2004 LSBC 36
Report issued: September 30, 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 section 47 review concerning

TIMOTHY JOHN HORDAL

Respondent

Decision of the Benchers
on Review

Review date: August 27, 2004

Quorum: Ralston S. Alexander, Q.C., Chair, Joost Blom, Q.C., John Hunter, Q.C., Margaret Ostrowski, Q.C., Grant Taylor, Ross Tunnicliffe, Art Vertlieb, Q.C., James Vilvang, Q.C.

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

Introduction

[1] This was a Hearing of a Review concerning Timothy John Hordal, a member of the Law Society of British Columbia, pursuant to Section 47 of the *Legal Profession Act.*

[2] On February 12th, 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 a 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 C.W.B., 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 (sic) 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.
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> 2. You induced counsel for C.W.B. 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:
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> > (a) in your letter of December 28, 2001, you required that C.W.B. sign a release of C.W.B.'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 C.W.B. and advised counsel for C.W.B. 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 C.W.B. that your client was prepared to transfer to C.W.B. 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 C.W.B.

[3] On June 17, 2004, a Hearing Panel enquired into the member's conduct, and issued oral reasons on that day as to Facts, Verdict and Penalty. Written reasons were issued by the Hearing Panel on July 7,

2004.

[4] The June 17, 2004 Hearing before the Panel proceeded by way of an Agreed Statement of Facts and the Hearing Panel found that the Respondent had professionally misconducted himself in respect of the matters set out in the Citation.

[5] The Panel ordered that the Respondent be reprimanded and that a reprimand be placed on his Professional Conduct record, that the Respondent pay a fine of $12,500.00 by June 17, 2006, that the Respondent be suspended from the practice of law for a period of two months commencing August 7, 2004, that the Respondent pay costs of $5,000.00 by June 17, 2006, and that publication of the Decision would follow in the normal course.

[6] At a meeting of the Discipline Committee of the Law Society held on July 8, 2004, the Discipline Committee resolved to refer the matter of the penalty decision of the Panel to the Benchers for review pursuant to Section 47 of the *Legal Profession Act*. It was the view of the Discipline Committee that in the circumstances of this case, a penalty consisting of a two month suspension plus a fine was insufficient. At the hearing of this review, the Law Society argued that the period of suspension should be eight months.

The Scope of Review by the Benchers under Section 47(3) of the *Legal Profession Act*

[7] Section 47 of the *Legal Profession Act* provides a broad power of review on the part of the Review Panel, with a discretion to substitute its own decision for that of the Panel. The relevant provisions of Section 47 state:

> " (3) within 30 days after the decision of the Panel under Section 36 (4) (5) (6) or (7), the Discipline Committee may refer the matter to the Benchers for a review on the record.
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> (4) If, in the opinion of the Benchers, there are special circumstances, the Benchers may hear evidence that is not part of the record.
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> (5) After a hearing under this section, the Benchers may:
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> a) confirm the decision of the Panel, or
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> b) substitute a decision the Panel could have made under this Act or the Rules.
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> (6) The Benchers may make rules establishing procedures for an application for a review under this section."

[8] The test to be applied by the Benchers on a review under Section 47 has been stated to be " correctness" . The applicability and parameters of this standard are described in Decisions of the Benchers in the cases of *Dobbin* ([1999] L.S.B.C.27), *McNabb* (June 15, 1999), and *Hops* ([1999] L.S.B.C. 29).

[9] In *Hops*, while considering the appropriate scope of review for " findings of proper standards of professional and ethical conduct" , the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971) 10 D.L.R. (3d) 446, at 452:

> " The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is " contrary to the best interests of the public or of the legal profession" . The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province."

[10] It follows from that observation that the Benchers must determine whether the decision of the Hearing

Panel was " correct" , and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47 (5) of the *Legal Profession Act.*

[11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[12] No such deference issues arise on this review as the Panel was not required to make any findings of fact in respect of controversial matters as the hearing proceeded on an Agreed Statement of Facts. In those circumstances, this quorum of Benchers is equally capable of determining an appropriate outcome without being required to defer to the Hearing Panel on findings of fact. This is not to say that we should randomly substitute our judgment for that of the Hearing Panel, but that we must do so if in our view the disposition made by the Hearing Panel, in all of the circumstances, is incorrect.

[13] We note that the correctness test is easier to apply in some circumstances than in others. For example, the question of whether particular conduct amounts to professional misconduct or not is a question that is amenable to the application of the test for correctness. The Benchers are generally able to agree whether or not a particular set of facts constitute professional misconduct. When a Hearing Panel finds that particular facts do not constitute professional misconduct, it is not difficult for a quorum of Benchers to substitute its judgment if there is a view in that quorum that the impugned behaviour constitutes professional misconduct, despite a finding of the Hearing Panel to the contrary.

[14] Similarly, questions of whether particular misconduct should lead to particular penalties can often be easily answered by the Benchers. Should particular conduct lead to penalty of disbarment versus a penalty of suspension, is a question often faced by Benchers, and again is a question which is relatively susceptible to the test for correctness. For example, it is the nearly unanimous view of the Benchers, that a misappropriation of client funds, the ultimate breach in trust, should carry the ultimate penalty of disbarment. Should a panel find to the contrary, it would not be surprising for the Benchers to substitute their judgment in seeking to establish a " correct" determination in that matter.

[15] It follows then that questions which are capable of yes/no answers are most suitable for the application of a correctness test on review. It is equally clear however that that does not fully delimit the range of questions which Benchers on review are asked to examine.

[16] The Benchers are often required to consider whether the quantum of a fine levied on a member, or the duration of a suspension imposed as a result of particular conduct, is the correct fine or is the correct duration for the suspension. Those issues arise in this Review.

[17] While we have determined that these issues are not as easily capable of the application of the correctness test, they are nonetheless questions to which there is a correct answer. If the Benchers in review are satisfied that the proper penalty differs from that imposed by the Hearing Panel, the Benchers must substitute their judgment for that of the Hearing Panel.

[18] In considering questions regarding the correctness of the magnitude of a fine, or of the duration of a suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a " range" of penalties that have been applied in similar situations in the past. This examination is often referred to as a " reasonableness" test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be " reasonable" or within the range of appropriate penalties for similar delicts. In other words, the " correctness" test is informed by the " reasonableness" test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension duration in those circumstances.

[19] Counsel suggested that it would be improper for the Benchers to interfere with the fine quantum and/or suspension duration, as it was suggested that conduct by the Benchers would amount to " tinkering" with the determination of the Hearing Panel. Within certain parameters, we agree that it is inappropriate for the Benchers to " tinker" with determinations made by a Hearing Panel. It would, for example, be inappropriate for the Benchers to determine, in circumstances where a Hearing Panel had levied a fine of $5,000.00, that a fine of $4,000.00 or $6,000.00 would have been more appropriate. That substitution of judgment would clearly amount to tinkering by the Benchers, and would be inappropriate. On the other hand, if the Hearing Panel had determined a fine of $5,000.00 while the Benchers thought that a fine of $15,000.00 was the

correct fine, then clearly it would not, on a relative basis, amount to tinkering with the determination of the Hearing Panel for the Benchers to substitute a fine of $15,000.00 for the fine of $5,000.00 imposed by the Hearing Panel. Similar considerations with respect to orders of magnitude as to penalty duration will arise, and we will address those later in these reasons.

[20] In summary then, we note that we must review the correctness of the Hearing Panel's determination, and when considering issues of magnitude of fine and duration of suspension, if we are satisfied that the magnitude of fine and/or duration of suspension established by the Hearing Panel is incorrect, meaning that it falls outside an appropriate range, then we must substitute our judgment for that of the Hearing Panel.

Facts

[21] The facts in this matter are significant. We will provide a summary of them to provide a context for our decision.

[22] The Respondent acted for J.E.L. at all material times and that Company owned properties which together with other properties, were mortgaged to a Canadian Chartered Bank, C.W.B. In July, 2001, J.E.L. sold the properties to a third party, I.C.P., and in concluding that transaction, took a mortgage back from I.C.P. in part payment of the purchase price. The cash proceeds of the sale were provided to the Respondent on his undertaking to pay sufficient funds to C.W.B. to obligate that bank to discharge its mortgage and assignment of rents against the properties. The cash proceeds of sale were not sufficient to retire J.E.L.'s debt to the C.W.B., but that bank agreed to provide a partial discharge of its mortgage if it received an assignment of the I.C.P. mortgage as additional security. In that regard, the Respondent wrote to C.W.B. and provided the following undertaking:

> " Please deliver to me.....an executed release of mortgage BN269452 and assignment of rents BN269453 with respect to the seven properties listed on the enclosed schedule, on my undertaking not to register the partial release until I have delivered to you an executed assignment from J.E.L. of all of its right, title and interest in and to the second mortgage from I.C.P. covering the seven legal parcels."

[23] Over the ensuing six month period to December of 2001, C.W.B. sought to recover on its security and in December, commenced foreclosure proceedings against J.E.L. By December of 2001, the Respondent had still not obtained and registered a release of the C.W.B. mortgage, and had not obtained and registered an assignment of the I.C.P. mortgage to C.W.B.

[24] At this point in the proceedings, the more troubling behaviour begins. In December, 2001, J.E.L. arranged to borrow money from a third party lender on the security of J.E.L. transferring the I.C.P. mortgage to that Lender. We note here that this is the same mortgage that was to be assigned to C.W.B. pursuant to the undertaking described above.

[25] On December 3, 2001, the Respondent and counsel to C.W.B. had a telephone conversation during which counsel to C.W.B. told the Respondent that C.W.B. probably no longer required an assignment of the I.C.P. mortgage to C.W.B., but that he needed to confirm this with his client.

[26] On December 4, 2001, J.E.L. transferred the I.C.P. mortgage to the third party lender, and the Respondent participated in that transfer as an " officer" under the *Land Title Act* by validating the execution of the Transfer of Mortgage by J.E.L.

[27] Counsel for C.W.B. determined that it was in error in its December 3, 2001 assessment of its client's needs, and on December 7, 2001, advised the Respondent that it continued to require an assignment of the I.C.P. mortgage. In that December 7, 2001 correspondence, counsel for C.W.B. wrote to the Respondent as follows:

> " Following our telephone conversation on December 3, 2001, and the writer's subsequent discussions with C.W.B., we advise that the writer was incorrect in saying that the C.W.B. would not require an unconditional assignment of the second mortgage from I.C.P. in favour of J.E.L..... Accordingly, the C.W.B. will require the executed assignment as 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 C.W.B."

[28] Upon receiving the above letter, the Respondent did not tell counsel to C.W.B. that J.E.L. had already transferred its interest in the I.C.P. mortgage to the third party lender and therefore that it no longer had an interest to transfer to C.W.B. In a letter dated December 28, 2001, the Respondent forwarded a release of the C.W.B. mortgage to counsel for C.W.B. in a letter which contained the following paragraph:

> " 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 I.C.P. to J.E.L."

[29] At the time the Respondent sent this letter, he knew that the I.C.P. mortgage had already been transferred to the third party lender, and that he was offering an undertaking that he could not fulfill.

[30] On January 23, 2002, counsel for C.W.B. wrote the Respondent advising that he had received the duly executed release of mortgage and suggested that he would provide that release once he had reviewed the form of Assignment of Mortgage to be prepared by the Respondent. He went on to say that he would provide that release to the Respondent on his undertaking not to deal with it until he had provided the executed and registrable assignment to counsel for C.W.B.

[31] Counsel for C.W.B. followed up seeking copies of the Assignment of Mortgage and finally by a letter dated March 21, 2002, the Respondent forwarded an unsigned document which purported to transfer the I.C.P. mortgage to C.W.B. This correspondence included the following paragraphs:

> " I have made an appointment for Mr. K.G. of J.E.L. 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."

[32] The Respondent had made an appointment to have the Transfer of Mortgage signed, although he knew when making that statement that it was misleading because it implied that the transfer of that mortgage would have immediate legal effect. Throughout this period of time, J.E.L. was seeking to arrange alternative financing to pay out its indebtedness to C.W.B. It was in particular seeking to obtain a transfer of the I.C.P. mortgage back to J.E.L. so that it could be in a position to provide an assignment of that mortgage to C.W.B. The Respondent went so far as to provide a Transfer of the I.C.P. mortgage to the solicitor for the third party lender, with a view to having the I.C.P. mortgage transferred back to J.E.L. This Transfer of Mortgage was never executed.

[33] On April 8, 2002, the Respondent wrote to counsel for C.W.B. requesting that counsel for C.W.B. forward the executed release of mortgage. He wrote this letter to falsely represent that J.E.L. was in a position to transfer the I.C.P. mortgage to C.W.B. and to induce counsel for C.W.B. to deliver the signed release of mortgage. By a letter written that same day, counsel for C.W.B. wrote to the Respondent enclosing a registrable form of the transfer of the I.C.P. mortgage for execution by J.E.L. and an executed release of mortgage with the following undertaking:

> " The release is provided to you upon your undertaking not to deal with the same until you provide to us
>
> 1) an executed and registrable copy of the transfer for registration in favour of C.W.B.; and
>
> 2) the Estoppel Certificate signed by the Borrower."

[34] On April 10, 2002, the Respondent registered the release and by doing so he was in breach of his undertaking to provide to counsel for C.W.B. the registrable Transfer of Mortgage and Estoppel Certificate.

[35] On May 14, 2002, understandably not realizing that the release had already been registered, counsel for C.W.B. wrote to the Respondent demanding that he comply with his undertaking or return the release. At that time, by reason of his actions described above, the Respondent was unable to do either.

[36] On May 21, 2002, counsel for C.W.B. telephoned the Respondent and reminded him of his undertakings. The Respondent did not inform counsel for C.W.B. during that conversation that he could not comply with his undertaking.

[37] In what can only be described as an act of desperation, by a letter dated June 3, 2002, the Respondent wrote to counsel for C.W.B. suggesting that counsel's conversation on December 3, 2001, amounted to a release of C.W.B.'s requirement that J.E.L. assign the I.C.P. mortgage.

[38] On June 4, 2002, counsel for C.W.B. performed a title search of the properties and discovered that the I.C.P. mortgage had been transferred by J.E.L. to the third party lender on December 4, 2001. Counsel for C.W.B. wrote to the Respondent on that same day saying that the Respondent had breached his undertaking to provide the Transfer of Mortgage and Estoppel Certificate to C.W.B.

[39] Following a complaint by counsel for C.W.B. to the Law Society, the Respondent wrote to the Law Society explaining his misconduct:

> " I fully acknowledge 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."

[40] In or about February of 2003, C.W.B. was paid the full amount owed to it by J.E.L. and its only financial loss was in increased legal fees. The Respondent admitted that his conduct in misleading counsel for C.W.B. in order to induce that counsel to provide him with the release of mortgage, and his conduct in registering the release of mortgage in breach of his undertaking amounted to professional misconduct.

[41] The Respondent has in his professional conduct record, a Conduct Review which was conducted on January 10, 2001. This Conduct Review involved circumstances where the Respondent, when acting for a Vendor of real property, received sale proceeds from another solicitor on an undertaking to pay out and discharge claims of Builders Liens and related Certificates of Pending Litigation. When the Respondent received these funds, he was not in a position to fulfill the undertaking, but despite that inability, paid out the full net sale proceeds to his client. His client had advised him that he had delivered the required 21 day notice to the Lien Claimant and that no Certificate of Pending Litigation had been registered. The client had improperly dealt with the 21 day notice requirements and the notice was ineffective.

[42] With the net proceeds having been distributed to the client, the Respondent was no longer able to discharge the Claims of Builder's Liens, and was not in a position to require his client to attend to the matter. The Respondent attempted to encourage his client to bring the matter to a successful conclusion, but in the absence of leverage, his attempts were unsuccessful. The matter dragged on, until the solicitor for the purchaser of the property reported the Respondent to the Law Society. Ultimately, after one year lapse of time, the Claims of Builder's Liens were cleared from title.

[43] When asked by the Conduct Review Subcommittee if he thought that he might find himself in the same difficulty in the future, the Respondent asserted that he would never again accept an undertaking in similar circumstances, but would ensure that he had the power to carry out the undertaking before accepting it. The Conduct Review Subcommittee recommended that no further action be taken against the Respondent. This determination was based upon the belief, expressed by the Conduct Review Subcommittee, that the Respondent understood the extent to which he had failed to observe his undertaking and would not soon fall into similar circumstances.

Discussion of hearing panel decision

[44] We will comment briefly on the Decision of the Hearing Panel on penalty.

[45] In its considerations, the Panel noted the previous Conduct Review described herein. The Hearing

Panel noted " a disturbing similarity between the facts of the Conduct Review and the matter before us" .

[46] The Panel noted " it appears that despite his assertion to the Conduct Review Subcommittee, the Respondent did not learn his lesson" .

[47] The Hearing Panel struggled to find guidance in the case authorities to an appropriate range of penalty. The Panel reviewed a number of decisions where members had been guilty of deceptive behaviour with a view to misleading others, and they determined that suspensions in those cases ranged from one month to eighteen months. The Panel noted that it was unable to find a clear pattern in the cases of the appropriate range of penalty to be imposed in fact patterns involving breaches of undertaking and misleading behavior. The Panel determined that there was no pattern to be discerned, that each case must be analyzed on its own merits, and compared and balanced according to the factors set out in *LSBC v. Ogilvie* [1999] LSBC 17, and any other relevant factors.

[48] The Panel then considered the *Ogilvie* characteristics, and noted particularly the first of those factors which is the nature and gravity of the proven conduct.

[49] The Panel noted that it found this first characteristic to be the most important and observed as follows:

> " In this case the Respondent received the release on his undertaking not to register it until he fulfilled certain conditions, but deliberately breached that undertaking and then deceived other counsel for a further two months. Honesty, integrity and trustworthiness are fundamental values of the legal profession. They form the underpinning and raison d'etre of the profession. If a lawyer's word cannot be trusted, what is the point of hiring him or her? Therefore the Panel finds that the violation of the duty of honesty and a breach of undertaking amount to grave misconduct."

[50] The Hearing Panel noted under the *Ogilvie* characteristic of need for specific and general deterrence, that the Respondent's conduct was similar to the behaviour which was the subject of the Conduct Review. The Panel noted:

> " This emphasizes the need for specific deterrence as the Respondent did not learn his lesson. The need for specific deterrence supports a penalty of a significant suspension. Balanced against that is the situation of the Respondent personally, his modest income of some $3,900.00 gross income per month, small practice, support from the legal community, complete acknowledgment of the Agreed Statement of Facts and remorse.
>
> Balanced against this is the need for the regulator of the profession to deliver the message to the profession and the public that cases involving breaches of undertaking and misleading are grave, as they damage and undermine the very structure of our society of which the legal profession is one of the pillars."

Discussion

[51] We adopt the view expressed in a recent hearing panel decision (*LSBC v*. *Hammond*, [2004] LSBC 32) where it was noted:

> " We are mindful of the requirement imposed upon the Benchers of the Law Society by Section 3 of the *Legal Professional Act* which requires that the legal profession be governed in the best interests of the public. We note in Gavin McKenzie's publication " Lawyers and Ethics" (Scarboro: Carswell, 1993) under the general heading Purposes of Discipline Proceedings, the following appears:
>
> > " The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence

> in the legal profession. In cases which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. If a lawyer has committed a criminal offence, it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessary have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, non-punitive.
>
> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practice will be terminated regardless of extenuating circumstances and the probability of reoccurrence. If the lawyer misappropriates a substantial sum of client's money, that lawyer's right to practice will almost certainly be determined, for the profession must protect the public against the possibility of a reoccurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession."

[52] In submissions, counsel for the Respondent sought to draw a balance between income " thrown away" during a period of suspension, and a rough matching of that sum with the amount of a fine. The theory advanced was that an appropriate period of suspension could be reduced if a fine equal to the amount of income lost during that period of suspension was imposed. In this particular case, with this Respondent's modest income ($3,900.00 per month gross - $2,700.00 per month net) counsel suggested that a $12,500.00 fine was approximately equal to a four to five month suspension. This analysis was based upon the theory if a member was fined an amount equivalent to his income for a five month period, that would equate to a five month period of suspension. Counsel argued that that five months, together with the two months imposed by the Hearing Panel, amounted to a seven month period of suspension which counsel acknowledged to be appropriate.

[53] The Hearing Panel appears to have considered a similar approach in that they determined firstly that the impugned behaviour would by itself justify a significant period of suspension. The Panel then determined, in the personal circumstances of this Respondent, that a more sizable fine and a reduced period of suspension would suffice.

[54] We disagree. It is the view of the Benchers that there is significant difference in impact between a fine and a period of suspension. There is no useful purpose served in equating income foregone during a period of suspension with a similar amount in fine quantum. The two remedies, both available to Hearing Panels in penalty determinations, are dramatically different in import and impact. While the analogy is imperfect, it is worthy of consideration to compare the option of a fine versus a period of incarceration for a criminal offense. It is apparent that all offenders would choose the fine as the preferred option, particularly if that fine were calculated in some way as a function of the amount of income that the person would forego during a similar period of incarceration.

[55] The imposition of a period of suspension upon a member who has professionally misconducted himself, is a significantly more severe penalty than is the imposition of a fine. In the particular circumstances of this member, it is acknowledged that a fine would have perhaps a greater impact due to the modesty of this member's income, but panels must not seek to balance fine and suspension on a dollar for dollar basis. Suspensions are reserved for the more serious demonstrations of misconduct, and the Benchers on this review are of the view that the conduct demonstrated on these facts is that type of misconduct which warrants a significant period of suspension.

[56] We note that the Hearing Panel expressed concern with the similarity between the facts of the previous Conduct Review and the circumstances of the misconduct before them. The circumstances were essentially identical. What the Hearing Panel failed to note in any meaningful way is the proximity of the circumstances. The events leading to the Conduct Review with respect to the breach of undertaking began in September of 1999. The Conduct Review took place in January of 2001. The sale proceeds were provided to the Respondent in respect of the circumstances of this case, in July of 2001, at most six months after the publication of the report of the Conduct Review Subcommittee.

[57] It is clear that the Conduct Review and its reporting process had absolutely no impact upon this Respondent. Within six months of his promise to deal with matters such as undertakings and client's instructions in a dramatically different way, he once again embarked upon a course of intentional conduct which could only lead to the inevitable problems which were ultimately demonstrated in the circumstances before the Hearing Panel.

[58] It appears to these Benchers sitting in review that the remarkable proximity of the Conduct Review to the events leading to the professional misconduct in this case, was not given appropriate weight.

[59] In a number of paragraphs of its determination, the Hearing Panel referred to the " breach of undertaking" and " misleading" in the same sentence. The Panel referred to these characteristics when seeking guidance as to an appropriate penalty by having regard to the case authorities. While it is not clear that the Hearing Panel regarded these two events of misconduct as being coincident or blended, the penalty imposed by that Panel suggests that it did not give enough weight to the distinctly separate and compounding nature of the two separate events of misconduct.

[60] The breach of undertaking by itself, particularly in light of the recent conduct review history, is a serious event. It demonstrates a regrettable disregard for the sanctity with which lawyers must regard undertakings. It has been variously observed that undertakings among solicitors form the basis upon which the commercial ventures of our clients are accomplished. They are at the heart of the value added to commercial transactions by the legal profession. Undertakings facilitate the efficient exchange of documents and funds. Any breach of undertaking, particularly one undertaken intentionally, must be responded to in the harshest possible terms. It is probable that the specific facts of this case, with the intentional breach of undertaking demonstrated would, by itself, have justified the suspension period suggested by the Hearing Panel.

[61] It is noted that the breach of undertaking, a very serious event of professional misconduct by itself, is not the only behaviour of this Respondent which is deserving of sanction. The carefully crafted and well executed plan to deceive counsel to C.W.B. as to the true state of affairs is a significantly more serious breach of professional conduct than the breach of undertaking described. Behaviour of this nature, visited by one member of the Law Society upon another, must be condemned in the strongest possible terms by any right thinking member of the public and more so by any member of the profession.

[62] On these facts, we note this Respondent to be writing letters to a fellow practitioner enclosing a partial release for execution and requesting that it be signed and returned on condition that a particular undertaking be fulfilled. This correspondence was written at a time when the member knew that the undertaking that was described was utterly incapable of fulfillment and the Respondent acknowledged that the correspondence was crafted and forwarded in the form presented so as to intentionally mislead opposing counsel as to the true state of affairs.

[63] Several months later, this same Respondent forwarded further documents to the same opposing counsel, this time suggesting that he had arranged an appointment for his client to execute the document which was forwarded, which document was the key document from the point of view of perfecting the required security. Once again, at the time that this document was forwarded, the Respondent knew that it was a sham, that the document could not be utilized if signed, and that the purpose of providing this correspondence to the opposing counsel was to mislead that opposing counsel in such a way as to encourage him to provide a discharge of mortgage which this Respondent desperately needed to fulfill an outstanding undertaking. A third letter was forwarded by this Respondent to opposing counsel, again seeking the executed release of mortgage and to further suggest that the Respondent's client was in a position to transfer the mortgage and perfect the security. This state of affairs was not true at the time this third letter was written.

[64] As a result of these three misleading correspondences, opposing counsel was persuaded to provide the release of the existing mortgage and did so.

[65] There is no favourable characterization possible for these facts. It is professional misconduct of a most serious nature. A member embarked upon a course of conduct designed to mislead an opposing lawyer, to provide a result favourable to the misleading lawyer, and to produce a result entirely contrary to the commercial interests of the client of the lawyer being misled. For this behaviour alone, absent the breach of undertaking, the penalty imposed by the Hearing Panel was inadequate.

[66] The Hearing Panel appears to have overlooked the significance of the two separate events of professional misconduct, or at least failed to accord those events sufficient and appropriate weight. The

cumulative effect of the events of misconduct must be considered and factored into the sentencing consideration.

[67] We note in passing that the Panel was considering the matters in question under the time frame of a three and one-half month duration for the deception, and a further two month period of time during which the breach of undertaking was not remedied. While the precise periods in respect of those events are correctly described by the Hearing Panel, the suggestion that these events occurred over a five and one-half month period of time is misleading in itself. The fact is that the initial circumstance leading to this breach of undertaking and subsequent deception occurred over a twelve month period of time, commencing in July of 2001, when the sale proceeds were received, through to and until February of 2003, when the C.W.B. was finally paid the debt which was to be secured by the mortgage assignment in July of 2001. A de facto delay of eighteen months, as opposed to the five and one-half months cited by the Hearing Panel.

[68] We note that this Respondent produced at the Hearing an unprecedented array of letters of support from his colleagues at the Bar in the community in which he practices. The support was characterized as coming from virtually every lawyer of significance in the community in which this member conducted his practice. It is also true that these letters of support were generated from members of the Bar who were fully apprised of the circumstances of the Respondent's misconduct. It is clear that this significant outpouring of support for the Respondent had a bearing upon the Hearing Panel as well it should have done.

[69] It is however improper to confuse popularity with probity. Most letters of support noted that this conduct was out of character for this Respondent. The apparent inconsistency of that observation appeared to be lost on many of the members providing letters of support. They were faced with two essentially identical and concurrent events of misconduct within twelve months of each other, and in those circumstances it must be difficult to suggest that this conduct is out of character. It is clear that this is a very popular member of the community Bar in which he practices. It is however also true that he has significantly impaired the reputation of the legal profession in that community by this conduct. That misconduct must be identified, criticized and penalized in an appropriate manner.

[70] The Benchers sitting in review find that the decision of the Hearing Panel in imposing a fine of $12,500.00 and a period of suspension of two months in respect of the events of misconduct described herein, was incorrect. The Panel improperly equated a period of suspension with a quantum of fine and for the reasons indicated herein that comparison is inappropriate. The Benchers sitting in review are obliged to substitute a penalty that is appropriate if they find the penalty imposed by the Hearing Panel to be incorrect, and we therefore require that the period of suspension to be served by this Respondent for these events of misconduct be increased from the two months imposed by the Hearing Panel to a suspension period of six months in total, commencing August 7, 2004.

[71] In the circumstances of this case, given the magnitude of suspension we have imposed, and having regard to the mistaken view of the Hearing Panel with respect to the comparison of fines and suspensions, we delete the fine imposed by the Hearing Panel as being an inappropriate penalty in the circumstances of this case. The reprimand imposed by the Hearing Panel, and the order of the Hearing Panel as to costs will stand.

[72] With respect to the costs of this appeal, counsel for the Respondent properly pointed out that the Respondent did not request this appeal, and for obvious reasons, did not wish to be here. In the circumstances, and particularly having regard to the outcome we have determined to be appropriate, we direct that each party bear its own costs in respect of this appeal.