

Vancouver, B.C.

Called to the Bar May 15, 1959

Discipline Hearing Committee: October 7-11, 1985, November 27-29, 1985, January 7, 1986, March 4-6 and 15, 1986, April 24-25, 1986, May 5, 1987, December 8-9, 1987

The Honourable Mr. Justice B.I. Cohen, Chairman, J.M. Hogg and D.A. Silversides, Q.C.

Summary

The member represented and made investments on behalf of clients whose interests conflicted with the interests of other clients of the member, and with the member's personal interests. The member failed to have these clients obtain independent legal advice and preferred his own interests to theirs on two occasions. In one instance, the member misappropriated, though not in the theft sense, money which was being held in trust pending an appropriate investment opportunity.

Facts

The M Estate Mortgage Investment

In January, 1980 the member became the sole executor and solicitor for M Estate, which consisted of net assets worth \$76,000 in bank deposits and savings bonds. The beneficiary died. The residual beneficiary of the estate, R.F., who resided in South Africa, granted power of attorney to D.F., his cousin in B.C.

On September 3, 1981 the member met with R.F. who had arrived from South Africa. They discussed the estate's assets and the various investment options. The member advised R.F. that the yield would be better if the bonds were cashed in, and the funds were invested in mortgages bearing interest at anywhere from 21% to 26 3/4%.

On September 8, 1981 the member met with H.H., a property developer who was a longstanding client, business associate, and co-investor of the member and a man to whom the member frequently lent money on his own behalf and that of clients.

The member learned that T Estates Ltd., a development company owned by H.H.'s sister but effectively controlled by H.H., had defaulted on mortgage payments on four properties and that H.H. hoped to refinance, likely through a financial institution. After speaking to the member about one of H.H.'s properties, the Kingsgrove property in Richmond, D.F. instructed the member to invest \$75,000 in a first mortgage on the land.

The \$75,000 mortgage proceeds were used to discharge an existing \$40,000 mortgage; to discharge an existing mortgage held by the member's company, Towncraft Ltd.; to pay outstanding taxes; to pay the member's legal fees and disbursements relating to the mortgage; to pay other outstanding legal accounts of the member in excess of \$10,000; and to pay Towncraft a mortgage finder's fee of \$2,250.

On October 31, 1981 T Estates granted a second mortgage on the Kingsgrove property to the member and his wife to secure a loan of \$7,000. The proceeds of this loan, advanced in 1982, were used to pay the member's law firm's fees and disbursements for drawing the mortgage, paying Towncraft a management fee, and enabling T Estates to make payments to R.F. under the first mortgage.

The member did not disclose to R.F. or D.F. that H.H. and his companies had a poor payment history or that part of the M Estate mortgage proceeds would be used to pay the member's legal fees. Any disclosure by the member that a management fee would be paid to himself or his company was done in a general manner, without disclosure of the identity of the person who would pay the fee or the specific amount of it.

A competent, prudent, and responsible solicitor would have advised R.F. or D.F. or both of them of H.H.'s poor payment history and that part of the M Estate mortgage proceeds would be used to pay outstanding legal fees owed by T Estates to the member.

In early November, 1981 T Estates granted to another of the member's companies, El Sorrento Ltd., a third mortgage against the Kingsgrove property to secure a \$15,000 loan. T Estates used the proceeds of this loan, in part, to fund payments due under the M Estate mortgage.

T Estate defaulted on payment of the M Estate mortgage in October, 1981 and left the Kingsgrove property without fire insurance. No payments were made until January, 1982 when the member drew four cheques for the arrears. He told R.F. that these cheques represented the first four mortgage instalments. He did not disclose that the payments had not been made on time, that he himself had advanced the funds, or that the mortgage property was not insured against fire.

In late 1981 the member personally advanced substantial sums of money to H.H. and his companies in order that H.H. could make payments on loans given by the member's various clients and co-investors. He continued this practice even though H.H. was having difficulty refinancing his properties and was the respondent in a foreclosure proceeding.

By August, 1982 the member knew, or ought to have known, that H.H. was in serious financial difficulty and he knew, or ought to have known, that loans made to H.H. or his companies were in jeopardy of default and, at best, risky investments. He also knew or ought to have known that real property values in the Vancouver area, which had dramatically increased in 1981, were just as dramatically declining in 1982. Despite these facts, the member obtained instructions from D.F. to renew the M Estate mortgage for a further one-year term from September 15, 1982. At that time M Estate had received one-year's interest, at 21%, in the amount of \$15,706.83.

At the time of the renewal, the member did not inform R.F. or D.F. that H.H. was in financial difficulty, owed mortgage arrears on four properties, and was being foreclosed of his equity on two others; that some or all of the payments on the M Estate mortgage had come from funds lent by the member; that the member was lending money to help H.H. make other mortgage payments; that the member held a second mortgage on the Kingsgrove property as security for a loan of \$7,000 to H.H.; that Kingsgrove property taxes were in arrears; or that strata corporation fees on the Kingsgrove property were in arrears until paid by the member.

A reasonably competent, prudent, and responsible solicitor would have advised a client of these matters.

In December 1982 the member, as second mortgagee, obtained an assignment of rents respecting the property, from T Estate. No payments had been received on the \$7,000 second mortgage, and no monies were ever paid under the rental assignment.

In February 1983 T Estates stopped making payments on the first mortgage. Until then it had paid \$20,971.21 for interest. In October 1983 the member's firm commenced foreclosure proceedings for R.F. An order nisi of foreclosure and a personal judgment against H.H. were obtained for \$95,895.39 plus costs.

The member himself was not named on the foreclosure petition because his \$7,000 second mortgage, in respect of which he had received no monies, had been discharged several days before the petition was filed in exchange for shares in E.S.P. Ltd., an H.H. company which planned to develop a Surrey sub-division. The member accepted these shares without the knowledge or consent of R.F. and so preferred his own interest.

The Kingsgrove property was sold for \$77,000; the Hearing Committee calculated that the M Estate suffered a \$36,051.75 deficiency on its \$75,000 mortgage investment, and determined that it was not recovered. The Committee concluded that if R.F. had not renewed the mortgage in September 1982 the estate would have suffered a substantially smaller deficiency.

The H Investments

The member began acting as solicitor for Mr. and Mrs. H in 1962. When Mrs. H was widowed in 1978 the member probated her husband's estate and placed the estate assets in term deposits. He later asked Mrs. H for permission to invest these funds on her behalf in mortgages.

Mrs. H co-invested substantial sums with the member and his wife. Some of these investments were in mortgages or property owned by H.H. In the summer and fall of 1982, several of these properties were

under foreclosure and Mrs. H expressed concern. The member agreed to take her out of the H.H. mortgages, provided she re-invest the funds in other investments of the member.

Mrs. H gave the member \$73,500 to so invest. The member placed \$20,000 in a mortgage on property owned by Towncraft, one of his companies. At that time the property was worth \$35,000 but it was encumbered with mortgages with a face value of approximately \$90,000.

The member then transferred shares in E.S.P. Ltd. from him and his wife to Mrs. H for \$30,000. E.S.P. Ltd. anticipated purchasing a Surrey property from Tri Holdings Ltd., another company owned by the member, but a caveat placed on title by the original vendor prevented the transfer. The member turned Tri Holding's shares over to E.S.P. Ltd. but the Surrey property was ultimately foreclosed and the shares became worthless.

Of the \$73,500 paid by Mrs. H to the member, \$50,000 was placed in these investments. Without Mrs. H's knowledge, authority, or consent, the member paid out the balance of \$23,500 to himself and his wife for their own purposes. More than two years later, and after the Law Society's investigation had begun, the member repaid Mrs. H the \$23,500.

The L Investments

The member had been the family solicitor for Mr. and Mrs. L and their son since the 1960's. The member acted for them when they sold the family hotel in 1963. Part of the proceeds from the sale were given to the member to invest for Mrs. L; some of these funds were put into mortgage investments.

One of these investments was an interest in the second mortgage on the Surrey property being developed by E.S.P. Ltd. Mrs. L advanced money for her interest well before the mortgage was registered. The member and his company, El Sorrento, also had an interest in this mortgage.

On the member's advice, all second mortgagees converted their interests into shares in E.S.P. Ltd. and discharged the second mortgage. Mrs. L's money was given to E.S.P. Ltd. long before her shares were actually allotted and before the company had acquired its major asset, the Surrey property. When the Surrey property was foreclosed, Mrs. H, the member, and El Sorrento had to make a claim to the sale proceeds paid into court.

The member had Mrs. L make several loans to H.H. who he knew was in financial difficulty. The member also made a mortgage loan on her behalf to another of his developer clients, F, for the development of a property in which the member himself held an interest.

At no time during these transactions did the member have Mrs. L obtain independent legal advice.

The T Investments

The West Broadway Property

In 1982 the member held a third mortgage on a West Broadway Avenue property, owned by the member's developer client F. The first mortgage of approximately \$350,000 was held by C Bank and a second mortgage of \$240,000 was held by the B.C. Lions Society.

Since 1978 the member had been almost continuously involved with this property as an encumbrance holder, either personally or through his company or with his clients. The Committee concluded that the member was fully aware of the property value trends, and their effect on the market value of this property. It had been appraised at \$585,000 in June 1981, at \$850,000 in October 1981, and a 1985 historical appraisal showed a \$700,000 value at April 1982 and \$425,000 at April 1983. As third mortgagee he was in a very unfavourable position, particularly if either the first or second mortgagee elected to realize on its security.

In October 1982 the member informed his client T, who had expressed an interest in buying his own office building, that the West Broadway property might be available for purchase. F formulated a proposal for developing the property, and provided T with the October 1981 appraisal and a Vancouver magazine article in support of his asking price of \$850,000.

The member accepted from T a \$50,000 deposit for the purchase of an interest in the land. The member knew or ought to have known that the value of the property lay somewhere between \$425,000 and \$700,000, but he did not advise T to obtain a current appraisal before purchasing. The member accepted T's deposit, although T had no security for his deposit and there was no agreement as to T's interest in the property, the purchase price, the proposed development of the property or the closing and adjustment dates.

A competent solicitor would have advised T that it was not in his interest to make this deposit in the circumstances.

After receiving the \$50,000 deposit, F authorized payment of those funds to the member to pay down the member's third mortgage on that property.

On December 30, 1982, T acquired a one-half interest in the land. In 1983 F's company defaulted on payments under the C Bank and Lions Society mortgages. The Lions Society, as second mortgagee, and El Sorrento, as third mortgagee, agreed to assume half ownership of the property instead of foreclosing. After registration, T held a 50% interest, the Lions Society a 32.1% interest and El Sorrento a 17.9% interest. The C Bank first mortgage remained on title.

In the spring of 1983 the market value of the property had dropped to \$425,000, and the member knew or ought to have known of this decline.

In May of 1983 the member was in financial difficulty. He arranged with F that, in addition to using T's \$50,000 deposit, the member or his companies were to receive other money or interests advanced by T for his purchase of the West Broadway property.

In early 1984 the member applied on behalf of all the owners to refinance the C Bank mortgage. He obtained a \$250,000 loan from another financial institution, although only \$200,526.69 was required to discharge the C Bank mortgage and pay related costs and taxes.

The member used the additional \$49,000 as "working capital" for his own company. He thereby obtained a benefit of 43.8% of the mortgage proceeds, while his company owned only a 17.9% interest in the property.

The E.S.P. Ltd. Shares

In September, 1982 T paid \$50,000 to the member to invest in shares in E.S.P. Ltd. The member controlled this company and acted as its solicitor. He also acted as solicitor for the registered owner of the development lands, some mortgagees, and most of the other shareholders, including T.

There was no shareholders agreement in place, which would have been of concern to an independent solicitor advising T.

Decision

The member was found guilty of misappropriation and professional misconduct.

Reasons

The M Estate Mortgage and Investment

Conflicting Client Interests

The member acted for the M Estate when the estate's interests conflicted with the interests of other clients of the member.

Although the member purported to act solely for the M Estate in the preparation and registration of its mortgage, the member had a continuing solicitor/client relationship with H.H. on different matters relating to the Kingsgrove property.

The interests of the M Estate also conflicted with the interests of clients of the member who held mortgage investments with H.H. that were in arrears by late 1981. If the M Estate mortgage had not been renewed, H.H. could not have refinanced the Kingsgrove property or made payment to those other clients.

Conflicting Personal Interests

The member acted for the M Estate when his duty to the estate conflicted with his personal interests. He also preferred his own interests to those of the M Estate. For example:

1. the member's company stood to make a profit from the management fee charged for arranging the M Estate mortgage and it was not in the member's interest to disclose any information which could have discouraged this investment;
2. the member charged the rents from the Kingsgrove property as additional security for his second mortgage loan, instead of allowing the M Estate this additional security;
3. the estate suffered a deficiency on foreclosure, whereas the member received shares from H.H. in satisfaction of his loan;
4. because the member was lending H.H. money to keep up mortgage payments, it was in his interest, but not in that of the M Estate, that the estate renew its mortgage.

The H Investments

The member deliberately led Mrs. H to believe that she was selling risky investments in order to acquire safe investments, and leaving a balance in trust for future investment on her behalf by the member. The member misappropriated \$23,500 of these funds.

The L Investments

The member acted for Mrs. L when her interests conflicted with the interests of other clients of the member, or with the member's own interests. He further failed to have Mrs. L obtain independent legal advice.

The T Investments

The member acted for T when T's interests conflicted with those of other clients of the member and with the member's own interests.

The member, his wife, and El Sorrento held a third mortgage on the West Broadway property, which mortgage was likely without value in December, 1982. As the member was in financial difficulty, it was in his interest to recover as much money as possible under the third mortgage. It was not, however, in the interest of T to purchase property for double its true value. The member knew or ought to have known that the property's value was far less than T was agreeing to pay for it. At no time before the transaction completed did the member disclose this information to T, although he had a duty to do so.

When refinancing the property in early 1984, the member used part of the mortgage proceeds for his own benefit. He obtained this money by using his clients' equity. His interest in obtaining as much money as possible to allay his financial difficulties conflicted with that of his clients to share in the proceeds proportionately.

The member also preferred his own interests by taking money from T to invest in E.S.P. Ltd. when there was no agreement in place to protect T.

The member failed in his duty to have T seek independent legal advice in these transactions.

Penalty

The member was suspended on August 31, 1984 during a Law Society investigation, pending a discipline hearing. The interim suspension was lifted in May, 1985.

The member's discipline hearing was held on different dates between October, 1985 and May, 1987 and submissions as to penalty were made on December 8 and 9, 1987.

On December 9, 1987 the Hearing Committee ordered that the member:

1. be suspended for two years, in addition to the nine-month suspension already served;
2. pay a fine of \$10,000;
3. pay \$2,500 toward the costs of the proceedings

with liberty to the member to apply to the Standing Discipline Committee to vary.

The Committee further ordered that, on return to practice, the member not:

1. directly or indirectly, by himself or through his spouse or any child, invest with or in, or otherwise benefit from, any investment of a person or corporation with which he or his law firm has had or continues to have a solicitor/client relationship;
2. act or perform any legal service for any person or corporation with or in which he, his spouse, or any child has invested;
3. act as a principal to an articled student without permission of the Credentials Committee.

The Hearing Committee noted that the misappropriation of funds by a member will usually lead to disbarment. In the circumstances, however, the Committee concluded that the misappropriation from H was not theft but another instance of the member's pattern of conflict of interest in dealing with his clients' affairs and should be placed in context as such for the purpose of imposing a proper penalty.

The Committee found that the member was an experienced solicitor who possessed all of the skill and knowledge required of him to competently carry out his duties and obligations to clients. It was plain that in all of the matters before the Committee the member fully understood the consequences of his acts but failed throughout to protect his clients' interest adequately, or at all. He showed more interest in his own welfare than in that of his clients, and his clients were badly served.

In imposing its penalty, the Committee was mindful of the member's impressive record of public service as testified to by character witnesses and in letters of reference. It concluded that the penalty and conditions of practice imposed were appropriate to protect the public interest and to deter conduct of this nature in the future.

J.E. Hall, Q.C., and Ken Ball, for the Law Society
B. Williams, Q.C., and S.L. Burns, for the member

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