

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

LAWRENCE BREMNER CHERRETT

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

HEARING DATE : July 21, 2015

PANEL: Jacob P. Janzen, Chair

David N. Gray

Marston Grindey (PR)

APPEARANCES: Ms. Darcia Senft for the Law Society of Manitoba

Mr. Gavin Wood for the Member

REASONS FOR DECISION

Introduction

1. By citation dated January 14, 2014, Lawrence Bremner Cherrett (hereinafter, "Mr. Cherrett") was charged with two counts of professional misconduct. Mr. Cherrett denied the charges and a two day contested hearing was held before this panel in January 2015.
2. By reasons given in February 2015, this panel found Mr. Cherrett guilty of professional misconduct in respect of both counts. In summary, this panel found that Mr. Cherrett purposefully misappropriated \$20,000.00 from his client J.F., and then misled J.F. as to the misappropriation.
3. The panel reconvened on July 21, 2015 to hear submissions as to penalty. The position of Ms. Senft, on behalf of the Law Society, was that the appropriate penalty was disbarment with costs of \$16,000.00. The position of Mr. Wood, on behalf of Mr. Cherrett, was that his client be allowed to retire from practice.

Further Information/Evidence

4. The panel was advised that the Law Society reimbursement fund has reimbursed J.F. for the funds misappropriated. We were also advised that Mr. Cherrett has not made restitution to date; nor were we advised that he has plans to do so.
5. The following additional documents were entered as exhibits:
 - ex. #52: Discipline History
 - ex. #53: seven letters of reference
 - ex. #54: point form personal background and illness history
 - ex. #55: medical report from Dr. Craig Hildahl dated February 27, 2012.

6. The Discipline History disclosed three prior convictions. On June 24, 1988, Mr. Cherrett pleaded guilty to two counts of professional misconduct. He had failed to comply with a trust condition imposed by another lawyer and he had failed to show the expected level of courtesy and good faith to another lawyer. The panel adopted the joint recommendation of counsel and imposed a reprimand, together with an order of costs in the amount of \$750.00. On March 1, 2001, Mr. Cherrett entered a guilty plea to four counts of professional misconduct. The allegations related to a failure to advise clients to obtain independent legal advice, a failure to serve clients in a conscientious, diligent, and efficient manner, and a failure to act with courtesy and good faith. The panel adopted the joint recommendation of counsel and imposed a fine of \$3500.00 and ordered payment of costs in the amount of \$2500.00. Finally, on July 17, 2007, he entered guilty pleas to four counts of professional misconduct. The allegations included an alleged breach of the duty of integrity by misleading a client and charging a disbursement that was not fully disclosed. The panel adopted the joint submission of counsel and imposed a requirement that he practice under supervision for six months, pay a fine of \$5000.00 and pay costs in the amount of \$4000.00.

7. The letters of reference were authored by a fellow Mason, a fellow Rotarian, former rugby colleagues, former clients, and a former law colleague. The letters speak to Mr. Cherrett's community involvement, his good character, and his health challenges.

8. The report from Dr. Hildahl is consistent with the information contained in the four Hildahl reports already entered as exhibits (exhibits #44-#47). It details Mr. Cherrett's health challenges going back to a prostate cancer diagnosis in 2002. It states that Mr. Cherrett was "advised off work on June 20, 2009 due to significant illness" (p.1) and that "It is my opinion that Lawrence Cherrett remains completely disabled from work as a result of medical illness. It is my opinion that his extreme fatigue is a manifestation of both the mental stress of his work as well as his underlying medical conditions including sleep apnea, type II diabetes, prostate cancer, depression, past history of pulmonary embolism and osteoarthritis of both knees." (p.4)

Submissions

9. Ms. Senft for the Law Society submitted that integrity was the cornerstone of the legal profession, the foundation of all its professional conduct rules. She submitted that Mr. Cherrett had made the decision to act dishonestly and had done so purposefully. She submitted that he had never truly taken responsibility for his actions. She reviewed a range of cases. Those cases, she argued, demonstrated that (i) the primary purpose of discipline proceedings is the protection of the public, and (ii) acts of purposeful misappropriation attract the penalty of disbarment unless there are exceptional extenuating circumstances. Here, she submitted, there were no circumstances that were either extenuating or exceptional. She specifically distinguished *McDowell* [Manitoba, 2007]. McDowell had, over the course of some seven years, systematically lied to a client as to the status and progress of the client's legal proceedings. The discipline panel did not disbar but rather allowed McDowell to resign. Ms. Senft submitted that the factors found to be extenuating in *McDowell* were that there was genuine remorse, the deceptions had not included misappropriation of funds, and the discipline panel found that McDowell's mental illness (depression) was directly causally implicated in the misconduct. None of these factors, she submitted, was present here.

10. The gravamen of Mr. Wood's submission was that, as demonstrated by the medical reports, Mr. Cherrett suffered from diminished capacity at the times material to the charges, and that, while that diminished capacity was not sufficient to act as a defence to the charges, it could nevertheless act as a mitigating circumstance sufficient to justify imposing a non-disbarment penalty. He submitted that from the early 2000s onward, Mr. Cherrett had had an increasing difficulty dealing with the ordinary demands of his practice. He said he had himself witnessed some of those difficulties. Those difficulties, he submitted, were caused by the medical problems described in Dr. Hildahl's reports. He argued that the *McDowell* decision gave the panel the discretion to be "charitable", meaning that where there is a causal connection established between illness and the alleged misconduct, it was open to the panel to impose a non-disbarment penalty. That said, he conceded, in conclusion, that Mr. Cherrett "still does not feel that he did anything wrong".

11. Mr. Cherrett spoke briefly. He stated that he had not needed J.F.'s money, and he repeated his position that he had not acted intentionally in taking it.

Analysis

12. This panel found, in its Reasons of February 2015, that Mr. Cherrett purposefully misappropriated \$20,000.00 from his client J.F. and subsequently misled J.F. about his having done so. We accept as our guiding legal principle that absent exceptional circumstances, the appropriate remedy for this misconduct is disbarment.

13. Mr. Cherrett's record with the Law Society prior to these allegations was not unblemished. He has prior disciplinary convictions and one of these, in 2007, includes an allegation of the breach of integrity. In the spring of 2009 when Mr. Cherrett withdrew from practice, he was the subject of further charges and investigations (which were withdrawn in consideration of his withdrawal from practice). While this record might well be construable as an aggravating factor, it certainly is not one that argues for leniency in the matter now before this panel.

14. The letters of reference speak to Mr. Cherrett's community involvement. We commend Mr. Cherrett for the service he has given to his community. That service is not exceptional, however, nor did Mr. Cherrett or his counsel make the argument that it was.

15. Then there is the matter of Mr. Cherrett's response to the allegations and to the findings of this panel. He has, as best this panel is able to judge, made no effort to make J.F. whole. He persists in denying, or at the very least qualifying, his responsibility for the fact that J.F.'s monies found their way into his personal bank account. Whether that came about purposefully, or whether due to diminished capacity, in either case Mr. Cherrett has now for over six years had the personal use and benefit of monies that even on his own account are

not his. That he has done nothing to remedy this wrong is a seriously aggravating factor, in this panel's view.

16. There is next the issue of the relationship between Mr. Cherrett's "diminished capacity", to use Mr. Wood's term, due to illness, on the one hand, and his misconduct in the matter before us, on the other.

- This panel accepts Dr. Hildahl's medical reports. That is, it accepts that Mr. Cherrett suffered the illnesses described by Dr. Hildahl and that those illnesses seriously impacted Mr. Cherrett's ability to practice law.
- Nevertheless, unlike *McDowell*, where a psychiatrist opined that McDowell's "depression most likely was a factor in the manner in which he dealt with his client's issues [the issues before the Law Society]", Dr. Hildahl does not offer any opinion as to the relationship between Mr. Cherrett's illnesses and the manner in which he dealt with J.F.'s money. Mr. Cherrett testified at the hearing in January 2015 that he had at no time advised Dr. Hildahl that he was the subject of Law Society charges or investigations. Thus, Dr. Hildahl's reports do not speak to what role, if any, Mr. Cherrett's health may have had on the specific manner in which he dealt with J.F. In this sense, this panel is left to its own conjectures as to the relationship between Mr. Cherrett's health and his misconduct, unaided by Dr. Hildahl's reports.
- This panel has an understanding that Mr. Cherrett's illnesses will have taken an emotional and psychological toll on him. It understands that the toll is likely to have included and to include depression. It understands that depression impairs capacities to concentrate and to focus, that it is draining of energy, purpose and will. Even ordinary tasks may appear insuperable. This may take on an ethical dimension if one begins to deceive others about one's failures to accomplish those tasks.
- The challenge to the diminished capacity argument as advanced on Mr. Cherrett's behalf, however, is that this constellation of psychological and emotional factors is inconsistent with what Mr. Cherrett did in the J.F. matter. In April and June 2009,

what remained to be completed in the J.F. matter was simple and straightforward. The file was clean. Nothing would have been easier than for Mr. Cherrett to refer its completion, as he referred many other matters, to the Law Society custodian Mr. Fabbri. Instead, Mr. Cherrett undertook something rather more complicated. What he undertook required more concentration and focus. What he undertook required more purpose and will. He undertook a series of transactions that moved J.F.'s trust funds from Mr. Cherrett's trust account to Scotiabank, from Scotiabank to a corporate account, from the corporate account to Royal Bank, and then from Royal Bank to Mr. Cherrett's personal account. The only capacity on display as seriously diminished in what Mr. Cherrett did was a seriously diminished capacity for integrity.

17. Finally, a striking feature of Mr. Cherrett's misconduct is that it coincided with efforts by the Law Society to resolve in a remedial and conciliatory way difficulties arising out of Mr. Cherrett's practice. In April 2009 charges against him had been authorized and further matters were under investigation. The Law Society offered Mr. Cherrett an opportunity to "retire with dignity". The Law Society is to be commended for the approach that it took. It is important that the public's confidence in the Law Society when it exercises its supervisory authority in this manner not be eroded. This panel considers that the timing of Mr. Cherrett's misconduct showed a particularly culpable disregard for the Law Society and the approach to governance of the profession which the Law Society took in his case.

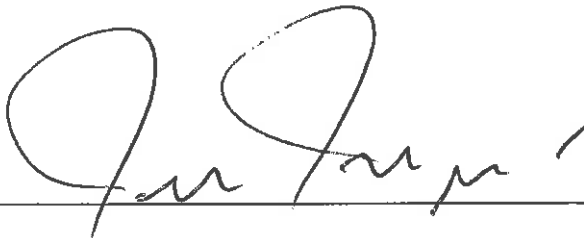
Conclusion

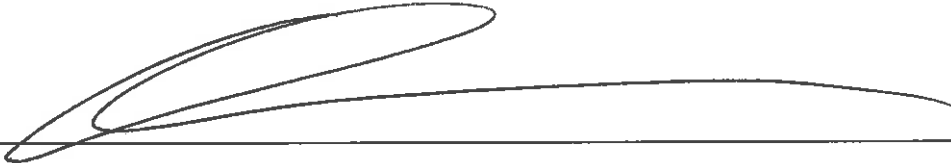
18. We accept the submission of Ms. Senft, on behalf of the Law Society, that there are no exceptional extenuating circumstances in this case.

Decision

19. We order that Mr. Cherrett be disbarred and that his name be struck off the rolls. We order that he pay the costs of the Law Society in the amount of \$16,000.00. This determination is to be published, as publication is mandatory.

Dated this 6th day of October, 2015.

Jacob P. Janzen (Chair) 

David N. Gray 

Marston Grindey (PR) 