2015 LSBC 37
Decision issued: July 24, 2015
Citation Issued: July 10, 2014

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 AND DETERMINATION

Hearing dates:	March 23, 24 and 25, 2015
Panel:	David Mossop, QC, Chair Bruce LeRose, QC, Lawyer Clayton Shultz, Public Representative
Discipline Counsel:	Kieron Grady
Counsel for the Applicant:	Ravi Hira, QC

INTRODUCTION

[1] On February 1, 2011, a long standing client, the Vendor and the Purchaser of a large tract of land in the interior of British Columbia, showed up unannounced at the Respondent's office. Such is the nature of small town practice. There seems to have been no appointment. Being entrepreneurs and wanting the deal to go through as quickly and cheaply as possible, the Vendor and the Purchaser wanted the Respondent to act for both parties. The deal was for the sale of land. The deal ultimately went through, and no one suffered any loss or harm.

[2] However, the Female Purchaser was not satisfied with the accounting of monies paid for the purchase of the property. She sought an accounting from the Respondent without success. He took the position that he represented the Vendor only and therefore she was

not entitled to any accounting of the money. She wrote a letter of complaint to the Law Society of British Columbia.

[3] The Law Society, in fulfilling its statutory mandate, investigated the complaint. The substance of the original complaint did not result in any citation.

[4] However, during the course of the investigation, officials of the Law Society uncovered three matters, unrelated to the original complaint, that led to this hearing. They are:

(i) the Respondent acted for both parties contrary to the *Professional Conduct Handbook* then in force;

(ii) alternatively, the Respondent did not advise the Purchasers that he was not protecting their interest;

(iii) the Respondent breached an undertaking.

[5] This Panel dismisses all allegations in the citation except for allegation 2: failing to advise the unrepresented parties that he was not protecting their interest.

THE PROPERTY AND THE PLAYERS

[6] To understand this discipline drama, one must understand the nature of the property, the main players and how they interrelate. The minor players will be introduced in the facts part of these reasons.

[7] Names of clients have not been used, and other changes have been made to protect solicitor-client confidentiality and the privacy interests of other individuals. This is not a law school examination, though we use the terms "Grey Acre" and "Black Acre" to protect confidentiality and privacy interests.

The Property

[8] The Vendor Corporation owns a piece of property that is unique for two reasons. First, it spans several thousand acres in the interior of BC. Secondly, it is already divided into between 30 and 40 separate lots. The Vendor Corporation planned to sell some of these lots individually with the intention of making a profit.

[9] The specific lot that was subject to this hearing can be called Grey Acre. Grey Acre has a gravel quarry contained within its boundaries. Prior to February 2011, the Purchaser Corporation had a lease with the Vendor Corporation to make use of the quarry for commercial purposes. However, the Purchaser found it advantageous to purchase Grey

Acre outright. The Vendor Corporation was willing and able to sell Grey Acre. Both the Vendor and Purchaser wanted this deal to go forward.

The Respondent

[10] The Respondent, Douglas Edward Dent, attended UBC Faculty of Law between 1972 and 1975. He articled with a downtown Vancouver law firm.

[11] The Respondent then briefly was an associate with another law firm.

[12] Between September 1977 and April 1987, he was a part-time sole practitioner and a sessional lecturer at the Faculty of Commerce at UBC. He later obtained his LLM from UBC.

[13] Between 1987 and 1992, he was a partner in a firm called Bonner and Dent in Vancouver. After that he continued to practise in the Lower Mainland.

[14] Ultimately he moved to 100 Mile House and started to practise as a sole practitioner there under the name of Centennial Law Corporation, which is continuing.

[15] He is a solicitor, practising in the areas of wills, estates, corporate, commercial real property and some family law. It could be described as a general practice on the solicitor's side. At the relevant time it was not the practice of the Respondent to have retainer letters or agreements or, for that matter, disengagement letters. After these events, he now has retainer agreements or letters of disengagement. We believe that he has learned his lesson.

Female Purchaser

[16] The Female Purchaser, the only other witness at the hearing, was 76 years of age at the time. She is best described as an experienced business person or entrepreneur. She has been involved with many land transactions over the years. For a period of time, she was also the accountant for a municipality. She has dealt with numerous lawyers and in fact has a close relative who is a lawyer. She is also no stranger to litigation.

[17] Unfortunately, she had recently suffered a concussion. She stated her long-term memory is intact, but she has trouble with her short-term memory. The concussion happened after the events related to the events stated in the citation.

Male Purchaser

[18] The Male Purchaser was the business partner of the Female Purchaser. He did not give evidence. He had experience in the quarry business. The Female Purchaser acknowledged

that her role was limited to providing money to the enterprise. The Male Purchaser negotiated the deal and the option to purchase, which are described in these reasons.

Purchasing Corporation

[19] The Purchasing Corporation was owned 50/50 by the Female Purchaser and the Male Purchaser. Both the Female Purchaser and the Male Purchaser were officers of the Purchasing Corporation. There was a shareholder agreement that provided that both parties had to agree to anything costing more than $5,000. This requirement was not always followed.

Vendor 1 and Vendor 2

[20] Both these individuals own the Vendor Corporation that owned the property described above. Both were long standing clients of the Respondent. Neither gave evidence.

FACTS

Initial Agreement

[21] In late January of 2011, the Vendor Corporation and the Purchasing Corporation entered into an agreement for the sale of Grey Acre. The parties used a standard self-counsel press form to make the agreement. The agreement was commercial in nature and transferred all the mineral rights in Grey Acre, and there were a number of provisions including an easement. Parts of the agreement were drafted by the Female Purchaser. However, it was signed by the Male Purchaser. This led the Respondent to believe that the Male Purchaser was the person in charge. The agreement shows some sophistication. However, it is not up to a standard that a lawyer would draft.

[22] The Male Purchaser led the negotiations on behalf of the Purchaser Corporation.

[23] On or about February 1, 2011, the parties to the agreement dropped in to see the Respondent. They wanted the Respondent to act for both sides. The meeting was probably unannounced. Such is the nature of a small town practice.

[24] At this point the evidence before the Panel starts to diverge.

[25] First, the Law Society agrees that the Male and Female Purchaser and the Respondent and at least one of the Vendors took part in the discussions in the Respondent's office. Whether the other Vendor was present is questionable.

[26] The position of the Respondent was that he agreed to act only for the Vendor Corporation because they were his long-standing clients and he could not act for both parties as the sale

had a commercial component. *However, significantly, he agreed to prepare the documents normally prepared by the solicitor for the purchaser. He had done this in a few commercial cases, but he had never done it for a commercial land transfer.*

[27] Counsel for the Law Society and the Respondent, pointed to other actions and documents to bolster their respective positions as to whether the Respondent agreed to act for the Purchaser Corporation at the February 1, 2011 meeting.

[28] However, the key issue is, "what did the parties agree to on February 1, 2011?" There is no doubt the Respondent felt he was only representing the Vendor Corporation. There is no doubt the Female Purchaser walked away from the meeting feeling the Respondent represented the Purchasing Corporation. The Panel will deal with this conflicting evidence in our analysis section below.

Closing Date and Option

[29] The closing date was set for March 1, 2011. However, this was not kept. Significantly, on that day, the Respondent prepared a draft letter to the Purchasing Corporation stating he was acting for the seller and forwarding certain documents pertaining to Grey Acre and asking the Purchasing Corporation to have a lawyer sign next to their signature. The letter was never sent. However, it is evident that the Respondent felt he was only acting for the Vendor. There are other letters sent or drafted by the Respondent between February and June 2011 showing a similar belief.

[30] On or about March 4, 2011, the Vendor Corporation and the Purchasing Corporation instead agreed to an option to purchase the property with an end date of March 31, 2011. This was done in order to have the deal complete. This option was negotiated by the Male Purchaser on behalf of the Purchasing Corporation and representative(s) of the Vendor Corporation. The Female Purchaser signed papers, but this was after the fact. The option was for a price that was to be reduced from the overall purchase of the Grey Acre. The Respondent prepared the option on instructions from the Vendor Corporation. The option was used to ensure that, if the deal did not go through, the Vendor could keep the amount paid for the option.

[31] The parties then agreed to a further extension of the option until June 11, 2011. This was signed on behalf of the Purchaser Corporation, both by the Male Purchaser and by the Female Purchaser.

[32] It is relevant that the Respondent gave no legal advice to either the Female Purchaser or the Male Purchaser on the option and the extension of time on the option. He did, however, have some of these option papers signed by the Female and Male Purchasers in his office.

The Other Corporation and the Mortgage

[33] The next important development was the request by the Female Purchaser that the Respondent represent her in regards to a mortgage on another piece of property owned by another corporation that was owned and controlled by the Female Purchaser. We will refer to this as the Other Corporation. This happened in late May or early June, 2011. The Other Corporation owned another separate piece of property, which we will call Black Acre.

[34] She had arranged, on her own, with a private mortgage company for a mortgage to be taken out on Black Acre, and that money was to be used for the purchase of Grey Acre. She requested that the Respondent represent her in regards to this mortgage transaction. He thought the matter through and felt there was no conflict. At that time, he did not know that proceeds from this mortgage would be used in the purchase of Grey Acre. It should be noted that the Law Society in this citation is not alleging any conflict in regards to this particular transaction as a separate allegation.

[35] The money from this transaction was ultimately used for the purchase of Grey Acre.

The Easement

[36] The selling of Grey Acre would make no sense unless there was an easement. Grey Acre was in the middle of the property with no access to a public road. The original agreement signed in early 2011 contemplated this problem. The Respondent's evidence is that he drafted three different versions; he did it on instructions of the Vendor.

Referral to LM

[37] In early June 2011, the Female Purchaser said something to the Respondent's assistant that indicated that the Female Purchaser believed that the Respondent was her lawyer on the purchase of Grey acre. The Respondent, at that point, insisted the Female Purchaser get her own lawyer. He referred her to LM.

BREACH OF UNDERTAKING

[38] There was a mortgage on the property as a whole and on Grey Acre. This mortgage had to be removed in order for the sale of Grey Acre to proceed. This mortgage was held by three holding companies.

[39] In early June, LM began representing the Purchasing Corporation, including the Female Purchaser, on the sale of Grey Acre.

[40] LM put the Respondent on an undertaking that he would not pay out the existing charge holders (the three holding companies), until the Respondent had a mortgage discharge in his hands.

[41] The Respondent breached that undertaking. The Respondent paid out the above charge holders, namely the three holding companies, before he had the discharge in hand. He had sent the money to BK, solicitor for the three holding companies. BK and the Respondent had represented their respective clients on a number of sales regarding lots of the property.

[42] An important factor in this matter is the undertaking the Respondent had with BK, solicitor for the holding companies.

[43] That undertaking required BK to have in his hands a registered discharge before he made use of the proceeds of the sale of Grey Acre. The discharge was to be forwarded to the Respondent. There was no time limit set for this forwarding of the discharge. However, the Respondent reminded BK that such discharges had to be forwarded within 60 days. This is a requirement of the Law Society of British Columbia.

[44] BK faithfully fulfilled his undertaking and provided the discharge to the Respondent within four days.

[45] Two points stand out. First, the Respondent was in breach of his undertaking to LM. However, it was only by six days.

[46] Secondly, the Respondent had a somewhat similar undertaking with BK. The Purchasing Corporation was never at risk. The Purchasing Corporation had a secondary undertaking to rely on in order to protect its interest. LM probably did not know about this secondary undertaking. In fact, he probably didn't know about the breach that lasted for six days.

[47] What is the explanation of the Respondent for this breach? The answer is he never reviewed his undertaking with LM. Simply put, he forgot about it.

[48] The Respondent only found out about his breach of the undertaking after the Law Society did a thorough investigation of his file in regards to the initial complaint of the Female Purchaser.

[49] The Respondent admits he breached the undertaking. However, he takes the position that the breach was because he forgot about the undertaking and that, in the circumstances of this case, it does not amount to professional misconduct.

CITATION

[50] The amended citation, redacted for privacy, reads as follows:

Nature of conduct to be inquired into:

1. Commencing in or around February 2011, you acted in a conflict of interest by acting for both the Purchasing Corporation and the Vendor Corporation in a real property conveyancing transaction when they had different interests, contrary to Chapter 6, Rule 10 of the *Professional Conduct Handbook* then in force.

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

2. In the alternative to paragraph 1, between February 2011 and June 2011, you acted for the Vendor Corporation in a real estate transaction against the Purchasing Corporation, an unrepresented party, when you had not advised that unrepresented party that you were not protecting its interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook* then in force.

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

3. On or about August 5, 2011, in the course of acting for the Vendor Corporation, you breached an undertaking you gave to LM, solicitor for Purchaser Corporation, by releasing funds required to pay out an existing chargeholder when you had not obtained the discharge of mortgage before releasing the funds to the existing chargeholder or its solicitor.

   This conduct is contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook*, then in force and constitutes professional misconduct, pursuant to s. 38(4)(b) of *the Legal Profession Act*..

ANALYSIS

Preliminary Legal Matters

[51] There are a few preliminary legal matters that have to be dealt with before we proceed with our analysis.

[52] The first is the standard of proof. This is set out in *Law Society of BC v. Shauble*, 2009 LSBC 11 at para. 43. The panel directly quoted from the Supreme Court of Canada:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must be scrutinized with care" and "must always be

> sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency." (*FH v. McDougall*, 2008, SCC 53, 297 DLR (4th) 193).

[53] This requirement is further expanded upon in the case of *Law Society of BC v. Seifert*, 2009 LSBC 17 at para. 13:

> … the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. In considering its findings in this matter, the Panel has applied that test.

[54] The important thing to remember is that the Law Society of British Columbia must have clear, convincing and cogent evidence of professional misconduct.

[55] The standard required for professional misconduct is one of "marked departure." This is set out in the case of the *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraphs 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 the conduct the Law Society expects of its members; if so, it is professional misconduct.

[56] Thirdly, what is the role of the *Professional Conduct Handbook*, now the *Code of Professional Conduct for British Columbia*? Specifically, does a breach of the *Handbook* in and of itself result in professional misconduct? The answer is found in *Law Society of BC v. Richardson*, 2009 LSBC 07 at para. 30, confirmed in *Law Society of BC v. McRoberts*, 2010 LSBC 17 at para. 15. The mere breach of the *Professional Conduct Handbook* is not professional misconduct. There must be a marked departure.

[57] In summary, the Law Society of British Columbia must provide clear, convincing and cogent evidence of professional misconduct. That evidence must also show a marked departure of what is expected of lawyers. The mere breach of the *Professional Conduct Handbook* is not in of itself enough.

[58] This Panel wishes to add to this, Section 3 of the *Legal Profession Act*.

[59] Section 3 of the *Legal Profession Act* requires the Law Society of British Columbia to uphold "the public interest in the administration of justice." This gives the meaning, a flavour to the expressional "professional misconduct" and what is a "marked departure." Both points of view come into play in deciding whether a breach of the *Professional Conduct Handbook* reaches the level of professional misconduct. More about the public perspective later. We will now go on to the three allegations.

Allegation 1 – Acting for Both Sides

[60] The position of the Law Society is that the Respondent acted for both sides in a real estate transaction contrary to Chapter 6, Rule 10 of *Professional Conduct Handbook* then in force.

[61] The Law Society's position is that all the actions of the Respondent from early February 2011 to early June 2011 are consistent with the Respondent acting for both in regards to the purchase and sale of Grey Acre. However, these actions may be consistent with another scenario, and that is that the Respondent was not acting for both parties. It is important to remember the law requires "clear, convincing and cogent evidence."

[62] This Panel believes the key point in time is what happened on February 1, 2011 when an unplanned meeting took place. No notes were taken, and we did not hear from all of those who were present.

[63] This Panel has a problem with the Female Purchaser's evidence. We are not suggesting she is not telling the truth. Instead, she has trouble remembering. There are several indicators of this in her testimony. They are and include:

Vol 1, p. 14, ll. 4 to 19 (dealing with the February 1, 2011 meeting):

A. I don't exactly how long it took.

Q. But you think it was about an hour?

A. *I think so. But as I told you I had a concussion in between then and now so it takes me a minute to think.*

Q. *When did you have a concussion?*

A. *A year ago. And I can remember the long-term things if I think about it but the short-term memory is pretty gone.*

Q. *All right. And if you're being asked about events that took place in February 2011 do you consider that short term or long term?*

A. *That's long term.*

Q. All right.

A. And it's things that happened since the concussion is where I'm having trouble.

Vol. 1, p. 28, l. 18:

A. *I'm trying really hard to remember all this.*

Vol. 1, p. 38, ll. 12 to 25 (dealing with the February 1, 2011 meeting):

Q. Okay. Now, this meeting at Mr. Dent's office after lunch, you'll agree with me that at – after the meeting started Mr. Dent had a private meeting in another office with Vendor 1. Do you remember that?

A. No, I don't. I am sorry I don't.

Q. So when you say, "I am sorry I don't," what you are trying to tell us is that it may have happened but it's been such a long time ago I may have forgotten?

A. That's right. And I am not going to lie to you.

Q. Fair enough. And you, of course, kept no notes of this meeting?

A. No I didn't, and that was pretty stupid of me.

Vol. 1, p. 64, ll. 13 to 14 (dealing with the mortgage on Black Acre):

A. *I'm not feeling sorry for myself. A lot of this I don't remember.*

Vol. 1 p. 67, ll. 5 to 10 (dealing with the mortgage on Black Acre):

A. *I don't remember going over it with him.*

Q. Sorry, if you just stay in the tab that you're in.

A. Is that his signature, Mr. Dent's?

Q. I'm asking you do you remember sitting down with Mr. Dent and going over this document?

A. *No, I don't remember.*

Vol. 1 p. 127, ll. 6 to 8 (end of examination in chief):

> A. *Have any of you ever had a concussion? You know what happens? Your memory comes and goes and it's horrible.*

[emphasis added]

[64] The exchanges, some of which deal with the meeting of February 11, 2011 and some with other aspects of the overall transaction, show the Female Purchaser had trouble remembering. In part, she blames it on a concussion. At one point, she says it only affects her short-term memory and at other times she states her memory comes and goes.

[65] At one point she states in her testimony:

Vol. 1, p. 46, l. 19 to p. 47, l. 3 (dealing with the February 1, 2011 meeting)

> Q. I'm still at the first meeting.
>
> A. No. He agreed to do the – he agreed to do the easement and get all the money in his account and take care – talk with [law firm] who was the lawyer in Vancouver here which I borrowed from a private person I don't know down here, and he said he could just do it. It was simple.
>
> Q. But at this first meeting at Mr. Dent's office [law firm] was not even contacted, was it?
>
> A. No.

[66] At the February 1, 2011 meeting, there was no way that the Respondent could agree to act for the Female Purchaser on the mortgage on Black Acre. She had not, at that point in time, arranged for any mortgage on Black Acre. The above quote from the testimony shows that she is confused about this matter.

[67] The Panel finds the Female Purchaser a believable witness in the sense she is not deliberately lying. However, her evidence indicates she is not a reliable witness. She can't remember or gets matters mixed up.

[68] The evidence of the Respondent in regards to this matter is *slightly better*, but he had trouble remembering everything that happened. He kept no notes. Parts of the transcripts read follows:

Vol. 1, p. 154, ll. 9 to 20:

Q. Okay. Please tell the panel in your own words what happened when you first saw this contract, who was there, what were the circumstances, what was said and what, if anything, was said by you?

A. Well, Vendor 1, probably because he tended to be the spokesperson for the Vendor Corporation, Vendor 1 think just showed up at the office. Maybe there was an appointment but I think he just showed up at the office, and my recollection is that he was with Female Purchaser, Male Purchaser and Vendor 2. So there were the four of them, and I was presented with the contract.

Vol. 1, p. 155, ll. 6 to 19:

A. Well, I must have been asked – it must have been in response to a request that I act for all parties because that's the most important reason that would justify that kind of announcement. I said, "Look, there's a commercial element here." *And I'm certainly not trying to recreate my words verbatim. It would be wonderful to have that kind of a memory but I don't.* I said, "Look, there is a commercial element here. I cannot act for all parties." At that point Vendor 1 in particular would have questioned that, and what I do quite clearly recall is leaving the room I believe with Vendor 1 alone and going down the hall in our office.

Vol. 1, p. 156, l. 21 to p. 157, l. 13:

A. "Can you act?" And I said, "No, I cannot." And then I was asked, well, what could I do, and I said, "Well, you know, it's highly unusual but acting for you alone I can prepare all of the documents." I certainly would have warned that that would be more expensive for the client from a legal cost point of view, and with that having been said we then went back into the meeting room and essentially we announced – I say we. It's kind of a royal we. I certainly would have announced, not Vendor 1, said essentially what I've just said. We will act. We will be representing the seller alone. You should get counsel. And Female Purchaser's response to that was basically as she testified today but she stopped short. Her response was, "This is a simple transaction. We don't need a lawyer. If I do have any questions I can ask LM."

Vol. 1, p. 158, ll. 10 to 16:

Q. Now, do you recall the exact words that you used in the course of any of this meeting, either before you took Vendor 1 aside, while you took

Vendor 1 aside or when you came back and stated that, "We will act representing the seller alone and you should get independent counsel"?

A. *No, I don't remember any exact words, no.*

[emphasis added]

[74] It is true the above evidence was tendered not to its truth, but to the state of mind of the Respondent. However, the Respondent was able to testify as to what he said at the meeting and the subsequent side meeting with Vendor 1. We accept his evidence as to what he said about not acting for both sides. We also accept that he agreed to prepare the documents.

[75] There is further evidence that indicates that the Respondent cannot remember exactly what was said. See below:

Vol. 3, p. 16, ll. 6 to 18:

A. Yes. In my mind it was late January but subsequent reviewing all the documents only February 1 works.

Q. Mr. Dent, when you say, "I must have," and, "I can only guess at what I said," that tells me you're not sure at all what you said. Is that a fair statement?

A. Well, I think what I would say is to me there's a different – I don't have that gift of being able to remember exactly what I said word for word but I can remember the gist of what I've said so that's what I'm trying to convey in my testimony or my answers to those questions.

[75] This Hearing Panel, based on the evidence as a whole, including the Agreed Statement of Facts, oral testimony and documented evidence, finds on the balance of probabilities that the following took place:

(a) The parties had a meeting on February 1, 2011. The parties wanted the Respondent to represent both parties. The Respondent took one of the Vendors aside and told him he could not act for both sides, but he would prepare all the papers usually prepared by the solicitor for the purchaser. The cost of this would be on the Vendor.

(b) They went back into the main room. The Respondent cannot remember the exact words used at that time. However, this Panel finds that the Respondent probably said the following:

(i) that he would prepare all papers including papers usually prepared by the purchaser's solicitor;

(ii) words to the effect that he was only acting for the Vendor.

[76] This Panel holds there is insufficient evidence to show the Respondent agreed to act or did act for both parties. The evidence to that effect presented to the Panel is not clear, convincing or cogent.

[77] Discipline counsel pointed to a number of subsequent actions to show the Respondent was acting for both sides.

[78] First, the money for the purchase of Grey Acre was put into his trust account by the Female Purchaser. However, if the Female Purchaser was unrepresented, sooner or later the money would end up in the Respondent's trust account.

[79] The Respondent prepared an option to purchase for Grey Acre. However, it is clear from the evidence, he prepared this on the instruction of the Vendor. He did not negotiate the option. The parties negotiated the options on their own. He did the paperwork on the instruction of the Vendor. He gave no advice to the Female or Male Purchaser.

[80] The third point is the easement. However, the evidence in the Panel's view is clear. The Respondent drafted three different easements on the instructions of the Vendor Corporation.

[81] Overall there is insufficient evidence or a lack of clear, convincing or cogent evidence to show the Respondent was acting for the purchaser in this matter.

[82] Allegation 1 is dismissed.

Allegation 2 – Failure to Advise

[83] The alternative to allegation 1 is allegation 2. The Respondent failed to advise the Purchaser Corporation that he was not protecting its interests.

[84] Chapter 4, Rule 1 of the *Professional Conduct Handbook* reads as follows:

> A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter's interests are not being protected by the lawyer.

[85] This Rule is simple and to the point. It does not require a written warning. An oral warning is sufficient.

[86] Did the Respondent give such a warning? The simple answer is no. In his testimony, the Respondent stated he did not give such a warning.

Vol. 3, pgs. 51, l. 23 to p. 52, l. 17:

Q. You never told Female Purchaser or Male Purchaser that you were not protecting their interests or the interests of the Purchasing Corporation. Is that correct?

A. To me I think when you put it that way I'm going to suggest that – I think it's a little bit playing with words. *I told them they should get their own lawyer.*

Q. All right. And in your mind implicit in that is that you're not protecting their interests. Is that what you're saying?

A. Yes.

Q. But do you agree with me that you never said to them you're not protecting their interests, used those words?

A. What I said to you is that I don't have the gift of remembering everything that is said to me verbatim, that I remember in general the gist.

Q. Sorry. Said to you or by you?

A. Sorry? In either case.

[87] This Hearing Panel finds the Respondent breached the Rule. He did not give the warning.

[88] It is not enough in the context of this case to tell someone to get their own lawyer or words to that effect. Someone can be under the illusion that a lawyer is protecting their interests, even if that lawyer tells them to get independent legal advice. Otherwise the Rule would say the lawyer had to advise them to get independent legal advice.

[89] This is particularly so in this case where the following factors come into play.

(a) Purchasing money was going through the Respondent's trust account.

(b) He prepared an option document and extension of that option.

(c) He represented the Female Purchaser for the legal work on the mortgage on Black Acre, and the proceeds of the mortgage were going to buy Grey Acre.

[90] These factors are similar to the ones raised by counsel for the Law Society as supporting the allegation that the Respondent was acting for both sides. We rejected that argument. However, the above factors play a role in deciding in this case that the Respondent needed to comply strictly with Chapter 4, Rule 1.

[91] For the education of the Respondent and lawyers generally, the new rule, now in force is stricter than the old rule then in force. It states as follows:

> 7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[92] Allegation 2 of the citation is proven. The cumulative effect of the Respondent's actions outlined in paragraph [90] is certainly sufficient to lead an uninformed person to believe that a solicitor may in fact be protecting his or hers interests and stands as a perfect example as to why the Rule exists. The Respondent's actions constitute a clear marked departure from what is expected by the Law Society of lawyers in this situation and therefore constitutes professional misconduct.

Allegation 3 – Breach of Undertaking

[93] The Respondent admits he breached the undertaking to lawyer LM. However, since he forgot about the undertaking and there was no loss as a result of the breach, he takes the position there was no professional misconduct.

[94] The Respondent relies on the *Law Society of BC v. McRoberts*, 2010 LSBC 17, at paras. 15, 30 and 32.

> As discussed, a breach of undertaking is a breach of the *Handbook* guidelines. As is often said, a "mere" breach of the Handbook does not necessarily constitute professional misconduct. (*Law Society of BC v. Richardson*, 2009 LSBC 07 at para. [30]).
>
> ...

> The focus of our inquiry must remain on the conduct itself. A solicitor is peculiarly responsible for the fulfillment of his or her undertaking and certainly is responsible for directing the registration of Land Title instruments. There is no evidence that anyone but the Respondent had carriage of the registration of the Easement against LL's property and, given the importance of the matter, it is a reasonable inference to assume he took responsibility for it. Indeed, he has not attempted to deflect blame on to anyone else and admits that he forgot about the Undertaking.
>
> ...
>
> There is no question that a breach of undertaking is a marked departure from the conduct that the Law Society expects from lawyers. Given that, we must then confine our consideration to the actual facts in evidence to determine if the conduct is blameworthy:
>
> (a) the Respondent made a solemn promise (for indeed this is what an undertaking is) not to register the Easement except with the written permissions of JL and LL;
>
> (b) he did not advise his client about the Undertaking;
>
> (c) he forgot about the Undertaking, and the Easement was registered eight months after he provided the Undertaking;
>
> (d) the rights of the unrepresented party, LL, who relied upon the Respondent, were damaged significantly.

[95] In *McRoberts*, the panel held the Respondent had forgotten about an undertaking, but since damage had resulted, professional misconduct had taken place.

[96] However, in *McRoberts* at para. 37, the panel held that forgetting may not be culpable.

> In short, the issue, as stated by the Respondent, is whether or not the "forgetting" is culpable. Our answer in this instance is "yes", although there may be circumstances where forgetting about an undertaking is not culpable. Here, no such circumstances are provided by the agreed facts.

[97] This Panel wants to make it clear that forgetting about an undertaking and no harm resulting is no defence to a finding of professional misconduct.

[98] There must be more. In this case the following added additional factors play a role:

(a) There was a secondary undertaking in place. We are referring to the BK undertaking. This provided an alternative protection to the Purchaser.

(b) No one complained to the Law Society. No one knew about the breach until the Law Society reviewed the file.

(c) The Law Society never contacted LM to get his position on this breach of undertaking. This area is a rural practice area. Everybody knows everybody. He may have waived the breach. We are now at the hearing stage. It is too late to contact LM at this point in time.

(d) The breach existed for only about six days.

(e) Everybody wanted this deal to go through.

[99] This Panel wants to make it clear that this is an *exceptional case*. In less than one per cent of breach of undertaking cases will "forgetting" be justified.

[100] The Panel recognizes the importance of an undertaking. In *Law Society of BC v. Heringa*, 2004 BCCA 97, the court stated at paragraphs 10 and 11:

> … The heart of the panel's reasoning is, in my opinion, found in these words:
>
> > [37] 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.
> >
> > [38] The trust and confidence vested in lawyer's 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.
>
> I agree with this. I would have reached the same result for the same reasons as did the panel without reference to the new rule as to undertakings and their performance.

[101] 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:

> [55] 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 is 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.
>
> [56] 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: CBA, 1996) at Chapter 16.

[102] Next, this Panel considers the public interest. The Law Society would find it difficult to explain to the public why this lawyer should be branded with professional misconduct. There was a slight breach of the Rule. It is an honest mistake. No one complained to the Law Society. No one lost any money. There was a secondary undertaking in place to protect the interests of the Purchasers.

[103] Under Chapter 13, Rule 1, of the *Professional Conduct Handbook*, the following is stated:

> 1. Subject to Rule 2, a lawyer must report to the Law Society another lawyer's:
>
> (a) breach of undertaking that has not been consented to or waived by the recipient of the undertaking.

[104] Implicit in the above rule is the concept that breaches of undertakings can be waived or consented to. There may be a number of circumstances where a lawyer may decide to consent or waive a breach. The other lawyer is sick. The breach is minor, and it is not in public interest or your client's interest to proceed with a report. In such circumstances, the lawyer for whose benefit the undertaking is given may decide to waive or consent to the breach. In such circumstances, the breach never occurred. In this case, there is no evidence from LM as to a possible consent or waiver.

[105] This Panel concludes that Allegation 3 is not proven, and it is dismissed.

CLOSING REMARKS

Conclusion

[106] Allegations 1 and 3 are dismissed. Allegation 2 is upheld as professional misconduct.

Sealing Order

[107] The following sealing order is made:

This Panel orders that:

1. Pursuant to Rule 5-7(1), if anyone who is not a party to these proceedings applies for a copy of a transcript of the proceedings, before the transcript is provided, it will be redacted to anonymize references to information that identifies the Respondent's clients and other parties;

2. Pursuant to Rule 5-6(2), if anyone who is not a party to these proceedings applies for a copy of Exhibit 1 (amended citation), a copy of Exhibit 70 will be provided, which is a copy of Exhibit 1 with identifying information about the companies referred to in the amended citation redacted from it;

3. Pursuant to Rule 5-6(2), if anyone who is not a party to these proceedings applies for a copy of Exhibit 2 (Agreed Statement of Facts), a copy of Exhibit 71 will be provided, which is a copy of Exhibit 2 with all identifying information about the Respondent's client or clients and other parties redacted from it; and

4. Exhibits 3 to 69 be sealed.

The Future

[108] The Respondent was successful on two of the three allegations. He could have easily avoided these proceedings by sending a simple letter or email to the Purchasers stating he was not protecting their interests and advising them to get independent legal advice or

independent legal representation. That is the best practice for a lawyer. If he had done that, there probably would not have been any citation.