

Case Name:
LAW SOCIETY OF ALBERTA v. MING J. FONG

**IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
MING J. FONG, A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**LAW SOCIETY HEARING FILE: HE20090057
HEARING COMMITTEE
PANEL: JOHN HIGGERTY, Q.C.,-CHAIR, FREDERICA SCHUTZ, Q.C., AND
MIRIAM CAREY, PH.D.**

HEARD: CALGARY, ALBERTA, NOVEMBER 16 AND 17, 2010
DECISION: NOVEMBER 17, 2010
SANCTION: NOVEMBER 17, 2010

APPEARANCES:

M. Naber-Sykes, for the Law Society.
T. Meagher, for the member.

DECISION

INTRODUCTION

1. On November 16 and 17, 2010, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Ming J. Fong. The Member was present throughout the hearing.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 – 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor with acknowledgements of service, the Notice to Attend with acknowledgement of service and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Letter of Exercise of Discretion re: Private Hearing Application Notices was entered as Exhibit 5. These exhibits were entered into evidence by consent.
3. There was no objection by the Member’s counsel or counsel for the LSA regarding the constitution of the Hearing Committee.
4. The entire Hearing was conducted in public.

BACKGROUND

5. This matter arises from the Member's involvement in two entirely separate legal transactions. The first which, concerned a mortgage and took place between May 1, 2006 and September 12, 2008, is referred to as "The McFarlane Complaint". The second is characterized as "The H complaint" and concerns a real estate transaction which commenced on April 10, 2007 and was eventually concluded by court proceedings on June 2, 2009.

THE MCFARLANE COMPLAINT

6. The member acted for N, a business operator, who borrowed \$300,000.00 from a banking institution, which was represented by James McFarlane, a member of the LSA.
7. By a letter dated May 1, 2006, Mr McFarlane sent Mr. Fong his firm's trust cheque for \$97,188.18 on the express trust condition that Mr. Fong provide him a certified copy of title ("CCT") to the lands (as defined in that letter) evidencing discharge of the mortgage registered in favour of Alberta numbered company X, "within a reasonable period of time".
8. Mr. Fong paid out the \$97,188.18 on May 11, 2006, but did not discharge the mortgage until September 12, 2008.
9. Mr. McFarlane wrote to Mr. Fong on June 27, 2006 to request the CCT. Mr. Fong did not respond.
10. On November 5, 2007 Mr. McFarlane again wrote to Mr. Fong requesting the CCT. Mr. Fong left a voice message on November 7, 2007.
11. Mr McFarlane further sought the CCT from Mr. Fong, by various means of communication, on November 7 and 26 of 2007, and on January 8 and 14 of 2008. On the latter occasion, Mr. McFarlane's assistant informed Mr. Fong that his client N would not be considered for any further loans by Mr. McFarlane's client (the bank) until the CCT was provided.
12. On January 28, 2008, Mr Fong wrote to say the mortgage had not been discharged. He wrote again on March 7, 2008 describing his efforts to obtain the discharge, and advised that he expected to be in a position to make the appropriate court application the following week.
13. On May 1, 2008, Mr. McFarlane again wrote to Mr. Fong to request the CCT. Mr Fong did not reply. Mr McFarlane emailed Mr. Fong on July 25, 2008 once more demanding the CCT.

14. The LSA continued with Mr. McFarlane's requests for the CCT at this point, and on September 16, 2008 Mr. Fong sent Mr. McFarlane proof of the mortgage discharge which had occurred on September 12, 2008.

THE H COMPLAINT

15. Client "H" entered into a residential real estate purchase contract on April 10, 2007. The vendors were "O" and "Z". H instructed Mr. Fong to put the property in the name of "C" as assignee.
16. Mr. Fong acted for O, Z, and C.
17. On or about July 23, 2007, the cash to close of \$59,000.00 was given to Mr. Fong's firm, German Fong Albus.
18. On July 30, 2007, vendors O and Z signed a transfer of land for the very same house to "T" in consideration of \$540,859.00, the same amount as client C was to pay. Mr. Fong witnessed the transfer and effected the registration on January 28, 2008. He did not inform his client, C.
19. On October 20, 2007, T signed a transfer of land for the same house to C. The instrument was witnessed by Mr. Fong. He did not inform his client, C.
20. On January 28, 2008, T became the registered owner of the house. Mr. Fong, who effected the registration, did not inform client C.
21. Client C became the registered owner of the very same house on March 25, 2008, when Mr. Fong registered the transfer.
22. C retained a new lawyer, George Fixler, later that year. In five letters written to Mr. Fong between December 4, 2008 and January 6, 2009, Mr. Fixler demanded to know why Mr. Fong, as C's lawyer, had transferred title of the house to T on January 28, 2008.
23. H and C complained to the LSA on January 13, 2009. The LSA forwarded the complaint to Mr. Fong and requested a response by February 20, 2009. Mr. Fong asked for an extension to February 23, 2009, which was granted. He did respond on that date, but the LSA deemed his reply as "unresponsive", and asked for a proper reply by March 27, 2009. Mr. Fong responded on April 6, 2009.

CITATIONS

24. As a result of the above matters, the Member faced the following citations:

The McFarlane Complaint Citations

Citation 1: IT IS ALLEGED that you breached the trust condition imposed on you by opposing counsel to provide a clear copy of title, and that such conduct is conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you failed to respond to opposing counsel on a timely basis, and that such conduct is conduct deserving of sanction.

The H Complaint Citations

Citation 3: IT IS ALLEGED you were in a conflict of interest or potential conflict of interest and failed to obtain the necessary consent permitting you to act on behalf of the vendor, and that such conduct is conduct deserving of sanction.

Citation 4: IT IS ALLEGED that you failed to obtain instructions from your client, the buyer, and that such conduct is conduct deserving of sanction.

Citation 5: IT IS ALLEGED that you implemented instructions from the vendor that were contrary to professional ethics, and that such conduct is conduct deserving of sanction.

Citation 6: IT IS ALLEGED that you failed to fulfill your commitments to your client, and that such conduct is conduct deserving of sanction.

Citation 7: IT IS ALLEGED that you failed to respond to communications from your client that contemplated a reply, and that such conduct is conduct deserving of sanction.

Citation 8: IT IS ALLEGED that you failed to ensure the buyer was fully informed as to the progress of the transaction, and that such conduct is conduct deserving of sanction.

Citation 9: IT IS ALLEGED that you failed to respond to communications from the buyer's subsequent counsel that contemplated a reply, and that such conduct is conduct deserving of sanction.

Citation 10: IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

25. On the basis of the evidence received at the Hearing and for the reasons outlined below, the Hearing Committee finds that citations 1, 2, 3, 4, 5, 6, 8, and 10 are proven and the Member is guilty of conduct deserving of sanction with regard to those citations.
26. The Hearing Committee finds that citations 7 and 9 have not been proven by the LSA, and the Member is found not guilty of conduct deserving of sanction.

SUMMARY OF EVIDENCE AND FINDINGS OF FACT

27. Exhibits 6-to-50 and exhibits 52-to-67 were entered into evidence by consent or through witnesses during the course of the proceedings.
28. Mr Meagher objected to the admission into evidence of Exhibit 51, Ms. H's complaint by letter to the LSA about the Member's conduct. Counsel's objection was based primarily on the fact that Ms. H's failure to appear for the Hearing rendered cross-examination impossible. After hearing argument the Hearing Committee ruled that the letter should be entered into evidence. The Committee considered the plain meaning of Section 68(1) of the *Legal Profession Act*, coupled with the fact that a copy of the letter had been provided to Mr. Fong as an attachment to LSA correspondence dated January 30, 2009 (Exhibit 37). So the contents were no surprise.
29. The Hearing Committee heard *viva voca* evidence from George Fixler, subsequent counsel for Ms. H and Ms. C, and from the member Mr. Fong.
30. At the conclusion of testimony, the Hearing Committee heard argument as to whether the conduct of Mr. Fong was conduct deserving of sanction.

CITATION 1

31. The evidence of the LSA concerning the alleged breach of a trust condition was submitted by an Agreed Statement of Facts (Exhibit 42) and is summarized at Paragraphs 6-to-14 above.
32. Mr. Fong testified on his own behalf. He acknowledged that he accepted the trust condition as set out in Exhibit 6, namely, to provide Mr. McFarlane with a CCT showing that the mortgage in favour of the numbered company was discharged, "within a reasonable period of time". Such a discharge, he testified, would take some 60-90 days with a bank, but longer with a numbered company.
33. Mr. Fong proceeded to blame the two year and four month delay on the lack of cooperation from the principal of the numbered company, who wouldn't come in

and provide the requisite signatures. Mr. Fong's client suffered as a result, in that the lending institution made it clear she would receive no further loans until the mortgage was discharged.

- 34.** The Hearing Committee finds the Member's explanation both astounding and unacceptable. A lawyer with more than 25 years at the Bar, with his primary focus on real estate and business transactions, he left the Hearing Committee with the distinct impression that he believed it was satisfactory conduct for a lawyer to accept a clear trust condition, disburse the funds, and then try later on to get the signatures that would put him in compliance. It should have been simple. No signatures? No money.
- 35.** Likewise, the Hearing Committee finds that the 28 month delay in obtaining the CCT is not a "reasonable period of time" because, for all intents and purposes, Mr. Fong ignored the trust condition.
- 36.** For the above reasons the Panel finds Mr. Fong guilty of Citation 1.

CITATION 2

- 37.** Paragraphs 9 through 13 above set out Mr. McFarlane's extraordinary efforts to obtain the CCT. He also complained to the LSA. Mr. Fong did not reply at all to at least three requests for a status update from Mr. McFarlane. The trust condition was imposed on May 1, 2006. Mr. Fong only gave something resembling an explanation in writing to Mr. McFarlane on January 28, 2008. This was after the LSA became involved. The Panel finds this totally unacceptable.
- 38.** For the above reasons, the Hearing Committee finds the Member guilty of Citation 2.

CITATION 3

- 39.** Mr. Fong acted for both the vendors (O and Z), as well as the purchaser, C. The purchaser acknowledged Mr. Fong's retainer letter (Exhibit 45) setting out the nature of the conflict and the basic conditions under which he could continue to act for the vendors and purchaser. Nevertheless, Mr. Fong took instructions at a later point in time from O and Z and transferred the very same house to T. He did not inform his client C, who clearly had a beneficial interest.
- 40.** Mr. Fong testified that he performed the transfer to T because the latter was part of the same business group as the vendors O and Z. The transfer would mean that T would also be liable to CMHC in the event of a foreclosure. Mr. Fong did not see any liability to his client C, as T and the vendors were known to him as reliable and trustworthy business people. He had obtained a transfer for the

property from T to C, so he felt C was protected. Approximately two months later he registered the property in the name of C.

41. Mr. Fixler, C's subsequent lawyer, testified that he did not see any gain or detriment to C as a result of the transfer to T, but he found it strange.
42. Under cross examination, Mr. Fong acknowledged that H, as attorney for C, had beneficial ownership of the property in question from July 23, 2007 onwards. After some pointed questions from Panel members Dr. Carey and Ms. Schutz, he further acknowledged that there was potential jeopardy to C's beneficial ownership if T had died while he was the registered owner, or if T transferred title to a third party, or mortgaged it, or if his judgement creditors registered writs against it.
43. The Hearing Committee rejects the explanation of Mr. Fong. His client C had a beneficial interest in a property. He facilitated the transfer of that same property to a third party. Fundamentally, that is a conflict of interest and the original retainer letter does not cover it.
44. The panel finds Mr. Fong guilty of Citation 3.

CITATION 4

45. The Panel having found Mr. Fong to be in a conflict of interest with regards to the rights of C and the transfer to T, it necessarily flows that he had a duty to seek instructions from C. The Hearing Committee finds him guilty of citation 4.

CITATION 5

46. Legal niceties about beneficial ownership aside, Mr. Fong is C's lawyer to help her buy a property. In a fundamental sense, O and Z did not have anything to sell when they sold the property to T, because it had already been sold to Mr. Fong's other client, C. Mr. Fong thinks that this transfer and his failure to inform C is acceptable because C does not suffer any harm and she gets the property in the end.
47. The Hearing Committee finds that an ordinary member of the public would look at these actions and find them both strange and contemptible. Mr. Fong was charged with looking out for C's legal rights as to the property. He ignored them, at least temporarily, to attend to the business interests of O, Z, and T.
48. For the above reasons, the Committee finds Mr. Fong guilty of Citation 5.

CITATION 6

49. Mr. Fong received instructions to transfer property from O and Z to C, receiving cash to close of \$59,000.00 on July 23, 2007. He did not complete the registration until March 2, 2008, and during the intervening period he assisted T to become the registered owner for approximately two months.

50. The second duty Mr. Fong had to the purchaser C was to facilitate the assumption of a mortgage on the property. At meetings with H (On behalf of C) on May 30, 2008 and July 15, 2008, Mr. Fong assured that the mortgage assumption was being looked after. In fact, nothing had been done. It was only by letter dated November 14, 2008 that Mr. Fong informed the mortgage holder that C was the new registered owner.

51. The Hearing Committee finds Mr. Fong guilty of Citation 6.

CITATION 7

52. Counsel for the LSA elected not to press for a finding of guilt on Citation 7 and the Committee finds Mr. Fong not guilty.

CITATION 8

53. By his own admission Mr. Fong did not inform C of the transfer to T. Nor did the Member inform C about progress on the mortgage assumption question. After meetings with H on this issue on May 30, 2008 and July 15, 2008, he did not even check his file to confirm what, if anything, had been done.

54. For the above reasons the Committee finds Mr. Fong guilty of Citation 8.

CITATION 9

55. H and C retained George Fixler as new counsel, who sent off five letters in about a month, essentially demanding an explanation of the transfer to T. Given the relatively short period of time and the realities of the Christmas season, the Hearing Committee is not convinced that Mr. Fong failed to respond in a reasonable period of time.

56. For the above reasons the Panel finds Mr. Fong not guilty of Citation 9.

CITATION 10

57. The LSA's demands for a response, commencing January 30, 2009, followed close on the heels of Mr. Fixler's five letters. Only two issues arise – the transfer to T and the mortgage assumption. Mr. Fong had to have known that trouble was brewing from shortly after December 8, 2008, and exactly what it was about. And

yet it took him until April 6, 2009 to deliver a response to the LSA – comprised of one page and one line.

58. For these reasons, the Hearing Committee finds Mr. Fong guilty of Citation 10.

SANCTIONS

59. The Member was admitted to the Bar in 1983. The majority of his practice of law concerns real estate transactions. He does other legal work of a general nature, and it is geared towards providing service to the Chinese community. The firm has four lawyers.

60. Mr. Fong has one previous entry on his discipline record – breaching a trust condition. However, it dates back to 1990 and the Hearing Committee gives it very little weight in determining the appropriate sanction.

61. Counsel for the LSA urges the Hearing Committee to consider a 30 day suspension; Mr. Meagher submits that a reprimand would be appropriate. The Panel is mindful of the need for individual and general deterrence, the status of the legal profession in the public eye, but most of all, the public interest. Bad lawyers endanger the public.

62. The Hearing Committee has observed Mr. Fong's demeanour throughout these proceedings. He has presented himself as a reasonable person who wants to do right by his clients. But his actions are appalling. He has placed his clients in jeopardy. In the case of H, he kept his own client in the dark as he executed a highly questionable legal manoeuvre. He has put lawyers and clients in the position of having to complain to the LSA to get straight answers. Members of the public can only view this behaviour with disdain.

63. The purpose of a lawyer is not to simply smooth legal transactions between friends and business associates. Those relationships are transitory. The public rightfully expects lawyers to vigorously protect the interests of their clients within the law and the ethics of the profession. By his actions Mr. Fong deliberately ignored these duties. He seems to have difficulty grasping that his actions were fundamentally wrong.

64. For all of these reasons the Hearing Committee agrees that fines and a reprimand are inadequate. A suspension of thirty days is imposed upon Mr. Fong.

65. In addition, he is directed to pay the full actual costs of the Hearing within 90 days of the date they are presented to him. It is directed that he be referred to Practise Review.

CONCLUDING MATTERS

66. There will be no notice issued to the Attorney General.
67. The exhibits in this matter will be available to the public, subject to redaction to protect solicitor and client privilege.

Dated this 6th day of May, 2011:

Miram Carey, Ph.D., Bencher

John Higgerty, Q.C., Bencher

Frederica Schutz, Q.C., Bencher