

Richmond, B.C.

Called to the Bar: January 9, 1986

**Discipline hearing panel:** October 28, 1997

Emily Reid, Q.C., Chair, Kristian Jensen and William Sullivan

Todd Follett, for the Law Society

Valmond Romilly, for Mr. Ash

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### **Summary**

Mr. Ash received postdated cheques from his client as the deposit in a real estate transaction. Mr. Ash knew or ought to have known that the real estate company in the matter believed the cheques would be deposited to his trust account in accordance with the terms of the real estate purchase and sale contract. Mr. Ash held the postdated cheques but did not disclose that they were postdated to the real estate agent who assumed the cheques had been deposited. The sale ultimately did not proceed. Mr. Ash acted incompetently in failing to seek instructions from his client to disclose that he held postdated cheques or, alternatively, to cease acting in the matter. Mr. Ash intended no gain for himself, however, and his conduct was not disgraceful or dishonourable. The hearing panel ordered that Mr. Ash be reprimanded, pay costs and complete a remedial real estate law program.

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### **Facts**

Mr. Ash's client (Mr. S) entered into a contract of purchase and sale of a condominium with Ms. B. Mr. S was to move into the condominium as a renter in January, 1996 and to become the owner on March 1, 1996.

The contract of purchase and sale contained a provision that the deposit would be held in trust by Mr. Ash's law firm as the stakeholder pending completion of the transaction. Mr. S entered into the contract without Mr. Ash's assistance and it was his initiative to have Mr. Ash's firm serve as the deposit stakeholder. There was also a provision for Ms. B to terminate the contract if Mr. S failed to pay the deposit as required by the contract.

Mr. S provided Mr. Ash with documents and two cheques, each bearing the note "do not deposit until February 27, 1996." Mr. S also sent a fax letting Mr. Ash know that the real estate company would call to confirm receipt of the paperwork and the cheques. Mr. S instructed Mr. Ash to "avoid mentioning that the cheques are dated for February 27th (three days before closing)."

Around January 13 the real estate agent called Mr. Ash. On being asked, Mr. Ash confirmed that he had received the paperwork and the cheques and that he was going to deposit the cheques. On January 30 the real estate company sent a letter that stated “As per the Contract of Purchase and Sale dated January 5, 1996, we confirm your office is holding a deposit of \$2,500.” Mr. Ash did not reply to this letter. On February 27 the real estate agent again called Mr. Ash. From that conversation, the agent concluded that Mr. Ash did not have a deposit. The sale did not ultimately proceed.

## **Decision**

Mr. Ash knew or ought to have known that the real estate company would rely on the assumption contained in its January 30 letter unless promptly advised otherwise. Mr. Ash acted incompetently by failing either to seek instructions from his client to disclose the postdated cheques or, alternatively, to cease acting in the matter. He intended no gain for himself, however, and the hearing panel could not categorize his conduct as disgraceful or dishonourable.

## **Penalty**

The panel ordered that Mr. Ash:

1. be reprimanded;
2. complete a remedial program in real estate law to the satisfaction of the Competency Committee; and
3. pay \$2,220 as costs of the hearing within one year.