



The Law Society of Saskatchewan

BENJAMIN MAH

HEARING DATE: November 9, 2017

DECISION DATE: November 29, 2017

Law Society of Saskatchewan v. Mah, 2017 SKLSS 9

**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF BENJAMIN MAH,
A LAWYER OF SASKATOON, SASKATCHEWAN**

**DECISION OF THE HEARING COMMITTEE FOR THE
LAW SOCIETY OF SASKATCHEWAN**

1. The Hearing in this matter proceeded on November 9, 2017, by conference call with Hearing Committee members Tim McLeod, Monte Gorchinski, and Perry Erhardt, Q.C. (Chair) present on the call. At the Hearing, Benjamin Mah, the Member, represented himself and Timothy Huber represented the Law Society of Saskatchewan (LSS).
2. The Hearing was convened to consider a Formal Complaint set out by the Conduct Investigation Committee of the LSS against Mr. Mah, which comprised a single count. The LSS complaint alleged that Mr. Mah is guilty of conduct unbecoming a lawyer in that he did, in connection with the purchase of property by his clients L.H. and J.H., fail to comply with the terms of an implied undertaking given to the Vendor, P.S., namely, that he would hold a forfeitable deposit paid into trust by his clients pending completion of the transaction.
3. At the outset of the Hearing, both Mr. Mah and Mr. Huber indicated that there were neither any objections to the composition of the Hearing Committee nor preliminary motions to be presented. The Hearing proceeded, and Mr. Huber filed three documents, copies of which had been previously circulated to the Member and each Hearing Committee member. The documents were accepted by the Hearing Committee: namely, Notice of Hearing with Proof of Service - Exhibit P-1; Agreed Statement of Facts and Admissions – Exhibit P-2 (copy attached); and, Statement as to Costs – Exhibit P-3.
4. Mr. Mah entered a plea of guilty to the single count set out in the Formal Complaint.
5. The salient facts from the Agreed Statement of Facts and Admissions are the following:
 - a) The Member was retained by the purchasers in a real estate transaction, and received a deposit of \$15,000.00 from them on October 21, 2013.

- b) The Member had written to the Vendor on October 17, 2013, and advised that he had received the deposit funds.
- c) The sale agreement stated that the deposit was “to be held pending completion or other termination of the transaction,” and further, that if “the Purchaser does not complete the transaction after waiver or satisfaction of his conditions the deposit shall be forfeited to the Vendor and this transaction shall be null and void.”
- d) The purchaser subsequently decided not to proceed with the purchase and sought the return of the deposit from the Member.
- e) The Member wrote to the Vendor’s lawyer on November 12, 2013 indicating that his client had abandoned the purchase, and that he had returned to the deposit to the purchaser.
- f) The Member returned the deposit to his client, the purchaser, on November 25, 2013.

6. The Hearing Committee accepted the Agreed Statement of Facts and Admissions and subsequently entertained oral submissions from each of Mr. Huber and Mr. Mah.

7. Mr. Huber directed the Hearing Committee’s attention to Commentary [7] under section 7.2-11 of the Code of Professional Conduct (Code), which pertains to undertakings and trust conditions and reads as follows:

“A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these Rules.”

8. As affirmed in the Agreed Statement of Facts, Mr. Huber indicated that the deposit was held by the Member pursuant to an implied undertaking, which compelled him to hold and release the deposit only in accordance with the terms of the sale agreement. The terms did not provide for the return of the deposit to the purchaser when the transaction was terminated. In effect, the Member’s actions were tantamount to breach of an undertaking.

9. Mr. Mah did not dispute the events set out in the Agreed Statement of Facts and Admissions. He indicated that he had been careless in this matter at a time when his real estate practice was extremely busy. He further indicated that, although he was not disputing the facts as set out in the Agreed Statement, he remained uncertain as to whether there was an “implied undertaking” arising in the circumstances. Regardless of this uncertainty, he was prepared to accept the interpretation provided, and to accept the outcome.

10. Mr. Mah further stated that his primary regret was his misleading communication to the Vendor’s lawyer regarding the timing of the return of the deposit to his client. To his mind, this was the more serious harm and he expressed considerable remorse for his actions. The Hearing Committee accepts the Member’s verbal submission, and notes his concern and obvious remorse regarding his behaviour toward other counsel.

11. Following submissions, the Hearing Committee reserved its decision in this matter.

12. The Committee observes that the formal complaint against the Member is brought under the provisions of the Code pertaining to Undertakings and Trust Conditions, and the relevant provision is set out above at paragraph 7. The Committee also notes that there was neither any trust condition nor written undertaking given in the circumstances, but that the facts give rise to an implied undertaking originating upon the Member's acceptance of the deposit.

13. Where a member of the LSS acts contrary to the Code or the Law Society Rules ("Rules"), it is left to be determined whether the conduct of the member is conduct unbecoming. Such conduct is defined in clause 2(1)(d) of *The Legal Profession Act* as follows:

““conduct unbecoming” means any act or conduct, whether or not disgraceful or dishonourable, that:

- (i) is inimical to the best interests of the public or the members; or
 - (ii) tends to harm the standing of the legal profession generally;
- and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);”

14. The Hearing Committee finds that the Member's breach of the Code constitutes conduct unbecoming. His conduct did not comply with the applicable rules, which the public understands are the rules that must be followed by a lawyer.

15. The Hearing Committee agrees that it has a duty to consider and accept a jointly recommended submission on sentencing unless it falls outside of the range of available sentencing options. The Hearing Committee notes *Law Society of Saskatchewan v. Wilson*, 2011 SKLSS 8, which cites and follows *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81, in this regard.

16. Two cases have been identified and described in the submissions of counsel, namely, *Law Society of Saskatchewan v. Mahon*, 2014 SKLSS 12, and *Law Society of Saskatchewan v. Galey*, 2014 SKLSS 7. Both cases illustrate a similar failing in the conduct of counsel with respect to a trust condition in the first instance and an undertaking in the second. A formal reprimand, \$1,500.00 fine, and order for costs was the result imposed in each of these cases.

17. In this instance, the Hearing Committee confirms that the proposed sentence set out in the joint submission of a reprimand, \$1,500.00 fine and order for costs falls within the range of reasonable sentencing options, and is consistent with sentences meted out for similar situations.

18. In view of both the plea entered by the Member and the submissions, this Hearing Committee finds the Member guilty of the charge. It finds that his conduct was improper in the circumstances and an appropriate penalty must be assessed. In this matter, the Hearing Committee hereby orders, in accordance with the joint submission, that the following penalty be imposed:

- a) Mr. Mah shall receive a reprimand; and,
- b) Mr. Mah shall pay, within 60 days of the date of this decision, a fine of \$1,500.00 and costs in the amount of \$1,850.00.

Agreed upon by the Hearing Committee this 29th day of November, 2017.

“Perry D. Erhardt, Q.C.”, Chair

“Tim McLeod”

“Monte Gorchinski”

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated July 7, 2017, alleging the following:

THAT BENJAMIN MAH, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

- 1. did, in connection with the purchase of property by his clients L.H. and J.H., fail to comply with the terms of an implied undertaking given to the Vendor, P.S., namely that he would hold a forfeitable deposit paid into trust by his clients pending completion of the transaction.**

JURISDICTION

19. Benjamin Mah (hereinafter “the Member”) is, and was at all times material to this proceeding, a practicing Member of the Law Society of Saskatchewan (hereinafter the “Law Society”), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (hereinafter the “Act”) as well as *the Rules of the Law Society of Saskatchewan* (the “Rules”). Attached at Tab 1 is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to Section 83 of the Act confirming the Member’s practicing status.

20. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated July 7, 2017. Attached at Tab 2 is a copy of the Formal Complaint along with proof of service. The Member intends to plead guilty to the allegation set out in the Formal Complaint.

BACKGROUND OF THE COMPLAINT

21. The Law Society commenced an investigation into the Member’s conduct after receiving a complaint by P.S. dated September 9, 2014 [Tab 3]. P.S. was the vendor in a real estate transaction. The Member represented the purchasers. In his complaint P.S. alleged that, contrary to the Memorandum of Sale governing the transaction, the Member had returned a non-refundable deposit, that he held, back to his clients after the real estate transaction fell through.

PARTICULARS OF CONDUCT

22. The Memorandum of Sale governing the transaction between P.S. and the purchasers [Tab 4] included the following terms:

“By deposit of \$15,000.00, paid to the Purchaser’s solicitor (Mah Law Offices P.C. Inc.) to be held pending completion or other termination of this transaction.

The deposit is to be applied to the Purchase Price upon completion of this transaction. In the event, the Purchaser does not complete the transaction after waiver or satisfaction of his conditions the deposit shall be forfeited to the Vendor and this transaction shall become null and void.”

23. Along with the Memorandum of Sale, the Member sent the Complainant a letter on October 17, 2013 [Tab 5] which stated, in part:

“This will confirm that the Purchaser has provided me with the 15,000.00 deposit which I have deposited in trust pending completion of this transaction.”

24. Despite this confirmation, the Member did not actually receive the deposit until October 21, 2013.

25. Sometime later, the Purchaser decided not to proceed with the purchase and sought a return of his deposit from the Member. In a letter dated November 12, 2013 [Tab 6], the Member advised the Complainant’s lawyer that his client wanted to abandon the purchase, and also that he had returned the deposit directly to the Purchaser. The Member later acknowledged that this was not correct in that he still had the deposit in trust until November 25th. On that latter date, the Member did provide the money to the Purchaser.

26. The Member’s “inaccurate representations” were the result of an excessive workload and personal carelessness, but were not a deliberate attempt to mislead the Complainant’s lawyer.

27. Counsel for the parties attempted to settle this matter over the course of several months, but settlement was not achieved. Eventually, this Complaint was filed with the Law Society and civil litigation was also commenced against both the Member and the Purchaser in the Court of Queen’s Bench. The Complaint was held in abeyance pending the outcome of the litigation, which was ultimately settled.

28. While there was no specific trust condition imposed on the Member which required him to pay the deposit into his firm’s trust account, the Memorandum of Sale clearly required him to “hold” the funds pending completion or termination of the transaction. The Memorandum of Sale provided a remedy on default. The taking of the money into his trust account pursuant to the terms of the Memorandum of Sale and having sent the letter of October 17, 2013 confirming that he held the money “pending completion of this transaction” served to invoke an implied undertaking on the part of the Member as contemplated by section 7.2-11, Commentary (7) of the Code of Professional Conduct.

29. The Member’s unilateral release of the deposit back to his client when the transaction fell through, contrary to the terms of the Memorandum of Sale amounted to a breach of the implied undertaking by which the Member was bound.