2016 LSBC 37
Decision issued: November 4, 2016
Citation issued: August 25, 2011

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a s. 47 Review concerning

PETER KROGH JENSEN

RESPONDENT

DECISION OF A REVIEW PANEL OF THE BENCHERS

Review date:	March 31, 2016
Benchers:	Gregory Petrisor, Chair Lynal Doerksen Woody Hayes Jamie Maclaren Lee Ongman Elizabeth Rowbotham Sarah Westwood
Discipline Counsel:	Craig Dennis, QC
Counsel for the Respondent:	H.C. Ritchie Clark, QC

BACKGROUND

[1] This is a review, pursuant to section 47 of the *Legal Profession Act* (the "Act"), brought by the Respondent from the decision of a hearing panel issued March 14, 2014 (2014 LSBC 10) (the "Decision") in respect of a citation issued August 25, 2011.

[2] There were two allegations addressed to the Respondent in the citation:

1. In the period from approximately September 2008 to April 2009, while you were representing C Inc., M Capital and its principal, JN, you accepted funds in trust in the amount of US $200,000 from BF and/or DF for the purchase of shares of C Inc. from M Capital and disbursed those funds on instructions from JN, without advising BF and DF that you were not protecting their interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*.

   This conduct constitutes professional misconduct.

2. In the alternative, in the period from approximately September 2008 to April 2009, while you were representing C Inc., M Capital and its principal, JN, you permitted your trust account to be used to receive and disburse funds in the amount of US $200,000 received in trust from BF and/or DF for the purchase of shares of C Inc. from M Capital when you were not acting for either party to the transaction without advising BF and DF that you were not protecting their interests.

   This conduct constitutes professional misconduct.

The hearing focused on the first allegation in the citation. Discipline counsel did not pursue the second allegation.

[3] Chapter 4, Rule 1 of the *Professional Conduct Handbook* (the "Handbook") in effect at the time of the events giving rise to the citation occurred stated:

> 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.

[4] In contrast, the current rule as set out in the *Code of Professional Conduct for BC*, at Chapter 7.2-9, states:

> 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.

[5] On March 14, 2014, the hearing panel released its decision (2014 LSBC 14) on facts and determination (the "Decision"). The panel determined that the Respondent's failure to caution in these circumstances was a marked departure from that expected of a competent solicitor and was therefore misconduct and, in the result stated that the Respondent erred by failing to state that he did not represent the interests of the complainants in the share transaction.

[6] The panel issued its decision (2015 LSBC 10) on disciplinary action on March 25, 2015. In the result the Respondent received a fine of $2,000 and the Law Society was ordered its costs in the amount of $30,000.

[7] On April 24, 2015, the Respondent issued a Notice of Review seeking a review of the hearing panel's determination and a review of the penalty and costs imposed by the hearing panel.

ISSUES

[8] The Review Panel considered the following issues:

(a) Whether the panel erred by interpreting the Rules to impose a duty on the Respondent to advise an unrepresented party to obtain independent legal advice; and

(b) Whether the panel erred in finding that credibility was not an issue and erred by not conducting an assessment of credibility.

STANDARD OF REVIEW

[9] Pursuant to section 47(5) of the Act, the Benchers on review have the power to either confirm the decision of the panel or substitute a decision the panel could have made under the Act. The relevant provision of the Act states:

Review on the record

47 (1) Within 30 days after being notified of the decision of a panel under section 22 (3) or 38 (5), (6) or (7), the applicant or respondent may apply in writing to the benchers for a review on the record.

(5) After a hearing under this section, the benchers may

(a) confirm the decision of the panel, or

(b) substitute a decision the panel could have made under this Act.

[10] In *Kay v. Law Society of BC*, 2015 BCCA 303, the Court of Appeal considered the applicable standard of review for decisions made by a Law Society hearing panel. At paragraph 40, the Court confirmed its exhaustive analysis from *Mohan v. Law Society of BC*, 2013 BCCA 489, where it stated:

> [30] The Law Society of Upper Canada's equivalent to the LSBC's Review Board is called an Appeal Panel. Such an Appeal Panel described the two possible standards, correctness and reasonableness for their review of an Ontario Hearing Panel decision in *Law Society of Upper Canada v. Kerry*, 2007 ONLSAP 5. The Appeal Panel held that the Hearing Panel was entitled to deference with respect to findings of credibility. At paras. 79-80 the Appeal Panel wrote:
>
> > [79] The jurisdiction of the Appeal Panel is set out in s. 49.35 of the *Law Society Act*. The Appeal Panel is a review tribunal and does not conduct a trial *de novo*. The standard of appellate review is correctness for questions of law, and reasonableness for questions of fact or of mixed fact and law (*Law Society of Upper Canada v. Crozier*, 2005 CanLII 38899 (ON SCDC), [2005] OJ No. 4520 (Div. Ct.), para. 71, and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247, para. 42).
> >
> > [80] Where findings of facts are based upon credibility assessments, as is the case with regard to Mr. Evans, it is of particular importance for the Appeal Panel to recognize the deference built into the standard of reasonableness. An Appeal Panel is not well-situated to make its own assessments of credibility, nor is it permitted to do so (*Law Society of Upper Canada v. Kadir Baksh*, 2006 ONLSAP 6, par. 13).

[11] Following the principles outlined in *Mohan* and confirmed in *Kay*, this Review Panel must give deference to decisions made by the hearing panel on questions of fact and questions of mixed law and fact. Such decisions are reviewed on a standard of reasonableness. Where the credibility of witnesses is concerned, this Review Panel may only substitute its decision for the hearing panel decision where the hearing panel made one or more clear and palpable errors.

SUMMARY OF THE RELEVANT FACTS AND EVIDENCE

[12] The events at issue centre around the failed purchase of shares by BF and/or BF, and BF's spouse, DF.

[13] DF was the founder of a company called S Inc. S Inc. was a client of the Respondent.

[14] JN was a wealthy investor with interests worldwide. JN became a major investor in S Inc., having been introduced to DF by the Respondent in mid-2007. JN later also invested more than a million dollars in a DF company called G Packaging that DF was promoting.

[15] JN was also an investor and shareholder in a publicly traded company, C Inc. C Inc. shares were being traded for approximately $1.00 each in September 2008.

[16] In September of 2008 JN asked DF whether he or his family were interested in purchasing shares in C Inc.

[17] On September 26 2008 DF, BF and JN had a lunch meeting. JN offered to sell 400,000 shares to them for 50 cents a share. It was a term of the offer that payment was to be made that day. The offer was accepted, and at the time, DF and BF understood the shares would be transferred to BF's trading account the following week if payment was made later that day.

[18] During the lunch meeting it was agreed that payment would be by bank draft. JN wrote payment instructions on the back of a napkin for BF and DF as to how payment was to be made. JN wrote: "Mcap ITF Devlin Jensen." JN orally instructed BF and DF to pay the purchase price to M Capital in trust with Devlin Jensen. BF was told to provide JN's secretary with BF's trading account details and BF understood that, if the bank draft was delivered to Devlin Jensen that day, 400,000 C Inc. free trading shares would be delivered within one week. The Respondent was not involved in this discussion.

[19] Both BF and DF attended at the Respondent's law office later that day just as the Respondent was leaving the office. They met for a few minutes in an office near reception.

[20] BF and DF tried to give the Respondent a bank draft payable to M Capital in trust for $200,000, in payment for the shares. Their evidence was that they wanted to make the payment for the shares that day so that they were paid for and JN was then obliged to deliver the shares.

[21] The Respondent refused to accept the bank draft in its existing form and BF and DF left the office and did not deliver a bank draft that day.

[22] On September 29, 2008, three days after making the agreement to purchase the C Inc. Shares, BF and DF returned to the Respondent's office during his absence and dropped off a bank draft payable to Devlin Jensen in trust in payment for the shares in C Inc.

[23] On October 1, 2008 when the Respondent returned to his office he learned that BF and DF had returned with a bank draft for $200,000 payable to Devlin Jensen in trust in payment for the shares.

[24] That day the Respondent sent an email to DF stating "I received the bank draft for the $200,000 US for the M Capital account for your purchase of the C Inc. shares. Please provide instructions for deposit to the M Capital trust account and please confirm purchase price of the C Inc. shares. I can't deposit without that."

[25] DF responded stating "… please put it in M Capital and JN will tell you the rest. Thanks."

[26] The Respondent deposited the funds to the credit of M Capital.

[27] The panel found the shares were to be transferred to BF and JN had an obligation to transfer the shares, or cause the shares to be transferred to BF, within a certain time period.

[28] JN did not transfer the shares in C. Inc.

[29] The relationship between DF and JN apparently deteriorated at some time after September 2008 as a result of their dealings with S Inc. and G Packaging, with JN requesting a global accounting for the money JN invested in S Inc. and G Packaging and BF commencing a civil suit against JN, the Respondent and others.

[30] On March 8, 2010 BF wrote to the Respondent requesting return of the funds paid to M Capital and "held in trust with the Respondent's firm."

THE TESTIMONY OF THE PARTIES IN RESPECT OFRULE 1 (CHAPTER 4, RULE 1 OF THE HANDBOOK)

[31] BF testified:

(a) that the Respondent never gave her any business advice or legal advice when they went to the Respondent's office;

(b) that she knew that the Respondent was JN's lawyer;

(c) that the purchase of shares was between her and JN;

(d) that the Respondent did not advise her to get independent legal advice or do research;

(e) that they wanted to give him the bank draft to purchase shares from JN as it was a good deal.

[32] BF and DF also testified before the panel that they were aware the Respondent acted for JN and M Capital.

[33] The Respondent testified that DF and BF attended without appointment to deliver a bank draft, that he told them that the draft was in the wrong form and that he could not deposit the bank draft with M Capital as the payee. The Respondent further testified that he refused to take the bank draft from them and told them all of the following:

(a) do the deal directly with JN;

(b) think about it and do not do the deal;

(c) that if they did the deal, it was at their own risk;

(d) they could go away and if they changed the draft to Devlin Jensen in trust for M Capital then he could accept it.

[34] The panel asked the Respondent a direct question about this conversation that occurred in his office:

Q. Okay. And did you tell them to get independent legal advice?

A. Not in those words, no.

Q. Well, did you suggest that they should speak to a lawyer about doing this?

A. I thought that that was fully understood.

Q. And did you give them any advice expressly or – well, start off expressly that you were not going to represent their interests in any share acquisition?

A. Not expressly, no.

Q. Okay. Did you say words to that effect?

A. I believed I was saying words to that effect.

Q. Could you please tell the panel exactly the words you used as best you can recall?

A. I can't exactly say but they knew the situation, my giving them their option to go away and think about it and basically effect it if they wished on their own risk or recognizance was as I believed sufficient in the circumstances.

[35] The panel made the following finding of fact in paragraph 28 of the Decision:

> We find it is impossible to know exactly what the conversation was based on memories of a five minute conversation that old.

The panel stated that both parties had tried their best to recall what happened.

ANALYSIS

Credibility submissions

[36] The Respondent submits that credibility is an issue and that the panel preferred the testimony of the complainants BF and DF over the testimony of the Respondent and did so in spite of the abundance of conflicting testimony. The Respondent also submitted the panel did not provide reasons for stating that credibility was not an issue and further argued that the facts as found by the panel equally supported another scenario.

[37] The alternate scenario is: two sophisticated business people securing an opportunity for a quick profit by investing in a share deal that became known to them through JN, a business associate and investor in DF's company. They were fully aware that the Respondent was JN's lawyer and was not protecting their interest. As sophisticated and successful businesspersons, they had used the Respondent's services on many occasions. The evidence, if accepted, shows that each of BF and DF operated businesses valued in excess of a million dollars and were far from naive and fully aware of the legal arrangements between JN and the Respondent. BF and DF used JN's trust account with the Respondent's firm because the seller, JN, told them to, for his benefit not theirs. The evidence, if

accepted, shows that they were willing to direct the purchase money anywhere that the seller requested in order to complete the sale and purchase obligation. Their concern was simply to take up an offer that would allow them to make a substantial profit on the resale of the shares.

[38] Law Society counsel submits that the panel described a scenario in which they found BF to be an unsophisticated and inexperienced businesswoman who, with her somewhat inexperienced husband, DF, attended at a seasoned lawyer's office to purchase shares in a company owned by one of the lawyer's clients. To complete this transaction the wife tried to provide the lawyer with $200,000 to hold and protect in his trust account until such time as she received the shares they were anxious to purchase.

[39] BF, DF and the Respondent each testified before the panel and each had a slightly different version of what was stated in their meeting and what each of the parties believed about the obligation of the Respondent.

[40] Based on all of the evidence, taken as a whole over many days, credibility may be in issue in some areas of the parties' respective testimony. The panel did not express in their reasons that they weighed the evidence against the individual factors such as motive, experience, age, consistency, forgetfulness, convenience, external information and the circumstances as a whole.

[41] In paragraph 26 of the Decision the panel found that both parties tried to reconstruct this conversation honestly but found that the Respondent agreed he did not directly caution DF and BF about independent legal advice or that he was not protecting their interest.

[42] In paragraph 28 of the Decision the panel stated that it was impossible to know exactly what the conversation was based on memories of a five-minute conversation that old [five years earlier].

[43] We find that the panel did not err with respect to the issue of credibility, and we do not find that the panel preferred the evidence of one party over another. A hearing panel is free to accept some, all or none of the evidence put before it. It is also free to give the evidence it accepts the appropriate weight. This panel accepted the evidence of all witnesses and it appears gave all evidence the same weight.

[44] The question for this Review Panel is whether the finding of professional misconduct is supported by the facts found by the hearing panel after applying the law.

CHAPTER 4, RULE 1

[45] The issues established by the panel were clearly set out on pages 1 and 2 of its Decision:

1. Was the Respondent required to provide the caution contained in Chapter 4, Rule 1 of the *Professional Conduct Handbook* in the circumstances surrounding the payment of $200,000 US to his firm?

2. If the Respondent was required to provide the caution and failed to do so, did that breach amount to professional misconduct?

[46] Counsel for the Respondent submits that Chapter 4, Rule 1 was not intended to be a formulaic statement and, if that were the case, then he admitted that the Respondent had not expressed the formulaic statement or "magic words."

[47] Counsel for the Law Society submits that the issue was not difficult and the panel had correctly found that the Respondent had failed to advise BF and DF that he was not protecting their interest in circumstances where he was obliged to do so, and that such failure constituted professional misconduct.

[48] In concluding that the Respondent committed professional misconduct by failing to properly advise BF or DF that their interests were not being protected by the Respondent, the panel repeatedly stated that the Respondent had failed to provide "the caution" or to properly "caution" BF or DF. At no time did the panel define "the caution," nor refer to words that would satisfy such a requirement. This phrase is not a defined term, and its use as a requirement may be misleading.

[49] In *Law Society of BC v Skogstad*, 2008 LSBC 19, para. 54, the panel stated, with respect to Chapter 4, Rule 1:

> The evil to which that provision of the *Handbook* is directed is the fear that an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where that impression is not accurate.

[50] The proper question is not, therefore, whether a "caution" was given but rather, whether the unrepresented parties in the circumstances were under the impression that the Respondent was representing them.

[51] The panel was unsure of whether BF or DF or both were to be the share purchasers and a line of questions began concerning the source of the purchase monies. BF testified that the monies for the US $200,000 bank draft came from the proceeds of

the sale of her house. She stated that the house was hers, in her name alone. A series of question and answers ensued:

> A. ... it was my house, that's the way we wanted it. He gave it to me. He had a business, I didn't; I didn't have a business or anything, so it was my house.
>
> ...
>
> Q. What was the understanding between you and your husband with respect to the proceeds of the sale?
>
> A. It was my money.

[52] However, when counsel for the Respondent attempted to cross-examine on whether the money was a family asset, counsel for the Law Society objected on the grounds that BF was not qualified to make a legal assessment as to the characterization of assets under the *Family Relations Act*. Counsel for the Respondent withdrew that question. Ultimately, the panel did not decide to whom the shares were to be issued, BF or DF, but rather found that the Respondent had failed to state that he did not represent the interest of DF and BF in the share transaction.

[53] In any event, both BF and DF testified that that they knew that the Respondent represented JN and M Capital.

[54] Moreover, DF had express knowledge about similar transactions when utilizing share subscriptions. S Inc., one of DF's corporate entities, was a client of the Respondent's. While S Inc. was not involved in the transaction, DF, through his involvement with S Inc., was familiar with share subscriptions. In the share subscriptions issued by S Inc. there was an express notice that, should the subscriber's payment be submitted to Devlin Jensen, Devlin Jensen would have no accountability to the subscriber whatsoever and that Devlin Jensen were merely recipients for the company (S Inc.). The notice also stated that payment to Devlin Jensen in trust would be deposited into the trust account of the company (S Inc.) and would become the property of the company (S Inc.) immediately. The notice further stated that, under no circumstances would Devlin Jensen be considered to be giving legal advice to the subscriber and no communication between the subscriber and Devlin Jensen would be considered legal advice. Any communication would only be considered administrative subscription service on behalf of the company (S Inc.).

[55] In the circumstances, it was reasonable for the Respondent to expect that DF would know, based on DF's own experience with S Inc., that the monies would be deposited to the trust account of M Capital and immediately become the property of M Capital. In fact, the first bank draft presented by BF and DF purported to do exactly that – deposit the money into M Capital's trust account.

[56] However, the issue before us is whether Chapter 4, Rule 1 of the Handbook required the Respondent to expressly advise BF and DF that he was not representing their interests. The evidence establishes that BF and DF each knew that the Respondent was not acting for them. They knew he was the lawyer for M Capital. We find that, in the circumstances of this matter, the Respondent was not required to express the "caution" to further advise BF and/or DF that the Respondent was not protecting their interests. There was no fear that the complainants developed the impression that the Respondent was representing them as explained in *Skogstad*.

[57] Consistent inquiry was made as to whether the Respondent advised BF and or DF to seek independent legal advice as an obligation of the Respondent. The panel and Law Society counsel questioned the Respondent and the complainant BF and DF as to whether the Respondent advised BF and DF to obtain independent legal advice.

[58] Despite these questions the Respondent testified that he believed he was in compliance with the Rule by ensuring that the complainants knew that he was not their lawyer and was not acting for them, and that, if they proceeded with the transaction, they would be doing so at their own risk.

[59] In paragraph 64 of its Decision the panel emphasized the "failure to caution," and in the penultimate paragraph the panel cited *Law Society of BC v. Hops*, 1999 LSBC 29, [2000] LSDD No. 11, and concluded, "In this situation the public would expect the caution to be given to permit the unrepresented individual an opportunity to consider independent legal advice."

[60] Chapter 4, Rule 1 of the Handbook applied to the Respondent's conduct throughout his dealings with the complainants. There was no mention of urging anyone to obtain independent legal advice contained in that Rule. Consequently, whether the Respondent did or did not advise BF and DF to obtain independent legal advice was not determinative of whether or not the Respondent was in breach of Chapter 4, Rule 1.

[61] The panel appears to have incorrectly incorporated in its reasons part of the current Rule requirement for independent legal advice which is set out in the *Code of Professional Conduct for BC* at Chapter 7.2-9 which states:

> When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented party to obtain independent legal representation;

This duty for urging independent legal advice was not a duty that was imposed on the Respondent in September 2008.

[62] Although it would have been better if the Respondent had advised BF and DF to obtain independent legal advice, and it would have been better if the Respondent had sent a brief letter or email to BF and DF at the time of these events stating that he was not representing or protecting their interests, that was not the requirement of the Rule. It appears the panel found the Respondent had committed professional misconduct because he had not followed a "best practice."

[63] Further, as the panel did not prefer the evidence of one party over another and the onus is on the Law Society to prove an allegation on a balance of probabilities, we find that the evidence is insufficient to make a finding of professional misconduct when the Respondent testified that he stated in "words to that effect" that he was not protecting BF and DF's interests. This Review Panel finds that this evidence would have to have been rejected by the panel in order for such a finding to be made.

[64] Accordingly, for the reasons set out, this Review Panel finds that hearing panel's Decision was not correct, and according to Section 47(5)(b) of the Act, we substitute for that decision one that the panel could have made and dismiss the citation.

ORDER

[65] The Review Panel orders that:

1. The Decisions of the hearing panel issued March 14, 2014 and March 25, 2015 are overturned and the citation issued August 25, 2011 is dismissed.

COSTS

[66] Submissions have not been made by the Law Society or the Respondent as to costs. In the event of disagreement by the Law Society and the Respondent with respect to costs, submissions can be made to the Review Panel by December 1, 2016.