LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT;*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF CLIVE LLEWELLYN, A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Brett Code, QC - Chair
Glen Buick – Lay Bencher
Edith Kloberdanz, Public Adjudicator Committee Member

Appearances:

Counsel for the Law Society – Nancy Bains
Counsel for Clive Llewellyn – J. Patrick Peacock, QC

Hearing Dates:

August 9 - 10, 2017

Hearing Location:

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

HEARING COMMITTEE REPORT

Introduction and Summary

1. Mr. Clive Llewellyn was brought to hearing on seven citations. At the outset of the hearing, counsel for the Law Society of Alberta ("LSA") advised that the LSA would not be calling evidence on three of the seven citations and asked the Hearing Committee (Committee) to dismiss them. Those citations are dismissed.

2. The LSA sought to prove that Mr. Llewellyn was guilty of conduct deserving of sanction on the four remaining citations, primarily on the basis of an Agreed Statement of Facts. The only witness was Mr. Llewellyn himself, who testified in chief and was subject to cross-

examination. Also before the Committee were approximately 1400 pages of documentary evidence tendered jointly by counsel as agreed exhibits.

3. The Committee is unanimously of the view, for the reasons below, that the LSA has not succeeded in demonstrating that Mr. Llewellyn is guilty of conduct deserving of sanction. We dismiss all seven citations.

Jurisdiction, Preliminary Matters, and Exhibits

4. On August 9 and 10, 2017, the Committee convened at the office of the LSA in Calgary to conduct a hearing regarding seven published citations against Clive Llewellyn.

5. The original members of the Committee were appointed some time prior to the hearing, but one of those people was unable to attend at the last minute. Consequently, the Chair of the Conduct Committee appointed a substitute member of the Committee only the day before the hearing was scheduled to commence. No objection was made to the constitution of the Committee.

6. No application was made for a private hearing. The Committee specifically requested whether any of the records tendered were subject to ongoing claims of solicitor-client privilege and whether they should therefore be protected from public disclosure or discussion. We were advised that solicitor-client privilege was not an issue. We agreed with LSA counsel that the names of clients and others should be protected from public view using initials or other means, as is done in the ordinary course. The hearing proceeded in public, with numerous members of the public present throughout the hearing.

7. At the outset of the hearing, Exhibits 1 through 35, contained in the Exhibit Book that had been provided to the Committee in advance, were entered into evidence with the consent of the parties. The Exhibits were entered on the basis that they were documents sent and received including the information expressed in them. There was no agreement beyond that, for example, that the exhibits were entered for the truth of their contents.

Citations

8. Mr. Llewellyn faced the following citations, which had been posted publicly for many months:

[1] It is alleged that Clive Llewellyn failed to honour certain trust conditions and that such conduct is deserving of sanction.

[2] It is alleged that Clive Llewellyn gave an undertaking to another lawyer, R.H., that he knew or should have known he did not have the ability to fulfil and that such conduct

is deserving of sanction.

[3] It is alleged that Clive Llewellyn failed to act to the standard of a careful and prudent lawyer and that such conduct is deserving of sanction.

[4] It is alleged that Clive Llewellyn failed to properly supervise support staff and that such conduct is deserving of sanction.

[5] It is alleged that Clive Llewellyn failed to conscientiously serve his clients, the mortgage lenders, and that such conduct is deserving of sanction.

[6] It is alleged that Clive Llewellyn acted in a conflict or potential conflict of interest without obtaining his clients' consent or in circumstances where it was not in the best interests of his clients, and that such conduct is deserving of sanction.

[7] It is alleged that Clive Llewellyn allowed his trust account to be used in a matter that breached the Rules and that such conduct is deserving of sanction.

Agreed Statement of Facts

9. By agreement, dated August 4, 2017, Mr. Llewellyn and LSA counsel, on behalf of the LSA, created the document entered as Exhibit 6, entitled "Agreed Statement of Facts". That document is attached as Schedule 1 to this Report.

10. As part of the agreement that gave rise to the Agreed Statement of Facts, it was agreed that Citations 1, 5, and 6 would not be pursued by LSA. At the hearing, LSA counsel advised that LSA would not call evidence in support of those 3 citations and asked that the Committee dismiss them.

11. Mr. Llewellyn did not admit guilt. LSA counsel, in both opening and closing statements, believed that the admissions made by Mr. Llewellyn proved his guilt on each of citations 2, 3, 4, and 7.

Evidence, Submissions, and Analysis

12. The citations were treated as three separate matters. The Agreed Statement of Facts, Mr. Llewellyn's testimony, and the submissions of each party neatly divided among Citation 1, Citations 3 and 4, and Citation 7. We therefore treat them in that manner as well, as three essentially distinct allegations.

Citation 2

13. The relevant facts are those set out in paragraphs 22 to 36 of the Agreed Statement of Facts.

14. For the Committee, the most important fact was that WC, which was registered last in priority on the blanket mortgages, despite having its mortgage registered on title, had no legal or equitable interest or entitlement to the funds that were to be received by the sale on which Mr. Llewellyn and the complainant were legal counsel. Its mortgage registration stood in the way of other mortgagees obtaining payment from the sale of the first 6 of 12 units, but WC stood to gain nothing. It had an encumbrance that was worth essentially nothing and had to be removed without compensation, one way or another, in order for the sale transaction to proceed.

15. Only as a consequence of the blanket nature of the original mortgages, WC's mortgage had to be discharged in order for the deal to proceed without a hitch. As his office did with regard to all of the other mortgagees, Mr. Llewellyn's office sought commitment from WC to discharge their mortgages in order to permit the 6-unit sale to proceed. The reply commitment received from WC was equivocal, and it appeared to be qualified.

16. With regard to two of the units, Mr. Llewellyn gave an undertaking to ensure the discharge of a specified list of encumbrances from title to the units, including that of WC, being purchased by the purchaser. The purchaser's counsel relied on the undertaking, and the transaction closed.

17. Soon afterwards, the accounting that had been requested by WC was sent to WC and a request was made for the discharges. No response was received.

18. WC never did respond to that correspondence, and none of the persons involved knew what WC was going to do until it issued a Statement of Claim in a foreclosure action. Mr. Llewellyn was not named in the lawsuit, so he did not know about this surprising strategy for some time.

19. Once he learned of the lawsuit, he moved to have the Statement of Claim dismissed and the mortgage discharges effected. He also advised all interested parties of what had happened, and reported to ALIA of the existence of a possible claim.

20. On June 10, 2015, Mr. Llewellyn was finally able to provide clear title for the property to RH's client, and it received what it had originally paid for. From our point of view, at that time, he fulfilled his undertaking.

21. Mr. Llewellyn was apologetic about the course that the matter took, and he thinks, now, that there might have been a better way to approach the matter, but he does not think that he breached his undertaking, and he denies that this was an undertaking, to use the language of the citation, where he knew or should have known that he did not have the ability to fulfill his undertaking. To the contrary, Mr. Llewellyn is adamant that he knew he could fulfill it. Based upon his judgment in the circumstances, he believed that the discharges would be forthcoming from WC, so long as WC acted in good faith. As it had no legal or equitable interest, and as its mortgage simply stood as an impediment to the transaction, Mr. Llewellyn believed that WC had no legal choice but to provide the discharges. He was right about that.

22. What he was wrong about was that WC would act in good faith and discharge once it had received the information that it had requested as its only apparent condition to discharge. Instead, it issued a Statement of Claim seeking, and eventually obtaining, a nuisance payment. WC was not legally entitled to any payment, and Mr. Llewellyn knew that. It obtained the payment because it improperly refused to discharge, and it was a nuisance.

23. Consequently, practical mischief ensued.

24. The LSA believes that Mr. Llewellyn could have avoided that mischief by following up with WC when it gave its equivocal commitment to the discharge, and by insisting upon the unequivocal promise of a discharge to which he and his client were entitled. Because he did not do so, LSA submits that the subsequent mischief was the fault of Mr. Llewellyn, that his failure to get that clarification was the cause of the mischief, and therefore that Mr. Llewellyn is guilty of conduct deserving of sanction.

25. The difficulties with that position are that it overstates Mr. Llewellyn's undertaking, implying a term of immediacy which was not expressed and which the relying lawyer did not insist upon or clarify for himself, and that it underplays the ultimate result, that is, that the undertaking was fulfilled, albeit more slowly and with more headaches, delays, and costs than are often the case.

26. The further difficulty for the LSA is that the cause of the mischief was not Mr. Llewellyn but WC. LSA's position regarding the undertaking and clarification treats it as though it were a trust condition, that is, that there was a guaranteed outcome within a short period of time. Even with a clear and unequivocal promise, Mr. Llewellyn could not have guaranteed that WC would discharge. The only way to obtain such a guarantee would have been to obtain an executed discharge, ready to be filed, that he held in trust, filing only once he had delivered on some specific trust conditions. But that was not how this deal was being done, not by Mr. Llewellyn, not by any of the other mortgagees or their counsel, and, importantly, not by the purchaser and its counsel, RH. Rather, the deal was proceeding only on ***promises*** of discharge, promises not given by lawyers. As a

consequence of the nature of the blanket mortgages and the unique situation it created, all the others delivered on their promises to discharge. That was the expected and normal result of parties acting in good faith, parties who understood their rights and obligations, and who had a clear understanding of the limits of their rights to interfere with sale transactions. Even if WC had positively stated that it would discharge, it could still have done what it did: not responded to the discharge request and filed a Statement of Claim. Whether it had made the promise or not, even unequivocally, it would still have been free to do what it did: attempt to obtain nuisance cash essentially in bad faith. Any of the mortagees could have done that. No lawyer on the transaction thought there was a need to require anything other than the promise, and each of them knew that the promise rendered their undertakings subject to delay, to mischief – worth only the paper they were written on, unless complied with by the promisor.

27. Because WC had no financial interest in the funds obtained from the sale of the first 6 units, WC could never have held up the deal: if it did not consent, it would naturally have been forced to discharge by a court. As he testified, Mr. Llewellyn knew that, applied his judgment, and gave the undertaking he gave, which was accepted by RH and relied upon.

28. Mr. Llewellyn wishes it had turned out differently, as do we. The mischief that ensued was unfortunate. But, in our view, the mischief was caused by WC, not Mr. Llewellyn. Whether a follow-up and further clarification to the equivocal email would have avoided the subsequent mischief is speculative. There was a solution that would have avoided the mischief with certainty, but that was not the solution that the participants in the transaction were using, and it is not the solution that the LSA states as the justification for what it alleges is conduct deserving of sanction.

29. Citation 2 is dismissed.

Citations 3 and 4

30. The primary relevant facts are those set out in paragraphs 38, 39, 40, 41, and 43 of the Agreed Statement of Facts.

31. Although Paragraph 42 contains admissions, LSA advised us that it was not tendering the facts and admissions in that paragraph to prove guilt.

32. The LSA had learned of a person who was alleged to have been involved in mortgage fraud. They learned that he had been a client of Mr. Llewellyn. They investigated Mr. Llewellyn for his role, if any, in any mortgage fraud, if any. No mortgage fraud was found, and LSA was unequivocal in stating that it had no evidence and was not pursuing anything to do with mortgage fraud against Mr. Llewellyn. No participation in any

mortgage fraud was found. None of the citations bear in any way the taint of mortgage fraud or of the kind of lawyering that sometimes leads to mortgage fraud.

33. As part of the investigation, the LSA obtained many of the files of Mr. Llewellyn's firm, Llewellyn Law. The LSA found a handful of files, 5 residential real estate files, in which it was said certain failings were present. The LSA submits that those failings were red flags, that they could have been indicators of mortgage fraud, that they were indicative of a need for further training or supervision and, therefore, submits that Mr. Llewellyn failed to act to the standard of a careful and prudent lawyer and that he failed to supervise properly his support staff.

34. Each of the 5 files was opened and closed over a 9-month period.

35. ZZ was a paralegal and legal assistant to Mr. Llewellyn and to the other lawyers in the firm. She had been a qualified lawyer in Pakistan but was not a member of the LSA. It was proved that ZZ gave advice, attended closings, and prepared documents.

36. It appears that on two occasions third parties attended the office at the time of the closings. One of those is undisputed. The second is disputed, and Mr. Llewellyn testified that his associate lawyer, BL, had advised the LSA investigators that the two third parties alleged to have been present were not present but, to the contrary, that the client alone met with BL. BL could not be found and was not present to testify so that second allegation regarding the attendance of a third-party on the second occasion was not clarified.

37. Mr. Llewellyn also admitted that third parties funded down payments and cash shortfalls to certain of the 5 transactions.

38. Finally, in one of the transactions, a firm trust cheque made payable to a firm client was handed over, not to the client himself, but to one of the above-mentioned third parties for delivery to the client. The cheque and the cash were then actually delivered to the client by the third party, such that there was no loss and no harm. The issue raised by the LSA is that it is odd that a third party should be given the cheque for delivery and that there exists no explanation on the file why the cheque was given to that third party for delivery to the client.

39. For the LSA, those items are red flags that should have put Mr. Llewellyn on notice that he must do something differently, whether in terms of the standard of his practice (citation 3) or the supervision of his staff (citation 4). Key to the LSA's case against Mr. Llewellyn is that there are no notations or memoranda that demonstrate that Mr. Llewellyn did anything about those matters.

40. Also admitted and agreed by the LSA was that none of the clients complained to the LSA, that each of them had obtained what they sought, that the transactions were completed to their satisfaction, such that, where the file was for the purchase of a home, the home was acquired as intended, and where money was to be delivered to a particular person it was so delivered. There was no harm, no prejudice, and there were no losses, no delays.

41. Mr. Llewellyn testified at length on these citations. He told us about his practice, the lawyers he has worked with and the staff that support them. He told us about his training of ZZ, how he conducts a real estate transaction, and how he used ZZ to assist in the completion of his real estate transactions filed. All of that evidence was uncontradicted and much of it went to disproving, in the general sense, both citations 3 and 4.

42. He also described at great length the amazing articling experience that his associate, BL had. He described her training and his supervision of her. He also reminded us that she is a full member of the LSA, a fully qualified lawyer, albeit, at the time, quite junior.

43. Once he had trained his staff, his supervision did not stop. He expected them to do the things he had asked of them, and his understanding is that they did so. He taught his staff to come to him when there were any difficulties or questions on a file, and he also tried to train them to know what he meant by difficulties and questions that should be brought to him.

44. Some of the matters discovered by the LSA during its investigation into mortgage fraud were not known to Mr. Llewellyn. That his staff did not bring those to Mr. Llewellyn was, for the LSA, cause for concern and, ipso facto, proof that he had not properly trained them and that he was not properly supervising them.

45. BL was involved in, and signed the reporting letters, on some of the impugned files here, and she was interviewed by LSA. We of course do not know if the LSA is pursuing any of these matters with her. Mr. Llewellyn's testimony, in addition to expressing full confidence in BL and real pride in the legal experience and learning that he had made available to her, was that those were not his files, but hers. Implicit in his testimony was the question: how is this my fault? The LSA's answer was that BL was, during this 9-month period, quite junior. The LSA therefore implies that Mr. Llewellyn should have supervised this lawyer more fully, that she had not been well-trained, that he was responsible for her, and therefore that he should be liable for, and found guilty for, her mistakes (if any mistakes were made by her).

46. As to BL, we disagree. The clients of BL and Mr. Llewellyn, that is, of Llewellyn Law, had the benefit of having a fully trained, active member of the LSA, who had been duly called to the bar and certified to give legal advice in Alberta, which active lawyer had the benefit

of Mr. Llewellyn's 30-plus years of experience in the office next door. They also had the benefit of BL's access to other senior lawyers who also practised at desks nearby.

47. Had BL been practicing on her own, she would have had none of that but would have been on her own. That is the nature of articling and the reality of the call to the bar. It is a puzzle to us why the LSA here would make a distinction between BL in a firm and BL on her own, particularly in an area which, while fraught with risks of a certain type, is one of the prime areas in which sole practitioners practice every day, often from the date of their call to the bar. Under the current regulatory regime, she is either qualified or she is not. Mr. Llewellyn says that she is highly qualified, that she gave good advice, and that her transactions closed without a hitch to the benefit of her clients. Even had they not, we do not see how Mr. Llewellyn bears responsibility at all, let alone guilt for conduct deserving of sanction for having permitted his associate to open and close a file independently.

48. The LSA also states that ZZ gave legal advice, that she was not a lawyer, and that she therefore should not have been giving such advice. This is also a bit of a puzzle to us. It is obvious that a paralegal cannot act or purport to act as a barrister and solicitor, for such conduct is proscribed by s. 106 of the Legal Profession Act. ZZ never purported to act in that capacity.

49. Mr. Llewellyn testified that ZZ gave advice, and he went further and said: it was good advice. By that, he meant that his clients, and the clients of his firm and all its lawyers, benefitted from the knowledge, judgment, and wisdom of a well-trained paralegal. They did. It does not mean that he permitted her to practise law, to give unfettered legal advice, or even to pretend to do so. She did not. If she did, we do not have any proof of it before us.

50. When asked during legal submissions whether the LSA had a definition of legal advice that covered the advice being given by ZZ, the response was negative. There is no definition of legal advice in the LPA or in the Rules. It is not a black and white matter, and it is not obvious to us that ZZ ever crossed the line from giving the kind of advice that well-supervised and well-trained paralegals can give and should be entitled to give to giving the kind of legal advice that only a lawyer can give.

51. It does appear that ZZ may have been too tolerant of the participation of third parties in these 5 transactions selected by the LSA as demonstrating Mr. Llewellyn's misconduct. This is an important matter, for participation by third parties in real estate transactions, that is by people who are not buying or selling, is definitely a red flag for certain types of mortgage fraud cases.

52. In answer, Mr. Llewellyn testified that he did not know about these third-party appearances. He could not therefore be held directly responsible for them. He also says,

having the benefit of hindsight, that the third-party appearances on the various transactions were not nefarious, did not cause any harm, and were in fact not indicators of mortgage fraud.

53. The LSA alleges that these third-party appearances are indicative of failures in training, failures of supervision, and failures to practice in accordance with acceptable professional standards. We disagree.

54. To prove its case against Mr. Llewellyn, the LSA needed more evidence. For example, LSA could have called ZZ and BL to testify regarding their training and supervision, and to explain whether and how these various failures happened. Each of them then could have given evidence that might have assisted in proving citations 3 and 4. LSA could also have called an expert witness to testify as to the expected standard of a careful and prudent lawyer and to testify as to what is normally expected regarding supervision of staff and to testify that Mr. Llewellyn's conduct on these 5 files fell so far below the expected standard that it would be open to us to find that he was guilty of conduct deserving of sanction. For reasons known only to the LSA such evidence was not tendered.

55. What was tendered was 5 files, which add up, at the most, to anecdotal evidence of possible mistakes and possible failures by people who worked for Mr. Llewellyn. That in no way persuades us that Mr. Llewellyn either fell below the standards expected by the matters cited in citations 3 and 4 or that he was thereby guilty of conduct that should be sanctioned under s. 49. LSA has not proved that Mr. Llewellyn's conduct either is incompatible with the best interests of the public or of the members of the LSA or tends to harm the standing of the legal profession generally.

56. Citations 3 and 4 are dismissed.

57. That said, we do have something further to say regarding the matters presented to us. Mr. Llewellyn focused significantly on the fact that no harm or prejudice was caused and that these transactions were in fact not shown to be part of mortgage frauds. One of his main arguments was that he should not be found liable because no harm resulted.

58. We disagree with that. It may be that there was a time in Alberta where a lawyer would be found not guilty simply as a result of the positive consequences of a particular file or series of files. Those days are gone. Red flags, badges of mortgage fraud, and indicators of potential impropriety or "trouble" manifestly are the business of the practicing lawyer in Alberta. Each lawyer has a responsibility to watch for those, to deal with them, to curtail them, to ensure that they do not cause harm. It is not sufficient for the lawyer who sees and recognizes badges of mortgage fraud to carry on unwittingly, hoping with some degree of willful blindness that nothing bad will happen. Lawyers cannot wait for the bad stuff to happen and then rely on their insurance policies as a remedy. Lawyers in Alberta

have a positive obligation to watch for and deal with red flags. If they do not, they could well be guilty under s. 49.

59. The positive consequences of the 5 transactions at issue here were not the full defence of Mr. Llewellyn, as described above. He did not see and ignore red flags. Generally, the problem for him was that, on these 5 files, such red flags occurred, but he either was not told or did not know about them. He could not have acted. The only thing he could have done to ensure that each red flag was dealt with by him to his standard was to have done all the work himself, including on BL's files. Such an expectation of Mr. Llewellyn in this circumstance is unreasonable and not in the public interest.

Citation 7

60. The primary relevant facts are those set out in paragraph 44 of the Agreed Statement of Facts.

61. Mr. Llewellyn had two particular clients, both of whom were ongoing clients. One had entered a purchase agreement but the deal fell through, and she wanted him to recover the deposit. He did that, and the funds recovered went into his trust account under that file.

62. At about the same time, another of Mr. Llewellyn's clients asked him to document and assist in completing the payout of a loan that that client had with the first client. Mr. Llewellyn used the trust account that had been used for the recovery of the deposit. The PC Law records show the series of transactions set out in paragraph 44(e) of the Agreed Statement of Facts.

63. In reviewing these records for mortgage fraud, the LSA found no fraud, no loss, no harm, and no indication of impropriety of any kind. Instead, the LSA found what it alleges is the use of the trust fund contrary to the trust accounting rules, which forbid the use of trust accounts when no legal services are provided.

64. LSA concluded that no legal services were provided here. LSA then submits that breach of the trust accounting rule is a strict liability offence and that proof of breach is proof of conduct deserving of sanction under s. 49 of the LPA. Mr. Llewellyn having admitted to the transaction records set out in paragraph 44(e), LSA submits that he is therefore automatically guilty.

65. We disagree.

66. LSA alleges that Mr. Llewellyn breached Rule 119.17. That Rule is set out below, along with the various subtitles of the Part and Division in which the Rule is contained:

PART 5 DUTIES OF LAW FIRMS

DIVISION 4 FINANCIAL RECORDS AND MANDATORY PROCEDURAL CONTROLS

TRUST TRANSACTIONS
Prohibition on Use of Trust Accounts

119.17 The use of a trust account is prohibited where no legal services are provided in relation to the trust money in the trust account. Nov2010

67. The language in the subtitles and in Rule 119.17 are of mandatory compliance and of prohibition. The rules are therefore meant to be taken seriously by those who must comply with them, and Mr. Llewellyn was one of those.

68. The factual evidence from the Agreed Statement of Facts is that the trust account was used to document the payment in and the payment out of funds used for the repayment of a loan from one client to another.

69. Th LSA asserts that on those facts alone it has succeeded in proving that no legal services were provided. That position is just that: asserted, without authority and without further evidence. LSA takes the position that it would have been better had Mr. Llewellyn simply said no and asked his clients to document their own loan payments. That there existed an alternative way of effecting the loan repayment is, LSA asserts, a further demonstration that this was a misuse of the trust account.

70. Mr. Llewellyn was the only witness on this matter. His evidence was that he believed, and believes now, that he was providing a legal service: he was documenting the payment of a loan by one client to another. He had been asked by a client to do so, and agreed. He did what he had undertaken to do. He used his trust account as the most certain method of recording financial transactions.

71. He also states that, if that is not a legal service, that he certainly did not intend to breach the rules, as his intention was to serve the interests of his clients. If there was breach, therefore, he says it was innocent and unintended.

72. Finally, he states that no harm resulted, that his clients did not complain and that, to the contrary, his clients both got what they wanted. For him, it was a successful legal retainer.

73. There is no definition of “legal services” in the LPA or the Rules. There is a definition section in this Part of the Rules. The relevant portions of that Part are set out below:

DIVISION 2 INTERPRETATION AND AUTHORITY
Interpretation
119 (1) In this Part,

(e) "Client" in relation to a law firm, includes a person or group of persons from whom or on whose behalf money is held by the law firm, if the money was received by the law firm in the course of its law practice and in relation to the provision by the law firm of legal services;

(u) "Trust account" means a pooled trust account or a separate interest-bearing account;

(v) "Trust money" means

(i) money entrusted to or received by a lawyer in the lawyer's capacity as a barrister and solicitor in connection with the lawyer's practice in Alberta and the provision by the lawyer of legal services, and that belongs in whole or in part to a client of the law firm or is received on a client's behalf or to the direction or order of a client, or
(ii) money received by a lawyer as a general retainer, subject to subclause (iv), or on account of fees for services not yet rendered or on account of disbursements not yet made, but does not include
(iii) money received on account of the law firm's fees or disbursements respecting services already performed and for which a written billing has been rendered and delivered or for which a written billing is rendered and forwarded forthwith after receipt of the money, or
(iv) money received as a general retainer where the client has signed a written acknowledgment, to be retained by the law firm in accordance with rule 119.37(1)(f) that (A) the money is non-refundable and belongs to the law firm immediately upon receipt, (B) the law firm is not obliged either to account for the money or render services with respect to the money, and (C) services may never be rendered in respect of the money

74. The money paid into the trust account was money paid in at the request of a client on the client's behalf for the purpose of repayment to another client of the firm. The only question that remains is whether the handling of the payment and the documentation thereof as proof of the payment for the benefit of both clients constitute "legal services".

75. LSA asserts simply that those are not legal services. LSA does not explain why, seeming to assert that it goes without saying. We disagree.

76. A fundamental principle of regulatory law is that the regulator is the entity that creates and enforces the rules and requirements. The LSA, as regulator, does not seek input from its members on the content of such rules. Rather, it devises rules, writes them, has the Benchers pass them, and then enforces them, as written. It can also amend and change them just as easily.

77. With this Rule, the LSA created a rule that is ambiguous. It appears that the hope was that the use of words like mandatory and prohibition would get the meaning across, and they do accomplish that. The difficulty is that what is prohibited is the use of the trust account when no legal services are performed. "Legal services" is a definable term; LSA as regulator chose not to define term but left its specific definition to each lawyer in the circumstances he or she is in to apply his or her judgment and determine whether legal services are being provided. That is, LSA as regulator left the definition and its application in the eye of the beholder. Certainly, in hindsight, there would be a reasonableness of belief test applied, but that is not something that occurs here. In this case, Mr. Llewellyn believed that he was providing a legal service and that he was in compliance with the rule. It may be that that is all that is required for compliance, an honestly held belief that one is in compliance in that way.

78. What is certain is this. Section 49 is serious. Allegations of breach of s. 49 are serious. Findings of guilt for breach of s. 49 gravely affect the reputation and standing of a member of the LSA. If it had been the intention of the LSA as regulator that any breach of this rule, however understood, results in an automatic finding of guilt under s. 49, all it had to do was say so. It would have been easy for the creator of the rules to add a penalty section that stated explicitly that any breach of the prohibition set out in Rule 119.17 would result in an automatic finding of a breach of s. 49 of the LPA.

79. From our perspective, such a rule would be absurd. The LSA could have created it, but to do so would have been absurd, which likely explains why it did not do that. Lawyers are guilty of conduct deserving of sanction if, and only if, they are found guilty of conduct that is incompatible with the best interests of the public or of the members of the Society, or that tends to harm the standing of the legal profession generally.

80. Conduct that inadvertently, unintentionally, or in good faith breaches a rule, even a rule containing a mandatory prohibition, is not conduct that is incompatible with the best interests of the public or of the members of the Society, or that tends to harm the standing of the legal profession generally. There may be matters of strict liability, where the conduct of a lawyer automatically and without further proof results in a finding of guilt in proceedings such as these, but the conduct of Mr. Llewellyn here, even if what he did should not be classified as "legal services", does not amount to the kind of conduct that would have that dire result.

81. Citation 7 is dismissed.

Conclusion

82. This is a very unfortunate case. We are pleased that LSA chose to investigate Mr. Llewellyn while it had some legitimate suspicion that he might have been involved in or participated in mortgage fraud. Why LSA thought those things, we do not know, as the evidence before us is evidence of a highly competent and effective lawyer, with many loyal clients, who practices in an ethical manner. Even ethical lawyers happily accept investigations, of course, for we all know that the LSA must fulfill its role in protecting the public from lawyers who, through incompetence or intention, would undermine the public interest.

83. Once the LSA found no indication whatsoever of mortgage fraud in Mr. Llewellyn's files, it changed course and sought to prosecute him for matters that, at least in our view, are without substance. For months and months, the public had access to citations indicating that Mr. Llewellyn was being accused of conduct deserving of sanction, including violations of the trust accounting rules. When it came time for hearing, the LSA withdrew three of those, and then provided insufficient proof of the remaining four citations. This has surely had an unfortunate result for Mr. Llewellyn. As said above, it is unfortunate.

84. The citations are all dismissed. Mr. Llewellyn is not guilty.

Dated at the City of Calgary in the Province of Alberta, this 30th day of August, 2017 by:

_____

W. E. Brett Code, QC

_____

Glen Buick

_____

Edith Kloberdanz

SCHEDULE 1

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF CLIVE O. LLEWELLYN,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

LAW SOCIETY HEARING FILE HE20160202

AGREED STATEMENT OF FACTS

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta in June 1983.

2. My present status with the Law Society of Alberta is Active/Practicing.

3. I have practiced in Calgary, Alberta from 1983 to present.

4. In 2013, Llewellyn practiced at Llewellyn Law in offices in a house at [•]. As of December 2013 Llewellyn Law consisted of:

   Lawyers: Clive Llewellyn, [BL], [FT]

   Legal assistants: [ZZ] and [ZH]

5. In January 2014, an articling Student joined the firm ([AR]).

6. In March 2014, [RE] joined as an affiliated lawyer (senior lawyer), and the firm moved to [•].

7. In September 2014, [SC] joined the firm as a senior associate and [SC] became fully in charge of real estate conveyancing and commercial matters in the summer of 2015.

8. In July 2015, an additional real estate assistant was hired ([KS]).

9. In October 2015, [KS] joined the firm as an articling student.

10. In November 2015, [MF] joined as an associate.

11. In 2016, [SK] joined as an associate.

12. In 2016, [MA] joined as a senior associate.

13. In September 2016, [SC] left the firm to be employed in–house by the Law Society.

14. In October 2016, [KS] joined the firm as an associate.

15. In February 2017, [MF] left the firm.

16. In March 2017, [FT] left the firm.

17. [BL] left the firm in July 2017.

18. [ZZ] left the firm in July 2017.

19. My practice has varied over the years and as the firm Llewellyn Law changed. In 2017, comprises:

Civil Litigation	(50%),
Bankruptcy, Insolvency & Receivership	(15%),
Real Estate Conveyancing	(10%),
Commercial Law	(10%),
Matrimonial/Family	(5%),
Corporate	(5%),
Immigration	(5%).

[MA] is in charge of, and is supervising the Llewellyn Law Real Estate practice, and that will be a greater proportion of her practice than mine. My Real Estate involvement is in the most part to deal with difficult conveyancing and conveyancing problems that arise, although I will review and address the closings as may be required from time to time. Most of my practice is commercial litigation of many types, and I am well recognized in the foreclosure practice and at times in the insolvency practice. My matrimonial work is primarily litigation assistance to the matrimonial lawyers in the firm.

CITATIONS

20. On July 6, 2016 the Conduct Committee Panel referred the following conduct, based on three separate complaints, to hearing:

*CO**[•]*** (Complaint #1)

1. It is alleged that you failed to honour certain trust conditions and that such conduct is deserving of sanction.

CO[•] (Complaint #2)

2. It is alleged that you gave an undertaking to another lawyer, R.H. That you knew or should have known you did not have the ability to fulfil and that such conduct is deserving of sanction.

CO[•] (Complaint #3)

3. It is alleged that you failed to act to the standard of a careful and prudent lawyer and that such conduct is deserving of sanction;

4. It is alleged that you failed to properly supervise support staff and that such conduct is deserving of sanction;

5. It is alleged that you failed to conscientiously serve your clients, the mortgage lenders, and that such conduct is deserving of sanction;

6. It is alleged that you acted in a conflict or potential conflict of interest without obtaining your clients' consent or in circumstances where it was not in the best interests of your clients, and that such conduct is deserving of sanction; and

7. It is alleged that you allowed your trust account to be used in a matter that breached the Rules and that such conduct is deserving of sanction.

21. In respect of the Complaints/Citations:

a. Complaint #1 (Citation 1) arose in respect of a complaint from a lawyer relating to a 2015 commercial real estate transaction, and is not proceeding. This was also a matter that related to a complaint regarding the lawyer [BL] of Llewellyn Law.

b Complaint #2 (Citation 2) arose in respect a complaint from a lawyer relating to a 2014 commercial real estate transaction and is proceeding. Particulars of this Complaint as stated by LSA are set out below.

c. Complaint #3 (Citations 3 – 7) arise in respect of 9 residential real estate files starting December 2103 and through to August 2014, reviewed by the Law Society investigators and the Citations result from that investigation. LSA is not proceeding with Citations #5, and #6.

***CO[•]* (Complaint #2); Citation #2: It is alleged that you gave an undertaking to another lawyer, R.H. that you knew or should have known you did not have the ability to fulfill and that such conduct is deserving of sanction.**

FACTS AGREED - I agree to the following facts in relation to the above matter:

22. I was involved in a complex real estate matter in 2014. My client had 12 condominium units which were subject to five separate blanket mortgages. I was representing my client in relation to the sale of 6 of these units. The units were being sold individually, and the sale of each unit did not provide sufficient funds to satisfy all of the mortgages.

23. My office reached out to each of the lenders to ask for commitments from each of them that they would provide discharges to permit the sales to close on the understanding that the net proceeds of each sale would be applied to the mortgages in order of priority as each unit was sold.

24. [WC] was one of the lenders – with last priority on title.

25. By letter dated April 22, 2014, I advised the principal of W[C], [TP], that the sale proceeds would be sufficient to only payout the prior mortgages, and asked for partial discharges for the properties being sold so that the transactions could close. In the letter, I stated:

> *"By this letter we would ask you to confirm in writing that:*
>
> *That you will provide our office with the partial discharges for the above-noted units.*
>
> *I ask you to confirm that the transaction may proceed along such basis and that providing all the funds utilized in the above manner, that your client's mortgage, writs, and other instruments registered against the Title shall be discharged.*

26. TP responded via email on April 29, 2014 to ZZ by stating that:

> *"I cannot issue a partial discharge for this mortgage until I receive an accounting of the sale proceeds. Once I receive a complete breakdown of how the sale proceeds are being used, and can confirm that we are satisfied with it, I can send you partial discharges. Please send the details when you have them."*

27. In one of the specific transactions, the purchaser of two of the condominium units was represented by [RH].

28. On June 3, 2014, I sent a letter to RH enclosing closing documents and instructions, at paragraph 12, I undertook to ensure the discharge of a specified list of encumbrances from title to the units, including that of W[C], being purchased by the purchaser.

29. On June 18 and June 20, 2014 RH advanced the cash to close to me pursuant to my undertaking. In reliance on my undertaking, RH used the funds provided by the purchaser's lender, CIBC, which had been provided by its counsel, Colin Yeo (CY"). CY

had put a trust condition on the mortgage proceeds that RH provide him with evidence of discharge of the encumbrances that I had undertaken to discharge.

30. On August 7, 2014, accounting for the 6 units was sent to W[C] by email requesting discharges.

31. My office had received no response and no objection from W[C] until a Statement of Claim was issued. I understand that on August 29, 2014, [RH] was served with a Statement of Claim, naming his client as Defendant in a foreclosure action brought by W[C]. W[C] took the position that it did not agree to provide a partial discharge of its mortgage.

32. On September 18, 2014, I sent a Blanket letter to [MT], [CC] and [HO] advising of what had transpired with W[C] and [BC].

33. I reported the matter to ALIA and to the Law Society in September, 2014 in order to be prudent and advise them of a "potential" claim.

34. I did not use the discharges of the prior mortgages, on the basis that if necessary assignments could be obtained from the discharging mortgagees on these properties to ensure that [RH]'s new purchaser's mortgagees could be assigned first position as a fall back, and if necessary foreclose the subsequent [WC] security off title.

35. On June 10, 2015, I was finally able to provide clear title for the property to RH's client.

36. RH's client had to defend the foreclosure action, and RH lost time in dealing with this matter and defending himself in an ALIA claim made against him.

***CO[•]* (Complaint #3); Citations 3 and 4**

3. It is alleged that you failed to act to the standard of a careful and prudent lawyer and that such conduct is deserving of sanction;

4. It is alleged that you failed to properly supervise support staff and that such conduct is deserving of sanction;

FACTS AGREED - I agree to the following facts in relation to the above matters:

37. A number of real estate transaction files, dating 2013-2014 were requested by the Law Society in 2015 and are subject of current proceedings. There were 9 files reviewed by LSA Investigators as follows:

File 1. [•] opened November 28, 2013 - [•] – [SY] purchase

Lender – [NB],
Opposing Lawyer – [TM].

File 2. [•] opened December 9, 2013- [•] – [VT] purchase

Lender: **[NB].**

Opposing Counsel: **[GW]**

File 7. [•] opened February 6, 2014 - [•] – [VT] purchase

Lender: **[SB].**

Opposing Counsel: **[SV]**

File 6. [•] opened February 14, 2014 - [•] – [GG]

Lender: **[SB].**

Opposing Counsel: **[CH]**

File 3. [•] opened May 28, 2014 - [•] – [NT] Purchase

Lender: **[SB].**

Opposing Counsel **[CH].**

File 5. [•] opened June 2, 2014 - [•], [VT] Purchase

Lender: **N/A**

Opposing Counsel: **[RBR]**

File 9. [•] opened June 27, 2014: [•], - [CC] Purchase

Lender: **VWR**

Opposing Counsel: **[DD]**

File 10. [•] opened July 24, 2014 - [•] – [RK] refinance

Lender: **VWR**

Opposing Counsel: **[MA]**

File 4. [•] opened August 7, 2014 - [•], [LP] 2nd Mortgage

Lender: **VWR.**

Opposing Counsel: **[MA]**

38. **[SY]; [•] - opened November 28, 2013**

a) [VT] represented by [TM] firm entered into an agreement (at an unknown date and no copy is in evidence) to buy the property at **[•]** agreement which closed in October 2013 for $600,000.

b) The Buyer entered into an agreement to sell to [SY] for $664,000 which closed in December 2013, by way of cash of $135,000 more or less and with a mortgage advance of $531,200.

c) Llewellyn Law acted for SY and the lender, [NB] on the transaction.

d) ZZ cautioned SY not to release the $97,000 deposit funds to the vendor without approval of financing but he did so anyway.

e) My assistant [ZZ] prepared the transactional documents.

f) ZZ met with the client and witnessed the signatures.

g) I completed the client identification form;

h) [BL] signed the Cash to mortgage cheque of $97,000 on November 29th 2013.

i) The file was finalized with the reporting letter signed by the lawyer [BL].

j) There were no irregularities in the PC law records.

k) The search of title shows the property was sold in December 2016 and the mortgage was paid in full.

39. **[DT]; [•] opened December 9, 2013**

a) [DT] purchased a newly built property at [•] for $1,399,000 with a $979,930 conventional mortgage.

b) The down payment was $419,000. A portion of the down payment of $140,000 was received into the file by transfers from a third party file of [FS] and [RK] through their company [•] ("123 Ltd""). The PC law records confirm this transfer.

c) DT signed a Statutory Declaration on December 9, 2013 stating the down payment was made from her own funds.

d) ZZ prepared the transactional documents.

e) ZZ met with the client and witnessed the signatures.

f) The Client Identification was verified by me on December 11, 2013 and the Lawyer's Report on Mortgage was signed by me.

g) Insofar as is known [DT] still owns the property.

40. **[GG] – [•] opened February 5, 2014**

a) [GG] purchased property from CK Developments for $704,500.

b) GG obtained a high ratio mortgage from Scotiabank.

c) ZZ prepared the transactional documents.

d) [BL] attended the signing meeting with the client and ZZ.

e) Third parties, FS and RK attended at our firm at time of signing documents.

f) A full detailed reporting letter was sent to the Client on March 7, 2014 and cautioning the client in respect to liabilities on CMHC mortgages.

g) A recent title search indicates that the client remains the owner of this property.

41. **[NN]/[MT] – [•] opened May 28, 2014**

a) [NN] and [MT], both out of town, were buying a condominium for $670,000 with a high ratio mortgage of $636,470.92 (95%).

b) In that regard, NN signed before a notary public in Vancouver and MT signed before an Edmonton Lawyer.

c) NN and MT signed a Statutory Declaration stating the down payment was made from their own resources.

d) Cash shortfall of $3,140 by way of bank draft was delivered to the firm by FS.

e) ZZ prepared the transactional documents.

f) A search of Title in February 2017 shows that the clients remain the owners of the property.

42. **[CC]; [•]**

a) This file was opened June 27 2014 and the client attended to execute documents on July 2 2014.

b) I was out of country.

c) The file indicates that [FT] met with the client.

d) This was a conventional mortgage of $336,000 with $127,000 cash to mortgage deposit.

e) Llewellyn Law did not act for the lender.

f) A search of title indicates it remained in the name [CC] until January 2017 when the mortgage was paid out.

43. **[•]; [LP]**

a) [LP] obtained a second mortgage of $135,800 from VWR Capital Corp (“V Corp”) in August 2014.

b) ZZ prepared the transactional documents.

c) LP attended our offices with FS and RK and met only with ZZ for signing the documents. ZZ confirms that no lawyer met with LP.

d) The trust cheque, containing the mortgage proceeds minus legal fees was payable to LP was in the amount of $131,631.00 was signed by [BL].

e) [BL] a lawyer signed the reporting later to the client.

f) ZZ confirmed that the cheque was picked up from the office by FS.

***CO20150050* (Complaint #3); Citation 7**

7. It is alleged that you allowed your trust account to be used in a matter that breached the Rules and that such conduct is deserving of sanction.

FACTS AGREED - I agree to the following facts in relation to the above:

44. **DT – [•]**

a) DT entered a purchase agreement for property but transaction fell through.

b) The sale did not close and I was hired to recover the $10,000 deposit, which I did by registering a lien. An Action was commenced to recover the deposit.

c) The matter resolved itself with a settlement that was completed in September/October 2014.

d) The trust account was then used for processing additional funds that were considered a loan repayment to DT from FS.

e) The PC Law records indicate the following activity:

- September 26, 2014- My recorded time for filing lien
- October 9, 2014 – Return of $10,000 deposit from seller's lawyer
- October 23, 2014 – Legal fees and disbursements of $2,557.06
- October 23, 2014 – Trust balance to DT of $7,442.94
- October 23, 2014 - $10,000 loan payment from FS
- October 23, 2014 - $10,000 loan payout to DT
- October 27, 2014 - $10,000 loan payment from FS
- October 27, 2014 - $4,000 loan payment from FS
- October 28, 2014 - $6,000 transfer from #41762 (FS)
- October 28, 2014 - $20,000 loan payout to DT

f) I thought by putting the funds through the trust account that, we were documenting the loan and repayment of loan transactions.

ADMISSIONS OF FACTS

45. I admit as facts contained within this Agreed Statement of Facts for the purposes of these proceedings.

46. I acknowledge that I have had the opportunity to consult legal counsel and provide this Agreed Statement of Facts on a voluntary basis.

47. This Agreed Statement of Facts is not exhaustive. The Law Society or I may lead additional evidence not inconsistent with the facts stated herein.

THIS AGREED STATEMENT OF FACTS IS DATED THE 4TH DAY OF AUGUST, 2017.

"Clive Llewellyn"

_____

Clive O. Llewellyn

"Nancy Bains"

_____

Consented to by Nancy Bains for the Law Society of Alberta