

Victoria, B.C.

Called to the Bar: May 19, 1989

Voluntarily ceased membership: January 1, 1997

Discipline hearing:

Dates: February 18-20 and 24-27, May 25-26, June 8-10 and 22-24 and July 2, 3 and 29, 1998, April 7, 1999 and November 27, 2000

Panel: Gerald J. Lecovin, Q.C., Chair, G. Ronald Toews, Q.C. and William J. Sullivan, Q.C.

Reports: January 25, 2000 and April 10, 2001

Indexed as [1999] LSBC 37

Counsel:

Henry C. Wood and Norman Wexler, for the Law Society

Robert S. Fleming (facts and verdict) and E. David Crossin, Q.C. (penalty), for Mr. Pomeroy

Summary

Mr. Pomeroy acted for clients who loaned money for investment in real estate developments when, by virtue of Mr. Pomeroy's personal interest in the developments, he was in a conflict of interest. He failed to recommend that clients obtain independent legal advice, acted recklessly as to their interests in securing their investments, failed to disclose information to clients, deceived clients, delayed in refunding fees to a client and misappropriated client funds and wrongfully converted funds. Mr. Pomeroy's pattern of behaviour involved clients who were unsophisticated or vulnerable, and he kept to a minimum written evidence of funds he had borrowed. The hearing panel rejected Mr. Pomeroy's claims of good faith in his financial dealings with clients, noting that, in using client funds in his investment projects, Mr. Pomeroy anticipated large financial gains for himself and only incidentally that the funds borrowed from clients would be repaid with interest. Moreover, he misappropriated funds and his long-range hopes of successful investments for himself and an orderly return of the money to clients did not excuse that misappropriation.

Mr. Pomeroy was found guilty of professional misconduct and breach of the Law Society accounting rules. The panel noted that Mr. Pomeroy's misconduct was very serious, occurred on multiple occasions over a three-year period in the mid-1990s and had a catastrophic effect on some of his victims. He was disbarred and ordered to pay costs.

Facts

Mr. Pomeroy agreed to assist Mr. and Mrs. P with the financing in a redevelopment of a shopping centre at a time when the project was in the early stages of foreclosure. Mrs. P had previously been a client of Mr. Pomeroy.

In 1994 Mr. Pomeroy assisted another client, Mr. F, with development of tracts of land in B.C. and Alberta. Both developments were heavily mortgaged and Mr. F was having difficulty obtaining financing. Although Mr. Pomeroy initially worked as a lawyer, over time he became more involved in the developments until he became project manager for the B.C. project in April, 1994 and for the Alberta project in September, 1994. He found this role more exciting than the practice of law and offered more potential for financial reward as he expected to be paid a percentage of lot sales.

Because of the time he was spending on the projects of Mr. P and Mr. F, Mr. Pomeroy's law practice suffered. He was not producing enough income, suffered cash shortages, serviced a heavy personal debt and spent heavily to assist friends and relatives.

Conflicts of interest, deception, misappropriation and other misconduct and wrongful conversion

Mrs. M

In 1993 Mr. Pomeroy acted in a matrimonial proceeding for Mrs. M, an unsophisticated client. He subsequently persuaded her to invest money in the company owned by Mr. and Mrs. P. Mr. Pomeroy did so in a conflict of interest since he had a personal financial interest in the borrowers and was negotiating to become a partner in their development project. He did not recommend that Mrs. M obtain independent legal advice.

In July, 1993 Mrs. M advanced \$146,000 as a loan to be secured by a 12% second mortgage against property owned by Mr. and Mrs. P's company. The first mortgage was in foreclosure and the property was threatened by sale because of property tax arrears. Mr. Pomeroy acted recklessly with respect to the interests of Mrs. M in obtaining security for her loan. The mortgage was eventually paid out in August, 1995, but six months prior to that Mrs. M received no payments and in the six months before that the payments were made by Mr. Pomeroy personally.

Mr. Pomeroy subsequently convinced Mrs. M to again lend money to Mr. F, secured by a second mortgage for a higher interest rate than she would receive at a bank. Mr. Pomeroy disclosed that the loan was for a development project in Alberta, but not that the loan was to another client. She loaned \$160,000 on the security of a mortgage from a company owned by Mr. F. Unknown to Mrs. M and others in the transaction, the company did not own the Alberta property, so there was in fact no security. Mr. Pomeroy was negligent in the preparation of this mortgage. Mr. Pomeroy paid out the loan proceeds as follows: \$90,000 for Mr. F's Alberta development, \$40,000 for the B.C. development and \$30,000

to Mr. Pomeroy directly as an “operating loan.” Mr. Pomeroy deceived Mrs. M by telling her that the \$30,000 would be held by him for her in trust to ensure she received her monthly interest payments. In fact, this was untrue and Mr. Pomeroy used the money for his own purposes.

In 1995 Mr. Pomeroy convinced Mrs. M to lend Mr. F a further \$20,000, which was repaid. In 1996 he convinced her to lend this amount again and she was under the impression it was for another client. In fact it was for Mr. Pomeroy personally. He did not document the loan and failed to recommend that Mrs. M receive independent legal advice. He never repaid this loan.

As a result, Mrs. M was forced to live in diminished circumstances and to work cleaning homes.

Mr. J

Mr. Pomeroy began acting for Mr. J in 1992 and drafted several wills for him. In June, 1993 he persuaded Mr. J to lend Mr. and Mrs. P’s company \$200,000, secured by a third mortgage against the shopping centre property (behind a first mortgage of \$1.6 million and a second mortgage of \$160,000 of another client, Mrs. M). He did not recommend that Mr. J obtain independent legal advice.

Mr. Pomeroy had a financial connection to the borrowers, Mr. and Mrs. P, in two respects. First, they were in debt to him because he had paid, on their behalf, money they owed to his client, Mrs. M. Second, he was negotiating to be a partner in the development of their shopping centre project and stood to make a great deal of money if the negotiation came to fruition. In these circumstances, Mr. Pomeroy acted for Mr. J while his interests were in conflict with those of the client.

He also acted in a conflict of interest in representing Mr. J in foreclosure proceedings against two other clients, Mr. and Mrs. P, and in failing to advise Mr. J to obtain independent legal advice regarding his investments.

After the death of Mr. J, Mr. Pomeroy as executor acted in a conflict of interest by loaning \$160,000 from the estate to a company of which the principal was another client, Mr. F. Mr. Pomeroy negligently failed to ensure mortgage security for the loan from Mr. J’s estate because he failed to register the mortgage and because the company did not in fact own the property intended to be mortgaged.

Mrs. H

While acting as executor and solicitor for the estate of Mrs. H in 1993, Mr. Pomeroy prepared an account for fees of \$7,500 and paid that amount to his law firm from trust, notwithstanding that he had not completed work on the estate and had no authorization, from either the beneficiaries or the court, to take the fees. The fees were calculated as 5% of the value of the estate and represented both executor and solicitor fees.

There were two beneficiaries of the estate. At the time of an interim distribution and review of executor's accounts, one beneficiary objected to the \$7,500 fee and requested details. Another lawyer advised that beneficiary that Mr. Pomeroy was not entitled to solicitor's fees as he had witnessed Mrs. H's will. Mr. Pomeroy subsequently agreed to reduce his fees and to refund the estate \$4,284, but he did not do so. As a result of Mr. Pomeroy's failure to refund the estate, there was insufficient money to pay out to both beneficiaries in the final distribution. Mr. Pomeroy, however, lied to one of the beneficiaries by telling her that the estate was ready for final distribution.

Mr. Pomeroy took the view that he need not immediately refund the estate since one of the beneficiaries was out of the country and would not request his share of the money until his return. By the fall of 1995, an attorney for that beneficiary (acting under a power of attorney) requested the final estate distribution, but Mr. Pomeroy did not take steps immediately.

In December, 1995 Mr. Pomeroy withdrew \$5,100 from the estate trust account and used the money to meet the payroll for his office staff. He replaced the money in January, 1996 and then made the final estate distribution. At the time, Mr. Pomeroy viewed this withdrawal of funds as a short-term loan, but at his hearing he acknowledged he had not been thinking straight, had faced heavy pressures in his business and personal life and had been drinking heavily.

Mrs. G

In March, 1993 Mr. Pomeroy was given power of attorney by Mrs. G, who was a widow of advanced years and lacked business and investment knowledge. In October, 1993 Mr. Pomeroy acted in a conflict of interest by persuading Mrs. G to authorize a loan to him of up to \$200,000 with or without security. He did not advise her to obtain independent legal advice.

In the fall of 1993 Mr. Pomeroy, using the power of attorney, borrowed \$142,500 from Mrs. G, with reckless disregard as to whether or not he could repay the loan. Mr. Pomeroy had arranged a \$130,000 third mortgage on his family home as security for the loan, but Mrs. G recovered only \$30,000 under this mortgage.

In 1996 Mr. Pomeroy, using the power of attorney, borrowed a further \$29,700 from Mrs. G who was not competent at the time. Mr. Pomeroy's conduct in borrowing this money from his client was particularly abhorrent. Furthermore, he knew that, in his financial circumstances, he was incapable of making repayment.

Mr. Pomeroy further withdrew \$7,800 from money in trust for Mrs. G as fees and disbursements without rendering an account to her.

Mrs. B

Mr. Pomeroy acted as solicitor for Mrs. B in April, 1993 on the sale of her house. Mrs. B was an elderly, vulnerable person with a history of psychological problems and who was

part of a difficult family. Mr. Pomeroy knew of Mrs. B's vulnerability and he abused her trust in him, behaving in such a way to take advantage of her money while minimizing the likelihood that other people would find out.

In December, 1993 Mr. Pomeroy drafted for Mrs. B a will and a power of attorney in which she appointed Mr. Pomeroy as attorney to handle her financial affairs.

In January, 1994 Mr. Pomeroy had Mrs. B sign a loan authorization to allow him to borrow up to \$200,000, with or without security, at a rate of not less than 9% in the case of personal loan. He did not advise Mrs. B to seek independent legal advice and did not discuss with her his own creditworthiness, alternative investments, credit risk or variations in interest rate levels.

Mr. Pomeroy then borrowed \$155,000 from Mrs. B and used the funds to personally invest in the project, to pay his law firm expenses, to lend to a friend's daughter and to give to a woman with whom he was having an affair. Mr. Pomeroy had his wife execute an "interest only" third mortgage in favour of Mrs. B on property on Vancouver Island. That property was already encumbered by two prior mortgages and did not fully secure the mortgage to Mrs. B. On later sale of the property, only \$24,453 remained after the first two mortgages were paid out, and those proceeds were paid into Mr. Pomeroy's account. Mr. Pomeroy had Mrs. B sign a discharge of mortgage without recommending independent legal advice or providing her a copy of the discharge.

In the course of paying Mrs. B's bills, Mr. Pomeroy wrote two NSF cheques to her care home.

Throughout this matter, Mr. Pomeroy converted to his own use almost all of Mrs. B's life savings, leaving her "a paltry and relatively pathetic sum," in Mr. Pomeroy's own words. He repaid Mrs. B a total of \$4,865.

The B.C. development project

While acting for P Estates Corporation in July, 1995, the company in which Mr. F was a principal, Mr. Pomeroy misappropriated \$10,000 in trust for the company by transferring those funds to his general account to eliminate an overdraft. He returned that amount to trust just over two weeks later.

Breach of accounting rules

Mr. Pomeroy failed to maintain the books, records and accounts required by the Law Society Rules. He failed to maintain records identifying sources of deposits to trust and general accounts, records identifying clients' non-trust positions, client disbursements incurred or billed, copies of client billings or trust ledgers for all client transactions. He further failed to disclose on his accountant's report (Form 47) a lawful attorney trust account and two other bank accounts pursuant to the power of attorney given to him by Mrs. G.

Decision

Mr. Pomeroy was guilty of professional misconduct in acting for clients in loan transactions while his personal interests were in conflict with the clients' interests, failing to recommend that clients obtain independent legal advice, acting recklessly as to the interest of clients in securing their loans, failing to disclose information to clients, deceiving clients, delaying six months to refund fees to a client, misappropriating client funds and wrongfully converting funds.

Mr. Pomeroy's failure to maintain books, records and accounts was in breach of the Law Society Rules.

The hearing panel rejected Mr. Pomeroy's claims of good faith in his financial dealings with clients, noting that, in using client funds in his investment projects, Mr. Pomeroy anticipated large financial gains for himself and only incidentally that the funds borrowed from clients would be repaid with interest. Moreover, he misappropriated funds. His long-range hopes of a successful investment for himself and an orderly return of the money to clients did not excuse that misappropriation.

The panel also pointed to Mr. Pomeroy's pattern of behaviour in dealing with clients who were unsophisticated or vulnerable, in failing to recommend independent legal advice and in keeping to a minimum written evidence of funds he had borrowed. In addition to his hope for personal gain from the investment projects, he received from clients large finder's fees in relation to the size and duration of their loans. He knew the investments were of greater risk than money invested in established financial institutions, yet the returns given to the borrowers were modest in relation to that risk.

The hearing panel further rejected alcoholism as a defence to the misconduct. The panel was not satisfied that an alcohol dependence had been established during the relevant periods. If, however, Mr. Pomeroy were alcohol dependent at that time, he was nevertheless able to distinguish between right and wrong and did have the requisite intent to perform dishonest acts. Mr. Pomeroy wished to bring to completion projects in which he had a financial interest, and it was this concern, not alcohol dependency, that explained his conduct.

Penalty

The hearing panel considered various factors relating to penalty and observed that Mr. Pomeroy's misconduct was very serious, occurred on multiple occasions over a three-year period in the mid-1990s, was intended for his own personal benefit and had a catastrophic effect on some of his victims.

Whether or not Mr. Pomeroy was alcohol dependent, he was able to distinguish right from wrong, and the panel could not conclude that abstinence from alcohol alone meant his rehabilitation. Moreover, given the magnitude and severity of Mr. Pomeroy's misconduct, the public should not be put at risk should his rehabilitation not prove successful.

The panel noted that a penalty was required to deter Mr. Pomeroy from repeating his misconduct and to send a clear message to the profession that, as the misappropriation of client funds is one of the most serious forms of lawyer misconduct, the Law Society will deal with it most seriously. The panel pointed to the importance of effective self-regulation in ensuring public confidence in the integrity of the legal profession.

The hearing panel ordered that Mr. Pomeroy be disbarred and pay costs of the hearing.

Note: A number of claims have been brought against the Law Society's Special Compensation Fund by Mr. Pomeroy's former clients. To date, compensation has been approved on claims on behalf of Mrs. G, Mrs. B and the estate of Mr. J.

Discipline Case Digest — 2001: No. 11 May (Pomeroy)