

2004 LSBC 22

Report issued: July 7, 2004

Oral reasons: June 17, 2004

Citation issued: February 12, 2003

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

TIMOTHY JOHN HORDAL

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: June 17, 2004

Panel: Patricia Schmit, Q.C., Chair, Gavin Hume, Q.C., Terence La Liberte, Q.C.

Counsel for the Law Society: Jean Whittow, Q.C.

Counsel for the Respondent: Jerome Ziskrout

Background

[1] On February 12, 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 Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. This citation directed that this Panel enquire into the Respondent's conduct as follows:

1. In a transaction where you acted for J. E. Ltd. and another member acted for CWB, you breached an undertaking dated April 8, 2002 that you would not make use of an (sic) Release forwarded to you by another member until you had provided to that member with certain documents, namely a registrable copy of a Transfer of the I.C.P. mortgage and Estoppel Certificate. On April 10, 2002, you registered the Release without having complied with your undertaking.

2. You induced counsel for CWB to forward to you an executed Release of his client's inter-alia mortgage by means of representations that you knew to be false.

The false representations were:

a) in your letter of December 28, 2001, you requested that CWB sign a release of CWB's inter-alia mortgage on an undertaking from you to register an assignment of the I.C.P. mortgage when you knew that the mortgage had already been assigned to another party and that you could not fulfill the undertaking;

b) in your letter of March 21, 2002 you enclosed an unsigned copy of a transfer of mortgage between J.E. Ltd. and CWB and advised counsel for CWB that your client would be signing

the transfer of the mortgage the following day when you knew that was not true;

c) you advised counsel for CWB that your client was prepared to transfer to CWB its interest in the mortgage when you knew that your client had already transferred its interest in the mortgage to another party and therefore did not have any interest to transfer to CWB.

[2] The Respondent acknowledged proper service of the citation.

AGREED FACTS

[3] An Agreed Statement of Facts was filed as Exhibit 1 in these proceedings. The facts are summarized as follows.

1. The Respondent was called to the Bar June 30, 1976.
2. At all material times, the Respondent practiced law with the firm Wilson & Co. in Abbotsford, British Columbia.
3. At all material times the Respondent acted for J. Enterprises Ltd. (" J.").
4. Prior to July 2001, J. owned certain properties (the " Properties") in which [bank] (" CWB") held a mortgage and assignment of rents.
5. In July 2001 J. sold the Properties to [a business] (" I.C.P.") in a transaction whereby:
 - a) J. granted I.C.P. a mortgage (the " I.C.P. Mortgage") over the Properties; and
 - b) The Respondent received the purchase proceeds on an undertaking to pay sufficient funds to CWB to obligate it to discharge its mortgage and assignment of rents and to provide discharge particulars within a reasonable period.
6. The proceeds of sale were not sufficient to extinguish J.'s debt to CWB. As well, CWB's security extended to other properties held by J. which were not the subject of the sale. CWB therefore agreed to provide a partial release of mortgage and assignment of rents (the " Release") upon the Respondent undertaking to obtain and register an assignment of the ICP Mortgage to CWB.
7. Between July and December, 2001, CWB sought to enforce its assignment of rents against I.C.P. and commenced foreclosure proceedings against J.
8. By December 2001, the Respondent had not obtained and registered a Release, and had not obtained and registered an assignment of the I.C.P. Mortgage to CWB.
9. In early December 2001, J. arranged to borrow money from a third party corporate lender (the " Lender") conditional on J. transferring the I.C.P. Mortgage to the Lender.
10. On December 3, 2001, the Respondent and counsel for CWB, Bruce G. Hall, spoke by telephone concerning the Release and assignment. During the call, Mr. Hall told the Respondent that CWB probably no longer required an assignment of the I.C.P. Mortgage to CWB, but he needed to confirm this with his client.
11. On December 4, 2001, J. transferred the I.C.P. Mortgage to the Lender. The Respondent signed the Transfer of Mortgage as Officer and registered it in the Land Title Office.
12. Upon enquiry by Mr. Hall, CWB advised that it continued to require an assignment of the I.C.P.

Mortgage. By letter dated December 7, 2001, Mr. Hall wrote the Respondent saying:

" Following our telephone conversation on December 3, 2001, and the writer's subsequent discussions with CWB, we advise that the writer was incorrect in suggesting that the CWB would not require an unconditional Assignment of the 2nd Mortgage from [a business] in favour of J . . .

Accordingly, the CWB will require the executed Assignment referred to above, or alternatively, a mortgage of the subject mortgage to be registered . . .

Please forward to our Langley office the appropriate Release (which we understand was never prepared) and we will arrange for its execution and return to you upon your undertaking to provide the above-noted security to the CWB."

13. Upon receiving the above letter, the Respondent did not tell Mr. Hall that J. had already transferred its interest in the I.C.P. Mortgage to the Lender, and therefore did not have any interest to transfer to CWB.

14. By letter dated December 28, 2001, the Respondent forwarded a Release to Mr. Hall for execution. His letter said:

" Please have the enclosed partial release signed and delivered to me on the appropriate undertaking with respect to registering an assignment of the mortgage from [a business] to J. Enterprises Ltd."

15. At the time the Respondent sent this letter, he knew that the I.C.P. Mortgage had already been transferred to the Lender and that he could not fulfill this undertaking.

16. On January 23, 2002, Mr. Hall sent a letter to the Respondent advising that he had received the duly executed Release, and asked that the Respondent provide copies of the proposed form of Assignment. Mr. Hall said that once he approved to the form of security, he would provide the Release to the Respondent on his undertaking not to deal with it until he had provided the executed and registerable Assignment to Mr. Hall.

17. Mr. Hall wrote again on February 4, 2002 and on February 13, 2002, reiterating his position.

18. By letter dated March 21, 2002, the Respondent forwarded an unsigned document purporting to transfer the Mortgage to CWB, saying:

" I have made an appointment for Mr. K.G. of J. Enterprises Ltd. to sign the Transfer of Mortgage tomorrow. If the enclosed are found to be in order, please deliver to me the signed release of mortgage which you are holding."

19. Although the Respondent had made an appointment for Mr. K.G. to sign the Transfer of Mortgage, he knew the statement was misleading because it carried with it the implication that the signing of the Transfer would have immediate legal effect.

20. During this time, J. was attempting to secure alternate financing to pay out all indebtedness to CWB. In particular, J. was trying to obtain a Transfer of the I.C.P. Mortgage back to J. On March 28 and April 4, 2002, the Respondent provided a Transfer of Mortgage to the solicitor for the Lender, in order to have the I.C.P. Mortgage transferred back to J. This document was not executed.

21. By letter dated April 8, 2002, the Respondent wrote to Mr. Hall enclosing a letter and a schedule of payments made by I.C.P. on the I.C.P. Mortgage, and requesting that Mr. Hall forward the Respondent

an executed Release. He did this to falsely represent that J. was prepared to transfer the I.C.P. Mortgage and to induce Mr. Hall into delivering the signed Release.

22. By letter dated April 8, 2002 Mr. Hall wrote to the Respondent saying the form of transfer the Respondent had sent him was unregistrable. Mr. Hall enclosed a registrable form of transfer of the I.C.P. Mortgage for execution by J., and enclosed an executed Release saying:

This Release is provided to you upon your undertaking not to deal with same until you provide to us:

1. an executed and registrable copy of the Transfer for registration in favour of CWB; and
2. the Estoppel Certificate signed by the Borrower.

23. On April 10, 2002, the Respondent registered the Release. He did so in breach of his undertaking to provide Mr. Hall a registerable Transfer and Estoppel Certificate.

24. On May 14, 2002, not knowing that the Release had already been registered, Mr. Hall wrote to the Respondent and demanded that he comply with his undertaking or return the Release.

25. On May 21, 2002, Mr. Hall telephoned the Respondent and reminded him of his undertakings. The Respondent did not inform Mr. Hall that he could not comply with his undertaking.

26. By letter dated June 3, 2002, the Respondent wrote Mr. Hall saying Mr. Hall's discussion with the Respondent on December 3, 2001 constituted a release of CWB's requirement that J. assign the I.C.P. Mortgage.

27. On June 4, 2002, Mr. Hall performed a title search of the Properties and discovered that J. had assigned the I.C.P. Mortgage to the Lender on December 4, 2001. Mr. Hall wrote the Respondent by letter of the same date, saying the Respondent breached his undertaking to provide a Transfer and Estoppel Certificate to CWB.

28. By letter dated June 6, 2002, Mr. Hall wrote the Law Society complaining of the Respondent's breach of undertaking.

29. By letter dated October 11, 2002, the Respondent wrote the Law Society explaining his misconduct in this matter, saying:

" I fully acknowledge that I misled Mr. Hall and breached my undertaking imposed on me by him in his letter dated April 8, 2002. I greatly regret having so misconducted myself."

30. CWB was paid the full amount owed by J. in about February, 2003. Its only financial loss was in increased fees.

31. The Respondent admits that his conduct in misleading Mr. Hall in order to induce Mr. Hall to provide him with the Release and in registering the Release in breach of his undertaking, as set out in the schedule to citation, amounts to professional misconduct.

[4] After considering the circumstances as set out in the Agreed Statement of Facts, and having heard the submissions of counsel, the Panel finds that the Respondent professionally misconducted himself.