dhindsa's trust account on undertakings contained in that letter, which were identical to those set out in Counsel for the Purchaser's letter of February 10, 2012.

13. Mr. Dhindsa did not receive Counsel for the Purchaser's March 1, 2012 letter, and he did not review the letter until after the complaint to the Law Society.

14. Mr. Dhindsa did not provide any specific instructions to his staff, including his Employee, with respect to the undertakings set out in Counsel for the Purchaser's February 10, 2012 letter. Mr. Dhindsa took no specific steps, beyond his general office instructions set out at paragraph 4, to ensure that the undertakings imposed by Counsel for the Purchaser were performed.

15. On March 2, 2012, Mr. Dhindsa's office wrote to the Bank and enclosed Mr. Dhindsa's trust cheque dated March 2, 2012 in the amount required to pay out the Security. Mr. Dhindsa's letter was sent on March 2, 2012, after the Vendor brought in additional funds, when Mr. Dhindsa had sufficient funds in trust to pay out and discharge the Security.

16. The March 2, 2012 letter had two errors as follows:

(a) the letter was inadvertently dated March 1, 2012, and

(b) referred to only one of the mortgages and one of the assignments of rents (Mortgage No. 1 and Assignment of Rents No. 1) and not the rest of the Security (Mortgage No. 2, Assignment of Rents No. 2, and the two PPSA Security Base Registrations).

17. Mr. Dhindsa did not review this letter before it was sent.

18. The trust cheque contained sufficient funds to obtain a discharge of all of the Security. The Bank received this letter and the full amount required to discharge the Security on March 2, 2012. On March 13, 2012, the Bank released the two PPSA Security Base Registrations. However, the Bank did not provide confirmation of these discharges to Mr. Dhindsa's office until August 14, 2012.

19. On March 15, 2012, the Bank signed the discharge of Mortgage No. 2 and Assignment of Rents No. 2. Mr. Dhindsa's office received the discharge particulars for Mortgage No. 2 and Assignment of Rents No. 2 from the Bank on March 23, 2012 and registered those discharges on April 3, 2012.

20. After registering the discharges in paragraph 19, neither Mr. Dhindsa nor anyone at his office took any steps to provide Counsel for the Purchaser's office with the discharge particulars for the remaining Security until after further communication from Counsel for the Purchaser's office.

21. Mr. Dhindsa did not review the file or the Checklist to ensure the conveyance had completed and that all obligations were performed. Mr. Dhindsa says he honestly but mistakenly believed and expected that his Employee would have, in the usual course of her duties, taken timely and appropriate steps to do so and would have brought a matter such as this to his attention. He took no independent steps to confirm this belief.

22. On May 31, 2012, Counsel for the Purchaser's assistant emailed Mr. Dhindsa's Employee and requested discharge particulars from Mortgage No. 2 and Assignment of Rents No. 2. This email was not copied to Mr. Dhindsa, and his Employee did not bring this email to his attention.

23. On June 1, 2012, Mr. Dhindsa's Employee provided Counsel for the Purchaser's office with the discharge particulars for Mortgage No. 2 and Assignment of Rents No. 2. This was the first time that discharge particulars for Mortgage No. 2 and Assignment of Rents No. 2 were provided by Mr. Dhindsa's office to Counsel for the Purchaser's office. Mr. Dhindsa's Employee did not previously provide these discharges to Counsel for the Purchaser's office because she decided, without consulting Mr. Dhindsa, to wait for all of the discharges to be received before doing so, and she did not advise Mr. Dhindsa of that.

24. On June 1, 2012, Counsel for the Purchaser's assistant advised Mr. Dhindsa's Employee that discharge particulars for Mortgage No. 1 and Assignment of Rents No. 1 remained outstanding. Mr. Dhindsa's Employee and Counsel for the Purchaser's assistant then spoke and Counsel for the Purchaser's assistant made notes of their conversation indicating that Mr. Dhindsa's office was still waiting for discharges of Mortgage No. 1 and Assignment of Rents No. 1 and the PPSA Releases. Mr. Dhindsa's Employee did not bring this matter to his attention. Nor did she follow up and make inquiries of the Bank.

25. On June 27, 2012, Counsel for the Purchaser requested that his assistant contact Mr. Dhindsa's Employee to follow up with respect to the outstanding discharges. Counsel for the Purchaser did not contact Mr. Dhindsa directly.

26. Counsel for the Purchaser's assistant then called Mr. Dhindsa's Employee. The Employee advised her that she could not find the file but would investigate further. The Employee did not take any steps to investigate this matter any further and did not bring this inquiry or the status of the matter to Mr. Dhindsa's attention.

27. On July 4, 2012, Counsel for the Purchaser reported Mr. Dhindsa to the Law Society (the "Complaint").

28. Mr. Dhindsa was advised of the Complaint by the Law Society on August 9, 2012 via email that day. Prior to this date, Mr. Dhindsa was unaware of the subject matter of the Complaint because he had not reviewed the file since February of 2012 and he had not discussed the status of the undertakings with his Employee, and his Employee did not tell him about the communications received from Counsel for the Purchaser's office.

29. Upon learning of it, Mr. Dhindsa immediately investigated and instructed his Employee to ensure that discharges of Mortgage No. 1, Assignment of Rents No. 1, and the two PPSA Security Base Registrations were obtained and provided to Counsel for the Purchaser's office as soon as possible.

30. On August 13, 2012, Mr. Dhindsa's office (by email and mail) contacted the Bank and explained the discharge particulars for Mortgage No. 1 and Assignment of Rents No. 1 remained outstanding. The Bank mistakenly advised that those discharge particulars had been sent to Mr. Dhindsa's office on August 1, 2012.

31. On August 14, 2012, Mr. Dhindsa's Employee informed the Bank representative that the discharge particulars sent to Mr. Dhindsa's office on August 1, 2012 were duplicates of those already received and again requested particulars for Mortgage No. 1 and Assignment of Rents No. 1.

32. On August 14, 2012, Mr. Dhindsa's office received confirmation of the release of the two PPSA Security Base Registrations from the Bank.

33. On August 17, 2012, Mr. Dhindsa's office received the discharge particulars for Mortgage No. 1 and Assignment of Rents No. 1. Mr. Dhindsa's office registered the discharges that day and provided the registration particulars to Counsel for the Purchaser's office, together with discharge particulars for the release of the two PPSA Security Base Registrations.

34. Prior to the Complaint:

(a) Mr. Dhindsa's office did not have any centralized bring forward system in place. Mr. Dhindsa's Employee wrote important dates on the file and in her desk calendar. This information was not contained in Mr. Dhindsa's calendar;

(b) Mr. Dhindsa's office calendar reflected the number of closings occurring each month but did not contain a record of undertakings, holdbacks or discharges;

(c) Mr. Dhindsa did not have a system to ensure that he would be personally notified in a timely manner for the purpose of complying with Rule 3-89 of the Law Society Rules;

(d) Mr. Dhindsa's Employee had never done any five day reporting letters and his office did not have an adequate bring forward system for such reporting letters;

(e) It was Mr. Dhindsa's Employee's practice to complete the "Checklist" after the transaction concluded, as opposed to an ongoing basis as events occurred during the course of a specific transaction;

(f) Mr. Dhindsa had an incorrect understanding of his Employee's experience in handling real estate transactions, and he says he had an honest but mistaken belief that she was following the instructions he provided to her, as stated in paragraph 21 above;

(g) Mr. Dhindsa relied on his employees to notify him about any problems or delays they encountered regarding obtaining discharges and fulfilling the usual undertakings associated with conveyancing files;

(h) Mr. Dhindsa implemented the Checklist system in 2009, as recommended by the Law Society, in an effort to ensure the fulfillment of undertakings related to the discharge of mortgages. However, he did not review the Checklists to ensure that undertakings were fulfilled relating to the discharge of mortgages until the file was closed. Therefore, unless specifically notified by one of his employees, the Checklist system utilized by Mr. Dhindsa provided no means for him to be personally informed when undertakings were not being fulfilled, discharges were not obtained, reporting letters were not completed or 3-89 reports were not completed.

RULE 4-22 ADMISSIONS

[7] Under Rule 4-22, a respondent to a citation may make admissions of disciplinary violations to the Discipline Committee of the Law Society 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.

SUBMISSIONS OF THE PARTIES

[8] Counsel for the Law Society provided its submissions with respect to the test for professional misconduct, breaches of the Law Society Rules, the importance of undertakings, and analysis (the "Law Society Submissions"). Counsel for the Respondent agreed with the Law Society Submissions. Therefore, for convenience, the relevant paragraphs of the Law Society Submissions (paragraphs 9 – 26 of the Law Society Submissions) are repeated below as follows (some minor changes have been made to exclude confidential information in accordance with our sealing order [see paragraphs [25] to [32] of this decision]. Some headings have been added for ease of reference only.)

Professional misconduct

9. Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct for British Columbia*, but has been considered by hearing panels in several cases.

10. The leading case on the test for professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16, wherein the hearing panel concluded at paragraph 171 the test 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."

11. In *Martin*, (supra), the panel also commented at paragraph 154:

> 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.

12. The Bencher Review decision in *Re: Lawyer 12*, 2011 LSBC 35, is a recent pronouncement concerning the test for professional misconduct. In the Facts and Determination decision of *Re: Lawyer 12*, 2011 LSBC 11, the single Bencher hearing panel had reviewed prior decisions and held at paragraph 14 (in paragraph 7 of the Review decision):

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and

whether that conduct falls markedly below the standard expected of its members.

13. Both the majority and the minority of the Bencher Review Panel confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single-Bencher hearing panel: *Re: Lawyer 12*.

14. Recently, the hearing panel in *Law Society of BC v. Gellert*, 2013 LSBC 22, summarized what type of conduct will support a finding of professional misconduct, at paragraph 67:

> 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 (*Martin*, para 154; *Law Society of BC v. Singh*, 2013 LSBC 76, paragraphs 11-12).

15. Some of the standards expected of lawyers are articulated in the *Professional Conduct Handbook* and the *Code of Professional Conduct for British Columbia*. At the time of the Respondent's misconduct, the *Professional Conduct Handbook* was in force. Since January 1, 2013, the *Code of Professional Conduct for British Columbia* now provides the articulation of some of the expected standards.

Breach of Law Society Rules

16. In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the distinction between a breach of the Act or the Rules that constituted a "Rules breach" under s. 38(4)(b)(iii) of the *Legal Profession Act* and one that constituted professional misconduct under s. 38(4)(b)(i). The panel found at paragraphs 32 and 35:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
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> …
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> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent's conduct.

17. In making a finding of professional misconduct rather than a Rules breach, the panel must determine whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of its members in reference to the five factors articulated in *Lyons*.

Undertakings

18. Because of the importance of undertakings to the profession and its reputation, the expected standard is higher than it may be in other areas of practice. Some of the standards regarding undertakings are articulated in the *Professional Conduct Handbook* and the Law Society Rules, as detailed below.

19. Chapter 11 of the *Professional Conduct Handbook* sets out the obligations of lawyers with respect

to undertakings, and in particular the following obligations in Rule 7 and Rule 7.1:

> 7 A lawyer must
>
> (a) not give an undertaking that cannot be fulfilled,
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> (b) fulfill every undertaking given, and
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> (c) scrupulously honour any trust condition once accepted.
>
> 7.1 Undertakings and trust conditions should be
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> (a) written, or confirmed in writing, and
>
> (b) unambiguous in their terms.

20. Rule 3-89 requires lawyers to report to the Law Society when a discharge of mortgage has not been received from the mortgagee after delivery of funds to discharge the mortgage to the mortgagee or another lawyer. Specifically, Rule 3-89 provides:

> 3-89 A lawyer must deliver to the Executive Director within 5 business days a report in a form approved by the Executive Committee when
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> (a) the lawyer delivers funds to
>
> (i) a mortgagee to obtain a registrable discharge of mortgage, or
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> (ii) another lawyer or a notary on the undertaking of the other lawyer or notary to obtain and register a discharge of mortgage, and
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> (b) 60 days after the closing date of the transaction giving rise to the delivery of such funds, the lawyer has not received
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> (i) a registrable discharge of mortgage from the mortgagee, or
>
> (ii) satisfactory evidence of the filing of a registrable discharge of mortgage as a pending application in the appropriate land title office from the other lawyer or notary.

21. The review panel in *Law Society of BC v. Richardson*, 2009 LSBC 7, considered the question of what constitutes an undertaking and concluded, relying on *Witten v. Leung* (1988), 148 DLR (3rd) 418 (Alta. QB); and *Carling Development Inc. v. Aurora River Tower Inc.*, 2005 ABCA 267, that an undertaking may be imposed through the imposition of trust conditions, and undertakings are not restricted to those voluntarily given. At paragraph 23, the review panel stated:

> In summary, the combined effect of the written ethical guidelines for lawyers together with the case law is that no distinction can or should be drawn between the effect of an imposed trust condition and a solicitor's undertaking; they are equivalent.

22. 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 that undertakings be in writing, which is further evidence of their importance and the formality surrounding them.

23. As well, Rule 1(a) of Chapter 13 of the *Professional Conduct Handbook* requires that a lawyer must report to the Law Society another lawyer's breach of undertaking that has not been consented to or

waived by the recipient of the undertaking. It is worth noting that the only other two categories of conduct which a lawyer is required to report to the Law Society are shortage of trust funds and "other conduct that raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer." The fundamental importance of fulfillment of undertakings is demonstrated by the inclusion of breaches with these other types of conduct.

24. The fundamental importance of undertakings to the profession is well-established. The Court of Appeal commented on this importance in *Law Society of BC v. Heringa*, 2004 BCCA 97, in which it cited with approval the following comments made by the Law Society Hearing Panel:

> Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> The trust and confidence vested in lawyer's [sic] undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. *Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.*
>
> [Emphasis added]

25. Similarly, in its 2004 decision in *Hammond v. Law Society of BC*, 2004 BCCA 560, the Court made an equally strong statement on the importance of undertakings to the profession:

> The heading of Chapter 11 [of the *Professional Conduct Handbook*] might suggest that the Law Society is concerned only with undertakings given by one lawyer to another and not with undertakings given by lawyers to members of the public. Neither counsel suggested that such a restrictive interpretation was warranted. This is not surprising *given the paramount responsibility of the Law Society to the public (s. 3 of the Act) and the primary importance which the Law Society and its members attribute to lawyers' undertakings.* These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.
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> *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*. For that reason, the importance of undertakings is also stressed by the Canadian Bar Association in its *Code of Professional Conduct* (Ottawa: C.B.A., 1996) at Chapter 16.
>
> [Emphasis added]

26. Likewise, in *United Mining & Finance Corp. Ltd. V. Becher*, [1910] 2 KB 296, the court wrote:

> … those undertakings are given in their capacity as solicitors, and the money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust.
>
> (quoted in *Law Society of BC v. McRoberts*, 2010 LSBC 17, at paragraph 10)

ANALYSIS

[9] The Respondent had virtually no oversight over his file. After meeting with his client on February 24, 2012, the Respondent did not review the file again until he learned of the Complaint to the Law Society on August 9, 2012.

[10] Although the Respondent accepted the undertakings requested by Counsel for the Purchaser, the Respondent did not take any steps to actually ensure that those undertakings were complied with. As a consequence, the undertakings were breached.

[11] Up until the Respondent received notification of the Complaint from the Law Society, the Respondent was unaware of the basis for the Complaint because he had not reviewed the file since February of 2012, had not discussed the nature of the undertakings with his staff, and did not follow-up with his staff.

[12] As well, the Respondent did not prepare or send the Five-Day Report, or any report that complied with Rule 3-89.

Determination

[13] The Panel thanks both counsel for their preparation of the Agreed Statement of Facts and the able, thorough and helpful submissions provided.

[14] Based on the foregoing, we find that the allegations contained in the citation have been proven. We accept the Respondent's admission that he has committed professional misconduct on allegations 1 and 3 of the citation and a breach of the Law Society Rules on allegation 2 of the citation.

Disciplinary Action

[15] Both the Respondent and the Law Society have consented to disciplinary action consisting of a fine of $5,000. Counsel for the Law Society provided submissions in support of the appropriateness of the proposed disciplinary action. Counsel for the Respondent agreed with those submissions. The relevant paragraphs of the Law Society submissions (paragraphs 39 to 62 of the Law Society submissions) are repeated below as follows (some minor changes have been made to exclude confidential information in accordance with our sealing order [see paragraphs [25] to [32] of this decision].):

> **Submissions regarding Appropriateness of Penalty**
>
> 39. Deference should be given to the recommendation of the Discipline Committee to accept the proposal if the proposed disciplinary action is within the range of a "fair and reasonable disciplinary action in all of the circumstances." As stated in *Law Society of BC v. Rai*, 2011 LSBC 2, at paragraphs 6 through 8:
>
> > 6. This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
> >
> > 7. This provision exists to protect the public. The Panel must be satisfied that the proposed

admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is “acceptable”. What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, “Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?”

8. This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

40. The Law Society submits that the proposed disciplinary action is appropriate in this case, having regard to the non-exhaustive list of factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as follows:

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.

Factors related to the Respondent

41. The Respondent was called to the bar in British Columbia in June 2001. He is 41 years of age.

42. The Respondent took steps to fulfill the breached undertakings approximately six months after the breaches, and this was immediately after he became aware that the undertakings had been breached.

43. There was no discernible advantage gained by the Respondent by this misconduct, as he was unaware that he had committed the misconduct until after the Law Society advised him of Counsel for the Purchaser’s complaint.

44. The Respondent's Professional Conduct Record ("PCR") is an aggravating factor, as it displays a prior history of breach of an undertaking. It supports a disciplinary action above the minimum in the range, despite that this is the Respondent's first citation. The Respondent's PCR is summarized in chronological order in the paragraphs below.

45. Two Conduct Reviews were authorized by the Discipline Committee on December 1, 2008, and both were conducted in March 2009. On March 16, 2009, the Respondent attended a Conduct Review regarding a complaint the Law Society received in January 2007 of a breach of undertaking in a real estate transaction where the Respondent acted for the sellers. The undertaking the Respondent gave was to pay the outstanding property taxes, and provide the seller's lawyer with proof of that payment. The Respondent disbursed the sale proceeds without first confirming that the property taxes had been paid, and the Direction to Pay did not include authorization to pay the outstanding taxes. At the Conduct Review, the Respondent presented the Subcommittee with a document entitled "Lessons Learned", which detailed that he had failed in his professional responsibilities by failing to properly supervise staff, and that as soon as he learned the property taxes were outstanding, he should have paid them. The document also compared the failings with the Respondent's current practices and noted the Respondent now "meticulously review[s] conveyancing files before completion" and that he had advised staff to bring any problems to his attention immediately so they could be resolved.

46. On March 18, 2009, the Respondent attended a Conduct Review to address the importance of adhering to the strict requirements for taking oaths on affidavits. A former employer had advised the Law Society that a potential client had complained to the firm that the Respondent was not present at the time she and her nephew signed affidavits. The Respondent told the Subcommittee he was present when the deponents signed the affidavits, but he had secretly observed them providing their oaths to an immigration consultant. As he did with the previous Conduct Review, the Respondent presented the Subcommittee with a document entitled "Lessons Learned" setting out the Respondent's acknowledged failures and the current practices adopted to avoid future difficulties.

47. The Respondent was referred to the Practice Standards Committee, who authorized a practice review in February 2009. The recommendations in the April 2009 Practice Review Report included that the Respondent should personally review every undertaking, and should implement a system to reflect when the Respondent had reviewed, accepted and complied with undertakings, and that the Respondent should review real estate files within 30 days of completion to ensure that undertakings had been fulfilled. Another recommendation included that the Respondent ensure his staff complied with Rule 3-89 regarding reporting of mortgages that had not been discharged within 60 days of payout. The Practice Standards file was closed in July 2010, after the Respondent completed various recommendations of the Practice Standards Committee regarding the implementation of systems to ensure fulfillment of undertakings.

48. In Apri1 2013, the Discipline Committee directed the Respondent attend a Conduct Review to discuss his conduct in putting his female legal assistant in a surprise chokehold at the office. The Conduct Review took place in July 2013, and the Respondent explained his conduct was intended to be playful. The Respondent was charged with assault, but the charge was stayed. The Respondent acknowledged his behaviour was unacceptable and unprofessional and assured the Subcommittee he was addressing it by his intention to consult with the Lawyer's Assistance Plan, the Law Society's Personal Performance Consultants and to contact the Law Society's Equity Ombudsperson for guidance and support in addressing his behaviour.

Factors related to the misconduct

49. A breach of undertaking is generally considered as a serious form of misconduct, as undertakings are a fundamental aspect of the legal profession. They are solemn promises given by legal professionals and their fulfillment is crucial to the operation of the profession, as they are linked to and based on essential aspects of membership in the profession: trustworthiness and honesty.

50. In *Law Society of BC v. Lee*, [2002] LSBC 29, the hearing panel commented at paragraph 21:

> Undertakings ensure that members of the public, may, through their counsel or otherwise, freely surrender control over their affairs to an adversary, confident in the knowledge that the lawyer who has assumed the obligation will keep his or her promise. The beneficiary of an undertaking is entitled to require strict compliance with the terms imposed, and it is no answer to such a person that the lawyer forgot, misunderstood or otherwise failed to comply.

51. Accordingly, the Law Society submits that all breaches of undertaking, even those that are inadvertent or unintentional should be regarded as serious disciplinary matters. If the profession did not demand strict compliance of the fulfillment of undertakings, public confidence in the legal profession would be compromised, if not lost altogether.

52. Undertakings are commonplace and are used regularly by lawyers in countless types of transactions and legal matters on a daily basis. It is important that the message conveyed to the profession is that a breach of an undertaking falls below the standard expected of members, and warrants a correspondingly appropriate disciplinary action.

53. In this case, the Respondent breached two trust conditions (undertakings), failed to report to the Executive Director the discharges that were outstanding 60 days after the transaction closed, and improperly abdicated his professional responsibilities to his staff. However, the misconduct all occurred in respect of one client matter, and in respect of the same transaction regarding that client.

54. Fortunately, the impact of the misconduct in this case was modest. Counsel for the Purchaser's clients may have suffered some inconvenience and some potential increased legal costs (to follow up with the Respondent regarding the outstanding discharges) but there does not appear to be any other consequence of significance.

55. Given the importance of undertakings and adherence to them, it is imperative that hearing panels continue to send a strong message of general deterrence to the profession when undertakings are breached. As stated in *Law Society of BC v. Choda*, 2011 LSBC 31, at paragraph 11(1):

> It must be obvious to the public that undertakings are properly regarded, and breaches of undertakings are appropriately dealt with. Sanctions for breach of an undertaking must be significant to ensure the public will continue to have confidence in transactions based upon undertakings, confidence in the profession as a whole, and confidence in the self-regulation of the legal profession.

Range of disciplinary action in similar cases

56. In *Law Society of BC v. Lee*, (supra), the respondent breached an undertaking he gave in a matrimonial matter to provide opposing counsel with a series of post-dated cheques and filed copies of documents. The respondent made use of the documents but did not provide the cheques in the timeframe required by the undertaking and did not provide a copy of one of the filed documents. The respondent told the Law Society at the time she accepted the documents, she did not anticipate the difficulties she would face in obtaining the post-dated cheques from her client, who did not have a bank

account in Vancouver, as he was resident in Hong Kong. The hearing panel characterized the breach as “not deliberate”. The respondent’s proposal under Rule 4-22 for a fine of $2,000 was accepted by the hearing panel. The respondent’s PCR included one prior conduct review.

57. In *Law Society of BC v. McLellan*, 2003 LSBC 40, the respondent breached an undertaking given to opposing counsel in a matrimonial matter to discharge an existing mortgage and replace it with a new mortgage if documents regarding the new mortgage were delivered to opposing counsel. The respondent discharged the existing mortgage without delivering the documents regarding the new mortgage to opposing counsel and receiving her approval. The breach of undertaking appeared to be not intentional but inadvertent, the other party was not prejudiced and the respondent did not benefit from the breach. The hearing proceeded under Rule 4-22 and the proposed disciplinary action of a reprimand and fine of $3,000 was ordered. The decision did not mention the respondent’s PCR.

58. The respondent in *Law Society of BC v. Linge*, 2008 LSBC 07, breached an undertaking in 2000 which remained undischarged at the time of the hearing in 2008. The respondent had attempted to discharge an easement as required by his undertaking, but the discharge application was rejected by the Land Title Office. The respondent released trust funds before he was advised that the application to discharge was rejected by the Land Title Office. At the time of the hearing, the undertaking was not fulfilled, and the respondent had made an application to discharge the easement, but it would likely take several months to obtain the discharge because the property had been subsequently subdivided. There was no hardship suffered by the delay in fulfilling the undertaking. The hearing panel in that case accepted the respondent’s 4-22 proposal for a $3,000 fine. There was no mention of the respondent’s PCR in the hearing report.

59. In *Law Society of BC v. Epp*, 2006 LSBC 5, the respondent was found to be bound by an undertaking contained in Minutes of Settlement executed by his client which required him to forward funds to another lawyer “in trust” upon the occurrence of certain events. The respondent did not forward the funds after the events took place. The respondent admitted his behaviour, but did not admit that it constituted professional misconduct. The hearing panel disagreed, finding that the respondent was bound by an undertaking even though it was set out in a document that he did not sign, but which he negotiated. The panel noted the respondent’s lack of a PCR, and remarked that the respondent’s conduct was not characterized by such factors as flagrant disregard, cavalier attitude, aggravating circumstances or a shortfall of trust funds. The respondent was ordered to pay a fine of $5,000.

60. In *Law Society of BC v. Choda*, (supra), the respondent breached an undertaking when he received net sale proceeds but did not discharge a lien or provide a filed copy of the discharge of the lien to opposing counsel within the prescribed time frame, which was within 60 days of the closing date. The respondent had previously undergone a conduct review regarding breach of undertaking in 2008. The respondent admitted that his behaviour constituted professional misconduct, but did not agree with the Law Society’s position on sanction. The Law Society submitted a fine of $5,000 was appropriate, while the respondent submitted that a fine of $3,500 was adequate. The hearing panel concurred with the Law Society’s position and ordered a fine of $5,000, noting the respondent’s PCR as a significant factor, as well as the fact that the breach endured over approximately two months.

61. In *Law Society of BC v. Clendening*, 2007 LSBC 10, the respondent gave an undertaking to “use diligent and commercially reasonable efforts” to obtain a discharge of a mortgage, but did not do so until approximately 18 months after the transaction closed. Like in the present case, the mortgage had been paid but was not removed from the title. The respondent had confirmed to the opposing party that the loan had been paid, but did not follow up and obtain a discharge of it, and attributed the delay, in part, to his own medical condition. The respondent also failed to respond to communication from the

notary regarding the status of the discharge. The respondent's PCR included a prior conduct review regarding compliance with undertakings. The hearing panel agreed with the joint submission of the Law Society and the respondent regarding sanction, ordered a fine of $7,500, and made the following comment about the necessity of delivering a discharge and the requirements of Rule 3-89, at paragraph 8:

> The requirement to deliver a Discharge of Mortgage in a timely way has assumed particular importance as a means of ensuring that purchasers of real estate are protected against error or misdeed. In March of 2003, the Law Society adopted a specific rule of conduct, Rule 3-89, requiring members to advise the Law Society if they have not received a discharge of mortgage from the mortgagee within 60 days after the closing date of a transaction in which funds are advanced to obtain such a discharge. It is imperative that lawyers practising in this field be alive to the requirement to obtain a discharge of mortgage expeditiously, all the more so when an undertaking has been given to provide such a discharge in a timely way.

62. In *Law Society of BC v. Goddard*, 2006 LSBC 12, the respondent breached four undertakings in real estate matters by failing to promptly obtain discharges of mortgages. The respondent's PCR consisted of a prior conduct review and a referral to the Practice Standards Committee. In this instance, the panel accepted that the respondent's actions in failing to fulfill the undertakings were a result of stress rather than as a result of incompetence or laziness. The respondent was suspended from practice for two months, with the panel noting at paragraph 11:

> The Law Society of BC has recently taken a much sterner approach to breaches of undertaking due to the catastrophic results of the actions of one member who defrauded clients of millions of dollars using undertakings as a tool for his dishonesty. It must be clear to the Law Society's members that if they breach their undertakings, there will be serious consequences.

[16] 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.

[17] 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.

ANALYSIS

[18] The $5,000 fine proposed by the Respondent is somewhere in the middle of the range of disciplinary actions ordered presented by the cases summarized above. The Law Society submitted that the proposed disciplinary action is suitable, as it is within the suggested range, but it is not at the bottom end of the range. The proposed sanction appropriately reflects the aggravating factors of the Respondent's additional failure to adequately supervise his staff, his failure to provide the Executive Director with the required report under Rule 3-89 and his PCR, which includes a Conduct Review to address a breach of undertaking.

[19] Although the Panel is concerned about the Respondent's behaviour, especially in light of his PCR, the Panel agrees that a fine of $5,000 is appropriate and within the range of a fair and reasonable disciplinary action in all the circumstances.

COSTS

[20] The authority to order costs is derived from section 46 of the *Legal Profession Act* and Rule 5-9 of the Law Society Rules. The rule provides that:

> …
>
> (1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or citation.
>
> (1.2) If, in the judgment of the panel or review board, it is reasonable and appropriate for the Society, an applicant or a respondent to recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4, the panel or review board may so order.
>
> (1.3) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
>
> (1.4) In the tariff in Schedule 4,
>
> > (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
> >
> > (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units applies.
> >
> > …

[21] Costs calculated under the tariff are to be awarded unless, under Rule 5-9(1.2), a panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

[22] The Respondent has proposed costs of $2,500 inclusive of disbursements and counsel fees, which is calculated under item 23 of the tariff, which applies to hearings under Rule 4-22. The range presented in the tariff is $1,000 to $3,000. The $2,500 proposed for costs also includes disbursements incurred. Rule 5-9(1.3) allows for disbursements to be added to costs calculated under the tariff.

ORDER

[23] The Panel orders the Respondent:

> (a) to pay a fine in the amount of $5,000;
>
> (b) to pay costs in the amount of $2,500; and
>
> (c) to pay the total of the fine and the costs in the aggregate amount of $7,500 in 15 equal instalments of $500 each, commencing February 28, 2014 and payable on or before the last day of each month thereafter.

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

ORDER TO PROTECT CONFIDENTIAL INFORMATION

[25] Counsel for the Law Society requested an order under Rule 5-6(2) that confidential client information and third party information, including lender bank information, not be disclosed and that the citation, the Agreed Statement of Facts, and the transcripts of this hearing be sealed. This was requested on the basis of an expressed concern that the particulars of the sale of the Property and the Vendor's financing arrangements contain confidential information and are disclosed throughout the Agreed Statement of Facts, and should therefore not be accessible to the public on the basis of solicitor/client privilege and client confidentiality. The Respondent agreed to such an order.

[26] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-6(1) provides that every hearing is open to the public. Rule 5-7(1) permits any person to obtain a transcript of the hearing and Rule 5-7(2) permits any person to obtain a copy of an exhibit entered during a public portion of a hearing.

[27] The Rules recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, Rule 5-6(2), read in conjunction with Rule 5-7(2), permits a panel to make an order that all or part of an exhibit filed at a public hearing not be made available to third parties "to protect the interests of any person."

[28] It is important that clients not lose the protection of solicitor/client confidentiality simply because the Law Society has relied on documents containing confidential information for the legitimate purpose of bringing disciplinary proceedings against a lawyer or former lawyer. A panel can therefore utilize Rules 5-6(2) and 5-7(2) to seal materials filed at a hearing in order to prevent confidential information from being accessible to the public.

[29] The citation dated August 12, 2013 should be sealed because this document contains the name of the Respondent's client, the Vendor, the details of the Vendor's Security, and the location of the Property. This generally constitutes confidential information (Code of Professional Conduct for British Columbia, Rule 3.3-1(5(a)). The Agreed Statement of Facts and the transcripts of this hearing should be sealed for the same reasons.

[30] We note that a version of the citation from which confidential information has been redacted is available on the Law Society's website. The essential nature of the citation is also reproduced, without reference to client names, in this decision. The public thus has access to versions of the citation from which the confidential information has been removed.

[31] We have also included all relevant portions of the Agreed Statement of Facts at length in our decision without the confidential information and information that is subject to solicitor/client privilege. Therefore, we find that the public has access to the essential information to understand the context of the professional misconduct by the Respondent and the reasons for our decision.

[32] For those reasons, we order that the citation, the Agreed Statement of Facts, and the transcripts of this hearing be sealed.