

SUMMARY: The member and his associates incorporated a company to develop a hotel complex. Two interior designers invested \$105,000 on several conditions. The member transferred those funds from trust to the credit of the development company without having fulfilled the trust conditions. The member's conduct was so far below the standard expected of a competent solicitor as to amount to gross negligence and hence constituted conduct unbecoming a member. He was suspended, and conditions were attached to his reinstatement and return to practice.

STUART THOMAS CLENDENING

84/4

Discipline Hearing Committee: November 15, 1983

B.B. Corbould, Chairman, R.H. Guile, Q.C. and J.R. Webber

Benchers: January 27, 1984

FACTS:

The member and his associates incorporated Highliner Inn Ltd. as a vehicle to raise capital in order to develop a major hotel complex in Prince Rupert for 26 joint venture partners. The member was a shareholder, a director, Secretary/Treasurer, and Chairman of the Finance Committee of this joint venture partnership. The member's law firm were solicitors for and handled the legal affairs of Highliner, and acted as its records and registered offices. The member also acted as solicitor for and provided legal advice to the project's general contractor and the joint venture partnership.

In May or June 1980 two interior designers, Brown and Beyer, expressed an interest in becoming shareholders in the Highliner Hotel project. On June 27, 1980 they wrote to the member, accepting the invitation to become shareholders and partners, and enclosing their cheques totalling \$105,000, to be held in trust. They stated that their participation was conditional on (1) a favourable market study, (2) an acceptable shareholders' agreement, and (3) Beyer-Brown & Associates Ltd. being given the contract for interior design and supply of all furniture, carpet and drapes. The member returned the cheques asking that they be certified.

On August 19 and 20 the member met with Brown, and advised him that it would be impossible for Highliner to agree to award the contract (condition 3) to Beyer-Brown. There was a conflict in evidence as to conditions 1 and 2. Brown gave to the member his bank draft and Beyer's cheque, each for \$52,500. Brown realized that condition 3 would not be met by Highliner.

The member admitted that he was concerned with condition 3. He testified that he received the trust monies with no conditions, but the Hearing Committee found that either he did not put his mind to conditions 1 and 2, or was reckless or incompetent in dealing with those conditions and did not take the normal precautions in dealing with trust funds.

The two sums totalling \$105,000 were immediately transferred from the law firm's trust account into Highliner's trust account. At that time a sub-contractor was owed \$600,000 by Highliner, while Highliner had only \$175,000 in its account, including the Brown and Beyer funds.

On September 25, 1980 Brown and Beyer wrote to the member, reiterating that their participation in the project was conditional on the terms and conditions set out in their letter of June 27. On November 4 their solicitor wrote to the member requesting the return of their \$105,000, since the conditions had not been met.

Brown and Beyer eventually commenced an action against the member, his firm and Highliner for the return of their \$105,000 plus costs and interest. The case was settled for \$120,000; the member contributed \$45,000 and the Law Society's Liability Insurance Fund paid \$75,000.

The member was cited for his conduct in depositing the \$105,000 from his law firm's trust account to the credit of Highliner, and using those funds on behalf of Highliner to pay various accounts related to the hotel project, when the funds were being held in trust for Brown and Beyer on the 3 trust conditions noted above.

DECISION:

The member's conduct constitutes conduct unbecoming a member of the Society.

REASONS:

The member paid out the trust funds in the absence of any agreement as to what Brown and Beyer were getting for their money. No shareholders' agreement had been agreed to, no shares were issued, and no partnership agreement had been settled for tax purposes. He failed to deal with the legal issues as they arose, and attempted to handle complex legal matters that he was not competent to handle. He failed to provide Brown and Beyer with the market study, or with the shareholders' agreement.

The legal work and the manner in which it was carried out by the member was so far below the standard expected of a competent solicitor exercising reasonable care and effort in the handling of such a transaction that it amounted to gross negligence.

PENALTY:

The member had been suspended since December 16, 1982 pending the outcome of the citation. The Hearing Committee ordered that:

1. he be suspended until January 1, 1984;
2. he not be reinstated unless:
 - (a) the Credentials Committee has received a satisfactory medical report as to his emotional fitness to practice;

- (b) the Credentials Committee has approved his reinstatement;
- (c) the Financial Advisory Committee has approved his reinstatement;
- 3. upon reinstatement, he
 - (a) practice as an employed lawyer for 2 years for an employer approved by the Credential Committee;
 - (b) may hire an articling student only with the approval of the Credentials Committee;
- 4. he pay the costs of the inquiry by January 1, 1985.

J.D. Ziskrout, for the Law Society

R. Weddigen, for the member