

LAW SOCIETY OF ALBERTA  
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of  
Alan Warnock, a Member of the Law Society of Alberta

**INTRODUCTION**

- [1] On October 9, 2009, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Alan Warnock, a Member of the LSA. The Committee was comprised of Anthony G. Young, Chair, Stephen Raby Q.C., Bencher and Norma Sieppert, Bencher. The LSA was represented by Garner Groome. Molly Naber-Sykes, newly appointed Law Society Counsel, accompanied Mr. Groome as an observer. The Member was present at the Hearing and was self represented. There were 2 members of the public that attended the hearing, Robert O. Millard Esq. and a student from the University of Calgary. Also present at the Hearing was a Court Reporter to record the transcript of the Hearing.

**JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS**

- [2] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
- [3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.
- [4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were to be served with a Private Hearing Application was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. The Chair inquired of Counsel for the Member whether he wished to make a Private Hearing Application and he declined. Accordingly, the Chair directed that the Hearing be held in public.

- [5] Exhibits 1 through 5, 7 and 8 contained in the Exhibit Book provided to the Committee and the Member were entered into evidence in the Hearing with the consent of the Committee and Counsel for the LSA and the Member.
- [6] At the commencement of the Hearing, Counsel for the LSA presented the Committee with a Statement of Facts agreed to by the Member on September 30, 2009. With the Consent of the Committee and both Counsel, the Statement of Facts was entered into evidence in the Hearing as Exhibit 6.

### **CITATIONS**

- [7] The Member faced the following Citations:
1. IT IS ALLEGED that you failed to keep your clients, R.S. and R.S. informed regarding material information relating to their property purchase, and such conduct is conduct deserving of sanction.
  2. IT IS ALLEGED that you failed to obtain instructions from your clients, R.S. and R.S. with respect to how to proceed as a result of a problem in their property transaction, and that such conduct is conduct deserving of sanction.

### **SUMMARY OF RESULTS**

- [8] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee merged the 2 Citations into the following Citation:
1. IT IS ALLEGED that you failed to keep your clients, R.S. and R.S. informed regarding material information relating to their property purchase and obtain instructions arising therefrom, and such conduct is conduct deserving of sanction.
- [9] The Member admitted as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. The Member did not, however, admit that these facts amounted to conduct deserving of sanction.
- [10] After the Hearing, the Committee determined that the amended citation was made out and the conduct complained of was deserving of sanction. The Committee found that a reprimand was an appropriate sanction in the circumstances. The Chair administered the reprimand.

### **OPENING STATEMENT**

- [11] Counsel for the LSA stated that the Complainants currently reside in Indonesia. They were happy that they did not have to appear at the Hearing as a result of the agreement regarding the facts in this matter. Exhibit 7, a copy of Residential Real

Estate Purchase Contract [number removed] and Exhibit 8, a letter dated June 13, 2006 from the Member to the Complainants, were introduced to the hearing.

### **AGREED STATEMENT OF FACTS**

[12] The Agreed Statement of Fact is as follows:

#### **“... INTRODUCTION**

1. The Member was admitted to the Bar on September 28, 1990, and practices in Airdrie, Alberta.
2. The Complainants were clients of the Member who now reside, insofar as is known to the Member, in Southeast Asia.

#### **CITATIONS**

3. On October 9, 2008, the Conduct Committee referred the following conduct to hearing:
  1. IT IS ALLEGED THAT you failed to keep your clients, R.S. and R.S., informed regarding material information relating to their property purchase, and that such conduct is conduct deserving of sanction.
  2. IT IS ALLEGED THAT you failed to obtain instructions from your clients, R.S. and R.S., with respect to how to proceed as a result of a problem in their property transaction, and that such conduct is conduct deserving of sanction.

#### **FACTS**

4. The Complainants, R.S and R.S., signed a Real Estate Purchase Contract on May 29, 2006 to purchase a condominium.
5. The Member represented the Complainants. The purchase was scheduled to close on June 16, 2006. One of the joint owners of the property had not signed the sale agreement and subsequent to the closing date, it became apparent that that person was unwilling to sign the Transfer of Land.
6. The Complainants met with the Member on June 13, 2006, to sign the purchase documents and they obtained possession on June 16, 2006. Advised by the vendors' solicitor's office only that there was a "glitch" regarding the transfer documents, in order to obtain possession of the property on June 16, 2006, the cash difference of \$89,487.50 was paid to the vendors' lawyer in trust (until satisfactory title in the purchasers' names was obtained) with no interest to be

paid on the cash to close amount. The funds were advanced on the basis of an assurance from the vendors' solicitor that "We should have the transfer documentation to you shortly". The Member at that time was not aware of any concerns with respect to obtaining title to the property other than there was a delay in receiving the transfer documentation. The Member did not seek instructions at this time from the Complainants.

7. On or about June 22, 2006, the Member learned that the vendors' solicitor was not able to forward the transfer documentation as they were unable to obtain all necessary signatures. On June 22, 2006, the Member wrote the vendors' solicitor inquiring as to the status of the matter and seeking advice as to what steps were being taken to provide the transfer documentation but he did not receive a response. The Member did not advise the Complainants of this information at this time. Between June 19, 2006, and July 26, 2006, the Member's staff unsuccessfully made several inquiries of the vendors' solicitors into the delay in obtaining the transfer.

8. The Complainants were not aware of any problems until July 24, 2006, when they found out from the Condominium Board that there were arrears of condo fees. It was then that they discovered title had not transferred to them. Up until that time they had not heard anything from the Member or his office about the status of their purchase.

9. Mrs. S. spoke to one of the Member's paralegals (who had day to day responsibility for the file) at the Member's office on or about July 27, 2006. The paralegal confirmed that a transfer of land had not been received yet and indicated the Member would speak to the Complainants in a few days with an update on the matter. The Member spoke to Mrs. S. on August 1, 2006, and confirmed that the transfer had not yet been received and that there appeared to be some form of dispute by one of the vendors, resulting in his not signing the Transfer of Land. The member advised that they were attempting to obtain more details from the vendors' lawyer and as he was about to leave on vacation, his partner, Dale Rathgeber, would contact the Complainants when more information was available on the file.

10. Mrs. S. contacted the paralegal and Mr. Rathgeber on August 14, 2006. Mr. Rathgeber advised Mrs. S. that the vendors' solicitor was reviewing the issue and that he would contact the vendors' solicitor again to inquire on the matter.

11. The Complainants say they never received any further follow up from Mr. Rathgeber after August 14, 2006, and so on September 11, 2006 they retained new counsel. However, according to a note on the file Mr. Rathgeber did have a telephone conversation with Mr. S. on August 18, 2006, wherein it appears he essentially advised Mr. S. that the best course of action would be to be patient and let the vendors and their solicitor work out the matter between them. He reminded Mr. S. that this was a rapidly rising real estate market and to abandon

the contract and seek out another condominium would be much more costly. Although they would like this matter completed, in the interim they were not responsible for mortgage payments or any interest to the vendors and therefore they should just be patient. Mr. Rathgeber advised Mr. S. that he would follow up with the vendors' solicitor again.

12. According to the file notes, after several telephone messages left with the vendors' solicitor, Mr. Rathgeber spoke with him on August 24, 2006, wherein he advised Mr. Rathgeber that the Complainants had changed lawyers to deal with the problems surrounding their purchase. Mr. Rathgeber says he left messages with the Complainants to confirm the change in solicitors but no return calls were received from the Complainants. On September 11, 2006, the Member received a letter from the Complainants' new counsel confirming the change.

13. Several months later the matter was resolved by the Complainants' new solicitor, title was transferred, and the Complainants indicate they incurred additional legal fees of approximately \$10,000.00.

#### **ADMISSION OF FACTS**

14. The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. The Member does not, however, admit that these facts amount to conduct deserving of sanction.

15. This Agreed Statement of Facts is not exhaustive and the Member may lead additional evidence not inconsistent with the stated facts herein. The Member acknowledges that the Law Society is not bound by this statement of facts and that it may cross-examine the Member, adduce additional evidence, or otherwise challenge any point of fact it may dispute in this statement.

**THIS AGREED STATEMENT OF FACTS IS MADE THIS "30<sup>th</sup>" DAY OF SEPTEMBER, 2009.**

"Alan G. Warnock"

**Alan G. Warnock"**

[13] The Member was sworn and gave further testimony. The Member readily admitted the facts set out in the Agreed Statement of Facts. He stated that if there was a delay or a transferor was refusing to sign the transfer of land his office would typically call the client. What happened in the instant case was not in keeping with his office's usual practice.

- [14] The Member testified that his office was a busy real estate practice during the period in question. Paralegals in his office had day to day contact with clients. In this case no one called the clients when there appeared to be a problem obtaining the transfer. The Member suggested that (his office) neglected to contact the clients by “oversight”.
- [15] The Member stated that (his office) was comfortable that the delay was not adversely affecting his clients and that the situation was a “good short term situation” because the clients were paying no interest and were in possession of the property.
- [16] The Member stated that between June 22 and June 30, 2006 he wanted to get better information. The file came off his desk.
- [17] The Member then went on vacation and his partner, Mr. Rathgeber was to follow up. The Member did not sense any alarm.

#### **SUBMISSIONS OF COUNSEL FOR THE LSA**

- [18] On June 16, 2006 the Member became aware that there would be a delay in closing. No instructions were sought from the clients at this juncture.
- [19] On June 22, 2006 the Member knew or ought to have known:
- (a) The reasons for the delay in closing;
  - (b) The delay was more than a “glitch”;
  - (c) The reason for the delay was due to the fact that one of transferors was refusing to sign the Transfer of Land;
  - (d) The clients would want to know about the delay in closing and the reason for the delay; and
  - (e) The clients would be shocked.
- [20] Counsel for the LSA discussed the Burden and Standard of Proof in this matter. The Panel must find that the citation against the Member is made out, on the balance of probabilities. Counsel for the LSA referred the Committee to Section 49 (1) of the Legal Professions Act that states:
- “For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that
- (a) is incompatible with the best interests of the public or of the members of the Society, or
  - (b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta."

- [21] Counsel for the LSA also referred the Committee to Chapter 9 Rule 14 of the Professional Code of Conduct:

"A lawyer must keep a client informed as to the progress of the client's matter."

- [22] Reference was also made to the Commentary to Chapter 9 Rule 14:

"A lawyer often assumes that a client has more legal knowledge and understanding than is actually the case, or that the client will not be interested in the routine details of a matter. Both these assumptions can lead to misunderstandings that are detrimental to the lawyer/client relationship. The process of informing, consulting with, and explaining and reporting to the client improves the quality of legal services in fact (since a lawyer must have the matter well in hand to implement this process), while contributing to the client's feeling of involvement and conviction that the lawyer is genuinely concerned about the client's matter.

...

A lawyer's obligation to inform includes the following:

...

(b) fully explaining to the client all matters necessary to ensure appreciation of the client's legal position and accompanying risks, benefits and obligations; ..."

- [23] Counsel for the LSA also brought Rule 5 to the attention of the Committee:

"A lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer."

- [24] In the present case, Counsel for the LSA asks the following question: "What is a reasonable standard to impose?" Counsel for the LSA argues that it is critical to the rights and obligations of a purchaser client if a Vendor refuses to sign a Transfer of Land resulting in the delay of the closing of a real estate transaction.

- [25] Even if the Member had implied authority to complete the real estate transaction it is incumbent upon the Member to obtain instructions when a routine matter changes into something unusual.

## MEMBER'S SUBMISSIONS

- [26] The Member explained that on occasion closing documents arrive late. When this happens his office takes steps to get the purchaser into possession of the new property.
- [27] It is not unusual to receive documents late. As such, the Member argued, it was not necessary to advise the Complainants of the “glitch” that delayed their transaction.
- [28] The Member states that on June 22, 2006 his office received information that one party was refusing to sign. There was no indication that the transaction could not be completed.
- [29] The Member admitted that his office should have advised the Complainants in a timely manner that one party was refusing to sign. This did not occur. It was a mistake.
- [30] The Member argues that the Complainants were not prejudiced. It was a rising real estate market. He argues further that it is highly likely that if his clients were aware of the “glitch” his recommendation would have been to “hold tight”.
- [31] The Member further argues that there was no change in circumstances. The Complainants were not paying interest on the cash to close. The alternative would have been inconvenient to the Complainants. As such, the Member states that any competent lawyer would have continued to work with the Vendors’ lawyer.
- [32] The Member states that he should have obtained instructions but did not do so and submits that the real question is whether this conduct is sanctionable.
- [33] The Member argues that his was not a malicious error. It follows that this error does not meet the standard of damaging the profession generally.

## DECISION

[34] The question in this matter is to determine whether the conduct complained of is deserving of sanction. The conduct complained of is quite simply set out in the citation. The facts that support the citation are not in dispute.

[35] Section 49(1) of the Legal Professions act states:

“For the purposes of this Act, any conduct of a member, arising from incompetence or **otherwise**, that

(a) is incompatible with the best interests of the public ...

is conduct deserving of sanction ...”



- [36] It is fundamental to a lawyer's relationship with a client that advice be given and instructions obtained. The general instructions and authority received by a lawyer at the outset of his retainer to close a routine real estate transaction are not sufficient if that transaction takes an unusual turn.
- [37] When a routine matter evolves into something unusual a lawyer has a duty to keep his client informed about the change. This duty is set out in Chapter 9, Rule 14 of the Professional Code of Conduct.
- [38] The Member failed in this duty.
- [39] When a routine matter becomes unusual the Member also has a duty to explain to the client all matters necessary to ensure appreciation of the client's legal position and accompanying risks, benefits and obligations.
- [40] The Member also failed in this duty.
- [41] In the present case the Member should have, at the very least, informed his clients with respect to the fact that the Vendor was refusing to sign the transfer of land. This advice may have lead to further inquiry by the client. It may have lead to advice being sought by the client and given by the lawyer. Unfortunately, we will never know what could have happened because the lawyer failed to take the fundamental step of keeping his clients informed.
- [42] The failure to inform the clients was not a simple case of inadvertence as argued by the Member. On or about June 22, 2006, the Member learned that the vendors' solicitor was not able to forward the transfer documentation as they were unable to obtain all necessary signatures. On June 22, 2006, the Member wrote the vendors' solicitor enquiring as to the status of the matter and seeking advice as to what steps were being taken to provide the transfer documentation but he did not receive a response. The Member did not advise the Complainants of this information at this time. It would have been a simple matter for the Member to copy his clients on the correspondence sent to the vendors' solicitor. The matter was important enough to merit a specific inquiry by the Member. The Member should have known that it was imperative to seek his clients' instructions at this juncture.
- [43] Counsel for the LSA states that the onus is on the Member to keep his clients informed. The Committee agrees. The Member knew that there was a problem in obtaining a signed transfer. He did not seek instructions from his clients. The Member assumed that the Complainants wanted him to do what he did. The Member argues that they were in a "rising market" and as such there was no prejudice to the client. The difficulty is that we will never know what prejudice the client may have suffered because the clients did not become aware of the "glitch" in a timely fashion. No instructions could be given because no instructions were sought. No advice could be rendered because the clients were unaware that advice should be received. It is impossible to determine the

outcome. In the result the clients were deprived of the opportunity to take alternate action if they so desired. Even though the Member was attempting to bring the matter to its conclusion he usurped his clients' prerogative to receive the Member's advice and to provide their instructions.

[44] The failure to obtain instructions in these circumstances is conduct that is incompatible with the best interests of the Member's clients and as such is conduct deserving of sanction.

### **SANCTION**

[45] There shall be a reprimand without costs. A reprimand is appropriate in the circumstances for the following reasons:

- The Member has no record;
- There was no public mischief;
- This was an isolated incident;
- It appears as if the Member has a good practice;
- The Member has been honest and forthright throughout the proceedings;
- The Member did not shirk the fact that he made a mistake;
- The Member was co-operative and saved time and expense to the LSA; and
- The Member's cooperation made it unnecessary for the Complainants to return to Canada to appear.

[46] The following reprimand was issued by the Chair:

- There was no reason why the Member could not keep his clients informed.
- There was a fundamental issue with the clients' purchase transaction and the Member should have contacted his clients on a timely basis to offer his advice and obtain his clients' instructions.
- A failure of a lawyer to provide advice on a fundamental aspect of a transaction calls into question whether the legal profession should have a monopoly on these types of transactions. As a profession, lawyers must continue to meet the highest standards to ensure the protection of the public.

[47] There shall be no referral to the Attorney General.

[48] There shall be an order for the usual redaction of names of clients and other personal information from the record for the purposes of publication.

All of which is respectfully submitted this 11<sup>th</sup> day of February, 2010.

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Anthony G. Young (Bencher and Chair)

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Stephen Raby Q.C. (Bencher)

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Norma Sieppert (Lay Bencher)