2004 LSBC 18
Report issued: June 2, 2004
Citation issued: October 1, 2003

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

PETER WALLACE HAMMOND

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: February 17th and 18th, 2004

Panel: Ralston S. Alexander, Q.C., Chair, Margaret Ostrowski, Q.C., June Preston

Counsel for the Law Society: Jessica S. Gossen
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] On October 1, 2003, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules, by the Corporate Secretary of the Law Society pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Hearing Panel enquire into the Respondent's conduct on a total of 20 enumerated counts.

[2] Prior to the commencement of these proceedings, certain amendments to the citation were effected. At the commencement of these proceedings, the Law Society sought leave to amend the citation to correct certain date references, and those amendments were consented to by Counsel for the Respondent.

[3] Certain of the matters set out in the Citation were the subject of an Agreed Statement of Facts submitted by both counsel, and where appropriate in these reasons, we will describe the circumstances that were the subject of the Agreement.

[4] In the course of one and one-half days of hearings, evidence was heard from various witnesses on behalf of the Law Society. The Respondent did not call evidence on his own behalf.

[5] During the period of time covered by this citation, the Respondent operated his practice, from a banking perspective, through a trust account which was maintained in the name of a numbered company, 5910006 Ltd. He did not have a general account but instead operated this specific trust account as if it were his general account. Where it is necessary to describe the Respondent's general account banking activity in these reasons, we refer to the trust account described herein as the " Respondent's " General" Trust Account" .

[6] To bring some order to the multiplicity of matters which are described in the 20 counts of the citation, it is proposed that these reasons will deal with the counts in the citation seriatim, with the relevant facts,

discussions, and results with respect to each count being provided with the text of the count where that is appropriate.

BURDEN OF PROOF

[7] The panel has instructed itself with respect to the burden of proof which is upon the Law Society throughout. The standard to be met is beyond the civil standard of a balance of probabilities, and is not as demanding as being beyond a reasonable doubt. As the consequences from a finding of professional misconduct grow more severe, so too does the extent to which the test for such a finding becomes more exacting. At the most extreme end of the scale, where disbarment is a possible outcome from a finding of professional misconduct , the test approaches (" becomes perilously close to") the criminal law test of beyond a reasonable doubt.

[8] The decision of Mr. Justice Taylor in J.C. v. The College of Physicians and Surgeons of British Columbia, 31 B.C.L.R. (2d) 383, is helpful where Mr. Justice Taylor spoke on the burden of proof as follows:-

> " In the present case, the Disciplinary Committee considered the required standard at the outset of its report. It says the onus of proof proving the facts against the Doctor rest with the College. To discharge that burden a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence. The case for the College must be proven by a fair and reasonable preponderance of credible evidence. This is essentially the view adopted by McLachlin J. as she then was in the decision of this court in Jory v. The College of Physicians and Surgeons."

Mr. Justice Taylor goes on to say

> " While the cases provide no clear rule, the most helpful terms used in various judicial pronouncements on this subject seems to me to be the word " convincing" . To be convinced means more than merely persuaded. I think the test to be applied in the present case is whether on the evidence before us, the Committee could properly have been convinced that the patient had told the truth in making her accusations of sexual misconduct against the Doctor."

[9] The decision of Madam Justice McLachlin in Jory v College of Physicians and Surgeons of B.C., [1985] B.C.J. No. 320, Vancouver Registry A850601 is instructive on this subject where the following appears:

> " The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence.....The evidence must be sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community:

[10] The panel has adopted that interpretation of the burden of proof upon the Law Society.

THE CITATION

> Count 1. You failed to serve your client, A.G. in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer, contrary to Chapter 3,

Paragraph 3 of *The Professional Conduct Handbook.*

DISCUSSION - COUNT 1

[11] Counsel for the Respondent brought a preliminary objection, arguing that this Count should be struck from the citation as it offended the law against multiple convictions from the same facts, as that principle is described in the Supreme Court of Canada decision of Kienapple v Her Majesty the Queen, [1975] SCR 729.

[12] On December 18, 2002, the Respondent was the subject of a citation issued by the Law Society, which citation alleged, inter alia, that:

> " You failed to serve your clients in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer, contrary to Chapter 3, Paragraph 3 of *The Professional Conduct Handbook*."

[13] The Respondent was found guilty of professional misconduct in respect of that count by Patricia L. Schmit, Q.C. sitting as a single Bencher in a decision rendered by her on October 16, 2003.

[14] It was common ground that the events underpinning Count 1 of the citation in this matter occurred prior to December 18, 2002, and therefore were, in the argument of the Respondent, subsumed in the count of the citation issued on December 18, 2002.

[15] The Law Society argued that the instances of failure to serve client A.G. in a competent manner were specific instances that were not investigated at the time that the December 18, 2002 citation was authorized, and that the specific instances of incompetence with respect to client A.G. should stand alone and separate from the omnibus charges of incompetence that are described in Count 1 of the December 18, 2002 citation.

[16] The Law Society further argued that the public interest required that it not be precluded from identifying specific instances of incompetence despite the fact that it had previously obtained a conviction for general incompetence in respect of the same time period.

[17] The Law Society further sought to confine Kienapple to its specific facts where the two separate offenses with which that accused was charged were related to the identical fact pattern and that the fact that the circumstances for which this Respondent was found guilty of professional misconduct in the decision of Bencher Patricia Schmit, Q.C., are a general set of circumstances with respect to the conduct of his practice, rather than the specific instances of neglect that were alleged in respect of client A.G.

[18] The Law Society says that no specific evidence with respect to incompetence was adduced on the December 18, 2002 citation, that the evidence in support was much more general in nature, including proof that the Respondent did not keep accounts receivable ledgers, did not keep cash books, did not keep journals with respect to a general account, that he was very late in recording and reconciling general trust activities, and that he didn't keep any kind of a bring forward system that could be identified and relied upon.

[19] Finally, argued the Law Society, the complaint of client A.G. was the subject of an entirely separate audit conducted by the Law Society, and no evidence with respect to the client A.G. circumstances was adduced in support of the December 18, 2002 citation.

[20] Following submissions by Counsel, the Panel determined that the decision in Kienapple did govern in these circumstances, and that the Law Society was precluded from bringing a specific count of

incompetence (in respect of a particular client's matters) when an omnibus complaint of incompetence had previously been alleged and successfully prosecuted for circumstances that existed at the same time as the specific incidents of incompetence which the Law Society would allege in support of the second citation.

[21] In arriving at that conclusion, the Panel noted that the public interest could be met by requiring the Law Society to particularize incidents of incompetence whenever that allegation is brought, so that the prohibition in Kienapple is not engaged and so that the member will have the benefit of knowing the case he or she must meet when incompetence is alleged.

RESULT - COUNT 1

[22] In the result, the first Count in the citation was struck and the hearing proceeded to consider the balance of the Counts in the citation.

> **Count 2. You misappropriated funds received in trust by you, in your capacity as a barrister and solicitor, from or on behalf of your client, A.G., by paying those funds out of trust without the knowledge or consent of A.G. and contrary to the conditions upon which those funds were received by you.**

FACTS - COUNT 2

[23] The Respondent acted for client A.G. in a complicated real estate transaction involving the trade of a property in Winnipeg for the shares of a company operating a motel in Kamloops, British Columbia (the " Motel Company"). The purchase price for the shares in the Motel Company was $565,000.00, and that purchase price was to be satisfied by credit for the Purchaser's equity in the Winnipeg property in the approximate amount of $153,300.00, cash in the amount of $10,000.00, an agreed credit between the parties of $7,500.00 and financing provided by the Vendor of the shares in the amount of approximately $394,200.00.

[24] There was some variance in the evidence provided to the hearing with respect to the precise numbers which worked together to make up the Purchase Price for the shares in the Motel Company. There were variations of several thousands of dollars attributed to some of the components of the Purchase Price, including the value of the equity in the Winnipeg trade property, and the amounts which were agreed to be financed and by whom. There was a mortgage on the trade property and the equity in that property varied depending on the amount of the mortgage. At one point in the transaction, it was necessary for client A.G. to direct that certain funds be provided to the mortgagee in Winnipeg to reduce the outstanding mortgage balance.

[25] We are satisfied that the fundamental characteristics of the transaction are before us with sufficient clarity to determine whether moneys were payable by the Respondent to his client A.G. In a transaction of this complexity, it is common for the various required payments to fluctuate with the numerous adjustments that are required to be made. One constant throughout this transaction was that the cash deposit from client A.G. remained unchanged at $10,000.00. The significant issue with respect to this count in the citation is what happened to that money.

[26] Client A.G. gave evidence at the Hearing and although he had some confusion as to the precise numbers upon which the transaction was to proceed, it was clear from his evidence that the transaction did not complete on July 15, 2001, the Completion Date contemplated by the contract, and may not have completed at all. Despite the absence of formal completion of the agreement, client A.G. obtained effective control of the motel operation on July 15 th ,2001, and it appears that at some time in February of 2002, the

transfer of the Winnipeg trade property to N.K. and A.S., the vendors of the shares in the Motel Company, was concluded. It was also at that later date that the balance of the funds in trust with the Respondent were disbursed.

[27] While the precise arithmetic around the purchase transaction was not clearly before us in evidence, it was clear that client A.G. deposited the sum of $11,000.00 to the trust account of the Respondent on July 17, 2001. It was also clear that that $11,000.00 represented $1,000.00 for the Respondent's fees and disbursements, with the balance of $10,000.00 paid on account of the required $10,000.00 payment of the cash component of the purchase price specified in the agreement.

[28] On the same day that the $11,000.00 was paid to the trust account of the Respondent, a cheque in the amount of $1,000.00 was transferred to the Respondent's " General" Trust Account.

[29] It is also clear that of the remaining $10,000.00, $6,000.00 was also paid to the Respondent's " General" Trust Account. These sums were paid as follows:

On February 4th, 2002 $1,500.00

On February 13th, 2002 $570.00

On February 15th, 2002 $3,930.00

Total $6,000.00

[30] There was evidence before us that client A.G. had concluded an agreement with N.K. and A.S. by the terms of which client A.G would be afforded a credit of $6,700.00 on the completion of the sale to compensate client A.G for the fact that some credit card receipts from the Kamloops motel operation were deposited to the account of N.K. and A.S., the Vendor of the motel, rather than to credit of client A.G., the purchaser.

[31] It is not clear whether the credit was to be $6,700.00 as client A.G. alleged, or whether it was to be $6,951.82 as set out in a letter from counsel for N.K. and A.S. (J.R.T., of [Law Firm]) to the Respondent dated February 6, 2002. We think little turns on the distinction between the two numbers but the precision of the T. number, and the fact that client A.G. has received no documentation from the Respondent in respect of this transaction from which to reconstruct his records, leads us to conclude that the more precise number is the correct one and that the frailties of client A.G.'s memory (as to the precise number) are explained by the fact that he did not receive any reports or other documents from the Respondent. In addition, these events took place from July 2001 through February 2002, at least two years prior to client A.G.'s attendance before us to give evidence.

[32] This credit of $6,951.52 is to be differentiated from a general credit of $7,500.00 described above (which was also before us in evidence) and which is provided for in the contract. The credit that appears in the contract ($7,500.00) is not expressed as a deduction from the cash component of the purchase price, which, in the contract, which does reference the $7,500.00 credit, continues to be expressed at $10,000.00.

[33] It appears then that the transaction was to have been concluded with a general credit of $7,500.00, and with the cash payment of $10,000.00 being subject to a permitted deduction for the $6,951.52 credit that was to be afforded client A.G. on the closing.

[34] The sale documents for the Motel Company were provided to the Respondent on trust conditions that required the Respondent to pay to the solicitors for the Vendor, (for subsequent payment to the Vendor), the sum of $3,048.48 from the $10,000.00 held by him in trust on the transaction. The balance of $6,951.52, the proceeds of a credit provided to client A.G., were therefore funds that belonged to client A.G. and should

have been payable according to the instructions of client A.G.

[35] One such instruction to the Respondent was provided by client A.G. when he directed that a $4,000.00 payment from that credit be paid to solicitors in Winnipeg to reduce the balance owing on a line of credit mortgage he (client A.G.) had on the Winnipeg trade property. After that instruction, there remained in trust the sum of $2,951.52 to be accounted for by the Respondent to client A.G.

[36] The sum of $3,048.48 owed to the Vendors by the Respondent from the $10,000.00 cash deposit, the sum remaining after deduction of the permitted credit, was described in Mr. T.s' February 6, 2002 letter, as being:

> " subject to payment of ½ of your account by me (sic) client as approved by him. I expect that our clients will make any adjustments to the credit allowed for the Winnipeg property directly between themselves."

There was no evidence before us as to the amount of any account that was owing by Mr. T.s' client to the Respondent, nor was there any evidence that the Respondent performed any legal services for the Vendors. It was however acknowledged in evidence before us that Mr. T. received no amount of the $3,048.48 from the Respondent.

[37] Client A.G. gave evidence that no part of the $2,951.52 " change" remaining from the credit to which he was entitled was received by him, and that no documentation, account for legal fees, or other report was ever received by him.

[38] The numbers in this trust account are confusing. The February 6, 2002 letter actually speaks to a balance for deduction of $6,951.82 and then says that the balance is $3,048.48. One or other of the " pennies" numbers is incorrect since it does not add up to $10,000.00 amount stated in the letter. Nothing turns on the pennies and we have used the number $6,951.52 in these reasons to reduce the confusion. Particularly note that all of the balance, after deduction of the $4,000.00, was, in any event, paid to the Respondent.

DISCUSSION - COUNT 2

[39] Some matters of significance emerge from these facts. On the same day that the Respondent received the $11,000.00 deposit to trust from client A.G. and well before the transaction for which the account was rendered was concluded (it being case that it now appears that the transaction was never concluded), the Respondent paid to himself the sum of $1,000.00 on account of fees and disbursements pursuant to an account which provided

> " Re: PURCHASE OF MOTEL IN KAMLOOPS/SALE OF WINNIPEG HOUSE
>
> TO PROFESSIONAL SERVICES RENDERED with respect to the above captioned and to all matters relating thereto including, to discussions with you; attending court; misc telephone calls and correspondence.
>
> FEES HEREWITH: .....etc."

Client A.G. gave evidence that he had never received any report from the Respondent, including this account.

[40] By our analysis, and after a thorough review and analysis of all information provided to us in respect of this matter, we have determined that the $10,000.00 cash component of the transaction, held by the

respondent in trust from July 15 th, 2001 to February 15th, 2002, should have been distributed as follows:

> $4,000.00 To Winnipeg law firm on account of the mortgage owed by A.G., and to reduce that balance owing.
>
> $3,048.48 To [Law Firm] as payment to Vendors for the Shares in the Motel Company, (subject to deduction for sums owing to Respondent for ½ of account - see Paragraph 36).
>
> $2,951.52 To Client A.G., or as directed by him.

[41] In the absence of evidence as to services provided by the Respondent for Mr. T.s' client, we are not able to form any conclusions as to the propriety of the payment of $3,048.48 of the Vendor's proceeds to the Respondent's " General" Trust Account. There was no evidence provided to us regarding legal services provided by the Respondent to the Vendors, as suggested in Mr. T. letter of February 6, 2002. If we based the probable " ½ fee amount" upon the historical billing practices of the Respondent, we would conclude that it is unlikely that the full amount of $3,048.48 would have been due to the Respondent, but we are unable to develop any conclusions in that regard since there is no evidence before us.

[42] When we compare the actual disposition of the $10,000.00 with the disposition that should have occurred, and after giving the Respondent full credit for a questionable entitlement to the $3,048.48 of the Vendor's sale proceeds, we see that there is an unexplained payment of $2,951.52 to the Respondent's " General" Trust Account. This conclusion is based upon the deduction from $10,000.00 of the sum of $4,000.00 and $3,048.48, (the two amounts for which we have developed a basis for payment) , which leaves a balance of $2,951.52.

[43] This sum is obscured in the accounting records of the Respondent. There is no specific payment to the Respondent's " General" Trust Account of $3,048.48. This is a further basis upon which we are troubled to see that this amount was paid in full to the Respondent. If he was paying himself a cheque on account of legal fees, he should have paid it as a separate discrete cheque in the correct amount. He did not do this. The two amounts paid to the Respondent's " General" Trust Account are $3,048.48 and $2,951.52 but these amounts are paid in the three cheques described in paragraph 29.

[44] The absence of a report to client A.G., and the failure to provide client A.G. with any further account for legal services, whether the same were rendered or not, leads this panel to the conclusion that the funds ($2,951.52) were paid by the Respondent to the Respondent's " General" Trust Account without colour of right or authority. This amounts to a misappropriation of client A.G.'s funds and we find accordingly.

RESULT - COUNT 2

[45] In the result, we are satisfied that this Count of the citation has been made out by the Law Society and we find that the Respondent professionally misconducted himself in respect of this matter.

Count 3. You failed to respond to communications from the Law Society concerning your client, R.M., dated January 7, February 4, and April 30, 2003.

FACTS - COUNT 3

[46] On December 16, 2002, lawyer M. complained to the Law Society that the Respondent had not responded to his communications. These communications related to a request by a client of lawyer M. that the Registered Office and Records Office of a Company belonging to that client be transferred from the

offices of the Respondent to the offices of lawyer M.

[47] On January 7, 2003, the Law Society requested the Respondent's explanation for the failure described in the December 16, 2002 correspondence from lawyer M. No reply was received to that enquiry, and on February 4, 2003, a further enquiry was directed to the Respondent and no response was received. On April 30, 2003, a further letter requesting a response was provided to the Respondent and he did not respond to that enquiry.

[48] On May 27, 2003, a further enquiry was directed to counsel for the Respondent with respect to this request by lawyer M., and no reply to that communication was received by the Law Society.

[49] This count in the citation was admitted by the Respondent, through his counsel, except as to those communications which occurred after December 31, 2002, the effective date that the Respondent's membership in the Law Society ceased for non-payment of his practice fees.

[50] It may be useful to note a peculiarity that emerges from the Rules of the Law Society as they were constituted at the material time. (The unusual circumstance described herein has been addressed by an amendment to the Rules of the Law Society passed while these reasons were being finalized.) A member of the Law Society was required to pay his or her Law Society dues on or before December 31 of each year for the next ensuing calendar year. The peculiarity of the Law Society Rules is that there was provided a one month " grace" period from January 1 to January 31 of the next following year, during which a member was permitted to pay his/her Law Society dues upon payment of a penalty. If the Law Society dues and appropriate penalty were paid within that one month period, the member was deemed, for all purposes, to have been in good standing for that month.

[51] On the other hand, if the dues were not paid by January 31 of the membership year for which the dues were payable, then the membership would lapse, but with effect from December 31 of the previous year, rather than from January 31 of the following year. The peculiarity then results in the member's practice status during January of that year being unclear as it is possible for that member either to be reinstated to full practicing status, or to have that member's membership terminated, with effect from December 31.

[52] Counsel for the Respondent argued that the Respondent has no obligation to respond to the Law Society's communications once the Respondent is no longer a member of the Law Society.

[53] The Respondent's acknowledgment of Count number 3 turns out to be ineffective since all of the communications to which the member is accused of failing to respond occurred after the effective date of the termination of his membership in the Law Society. In the result, it is necessary to examine the validity of the proposition advanced by counsel for the Respondent, that a member has no obligation to respond to the Law Society after the date that a member's membership in the Law Society has lapsed.

DISCUSSION - COUNT 3

[54] In this regard, the Respondent's position is without basis in law.

[55] The Part 3 (Protection of the Public) Rules passed by the Benchers under the *Legal Profession Act* provide at 3.1 as follows:

> " 3-1 This Division applies to the following as it does to a lawyer, with the necessary changes and so far as it is applicable:
>
> (a) a former lawyer; ."
>
> Rule 3.5(6) and 3.5(7) provide as follows.

" (6) The Executive Director may require the lawyer to whom a copy or summary of the complaint has been delivered under subrule (3) to respond to the substance of the complaint.

(7) The lawyer's response under subrule (6) must be

(a) in writing and, unless the Executive Director permits otherwise, signed by

(i) the lawyer personally,

(ii) a director of the law corporation, if the complaint is about a law corporation, or

(iii) counsel for the lawyer or law corporation, and

(b) delivered to the Executive Director as soon as practicable and, in any event, by the date set by the Executive Director."

[56] The communications to the Respondent dated January 7, February 4 and April 30, 2003, were all communications seeking a response in respect of a complaint of lawyer M. The obligations described in Part 3 of the Rules in respect of complaint matters apply to former members. It follows that the Respondent has an obligation to respond to the Law Society in respect of these communications, despite the fact that his membership in the Law Society has lapsed for non-payment of dues.

[57] The evidence is clear that the member did not respond.

RESULT - COUNT 3

[58] This Count has been proven by the Law Society and we find that the Respondent professionally misconducted himself by failing to respond to communications from the Law Society dated January 7, February 4 and April 30, 2003.

[59] These reasons refer from time to time to the fact that the Respondent did not reply to correspondence from the Law Society seeking an explanation as to an alleged complaint. We do not refer to the legal analysis in each instance that requires a former member to respond to the Law Society in respect of a complaint matter, but the analysis under this count covers all such circumstances.

Count 4. You failed to respond to communications from another member, S.H. dated November 4, November 28, 2002 and January 13, February 7, February 10, February 12, and February 25, 2003.

Count 5. You failed to respond to communications from the Law Society concerning your client (sic), S.H., dated March 20, April 7, and April 30, 2003.

Count 6. You breached an undertaking dated August 22, 2002, given to S.H. to provide to S.H.'s office Discharge of Mortgage particulars within a reasonable period of time.

FACTS - COUNTS, 4, 5 AND 6

[60] These three counts relate to a relatively straight forward real estate transaction in which the Respondent was acting for a Vendor and the offices of lawyer S.H. were acting for the Purchaser.

[61] On August 22nd, 2002, sale proceeds were paid to the Respondent on his undertaking to repay and discharge a mortgage in favour of [Bank] Mortgages Inc. and to provide discharge of mortgage particulars

within a reasonable period of time.

[62] It appears from the evidence that the mortgage was repaid as required by the undertaking, but for reasons that were not explained, the discharge of mortgage was not filed by March 6, 2003, an interval of nearly seven months.

[63] Lawyer S.H. gave evidence at the Hearing and it was evident that none of the correspondences which were attributed to him and for which the Respondent was cited for failing to respond, were in fact correspondences which originated with lawyer S.H.

[64] No explanation was provided as to why the mortgage to [Bank] Mortgages Inc. had not been discharged by the Respondent.

DISCUSSION - COUNTS 4, 5, AND 6

[65] The Law Society had two difficulties with respect to the allegations that the Respondent failed to respond to communications from lawyer S.H. None of the communications to the Respondent prior to the date he ceased membership in the Law Society were communications from lawyer S.H., but instead were communications from other members of the firm in which S.H. was a partner, and/or were communications from legal assistants working in that office.

[66] With respect to the communication required of the Respondent after the date his membership in the Law Society had ceased, he would clearly be prohibited from responding to those communications for to do so would require him to engage in the unauthorized practice of law.

[67] The Respondent did not reply to enquiries from the Law Society with respect to this complaint, and our discussion on Count 3 above demonstrates that he had an obligation to do so.

[68] The Respondent clearly breached his undertaking to provide discharge of mortgage particulars within a reasonable time. In the absence of an explanation for the reason why the discharge of mortgage was not filed within the 6 ½ month period provided, this Panel can take judicial notice of the fact that a discharge of mortgage in the normal course of events would be available to be filed within that period of time.

RESULTS - COUNTS 4, 5, AND 6

[69] With respect to Count 4, the Law Society has failed to establish that the Respondent, during the period of time when he was still a member of the Law Society, failed to respond to any communications from member S.H. That count is dismissed.

[70] With respect to Count 5, we find that the Law Society has made out that count of the citation and we have determined that the Respondent has professionally misconducted himself by failing to respond to the communications from the Law Society with respect to the complaint of lawyer S.H.

[71] With respect to Count 6, we find that the Respondent has professionally misconducted himself by breaching his undertaking to provide discharge of mortgage particulars within a reasonable period of time after August 22, 2002.

> **Count 7. You failed to respond to communications from the Law Society concerning G.V., dated March 20, April 4, and April 30, 2003.**
>
> **Count 8. A monetary judgment dated July 3, 2002, having been entered against you by D & D and not being satisfied within seven days you failed to notify the Executive Director of the Law**

Society in writing of the circumstances of the judgment and your proposal for satisfying it, contrary to Rule 3-44 (1) of the *Law Society Rules.*

Count 9. You breached an undertaking you gave to G.V., counsel for D & D, that you would make payments on your debt to D & D on the 15th of each month commencing August 15, 2002 until the debt had been paid. You failed to make any of the payments from October 2002 to the present.

FACTS - COUNTS 7, 8, AND 9

[72] D & D provided Court and Land Registry support services to the Respondent for a period of time and in the course of providing those services, developed an account receivable from the Respondent in an amount in excess of $50,000.00.

[73] Following some attempts to collect this amount from the Respondent, D & D retained counsel who commenced a proceeding against the Respondent and obtained a Default Judgment on July 3, 2002.

[74] The Respondent did not report the Judgment to the Law Society as required by Rule 3-44 of the *Law Society Rules.*

[75] In anticipation of an assessment of the quantum of the Judgment being obtained, the Respondent contacted counsel for D & D and provided an undertaking to make payments on account of the Judgment in the sum of $3,500.00 per month, with the first of such payments to be made forthwith upon the provision of the undertaking (around August 1, 2002) and thereafter the sum of $3,500.00 on the 15 th day of August, 2002, and on the 15th day of each and every month thereafter.

[76] The Agreed Statement of Facts in this matter does not precisely reflect the terms of the undertaking given, in that it does not refer to the requirement for an initial payment to be made forthwith. We note that a payment of $3,500.00 was made on August 2, 2002, some thirteen days earlier than the first payment described in the Agreed Statement of Facts. We find that payment regime described in the Agreed Statement of Facts is at variance with the terms of the Undertaking and we have determined that the terms of the Undertaking, as described in paragraph 75, correctly states the payment schedule that was agreed upon.

[77] The Respondent paid the initial (" forthwith") payment when required. The August 15, 2002 payment of $3,500.00 was made as to $2,000.00 on August 21, 2002 and as to a further $1,000.00 on September 9, 2002, and as to the balance of $500.00 on September 17, 2002.

[78] The September 15, 2002 payment was made as to $1,500.00 on September 17, 2002, with the balance of that payment made on October 21, 2002.

[79] The October 15, 2002 payment was paid as to $500.00 on October 21, 2002, with a further payment of $2,000.00 on November 13, 2002, and the balance of that payment made on January 10, 2003.

[80] The November 15, 2002 payment was paid as to $1,000.00 on January 10, 2003, and no further payments required by the undertaking were made.

[81] The lawyer for D & D complained to the Law Society about the Respondent's breach of undertaking on March 17, 2003, and despite numerous requests for a response from the Respondent, no response was ever provided to the Law Society with respect to that complaint.

DISCUSSION - COUNTS 7, 8, AND 9

[82] There can be no doubt that the Respondent was in breach of his undertaking to make the payments to D & D from the date that the first regular payment was required to be made on the 15th of August, 2002. From and after that date, the Respondent was never in compliance with his undertaking and we find as a fact that the only payment that did comply with the undertaking was the initial payment made.

[83] It is clear that the Respondent did not respond to communications from the Law Society with respect to its attempt to investigate the complaint made by the lawyer to D & D regarding this matter.

[84] It is clear that the Respondent did not report the fact of the Judgment taken against him to the Law Society as is required by Law Society Rule 3-44.

RESULT - COUNTS 7, 8, AND 9

[85] We find that the Respondent failed to respond to communications from the Law Society concerning the complaint made by the lawyer to D & D, which communications were dated March 20, April 4, and April 30, 2003, and in that regard we find that the Respondent professionally misconducted himself.

[86] We find that the Respondent failed to report a monetary Judgment entered against him dated July 3, 2002, within the 7 day time period required by Law Society Rule 3-44, and in that regard we find that the Respondent professionally misconducted himself.

[87] We find that the Respondent repeatedly breached an undertaking given by him to counsel for D & D with respect to his obligation to make monthly payments on account of the Judgment taken by D & D, and in that regard we find that the Respondent professionally misconducted himself.

Count 10. You failed to respond to communications from the Law Society concerning the Estate of I.G., dated March 27, and April 30, 2003.

Count 11. You misappropriated trust funds received by you, in your capacity as barrister and solicitor, from or on behalf of your client, the Estate of I.G., in the sum of $1,855.00.

Count 12. You acted on behalf of the Estate of I.G. at a time when you were no longer able to practice law due to non-payment of your practice fees on January 31, 2003.

FACTS - COUNTS 10, 11, AND 12

[88] The Respondent acted in an estate matter and received from the Executor of that estate on September 11, 2002, a retainer cheque in the amount of $3,000.00 which he deposited to trust.

[89] On September 19th, 2002, the Respondent rendered an account to the estate in the amount of $1,145.00 and on the same day issued a cheque to the Minister of Finance on account of probate fees in the amount of $1,500.00. This combination of cheques left the sum of $355.00 in trust.

[90] The probate documents in respect of which the $1,500.00 cheque was issued were returned to the Respondent for correction, were never corrected by the Respondent, and the custodian of the practice of the Respondent arranged to have the Probate Registry return the $1,500.00 cheque to the offices of the Respondent, uncashed.

[91] On reviewing the trust account activity of the Respondent, the Custodian of the practice determined that the trust account upon which the cheque to the Minister of Finance was written, which trust account should have contained at least $1,855.00, (the $355.00 described above in paragraph 89 together with the $1,500

uncashed Probate Fees cheque), only contained the sum of $574.91. It was a pooled trust account and the Custodian was not able to determine whether there were other trust obligations outstanding against that pooled trust account, but it was at least deficient by the difference between $1,855.00 and $574.91.

[92] The Custodian determined that the [Insurance Company] was withdrawing funds from this trust account in the monthly amount of $352.08. The Custodian arranged for the reversal of a withdrawal from the account which occurred on March 20, 2003, and those funds were re-deposited to the pooled trust account. A withdrawal to the [Insurance Company] from the pooled trust account occurred on February 20, 2003, in the identical amount.

[93] The Custodian's evidence was to the effect that monthly withdrawals in that amount to the [Insurance Company] had been made from this trust account for each of October, November, December, 2002, and January, 2003.

[94] There was no evidence before the Panel as to the reason for these withdrawals by the [Insurance Company].

[95] On February 10, 2004, after the Respondent's entitlement to practice law had been suspended for non-payment of membership fees, the Respondent sent a fax on his firm fax cover sheet to [Realty Firm] advising as follows:-

> " Please be advised that B.G. is the Executor of his Mother's Estate, therefore he is entitled to list the Estate property for sale and accept offers. However, his acceptance must be subject to the probate of the Estate being completed. The probate has been under way for sometime (sic) and it should be completed within the next 30 days. There is no guarantee that it will be completed within 30 days.
>
> Yours very truly,
>
> HAMMOND & COMPANY
>
> Peter W. Hammond"

[96] The Law Society enquired of the Respondent as to the basis for his providing this fax given that he was no longer entitled to practice and this enquiry was made on March 27, 2003, and was followed up on April 30, 2003. On May 27, 2003, a letter to the Respondent's counsel was provided and no response to any of the referenced communications has been received by the Law Society.

DISCUSSION - COUNTS 10, 11, AND 12

[97] It appears to this Panel that the Respondent was engaged in the practice of law while he was no longer a member of the Law Society. His counsel urged upon the Panel the fact that the faxed correspondence was providing information that was needed to be provided and that the information could have been provided by anyone. It was not necessary, in the view of counsel for the Respondent, for this information to be provided by a lawyer.

[98] We disagree. It was a communication which contained several matters which are the subject matter of legal opinion. It advises that an Executor of an estate is entitled to accept offers on behalf of the estate, despite the fact that probate has not been granted. It notes that any sale will be subject to obtaining the grant of probate and opines as to the likely time frame within which that grant of probate will be obtained. All of these matters are subjects that are clearly within the practice of law and by providing that information the

Respondent was conducting the practice of law when he was not authorized to do so.

[99] The Respondent is obliged to account to the estate of I.G. for the sum of $1,855.00. There is no evidence as to the reason for the deficiency in the trust account, but it is clear that a trust deficiency exists at least to the extent of the sum of $1,280.09.

[100] On the evidence before us, we are unable to conclude that a misappropriation has occurred in respect of this sum. We can only be sure that a breach of the Law Society trust accounting rules has occurred. This is not a matter for which the Respondent has been cited.

[101] Once again, it is clear that the Respondent has failed to respond to Law Society enquiries as to this conduct.

RESULT - COUNTS 10, 11, AND 12

[102] We find that the Respondent has failed to respond to Law Society communications with respect to the estate of I.G., and in that regard we find that he has professionally misconducted himself.

[103] We find that the Law Society has failed to make out the charge of misappropriation in Count 11 of the citation, and that count is dismissed.

[104] We find that the Respondent was engaged in the practice of the law on February 10, 2004, when he provided the faxed information to [Realty Firm], and that he was then engaged in the unauthorized practice of law and in that regard we find that he professionally misconducted himself.

> Count 13. You failed to respond to communications from the Law Society concerning R.S., dated March 27, and April 30, 2003.
>
> Count 14. You misappropriated trust funds received by you, in your capacity as barrister and solicitor, from or on behalf of your client, R.S., when you transferred the sum of $2,200.00 from your trust account by way of a cheque to Hammond & Company on June 20, 2001, without rendering an account or providing services to your client.

FACTS - COUNTS 13 AND 14

[105] The Respondent acted for a Mr. S. with respect to Mr. S.'s purchase of a lot in Langley, BC, from [Numbered Company]. This transaction took place in September of 1999. There was a trust reconciliation prepared dated September 15, 1999, which showed receipts from a Credit Union mortgage of $68,000.00, proceeds from the Purchaser of $35,000.00, and a transfer from another file for the same client, totalling $120,564.31. The trust reconciliation discloses various payments from trust, including a payment to the Respondent's law firm of $1,500.00 on account of fees, and the sum of $101,973.19 paid to another law firm representing the Vendor of the lot.

[106] At the conclusion of this transaction, there remained in trust the sum of $2,200.00. On June 20, 2001, nearly 2 years later, the Respondent prepared a statement of account on this same file that came to the total sum of $2,200.20. He paid that account from this trust account leaving a balance of 20 cents owing on the account. The account described the work for which the fee is rendered as being " To Professional Services Rendered concerning the above" with the " above" being File SID99292, the file pursuant to which the lot was purchased from [Numbered Company]. The Custodian for the Respondent's practice testified at the hearing that he was not able to find any covering correspondence in the file with which the account had been provided to the client S. The Custodian further testified that no further legal work was done or required

to be done on the file following the completion of the closing in October of 1999.

[107] The Law Society wrote to the Respondent on March 27, 2003, and on April 30, 2003, seeking an explanation for this conduct. The Law Society wrote to counsel for the Respondent on May 27, 2003, requesting a response from the Respondent with respect to this conduct and no response from either the Respondent or his counsel was forthcoming.

DISCUSSION - COUNTS 13 AND 14

[108] The Law Society argues that no legal services were provided in support of the additional fees that were charged and paid, and suggests that the absence of a cover letter in the file is evidence that the account was not provided to client S. by the Respondent. In the result, the Law Society argues that since the $2,200.00 was paid to the Respondent and since no legal services were performed for that payment, the Respondent misappropriated the funds.

[109] Counsel for the Respondent argues that the only witness who can assert with certainty that the account was not rendered to the client, is the client himself and since the client was not called as a witness before this Panel, we must not draw any conclusions as to whether the account was provided to the client or not.

[110] We have by now developed an understanding of the manner in which Mr. Hammond practices. It is possible that he could have rendered the account to the client without providing a cover letter for that account and accordingly, the absence of such a cover letter is not significant. However, that does not sufficiently dispose of the issues.

[111] The uncontroverted evidence of the Custodian was that no further legal work was done on the file after October of 1999. It is our finding that the payment to the Respondent's law firm in the amount of $1,500.00 in October of 1999 was on account of the legal services provided with respect to the acquisition of the subject lot, and that no further work beyond those services was provided by the Respondent. It is therefore the conclusion of this Panel that the Respondent did misappropriate the sum of $2,200.00 from his client S. by paying that sum to himself pursuant to a legal account when no further legal services (beyond those legal services for which the initial payment of $1,500.00 was made) in respect of the subject matter of the " new" account had been provided.

RESULT - COUNTS 13 AND 14

[112] It is clear on the facts as recited above that the Respondent did not reply to communications from the Law Society when he was required to do so, and in that regard we find that he professionally misconducted himself.

[113] With respect to the misappropriation alleged in Count 14, we find that the Respondent professionally misconducted himself.

> **Count 15. You failed to respond promptly to communications from the Law Society concerning P.W. dated April 1, and April 30, 2003.**
>
> **Count 16. You breached an undertaking dated September 18, 2002, given to P.W. that upon receipt of a registrable discharge of mortgage, you would file the discharge and provide P.W. with confirmation of registration and particulars of filing. You received a registrable discharge but failed to register it.**

FACTS - COUNTS 15 AND 16

[114] The Respondent acted for the Purchaser in a real property purchase transaction where P.W., a Notary Public, acted for the Vendor. On September 18, 2002, the Respondent provided an undertaking to P.W. on the following terms.

> " We undertake to pay forthwith to [Bank] Bank of Canada sufficient funds to place them under a legal obligation to provide us with a registrable discharge (sic) the mortgage which is registered against the title to the property under number BN235046.

On receiving a registrable discharge of the mortgage from [Bank] Bank of Canada, we will file that discharge in the New Westminster Land Title Office and will provide you with confirmation and registration particulars of that filing."

[115] P.W. complained to the Law Society on March 25, 2003, indicating that she had made a number of attempts to follow up with the Respondent to determine whether the mortgage had been discharged from title, and she provided the Law Society with a copy of the title search which indicated that the mortgage continued to be registered as a charge against the title on March 18, 2003.

[116] The Respondent did not file a discharge of the mortgage number BN235046 and the mortgage was ultimately discharged from title by the Custodian of the Respondent's practice on April 4, 2003.

[117] A discharge of mortgage BN235046 was found by the Custodian of the Respondent's practice in the possession of the Respondent, which discharge of mortgage was dated November 22, 2002.

[118] The Law Society requested an explanation of this matter on April 1, 2003, and on April 30, 2003. The Respondent did not reply to those requests.

[119] On May 27, 2003, the Law Society sent a letter to counsel for the Respondent requesting a response from his client within two weeks. No response was received.

DISCUSSION - COUNTS 15 AND 16

[120] These counts of the Citation are straightforward. Counsel for the Respondent argued that the discharge was filed by the Custodian at a time when the Respondent was prohibited from practicing law. Counsel for the Respondent argues that the Respondent was prevented from filing the discharge of mortgage due to the prohibition on his ability to practice law.

[121] This explanation of the Respondent's behavior misses a significant characteristic of the evidence. The discharge of mortgage was dated November 22, 2002. The discharge of mortgage was located by the Custodian in a pile of mortgage discharges that were awaiting filing. It is clear that the discharge of mortgage had been received by the Respondent shortly after the date of its preparation, namely in late November or early December of 2002. He was at that time still entitled to practice law. He did in fact practice law in February of 2003. No explanation was offered as to why the discharge of mortgage in his possession was not filed in the Land Title Office.

RESULT - COUNTS 15 AND 16

[122] We find that his failure to respond to the Law Society with respect to this matter constitutes professional misconduct.

[123] By his failure to file the discharge of mortgage when it was received by him, he was in breach of his undertaking provided to Notary Public P.W. In this regard, we find that he has professionally misconducted himself.

> **Count 17. You borrowed funds in the sum of $35,000.00 from a client D.B., contrary to Chapter 7, Ruling 4 of the** *Professional Conduct Handbook***.**

FACTS - COUNT 17

[124] On May 17, 2000, the Respondent's client B. paid funds in trust to Hammond & Company in the amount of $35,000.00. These funds were credited to a trust account for file LAN00024 which was under the name L.H. Ltd. These funds were used to pay debts for this Company in the amount of $13,275.00, and some part of the balance of funds was released to L.H. Ltd. $5,000.00 of the funds were transferred to the Respondent's " General" Trust Account. There is no explanation in the evidence as to why $5,000.00 of these proceeds were paid to the Respondent's " General" Trust Account.

[125] Later, in response to questions from her, the Respondent advised Roseanne Terhart, a forensic accountant hired by the Law Society, that a $5,000.00 payment to Mr. B. from another trust account was in repayment of a loan made to him by Mr. B.

DISCUSSION - COUNT 17

[126] The evidence on this count of the Citation is woefully inadequate and it is not possible for this Panel to rationalize the flow of funds which occurred with respect to this transaction.

[127] It is not possible to determine on the evidence before us whether a loan from client B. was made to the Respondent. We have only the Respondent's advice on that subject to Roseanne Terhart.

[128] What is clear, however, is that if a loan was made at all, it was not made in the amount of $35,000.00 as alleged in the Citation, and it was at best a loan in the amount of $5,000.00.

[129] There is insufficient evidence before us to determine whether this loan was in fact made. We are significantly confused by the array of evidence provided which discussed the presence or absence of either a Loan Agreement or a Promissory Note, and evidence as to whether client B. was or was not an investor in L.H. Ltd.

RESULT - COUNT 17

[130] In the result, we must dismiss this count of the Citation as being unproven.

> **Count 18. You breached your undertaking dated October 1st, 2001, to holdback (sic) funds in the sum of $8,500.00 until a Builder's Lien was released. These funds were distributed prior to the release of the lien.**

FACTS - COUNT 18

[131] Ms. Terhart gave evidence on this Count of the Citation. The Respondent acted for the Vendor on the sale of property at [Address] in Langley, British Columbia. Sale proceeds were provided to the Respondent by the solicitors to the Purchaser, Lindsay Kenney, on his undertaking to withhold $15,000.00 as a Builder's

Lien Holdback, and upon the further undertaking:

> " to pay out the sum required to legally obligate the chargeholder to provide your office with a registrable Form-C Release, to apply for registration of the said Form-C Release forthwith upon your receipt, and to advise our office of registration particulars in due course for each of the following encumbrances:
>
> .....
>
> 6. Claim of Builders Lien, registered in favour of [Company] under Registration No. BR215690."

[132] Rather than paying the sum of $8,500.00 to discharge the [Company] lien, the Respondent instead held that sum in trust with a notation to his file " to call [Compnay] re lien, funds held in trust, not to be released until the lien is released" . At the conclusion of the pay out of the remaining funds on this transaction, there was $23,500.00 in trust, being the combined total of the $15,000.00 lien holdback and the sum of $8,500.00 held with respect to the [Company] lien.

[133] On November 2, 2001, the Respondent was given authority to release the $15,000.00 Builders Lien holdback and he did so by paying $14,500.00 to his client and advising his client that a further $500.00 was to be held back on account of the lien in favour of [Company]. Following that distribution of funds, there remained $9,000.00 in trust, on account of the [Company] lien.

[134] On November 8, 2001, the sum of $500.00 was paid to the Respondent's " General" Trust Account. Ms. Terhart observed that no invoice in respect of that $500.00 appeared in the file and noted that the Respondent had earlier been paid fees in the amount of $811.30 on account of this transaction.

[135] On November 20, 2001, a further $500.00 was transferred to the Respondent's " General" Trust Account and an invoice in the file indicated that this sum was in payment for a " Court appearance and related matters" .

[136] On November 21, 2001, a further $5,000.00 was paid to the Vendor in this transaction, leaving only $3,000.00 in trust against an obligation which required a holdback of $8,500.00.

[137] On November 26, 2001, a further sum of $1,200.00 was paid to the Respondent's " General" Trust Account. At the time of that deposit, there was $68.54 in that account, and immediately after the deposit, a cheque in the amount of $1,250.00 was drawn on the account in favour of the Respondent's spouse. This payment of $1,200.00 to the Respondent's " General" Trust Account left a balance in trust of $1,800.00.

[138] On December 17, 2001, a further $200.00 was paid from this trust account to the Respondent's " General" Trust Account and an invoice found in the file in that amount suggested that the payment was in respect of " matters with respect to the property" .

[139] On December 31, 2001, a further $1,000.00 was paid from this account to the Respondent's " General" Trust Account. An invoice in this amount was found in the file relating to further matters with respect to the property.

[140] On December 31, 2001, there was $600.00 in trust in respect of this obligation.

[141] On January 4, 2002, $5,000.00 was deposited to this trust account from [Numbered Company] and $5,500.00 was paid out to the Respondent in a series of four payments over the month of January; this left the sum of $100.00 in trust on this file.

[142] The $100.00 which was in this trust account at the end of January, 2002, remained there until July,

2002.

[143] In August of 2002, from the proceeds of sale of another property belonging to a Company related to client S., the sum of $6,063.50 was paid to this trust account, and in turn, the funds were utilized to pay the Builders Lien.

DISCUSSION - COUNT 18

[144] This Count in the Citation is badly crafted. It is clear that the Respondent breached an undertaking which he had provided to [Law Firm] with respect to his treatment of the sale proceeds of the subject property. The undertaking that he accepted was that undertaking described at paragraph 131 of these reasons. That undertaking was clearly breached.

[145] The Citation alleges a failure to hold back funds until a Builders Lien was released. No such undertaking was imposed upon or accepted by the Respondent.

[146] We have considered whether the count alleged in the Citation is somehow capable of alignment with the facts of the matter as they were introduced into evidence. While there is some similarity between an undertaking which requires that certain funds be paid on account of a particular debt, and an undertaking that certain funds be held until evidence of the satisfaction of a debt is in hand, it is the view of this Panel that the similarities are not sufficiently clear to justify a finding of professional misconduct in respect of this Count.

[147] The burden lies with the Law Society to craft Citations in respect of conduct which it alleges constitutes either professional misconduct, conduct unbecoming a member, or a breach of the Act or Rules. The obligation carries further to ensure that the allegations which are contained in the Citation are in line with the factual basis upon which the Citation is issued. The alignment of allegations and facts does not exist in this Count.

RESULT - COUNT 18

[148] In the result of the failure of the Law Society to allege the breach of undertaking which actually took place, we dismiss this Count of the Citation.

> **Count 19. You breached an undertaking dated April 12, 2002, to hold back funds in the sum of $11,000.00 on certain conditions. You released $2,300.00 of the funds prior to the conditions being fulfilled.**

FACTS - COUNT 19

[149] Ms. Terhart gave evidence on this Count of the Citation which involved the sale of property at [Address] in Maple R