



DISCIPLINE CASE *DIGEST*

Case 08-06

Member:	Victor Erich Bargaen
Jurisdiction:	Winnipeg, Manitoba
Called to the Bar:	June 25, 1992
Particulars of Charges:	Professional Misconduct (2 counts) <ul style="list-style-type: none">▪ Breach of Chapter 16 of the <i>Code of Professional Conduct</i> (Failing to comply with a trust condition imposed on him by another lawyer)▪ Breach of Chapter 5 of the <i>Code of Professional Conduct</i> and Practice Direction 93-02 (Acting for clients in a matter and then later acting against the clients in the same or a related matter)
Date of Hearing:	July 17, 2008
Panel:	<ul style="list-style-type: none">▪ Robert T. Gabor, Q.C.(Chair)▪ Brian A. Pauls▪ Karen A. Clearwater
Disposition:	<ul style="list-style-type: none">▪ Fine of \$1,500.00▪ Costs of \$3,000.00
Counsel:	<ul style="list-style-type: none">▪ Joe R. Gallagher for The Law Society of Manitoba▪ Gavin M. Wood for the Member

Breach of Trust Condition / Conflict of Interest

Facts

Mr. Bargaen was retained by clients in July 2005 concerning the purchase of a residential property. The clients advised Mr. Bargaen that they were arranging a mortgage through a private lender.

Prior to the closing date of the transaction Mr. Bargaen received a letter from the vendors' solicitor enclosing closing documents and keys to the property. The letter stated that the documents and keys were provided to Mr. Bargaen subject to certain trust conditions, including that to the best of his knowledge, all conditions precedent to the advance of mortgage funds had or would be complied with excepting only registration of the mortgage and that the keys would not be released until Mr. Bargaen had complied with this trust condition.

In fact, as of the closing date, Mr. Bargaen had not received mortgage confirmation or mortgage instructions from a mortgagee and the purchasers had not executed the required mortgage and

supporting documentation pertaining to a bona fide mortgage loan. Notwithstanding this, Mr. Bargaen sent a letter to the vendors' solicitor confirming that the solicitor's trust conditions were satisfactory. Mr. Bargaen also confirmed that the purchasers had executed the new mortgage and its supporting documentation and he requested confirmation that he could release the keys to his clients.

Based on the representations in Mr. Bargaen's letter, the vendors' solicitor authorized the release of the keys and the purchasers took possession of the property. Some 18 days later, Mr. Bargaen wrote to the other solicitor and advised that the purchasers had been unable to secure mortgage financing for the purchase. By his actions, Mr. Bargaen failed to comply with the trust condition imposed on him by the vendors' solicitor and acted contrary to Chapter 16 of the *Code of Professional Conduct* adopted by the Benchers of The Law Society of Manitoba (the "Society").

In respect of the same matter, with Mr. Bargaen's assistance, alternate private mortgage financing was eventually obtained through another client of Mr. Bargaen, enabling the purchasers to remain in the premises. With the knowledge and approval of both of his clients, Mr. Bargaen acted for the mortgagee as well as the purchasers in the matter. Mr. Bargaen advised the parties in writing that in the event of a conflict of interest in the matter, he would be obliged to refer both parties to other counsel.

After one year, difficulties arose regarding the mortgage payments and some months later Mr. Bargaen, acting on instructions from the mortgagee, wrote to the purchasers. He demanded payment of the arrears and provided notice that they were to vacate the premises. In now acting for the mortgagee against the purchasers in the same or a related matter, Mr. Bargaen was in a conflict of interest. By his actions Mr. Bargaen acted contrary to Chapter 5 of the *Code of Professional Conduct* adopted by the Benchers of the Society and contrary to Practice Direction 93-02 issued to the profession by the Society.

Plea

Mr. Bargaen entered a plea of guilty to the charges.

Decision and Comments

Based on his admission to the charges the panel found Mr. Bargaen guilty of professional misconduct.

Penalty

The panel accepted a joint recommendation made by the Society and counsel for Mr. Bargaen and ordered that he pay a fine of \$1,500.00 and costs of \$3,000.00. It was further ordered that the fine and costs be paid within one year according to a payment schedule to be agreed upon by the Society and counsel for Mr. Bargaen.