

ANDREW STEPHEN BERNA 93/16

Kamloops, B.C.

Called to the Bar October 1, 1965

Discipline hearing panel: April 21, 1993

W.M. Trotter, Q.C. as a one-Bencher panel

Counsel for the Law Society: M.C. Baillie

Counsel for the member: R. Sugden, Q.C.

Summary

The member professionally misconducted himself by registering a release of lis pendens on his client's property contrary to the terms of an undertaking imposed on him by opposing counsel.

Facts

In April, 1988 the member represented T Ltd., the defendant in an action for an interest in land owned by that company. The plaintiff had earlier filed a lis pendens against the property.

T Ltd. instructed the member to attempt to remove the lis pendens. The member filed a petition and undertook negotiations with the plaintiff's lawyer. On April 26 the plaintiff's lawyer provided the member with a release of lis pendens. His covering letter stated that the document was delivered "on the clear understanding and upon your undertaking not to proceed with the registration of same until we can register concurrently and immediately following the plan of subdivision a new Lis Pendens securing our client's position having the same priority ... as the present Lis Pendens referred to above."

The member registered the release of lis pendens on May 5. He never advised the plaintiff's lawyer of the filing. He reported the release filing to his client on May 19. At the client's request in early August, the member sent the client copies of correspondence with the plaintiff's lawyer, including the letter of undertaking imposed by the plaintiff's lawyer.

On September 14, 1988 a \$750,000 mortgage was registered against the T Ltd. property, and a second mortgage for \$62,500 was registered on November 28. T Ltd. retained a different law firm in respect of these mortgages, and the company terminated the member's retainer two days later.

The plaintiff's lawyer did not discover that the lis pendens was no longer registered against the T Ltd. property until he conducted a routine search of the property in January, 1989. The lawyer then immediately registered a second lis pendens. The plaintiff's law firm wrote to the member requesting that he "take such steps as are necessary to ensure that our priority remains in place at this time." The member did not respond to the correspondence and took no steps at any time.

Decision

The member's conduct constitutes professional misconduct.

Penalty

The hearing panel found that the undertaking in this case was imposed by the plaintiff's lawyer whose client had an adverse interest to that of the member's client. The specific purpose of the undertaking was to protect the plaintiff in dealings with a large parcel of real estate. The breach of undertaking was deliberate and weighty because it resulted in the plaintiff's interest being entirely unprotected. The member took no steps toward reasserting the protection required by his undertaking. Even after he was discharged by T Ltd., the member did not inform the plaintiff's lawyer of his breach or the risk faced by the plaintiff.

The hearing panel considered letters attesting to the member's exceptionally good record in his 27 years of practice. A Supreme Court judge, a Provincial Court judge and the plaintiff's lawyer, who had imposed the

undertaking, said that the member had a fine reputation. The plaintiff's lawyer also asserted he would still accept the member's undertaking. The panel found the member's misconduct was out of character.

Because of the serious nature of the undertaking, however, the panel decided against a joint recommendation of counsel for a reprimand and costs, but ordered that the member:

1. be reprimanded;
2. pay a fine of \$2,000;
3. pay costs of the discipline proceedings by July 31, 1993.

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