

THE LAW SOCIETY OF ALBERTA  
IN THE MATTER OF THE *LEGAL PROFESSION ACT*  
AND IN THE MATTER OF  
A HEARING REGARDING THE CONDUCT OF  
**JACOBUS DAMEN**,  
A MEMBER OF THE LAW SOCIETY OF ALBERTA

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HEARING COMMITTEE REPORT

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HEARING COMMITTEE:

Brett Code, QC, Chair  
Nancy Dilts, QC, Committee Member  
Amal Umar, Committee Member

COUNSEL:

Heather Spicer, for the Law Society of Alberta  
Dale Ellert, for the Member

MEMBER:

Jacobus Damen

HEARING DATE:

October 7, 2014

HEARING LOCATION:

500, 919 – 11<sup>th</sup> Avenue SW, Calgary, AB

**Introduction**

1. While acting for one of two people involved in a matrimonial dispute, the Member, Mr. Damen, entered into a business transaction with his client. He purchased a trailer that belonged to both his client and his client's former spouse. Although he paid a fair price for the trailer, and although both sellers obtained their proper share of the proceeds, Mr.

Damen structured the transaction by having his step-daughter's father purport to purchase the trailer, thus disguising the fact that Mr. Damen himself had in fact purchased the trailer from his own client. The Hearing Committee found him guilty of conduct deserving of sanction and sanctioned him with a reprimand and by requiring the payment of costs in the amount of \$6,335.23.

## Citations

2. Mr. Damen faced three citations, namely, that he:
  - (a) deliberately misrepresented the substance of a transaction, thus failing to act with honesty and integrity;
  - (b) knew his client had misled another lawyer but failed to correct the misapprehension; and
  - (c) continued to represent his client after he had undertaken to withdraw.
3. The Law Society tendered no evidence in support of citations number 2 and 3 and, therefore, failed to meet the burden of proof on a balance of probabilities. Those two citations are, therefore, dismissed.
4. Citation number 1 was amended by consent and we permitted that amendment. The amended citation reads, as follows:

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.

## Evidence

5. Exhibit 6 was entered by consent. It is an Agreed Statement of Admitted Facts signed by Mr. Damen and by Law Society counsel as of October 7, 2014.
6. Paragraphs 1 to 9 of the Agreed Statement of Admitted Facts state the following:
  - 1) I'm an active and practicing member of the Law Society of Alberta ("the LSA") having been admitted to the LSA on July 24th, 1992.
  - 2) I practice in Calgary, Alberta, almost exclusively in the area of Family Law.

- 3) In 2007, I represented D.W. in his divorce from V.W. In the course of discussions with D.W., he advised me that he and V.W. were selling items of property neither of them wanted to keep. In the Fall of 2007, they were trying to sell their travel trailer. They had previously sold the boat by agreeing to the sale price and then dividing the sale proceeds equally.
- 4) The trailer was advertised for sale in the paper and online, but there was little interest due to the time of the year. Sometime in November and December of 2007, I had discussed with D.W. about purchasing the trailer. D.W. said he would speak with V.W. and find out how much she wanted for the trailer. Sometime in November or December, D.W. advised me that he and V.W. had agreed they would sell the trailer for \$16,000. I agreed to purchase the trailer for this sum. I was aware that the trailer was a matrimonial asset.
- 5) The \$16,000 for the purchase of the travel trailer was paid to D.W. by S.C. by way of cheque drawn on his chequing account dated December 15, 2007. D.W. provided a bill of sale to S.C. in the name of S.C. D.W. was the sole registered owner of the trailer and did not require V.W.'s signature.
- 6) D.W. paid V.W. her half share of the trailer proceeds (\$8,000.00) and she negotiated his cheque on or about December 24, 2007.
- 7) S.C. is my stepdaughter's father. I asked him to provide his cheque to D.W.
- 8) I subsequently paid \$16,000.00 to S.C. for possession of the trailer in January of 2008 and registered it in my name in July of 2008.
- 9) It was always intended that I would be the beneficial owner of the trailer.

### **Analysis and Conclusion**

7. The Law Society concedes, and we find, that the purchase price was fair. That the 50/50 division of the purchase price as between D.W. and V.W. was also fair. That being so, no issue arises as to undue influence or unfair advantage taking, among other things that a lawyer could be proscribed from doing while conducting business with his or her client. We accept that as conceded and agreed.
8. The issue then arises whether the conduct described above is conduct deserving of sanction in accordance with Section 49 of the *Legal Profession Act*. Section 49(1) says the following:

49(1) 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.

9. Mr. Ellert, for Mr. Damen, says that, so long as the transaction was fair and so long as the transaction was not coerced or the result of undue influence or breach of fiduciary duty or some other failing of the lawyer in the performance of his or her solicitor-client obligations, the conduct is not deserving of sanction.

10. Law Society counsel asserts several things relying on particular provisions of the Code of Professional Conduct of the Law Society of Alberta (the "Code").

11. Law Society counsel asserts that Mr. Damen's conduct breached Chapter 6, Rule 9, of the Code.

Chapter 6 says:

"In each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences."

Rule 9 says:

"A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects."

12. The commentary to Rule 9 defines a business transaction as the buying or selling of property such that the transaction before us today is included. The commentary further asserts that, as with all rules in the Code, Rule 9 must be observed in spirit as well as to the letter and asserts that the wisest course for a lawyer is to never engage in a business transaction with a client.

13. But the Code recognizes that a blanket prohibition would fail to acknowledge the realities of lawyer/client relationships and the fact that a particular business transaction may appear to both parties to be mutually advantageous. And it goes on then to caution in

various ways lawyers before they enter into transactions with their clients of the various matters that they ought to consider, including their role as fiduciary and fiduciary obligations, a likely presumption of undue influence and the advice that should often go to a client regarding the need for, or caution regarding the potential need for, independent legal advice.

14. The facts before us in the Agreed Statement of Admitted Facts do not speak clearly to those matters, but what we have and what we know we have is agreement by both parties on the fairness of the transaction, a fact which is fundamental to Rule 9 of Chapter 6 of the Code. Due to the transaction's agreed fairness, it could be said that Mr. Damen did not violate this provision of the Code. Seen in light of his other obligations, however, the manner by which even a fair transaction was undertaken or completed by the lawyer involved may be found to amount to conduct deserving of sanction.

15. Law Society counsel also relies on Rule 6 of Chapter 1 of the Code. Chapter 1, which is entitled "Relationship of the Lawyer to Society and the Justice System", describes its statement of principle as follows:

"A lawyer shares the responsibility of all persons to society and the justice system and, in addition, has certain special duties as an officer of the court and by virtue of the privileges accorded the legal profession, including a duty to ensure that the public has access to the legal system."

Chapter 1, Rule 6 says:

"A lawyer must be courteous and candid in dealings with others."

16. It is important to highlight, since we are talking about the Code of Professional Conduct, that the Preface introduces all of the Rules by saying, in part, the following:

"Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise indicates an unsuitability to practise law. However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a

personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public.”

17. With those rules and those principles in mind, we refer to paragraph 18 of the Agreed Statement of Admitted Facts which says the following:

“I admit that D.W. and I structured the purchase of the trailer *to avoid disclosing to anyone* that I was the ultimate purchaser of the trailer.”

18. Having determined that the transaction was fair to his client and having determined that the transaction was fair to his client's ex-spouse, Mr. Damen chose to enter into a contract of purchase and sale but chose deliberately not to do so in his own name. Rather, he caused his stepdaughter's father to be the person named in the transaction and provided funds to close the transaction to his stepdaughter's father who then closed the transaction and eventually delivered title to Mr. Damen. Our view is that Mr. Damen had an obligation to enter into this transaction in his own name and to disclose that he was a party to that transaction.

19. As a member of the Law Society of Alberta, Mr. Damen has a duty to his client and he has duties to society, to the profession and to others.

20. Did he fulfill his duty to his client? Our answer is no. He bought a trailer at a fair price and then instead of dealing with it forthrightly, he involved his client in a transaction that was not true, that was, to the contrary, *structured to avoid disclosing* the true nature of the transaction. We find that it was structured and designed by Mr. Damen to deceive.

21. Did he fulfill his obligations to society and the profession equally? Our answer is again no. A lawyer has an obligation to the truth. If the transaction is fair, he or she must say so and must act as though it were so, not as though there were something to hide. If it is fair, sign it and disclose it to all of those who might have reason to examine its contents or determine its fairness.

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 therefore 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.

### **Sanction**

23. Our decision on sanction was that Mr. Damen be reprimanded and that he pay costs.

24. The reprimand was delivered by the Chair of the Hearing Committee, which imparted to Mr. Damen that:

Ours is a profession that depends for its success and for public support on the integrity of its members. As heard today we believe that your conduct lacked the integrity expected of our members. For that, you are reprimanded by us.

25. There will not be a fine and Notice to the profession under Section 85(3) will not be issued.

26. Costs will be payable in the amount of \$6,335.23. Mr. Damen has 6 months from the date of the hearing to pay that amount.

Signed as of the 27<sup>th</sup> day of November, 2014.

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Brett Code, Q.C.

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Nancy Dilts, Q.C.

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Amal Umar