

2004 LSBC 31

Report issued: September 21, 2004

Oral Reasons: July 15, 2004

Citation issued: June 25, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

ROBERT JOHN PALKOWSKI

Respondent

Decision of the Hearing Panel

Hearing date: July 15, 2004

Panel: Gordon Turriff, Q.C., Single Bencher Panel

Counsel for the Law Society: Jean Whittow, Q.C.

Counsel for the Respondent: Craig Dennis

Background

[1] In June 2003, Mr. Palkowski was cited for having breached an undertaking he gave to the Law Society in 1992. By the terms of the undertaking, he promised not act against unrepresented parties except in limited circumstances. The citation reads:

"1. On November 16, 1992, you accepted an undertaking to the Law Society dated October 16, 1992. This undertaking, imposed as a condition on your practice, prohibited you from acting against an unrepresented party except in limited circumstances. In certain litigation, you acted against unrepresented opposing parties, contrary to your undertaking:

(a) In B.C.S.C. Action W.P.T. Company v. 486*** Ltd. et al., you acted for A.M. Co. when the Respondent K.S. was unrepresented.

(b) In B.C.S.C. Action 604**** Ltd. and R.Y. v. 486*** Ltd. et. al., you acted for A.M. Co. when the Plaintiffs were unrepresented.

(c) In B.C.S.C. Action 604*** Ltd. v. 486*** Ltd. et. al., you acted for all three Defendants, when the Plaintiff was unrepresented.

(d) In B.C.S.C. Action 604*** Ltd. v. 486*** et. al., you acted for all three Defendants when the Plaintiff was unrepresented."

[2] The wording of the 1992 undertaking was somewhat ambiguous but in answer to the current citation the Respondent has not suggested that he could rely on any ambiguity. I was told in any event that he has now signed a new undertaking in clearer terms.

[3] For present purposes, the Respondent has tendered a conditional admission to the Discipline Committee. Accordingly, the citation, which came to me as a single panel member by consent, fell to be considered and as it turns out to be disposed of under Rule 4-22 of the Law Society Rules.

[4] Exhibit 3 is an Agreed Statement of Facts. The agreed facts are as follows:

- "1. Robert John Palkowski was called to the bar of British Columbia on January 10, 1978.
2. During 2001 and the first half of 2002, Mr. Palkowski engaged in the practice of law as a sole practitioner located at #703 - 938 Howe Street, Vancouver, British Columbia under the name of Palkowski & Company Law Corporation. In or about May or June, Mr. Palkowski agreed to hire an associate lawyer, Mr. Bruce MacLean, who joined the firm on July 1, 2002 and is currently employed with Palkowski & Company Law Corporation.
3. A copy of the citation issued to Mr. Palkowski is attached as Tab 1. A copy of the letter signed by Mr. Palkowski's counsel acknowledging service of the citation is at Tab 2.
4. Upon the recommendation of the Competency Committee of the Law Society Mr. Palkowski provided an undertaking (the "Undertaking") to the Law Society dated November 16, 1992, which reads as follows:

'To not act on any file unless the other party(ies) is (are) represented by counsel except where the legal tasks to [sic] not involve contested matters and do not involve other opposing parties to the transaction. For the purposes of this undertaking and without limiting its generality, a matter is considered to involve other opposing parties where:

- (a) a dispute of fact or law arises between the parties who have given instructions on what previously was an uncontested matter;
- (b) consideration (e.g. money, securities, property, debt or other promises) is exchanged or intended to be exchanged between two or more parties; or
- (c) consideration other than a retainer for fees and disbursements (eg. Money, securities, property, debt or other promises) is given or intended to be given to Robert J. Palkowski in Trust or to Robert J. Palkowski personally in exchange for or in the expectation of receipt of a benefit or other advantage.

Any documentation prepared by Robert J. Palkowski should contain the following paragraph or, if not practical to incorporate this paragraph in the document, be contained in a covering letter:

'This document was prepared by Robert J. Palkowski, who acted solely for _____. Anyone else who intends to (become a party to this agreement/rely on this disclosure statement/etc.) should seek independent legal advice.'

A copy of the letter sent by the Law Society on October 22, 1992, and signed by Mr. Palkowski on November 16, 1992 is attached at Tab 3.

5. On November 2001 a foreclosure petition filed under BCSC No. H010467 named W.P.T. Company as Petitioner and 486*** Ltd. ("486***"), A.M. Co. ("A.M. Co."), E.T. ("E.T."), 587*** Ltd., ("587***") and [Investment Co.] as Respondents ("Foreclosure"). In the Foreclosure, Mr. Palkowski represented A.M. Co.; S.B. of the law firm of Chen & Leung represented 486***, 587*** and E.T.; K.A. of the law firm of Aydin Bird represented [Investment Co.]. All were presented by legal counsel.

6. On or about September 25, 2001, about five months after the Foreclosure proceedings began, the court ordered that K. & S. Investments Inc. be added as a party to the Foreclosure (Tab 6). K. & S. Investments Inc. was not represented by legal counsel. R.Y., director of K. & S., conducted its legal proceedings with the assistance of M.W. who also attended with him at court. All respondents opposed the Foreclosure. Thereafter, Mr. Palkowski corresponded with and served documents upon the unrepresented party, K. & S. through its director, R.Y.
7. In light of the fact that all parties opposed the Foreclosure, Mr. Palkowski did not direct his mind to his Undertaking.
8. On December 18, 2001, a Statement of Claim was filed in BCSC Action No. S017147 by 604*** B.C. Ltd. and R.Y. as Plaintiffs against 486*** and A.M. Co. as Defendants (Tab 4). In this action (the "Equitable Mortgage Action") the Plaintiffs sought a declaration of an equitable mortgage ranking in priority to a mortgage registered in favour of the Defendants, as against the lands which were the subject of the Foreclosure.
9. The Plaintiffs did not have legal representation in the Equitable Mortgage Action. 604*** was owned by M.W., who conducted 604***'s legal proceedings.
10. On December 28, 2001 Mr. Palkowski filed an Appearance and Statement of Defence on behalf of the Defendant, A.M. Co. (Tab 5) in the Equitable Mortgage Action.
11. On December 28, 2001 in the Equitable Mortgage Action, R.Y. and M.W. filed a Notice of Motion and Affidavit in support of their claim (Tabs 7, 8 and 9). A similar Affidavit was also filed in the Foreclosure.
12. On January 4, 2002, Mr. Palkowski filed an Affidavit sworn by the President and only shareholder of A.M. Co. in the Equitable Mortgage Action asserting that "A.M. Co. agrees to honour [a] priority agreement with 604***" (Tab 10).
13. On January 22, 2002, in the Equitable Mortgage Action, the Plaintiffs filed a Notice of Hearing returnable Friday, January 22, 2002 (Tab 11).
14. On January 25, 2002, upon hearing Mr. Palkowski on behalf of A.M. Co. and R.Y. on behalf of K. & S., and M.W. on behalf of 604***, the Court ordered that the Equitable Mortgage Action be heard in conjunction with the Foreclosure (Tab 12).
15. On February 22, 2002, Mr. Justice Groberman dismissed the Equitable Mortgage Action and granted an Order Absolute in the Foreclosure (Tab 13).
16. On March 25, 2002, M.W. commenced an action on behalf of 604*** against 486***, C.K.F. and E.T. This action was filed in the New Westminster Registry of the BCSC under Action No. S072680 ("BCSC S072680"). Tab 14 is a copy of the Writ and Statement of Claim. The action was founded in debt against 486*** and upon personal guarantees given by the other defendants.
17. M.W. served the Defendants and on April 15, 2002 Mr. Palkowski filed an Appearance on behalf of all three defendants in BCSC S072680 (Tab 15). Through oversight, this was not delivered to M.W. who eventually obtained copies from the Registry.
18. On April 23, 2002 Mr. Palkowski filed a Statement of Defence on behalf of each of the three defendants in BCSC S072680 (Tax 16, 17 and Tab 18).
19. On May 21, 2002 M.W. filed a Notice of Motion and Affidavit in BCSC S072680 (Tabs 19 and 20) seeking, inter alia, judgment against the Defendants. On May 29, 2002 the Plaintiff filed a Notice of

Hearing returnable May 31, 2002 (Tab 21). M.W. personally delivered these documents to Mr. Palkowski.

20. Mr. Palkowski filed a Third Party Notice on behalf of the Defendants against R.Y. on BCSC S072680 (Tab 22).

21. On May 30, 2002 Mr. Palkowski wrote to the third party, R.Y. (Tab 23).

22. On May 31, 2002, M.W. went to Mr. Palkowski's office. She indicated she was prepared to settle the claim for less than the full amount claimed. Mr. Palkowski indicated to M.W. that R.Y. should be served with her materials and be at this hearing as he was named as a Third Party. M.W. indicated that she did not serve him and therefore wanted to change the date for the hearing to June 19, 2002. Palkowski consented to this date and Ms. W. filed a Praecipe adjourning her hearing date to June 19, 2002 (Tab 24).

23. On May 31, 2002 Mr. Palkowski wrote to M.W. confirming that she had picked up the third party documents and asked that the Chambers date be altered from June 19, 2002 to either June 17, 25, 16 or 28, 2002 (Tab 25).

24. On or about June 18, 2002, M.W. called Mr. Palkowski to discuss a settlement. In a telephone conversation M.W. said that she would file a discontinuance in BCSC S072680 if Mr. Palkowski client's would make a settlement proposal. Mr. Palkowski said he would ask his clients to make a settlement proposal to M.W. On June 18, 2002, M.W. filed a Praecipe adjourning the hearing in BCSC S072680 generally by consent (Tab 26).

25. On June 19, 2002 M.W. faxed a confirming letter to Mr. Palkowski (Tab 27).

26. On June 19, 2002, M.W. filed a Notice of Discontinuance in BCSC S072680 (Tab 28).

27. On June 24, 2002 Mr. Palkowski advised M.W. that he asked his client to make a settlement proposal to M.W. but that they would not do so.

28. On June 26, 2002, M.W. filed a Writ of Summons and Statement of Claim brought on behalf of 604*** against 486***, C.F., E.T. and R.Y. for similar relief (Tab 29). The action was filed in the Vancouver Registry of the BCSC under Action No. S023577.

29. M.W. then delivered these documents to Mr. Palkowski's office.

30. On July 6, 2002, Mr. Palkowski telephoned M.W., but did not reach her. He then wrote to M.W. to advise that he had no instructions to accept service of the documents and that she must serve the defendants (Tab 30).

31. On July 11, 2002 M.W. wrote to Mr. Palkowski concerning recent events (Tab 31).

32. On July 11, 2002 M.W. made a complaint to the Law Society concerning Mr. Palkowski's conduct. The substance of M.W.'s complaint was dismissed by the Discipline Committee, however, the complaint caused the Law Society to consider whether Mr. Palkowski had breached his Undertaking.

33. On July 1, 2002, Mr. MacLean became an associate in Mr. Palkowski's office and in mid-July took conduct of the litigation.

34. Mr. Palkowski admits that in acting against an unrepresented party, he breached his Undertaking to the Law Society, and committed professional misconduct." (Exhibit 3)

[5] For the admitted professional misconduct, Mr. Palkowski proposed that he pay a fine of \$2,500.00 and

costs of \$6,000.00. I heard counsel on the proposed penalty. After expressing some concern about the difficulty I faced trying to reconcile the proposed fine with fines in other classes of cases, notably fines in cases involving lawyers who have breached the statutory duty to pay taxes collected from clients, and after commenting about what I thought were rather unsatisfactory penalties imposed in many of the breach of undertaking cases to which counsel referred me, I somewhat reluctantly accepted the proposed disciplinary action, imposed the fine of \$2,500.00 and made the costs Order, giving Mr. Palkowski until December 31, 2004 (a date suggested by Mr. Dennis) to pay the fine and the costs.

[6] I instruct the Executive Director to record Mr. Palkowski's admission on his professional conduct record. Publication of this disciplinary action will follow in the normal course.