2023 LSBC 02
Review File No.: HE20220002
Decision Issued: February 13, 2023
Citation Issued: December 12, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

REVIEW DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

FLORENCE ESTHER LOUIE YEN

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date:	April 7, 2022
Review Board:	Steven McKoen, KC, Chair Cindy Cheuk, Lawyer Brian Dybwad, Bencher Eric Gottardi, KC, Lawyer Lance Ollenberger, Public representative
Discipline Counsel:	Michael Feder, KC Connor Bildfell
Counsel for the Respondent:	Gerald A. Cuttler, KC
Written reasons of the Board by:	Steven McKoen, KC

INTRODUCTION

[1] This is a review concerning Florence Esther Louie Yen (the "Respondent") pursuant to section 47 of the *Legal Profession Act*, SBC 1998 c. 9 (the "*Act*").

[2] On December 12, 2018, a citation was issued against the Respondent (the "Citation").

[3] The Citation alleges that:

(a) the Respondent engaged in professional misconduct pursuant to section 38(4) of the *Act* by using or permitting the use of her firm's trust accounts to receive and/or disburse over $9 million without doing one or more of: (i) providing any substantial legal services; (ii) making reasonable inquiries about the circumstances of the retainer, the source of the funds, the purpose of the payment or the reason the funds were paid through her firm's trust accounts; and (iii) making a record of the results of her inquiries ("Allegation 1"); and

(b) the Respondent engaged in professional misconduct or a breach of the *Act* or the Law Society Rules (the "Rules") pursuant to section 38(4) of the *Act* by failing to record the source of the funds received into her firm's trust accounts, contrary to Rule 3-60(a)(ii) of the Rules [now Rule 3-68(a)(ii)] in relation to one or more transactions in 2015 ("Allegation 2").

[4] On September 18, 2020, a hearing panel found that the Respondent committed professional misconduct (2020 LSBC 45) (the "F&D Decision"). In the decision of the hearing panel on disciplinary action (2021 LSBC 30) (the "DA Decision"), the hearing panel imposed discipline consisting of a three-month suspension from the practice of law and costs of $35,209.83.

[5] This is a review initiated by both the Respondent and the Law Society. The Respondent seeks to have the Review Board either dismiss the Citation in its entirety or, alternatively, dismiss Allegation 1 or Allegation 2 and make an award of costs in favour of the Respondent. The Law Society seeks an order setting aside the three-month suspension, substituting an order for a suspension of six months or more, and an order for costs of the review in favour of the Law Society.

ISSUES

[6] The Review Board must determine the following issues raised by the Respondent:

(a) In respect of Allegation 1, did the hearing panel err in its application of the test for professional misconduct when it found that the Respondent committed professional misconduct and did not make an "innocent mistake"?

(b) In respect of Allegation 2, did the hearing panel err in finding that the Respondent breached Rule 3-60(a)(ii) of the Rules and that the breach constituted professional misconduct?

[7] The Review Board must also determine the following issue raised by the Law Society:

(a) Did the hearing panel impose an inadequate sanction?

BACKGROUND

[8] In the F&D Decision, the hearing panel found, with respect to Allegation 1, that the following key facts occurred:

(a) The Respondent began practising at JWLC in 1995 and she remained practising there till the practice was sold by JW to KA. She then practised at the successor firm, KALC.

(b) PL was a client of JWLC and then KALC since 2007, and at all relevant times for this matter.

(c) Prior to the activities that form the basis for the Citation, JWLC and KALC provided a variety of legal services to PL and his companies including acting as records office, documenting share transfers and obtaining a liquor licence. As part of the liquor licence work, the Respondent reviewed the results of a criminal record check of PL, which disclosed no criminal record.

(d) PL contacted KALC and the Respondent in 2015 with respect to a potential property purchase by a foundation run by his uncle. PL requested wire transfer instructions so that purchase funds could be sent to KALC.

(e) $604,770.16 Canadian was received by KALC on May 20, 2015 and on that same day, PL called the Respondent and told her that the offer to purchase the property was not accepted.

(f) PL requested that the funds be released to him rather than returned to the foundation. The Respondent and KALC's bookkeeper were unsure if this was permitted. The bookkeeper contacted the Law Society for guidance, but only communicated some of the relevant facts; namely, that the funds were provided for a client by an uncle for a real estate transaction and that the transaction did not proceed.

(g) The Respondent and KALC released the funds as directed by PL after providing notice to the uncle by email of the release and receiving a response back by email. The release was made in part to PL and in part to law firms for transaction purchase deposits. The Respondent did not act for PL with respect to any of those transactions.

(h) On June 10, 2015, a further $1,700,000 US was wired from Luxembourg to KALC's trust account from a company that the Respondent was informed by PL belonged to the uncle. Those funds were released by bank draft to A. Inc., one of PL's companies.

(i) On June 15, 2015, a further $1,849,971.20 US was wired from Singapore to KALC's trust account. Again, PL instructed the Respondent that the funds were from his uncle and the Respondent released the funds to A. Inc.

(j) The hearing panel found that there was no evidence that any legal services were provided by the Respondent to PL with respect to these funds.

(k) Over the next two years, a total of $9,949,688.99 US and $1,274,764.96 Canadian was received in KALC's trust account and the Respondent disbursed those funds as instructed by PL. Approximately $1,500,000 US of those funds were credited to files at KALC where the Respondent provided legal services to PL.

(l) At no time did the Respondent meet or speak with the uncle who was providing the funds to PL.

(m) The Royal Bank of Canada made inquiries about the source and purpose of the funds in 2016 and 2017. The Respondent's assistant asked for and was provided with information from PL who indicated that the funds were a gift from an uncle who received dividend income from rice wine and tobacco businesses. The hearing panel found that the Respondent

had not made similar inquiries into the source of the funds prior to the Royal Bank doing so.

(n) The Respondent opened 16 files for PL during the relevant time period. These matters included purchases of commercial buildings and related lease matters in Vancouver and Victoria. She also created a family trust for PL, incorporated companies and drafted a shareholders agreement.

(o) The hearing panel summarized the Respondent's evidence before them as follows at para. 31:

> Her understanding was that she was performing substantial legal services for PL and his related companies with respect to property investments. Further, she believed that this was sufficient reason for her to receive funds into trust even if the funds deposited for File 20968 were not connected to any specific legal file at the time of the deposits or withdrawals from trust.

(p) The hearing panel found, however, at paras. 40 and 41:

> In this case, it is not disputed that the Respondent continued to do legal work for PL and his related companies. It is fair to characterize this work as substantial. However, it is not enough that a lawyer does legal work, even substantial legal work, for a client who deposits money into the lawyer's trust account. These legal services must be 'in connection with the trust matter'.
>
> In this case, although PL indicated that he wanted to invest in properties with money from his uncle, and although the Respondent ultimately did in fact act for PL in connection with the purchase of certain properties in BC, there is nothing (with the exception of the four transfers noted above) tying the deposits and withdrawals from trust with the legal work provided.
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> [emphasis added]

(q) The hearing panel found that there were a number of "red flags" that should have lead the Respondent to make inquiries as to the source of the funds being received, which included: no contracts related to the purported transactions were provided; the Respondent did not know PL's uncle or any details about his financial means; the funds came

from a variety of sources at a variety of intervals without explanation; the value of the gift was originally described as $3 million to $4 million, but grew to over $10 million; PL asked that the first deposit be immediately paid to him personally; no explanation was given to the Respondent for the further $3.5 million being deposited into trust; no explanation was given for why substantial funds were being deposited into a non-interest bearing trust account; and the source of some of the funds was Panama, which at the time was the subject of the "Panama Papers" media coverage and which should have highlighted a linkage between Panama and potential money laundering. Further, the hearing panel found that it was evidence of the questionable nature of the transactions that inquiries of PL about the source of the funds were only made after the Royal Bank made its own inquiries.

(r) The hearing panel found at para. 47 that upon reviewing the evidence as a whole "there was an objective basis for suspicion such that the Respondent had a duty to make further inquiries."

(s) While the hearing panel noted that some inquiries were made, they found that those inquiries were insufficient and did not meet the standard expected of the Respondent. At para. 49, the hearing panel found:

> … Neither the inquiry to the Law Society nor the information that she obtained from her client met the standard required of the Respondent to make inquiries about the subject matter and objectives of her retainer, the source of the funds, the purpose of the payment of the funds or the reason for the payment of the funds to or through the firm's trust accounts.

(t) On that basis, the hearing panel found that Allegation 1 was proven.

[9] With respect to Allegation 2, the hearing panel found that while the Respondent and her bookkeeper kept wire receipts for the $604,770.16 Canadian, the $1,700,000 US and the $1,849,971.20 US, the wire transfers as described in sub-paragraphs 8(e), (h) and (i) above and the source of the funds were not recorded in the book entries for the deposits in the KALC trust ledger.

[10] The hearing panel cited *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171 for the test for professional misconduct and stated at para. 32: "A lawyer will be found to have committed professional misconduct if the conduct is a marked departure from the conduct that the Law Society expects of lawyers." The hearing

panel found that the Respondent's conduct met that test and that she committed professional misconduct with respect to both Allegation 1 and Allegation 2.

[11] In the DA Decision, after discussing the transactions the Respondent undertook on behalf of PL, the hearing panel made the following findings at para. 24:

> As this Panel has found, the Respondent was at best wilfully blind in allowing her firm's trust accounts to be used and manipulated in this manner. …
>
> [emphasis added]

and at para. 55:

> We find the Respondent's wilful blindness in allowing her firm's trust accounts to be used by PL effectively as his private bank account warrants significant rebuke and attracts a lengthy suspension. The conduct occurred repeatedly over a period of almost two years, without attempts to make adequate or any inquiries, and without the provision of substantial or, in many cases, any legal services.
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> [emphasis added]

[12] After reviewing the list of factors provided in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 as consolidated in *Law Society of BC v. Dent*, 2016 LSBC 05, as well as *Charter* values raised by the Respondent, and after considering the Respondent's conduct, the hearing panel determined that a suspension was an appropriate sanction and that precedent cases supported a suspension of two weeks to six months. After considering those factors, the hearing panel imposed a three-month suspension and ordered that the Respondent pay costs in the amount of $35,209.83.

NOTICES OF REVIEW

[13] In her Notice of Review, the Respondent asks the review board to determine whether the hearing panel erred:

(a) in finding that the Respondent's conduct with respect to Allegation 1 constituted professional misconduct;

(b) in finding that the Respondent's conduct with respect to Allegation 2 constituted professional misconduct;

(c) in failing to conclude that when the Respondent's conduct is considered as a whole, in the context of all of the surrounding circumstances as they existed at the relevant time, the Law Society did not discharge its burden to establish that the Respondent conducted professional misconduct;

(d) regarding Allegation 1, in failing to conclude that when the Respondent's conduct is considered as a whole, in the context of all of the surrounding circumstances as they existed at the relevant time, the Respondent's conduct amounted to innocent errors or failures to exercise ordinary care that do not amount to professional misconduct;

(e) regarding Allegation 2, in failing to conclude that the Law Society did not discharge its burden to establish that the Respondent breached Rule 3-60(a)(ii) of the Rules [now Rule 3-68(a)(ii)];

(f) in the alternative regarding Allegation 2, in failing to conclude that the Law Society did not discharge its burden to establish that an application of the *Lyons* Factors (discussed below) to the Respondent's conduct as a whole, in the context of all of the surrounding circumstances, amounted to a finding of professional misconduct; and

(g) with respect to the DA Decision, by making a finding of wilful blindness against the Respondent.

[14] In its Notice of Review, the Law Society asks the review board to determine if the hearing panel erred in:

(a) failing to determine the applicable range of sanctions;

(b) failing to appreciate the import of a finding of wilful blindness and that it is tantamount to a finding of intent;

(c) failing to appropriately distinguish prior cases from the circumstances before them;

(d) failing to impose a sanction that adequately took into consideration the multiple aggravating factors and sole mitigating factor in the case;

(e) failing to impose a sanction that adequately took into consideration the need for denunciation and general and specific deterrence;

(f) erroneously concluding that the Respondent was unlikely to repeat the conduct that resulted in her facing disciplinary action when she admitted that she continued to act for the client at issue without having taken any steps to address the multitude of red flags that the hearing panel identified in the F&D Decision; and

(g) failing to place sufficient emphasis on the protection of the public.

LEGISLATIVE FRAMEWORK

[15] These applications are governed by section 47 of the *Act*, which permits a review board to confirm the decision of a hearing panel or to substitute it with a decision that the panel could have made under the *Act* as follows:

> **Review on the record**
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> 47(5) After a hearing under this section, the review board may
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> (a) confirm the decision of the panel, or
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> (b) substitute a decision the panel could have made under this Act.

STANDARD OF REVIEW

[16] The question of the appropriate standard of review to be applied by a review board in a section 47 proceeding is set out in two decisions of the British Columbia Court of Appeal: *Vlug v. Law Society of British Columbia*, 2017 BCCA 172 and *Harding v. Law Society of British Columbia*, 2017 BCCA 171.

[17] In *Harding*, the Court of Appeal concluded that it was reasonable for section 47 review boards to use the standard of review articulated in *Law Society of BC v. Hordal*, 2004 LSBC 36 and *Law Society of BC v. Berge*, 2007 LSBC 07 ("*Hordal/Berge*"):

> [6] … These decisions establish that the standard is correctness, except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact.
>
> [7] In *Hordal*, the review board described the standard of review as follows:

[9] In *Hops*, while considering the appropriate scope of review for 'findings of proper standards of professional and ethical conduct', the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971) 10 D.L.R. (3d) 446, at 452:

> 'The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is 'contrary to the best interests of the public or of the legal profession'. The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province.'

[10] It follows from that observation that the Benchers must determine whether the decision of the Hearing Panel was 'correct', and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47 (5) of *the Legal Profession Act*.

[11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[8] In *Berge*, the review board described the standard of review in this way:

> [19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin,* [2000] L.S.D.D. No. 12.

> [20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:
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> i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer, and/or
>
> ii) whether the penalty imposed was appropriate.
>
> [21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops*, [1999] LSBC 29 and *Law Society of BC v. Dobbin* (*supra*).

[18] In *Vlug*, the Court of Appeal stated that:

> [2] … the standard of review articulated in the *Hordal/Berge* line of cases is the internal standard developed by review boards for s. 47 reviews and is reasonable. The *Hordal/Berge* review board decisions establish that the internal standard is correctness, except where the hearing panel has heard *viva voce* evidence and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact.
>
> [emphasis added]

[19] In deciding this matter, we have followed the approach in the *Hordal/Berge* line of cases and have, when reviewing the decision of the hearing panel in this matter as a whole, considered whether the decision is correct. We have also been mindful that where the hearing panel had the benefit of hearing *viva voce* testimony, we would show deference to the hearing panel, subject to making a determination as to whether a clear and palpable error was made.

[20] With respect to range of sanction, we have followed the review board in *Hordal* where they stated:

> [16] The Benchers are often required to consider whether the quantum of a fine levied on a member, or the duration of a suspension imposed as a result of particular conduct, is the correct fine or is the correct duration for the suspension …

[17] While we have determined that these issues are not as easily capable of the application of the correctness test, they are nonetheless questions to which there is a correct answer. If the Benchers in review are satisfied that the proper penalty differs from that imposed by the Hearing Panel, the Benchers must substitute their judgment for that of the Hearing Panel.

[18] In considering questions regarding the correctness of the magnitude of a fine, or of the duration of suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a 'range' of penalties that have been applied in similar situations in the past. This examination is often referred to as a 'reasonableness' test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be 'reasonable' or within the range of appropriate penalties for similar delicts. In other words, the 'correctness' test is informed by the 'reasonableness' test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension duration in those circumstances.

[19] Counsel suggested that it would be improper for the Benchers to interfere with the fine quantum and/or suspension duration, as it was suggested that conduct by the Benchers would amount to 'tinkering' with the determination of the Hearing Panel. Within certain parameters, we agree that it is inappropriate for the Benchers to 'tinker' with determinations made by a Hearing Panel. It would, for example, be inappropriate for the Benchers to determine, in circumstances where a Hearing Panel had levied a fine of $5,000.00, that a fine of $4,000.00 or $6,000.00 would have been more appropriate. That substitution of judgment would clearly amount to tinkering by the Benchers, and would be inappropriate. On the other hand, if the Hearing Panel had determined a fine of $5,000.00 while the Benchers thought that a fine of $15,000.00 was the correct fine, then clearly it would not, on a relative basis, amount to tinkering with the determination of the Hearing Panel for the Benchers to substitute a fine

> of $15,000.00 for the fine of $5,000.00 imposed by the Hearing Panel …
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> [emphasis added]

ANALYSIS

With respect to Allegation 1, did the hearing panel err in its application of the test for professional misconduct?

[21] The Respondent argues that the hearing panel erred in applying the correct test for professional misconduct. The basis for this argument is a series of statements in both the F&D Decision at para. 31 and the DA Decision at paras. 20, 24, 25 and 55.

[22] At para. 24 of the DA Decision, the hearing panel made reference to a finding that the Respondent was "at best wilfully blind " in allowing PL to use her trust accounts as she did. At para. 55, the hearing panel stated: "We find the Respondent's wilful blindness in allowing her firm's trust accounts to be used by PL effectively as his private bank account warrants significant rebuke and attracts a lengthy suspension."

[23] The Respondent argues that there was no express finding of wilful blindness in the F&D Decision. Rather, the Respondent cites para. 31 of the F&D Decision, which states:

> Her understanding was that she was performing substantial legal services for PL and his related companies with respect to property investments. Further, she believed that this was sufficient reason for her to receive funds into trust even if the funds deposited for File 20968 were not connected to any specific legal file at the time of the deposits or withdrawals from trust.
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> [emphasis added by Respondent]

[24] The Respondent also cites para. 20 of the DA Decision, which states that the Respondent was apparently not suspicious of the transactions the Royal Bank was inquiring about, and para. 25, which states: "Nevertheless, if money laundering did in fact occur, it could not have happened without the participation and assistance of the Respondent, however inadvertent such assistance may have been." The Respondent argues that those statements are inconsistent with a finding of wilful blindness because they suggest that the Respondent was not suspicious and acted inadvertently.

[25] The Respondent argues that para. 31 of the F&D Decision constitutes a finding that the Respondent was not wilfully blind, but instead had an honest belief that her errors were innocent because she believed she was providing substantial legal services with respect to the funds received into the KALC trust account on behalf of PL.

[26] The Respondent argues that if that was the finding of the hearing panel, then an innocent mistake could not be described as failing the *Martin* test because an innocent mistake is not conduct that could be considered to be a "marked departure from that conduct that the Law Society expects of lawyers" (*Martin*, at para. 171).

[27] Further, the Respondent argues that the hearing panel did not correctly apply the test for professional misconduct because they did not cite and apply para. 154 of the *Martin* decision, which states:

> … This Panel agrees that the gravamen of the citation alleged is not properly cast in terms of 'honour'. The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

nor *Lawyer 12 (Re)*, 2011 LSBC 35 where the review panel states:

> [8] … We find that the proper approach should be to consider the conduct as a whole. If the conduct arises because of: a) events beyond one's control; or b) an innocent mistake, then the conduct cannot be considered conduct that falls below the norm in a marked way …
>
> …
>
> [49] … there is a spectrum of culpability or blameworthiness between the standards that the Law Society expects of its members and the degree of fault that will constitute professional misconduct in a citation context.

[28] The Respondent argues that if the hearing panel found that since the Respondent had an honest belief that she had performed substantial legal services, then her duty to make further inquiries was not invoked. Even if it was invoked, the Respondent argues that her failure to make those inquiries was an innocent mistake and not behaviour that displayed gross culpable neglect of her duties. Therefore, the Respondent concludes that she did not engage in professional misconduct.

[29] To analyze that argument, we must first set out the rules that applied to the Respondent's conduct. Rule 3.2-7 of the *Code of Professional Conduct for British Columbia* (the "*Code*") states: "A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud." At the times in question, the commentary to that rule stated:

> Commentary
>
> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services …
>
> [3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature or purpose are not clear.
>
> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> …
>
> [3.2] The lawyer should make a record of the results of these inquiries.

[30] Commentary 3.1 makes it clear that if substantial legal services are not sought by a client with respect to the use of the lawyer's trust account, the lawyer has a duty to make inquiries of the client and make a record of the results of those inquiries.

[31] The Respondent argues that the hearing panel found as a fact in para. 31 of the F&D Decision that the Respondent believed that substantial legal services were sought in connection with the trust matter, and as such, her failure to make and record inquiries into the subject transactions was an innocent mistake.

[32] Applying *Martin* and *Lawyer 12*, the Respondent argues that an innocent mistake is not conduct that falls below the standard expected of lawyers in a marked way, and thus, is not professional misconduct.

[33] However, it is not clear to this Review Board that the hearing panel was making findings of fact in para. 31. In the preceding paragraphs, the hearing panel stated that they were describing the Respondent's argument (para. 27) and the evidence the Respondent provided (para. 29). Contrary to the Respondent's position, para. 31 could be read as a continuing recital of the Respondent's arguments and evidence and not a finding of fact.

[34] It is notable that there are no words in the F&D Decision expressly indicating that the hearing panel's statements in para. 31 were meant to be a finding of fact. To interpret that paragraph we have to look elsewhere in the hearing panel's reasons to determine what finding the hearing panel was making. Evidence of that finding is found in the DA Decision where, in the two statements we have cited, the hearing panel expressly states that it believed it had made a finding in the F&D Decision that the Respondent was at best wilfully blind with respect to the numerous red flags in this matter.

[35] Whether or not "wilful blindness" was found in the F&D Decision, those statements in the DA Decision are consistent with interpreting the F&D Decision as finding that gross culpable neglect occurred, which is conduct that falls below the standard expected of lawyers in a marked way.

[36] The Respondent points to paras. 20 and 25 of the DA Decision and argues that those statements are inconsistent with a finding of wilful blindness because they suggest that the Respondent was not suspicious and acted inadvertently. The Review Board has considered that argument but does not accept that characterization.

[37] Those statements are not used by the hearing panel to describe findings of fact. Instead, in para. 20 the statement appears to be a rhetorical method of indicating, through the use of the word "apparently", that the hearing panel did not find the Respondent's lack of suspicion to be credible. Again, in para. 25 the phrase "however inadvertent such assistance may have been" is best understood to be expressing that the hearing panel was not making a finding at that point with

respect to inadvertence, but rather making a statement that the Respondent's actions had left the door open to money laundering, whether or not she acted advertently or inadvertently.

[38] We note that the hearing panel had the benefit of hearing *viva voce* testimony from the Respondent about what she believed her obligations were and what steps she took with respect to inquiring into the suspicious nature of the financial transactions and the source of the subject funds.

[39] While it would be preferable if paras. 20, 25 and 31 were more clear, that lack of clarity does not amount to a clear and palpable error in the hearing panel's decision.

[40] The Review Board finds that the best interpretation of the hearing panel's two decisions is that para. 31 of the F&D Decision was not meant to be a finding of fact, but rather a recitation of the Respondent's evidence, and that the hearing panel did not accept the Respondent's characterization of her actions as an innocent mistake.

[41] Paras. 47 and 49 of the F&D Decision are consistent with that interpretation. Para. 47 sets out that the hearing panel found that upon reviewing the evidence as a whole, "there was an objective basis for suspicion such that the Respondent had a duty to make further inquiries."

[42] A finding of an objective basis for suspicions is not consistent with the Respondent's argument that the hearing panel made a finding of innocent mistake. However, it is consistent with a finding of professional misconduct as set out in para. 154 of *Martin* where professional misconduct can be founded in gross, culpable neglect of a lawyer's duties.

[43] After examining the inquiries that the Respondent made, the hearing panel concluded at para. 49 of the F&D Decision that despite there being an objective basis for suspicion that invoked a duty to make further inquiries, the Respondent's inquiries were sub-standard:

> … Neither the inquiry to the Law Society nor the information that she obtained from her client met the standard required of the Respondent to make inquiries about the subject matter and objectives of her retainer, the source of the funds, the purpose of the payment of the funds or the reason for the payment of the funds to or through the firm's trust accounts.

[44] The hearing panel cited para. 79 of *Law Society of BC v. Gurney*, 2017 LSBC 15 with respect to the Respondent's duties in this matter:

(a) *… a lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction. This is the requirement to provide legal services.*[emphasis added by the hearing panel]

(b) The Court of Appeal in *Elias v. Law Society of British Columbia* (1996), 26 BCLR (3d) 359, 1996 CanLII 1359, quoted the Bencher review decision at para. 9: "where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an *objective* test that the transaction is legitimate." [emphasis added by the *Gurney* panel] It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.

(c) The lawyer's duty to investigate arises when, on an objective basis, he becomes suspicious that the transaction is illegitimate. Professional misconduct can be found even if the underlying transaction cannot be proved to be illegitimate. A lawyer cannot delegate the duty to inquire to a third party such as a client and rely upon the client's assurance as to the legitimacy of the transaction.

[45] Applying the *Hordal/Berge* standard, the Review Board's obligation is to assess whether the decision of the hearing panel was correct and, where there was *viva voce* testimony and an opportunity to assess credibility, to apply deference where issues of credibility are concerned, unless the hearing panel made a clear and palpable error.

[46] We find that the hearing panel's decision was correct with respect to Allegation 1. Substantial funds passed through the KALC trust account that did not relate to any matter that the Respondent was advising on.

[47] The commentary to rule 3.2-7 at the time made it clear that where no substantial legal services were being performed with respect to a matter, a duty to inquire existed.

[48] It is clear that for many of the transactions in question, the Respondent provided no services other than the use of the trust account. As set out in *Gurney*, when coupled

with suspicious circumstances around the funds, it gives rise to an objective duty to make inquiries into the source of the funds.

[49] There were numerous red flags with respect to the source of the funds including the lack of documentation related to many of the transactions, the Respondent's lack of knowledge of the uncle from any source other than PL and the disparate locations and accounts the funds were sent from.

[50] We find the hearing panel was correct in that there was a duty on the Respondent to make inquiries into the source of the funds that flowed through the KALC trust account. The steps that the Respondent took to inquire into the source of the funds were inadequate. In many instances, no inquiries were made and where they were made, they consisted only of inquiries of PL directly or of a generic email address provided by PL.

[51] Applying *Gurney*, it is clear that the Respondent was involved in suspicious transactions where no substantial legal services were being provided and that she did not take steps to satisfy herself, on an objective standard, that the transactions were legitimate.

[52] We note that it is not necessary to make a finding of "wilful blindness" in this matter in order to establish that professional misconduct occurred. It is sufficient to establish that the Respondent's actions constituted a marked departure from the standard expected of lawyers when she failed to inquire into the source of funds being deposited into the KALC trust account.

[53] In this case, we find that the Respondent's failure to make those inquiries constituted gross culpable neglect of her duties and therefore find that the hearing panel was correct in finding that the Respondent's actions with respect to Allegation 1 constituted professional misconduct.

With respect to Allegation 2, did the hearing panel err in finding that the Respondent breached Rule 3-60(a)(ii) of the Rules and that the breach constituted professional misconduct?

[54] In 2015, Rule 3-60(a)(ii) provided that: "A lawyer must maintain at least the following trust account records: (a) a book of entry or data source showing all trust transactions, including the following: … (ii) the source and form of the funds."

[55] It is not in dispute that the Respondent's records did not include a book of entry that showed the source of all the funds. There were at least three transactions for which their source was not recorded in the book of entry for the trust account.

However, it is also not in dispute that the wire transfer receipts, which did show the source of all funds received, were maintained by the Respondent, although some information was not in English.

[56] The hearing panel interpreted Rule 3-60(a)(ii) broadly, and found that the wire transfer receipts did not constitute a data source showing the source of the funds. Their reasoning was that the Rules differentiate between supporting documents and a book of entry or data source, and found that there must be both a supporting document for a transaction and a book entry or data source that is different from the supporting document where the trust transaction is recorded.

[57] With respect, that interpretation reads words into Rule 3-60(a)(ii) that are not present in the text. While the Rules do define "supporting document", there is no express statement that a "data source" under Rule 3-60(a)(ii) cannot be a "supporting document". However, the Rules indicate that accounting records do include supporting documents, which is consistent with the Respondent's position that the subject information was kept in her accounting records.

[58] There is a separate obligation to maintain a trust ledger showing all funds received and disbursed and the balance for each client, and there is no dispute that the Respondent complied with that requirement.

[59] All relevant trust transactions were recorded in the trust ledger for the three trust transactions in question, but the source of the funds was not transcribed into a book of entry or a separate data source. There was a source for that data however; namely, the wire receipts that were kept in the Respondent's accounting records. The hearing panel found that despite there being a source for that data, there was no "data source" within the meaning of Rule 3-60(a)(ii).

[60] The hearing panel made that finding expressly in the context of the broader circumstance that lead to the Citation. The Respondent failed in her duty to make reasonable inquiries into the source of the funds she was receiving on behalf of her client, and in that context, the hearing panel found that the failure to record in a book of entry or separate data source the source for three receipts of money totalling over $4 million US was a marked departure from that conduct the Law Society expects of lawyers.

[61] This Review Board does not believe that this is a correct application of the test for professional misconduct to Rule 3-60(a)(ii). As set out in para. 154 of *Martin*, the lawyer's conduct must display gross culpable neglect of their duties as a lawyer. Here, the rule in question does not clearly state that keeping a wire receipt, which shows the source of funds, does not comply with the requirement to keep a "data

source" showing the source of funds, even though the receipt is, on a plain reading, a source of data. While we accept that the Law Society may have intended that to be the effect of this rule, the rule is not clear on its face that an ordinary meaning of "data source" should not be applied. The Law Society's position would require us to read into the rule that a data source could not be considered a trust account record to the extent the data source included supporting documents. The rule simply does not say that.

[62] We find that the Respondent's record keeping, while not consistent with the Law Society's interpretation of Rule 3-60(a)(ii), was consistent with a plausible interpretation of the rule, and as such, the Respondent's failure to transcribe the source of funds from the wire receipts into a book of account or *separate* data source was not clearly a violation of Rule 3-60(a)(ii). We find that the hearing panel was not correct in its determination that the Respondent engaged in professional misconduct with respect to Allegation 2.

[63] Pursuant to section 47(5) of the *Act*, we substitute the hearing panel's decision with our decision that the citation for Allegation 2 should be dismissed as no breach of the Act or Rules was made out on the facts before the Hearing Panel.

Did the hearing panel impose an inadequate sanction?

[64] The Law Society argues that the hearing panel was incorrect in imposing a three-month suspension in this matter and further argues that the suspension should have been at least six months.

[65] The Respondent argues, conversely, that if the hearing panel's finding of professional misconduct is upheld, the hearing panel's imposition of a three-month suspension should be confirmed.

[66] When considering the sanction that the hearing panel imposed, we have applied the correctness standard as interpreted in *Hordal* where it states at para. 18 "… to be correct, the proposed fine or suspension duration must be 'reasonable' or within the range of appropriate penalties for similar delicts. In other words, the 'correctness test' is informed by the 'reasonableness' test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension duration in those circumstances."

[67] The Law Society argues that the Respondent's conduct, when compared to precedent decisions, was different in kind and far more serious than any prior case

involving a failure to fulfill a lawyer's duty to act as gatekeeper with respect to the use of their trust account.

[68] The Law Society cited five cases where a lawyer similarly allowed their trust account to be used to facilitate transactions where substantial legal services were not provided and no adequate inquiries were made into the source of funds. The most severe sanction in those cases was a six-month suspension in *Gurney*. The other matters attracted four-month, three-month and two-week suspensions.

[69] The Respondent replied that there were a number of factors in *Gurney*, a case that resulted in a six-month suspension, where the conduct was more egregious than the Respondent's conduct, and as such, any sanction imposed here should be less than the sanction imposed in *Gurney*. The Respondent further argued that a suspension is not required in this case, though she acknowledged that argument is somewhat moot given that she has already served a three-month suspension prior to the commencement of this review.

[70] Following *Hordal*, we must determine if the three-month sanction imposed by the hearing panel is correct by determining if it was "reasonable" or within the range of penalties imposed in similar cases. If it falls outside that range, it will be necessary for us to substitute our own determination of the correct sanction.

[71] Since the Law Society argues that the Respondent's conduct warrants a sanction above the range of those cases, our analysis begins with a comparison of the Respondent's conduct with the conduct in *Gurney*.

[72] The factors we will use to compare the cases are those set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, as interpreted in *Law Society of BC v. Dent*, 2016 LSBC 05. In *Ogilvie*, a list of 13 factors was set out to be considered when determining a sanction in a disciplinary matter. Those factors are:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[73] In *Dent*, that list was grouped into four primary factors:

(a) the nature, gravity and consequences of the conduct;

(b) the character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession including public confidence in the disciplinary process.

[74] The Law Society argues that the hearing panel erred in applying these factors because when analyzed against the primary factors, the Respondent's actions were more egregious than the conduct in *Gurney*, and as such, should attract a more severe sanction than the six-month suspension in that case.

[75] The Respondent argues that when the Respondent's behaviour is considered in the context of the expectations of lawyers at the relevant times, her conduct is less egregious than the conduct in *Gurney*, and as such, a period of suspension, if any, should likewise be lesser than the suspension in *Gurney*.

[76] In *Gurney*, the respondent was a senior lawyer with no professional conduct record. In that case, the lawyer was asked by his former law partner, EF, to assist with receiving funds that would be transferred to his trust account from third parties and then used to purchase bank drafts payable to his client, C Corp., after deducting a fee of 0.1 per cent of the money that travelled through his account.

[77] No legal services were provided by the lawyer and the lawyer made no substantial inquiries into the source of the funds or why the funds were being borrowed. The lawyer gave evidence that he knew the people involved on both sides of the transaction (EF was a principal of one of the lenders who had retained him on various matters over a period of decades and the principal of C Corp. was a person the lawyer had met through occasional social engagements) and was told that there was no illegality involved. However, the hearing panel expressly found that the lawyer was not credible in the evidence he gave and was evasive and self-serving.

[78] In total, between May 2013 and November 2013, the lawyer in *Gurney* received $25,845,489.87, which was borrowed by his client pursuant to four separate one-page credit agreements. He did not advise on the agreements and his only role was to act as a conduit for the funds from the overseas accounts into Canada. Each credit agreement was substantially identical in terms, though the lenders were different entities in each case and were from three different jurisdictions (Nevis, Belize and the Marshall Islands).

[79] The borrowed funds arrived in the lawyer's account in seven separate wire transfers and were immediately dispersed by the lawyer after deducting his 0.1 per cent fee. The lawyer was suspended for six months, ordered to disgorge his fees and was made subject to practice restrictions regarding his trust account.

Nature, gravity and consequences of the conduct

[80] The nature and gravity of the conduct in *Gurney* and the present matter have many similarities.

[81] As acknowledged by the hearing panel, Canadian law gives lawyers the ability to keep information concerning their clients privileged and confidential, and this includes information concerning transactions that are facilitated through trust accounts. While preserving privilege and confidentiality has great societal benefits by allowing free and unfettered access to legal services, it also has the ability to work great harms if lawyers allow unscrupulous clients to launder their funds through untraceable transactions within a lawyer's trust account. Lawyers are obligated to ensure that they do not facilitate, and mitigate the risk that they facilitate, such dishonest transactions.

[82] The Law Society recently amended its Rules to make it more clear that lawyers cannot allow clients to use their trust accounts where no substantial legal services are provided. However, irrespective of whether those rule changes create any new obligations or merely clarify obligations that already existed, throughout all relevant times in this matter, the Respondent had a duty pursuant to rule 3.2-7 of

the *Code* to not engage in any activity that she knew or ought to have known assisted or encouraged any dishonesty, crime or fraud.

[83] Under Commentary 3.1 to that rule, the Respondent had a duty to inquire into anyone who sought the use of her trust account without seeking substantial legal services. These rules have been described as making lawyers gatekeepers of the financial system and were the same rules that existed at all relevant times in the *Gurney* case.

[84] Both in *Gurney* and here, the lawyers failed in their duty as gatekeeper of their firm's trust accounts.

[85] In the current matter, approximately $10 million from offshore sources was disbursed as directed by PL, and the Respondent did not make adequate inquiries into the source of the funds, acting in a way that the hearing panel in the DA Decision describes as at best wilfully blind.

[86] The Respondent's actions were very similar to the actions of the lawyer in *Gurney* who similarly made little effort to identify the source of the $25 million in funds that he received. We find that the aggravating factor of inadequate inquiry was similarly present in both cases.

[87] In the current case, there is a small differentiating factor, which indicates that the conduct in *Gurney* should attract a greater sanction. In at least four instances, the funds in this case were used for purposes where the Respondent provided legal services, and in some of the other instances, the Respondent had at least some indication that the transactions appeared legitimate (such as funds being sent to other law firms to fund transactions). Further, the transactions that the Respondent engaged in were not essentially duplicates of each other. While that evidence was not adequate, and does not indicate that the Respondent discharged her duty, it can be contrasted with *Gurney*.

[88] In *Gurney*, the funds similarly came from offshore sources and were then quickly converted into bank drafts payable to the client to be used for purposes that were unknown to the lawyer, and the funds were supplied pursuant to loan documents that were all substantially identical. The "cookie cutter" transactions and the lack of any third party to whom funds were paid, raised red flags that the transactions all appeared to be mere conduits for funds with no apparent business purpose.

[89] While in both cases the lawyer failed in their role as gatekeeper by failing to make inquiries into the source of funds being deposited into their trust account, we find that the behaviour in *Gurney* raises more red flags that the activities were

suspicious and risked the lawyer being involved in dishonest activity than in the current matter. The larger dollar amount over a shorter period and the near identical one-page loan documents raise greater red flags than in the present case, and ignoring those flags represented a greater dereliction of duty than is present here. We find those are aggravating factors identified in *Gurney*, which are not present in this case.

[90] In the current matter, however, while the dollar amount is lower, the amount of time over which the conduct occurred was substantially longer and comprised substantially more transactions. Further, the inquiries by the Royal Bank did not cause the Respondent to make her own substantive inquiries. The evidence indicates that there were far more opportunities for the Respondent to consider her actions, which she failed to take advantage of, and more individual incidents of improper conduct. We find those to be aggravating factors that were not present in *Gurney*, but are present in this case.

[91] As well, in *Gurney*, when the lawyer was informed that his fee would be paid as a percentage of the funds that would be funnelled through his account, it should have been exceedingly clear that the service he was providing was valued by his client on the basis of how much money he could help bring into the country. That is a large red flag that was present in *Gurney*, which is an aggravating factor that is not present in this case. Here, the evidence indicates that the Respondent was paid a salary by her firm, which was not tied to the transactions, and she was given no additional financial incentive to facilitate the transactions.

[92] The Respondent in this case did provide legal services to PL during the relevant time period, albeit with respect to unrelated matters. While those services were not relevant to the question of whether the Respondent allowed her trust account to be used without inquiry into the source of funds when no substantial services were being rendered for the particular matter, those services did give the Respondent additional opportunities to interact with and judge the trustworthiness of her client. In the *Gurney* case, the client, C Corp., was newly incorporated and the hearing panel found that the lawyer knew nothing about the principal's business other than it was described as a "printing company" and had no professional dealings with him outside of the subject transactions. We find that the lack of unrelated advice is an aggravating factor, which was present in *Gurney*, but not present in this case.

[93] Finally, in neither case was there any finding that actual money laundering or other actual dishonest or illegal conduct occurred. While those are not factors that need to be proved in order to show professional misconduct in either case, we point this out

to indicate that an aggravating factor, which would attract a higher degree of discipline, is absent in both cases.

Character and professional conduct record of the respondent

[94] In both *Gurney* and the current case, neither lawyer had a professional conduct record, and there was no indication that there were previous incidents of behaviour that would call their character into question. *Gurney* was a more senior lawyer, having been called for 45 years at the time of the conduct, while the Respondent had been called for 20 years when the conduct commenced. We do not believe that difference is significant, however, both were senior corporate lawyers of substantial experience and both should equally have been aware of their duties as gatekeepers of our financial system. We do not find that the cases are substantially different on this factor.

Acknowledgement of the misconduct and remedial action

[95] In both *Gurney* and the present case, the respondents maintained throughout the facts and determination hearing that they had not engaged in professional misconduct. In *Gurney*, however, the lawyer continued to take that position throughout. The hearing panel described his stance at para. 23 of their decision on disciplinary action as follows:

> At all times during the F&D hearing and this disciplinary action hearing, the Respondent maintained that he had done nothing wrong and characterized the Law Society's case as unfair, abusive, a violation of the principles of natural justice and procedural fairness as well as a vendetta and a protracted effort to smear EF.

[96] By contrast, the Respondent in this matter expressed remorse for her actions at the disciplinary action phase. The hearing panel wrote at para. 32 of the DA Decision:

> At the disciplinary action phase, however, the Respondent testified that she acknowledged the misconduct, respected the Panel's decision and apologized to the Panel. She expressed remorse and gave evidence of the impact that the Citation and the F & D decision had on her personal and professional life, including that she is no longer approved by several banking institutions to do work on their behalf since they became aware of the Citation.

[97] We do note that the hearing panel was troubled that the Respondent continued to act for PL and had not made further inquiries into the past transactions that were

the subject of the Citation. They found this to be an aggravating factor, but did not elaborate on why.

[98] The Law Society argues that the Respondent's conduct in continuing to act for PL shows that she has not learned from her mistakes and raises the need for specific deterrence in this case. However, the Law Society does not address in its argument that the hearing panel found that the new procedures the Respondent has put in place "suggests that she has become somewhat hyper-vigilant when dealing with trust funds" (DA Decision, at para. 35). This finding is not consistent with the Law Society's characterization of the Respondent as having taken no remedial action and we reject that characterization. There is also nothing on the written record to suggest that the Respondent is not applying her new hyper-vigilant approach to any current dealings with PL. Further, merely acting for PL in and of itself is not something that could be an aggravating factor without some evidence that in so acting, the Respondent was continuing to breach the Rules.

[99] On this factor, we find that the remorse expressed by the Respondent at the disciplinary action phase is a mitigating factor that is not found in *Gurney* where the lawyer did not acknowledge having done anything wrong at any point in the process.

Public confidence in the legal profession including public confidence in the disciplinary process

[100] In the DA Decision, the hearing panel dealt with very similar issues of public confidence as were present in *Gurney*. Both cases similarly show conduct that erodes the public trust in the legal profession. We find that similar aggravating factors exist in this regard in both cases.

[101] The hearing panel found that the Respondent was unlikely to repeat the conduct that led to the Citation and did not find that specific deterrence was necessary. They also adopted the reasoning in *Gurney* that in order to maintain the public's confidence in the profession as gatekeepers of the financial system in circumstances where the confidentiality obligations of lawyers raises the risk that money laundering or other dishonest or illegal activity could occur, it is important to treat the professional misconduct that occurred in this matter as a serious breach. We agree with those observations.

Does the respondent's conduct fall outside the range of appropriate penalties for similar delicts?

[102] After considering the foregoing comparison of the *Gurney* case with the current matter, we do not agree with the Law Society that the conduct in this case is deserving of a greater sanction than the conduct in *Gurney*. Instead, while both cases clearly require sanctions, we find that there were a number of aggravating factors that were present in *Gurney* that are not present in this case.

[103] As such, we do not find that the Respondent's conduct should be treated as being above the range of appropriate penalties for similar delicts where we would be required to substitute our own determination of the correct sanction.

[104] The Law Society cited five cases where a lawyer failed to discharge their gatekeeping duty, with sanctions ranging from two weeks to six months, and argued that the conduct of the Respondent warranted a sanction of six months or more.

[105] The *Gurney* case represents the high end of that range of sanctions. As the standard of review is correctness, as articulated in *Hordal*, it is open to us to consider whether the three-month sanction imposed by the hearing panel was placed at a reasonable place in that range, but we are mindful that we are to avoid "tinkering" with a decision. In *Hordal*, tinkering was described as "in circumstances where a Hearing Panel had levied a fine of $5,000.00, [deciding] that a fine of $4,000.00 or $6,000.00 would have been more appropriate" (para. 19).

[106] The other cases that the Law Society cited with respect to the range of sanctions are:

(a) *Law Society of BC v. Uzelac*, 2020 LSBC 58 where a senior lawyer with a professional conduct record admitted to receiving and disbursing $1,167,000 through his trust account on behalf of his client, AN, without making reasonable inquiries about the circumstances and without providing substantial legal services in relation to those funds. As a result, AN was able to dupe a third party into investing funds in a fraudulent scheme. While the conduct in the current case is far more extensive and over a longer period, there is no evidence before us that the Respondent's activity actually resulted in dishonest or illegal conduct. The Law Society points out that no specific finding of wilful blindness was made in *Uzelac*, but we note that the lawyer in that case "admitted that he did not ask AN anything about the source of AN's deposits or why he was being asked to write a cheque payable to AN at

the same time AN was making deposits" (para. 34), which is factually quite similar to the behaviour in the current case. The sanction in *Uzelac* was four months.

(b) *Law Society of BC v. Hsu* , 2019 LSBC 29 where a lawyer allowed $14 million to flow through her trust account in a series of securities transactions that facilitated fraud. Ultimately, over $5 million was lost to investors as a result. The lawyer was a five-year call when she began working on the transactions and the conduct continued for five years. She was not familiar with securities law. She readily admitted the misconduct and had no professional conduct record. There were numerous red flags that the lawyer did not react to but the hearing panel stated: "There is no indication of dishonesty on the part of the Respondent. She appears to have been an unwitting dupe of [her client]." The Law Society contrasted this with the findings respecting wilful blindness in the DA Decision. While we accept that being a dupe is a somewhat mitigating factor not present in the current case, we also note that there were aggravating factors in *Hsu* that are not present in the current case, such as questions of competence, a loss of $5 million to defrauded investors, and a failure to recognize that in written communications she reviewed, the lawyer was being portrayed as giving legal advice in a manner calculated to further the defrauding of the investors. The lawyer in *Hsu* was suspended for three months and restricted from practising securities law.

(c) *Law Society of BC v. Daignault*, 2020 LSBC 18 where a senior lawyer with no professional conduct record allowed his trust account to be used for three transactions totalling less than $300,000 over four months. The hearing panel found that no legal services were provided with respect to those transactions. The hearing panel differentiated the case from precedents where more severe sanctions were levied by noting, among other factors, that no fraud occurred in *Daignault*, unlike *Law Society of BC v. Skogstag*, 2008 LSBC 19 where a three-month suspension was imposed, and that in *Gurney*, the amount and frequency of the transactions was an aggravating factor. The hearing panel stated: "The panel also took into account the respondent's lack of understanding of the nature and extent of his misconduct, his age and his long experience as a solicitor, having been called to the bar in 1968. The panel expressed concern about the respondent's prospects for rehabilitation." We note that the current case can also distinguished from *Skogstag* because no fraud occurred, and from *Gurney* because of

the lack of understanding of wrongdoing there combined with no finding of concern over the prospects of rehabilitation. However, it is clear that the current case is more severe than *Daignault* due to the nature and extent of the Respondent's conduct. In *Daignault* there was also a significant mitigating factor of an investigative delay of over five years. The lawyer in *Daignault* was suspended for two weeks.

(d) *Law Society of BC v. Hammond*, 2020 LSBC 30 where a lawyer with no prior disciplinary history allowed his trust account to be used to facilitate a series of transactions totalling approximately $500,000 US without performing any services other than receiving and disbursing funds. There were red flags respecting the transaction, but more information was provided to the lawyer here than in the current case (albeit the information was somewhat contradictory and incomplete). The panel in *Hammond* considered the *Ogilvie* factors, and in particular, noted that no actual fraud occurred in this matter and determined that due primarily to the smaller dollar amounts and lesser number of transactions, the matter was more similar to *Daignault* than *Skogstag* or *Gurney*. The lawyer in *Hammond* was suspended for two weeks.

[107] After considering these cases, we find that *Gurney*, *Uzelac* and *Hsu* establish that the "range" of penalties applied in similar situations in the past is three to six months.

[108] Since we have also found that *Gurney* contains on balance more aggravating factors under the *Dent* analysis than the present case, the sanction in this case should fall below the sanction in *Gurney*. While we might be inclined to impose a sanction longer than the three months imposed by the hearing panel, we are mindful of the caution against "tinkering" in the *Hordal* decision and find that the hearing panel's decision on sanction is correct as it is "reasonable" and falls within the range of appropriate penalties for similar delicts. We therefore confirm the decision of the hearing panel.

[109] We have also considered the effect of our overturning of the finding of professional misconduct with respect to Allegation 2 on the appropriate sanction. On a holistic basis, the absence of this finding might be expected to decrease the sanction in this matter, however we are of the view that any decrease in the sanction would have to be weighed against any increase we might be inclined to impose as discussed above. The net effect of those two factors has lead us to conclude that no change to the sanction imposed by the hearing panel is warranted on the basis of Allegation 2 being overturned.

[110] We conclude as follows:

(a) the hearing panel was correct in finding that the Respondent's actions with respect to Allegation 1 constituted professional misconduct;

(b) the hearing panel was not correct in its determination that the Respondent engaged in professional misconduct with respect to Allegation 2 and pursuant to section 47(5) of the *Act*, we substitute the hearing panel's decision with our decision to dismiss the citation with respect to Allegation 2; and

(c) notwithstanding such error, the hearing panel was correct in imposing a three-month suspension in the circumstances.

COSTS

[111] The Law Society and the Respondent each applied for an order for costs in this review. As no submissions on the amount of costs of the section 47 review process were made at the hearing of this matter, if the parties cannot agree as to costs, we invite the parties to address this issue by written submissions within 30 days of the release of this decision.

NON-DISCLOSURE ORDER

[112] The Law Society also seeks an order under Rule 5-8(2) of the Law Society Rules that portions of the exhibits and transcripts that contain confidential client information or privileged information not be disclosed to members of the public.

[113] The Law Society has the right to override a lawyer's duty to keep client confidentiality and to maintain solicitor-client privilege by compelling lawyers to produce confidential and privileged information to the Law Society during its investigation and hearing processes. Sections 87 and 88 of the *Act* compel disclosure to the Law Society and protect confidential and privileged information from further disclosure. When using that power, however, the Law Society inherits the same obligations as a lawyer to keep the information confidential and protect privilege.

[114] Rule 5-9(1) allows any person to obtain a transcript of a hearing. Rule 5-9(2) allows any person to obtain a copy of an exhibit that was tendered in a Law Society hearing that was open to the public, subject to solicitor-client privilege. Rule 5-9 is subject to any orders made under Rule 5-8(2).

[115] In order to prevent the disclosure of confidential or privileged information to the public, we hereby make an order under Rule 5-8(2) excluding that information from disclosure to the public.