

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF PAUL KUSHWAHA
A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

[1] On May 26, 2008, a hearing committee comprised of Peter Michalyszyn, Q.C. (Chair), Yvonne Stanford and Stephen Raby, Q.C., convened at the Law Society offices in Calgary, Alberta to inquire into the conduct of Paul Kushwaha. The Law Society was represented by Garner Groome. Mr. Kushwaha was represented by Timothy Meagher.

Citations

[2] The Member faced the following citations:

It is alleged that you engaged in conduct that brings discredit to the profession by facilitating real estate transactions in an actual or apparent mortgage fraud scheme, and that such conduct is conduct deserving of sanction.

It is alleged that you failed to serve your client, F..., and that such conduct is conduct deserving of sanction.

Private Hearing

[3] No application was made to hold any portion of the Hearing in private. However, in these Reasons and for purposes of any transcript, or for purposes of any requests by a member of the public for access to exhibits, no reference is to be made to the names or clients or their counsel other than the Member himself, or to information that identifies the clients or their counsel.

Facts

[4] The following facts were agreed to by the parties, and accepted by the Hearing Committee:

1. The citations in this matter relate to the purchase, sale and mortgage financing of certain residential premises in Calgary, Alberta ("the Property").
2. On June 26, 2001 O.D. and N.S. offered to buy the Property for \$110,000.00 which offer was accepted by the sellers on the same date (the "First Transaction").

3. An amendment of the contract in the First Transaction was prepared. The vendors (W) allege that their signatures were forged. At all material times, the Member was unaware of this allegation. In fact, the signature line for the vendors was left blank on the Member's copy of this document.
4. N.S. was the wife of G.S who acted as the realtor for O.D. and N.S. in the First Transaction.
5. O.D. was a friend of G.S. and N.S.
6. The Member was retained by O.D. and N.S. on or about July 16, 2001 to handle the transfer of the Property. Prior to being retained, the Member did not know O.D.; he had a passing acquaintance with G.S. and may have been introduced to N.S. on one occasion.
7. O.D. and N.S. allegedly purchased the Property as an investment.
8. O.D. initiated contact with the Member.
9. O.D. and G.S and N.S. intended to realize a profit from the eventual resale of the Property which profit would be split equally, one-half to O.D. and one-half to the G.S. and N.S. O.D. contributed \$55,000.00 to the purchase price of \$110,000.00 and the G.S. and N.S. contributed the remainder.
10. O.D. and G.S. instructed the Member to register title to the property in the name of N.S. only. The transfer was executed on July 19, 2001.
11. The Member swore the affidavit of transferee on July 30, 2001, a copy of which was before the hearing, in which he indicates that the Property was transferred for \$110,000.00 and that the present value of the land is also \$110,000.00.
12. The Member swore the affidavit based on the value of the transaction. He made an error in stating that the consideration was cash and mortgage. He should have stated that the consideration was \$110,000.00 cash. The vast bulk of transfers he handles involve consideration of cash and a mortgage.
13. On or about October 15, 2001, N.S. accepted an offer to purchase the Property from P.D. and D.S. for \$155,000.00 to close on November 15, 2001 (the "Second Transaction").
14. P.D. was O.D.'s wife and P.D. was a friend of G.S. and N.S. D.S. was a friend of the P.D. and O.D., and of G.S. and N.S. The Member was not aware of the relationship between these parties.
15. P.D. and D.S. applied to F... for mortgage financing and obtained a commitment letter dated November 15, 2001 in the amount of \$123,520.00.
16. According to the RECA investigation, F... was provided with a feature sheet on the Property prepared by G.S. that indicated the value of the Property to

be \$155,900.00. The RECA investigation has stated that the most recent appraisal on the Property was done in October 2000 showing a value of \$118,500.00. It was not clear that G.S. aware of the appraisal. F... was not aware of the appraisal. To F... the loan application raised no concerns. The loans officer for F... handling this file was inexperienced. The Member was not aware of any of these facts at the time nor could he reasonably have been expected to be aware in the circumstances. Presumably, F... and/or CMHC would have done their own due diligence on the value of the Property.

17. F... retained the Member on or about November 19, 2001 with respect to the mortgage financing. The mortgage instructions were before the panel. They make reference to a "mortgage disk". There were no instructions pertinent to this matter contained in the said disk.
18. The Member represented the vendor and the purchasers in the Second Transaction. He swore the affidavit of value for this transaction based on the value of the transaction. The Member's file number for the First Transaction was 13,526 and for the Second Transaction it was 13,829 showing that he opened 303 files in the four months between. He had no recollection of the affidavit of value sworn in the First Transaction.
19. Mortgage funds were requested from F... and received on or about December 5, 2001. Before the panel was a copy of a cheque from F... in the amount of \$122,000.00.
20. The statement of adjustments for the Second Transaction was before the panel. The proceeds of sale were disbursed by the Member on or about December 6, 2001. The trust cheques were exhibited before the Panel.
21. On or about December 6, 2001 the Member disbursed funds to O.D. and N.S.
22. By December 2, 2001 the Second Transaction had been completed. Title was in the name of O.D. and G.S, the mortgage was registered on title and the Member had completed the performance of his retainer except for final reporting to F.... He reported to F... Calgary on June 18, 2002 by letter.
23. On or about December 7, 2001 the Member received a copy of a residential real estate purchase contract indicating that O.D. and G.S. had accepted an offer dated December 6, 2001 from T.T. and C.N. to purchase the Property for \$136,000.00 with a closing date of January 1, 2002 which offer included an assumption of the F... mortgage in the amount of \$123,500.00 (the "Third Transaction").
24. The Member's file number for this Third Transaction was 13, 884 indicating the Member opened a further 55 files since opening the file for the Second Transaction. The Member did not have a reference to Property Values from the First or Second Transactions. He had no reason to believe or know that the Property was selling for less than it had in the Second Transaction.
25. On or about December 11, 2001 the Member's office requested an assumption statement from F....

26. F... responded on December 14, 2001 with the assumption statement.
27. Based on the assumption statement, the Member's office prepared a statement of adjustments indicating the cash to close in the amount of \$6,277.74.
28. Before the Panel was a copy of a trust cheque from the Member's firm to G.S. and O.D. in the amount of \$7,952.93 representing the net sale proceeds from the Third Transaction.
29. T.T. swore the affidavit of transferee for the Third Transaction.
30. It was not until four years later when this matter was being investigated that the Member had reason to compare the Property values for each of the Three Transactions. Upon review of all three transactions and having been advised of the relationship of the various parties, the Member can see that there is the possibility of mortgage fraud having been committed. The Member has no knowledge of similar circumstances on any of the other transactions for which he provided legal services. The Member has now instituted the following measures which may safeguard against mortgage fraud. He uses PCLaw software to search property addresses and if he learns that he has provided legal services related to that address he reviews the old files in that regard.
31. The Property was sold in 2006 and the F... mortgage was discharged.
32. The website for the Real Estate Council of Alberta indicates that N.S. had not been disciplined as a result of RECA's investigation into this matter.

Submissions of counsel

[5] The Hearing Committee was invited by way of a joint submission to dismiss the citations against the Member. It was submitted that the evidence pointed only to a busy sole practitioner dealing with an alleged rogue realtor and a single property which changed hands on numerous occasions within a short time. There was no evidence that the Member knew or ought to have known of the alleged fraud. There was certainly no evidence that what occurred – which was at worst inadvertence -- was more than an isolated incident, so far as the Member was concerned. There was no evidence that what occurred was part of a pattern of alleged frauds around which the Member should have exercised greater diligence in the interests of the profession and the public.

[6] With the advantage of reflection, arguably the Member missed flags of what might have been a mortgage fraud. (It is of only limited comfort that no actual deprivation occurred – the lender was eventually made whole; for our purposes, however, the test is the risk of deprivation, not necessarily actual deprivation.) Yet as a single incident, it was submitted before the Hearing Committee – and we accepted – that what occurred was not conduct deserving of sanction.

[7] Counsel for the Law Society quite fairly pointed the Hearing Committee to law society discipline cases in this and other jurisdictions in which Members were sanctioned only after multiple failures of duped lawyers to guard against fraudulent transactions:

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Law Society of Alberta v. White [1995] L.S.D.D. No. 292; *Law Society of Upper Canada v. Senjule* [2008] L.S.D.D. No. 15.

[8] Moreover, the Panel accepted commentary that since 2001, real estate practice had seen stricter obligations on solicitors when properties were the subject of multiple transactions, as here, within a short period of time. This was not the usual practice in Alberta at the time of these transactions.

Decision

[9] The Panel, having reviewed all of the evidence and having heard submissions, found insufficient evidence to conclude the Member had engaged in conduct deserving of sanction. As such, both Citations were dismissed.

[10] That said, the Panel commented that its dismissal of the citations was not meant to signal that in every case isolated failures to detect apparent mortgage fraud will escape sanction. And the Panel took comfort that in the Member's case, both his practice had become more careful, and in line with the evolved expectations of his lender clients, such that even isolated instances of alleged mortgage fraud would be unlikely to go undetected.

Miscellaneous matters

[11] With regard to Exhibits, the Panel directed that Exhibits be made available for inspection but on the basis that the identities of clients and counsel other than the Member himself be kept private.

Dated this 25th day of July, 2008.

Peter Michalyshyn, Q.C., Chair

Yvonne Stanford - Member

Stephen Raby, Q.C. - Member