

Vancouver, B.C.

Called to the Bar: September 1, 1989

Discipline hearing panel: June 2 and 3 and November 12, 1999

Richard C. Gibbs, Chair, Robert W. McDiarmid, Q.C. and Peter J. Keighley

Benchers: January 11, 2000

Majority: Karl F. Warner, Q.C., Chair, Ralston S. Alexander, Q.C. Howard R. Berge, Marjorie Martin, Anita Olsen, William J. Sullivan and Bruce D. Woolley, Q.C.

Dissent: Robert W. Gourlay, Q.C.

Jessica S. Gossen, for the Law Society

Richard R. Sugden, Q.C., for JH

Hearing report indexed as [1999] LSBC 29

Summary

JH received into his trust account approximately \$300,000 in a series of wire transfers from Mr. B and B Ltd for investment in bonds by Mr. J. JH did not represent either Mr. B or Mr. J in this transaction and did not have duties as a trustee of the funds. He disbursed the funds to Mr. J on this latter's instruction that they were non-refundable deposits and were his sole property. Mr. B later complained that the bond he had received from Mr. J was worthless. JH had known of Mr. J's efforts to raise funds for a commercial investment and the fact that one of Mr. J's companies was defunct and incapable of issuing bonds. In the circumstances, JH had a duty to advise Mr. B and B Ltd. that he was not protecting their interests in the transaction. He failed to do so, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*. In the hearing panel's view, his conduct was dishonourable and disgraceful and amounted to professional misconduct. The panel ordered that JH be fined \$10,000 and ordered to pay \$7,500 as costs. On review, the Benchers found that JH's breach of the *Handbook* was conduct unbecoming, but could not be characterized as disgraceful and dishonourable. The Benchers reduced the penalty to a fine of \$3,000 and also reduced costs to \$3,000.

Facts

Between August and October, 1994, JH received in his trust account a series of wire transfers that totalled approximately \$300,000 from Mr. B and B Ltd. for investment in bonds through one of JH's clients, Mr. J (who was acting as bonding agent).

JH disbursed the funds from trust to Mr. J in accordance with this latter's instructions, which were that the funds were non-refundable deposits and his sole property. JH did not act for either Mr. J or Mr. B in the transaction and was not a trustee with respect to the funds. Two years later Mr. B complained to JH that the bond he had received had proved worthless. The panel found that Mr. B was the author of his own misfortune by forwarding large sums of money without consulting his own lawyer or ever attempting to convey instructions to JH, and JH did not owe him a duty as a trustee.

JH did, however, know that Mr. J was attempting to raise money for a commercial project, was having difficulty doing so and stood to lose \$800,000 in the matter. He also learned that a company Mr. J purported to represent had become defunct and was incapable of issuing bonds, and that Mr. J had incorporated two other companies with similar names that could have created confusion in the mind of an investor. JH also knew or ought to have known that Mr. B and B Ltd. may have felt the involvement of a lawyer enhanced the legitimacy of this transaction.

JH took steps to contact Mr. J to seek assurances that the money transferred into his trust account was not proceeds of crime. JH did not, however, contact Mr. B to advise him that his interests in the transaction were unprotected.

Decision

In the circumstances, JH had a duty to advise Mr. B and B Ltd. that he was not protecting their interests. He failed to do so, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*. His failure created conditions in which Mr. J was apparently able to bilk investors in a scam. In the hearing panel's view, JH' conduct was dishonourable and disgraceful and amounted to professional misconduct.

Penalty

The panel ordered that JH be reprimanded, pay a \$10,000 fine on or before July 1, 2000 and pay \$7,500 in costs on or before July 1, 2000.

Bencher review

Majority

On review of the panel decision under section 47 of the *Legal Profession Act*, the Benchers found that the evidence did not support a finding of disgraceful and dishonourable conduct on the part of JH. The Benchers noted, however, that they disagreed with the hearing panel's view that conduct must be found "disgraceful" and "dishonourable" before it will amount to professional misconduct, but rather that professional misconduct may include less serious conduct.

While the Benchers were not disposed to describe JH' misconduct as dishonourable or disgraceful, they were of the view that it amounted to conduct that was unbecoming, that

is, contrary to both the best interests of the public and the legal profession and tending to harm the standing of the legal profession. The Benchers accordingly reduced the penalty to a fine of \$3,000 and also reduced costs to \$3,000, given that most of these costs related to unproved counts on the citation.

Dissent

Mr. Gourlay dissented from the majority of Benchers on the review. He noted that professional misconduct need not be that described as “disgraceful or dishonourable,” but must be conduct that a right-thinking person would conclude has fallen below the standards of proper professional conduct on the part of a reasonably competent lawyer. It must have the component of blameworthiness that is more than lack of care or conduct which in hindsight should have been done differently. JH did not know or suspect that Mr. J was acting improperly towards the investors. He erred in failing to put these investors on notice that he was not protecting their interests, but his failure was not blameworthy to the extent of constituting misconduct.

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