

Breach of Undertaking

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North Vancouver, B.C.

Called to the Bar: October 1, 1969

In 1991 the member represented the purchaser in the conveyance of a Vancouver Strata title property. The vendor had made application to the city for an occupancy permit for the property.

The purchaser and vendor agreed that the member would retain a \$100,000 deficiency holdback from the sale proceeds. On March 28, 1991 the vendor, who owed money to a bank, executed an irrevocable direction to the member to pay the bank "\$100,000 from the deficiency holdback with respect to [the property] upon receipt of the occupancy permit."

The bank's solicitor faxed the irrevocable direction to the member on April 3. The member returned to the vendor's solicitor a statement that "I hereby acknowledge receipt of the irrevocable direction this 3rd day of April, 1991 and confirm that I will act in accordance therewith."

The member subsequently received into his trust account the sale proceeds, which included the deficiency holdback.

On May 23 the City of Vancouver issued an occupancy permit for the property. The bank's solicitor wrote to the member on July 9, 1991 to demand that the member pay out the full \$100,000 holdback in accordance with his undertaking and the irrevocable direction to pay.

On August 23, 1991 the member delivered a trust cheque for \$50,000 to the bank's solicitor as part payment of the holdback. He made no further payment to the bank's solicitor from the holdback and remained in breach of his undertaking. On January 2, 1992 the bank advised the member that the vendor had satisfied its indebtedness to the bank, and that the \$50,000 balance of the deficiency holdback could be released directly to the vendor.

The member explained to the Discipline Committee that he believed the holdback would ensure the correction of all deficiencies necessary to obtain an occupancy permit, *as well as* the correction of other deficiencies that remained even after the occupancy permit was issued. He did not, however, seek to amend the form of undertaking, which plainly stated the bank's position that the holdback was to secure the rectification of deficiencies relating only to the occupancy permit.

The Discipline Committee on September 16 accepted the member's admission that he had professionally misconducted himself in breaching his undertaking by failing to pay out the deficiency holdback.

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