LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

IN THE MATTER OF a Hearing regarding the conduct of
Robert Burgener, a Member of the Law Society of Alberta

INTRODUCTION

[1] On May 11, 2010, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Robert Burgener, a Member of the LSA (the "Hearing"). The Committee was comprised of Dale Spackman, QC, Chair, Stephen Raby, QC, Member and Anthony Young, QC, Member. The LSA was represented by Lindsay MacDonald, QC. The Member was present at the Hearing and self-represented. Also present at the Hearing during her testimony was the Complainant, Shirley Felker-Dunbar.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

[2] The Chair introduced the Committee and asked the Member and Counsel for the Law Society whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.

[3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee and were entered as Exhibits in the Hearing with the consent of Counsel for the LSA, the Member and the Committee.

[4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA determined that the Complainant was to be served with a Private Hearing Application Notice was entered as Exhibit 5 in the Hearing with the consent of Counsel for the LSA, the Member and the Committee. Counsel for the LSA advised that the LSA did not receive any application request for a private hearing. The Chair confirmed that no private hearing application was proposed at the Hearing and, accordingly, directed that the Hearing be held in public.

[5] Exhibits 1 through 16 contained in the Exhibit Book provided to the Committee and the parties were entered into evidence in the Hearing with the consent of Counsel for the LSA, the Member and the Committee.

CITATIONS

[6] The Member faced the following Citations as set out in the Notice to Solicitor:

1. IT IS ALLEGED that you failed to respond on a timely basis to all communications from the Complainant that contemplated a reply, and thereby breached Chapter 4, Rule 5 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED that you breached a trust condition imposed on you by registering .the Transfer of Land without having paid the full cash to close, and thereby breached Chapter 4, Rule 11 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

[7] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee found that the Citations were proven and that the Member was guilty of conduct deserving of sanction in respect of the Citations.

[8] The Member was fined $1,000 for each Citation for a total fine of $2,000 ordered to pay the actual costs of the Hearing less the amount of $2,500. A reprimand was issued by the Chair.

OPENING STATEMENT OF COUNSEL FOR THE LSA

[9] Counsel for the LSA advised the Committee that he would be calling one witness, being the Complainant, Shirley Falker-Dunbar.

[10] Counsel indicated that he would be referring to and relying on cases establishing strict liability on Citation 2 (breach of trust conditions). Counsel submitted that if the Member placed responsibility on his staff for the breach, the Member would be required to establish that he exercised due diligence in supervising the staff member.

OPENING STATEMENT OF MEMBER

[11] The Member acknowledged his conduct on Citation 1 (failure to reply to the Complainant), but indicated that there were reasons for this and that he did not acknowledge that it was conduct deserving of sanction.

EVIDENCE

Evidence of LSA

[12] Counsel for the LSA called the Complainant as a witness. The Chair administered the oath to the Complainant.

Examination of Complainant by Counsel for the LSA

[13] The Complainant testified that she is a barrister and solicitor and served her articles of clerkship with the Low, Glenn & Card firm in Calgary in 1992, at which firm she continued her employment following completion of her articles. In 1997, the Complainant started her own firm known as Felker-Dunbar McGovern. Her practice consisted of some family law and real estate. She was employed as a real estate paralegal at Low, Glenn & Card, prior to obtaining her law degree and joining that firm as a student at law.

[14] Counsel for the LSA referred the Complainant to the letter of complaint (Exhibit 1). Counsel then referred the Complainant to the trust letter at Exhibit 1, Tab 1. Counsel inquired of the witness the meaning of the term "GST Indemnity" used in the trust letter. The witness confirmed that if the purchaser is a registrant for GST purposes, this document allows GST to be excluded from in the transaction and dealt with directly by the purchaser and the CRA. Counsel then referred the witness to the Statement of Adjustments (Exhibit 1, Tab 2) and the witness confirmed the amount of the cash to close in the transaction.

[15] Counsel referred the Complainant to Exhibit 16, being a letter from the Member to the Complainant dated March 16, 2007 enclosing a cheque in the amount of $1,796,230 as "partial" cash required to close. The witness confirmed that there was an agreement between her and the Member to extend the time for closing and that these funds would be available to discharge the Vendor's mortgage on the property. The balance of the funds were released to her client (the Vendor) after receipt of the GST indemnity and payout of the Bank of Nova Scotia mortgage.

[16] Counsel inquired as to whether the Complainant had conversations with the Member in April. The witness testified that the transaction was supposed to close on April 7, 2007 and that she had attempted to contact the Member and left messages. The witness spoke to the Member on April 10, 2007 to inquire about the balance of the cash to close, at which time the Member indicated that he would have to speak with his secretary, but did not call back the Complainant. On April 13, 2007, her client called to say that the property had been listed for sale. The Complainant searched the title and noted that title had been transferred. The Complainant attempted to contact the Member without success. The Member did not contact the Complainant and she reported the Member to the LSA.

[17] Counsel for the LSA referred the Complainant to Exhibit 5, Tab 1 (Letter dated May 29, 2007 from the Complainant to the LSA) and Tab 2 (Letter dated May 4, 2007 from the Complainant to the Member) and the witness confirmed the accuracy of these letters and that they confirm the breach of trust conditions by the Member. The witness confirmed that a new mortgage was registered against the property at the same time as the transfer of title was registered.

[18] The Complainant confirmed that she did not hear from the Member prior to her reporting him to the LSA nor did she receive any communication from the Member after that report was made.

Cross Examination of Complainant by Member

[19] The Complainant testified that funds sent to her by the Member were released to her client after paying out the Bank of Nova Scotia mortgage and that she was not made aware of the new mortgage placed on the property until she searched the title after her client informed her that the property had been sold. The witness further testified that it was not her understanding that the transfer of the property would be registered prior to all cash to close being received. The Complainant testified that she was aware that there had been an extension of the time to close, but was not aware that it had anything to do with the placing of a new mortgage. The Complainant had assumed the Purchaser "could come up with the funds". The Complainant confirmed that she was aware that the Land Titles Office had been experiencing inordinate delays in January and February of that year.

[20] Mr. Raby confirmed with the Complainant that she always understood this was a cash transaction and that funds to close would be paid and released subject only to registration of the transfer and payment of interest. The witness testified that she could not remember amending the trust letter to contemplate an extension of the time to close, but confirmed her understanding that her client would retain title until final payment and that interest continued to accrue on the unpaid cash to close.

[21] **Re-Examination of Complainant by Counsel for the LSA**

[22] Counsel for the LSA asked the Complainant to review her file for any further material relating to the extension of time for closing the transaction. There being no objection from the Member or the Committee, the Complainant reviewed her file and could find no such further materials.

[23] Mr. Young inquired of the Complainant whether the cash shortfall in the transaction was ultimately paid and the witness confirmed that it was received plus accrued interest from John Wilson of Wilson Laycraft by letter of June 30, 2007.

[24] There being no further questions, the witness was dismissed.

Evidence of Member

[25] The Chair administered the oath to the Member..

[26] The Member admitted that the transfer of land should not have been registered and referred the Committee to Exhibit 4 (letter dated May 22, 2007 from the Member to the LSA) where he states this and indicates that he is reporting the matter to [ALIA].

[27] The Member referred the Committee to Exhibit 16 (letter dated March 16, 2007 from the Member to the Complainant enclosing funds) and noted that upon review of his file he determined that his secretary signed this letter. The Member admitted that he did sign the cheque sent with the letter. The Member testified that at the time, the Land Titles Office was behind and it was his practice to send the transfer with a transfer back. The Member agreed that he should not have preceded to registration without agreement from the parties to proceed. The Member testified that the paralegal who submitted the transfer of land for registration was a senior person. When he talked to her about the matter, she indicated that she thought the cash to close would be forthcoming.

[28] The Member testified that, on discovering the mistake, he knew he was in a conflict of interest and referred the matter to another lawyer, who took the matter to conclusion. The Member admitted that this should not have happened and that he takes full responsibility. The Member testified that he felt there were extenuating circumstances in that during the first week of February of 2007, his business partner left the office and took the file server, fax machine and phone system with him, and that this contributed to the mistake.

[29] The Member apologized and reiterated that this should not have happened.

Examination of Member by Counsel for the LSA

[30] Counsel for the LSA referred the Member to Exhibit 4 (letter dated May 22, 2007 from the Member to the LSA) and confirmed with the Member that this was the first time he realized "there was a screw up on the file". Counsel then referred the Member to Exhibit 16 (letter dated March 16, 2007 from the Member to the Complainant enclosing funds) and the Member confirmed that he signed the cheque that accompanied the letter, but that his paralegal signed the letter. The Member testified that he was surprised that the paralegal did not sign using her own name (or that this was not clear from her signature). The Member testified that the paralegal did not have his instructions to release funds.

[31] The Member testified that, at the relevant time, he utilized PCLaw computer software in his practice and would have a trust ledger sheet showing the funds held in trust and representing the cash to close, but that he would have relied on documents produced by his secretary in signing the cheque. The Member testified that this would have been one of approximately 500 files he was handling at the time. The Member testified that he was concerned with the language barrier for a great number of his clients and hired an "East Indian lawyer" at the end of April, 2007 to assist him.

[32] The Member testified that he would have understood that the cheque he signed represented the cash to close and that his paralegal would have satisfied herself that the trust conditions had been fulfilled.

[33] The Member again reiterated that [they] should not have gone for registration and he accepts responsibility.

[34] When questioned by Counsel about the phone discussion with the Complainant on April 10, 2007, the Member testified that he could not clearly recall the conversation. Counsel asked the Member why he did not get the file immediately and call right back to the Complainant, to which the Member responded that he should have done so. The Member testified that as soon as he received the letter of June 14, 2007 from the LSA (Exhibit 6), he responded and admitted his mistake (Exhibit 9 – letter dated July 5, 2007 from the Member to the LSA). The Member testified that he was not aware of what was going on with the file until he received the June 14, 2007 letter from the LSA and that he had a new lawyer doing real estate. The Member felt the "matter was going to litigation", so he did not see any purpose in responding to the Complainant after her complaint.

[35] Mr. Raby inquired of the Member as to whether the mortgagee was represented by counsel.

[36] The Member answered in the affirmative and testified that his client was a "commercial client" who had three to four transactions going on at any given time. The Member testified that he ceased to act for this client after the events giving rise to this Hearing. He indicated that funds came from different projects of the client at different times. The Member could not recall if he or his paralegal attended on execution of the mortgage documents relating to the transaction at issue.

[37] The Member referred to Exhibit 16 (Letter dated March 16, 2007 from the Member to the Complainant enclosing funds), which the Member testified he didn't see "until after the fact" and indicated that the letter should have been accompanied by a purchaser's caveat and a transfer back.

[38] The Member testified that he does not practice real estate law anymore.

[39] Mr. Young asked the Member what his practice was in reviewing trust conditions in the period February/March, 2007. The Member testified that his secretary has a checklist on her computer. The Member said "this woman has a mind like a steel trap" and the Member could not understand why she did not understand the trust conditions in this case. The Member testified that the trust letter in question was "atypical" and described his process for handling a file.

[40] Mr Young inquired of the Member as to whether he reviews the trust letter from the lawyer on the other side of the transaction again before releasing funds? The Member said he did not, that his concern would be that funds were in trust and it would not occur to him that funds were being released in breach of trust conditions. The Member said he could not understand why the letter would not have been given to him with the cheque; he testified that he thought the file was "on course" when the paralegal told him "we're just waiting for registration".

[41] The Chair asked the Member if he questioned the paralegal on why she submitted the documents (the transfer and mortgage) for registration when she must have known based on the use of the word "partial" in the letter forwarding the funds (Exhibit 16) that the balance of the purchase price was not paid. The Member answered that there must have been confusion of the part of the paralegal.

[42] Mr Spackman asked the Member why the letter was "atypical". The Member answered that the letter was in a different "form" or "format", that it was not confusing and he understood it, but there seems to be some confusion in the letter the paralegal sent.

[43] Mr. Raby pointed out that the Member should have known that he could not comply with the trust conditions as the transaction was framed as a cash transaction, not including a new mortgage. The Member testified that he was not sure, as the client was involved in a number of transactions.

[44] Counsel for the LSA again referred the Member to Exhibit 16 and confirmed with the Member that he did review his file and could not find a transfer back. Counsel referred to the statement in the response of the Member to the LSA "I am in the process of reversing title" and asked him to again look in the file to see if there was a transfer back, which the Member did and confirmed there was not one. The Member confirmed that after he originally did this, he referred the file to Mr. Llewyllen as he felt he could do nothing more himself.

[45] The Member testified that in hindsight, the file was not properly handled and that it became impossible to deal with the client further. The Member testified he did not feel that the paralegal did what she did intentionally knowing it was wrong; that he takes responsibility and that the mistake could have been contributed to by the "upset" in the office.

[46] The Member apologized to the Committee for having to hear this matter and said he had hoped the matter would be disposed of when he admitted the mistake.

CLOSING ARGUMENTS

LSA Counsel

[47] Counsel for the LSA stated that the Member "abandoned this transaction completely to his paralegal"; that the only involvement of the Member was to check his computer for funds and sign the trust cheque. Counsel submitted that if the lawyer doesn't look at the documents, what point is there in having a lawyer involved?

[48] Counsel for the LSA submitted that the answers given by the Member to questions from the Committee were telling. Counsel referred to Exhibit 4 (letter dated May 22, 2007 from the Member to the LSA), which implies that the Member must have looked at his file in order to verify that there was a breach of trust. However, the

Member must not have looked at his file carefully, or he would have known he could not make the statement that he was in the "process of reversing the title", as the Member has now confirmed that he had no transfer back on his file.

[49] Counsel submitted that the Member not getting back to the Complainant shows further evidence of the Member abandoning the file and that the onus is on the Member on a balance of probabilities to demonstrate he had proper controls in place to ensure that matters were being handled properly.

[50] Counsel referred to the Hearing Committee Report dated August 20, 2009 in the matter of the conduct of Murray Engelking, a member of the LSA, where the fourth citation in that case related to breach of trust conditions. Paragraphs 66 and 67 of that decision read as follows:

> *66. Counsel for the LSA argued that even though the Lawyer did not know of the breach of trust conditions, his lack of knowledge resulted from his lack of supervision for which he was ultimately responsible.*
>
> *67. Counsel for the Lawyer argued that the Lawyer's lack of knowledge concerning breach of the trust conditions arose from his reliance on a trusted, long-serving legal assistant which was consistent with Alberta practice and, accordingly, was not conduct deserving of sanction.*

[51] Counsel referred the Committee to Chapter 2, Rule 4 of the *Code of Professional Conduct* of the LSA (the "Code") which reads *A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised.* Counsel submitted that this Rule doesn't mean that a lawyer could abdicate all responsibility, including in this case, reviewing the file before the money was sent out.

[52] Counsel referred the Committee to paragraphs 69 and 70 of the Engelking decision, which counsel submitted are equally applicable in this case and read as follows:

> *69. The Hearing Committee found that the Lawyer had improperly delegated tasks in the provision of legal services to [Ms. F], a non-lawyer, by allowing her to exercise judgment with respect to accepting, imposing, or amending trust conditions.*
>
> *70. The trust conditions were breached and the fact that [Ms. F] was a trusted, long-time legal assistant did not authorize the Lawyer to escape his responsibility for trust conditions. In the result, the Lawyer failed to honour trust conditions imposed upon him. The Hearing Committee found that the Citation was proven and the Lawyer's conduct was deserving of sanction.*

[53] Counsel referred to the Court of Appeal of Saskatchewan decision in the *E.F. Anthony Merchant, Q.C. and Law Society of Saskatchewan* case, 2009 SKCA 33,

as authority for the proposition that strict liability should be applied to the conduct being considered in this Hearing. Counsel referred to paragraphs [46], [47], [51], [52] and [53] of that case which read as follows:

46. The issue is the degree of fault that will support a finding of conduct unbecoming where a marketing activity constitutes the prohibited act, and the lawyer is unaware he has violated the rules. A useful starting point – one that can serve as a functional basis for comparison – is the Sault Ste. Marie[16] decision, the landmark case that established three classifications for offences and the accompanying "fault lines" for each. The three categories were: (1) full mens rea offences; (2) strict liability offences; and (3) absolute liability offences.

47. Prior to the Sault Ste. Marie case, there were only two recognized categories of offences: (1) the traditional criminal offence which required proof of a certain state of mind in relation to the commission of the prohibited act (knowledge combined with a volitional choice, or intent, or at minimum a reckless disregard for the consequences); and (2) the absolute liability offence, where the performance of the act alone was sufficient to establish guilty, regardless of state of mind. The Sault Ste. Marie case gave recognition for the first time to an intermediate category of offences described as "strict liability offences" (also referred to as "regulatory offences" or "public welfare offences") where a defendant could avoid culpability for a prohibited act by demonstrating on a balance of probabilities that: (1) due diligence was exercised and all reasonable steps were taken to avoid its commission; or (2) the defendant held a reasonable belief in a set of facts which, if true, would render the act or omission innocent.

51. The rationale behind the creation of a third category of offences is that in regulatory situations, it is the defendant who has the relevant knowledge regarding the measures taken to avoid the particular breach in question. It was deemed proper to expect that the defendant would come forward with the evidence of due diligence. Thus, while the prosecution was required to prove beyond a reasonable doubt that the prohibited act has been committed, the defendant had to establish, on a balance of probabilities, that he or she had been duly diligent, taking all reasonable care to avoid offending. Alternatively, the defendant had only to establish the requisite reasonable belief in a state of facts that, if true, would render the act an innocent one.

52. Therefore, a strict liability offence requires, at minimum, a fault element amounting to negligence before misconduct will be found. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent in taking steps which a reasonable person would take[19].

53. Accordingly, while lack of the requisite knowledge or intent constitutes a defence to a full mens rea offence, it is not a defence in law to a strict liability offence. Required instead is evidence that establishes on a balance of probabilities that all reasonable steps were taken by the defendant to prevent the commission of the prohibited act.

[54] Counsel referred to the reasons for judgment in the Supreme Court of British Columbia case of *Duncan George Stuart and British Columbia College of Teachers*, 2005 BCSC 645 and, in particular, the reference in that case to the *R. v. Sault Ste. Marie (City)* decision (*supra*) and the useful discussion regarding due diligence in a strict liability offence contained in paragraph [47] as follows:

> *Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case. [R v. Hickey (1976) 12 O.R. (2d) 578, 68 D.L.R. (3d) 88, 29 C.C.C. (2d) 23; R.E.V.D. 13 O.R. (2d) 228, 70 D.L.R. (3d) 689, 30 C.C.C. (2d) 416].*

Counsel referred the Committee to paragraph [59] of the decision which reads "*I find that it is appropriate to treat issues of professional misconduct, and conduct unbecoming, under the [Teaching Profession Act], as similar to strict liability offences*".

[55] Counsel submitted there is precedent for applying the strict liability principle in cases involving conduct deserving of sanction in Alberta and referred to the Laws case and the Doerken case.

[56] Counsel referred to commentary G.2 on page 2-3 of the Code which reads as follows:

> *Incompetence vs. Negligence:*
>
> *The ethical rules governing competence do not necessarily correspond to the legal rules governing negligence. An isolated incident or inadvertent error may constitute negligence and be legally actionable without amounting to incompetence. Conversely, conduct that (for example) evidences gross neglect in a particular matter, or a pattern or neglect or mistakes in different matters, may prompt Law Society intervention although it has not resulted in any loss or damage to a client.*

Counsel submitted that the matters at issue are not a case where the Committee is looking at a continuum between negligence and incompetence, but that the necessary controls that the Member should have had in place to properly supervise his assistant and that, in this case, there was a total abandonment of responsibility by the Member.

[57] Counsel referred to Section 11(k) on page 4-2 of the Code which reads as follows:

> *A lawyer who has agreed, expressly or impliedly, to trust conditions or amendments is bound by them, whether or not they have been recorded in writing as required by this rule, and whether the lawyer is dealing with another lawyer or with a third party.*

Counsel submitted that the failure of the Member to respond is clearly made out by his failure to respond to the message from the Complainant and not getting back to her after their discussion on April 10, 2007.

[58] Counsel for the LSA indicated that this concluded his submissions and the Chair invited questions from the Committee. Mr. Raby inquired of Counsel for the LSA as to whether he was suggesting that it was only the citation relating to the breach of trust that invoked strict liability and Counsel answered in the affirmative.

Member

[59] The Member advised the Committee that he had admitted his error and that it should not have happened. The Member relied heavily on staff that he believed to be competent. The Member submitted that it is difficult to put perfect checks and balances in place and that the assistant in question had previously conducted over 400 files without problems.

[60] The Member submitted that the matter was ultimately resolved within several months of the extended closing date for the transaction. The Member was not sure what controls he could have put in place to prevent his staff in this case from submitting documents to the Land Titles Office for registration. This was an unintentional mistake and that the systems in place with the firm had worked for several years without problem. The incident in question occurred in 2007 and it is now 2010 and the Member indicated that he does not now conduct a real estate practice.

[61] The Member referred to paragraph [60] of the Hearing Guide relating to the general factors to be taken into account in the sanctioning process and, in particular, the following:

> *a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.*

The Member submitted that this factor is satisfied by the fact that he no longer practices in the real estate area.

b) Specific deterrence of the member in further misconduct.

The Member submitted that this factor is not required in this case.

d) General deterrence of other members.

The Member submitted that lawyers must be able to utilize paralegals and suggests his reliance on his paralegal in this case was not unreasonable.

g) Avoiding undue disparity with the sanctions imposed in other cases.

The Member referred to the Engelking decision and that the conduct in that case of placing trust in a paralegal and breach of trust was continuing after the member knew about the problems and that in this case the problem occurred as a result of a mistake or error on his part.

[62] The Member referred to paragraph [61] of the Hearing Guide relating to the specific factors to be taken into account in the sanctioning process and made the following submissions:

(a) the hearing process in itself is stressful and it has taken three years since the conduct in question to get to this Hearing;

(b) the Member did not act "intentionally, knowingly, recklessly or negligently";

(c) there was no ultimate injury or impact in respect of the conduct in question;

(d) this was a single incident;

(e) the mitigating factor in respect of the conduct in question was the problems being experienced in the office of the Member and the ongoing dispute with his former partner; and

(f) the Member has practiced since 1983.

[63] This concluded the closing submissions of the Member and, there being no questions from the panel or further submissions from Counsel for the LSA, the Committee adjourned to consider guilt.

DECISION AS TO CITATIONS

Citation 1

[64] The Committee did not accept the explanation from the Member for his failure to respond to the Complainant. The Member testified that when he received the letter dated June 14, 2007 from the LSA (Exhibit 6), he immediately responded to the LSA admitting his mistake. He testified that he knew the matter was going to litigation and did not see any purpose in responding to the Complainant after her complaint and that he had referred the matter to another lawyer. However, this all occurred well after the messages left by the Complainant with the Member and the telephone conversation the Member had with the Complainant on April 10, 2007. In addition, the Member admitted in testimony that he should have called the Complainant back following the April 10, 2007 telephone conversation after reviewing his file. On the basis of the foregoing, the Committee found that Citation 1 was proven and that such constitutes conduct deserving of sanction.

Citation 2

[65] The Committee accepts as an established principle that the offence of breach of trust conditions in contravention of the Code constitutes a strict liability offence as articulated in the *Sault St. Marie* decision (*supra*) and applied in the *Merchant* decision of the Court of Appeal of Saskatchewan (supra) and by the LSA in the *Laws* and *Doerken* decisions (*supra*). The Committee took particular note of paragraphs [52] and [53] in the *Merchant* decision quoted above and the findings of the Hearing Committee in the *Engleking* decision of the LSA and concluded that the Member in this case did not establish on a balance of probabilities that all reasonable steps were taken to adequately supervise his paralegal in compliance with the applicable provisions of the Code. Accordingly, the Committee found that Citation 2 was proven and that such constitutes conduct deserving of sanction.

SUBMISSIONS ON SANCTION

Submissions of Counsel for the LSA

[66] Counsel for the LSA advised the Committee that the Member had been found guilty in a Conduct Hearing in 2004 and submitted a letter dated April 15, 2010 from the Director of Lawyer Conduct at the LSA setting forth the Member's conduct record and an estimated Statement of Costs as of the date of the Hearing in the amount of $9,320.06. With consent of Counsel for the LSA, the Member and the Committee, the letter from the Director of Lawyer Conduct for the LSA was entered as Exhibit 17 in the Hearing and the Statement of Costs was entered as Exhibit 18 in the Hearing.

[67] Counsel for the LSA submitted the Hearing Report from the Conduct Hearing of the Member held in 2004, which was entered as Exhibit 19 in the Hearing with the consent of Counsel for the LSA, the Member and the Committee.

[68] Counsel referred the Committee to the second page of the Hearing Report (Exhibit 19) and referred to two citations being a breach of trust condition and misleading another lawyer by representing that the Member had $10,500 in trust for his client

when a lesser amount was being held. Counsel referred the Committee to paragraph 49 on page 10 of the Hearing Report which reads in part as follows:

Mr. Burgener states that he didn't know that he had made such an inaccuracy. He states that the second paragraph of that letter went out over his signature but unread and in essence prepared wholly from information that M.K. developed on her own.

Counsel submitted that M.K. was the assistant of the Member and that the Member was attempting to blame his assistant for certain deficits. The Hearing Committee in that case outlined why it did not accept that the assistant had created the problem.

[69] Counsel then referred the Committee to excerpts from paragraphs 50, 51, 52 and 53 of the Hearing Committee Report as follows:

(excerpt from paragraph 50)

We do accept however that the mis-statement with respect to the amount was unintentional and that Mr. Burgener did miscalculate how much he had in trust as between the two client files. This miscalculation occurred because Mr. Burgener failed to check the accuracy of his representations, one that only he could verify.

(excerpt from paragraph 51)

As a consequence the hearing panel is of the conclusion that Mr. Burgener made a misleading statement to Mr. Mah by the representations contained in the April 10, 2002 letter as to the amount he held in his trust account.

(excerpt from paragraph 52)

Overall, the breaches in conduct found to have occurred by Mr. Burgener are relatively minor.

(excerpt from paragraph 53)

Minor or technical breaches might be disregarded but as a result of our findings with respect to the reconstruction and the ill advised attempts to assert conversations or agreements that did not occur, or retrospectively interpret documents in a more favourable manner than they were understood at the time, makes the conduct more serious.

Referring to paragraph 58 of the Hearing Committee Report in discussion sanction, counsel referred to the Hearing Committee noting that the Member had in excess of 20 years of practice experience and quoted the following passage from the middle of that paragraph:

The breaches of which the Member had been found guilty did not result in any actual harm to any party to the transactions. The breach was rectified within a day of the time of the breach, and finally the advice provided that the Member practices with respect to diligence have changed and are now being strictly observed.

Counsel submitted that this should have been the Member's "wake-up call in 2004 about diligence"

[70] Counsel submitted that with respect to sanction, a reprimand is obviously required. Counsel further submitted that the Member should pay costs of the Hearing however Counsel advised the Committee that at least one third of the costs set forth in the Statement of Costs (Exhibit 18) were attributable to dealing with investigations and hearing preparation for two witnesses who were not called. Counsel submitted that the Member should pay a fine and costs and it is not yet time for a suspension and concluded his submissions. The Chair inquired if there were any questions from the Committee.

[71] Mr. Raby inquired of Counsel for the LSA of his position regarding the magnitude of the fine, considering the step principle in the Hearing Guideline. Counsel for the LSA referred to the fact that there was no fine levied by the 2004 Hearing Committee where there was a reprimand and costs. Counsel submitted that a suitable fine would be anywhere from $1,000 up per citation.

[72] Mr. Young referred to the submission of Counsel that one third of the costs reflected in the Statement of Costs were attributable to dealing with other investigations and asked whether Counsel was suggesting that the amount of the costs he would be seeking would be less than the full amount and whether the Committee should take that into consideration. Counsel suggested that the Committee should take this into consideration but that it was required work that did not affect this particular Hearing. Mr. Young inquired as to whether Counsel was suggesting that the Member had anything to do with these witnesses not appearing and Counsel confirmed that he was not suggesting this at all.

[73] The Chair confirmed with Counsel that one of the two witnesses he was referring to was the paralegal involved in the transaction.

Submissions of Member

[74] With respect to the "wake-up call" and the Hearing of 2004, the Member advised the Committee that at that time he had manual ledger cards for his clients and did all of his trust accounting manually. He shared a secretary with a larger office in a pool of other lawyers. Following that Hearing, the Member purchased an electronic system to keep track of the trust ledgers and the trust entries so that it could be seen by everyone in the office and it was available online. This way he did not have to look at ledger cards. The Member also indicated that he moved to Calgary and hired a dedicated secretary that had more experience in real estate

transactions. Therefore, the Member submitted that he thought he did learn a lesson from that error.

[75] With respect to costs, the Member referred to his letter of May 2007 to the LSA (Exhibit 4) where he acknowledged his error. The Member was not aware of "what revelations have come forward in the three years since that would have prevented the matter from being dealt with back in May 2007".

[76] The Member did not wish to go through again the list of sanctioning criteria and indicated that he was sure that the Committee was aware of those. So far as deterrents and learning a lesson, the Member reiterated that he will not practice real estate law again and doubts he will have employees ever again. The Member reiterated that he had already acknowledged his wrong doing and did not "know why [the LSA] didn't just move to an assessment".

[77] This concluded the submissions of the Member and the Hearing was adjourned to allow the Committee to consider sanction.

DECISION AS TO SANCTION

[78] The Committee considered the submissions of Counsel for the LSA and the Member and took note of the discussion in the Hearing Guide of the "purposeful approach" to sanctioning. In *Lawyers and Ethics: Professional Responsibility and Ethics* by Gavin McKenzie, the author states:

> *The purpose of Law Society discipline hearings are not to punish offenders and extract retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.*
>
> *In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes…*
>
> *The seriousness of the conduct is the prime determinant of the penalty imposed…*

Chapter 2, Rule 4 of the Code reads as follows:

> *A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained* ***and supervised****.* (emphasis added)

In this case, the Member did not meet the high professional standards required of a member of the LSA. Although the Committee recognized the need and appropriateness of the utilization of paralegals by lawyers in order to provide efficient and cost effective legal services to clients, there must be a clear line drawn between the services provided by the paralegal and the lawyer. To ensure compliance with trust conditions is clearly on the lawyer side of this line and the

Member failed in his professional obligation to ensure such compliance in this case. It is not a sufficient answer that the Member thought he had proper controls in place or that the paralegal in question was experienced. The ultimate responsibility rests in the lawyer. The lawyer must achieve a balance between his or her professional responsibilities and duties to the public, clients and the profession and the use of paralegals and assistants in his or her practice. The Committee is aware of the difficulties this may pose in a very busy legal practice. However, this is not a reason for a lawyer to shirk or, in this case and as put by Counsel for the LSA, "abandon", those professional duties and responsibilities.

[79] Chapter 4, Rule 5 of the Code reads as follows:

> *A lawyer must be punctual in fulfilling commitments made to other lawyers and* ***must respond on a timely basis to all communications from other lawyers that contemplate a reply***. (emphasis added)

In this case, the Member clearly breached his professional duties in not responding to the Complainant's phone messages and not getting back to the Complainant immediately following the April 10, 2007 telephone conversation between the Member and the Complainant.

[80] In the result, the Member was fined $1,000 for each Citation and ordered to pay the actual costs of the Hearing, less the amount of $2,500. A reprimand was also issued by the Chair to the Member, in which he summarized the reasons for the decision as stated above.

[81] The Committee ordered that the Exhibits in the Hearing be made available to the public with the names of clients and other third parties redacted and that there would be no notice to the profession or referral to the Attorney General in respect of this matter.

DATED this 9th day of December, 2010.

Dale Spackman, QC (Chair)

Stephen Raby, QC (Member)

Anthony Young, QC (Member)