

**THE LAW SOCIETY OF ALBERTA**  
**IN THE MATTER OF AN APPEAL TO THE BENCHERS**  
**OF THE LAW SOCIETY OF ALBERTA**  
**BY JACOBUS DAMEN**  
**A MEMBER OF THE LAW SOCIETY OF ALBERTA**  
**APPEAL PANEL REPORT**

**Pursuant to section 75 of the *Legal Profession Act*  
from the sanction imposed by the Hearing Committee in a report dated  
October 7, 2014**

**Appeal Panel:**

Kent Teskey, Chair

Glen Buick

Sandra Corbett, Q.C.

Donald Cranston, Q.C.

Anne Kirker, Q.C.

Julie Lloyd

Gillian Marriott, Q.C.

Kathleen Ryan, Q.C.

**Appearances:**

Dale Ellert for the Member, Jacobus Damen

Nancy Bains for the Law Society of Alberta

**Hearing Date:**

November 3, 2015

**Hearing Location:**

Law Society of Alberta at 500, 919 – 11<sup>th</sup> Avenue S.W., Calgary, Alberta

## **The Hearing Committee**

1. The Hearing Committee, composed of Brett Code, QC, Nancy Dilts QC and Amal Umar heard evidence on the amended citation that reads:

It is alleged that you failed to be candid when you entered into a business transaction by purchasing matrimonial property from your client and opposing party (former spouse) without that party's knowledge that you were to become the ultimate purchaser, thereby giving rise to an apparent impropriety.

2. The Hearing Committee found him guilty of conduct deserving of sanction, issued a reprimand, and required him to pay the costs of the hearing in the amount of \$6,335.23.
3. The facts surrounding this appeal are straightforward. The Member represented Mr. W. in relation to a divorce action. One of the pieces of matrimonial property involved was a trailer valued at \$16,000, title of which was solely in the name of Mr. W. The client and his ex-wife agreed to sell the trailer, but despite having been advertised on Kijiji for a substantial period of time, it did not sell. At this point, the Member agreed to purchase the trailer from the client for the amount of \$16,000. It is agreed that this was a fair price and the proceeds were distributed equally between husband and wife.
4. For reasons that were never given, Mr. W. and the Member decided to structure the deal by having the Member's stepdaughter's father complete the sale to conceal the fact that the Member was the actual buyer of the trailer. In an agreed statement of facts, the Member stated, "I admit that Derek and I structured the purchase of the trailer to avoid disclosing to anyone that I was the ultimate purchaser of the trailer."
5. The Hearing Committee found that the member had a duty to be transparent in this transaction with his client and that his decision to conceal his involvement as the true buyer gave rise to conduct deserving of sanction.

## **Jurisdiction**

6. The Jurisdiction of the Appeal Panel was conceded by the parties and was established by

the following Exhibits:

Exhibit 1- Hearing Committee, dated October 7, 2014

Exhibit 2- Notice of Appeal of the Member

Exhibit 3- Letter of Appointment, dated August 10, 2015

Exhibit 4- Notice to Attend, dated August 10, 2015

7. The Appeal Record and Hearing Report was acknowledged to have been received by the Member, pursuant to section 75(4)(b) of *the Legal Profession Act*, RSA 2000 c. L-8 (Act).
8. No issue was raised with the composition of the Appeal Panel and as no party applied to have the appeal held in private, it was conducted in public.

### **Standard of Review**

9. It was agreed on appeal that we are to assess the decision of the Hearing Committee on a standard of reasonableness.
10. The question before the Appeal Panel is whether the decision of the Hearing Committee is justifiable, intelligible and transparent and whether it falls within a range of acceptable outcomes which are defensible on both the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, and *Moll v. College of Alberta Psychologists*, 2011 ABCA 110, 410 AR 48.
11. When considering whether the Hearing Committee acted reasonably, it bears comment that conduct deserving of sanction is broadly defined in the Act as conduct that is incompatible with the best interests of the public or of the members of the LSA, or tends to harm the standing of the legal profession generally.

### **Grounds of Appeal**

12. The Member appeals the decision of the Hearing Committee on the following grounds:
  - 1) The Hearing Committee erred in law and fact or mixed law and fact by finding

- that the Member failed to fulfill his duty to his client.
- 2) The Hearing Committee erred in law and fact or mixed law and fact by finding that the Member failed to fulfill his obligations to the LSA and the profession equally.
  - 3) The Hearing Committee, having found that the transaction was fair to the Member's client and to the client's ex-spouse, erred in law by finding that the Member's conduct was deserving of sanction.

### **Argument of the Appellant**

13. Counsel for the Member argued that it was unreasonable to find that the Member had breached his duty of candour, because he only owed a duty of candour to his client and his client was obviously aware of the purchaser. Moreover he did not owe a duty to Mrs. W. and in any event, she was indifferent as to the identity of the buyer so long as a fair price was obtained.
14. It was argued that once there is evidence that the transaction was fair, it is effectively immaterial that the true identity of the buyer was obscured. Counsel for the Member stated that if a fair price was paid, it matters not how the transaction is structured or concluded. Once it is known that a fair transaction has occurred, it cannot be reasonably suggested that any apparent impropriety has occurred.

### **Analysis**

15. We rely upon the reasoning of the Hearing Committee below where they made the following findings, at paragraph 22:

The transaction was created by Mr. Damen with a deliberate intention to conceal his participation as purchaser in the transaction. His obligation as a member of the Law Society is to ensure that the transaction shows the actual terms and the actual parties. In doing a deal with a client, no matter how fair, the actual transaction cannot be concealed. Here, it was so concealed and we find that Mr. Damen's conduct was incompatible with the best interests of the public and of the Members of the society and we find that his conduct tends to harm the standing of the legal profession generally. Mr. Damen's conduct was conduct deserving of sanction.

16. It is clear that the duty of the Member is not to be interpreted in the rigid manner

suggested by his counsel. While the parties agree the transaction was fair, the deliberate concealment of the Member's participation in the transaction from the opposing party is the conduct which has attracted the sanction.

17. The former *Code of Professional Conduct* was in force at the time the relevant events occurred. Chapter 1, Rule 6, to which reference was made in the Hearing Committee's report, confirmed the requirement that lawyers must be candid in their dealings with others. Chapter 1 of the current *Code of Conduct* also requires that lawyers conduct themselves with integrity and uphold the standards of the legal profession. Compliance with the obligation to be candid, to conduct oneself with integrity, and to engage in conduct which is consistent with a lawyer's professional standing, demands more than payment of a fair amount in a transaction with a client. In this case, compliance with the duty of candour required that the transaction be transparent and that the Member disclose to the client's former spouse that he was the intended owner of the trailer. The client's former spouse was the opposing party in the divorce matter for which the client had retained the Member, and received half the proceeds of sale for the trailer.
18. Put in the terms of the Act, if a member chooses to conduct business with a client, it obviously must be a fair transaction, but beyond that it must be conducted in a manner which is consistent with the best interests of the public or of members of the LSA, and in a manner which does not harm the standing of the legal profession. This requires that it be conducted openly and without subterfuge. This was the rationale of the Hearing Committee and we find its decision reasonable.

### **Disposition**

19. The Appeal is dismissed.
20. Costs are imposed against the Member in the amount of \$2,172.98 payable by October 31, 2016.
21. This report and the exhibits entered in this appeal shall be made available to the public, subject to redaction to protect privileged and confidential personal information.

22. Notice of this decision shall be published by the Executive Director in accordance with Rule 10 of the Rules of the LSA.

Dated at the City of Calgary, in the Province of Alberta on this 3<sup>rd</sup> day of February, 2016.

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Kent Teskey (Chair)

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Glen Buick

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