

2015 LSBC 04
Report issued: February 5, 2015
Citation issued: February 18, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and section 47 review concerning

DOUGLAS EDWARD DENT

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date: October 16, 2014

Written submissions: October 31, 2014

Review Board: Jan L. Lindsay, QC, Chair
Don Amos, public representative
Dennis Day, public representative
Dean Lawton, Bencher
Elizabeth Rowbotham, Bencher
Donald Silversides, QC, Lawyer
Sandra Weafer, Lawyer

Discipline Counsel: Carolyn Gulabsingh

Counsel for the Respondent: Ravi R. Hira, QC and Peter E. Waldkirch

- [1] On February 18, 2013, Douglas Dent was cited for professional misconduct. It was alleged that he had improperly taken \$2,000 from funds held in trust, to pay his fees and disbursements, contrary to Rule 3-57(7) of the Law Society Rules.
- [2] In September of 2013 Mr. Dent and the Law Society entered into an Agreed Statement of Fact (“the ASF”).
- [3] In 2011, Mr. Dent was retained to act for the husband in a matrimonial dispute. He was given funds to be held in trust, and to be released to the wife on certain conditions and at certain times. He was also given some funds to pay his accounts.

Mr. Dent applied some of the funds held for the wife, and not yet released to her, to pay outstanding accounts for fees and disbursements.

- [4] Paragraph 20 of the ASF says:

The Respondent says he did so acting on the mistaken but honest belief that he had obtained the express consent of MW verbally on June 18, 2011.

- [5] At paragraph 27 of the ASF, the Respondent admitted that he improperly withdrew funds from trust in order to pay his fees and disbursements, contrary to Rule 3-57(7) of the Law Society Rules and further, at paragraph 28 that his conduct in doing so constitutes professional misconduct.
- [6] On October 11, 2013 a hearing panel was convened to determine the appropriate disciplinary action. Following a half-day hearing, the hearing panel gave reasons on January 27, 2014, suspending Mr. Dent from the practice of law for 45 days and ordering him to pay costs of \$4,720.
- [7] The Respondent sought a review of the decision and obtained a stay of the suspension.
- [8] This Review took place on October 16, 2014, and at the conclusion of submissions, the Review Board asked for further submissions on whether a suspension was an appropriate sanction for professional misconduct arising from an “honest but mistaken belief”.
- [9] We received those further submissions and have concluded that, on the facts of this case (as set out in the ASF), the Respondent’s improperly taking funds from trust to pay fees and disbursements while acting on an honest but mistaken belief that he had secured his client’s consent, does not warrant a 45 day suspension.
- [10] The ASF includes an admission by the Respondent that his conduct constituted professional misconduct. Implicit in the decision of the hearing panel is a finding of professional misconduct.
- [11] The *Legal Profession Act*, Law Society Rules and the *Professional Conduct Handbook* (the ethical rules in place at the time) do not define or set a test for “professional misconduct”. In *Law Society of BC v. Martin*, 2005 LSBC 16, the test is said to be “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.” (*Martin*, para [171]) We accept that statement of the test.

- [12] Mr. Dent admits that he did not have his client's clear consent to take the funds from trust. If he had had that consent, he would not have committed professional misconduct. He should have recorded what he believed to be his client's consent, and if he had, the outcome may have been different. He should have been more careful in how he handled the funds held in trust. His conduct is a marked departure from the conduct the Law Society expects of lawyers and from the conduct the public expects of lawyers.
- [13] The proper handling of trust funds is at the heart of the fiduciary duties that lawyers owe to their clients, but it does not follow that every case of improper handling of trust funds should result in a suspension.
- [14] Professional misconduct can encompass a wide range of circumstances and can attract a wide range of disciplinary action. The most egregious professional misconduct will attract the most significant penalty. Here, there is no dispute that the Respondent's improper taking of monies from trust was professional misconduct. The Respondent says that his taking of funds was on an honest but mistaken belief.
- [15] At paragraph 18 of the decision, the panel expressed some concern about the Respondent's "honest belief". However, the Respondent did not give evidence and was not cross-examined on the point. If the hearing panel did not accept the fact of his honest belief, then they should have said so, in clear terms, and should have given reasons. They did not. The only conclusion to be drawn is that the fact was accepted.
- [16] In this case, the Respondent says that he believed he was entitled to transfer funds from trust to pay his fees. There is no suggestion that he did not hold that belief. He was wrong but he was not dishonest. His conduct constitutes professional misconduct but does not warrant a suspension.
- [17] The hearing panel made reference to the Respondent's professional conduct record and specifically to a citation resulting in an adverse finding and a one-month suspension in 2001. The hearing panel discussed that earlier decision and referred to that earlier misconduct but concluded at paragraph 26 not to apply "the concept of progressive discipline." At paragraph 35, the panel again referred to that misconduct when determining a suspension to be the appropriate penalty in this case. The earlier misconduct is distinguishable from the current misconduct, and there were many distinguishing circumstances. This Board agrees with the hearing panel that the concept of progressive discipline should not be applied in this case.

- [18] This Board is satisfied that the standard we must apply on a review of the hearing panel decision on disciplinary action is “correctness”. (*Law Society of BC v Hordal*, 2004 LSBC 36 para 8.) The initial panel’s decision was not correct because the disciplinary action ordered (a 45 day suspension) is significantly outside the appropriate range of disciplinary action for professional misconduct by a member of the Law Society, which although wrong, was taken based on an a mistaken belief honestly held by the member.
- [19] We have concluded that a \$5,000 fine is the appropriate sanction in this case, payable over five months. Costs of the Review go to the Respondent. We would not interfere with the order for costs at the hearing on disciplinary action.
- [20] The Review Board orders
 - (a) that the suspension ordered by the hearing panel is set aside,
 - (b) that the Respondent pay, by June 30, 2015
 - (i) a fine of \$5,000, and
 - (ii) costs of the hearing in the amount of \$4,720, and
 - (c) that the amount payable under paragraph (b) be offset by the amount of costs of the review payable by the Law Society.
- [21] If the parties are unable to agree on the amount of costs of the review, they may make written submissions within 30 days of the issuance of this decision.