

LAW SOCIETY HEARING

IN THE MATTER OF THE LEGAL PROFESSION ACT AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF W. MURRAY SMITH, A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING DECISION

On September 1, 2009, a hearing committee panel comprised of Stephen Raby, Q.C. (Chair), Anthony G. Young and Norma Sieppert convened at the Law Society offices in Calgary, Alberta to enquire into the conduct of W. Murray Smith (the "Member"). The Law Society of Alberta ("LSA") was represented by Lois MacLean. The Member was present throughout the hearing and was represented by Graham Price, Q.C.

Jurisdiction and Preliminary Matters

1. Ms. MacLean introduced Exhibits 1 through 4, inclusive, to establish the jurisdiction of the hearing committee panel (the "Panel"). There was no objection to the composition of the Panel.
2. Ms. MacLean advised that a private hearing application notice had been served on a member, Andrew Macaig, who had filed the complaint and that Mr. Macaig had indicated that he had no objection to the matter proceeding as a public hearing. Mr. Price similarly had no objection to the matter proceeding in public and accordingly the hearing was conducted in public.

Citations

3. Ms. MacLean advised the Panel that the Member had executed an Agreed Statement of Facts and Admission of Conduct Deserving of Sanction and she tendered the original of such agreement, which was entered as *Exhibit 25*.
4. The Agreed Statement of Facts and Admission of Conduct Deserving of Sanction is reproduced herein (redacted with respect to the names of clients and property addresses):

Agreed Statement of Facts and Admission of Conduct Deserving of Sanction

1. Mr. Smith is a member of the Law Society of Alberta, having been admitted in 1981, Mr. Smith was a member at all times relevant to these proceedings.
2. Mr. Smith faces two citations:
 - (a) It is alleged that you failed to be punctual in commitments made to another lawyer and failed to respond on a timely basis to communications from another lawyer, and that such conduct is conduct deserving of sanction.

- (b) It is alleged that you misled another lawyer, and failed to immediately correct the resulting misapprehension on the part of the other lawyer, and that such conduct is conduct deserving of sanction.
3. The citations arise from files in which Mr. Smith acted for Lender C and four individual purchasers with respect to the purchase of condominiums in Canmore. The four condos at issue are in a development located near Canmore and were numbers 18, 20, 21, and 23.
 4. The developer of the condominium complex was Corporation B, who were represented by Leonard Zenith of Zenith Hookenson.
 5. The history of the correspondence and steps taken with respect to all four condos was identical with respect to all facts which are relevant to this hearing. To avoid duplication, the documentation attached will be for only one condo but is mirrored on the other three.
 6. The sales of each of the four units from Corporation B to the individual purchasers closed in late December 2002, or early January 2003. A copy of the trust letter dated Nov. 22, 2002, from Mr. Zenith to Mr. Smith for Unit 18 is attached as *Exhibit 23*. The trust letters for the other three units were mirrors of that letter.
 7. All four purchasers had arranged for financing through Lender C. The Lender C mortgage on each condominium was to be a first charge.
 8. Corporation B registered an unpaid vendor's lien on the properties on Nov. 28, 2002. At the time that the sales occurred there was also a mortgage on all four titles in favour of Lender J. That mortgage was registered on July 22, 2000 in the amount of \$3,000,000,
 9. On the closing of each purchase, Mr. Smith signed a Solicitor's Interim Report/Requisition of Funds to Lender C which indicated that there were no prior encumbrances. As an example, the Solicitor's Interim Report for Unit 21 is attached as *Exhibit 7, Tab 1*.
 10. All four condominiums were subsequently sold to Corporation P.
 11. A copy of the title to Unit 18 as at Sept. 20, 2006 is attached at *Exhibit 11, Tab 2*.

2003

12. On March 4, 2003, Andrew Maciag of Borden Ladner Gervais LLP wrote to Mr. Smith confirming the he now acted for Lender C with respect to the matter. He noted that more than 8 months had passed since registration of the mortgages, and that there were prior encumbrances still on title. He asked that the issue be addressed, and that the solicitors Final Report on Title be issued. (*Exhibit 6, Tab 1*)

13. On March 19, 2003, Mr. Maciag sent a follow up letter. (*Exhibit 6, Tab 2*)
14. On April 22, 2003, Mr. Maciag sent a follow up letter. (*Exhibit 6, Tab 3*)
15. On May 22, 2003, Mr. Maciag wrote to the Alberta Lawyers Insurance Association (ALIA) notifying them of a potential claim as a result of the failure by Mr. Smith to ensure that Lender C had a first charge against each of the condominiums. (*Exhibit 6*)

2005

16. On April 27, 2005, Mr. Maciag wrote to Mr. Smith. The letter stated that Mr. Smith had previously advised Mr. Maciag that Mr. Smith was "diligently working on removing all unacceptable prior encumbrances...". Mr. Maciag asked for Mr. Smith's written confirmation that all prior encumbrances had been discharged by May 6, 2005. (*Exhibit 7*)
17. On May 10, 2005, Mr. Smith wrote to Mr. Maciag advising in part that "... I am attending to place Lender C mortgages and Assignment of Rents in priority to those instruments or to have them discharged. I shall report to you further in due course." (*Exhibit 8, Tab 1*)

2006

18. On August 3, 2006, Mr. Maciag wrote to Mr. Smith, indicating that Lender C had commenced foreclosure proceedings, and notifying Mr. Smith of a potential claim against him. Mr. Maciag referred to the letter of May 10, 2005 and noted that he had expected to receive the postponement or discharge expeditiously after that letter. (*Exhibit 8, Tab 2*)
19. On September 20, Mr. Maciag wrote to the Law Society stating that in his opinion, Mr. Smith's letter of May 10th, 2005 as quoted above had constituted an undertaking and that in Mr. Maciag's view, Mr. Smith had breached the undertaking. (Counsel for both the Law Society and Mr. Smith note that no citation was directed with respect to the alleged breach of an undertaking.) (*Exhibit 8, Tab 4*)
20. On Sept. 27th, the Law Society wrote to Mr. Maciag advising that Mr. Hiltz (a Complaint Resolution Officer) would be following up. (*Exhibit 9*)
21. On Oct. 2nd, the Law Society wrote to Mr. Smith asking for a written response to the complaint. (*Exhibit 10*)
22. On November 16th, Mr. Smith wrote to Leonard Zenith asking for a discharge of the Mortgage and the Vendor's Lien Caveat. (*Exhibit 11, Tab 1*)
23. On the same date, Mr. Smith wrote to the Law Society. He attached a copy of his letter to Mr. Zenith, and advised that:

Through an oversight on my part I neglected to obtain an undertaking that the Vendor's Lien and Mortgage number [removed] on each of the four (4) Units be discharged or postponed to the Lender C Mortgages and Assignments of Rents.

24. The letter indicated that Mr. Smith would be in touch further as soon as he had a response from Mr. Zenith and instructions from Corporation P. (*Exhibit 11*)
25. On Dec. 21st, the Law Society wrote to Mr. Maciag forwarding Mr. Smith's letter. (*Exhibit 12*)

2007

26. On Jan. 4, 2007, Mr. Smith sent a fax to Mr. Maciag. The fax indicated, in part:

These letters only recently came to my attention The reason they did not come to my attention was due to the sudden departure of my legal assistance of 5 years because of a personal crisis. Your correspondence was misplaced and misfiled and consequently not attended to.

I will respond to each piece of correspondence that I have received from you early next week.

With respect to the complaint to the Law Society, I advise that all four (4) of the units have now been sold, and that being the case, the interest of Lender C in those units will be paid out by the end of January 2007. I am advising Mr. Hiltz accordingly and perhaps the payout of the Lender C interest will resolve your complaint.

I shall communicate with you on all of your correspondence prior to the end of next week. (*emphasis added*) (*Exhibit 13, Tab 1*)

27. No funds were received by Lender C following that letter.
28. On March 21st, Mr. Maciag sent an e-mail to the Law Society attaching a copy of this fax. He noted that nothing further had been received from Mr. Smith following that fax. (*Exhibit 13*)
29. On April 3, the Law Society sent Mr. Smith a demand under s. 53 of the *Legal Profession Act* asking for his formal response to the complaint. Mr. Smith was asked to provide his response within 14 days. (*Exhibit 14*)
30. On April 20, Mr. Smith sent a fax to the Law Society confirming that an extension had been granted to April 30th for his response. (*Exhibit 15*)

31. On May 4th, Mr. Smith wrote to the Law Society. He adopted his previous letter as summarized above. With respect to the complaint by Mr. Maciag that there had been a breach of an undertaking, Mr. Smith denied having made an undertaking as alleged. With respect to the statement in his letter of January 4th that all four units had been sold, Mr. Smith stated that:

The Purchase contracts were subject to financing and none of the sales proceeded.

32. He went on to state that it was his understanding that negotiations with respect to financing were on-going, and that in his opinion it was unlikely that Lender C would sustain any damages. By handwritten "P.S." he attached three letters, all of the same date. (*Exhibit 16*)
33. The first attachment was a letter from Mr. Zenith, in which he advised Mr. Smith that his client Corporation B would postpone its security to the Lender C mortgage. (*Exhibit 16, Tab 1*)
34. The second attachment was Mr. Smith's reply asking for confirmation that the Mortgage Amending Agreement and Vendor's Lien would also be postponed. (*Exhibit 16, Tab 2*)
35. All of that was copied to Mr. Maciag by way of the third letter. (*Exhibit 9, Tab 3*) (*Exhibit 16, Tab 3*)
36. On May 9th, the Law Society asked Mr. Maciag if he had any additional comments, (*Exhibit 17*)

2008

37. On April 9th, 2008, Mr. Smith sent certified copies of all four titles showing postponement of the prior mortgage and caveat and postponement of the Vendor's Caveat in favour of Lender C. (*Exhibit 18*) A copy of one of the titles is attached. (*Exhibit 18, Tab 1*)

All of these facts are agreed to and admitted. I agree that the facts as set out above constitute conduct deserving of sanction and that this is an admission within the meaning of s. 60 of the *Legal Profession Act*.

This agreement is dated the 25th day of August, 2009.

"L.P."

Witness: L.P.

"W. Murray Smith"

W. Murray Smith

5. The Panel was confused over one aspect of the agreed statement of facts. In paragraph 23 thereof, the Member indicated that through an oversight on his part, he neglected to

obtain an undertaking from Mr. Zenith that the existing Vendor's Lien and Mortgage on each of the four units be discharged or postponed to the Lender C mortgages and assignments of rents. *Exhibit 23* is a copy of the trust letter from Mr. Zenith to the Member and on page 3 of that letter, Mr. Zenith in fact undertakes to provide a discharge of such mortgage and caveat but only on the condition that the full cash to close including all interest had been paid to him and released in full. Ms. MacLean and Mr. Price confirmed that the difficulty was that the parties in fact had agreed to allow registration of the transfer and the new Lender C mortgage and related security without the Purchaser tendering the cash difference and in fact it was acknowledged by Mr. Price that the Member had proceeded to registration without the cash difference as had been agreed upon between the Vendor and the Purchaser without the member having addressed his mind as to how he would obtain a discharge or a postponement of the two non-permitted encumbrances if the cash difference was never paid in full.

6. During the sanctioning phase of the hearing, on questioning from the Panel, the Member candidly admitted that while he was acting for all three of the original Purchaser (and mortgagor to Lender C), Lender C and the ultimate purchaser of the units, P Corporation, and while he recognized that as a result of such multiple representation, there was no confidentiality of information and he had a duty to apprise all three of the clients of any material fact that came to his attention, he did not advise Lender C that its mortgage funds had been advanced without the cash difference having been tendered by Lender C's customer.
7. Having clarified these matters and having reviewed the Agreed Statement of Facts and Admission of Conduct Deserving of Sanction, the Panel determined to accept the admission of the Member and agreed that the two citations set forth in the Agreed Statement of Facts were made out.

Submissions re. Sanction

8. Ms. MacLean indicated that with the concurrence of Mr. Price, she would make her submissions regarding sanction after Mr. Price had examined the Member to allow the Member to provide direct evidence that was material to sanctioning.
9. The Member, having been duly sworn, testified as to his career in law and specifically with respect to certain aspects of the matters at issue. Specifically, he testified that:
 - (a) the difficulties that were encountered were in relation to only 4 of 25 units that were concurrently being completed;
 - (b) the difficulty with the lack of payment of the cash difference by the original purchasers was assumed by his other client, P Corporation, who obtained title to the four units in question as a result of each of the individual purchasers exercising an option to sell that they had which required P Corporation to assume their position;
 - (c) the principal of P Corporation had been a client of his for a number of years and although he trusted such individual to honour his obligations, the Member

described such client as being somewhat difficult to deal with as he often had innovative and unusual financing arrangements for his projects; and

- (d) certain of the delays experienced throughout the history of matter were as a result of the sudden departure of his legal assistant of some five years who had not kept the files well organized and had not brought to his attention certain correspondence received from Mr. Macaig, where such correspondence had requested immediate responses.
10. Ms. MacLean suggested that the Panel should look at the first citation from an overall perspective and not focus on the delay in response to a particular communication from Mr. Macaig. She stressed that the reality was that it took the Member five years to remedy the problem that became apparent shortly after Lender C advanced their funds.
 11. Ms. MacLean indicated that in circumstances where there was multiple representation, the Member should have realized that he needed to be very careful in dealing with all of the obligations that he had to the three parties and that, to the contrary, the Member's reaction to the problems that arose appeared to be more consistent with a lower threshold of care. In the result, Ms. MacLean submitted that the Member's manner of dealing with the issues that arose in the face of multiple representation fell well below the standard required of a member of the LSA.
 12. Ms. MacLean suggested that with respect to the second citation, the troubling aspect was not the fact that the Member had initially indicated that the four units in question were about to be sold (which would have immediately solved the outstanding issues), but that when it became apparent that the sale transactions were conditional and when it became apparent that the sale transactions were not going to proceed, the Member did not see fit to communicate at all with Mr. Macaig to advise him of what was transpiring.
 13. Ms. MacLean indicated to the Panel that mitigating factors would include the fact that ultimately there was no loss to Lender C.
 14. Ms. MacLean tendered the record of the Member which was entered as *Exhibit 24*. The record discloses one prior conviction on a completely unrelated matter. Ms. MacLean submitted that the conviction was a relevant factor but due to the fact that it was completely unrelated to the nature of the citations before the Panel, the conviction should have a minor impact on the sanctioning decision.
 15. On balance, Ms. MacLean indicated that she felt that the Panel should impose sanctions of a reprimand plus costs and consideration should be given to a low end fine. Upon questioning from the Panel, Ms. MacLean felt that a low end fine was in the range of \$1,000.00 to \$2,000.00 given that the maximum fine per citation is \$10,000.00.
 16. Mr. Price submitted that the Member has already suffered as a result of these matters. He indicated that Lender C will no longer refer work to the Member and as a result, he has suffered a pecuniary loss.

17. Mr. Price urged the Panel to conclude, with respect to Citation 1, that the mistake the Member made was one mistake that was made right from the outset of this transaction at the time when he allowed the advance from Lender C to occur without properly ensuring a mechanism where he could get the required discharges or postponements. Everything else following therefrom was simply an exacerbation of this one mistake.
18. Mr. Price indicated that mitigating factors were that the Member agreed to the admission of conduct deserving of sanction and thus expedited the hearing process, the Member has been a practising lawyer for almost 50 years in total and that he only had one other prior conviction which was not of the same nature as the conduct giving rise to these citations.
19. Mr. Price referred the Panel to a report of a hearing committee regarding the conduct of Garth Dymond dated February 2, 2009 where the hearing committee in that matter issued a reprimand and ordered costs in circumstances where there was an allegation of a misrepresentation which was similar to Citation 2 in the matter before the Panel. In the Dymond case, the member had used his position as a barrister and solicitor to request a mortgage statement in circumstances where he was attempting to determine the financial position of the mortgagor and was not in fact involved in a transaction relating to the mortgage as his correspondence had suggested.
20. In conclusion, Mr. Price suggested that a reprimand and costs would be an appropriate sanction in these circumstances.

Decision as to Sanction

21. The Panel had regard to the following matters that influenced their decision as to sanction:
 - (a) with respect to Citation 1, the Panel put a good deal of weight into the totality of the Member's conduct in dealing with the problem. While they were prepared to concede Mr. Price's point that the Member essentially only made one mistake, the Panel felt that the Member should have understood that in his multiple representation of three parties, a high onus was on him to attempt to rectify the problem immediately when it became apparent and to ensure that all parties were informed of the status of his efforts in this regard. The fact that it took the Member five years to resolve the problem in the face of significant pressure from Mr. Macaig, was, in the Panel's view, a significant breach of the Member's professional obligations. There appeared to be gaps of many months where the Member didn't appear to do anything in order to attempt to resolve the problem;
 - (b) given the lengthy period of time in which it had taken to attempt to resolve the problem, when the Member advised Mr. Macaig of the potential sales of the four units in question, he had an elevated obligation to ensure that Mr. Macaig was aware as to what transpired with respect to those offers. Instead, the Member completely ignored Mr. Macaig until Mr. Macaig finally demanded to know of the status of those transactions. The Panel concluded that this was a significant breach of the Member's professional obligations;

- (c) the Member cooperated with the process and streamlined the hearing as a result of his execution of the Agreed Statement of Facts and Admission of Conduct Deserving of Sanction;
 - (d) the Member's record was clean other than one relatively minor matter which was unrelated to the citations before the Panel;
 - (e) there was no ultimate pecuniary loss to Lender C; and
 - (f) a couple of the delays in responding to Mr. Macaig were the result of a staffing issue.
22. Taking into account all of the foregoing factors, the Panel concluded that the sanction should be a fine of \$500.00 for each of the two citations for the total of \$1,000.00, a reprimand and actual costs of the hearing, recognizing that as a result of the expedited hearing, the actual costs were expected to be well less than the estimated statement of costs which were tendered as *Exhibit 26*. The Panel concluded that the significant delay in resolving the problems, the complete lack of attention to the matter for lengthy periods of time during that five years and the failure to provide Mr. Macaig the courtesies of keeping him apprised as to the status of matters was such that, from the perspective of the denunciation of such conduct in the public interest and in upholding the integrity of the profession, a small fine was required in respect of each citation.
23. The Chair delivered the reprimand to the Member and specifically noted that the Member failed to meet the standard of conduct required of a member of the LSA in the circumstance of multiple representation and failed to act in the manner consistent with common courtesy towards a fellow member of the LSA. In the result, the Member had diminished the integrity of the profession in the eyes of Lender C, and while that resulted in a pecuniary loss to the Member as a result of the fact that Lender C no longer provides him with work, it also has a detrimental impact on the view of the profession as a whole that Lender C might now have. In addition, the common courtesy and integrity that should be expected of members of the LSA was not provided to Mr. Macaig and accordingly, Mr. Macaig's willingness to assume that basic professional courtesies will be afforded to him by all LSA Members may well also be diminished as a result of the actions of the Member.

Concluding Matters

- 24. The Member shall have 30 days to pay both the fine and the costs from the date of service of the actual statement of costs, failing which the Member shall stand as suspended.
- 25. No referral to the Attorney General is required in this matter.
- 26. No separate notice to the profession is required in respect of this matter.

27. The decision, the evidence and the exhibits in this hearing are to be made available to the public, with the actual name of any client of the Member to be redacted but without redaction of the references to Messrs. Macaig and Zenith.

Stephen Raby, Q.C.

Anthony G. Young

Norma Sieppert