2017 LSBC 29
Decision issued: August 4, 2017
Citation issued: July 15, 2016

NOTE: On September 28, 2017 the Discipline Committee considered and accepted a proposal under Rule 4-29. Under the proposal, the Respondent admitted professional misconduct as found by the Hearing Panel, obtained permission from the Discipline Committee to resign from membership in the Law Society effective September 28, 2017 and provided an undertaking not to apply for reinstatement for a period of seven years. The Respondent acknowledges that s. 15(3)(a) of the *Legal Profession Act* will apply to him such that he may not practise law, whether or not the act is performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed.

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KENNETH JOSEPH SPEARS

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	April 24, 25, 26, 27, 28 and June 22 and 23, 2017
Panel:	Bruce A. LeRose, QC, Chair Mark Rushton, Public representative Michelle Stanford, Bencher
Discipline Counsel:	Alison Kirby
Appearing on his own behalf:	K. Joseph Spears

INTRODUCTION

[1] A citation was authorized on July 7, 2016 and issued on July 15, 2016. The citation was amended on December 8, 2016, further amended during the hearing on April 26, 2017 and entered as Exhibit 14 in these proceedings.

[2] The citation as amended contains four allegations against Kenneth Joseph Spears (the "Respondent") as follows:

1. Between April 2006 and May 2009, you borrowed, or caused a company owned and controlled by you to borrow, some or all of the total sum of $69,000 from one or both of your clients, SH and BH, contrary to Chapter 7, Rules 4 and 6 of the *Professional Conduct Handbook* then in force.

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

2. Between April 2006 and May 2009, you breached your undertaking to the Law Society of British Columbia dated October 18, 2004 not to take on any new files, other than Department of Justice files or Government of Canada files, when you acted for SH and BH in relation to a proposed subdivision of property or a potential negligence claim against the City of Burnaby, or both, contrary to one or more of Chapter 11, Rule 7 and Chapter 13, Rule 3(f) of the *Professional Conduct Handbook* then in force.

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

3. In the alternative to allegations 1 and 2, between April 2006 and May 2009, you carried on a marine survey consulting business called H Group in such a way that a person might reasonably:

   (a) find it difficult to determine whether you were acting as a lawyer; or

   (b) expect that in carrying on this consulting business you would exercise legal judgment or skill for the protection of that person, contrary to Chapter 7, Rule 6 of the *Professional Conduct Handbook* then in force.

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

4. You failed to notify the Executive Director of the Law Society in writing of the circumstances of a judgment in the amount of $72,500 granted against you on March 12, 2015 in British Columbia Supreme Court, Vancouver Registry Action No. [number], and your proposal for satisfying such judgment, contrary to Rule 3-50 of the Law Society Rules 2015.

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

[3] The hearing took place on April 24 to 28 and June 22 and 23 of 2017.

[4] The Respondent admitted proper service of the original citation and the amended citation.

[5] At the commencement of the hearing the Respondent made an application to have the hearing adjourned so that he could retain counsel and in particular Richard Gibbs, QC. The Respondent indicated to the Panel that he had just spoken to Mr. Gibbs for the first time the morning of the hearing.

[6] Law Society counsel was not advised of this application to adjourn until 9:00 am, just prior to the commencement of the hearing.

[7] The Respondent's reasons for the application for adjournment to retain Mr. Gibbs were:

   (a) The Respondent will oppose the attempt of the Law Society to enter evidence that the Respondent states are covered by an implied undertaking of confidentiality; and

   (b) The Respondent says that he was only recently advised by the Law Society that he may be called as a witness by the Law Society pursuant to Section 41 of the *Legal Profession Act*.

[8] The Law Society opposed the Respondent's application to adjourn. The Law Society's position was that the Respondent was advised at three separate pre-hearing conferences that he needed to deal with the first issue by bringing on a court application and, if he did not, the Hearing Panel would determine this issue.

[9] The Law Society's position on calling the Respondent as a witness pursuant to Section 41 was that the Respondent was advised of the Law Society's intentions in this regard on April 10, 2017 some two weeks prior to the hearing date; furthermore, that section 41 of the *Legal Profession Act* allows a panel to require a

Respondent to give evidence; and that the Respondent knew or ought to have known about this provision.

[10] The Law Society also opposed the application on the basis that the Law Society, along with the Panel, were only told of this application minutes before the hearing was about to commence. As well, there was no correspondence or communications between Richard Gibbs QC and the Law Society indicating that he had been retained by the Respondent.

[11] The Respondent's application to adjourn was dismissed by the Panel at the hearing with these written reasons to follow.

[12] The Respondent made no effort to contact counsel until the morning of the hearing. He had been advised well in advance that, if he wanted to oppose the Law Society submitting evidence that he claimed was inadmissible under an implied undertaking of confidentiality, he should make such an application to the court or else the Hearing Panel would deal with his objection. None was made. Finally, the Panel found that the Law Society had given the Respondent adequate notice of its intentions to call the Respondent as a witness pursuant to Section 41 of the *Legal Profession Act.*

[13] In coming to this conclusion the Panel has adopted the findings of the hearing panel in the decision of *Law Society of BC v. Welder*, 2014 LSBC 53. In particular this Panel adopts paragraphs 33 and 34 of that decision, which state:

> The various factors to consider in determining if an adjournment is appropriate are found in Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Carswell, 2004), at p. 12-148.41 to 12-148.42:
>
> (a) the purpose for the adjournment …;
>
> (b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of an adjournment;
>
> (c) the position of the other participants and the reasonableness of their actions;
>
> (d) the seriousness of the harm resulting if the adjournment is not granted;
>
> (e) the seriousness of the harm resulting if the adjournment is granted …;

> (f) is there any way to compensate for any harm identified;
>
> (g) how many adjournments has the participant seeking the adjournment been granted in the past;
>
> ...
>
> Applying the above factors to this case, this Panel finds that the only factor in the Respondent's favour is that he has not sought any prior adjournments. All other factors are not favourable to his application.

[14] Once the Respondent's application for adjournment had been decided, the Law Society attempted to enter a Notice to Admit that included 48 documents that were objected to by the Respondent.

[15] The Law Society also wanted to use the transcript of the Respondent's Examination for Discovery in a civil suit between the Respondent and the complainant in these proceedings. The Law Society wanted to use the transcript to assist it in its proposed section 41 examination of the Respondent. Again the Respondent objected.

[16] The grounds for these objections by the Respondent is the general rule that there exists an implied undertaking that parties and their lawyers in civil actions will use discovery evidence strictly for the purposes of the court case in which such evidence was disclosed, unless eventually revealed in a courtroom or disclosed by juridical order: *Juman v. Doucette*, 2008 SCC 8 at paragraph 27.

[17] Exceptions to the implied undertaking of confidentiality include legislative override. The powers of the Law Society granted by the *Legal Profession Act* to compel information in the course of its investigations is a form of legislative override. Section 88(1.1) of the Act provides as follows:

> 88(1.1) A person who is required under this Act or the rules to provide information, files or records that are confidential or subject to a solicitor client privilege, must do so, despite the confidentiality or privilege.

[18] A lawyer who is required to provide such information is deemed conclusively not to have breached any duty or obligations otherwise owed to the Law Society or client (section 88(1.3)), and that information is admissible in a proceeding under Part 4 or 5 of the Act despite the confidentiality or privilege (section 88(1.2)).

[19] In *Skogstad v. The Law Society of BC*, 2007 BCCA 310, it was held that the proper regulation by the Law Society of the competence and the integrity of lawyers requires access to confidential information (paragraph 8).

[20] The *Legal Profession Act* and the Law Society Rules provide a legislative override to the implied undertaking of confidentiality and accordingly, the Respondent's objection to the admissibility of the 48 documents in the Notice to Admit and the use of the discovery transcript for section 41 purposes was dismissed by the Panel.

[21] The final preliminary matter that the Panel dealt with was the Law Society's application pursuant to section 41(2) of the *Legal Profession Act* and Rule 4-42 for an order that:

(a) the Respondent give evidence under oath or by affirmation; and

(b) the Respondent produce at the hearing all files and records in his possession in relation to the services rendered to and funds borrowed from SH and BH between February 2006 and June 2009.

[22] Rule 4-42 provides that discipline counsel must notify the Respondent for an application for an order that the Respondent give evidence at the hearing. This was done by way of letter dated April 10, 2017 receipt of which was acknowledged by the Respondent.

[23] The basis for the Law Society's application was that the Respondent, in his response to the Notice to Admit prepared by the Law Society, denied the truth of most of the facts alleged in the Notice to Admit and denied the authenticity of 48 of the documents the Law Society sought to enter into evidence.

[24] The Respondent opposed the Law Society's application on the basis that it is contrary to the rules of natural justice and the right to a fair hearing.

[25] The Panel granted the application and made an order pursuant to section 41(2) of the *Legal Profession Act* that the Respondent give evidence in this proceeding and that the examination by the Law Society of the Respondent be in the nature of a cross-examination.

[26] The Panel determined that this case was a clear example of what the section was designed for and that there was clear precedent provided in the decision of *Law Society of BC v. Lawyer 11*, 2007 LSBC 49.

BACKGROUND

[27] The Law Society called the Respondent as a witness in its case, and at the beginning of day three of this hearing, the Law Society sought to enter the Notice to Admit in these proceedings as an Exhibit. The Respondent no longer took issue with the Notice to Admit, and it was entered as Exhibit 15 in these proceedings.

[28] The facts in this case are set out fully in the Notice to Admit, and they are as follows:

Practice History

1. The Respondent was called and admitted as a member of the Law Society of British Columbia on September 25, 1987.

2. After his call, the Respondent practised at five different law firms until August 1998 when he became a sole practitioner.

3. Between August 1998 and September 17, 2009 (with exception of the period March 13, 2006 to May 12, 2006 when he was not entitled to practise), the Respondent practised as a sole practitioner through Spears and Company in West Vancouver.

4. On October 18, 2004, the Respondent gave an undertaking to the Law Society (Practice Standards Committee) to reduce his files by December 5, 2004 to matters where he was retained directly by the Department of Justice or the Government of Canada. He also undertook not to take on any new files after October 5, 2004 other than Department of Justice or Government of Canada files. [Tab 1]

5. On December 2, 2004, the Practice Standard Committee agreed to vary the undertaking to provide that the Respondent would conclude and/or transfer all outstanding non-Department of Justice files by January 15, 2005. [Tab 2]

6. On or about December 8, 2006, the Respondent was informed by the Law Society of an investigation into whether he had breached his undertaking to not take on any new files other than Department of Justice files or Government of Canada files. This Law Society investigation continued until April 21, 2009 when a citation was issued. [Tab 30]

7. On January 29, 2007, the Respondent received a letter from Kensi Gounden, manager of Practice Standards Department regarding the Respondent's inquiry to be released from his practice restrictions. [Tab 31]

8. On February 15, 2007, the Respondent sent a letter to the Practice Standards Department of the Law Society informing them that he "would like to have the practice restrictions lifted." In his letter, the Respondent confirmed that he was complying with his practice restrictions. [Tab 33]

9. On April 6, 2007, the Respondent formally applied to the Practice Standards Committee to be released from the practice restrictions. In his letter, the Respondent wrote that he has "restricted [his] practice to work for the Government of Canada." [Tab 34]

10. On or about May 3, 2007, the Respondent was informed that the Practice Standards Committee would not release him from his undertaking to only do Federal contract work. [Tabs 35 and 36]

11. Between October 1, 2009 and September 6, 2012, the Respondent did not practise law.

12. Between September 6, 2012 and July 10, 2014, the Respondent practised as an employee of Straith Law Corporation in North Vancouver.

13. Since July 10, 2014, the Respondent has not been entitled to practise law.

14. The Respondent became a non-practising member of the Law Society on January 1, 2015.

15. The Respondent practised primarily in the area of maritime law and civil litigation.

Background

16. Between 2006 and 2009, the Respondent practised law as a sole practitioner through his law firm, Spears and Company in West Vancouver, British Columbia.

17. The Respondent's email address for Spears and Company was [address].

18. Sometime in 2006, the Respondent also began operating a consultancy business under the name H Group.

19. H Group was a consultancy that looks at ocean-related issues, marine security, training of investigators, port and most things marine and also the Arctic.

20. Between 2006 and 2009, H Group did business through O Inc. and operated out of the same office premises as Spears and Company in West Vancouver.

21. Between 1997 and 2009, the Respondent was in a romantic relationship with his neighbour CF.

22. Between 2002 and 2009, the Respondent hired CF as office manager and bookkeeper at Spears and Company. She also assisted with the Respondent`s consulting firm H Group.

23. CF's father DC, CA was Spears and Company's accountant.

24. Through CF, the Respondent met her aunt and uncle, SH and BH.

Subdivision and purchase of property

25. On or about February 24, 2006, the Respondent was approached by SH to assist SH and BH with the zoning and subsequent subdivision of a residential property they owned in Burnaby, British Columbia and the purchase of an 11 foot strip of property from their neighbour.

26. SH and BH knew that the Respondent was a lawyer.

27. Prior to the Respondent's involvement, SH and BH had retained a lawyer with Boughton Law Corporation to work on the subdivision.

28. The Respondent opened a client file with respect to the subdivision matter.

29. The Respondent did not inform SH and BH that he was under a practice restriction to render legal services only to the Department of Justice or the Government of Canada.

30. The Respondent's work on the subdivision consisted primarily of consulting with architects, consulting with and meeting the Planning and Building Department of the City of Burnaby, meeting with a zoning consultant, reviewing correspondence, researching various land use regimes and advising SH and BH.

31. The Respondent met with and spoke with SH and BH and other persons on matters related to the subdivision on numerous occasions from 2006 through 2009.

32. The Respondent drafted notes and memos to SH and BH's subdivision file using his law firm memo template. [Tabs 10 and 11]

33. The Respondent corresponded with an architect and a zoning consultant on behalf of SH and BH using his Spears and Company email account. [Tabs 12 to 16]

34. The Respondent identified himself as the principal of Spears and Company and a Barrister and Solicitor in his signature line of the emails sent to the architect and zoning consultant.

35. The Respondent did not inform the architect or the zoning consultant or the staff of the Planning and Building Department of the City of Burnaby that he was not SH and BH's lawyer or that he was not acting in any legal capacity.

36. The Respondent did not inform the architect, the zoning consultant or the staff of the Planning and Building Department of the City of Burnaby that he was acting as a marine consultant for SH and BH.

37. There was no reference to H Group in any of the Respondent's correspondence or notes to file made in connection with the subdivision.

38. On or about October 15, 2008, the zoning consultant assumed primary conduct of the work on the subdivision on behalf of SH and BH.

39. The Respondent continued to be available to SH and BH to troubleshoot and quarterback whatever was needed.

40. The Respondent expected to be paid a fee for the services he rendered to SH and BH.

Damage claim against City of Burnaby

41. On or about May 10, 2007, the basement of SH and BH's house flooded due to a water main break allegedly caused by the City of Burnaby's contractor.

42. The Respondent met with SH to discuss a potential claim for damages against the City of Burnaby with respect to the water main break.

43. The Respondent opened a file with respect to this matter.

44. The Respondent assisted SH and BH with their damage claim filed with their insurers.

45. The Respondent reviewed and made notes on a draft notice of claim between SH and BH and the City of Burnaby for damages arising from the water leak. [Tab 37]

46. The Respondent reviewed and discussed with SH the without prejudice letters exchanged between SH and the City of Burnaby. [Tabs 38 and Tab 40]

47. There was no reference to H Group in any of the Respondent's correspondence or notes to files made in respect to the claim for water damage.

48. The Respondent expected to be paid a fee for the services he rendered to SH and BH.

Borrowing from SH and BH

49. In 2006, the Respondent was having cash flow issues due to his divorce, restrictions on his law practice and slow payment of his accounts.

50. The Respondent had taken out high interest loans from private lenders as a result of his credit rating with the charter banks being too poor to get financing.

51. SH was aware that the Respondent was borrowing from private lenders and offered to lend him money.

52. The Respondent informed SH and BH that he would prepare the paperwork for the loan.

April 6, 2006 loan — $15,000

53. On or about April 6, 2006, the Respondent drafted a promissory note, an acknowledgement of receipt of funds and a consent to judgment with respect to the $15,000 loan. [Tabs 6, 7 and 9]

54. On or about April 6, 2006, the Respondent met with SH and BH at their residence to pick up a cheque for $15,000 from them and provide them with the signed acknowledgement and consent to judgment.

55. On or about April 15, 2006, the Respondent provided SH and BH with a signed promissory note.

56. The $15,000 loan was intended to be a short term facility due on May 21, 2006 because the Respondent had some funds coming in from the Government of Canada that got delayed.

57. The $15,000 loan was advanced by way of a cheque dated April 6, 2006 payable to Spears and Company and issued by SH and BH. [Tab 5]

58. The Respondent deposited the cheque into Spears and Company's general account. [Tab 5 and Tab 8]

59. On or about July 4, 2006, the Respondent drafted and executed a promissory note, acknowledgement of receipt of funds and consent to judgment with respect to a $7,000 loan. [Tabs 19, 20 and 21]

60. On July 4, 2006, the Respondent met with SH and BH to pick up a cheque for $7,000 from them and provide them with the loan documentation. [Tabs 17 and 18]

61. The $7,000 loan was advanced by way of a cheque payable to K.J. Spears and issued by BH. [Tab 22]

62. The Respondent deposited that cheque into Spears and Company's general account. [Tab 23]

63. The Respondent states that Spears and Company was K. Joseph Spears doing business as Spears and Company.

64. The Respondent needed the money because of a delay in receiving payment from the Government and for his expenses for a trip to Ottawa, office expenses and supporting CF.

65. On or about July 31, 2006, the Respondent spoke to DC, CA, (CF's father, who had also worked as the Respondent's accountant for five years) and SH about repayment of the loans.

66. The Respondent was informed that SH was a bit nervous because he had never done any kind of lending like this.

67. On or about October 4, 2006, the Respondent offered to give SH a collateral mortgage on a property he owned in Halifax as further security for the loans. [Tab 27]

68. The Respondent recorded in his notes a telephone call he had with SH about the collateral mortgage; that he had borrowed a total of $22,500 from SH and BH as of October 4, 2006. [Tab 27]

69. The Respondent has no recollection of receiving $500 in cash but may have received at least $400 in cash from SH and BH at the time of the $7,000 loan transaction.

70. On or about October 10, 2006, the Respondent received a voice message from SH in which he agreed not to charge interest on the money owed if the Respondent could get the matter resolved with the subdivision. [Tab 28]

71. On or about November 29, 2006 and December 27, 2006, the Respondent spoke to SH who again asked about repayment of the loans.

72. At some point, the Respondent discussed with SH repaying the loans from amounts the Respondent would be paid for work done on the subdivision.

December 30, 2008 Loan — $26,000

73. On December 30, 2008, the Respondent borrowed $26,000 from SH and BH.

74. On or about December 20, 2008, the Respondent prepared a letter to SH setting out the terms of a short term credit facility. [Tab 42]

75. On or about December 30, 2008, the Respondent prepared a promissory note and acknowledgement and receipt of funds with respect to the $26,000 loan. [Tabs 43 and 44]

76. The $26,000 loan was advanced by a cheque payable to H Group and issued by BH. [Tab 45]

77. The cheque for $26,000 was deposited into a credit union account for O Inc. doing business as H Group.

78. The Respondent states that the money was used to pay the Law Society as a "penalty that went back to when DC was doing my trust accounting there was some issues around compliance and that's what those funds were used for."

79. At the time of the $26,000 loan, the Respondent was still working on the subdivision for SH and BH.

January 14, 2009 Loan — $6,000.00

80. On or about January 14, 2009, the Respondent borrowed a further $6,000 from SH and BH.

81. The Respondent has not produced any accounting records with respect to the receipt and deposit of the $6,000.

82. In January 2009, the Respondent prepared and executed a promissory note and acknowledgement of receipt of funds in connection with the $6,000 loan. [Tabs 46 and 47]

83. On or about January 14, 2009, the Respondent sent a letter to SH and BH setting out the terms of short term credit facility. [Tab 48]

84. On or about January 14, 2009, the Respondent prepared and executed a further promissory note and acknowledgement of receipt of funds in the amount of $32,000 in connection with the $6,000 loan and the $26,000 loan received in December. [Tabs 49, 50 and 51]

April 3, 2009 Loan — $8,000

85. On or about April 3, 2009, the Respondent borrowed a further $8,000 from SH and BH. [Tabs 48 and 49]

86. On or about April 21, 2009, a citation was issued against the Respondent for failing to comply with his undertaking not to act for clients other than the Department of Justice or the Government of Canada. [Tab 54]

87. The complaint files underlying the citation issued April 21, 2009 were opened in November 2006 and July 2008.

May 19, 2009 Loan — $7,000

88. On or about May 19, 2009, the Respondent borrowed a further $7,000 from SH and BH.

89. On or about May 19, 2009, the Respondent prepared and executed a promissory note in connection with the $7,000 loan. [Tab 53]

90. On the promissory note, the Respondent acknowledged that he owed SH $68,000. [Tab 53]

91. There were no discussions between the Respondent and SH about forgiving the loans.

92. The Respondent borrowed the money from SH and BH for the purposes of his law firm operations, for H Group and because he needed help to pay CF's rent where he spent a substantial amount of time.

93. SH and BH were not represented by any lawyer in connection with any of the loans.

94. The Respondent did not advise SH and BH to get independent legal advice.

Unreported Judgment

95. SH died in August 2011.

96. On or about March 25, 2013, BH commenced an action in the BC Supreme Court against the Respondent in her personal capacity as Executor and Trustee under the Last Will and Testament of SH to recover the amounts owed to SH and BH under the Promissory Notes (the "Debt Action"). An amended Notice of Civil Claim was filed on April 16, 2014. [Tab 55]

97. On or about April 30, 2013, the Respondent filed a Response to Civil Claim. [Tab 56]

98. On January 17, 2014, the Respondent was examined for discovery in the Debt Action.

99. On or about January 30, 2015, the parties to the Debt Action reached a settlement pursuant to which the Respondent agreed to pay the sum of $72,000 plus interest by way of instalments and provided BH with an executed consent order as security. [Tabs 57 and 59]

100. The Respondent failed to make the first required instalment payment under the settlement. [Tab 58]

101. On or about March 14, 2015, BH filed the consent order with the Supreme Court for entry. [Tab 59]

102. On or about March 23, 2015, the Respondent received a letter from the solicitor for BH, enclosing a copy of the entered consent order and an appointment to examine the Respondent in aid of execution on April 13, 2015. [Tab 60]

103. The Respondent did not immediately notify the Law Society in writing of the circumstances of the judgment and his proposal for satisfying the judgment.

104. The Respondent was at all material times aware of his obligation to notify the Law Society of his circumstances of the judgment and his proposal for satisfying the judgment under Rule 3-50 (formerly Rule 3-44).

ADDITIONAL BACKGROUND

[29] The Respondent received his law degree from Dalhousie University where he took courses in Admiralty, Maritime and Environmental Law.

[30] The Respondent worked for Parks Canada and set up the first Whale Watching in Nova Scotia.

[31] The Respondent has had a long-standing interest in resources in the Arctic and oceans.

[32] Much of the Respondent's practice in British Columbia during the 1990s and early 2000s was acting for the Federal Government, including the Department of Justice, the Department of National Defence, Transport Canada, Canadian Coast Guard and Fisheries and Oceans.

BURDEN AND STANDARD OF PROOF

[33] The onus of proof in a discipline hearing is on the Law Society. The standard of proof is on a balance of probabilities.

[34] In *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 43, the hearing panel summarized the onus and standard of proof as follows:

> 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.

PROFESSIONAL MISCONDUCT

[35] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook*, nor in the *Code of Professional Conduct for British Columbia*.

[36] The test whether conduct constitutes professional misconduct was established in the *Law Society of BC v. Martin*, 2005 LSBC 16. The test is:

> Whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so it is professional misconduct.

[37] The panel also observed as follows:

> 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.

ANALYSIS

[38] The key issue in this case is whether SH and BH were clients of the Respondent within the meaning of the *Professional Conduct Handbook*.

[39] In her complaint to the Law Society (Tab 61 of Exhibit 15) and amended Notice of Civil Claim (Tab 55 of Exhibit 15), BH states that the Respondent was their lawyer.

[40] The Respondent's evidence is that, while he rendered professional services to SH and BH, he did not act for them in his capacity as a lawyer. His evidence is that he was providing professional services to them as a marine consultant through H Group and he also wanted to help them because of their close personal relationship.

[41] "Client" was not defined in the *Professional Conduct Handbook* then in force. Guidance may be taken from the *Code of Professional Conduct for British Columbia* which defines "client" as follows:

> **"client"** means a person who:
>
> (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
>
> (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

[42] In *Milverton Capital Corp. v. Thermo Tech Technologies Inc.*, 2002 BCSC 773, Madam Justice Neilson adopted the following indicia with respect to whether a solicitor/client relationship exists at para. 74:

> … a contract or retainer; a file opened by the lawyer; meetings between the lawyer and the party; correspondence between the lawyer and the party; a bill rendered by the lawyer to the party; a bill paid by the party; instructions given by the party to the lawyer; the lawyer acting on the instructions given; statements made by the lawyer that the lawyer is acting

for the party; a reasonable expectation by the party about the lawyer's role; legal advice given; and legal documents created for the party. Not all indicia need to be present.

[43] The overall test is whether "a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party."

[44] The following is an application of the *Milverton* indicia to the facts presented to the Panel:

(a) The Respondent is a lawyer and SH and BH were aware that he was a lawyer. Their niece worked at Spears and Company, and BH's brother had been the Spears and Company accountant for many years.

(b) The Respondent testified that he had no discussions with SH and BH about him not acting as their lawyer with respect to the loans.

(c) SH and BH had previously retained a lawyer at Boughton and Company to work on the real estate subdivision, and had paid him $15,000 for his services and now need help to purchase an 11 foot strip of property needed for the subdivision from their neighbour. They consulted with the Respondent who agreed "to get out and do the deal."

(d) H Group, on the other hand, was a consultancy that looked at ocean-related issues, marine security, training of investigators, ports and most things marine and arctic. In other words, it is unlikely that SH and BH would have hired a marine consultant through H Group to do a real estate subdivision in downtown Burnaby.

(e) The Respondent had numerous meetings with SH and BH as well as with various third parties on behalf of SH and BH.

(f) The Respondent held himself out to third parties as a solicitor acting on behalf of SH and BH. Emails from the Respondent to the zoning consultant and architect were sent using Spears and Company's email address under the name "K. Joseph Spears, Principal Spears and Company Barristers & Solicitors".

(g) The Respondent opened client files with respect to the subdivision and potential litigation against the City of Burnaby. Memos in the subdivision client file were on Spears and Company letterhead. There is

no written record that the Respondent was working on the subdivision file for SH and BH as a consultant with H Group.

(h) The Respondent expected to be paid a "reasonable fee" for his services. He expected to be paid once the subdivision was obtained.

(i) The Respondent received instructions from SH and BH; he reviewed and organized documents with respect to the subdivision and property; he reviewed and gave advice on "without prejudice" letters to the City of Burnaby; he gave advice on drafting a Notice of Claim indicating that the claim against the City of Burnaby would be in negligence based on a failure to warn of a potential surge of water.

(j) The funds borrowed from SH and BH were allocated to costs associated with the Respondent's legal practice (used to pay Law Society fine, pay Law Society fees, pay law firm overhead). The first two loan amounts were deposited to Spears and Company's general account and were recorded in Spears and Company's deposit books. The $26,000 loan amount went to H Group accounts rather than Spears and Company due to "time constraint" so that the Respondent's Law Society fines and fees could be paid so that the Respondent could remain in practice.

(k) The Respondent prepared the promissory notes and consents to judgments on behalf of SH and BH to secure the various loans to him. The consents to judgment were documents for use in a judicial proceeding.

DETERMINATION

[45] Both allegations 1 and 2 of the further amended citation hinge on whether the Respondent acted for SH and BH in his capacity as a lawyer during the time frame alleged therein.

[46] The Respondent's position is that the Law Society has not proven on a balance of probabilities that he was acting as a lawyer when he borrowed $69,000 from SH and BH and when he assisted them in their efforts to subdivide their property in Burnaby as well as with a water back-up.

[47] The Respondent claims that he was well aware of the restriction imposed on his practice by the Law Society of British Columbia that he only work on Federal Government of Canada files at all material times.

[48] The Respondent also claims that, because of his close personal relationship with SH and BH, he wanted to assist them with their outstanding issues with the City of Burnaby and that he was able to do this through his business, H Group.

[49] The Respondent also testified that he saw this work as a way to help pay off some of his outstanding loans to SH and BH.

[50] The Law Society's position is that the Respondent's evidence that he was not rendering or offering legal services to SH and BH is self-serving and that he was attempting to mask the provision of legal services by hiding behind his H Group marine consultancy.

[51] In support of his position the Respondent called lawyer Jay Straith to testify before the Panel.

[52] Mr. Straith had known the Respondent for a considerable period of time and had worked with the Respondent on the Artificial Reef Society. He had also practised law with the Respondent and, in fact, was the Respondent's supervising lawyer pursuant to requirements imposed on the Respondent's practice by the Practice Standards Committee.

[53] Mr. Straith testified that he was well aware that there are times when providing ocean and marine type services being a lawyer but outside the scope of the practice of law requires extreme caution and clear written confirmation from the party you are doing business with.

[54] Mr. Straith testified that he specifically recalls warning the Respondent about this when he borrowed funds from SH and BH.

[55] When asked whether a marine surveyor would commonly provide services on a subdivision plan in the middle of Burnaby, Mr. Straith said no. When asked whether a marine surveyor would provide professional services on a storm sewer back up in the middle of Burnaby, Mr. Straith said no.

[56] The Panel finds that there is no evidence that the Respondent made any effort to advise SH and BH that the work he was doing for them was not in his capacity as a lawyer.

[57] The Panel also finds that the numerous loan security documents prepared by the Respondent on behalf of SH and BH to evidence and secure the personal loans he received from them is clearly and demonstrably the practice of law.

[58] Accordingly with respect to allegations 1 and 2 of the further amended citation and based on all of the evidence before us, the Panel has concluded that SH and BH were clients of the Respondent within the meaning of the *Professional Conduct Handbook*.

[59] The Respondent's second argument is that allegations 1, 2 and 3 of the citation should be dismissed based on the legal principle of "*res judicata*".

[60] The Respondent contends that the Supreme Court of British Columbia had already adjudicated on the issues before the Panel when the consent order for judgment was entered and filed.

[61] The Panel finds that this argument is without merit.

[62] Firstly, because the order was by consent, there was no adjudication on the merits by the Supreme Court. No evidence was considered and no decision rendered.

[63] Secondly and more importantly, the Supreme Court proceeding the Respondent relies upon is a simple action in debt. The Law Society's role is as regulator of the legal profession and the delivery of legal services.

[64] In its capacity as regulator, the Law Society is charged with the responsibility to set and enforce standards in order to protect the public interest. It gets the authority to do this pursuant to the provisions of the *Legal Profession Act*.

[65] The matters before this Panel are regulatory in nature and the issues the Panel must adjudicate on are entirely different than the matter dealt with by a consent order.

[66] The Panel finds that the Respondent's conduct in regards to allegations 1 and 2 constitutes a marked departure from the conduct the Law Society expects of its members and therefore is professional misconduct in both instances.

[67] Because allegation 3 is in the alternative, there is no need for the Panel to make any determination with respect to this allegation.

[68] Allegation 4 relates to the Respondent's conduct in failing to report to the Law Society an unsatisfied monetary judgment against him, contrary to Rule 3-50 of the Law Society Rules.

[69] This Rule forms part of the "financial responsibility" requirements set out in Part 3, Division 6 of the Law Society Rules. It is particularly designed to protect the public's funds being held by lawyers in their trust accounts and rightly so.

[70] If lawyers are having financial difficulties, often evidenced by outstanding judgments against them, the Law Society as regulator should be concerned about whether client funds are adequately protected.

[71] In the matter before this Panel, it is clear that, at the time the consent order for judgment was entered against the Respondent, the Respondent was a non-practising member and did not operate a trust account.

[72] The Panel finds in this particular instance that the Respondent's conduct is a technical breach of Rule 3-50 that does not amount to professional misconduct.