

Victoria, B.C.

Called to the B.C. Bar: July 10, 1980

Discipline hearing panel: March 25, 1993

W.T. Wilson, Chair, K.F. Nordlinger, Q.C. and W.M. Trotter

J. Whittow, for the Law Society

M. Macaulay, Q.C., for the member

Summary

The member acted in a conflict of interest by representing both a company and the majority shareholders in an action initiated by a minority shareholder who was claiming relief from oppression under the *Company Act*.

Facts

In March, 1991 the member began defending a company and the company's three majority shareholders against an action and a petition to claim relief for oppression under section 224 of the *Company Act* which were brought by a minority shareholder. Both the majority and minority shareholders in the litigation were directors of the company.

The member wrote to the solicitor for the minority shareholder acknowledging his representation of the majority shareholders and the company, and he filed Appearances on their behalf. The member subsequently filed a Statement of Defence on behalf of the individual majority shareholders. He did not file any Answer to Petition on behalf of the company.

In May, 1991 a special resolution was passed at a company meeting to alter the voting structure of the company, effectively giving additional voting power to shareholders having more than one share. The member, acting for the company, asked the Registrar of Companies to file the resolution; the lawyer for the minority shareholders opposed the filing.

The member ceased acting for the company and the majority shareholders on May 30, 1991, after the lawyer for the minority shareholder said the representation was inappropriate.

Admission

The member admitted that he professionally misconducted himself by acting in a conflict of interest.

Penalty

The member acted for both the majority shareholders and the company despite the conflict between the personal interests of those shareholders and the interests of the company.

The member, as solicitor to the company, also had a duty to make proper disclosure to the minority shareholder, who was also a director. That duty conflicted with the member's obligation of confidentiality as solicitor for the majority shareholders.

The Discipline Committee and the discipline hearing panel accepted the member's admission and proposed disciplinary action, and on March 25, 1993 the panel ordered that the member:

1. pay a fine of \$1,500;
2. pay the costs of the Law Society hearing, not to exceed \$1,000; and
3. complete the first assignment of the Professional Responsibility Remedial Studies Program, under the supervision of a staff lawyer of the Competency Committee.

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Case comment

The recent decision of *Mottershead v. Burdwood Bay Settlement Company Limited et al* (BCSC: Nanaimo Reg. No. SC9471) June 17, 1991 is also illustrative of conflicts of interest that may arise when representing parties in shareholder litigation. The Court in that case enjoined a lawyer from continuing to act for the defendant company and for the defendant majority shareholders individually. The Court found it clear that the lawyer and his firm were in a conflict of interest.

As corporate solicitor and counsel for the company, the lawyer's duty was to the company; as counsel for the majority shareholders, his duty was to those individuals. The best interests of the company are not necessarily those of the majority shareholders and directors, the Court stated. The company is a separate legal entity, and it is the duty of its solicitor to advise all of the directors so that they may make an informed decision as a board with respect to the best interests of the company.

In shareholder litigation, there exists a potential conflict of interest between the personal interests of the individual parties — both plaintiffs and defendants — as shareholders and their fiduciary duties as directors of the company. A solicitor acting both for the majority shareholders and for the company on the sole basis of the instructions of that same majority personifies that conflict.

A solicitor owes a duty of confidentiality to a client, so information received from the majority shareholders in their capacity as personal defendants is privileged. A conflict arises when the lawyer receives privileged information as solicitor for the majority shareholder defendants and declines to advise the board of directors — which includes the minority shareholders — of that information, notwithstanding the lawyer's role as corporate solicitor and counsel for the defendant company.

Discipline Case Digest — 1993: No. 5 July (Wilson)