

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DAVID A. BOURDON
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Fred R. Fenwick, Q.C., Chairperson (Bencher)
Nancy Dilts, Q.C. – Committee Member (Bencher)
Amal Umar – Committee Member (Lay Bencher)

Appearances

Nancy Bains, Counsel for the Law Society of Alberta (LSA)
Bruce Buckley, Counsel for David A. Bourdon

Hearing Date:

August 27, 2015

Hearing Location:

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

HEARING COMMITTEE REPORT

Jurisdiction

1. At the beginning of the Hearing a binder of agreed Exhibits including jurisdictional exhibits was placed before the Hearing Committee:

Exhibit 1 – Appointment of the Committee;

Exhibit 2 – Notice to Solicitor with Citations;

Exhibit 3 – Notice to Attend and Private Hearing Application Notice; and

Exhibit 4 – Certificate of Membership.

2. Counsel for the LSA and for Mr. Bourdon agreed that the Committee had jurisdiction and the Hearing Committee found that it had jurisdiction. Further, counsel for the LSA and counsel for the member confirmed they had no objections to the composition of the Hearing Committee.

Citations and Sanction

3. On March 6, 2014, a Conduct Committee Panel of the LSA referred the following citations to a hearing:
 1. IT IS ALLEGED THAT you failed to comply with Trust Conditions and that such conduct is deserving of sanction;
 2. IT IS ALLEGED THAT you failed to report the matter to the Alberta Lawyers Insurance Association [ALIA] in a timely manner and that such conduct is deserving of sanction;
 3. IT IS ALLEGED THAT you failed to respond promptly and completely to communications from another lawyer and that such conduct is deserving of sanction; and
 4. IT IS ALLEGED THAT you failed to respond promptly to the Law Society and that such conduct is deserving of sanction.
4. Mr. Bourdon signed a Statement of Agreed Facts and Admission of Guilt on April 1, 2015, which was accepted by the Conduct Committee Panel pursuant to section 60(2) of the *Legal Profession Act* (“Act”), on April 15, 2015. Mr. Bourdon admitted guilt with regard to Citations 1, 2 and 3 and this admission is deemed to be a finding of the Hearing Committee that the conduct is deserving of sanction, pursuant to section 60(4) of the *Act*. The LSA submitted no evidence and sought no finding with regard to Citation 4; it was accordingly dismissed. The Hearing Committee proceeded with the hearing to make a determination on sanction pursuant to section 72 of the *Act*.
5. The Hearing Committee accepted the joint submissions of counsel regarding sanction and imposed a sanction on the member of a \$2,000.00 fine plus actual costs of the Hearing, all to be paid within 90 days of the hearing date.

Facts

6. The facts were set out in an Agreed Statement of Facts and Admission of Guilt (Exhibit 6 in the binder of agreed exhibits).
7. The complicated set of situations set out in the 44 paragraphs of the Agreed Statement of Facts and Admission of Guilt belies the relative simplicity behind the complaint arising out of the improper use of documents and funds sent on specific trust conditions.
8. Mr. Bourdon's clients, the purchasers of residential property, arranged for financing through financiers who were represented by a solicitor, the complainant in this matter. Funds and closing documents were sent to Mr. Bourdon as solicitor for the purchasers on the condition that mortgages securing the borrowed funds be registered in priority to any other encumbrances, except for a short list of permitted (mainly municipal) encumbrances.
9. During the closing of the transaction, it became apparent that the purchasers were approximately \$20,000.00 short of the full purchase price and the vendors registered a vendor's lien caveat on the title. Notwithstanding the instructions and trust conditions imposed by the solicitor for the financiers, Mr. Bourdon registered the mortgages as subsequent encumbrances to the unpaid vendor's lien caveat, and sent the loaned funds (which were to have been protected by registration priority) to the vendors upon closing, without the required registration priority.
10. In between March 2008, when the transactions and the registrations occurred, and January 2012, there was a series of mostly unanswered communications between the complainant solicitor on behalf of the financier and Mr. Bourdon concerning rectifying the registration issue, Mr. Bourdon reporting the matter to his insurer, or otherwise dealing with the issue of the unpaid vendor's lien caveat remaining on the property as a prior charge to the mortgages.
11. We were informed that the caveat has "lapsed" in some fashion by failure to take steps and that recently the financiers have been returned to their priority position by that means as opposed to any payment.

Discussion

12. The importance of trust conditions to commercial practice in this jurisdiction and the importance of strict observance of trust conditions has been highlighted so many times in case reports, bar admission materials, continuing legal education, development of conveyancing protocols, etc., that the Hearing Committee is dismayed that cases like this still come before it.

13. Whatever pressures to close the transaction were exerted on or felt by Mr. Bourdon, his client's inability to raise the full amount of the purchase price was not his personal problem. He knew about the vendor's lien caveat being placed on the property; he knew that he was under trust conditions to place the mortgages in a primary position on the property and he knew that he could not do that in the face of the unpaid vendor's lien caveat. Nonetheless, he chose to breach the trust conditions and allow the financiers' funds to flow through his office in contravention of the trust conditions in the hopes that his clients could raise the shortfall through various vague promises they were making about income tax refunds or alternate financing, none of which (of course) came true.
14. It would have taken one or two letters at the time that the unpaid vendor's lien caveat showed up to either get a postponement of that lien from the vendors or an amendment of the trust conditions from the financiers, or simply to step back and say that the transaction could not be completed. Mr. Bourdon chose not to do that, gambling that his clients could come up with the financing in sufficient time to rectify the breach of trust condition which he already willfully allowed.
15. The various delays that occurred after March 2008 seemed to the Hearing Committee to be Mr. Bourdon simply ignoring the consequences of his wilful mistake, hoping that it would be remedied by the passage of time.
16. Obviously this is no way to conduct a conveyancing practice or to comply with undertakings and trust conditions which are at the heart of any conveyancing practice. Lesson #1 at bar admission courses concerns the close observance of trust conditions and the necessity to not allow responsibility for compliance with trust conditions to fall into the hands of parties other than the solicitor personally.
17. Further, it was learned that Mr. Bourdon was sanctioned in 2008 for matters involving lending money from an estate without proper authority and then failing to disclose the loan to the estate on a timely basis. Casual dealing with funds and failure to deal with "obstacles" on a timely basis bears similarity to this matter, thereby amounting to an aggravating factor.
18. Notwithstanding the aggravating factor, LSA counsel and Mr. Bourdon came before the Hearing Committee with an admission of guilt and an agreed sanction submission of a fine in the global amount of \$2,000.00, actual costs of the hearing, together with a reprimand. The Hearing Committee respects the efforts of the parties in bringing the joint submission to the Committee. We would only reject a joint submission if it was demonstrably unfit and it was acceptable in this matter.

Sanction

19. Mr. Bourdon shall receive a reprimand and shall pay a fine of \$2,000.00 plus actual costs of the hearing.
20. LSA counsel will deliver a statement of the actual costs of the hearing to Mr. Bourdon's counsel within 30 days of the date of this hearing, and the full amount of the fine plus actual costs will be paid by Mr. Bourdon within 90 days of August 27, 2015.
21. Citation 4 is dismissed.

Reprimand

22. A reprimand was delivered to the member by the Chair of the Panel at the Hearing reminding Mr. Bourdon of both the importance of the strict observance of trust conditions and the necessity of getting on top of "mistakes" when they occur.
23. The fundamental mistake of gambling with his clients' ability to fulfill a trust condition which remained his personal responsibility throughout was compounded by his failure to deal with it in a timely fashion afterwards. Both of these are fundamental errors which both affect the public interest, which relies upon the close observance of trust conditions for the conduct of commercial practice in this jurisdiction, and reflect poorly on the reputation of the profession.
24. As well in the regrettable circumstances where mistakes happen (and statistically they may from time to time) they need to be dealt with in a timely, candid and forthright fashion; in this instance, Mr. Bourdon did none of those things.
25. The Hearing Committee is appreciative of the work Mr. Bourdon and his counsel have now done to bring these matters together for resolution, understands that these matters happened at a time of personal strife in Mr. Bourdon's life and notes that the changes that Mr. Bourdon has instituted in his practice. He is apparently withdrawing from private practice to concentrate on a few main clients, with a view to (potentially) going "in house".
26. The Hearing Committee commends Mr. Bourdon for his steps but notes that this situation involved Mr. Bourdon being tempted to breach a trust condition by the assurances of one individual client. Mr. Bourdon, while practicing, will remain a member of the LSA and subject to the Code of Conduct. His obligations to observe trust conditions imposed by other members specifically, and his general obligation to protection of the public and maintenance of the integrity of the profession, specifically, shall remain at the forefront of his professional obligations.

27. The temptation to breach a trust condition of behalf of one's main client or employer might be even harder to resist and the Hearing Committee cautions Mr. Bourdon in this regard. The Code of Conduct together with its annotations, experienced and available practice advisors employed by the Law Society of Alberta together with colleagues and mentors all are available to give Mr. Bourdon advice and guidance should the temptation to either breach a trust condition or delay dealing with a mistake arise again.

Closing Matters

28. The Hearing Committee report, the evidence and exhibits at this Hearing are to be made available to the public subject to redaction to protect privileged communications, the names of any clients and such other confidential personal information as is the usual practice.
29. No notice to the profession will be issued.
30. No referral to the Attorney General is directed.

Dated at the City of Calgary, in the Province of Alberta this 18th day of March, 2016

Fred R. Fenwick, Q.C.

Nancy Dilts, Q.C.

Amal Umar