2014 LSBC 44
Decision issued: September 17, 2014
Citation issued: January 30, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

JOHN ROBERT SANDRELLI

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	July 21, 22 and 23, 2014
Panel:	C.E. Lee Ongman, Chair Lance Ollenberger, Public representative Brian J. Wallace, QC, Lawyer
Counsel for the Law Society:	Kieron Grady
Counsel for the Respondent:	William Smart, QC

INTRODUCTION

[1] The citation alleges that, in October 2012, the Respondent breached an undertaking and committed professional misconduct by instructing his firm's bank to stop payment on a trust cheque contrary to Chapter 11, Rule 8 of the *Professional Conduct Handbook*, then in force.

[2] Rule 8 provided,

Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque

(a) will be paid, ...

[3] The issue is whether "most unusual and unforeseen circumstances" justified the Respondent stopping payment on the trust cheque.

FACTS

[4] The Respondent is, and was at the time, the senior insolvency partner in the Vancouver office of Fraser Milner Casgrain LLP ("FMC"), a national law firm with about 70 lawyers in Vancouver. FMC has since become part of Dentons, an international law firm.

[5] The Respondent represented L Group, a major creditor of B Ltd. B Ltd. owned a golf course and related development property in Chilliwack and had sought to restructure its business under the *Companies' Creditors Arrangement Act* ("CCAA"). The CCAA provides for processes, including court oversight and creditor approval, to establish a plan of arrangement for the restructuring of insolvent companies while providing some protection to creditors.

[6] L Group and a creditor group called S Company were competing to acquire sufficient claims from other creditors of B Ltd. to obtain approval of a plan of arrangement favourable to their interests in the restructuring.

[7] By an agreement dated October 26, 2011 (the "Agreement"), L Group purchased from another creditor, PC, B Ltd.'s golf course indebtedness to her (the "Assigned Claim"), which allowed L Group to vote that claim.

[8] However, PC continued to hold indebtedness on the development property (the "Unassigned Claim") and the Agreement prevented L Group from voting the Assigned Claim "in support of any plan of compromise and arrangement that does not include or otherwise result in payment in full of the Unassigned Claim."

[9] The Agreement provided that the purchase price of the Assigned Claim was $90,000 plus "50% of the value greater than $90,000 received by [L Group]," and payment was conditional on either creditor approval of a plan of arrangement, or the occurrence of "a transaction" as defined by the Agreement. If neither occurred within specified times, PC could require L Group to "immediately re-assign" the indebtedness to her. The time for "a transaction" to occur would expire in July 2012.

[10] On April 20, 2012, BC Supreme Court Justice Sewell granted an order absolute of foreclosure on B Ltd.'s golf course property (the "Order Absolute"). The related documents were registered in the New Westminster Land Title Office on April 27, 2012.

[11] Taking the position that those events constituted "a transaction", the Respondent forwarded his firm's trust cheque in the amount of $90,000 to PC on April 27, 2012.

[12] At the time he instructed the Respondent to pay PC the purchase price, MT, the principal of L Group, knew that PC also had an agreement with S Company relating to B Ltd.'s indebtedness to her. By instructing the Respondent to pay the $90,000 to PC, MT was seeking to advance L Group's efforts to confirm there had been "a transaction", so that "there will be no reassignment of the Golf Course Claim."[1]

[13] PC did not cash the trust cheque at that time. On May 10, 2012, in the context of settlement discussions with S Company, MT asked the Respondent whether it was possible to stop payment. Both the Respondent and his associate advised MT almost immediately that they could not stop payment on a cheque written on their trust account.

[14] MT raised the issue of stopping payment of the trust cheque with the Respondent again in July 28, 2012 and October 6, 2012 emails, and with prospective investors on October 6. By October 6, L Group had sufficient investor/creditor support for approval of a plan of arrangement favourable to it that it no longer needed the Assigned Claim.

[15] Further, MT was concerned that L Group was prohibited by the Agreement from voting the Assigned Claim for the plan of arrangement favourable to it because it would not "result in payment in full of the Unassigned Claim."

[16] On October 25, 2012, Justice Sewell heard the application for a creditors' meeting to consider the proposed plan of arrangement. He set the meeting for November 19, 2012. PC unsuccessfully opposed the application and, after the hearing, deposited the $90,000 trust cheque in her bank account.

[17] On October 26, 2012, the Respondent, on his client's instructions, instructed his firm's bank to stop payment of the cheque. The following week, PC discovered that her bank had reversed the deposit.

[18] On November 6, 2012, PC's solicitor wrote to the Respondent's firm, noting that stopping payment of a trust cheque was a serious matter, and requested a replacement cheque "without delay".

[1] Exhibit 2, tab 3, Respondent's memo to file, April 24, 2012

[19] The Respondent replied on November 7, justifying stopping payment with reference to "most unusual and unforeseen circumstances". In particular, he noted that:

(b) PC failed to cash the cheque for six months;

(c) PC failed to confirm her position as to whether the Order Absolute constituted "a transaction" or whether the time for "a transaction" had expired;

(d) on October 25, the court had ordered the meeting of creditors and

(e) his client was unable "to determine with certainty whether it had any residual rights or control in respect of the Claim."

[20] PC's counsel rejected the justifications on November 8 and demanded a replacement trust cheque by the close of business on November 9.

[21] On November 19 and 20, the Respondent sought unsuccessfully from PC's solicitors either a settlement agreement or a release in exchange for a replacement cheque.

[22] On November 26, 2012, PC's solicitors made the complaint to the Law Society that gave rise to the citation.

[23] The Respondent provided a replacement trust cheque to PC's solicitors on November 30, 2012.

RESPONSE TO THE COMPLAINT

[24] The Respondent responded to the complaint in a letter of March 26, 2013 to the Law Society, confirming the justifications in his letter of November 7, 2012 for stopping payment of the cheque. In the response the Respondent reiterated that stopping payment was justified by PC's delay in cashing the cheque, and notes that his client believed that PC had not negotiated the cheque "so as to leverage her position into a better deal with the S Company group." He also notes that the cheque was reissued, so that PC was not prejudiced.

[25] The Respondent theorizes that PC might have been purporting to sell her claim to both his client and to the competing creditor, S Company. However, neither he nor his client knew what transaction she had agreed to with S Company.

ANALYSIS

[26] The Respondent does not suggest that he did not issue the trust cheque, and the evidence is clear that he did.

[27] Rule 8, as it read at the time, expressly makes a lawyer's issuing a trust cheque an undertaking that it will be honoured unless "most unusual and unforeseen circumstances" justify the lawyer stopping payment. Once the Law Society has established that the lawyer issued the trust cheque, the Respondent has the burden to prove circumstances justifying stopping payment of the cheque.

[28] The standard of proof in discipline cases is the civil standard, which the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, notes requires that "evidence must be scrutinized with care" and "must always be sufficiently cogent to satisfy the balance of probabilities test."

[29] The Law Society submits that, with the reverse onus that flows from the wording of Rule 8, that standard applies to the Respondent. The Respondent does not take issue with that submission, and we agree. In our view the Respondent must establish two things on the balance of probabilities with clear and cogent evidence:

1. that there existed most unusual and unforeseen circumstances, and
2. that those circumstances justified stopping payment on the trust cheque.

Were the circumstances most unusual and unforeseen?

[30] In summary, the Respondent's submission is that it was most unusual and unforeseen that PC did not cash the cheque for almost six months, and that she may have delayed cashing it to gain an advantage as a creditor in the CCAA process.

[31] We do not agree that either PC's delay in cashing the cheque for six months or her motivation for that delay was a most unusual circumstance. Even if payees usually cash cheques quickly, failing to do so is not "most unusual". Banking practice clearly anticipates that cheques may be held for a period of time before they are presented for payment. As a result, in the normal course, banks will honour cheques for at least six months from the date they are issued.

[32] Here, the Respondent issued the trust cheque in circumstances that make a delay in cashing it even less unusual. MT instructed the Respondent to issue the cheque in order to support L Group's position that the Order Absolute constituted "a transaction". The Respondent and MT hoped PC would cash the cheque, because that would support L Group's position.

[33] The Respondent and his client had not sought PC's express acknowledgement that the Order Absolute constituted a transaction because they were concerned that she would not do so, weakening L Group's position that she could not require that the claim be reassigned to her. They hoped that she would cash the cheque promptly as support for L Group's position. But they must have anticipated that she might delay.

[34] PC's motive for delaying presenting the cheque might well have been to keep her options open and maximize the value of her claims. But acting in one's self-interest is to be expected in the context of a business transaction. If doing so is a breach of contract, the remedy would be a civil remedy, not stopping payment of a trust cheque.

[35] Having found that the circumstances were not "most unusual", it is not necessary to determine if they were "unforeseen". However, it is clear that the Respondent and his client either foresaw or should have foreseen the possibility that PC would delay depositing the trust cheque in order to keep her options open.

Did the circumstances justify stopping payment on the trust cheque?

[36] In case we are found to be wrong in our conclusion that delaying depositing the trust cheque for six months was not "most unusual", and was, or should have been, "foreseen", we have also considered whether the circumstances could justify stopping payment on the trust cheque.

[37] In our view, even if the circumstances were most unusual and unforeseen, they do not justify stopping payment on the trust cheque. Rather than justifying failing to honour the cheque, the delay created an opportunity not to honour it.

[38] In October 2011, the Respondent's client, L Group, committed to pay PC at least $90,000 to improve its leverage in B Ltd.'s CCAA proceedings. It instructed the Respondent to pay that money in April 2012. By October 2012, L Group no longer needed the leverage and, because PC had not cashed the trust cheque, saw the opportunity to avoid what had become an unnecessary cost.

[39] The delay and PC's motive in not depositing the trust cheque do not justify stopping payment on it.

CONCLUSION

[40] In our view, on the plain meaning of the words in Rule 8, the exception does not apply to the circumstances here. Further, if there were any doubt as to their

meaning, the exception for "most unusual and unforeseen circumstances" must be read restrictively. It is fundamental to legal ethics that the public can rely on a lawyer's undertaking. Rule 8 and its successor in the current *BC Code of Professional Conduct*, Rule 7.2-12, apply that principle to trust cheques. In order to ensure the inviolability of trust cheques, the exception to Rule 8 must be limited to circumstances that would not jeopardize the public's trust in the legal profession.

[41] Applying the exception here, permitting the Respondent to stop payment on the trust cheque because PC's delay in presenting it created the opportunity and his client no longer needed the Assigned Claim, would undermine the inviolability of trust cheques and would jeopardize the public's trust in the legal profession.

[42] We find that, by stopping payment on the trust cheque without sufficient reason, the Respondent committed professional misconduct.