



DISCIPLINE CASE *DIGEST*

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Case 96-09 (Amended)

THOMAS GORDON FROHLINGER
Winnipeg, Manitoba

Called to the Bar
June 24, 1982

Particulars of Charges
Professional Misconduct and conduct unbecoming (3 counts)

- conflict of interest
- breach of duty
- preferring own interests to others to whom a duty was owed

Date of Hearing
November 14, 1995
January 15, 16, 17, 18 and February 6, 1996
Written Decision March 1996

Panel
Gary R. Gilmour (Chairperson)
D.D. Yard, Q.C.
G.E. Chapman, Q.C.

Disposition

- Fine \$8,500.00
- Costs \$29,000.00

Counsel
R. Rees Brock, Q.C. for the Law Society
Eleanor R. Dawson, Q.C. for the member

Conflict of Interest

Facts

Mr. Frohlinger was retained in April, 1988 on behalf of a company in which he had an indirect personal interest (Company "A") in connection with a proposed loan by that Company to another Company (Company "B") represented by his partner Mr. T (loan No. 1).

Subsequently Mr. Frohlinger again became involved for Company A in April 1989 in connection with a proposed loan to a Company (Company "C") represented by Mr. T (loan No. 2).

During 1988 and 1989 both Mr. Frohlinger and Mr. T were partners in the practice of law. Mr. T represented a Mr. G and various corporations controlled by Mr. G one of which owned a commercial building in Winnipeg. Companies B and C were companies of Mr. G. In addition, Mr. T was the trustee for investors under a Mortgage (the "T Mortgage") also registered against the commercial building.

In addition to being a partner of Mr. T's at relevant times Mr. Frohlinger was an officer and director of Company A, had an indirect financial interest in that Company and often acted as its legal counsel. 60% of the shares of Company A were owned directly or indirectly by various partners or associates in Mr. Frohlinger's law firm.

Loan No. 1 involved a granting by Company A of an interim loan for \$400,000.00 with security against the commercial building subject to the T Mortgage. The commitment letter from Mr. Frohlinger on behalf of Company A specified the security would be subject to other secured interests. It was Mr. Frohlinger's understanding at the time of this loan that the proceeds of the new financing being obtained would pay out existing mortgages including the T Mortgage.

Mr. Frohlinger and Mr. T resolved the conflict between Companies A and B at the outset. Mr. Frohlinger became aware during this transaction that Mr. T. held the T Mortgage as trustee for others. Mr. Frohlinger relied upon Mr. T to discharge his proper duty to the investors under that Mortgage. The possibility of a conflict with those investors was not discussed.

In fact as Mr. Frohlinger later learned the T Mortgage was not paid out but was postponed by Mr. T.

In July, 1988 Mr. Frohlinger became aware of that fact when acting for another lender to Mr. G (Company "D"). The security for that loan involved a further encumbrance against the commercial building and substantial additional collateral security.

In February, 1989, Mr. Frohlinger became aware of problems relating to payment under this additional Mortgage that had been placed against the commercial building on behalf of

Company D.

Loan No. 2 involved another approach on behalf of a company of G's (Company C) to Company A for a loan. A commitment letter dated April 11, 1989 was issued on behalf of Company A agreeing to loan Company C \$250,000 on terms. This was in effect to take out the loan that had been made by Company D. One of the terms of the loan by Company A was that the Mortgage against the commercial building in favour of Company D which was a third mortgage subject to the T Mortgage in second position would be elevated to a 2nd Mortgage. This required the postponement by Mr. T of the T Mortgage in favour of Company A. It was further provided that interest payable to Company A would be between 18 and 26% per annum and that Company A would assume some of the security previously granted to Company D.

Again Mr. Frohlinger and Mr. T resolved the conflict between Company A and Company C. No discussion took place between them concerning Mr. T's duty as trustee to the investors under the T Mortgage one or more of whom by this time had also become clients of the firm. Mr. Frohlinger testified that he relied on Mr. T to take whatever action was necessary concerning the T Mortgage.

Mr. T postponed the T Mortgage in favour of Company A.

In the end result the commercial building was sold under Power of Sale in favour of the 1st Mortgagee. No recovery was made on behalf of Company A or the investors under the T Mortgage.

Comments of the Discipline Committee

The Committee expressed its appreciation to Mr. Frohlinger in allowing admissions to be made which assisted counsel in their presentations and for his candour in answering questions before the panel.

Concerning loan No. 1 the Committee found Mr. Frohlinger reasonably relied upon the expectation that the T Mortgage would be paid out. He would not therefore have discerned any conflict between Company A and the T Mortgage therefore there was no duty or obligation on Mr. Frohlinger.

The Committee however found that Loan No. 2 was structured differently. One of the terms was that Company A would obtain a preference over the T Mortgage. Therefore even if legitimate commercial reasons existed to warrant the investors consenting to a postponement the interests of the investors under the T Mortgage were clearly adverse to the interests of Company A.

The Committee determined that additional factors should have alerted Mr. Frohlinger to the vulnerable position of the T Mortgage investors.

1. They had not been paid out as he believed they would be at the time of loan No. 1.

2. Company D had experienced difficulty in receiving payment on its loan on the commercial building.
3. Company A and Company D both took additional collateral security to protect their interests but there was no evidence of additional security for the T Mortgage.
4. The interest payable on the T Mortgage in 3rd position was 12% while the interest payable to Company A in 2nd position ranged between 18 and 26%.

The Committee held that both Mr. Frohlinger and Mr. T had an ethical obligation to ensure the firm did not act in loan No .2 unless the conflict was properly resolved. Mr. Frohlinger took no steps to resolve the conflict nor did Mr. T.

The Committee stated the business aspects of law and the rigours of having to move quickly were allowed by those involved including Mr. Frohlinger to take priority over the professional aspects of law.

Findings and Penalties

The Committee found that all 3 counts had been proven with regard to loan No. 2 and that as a result Mr. Frohlinger was guilty of professional misconduct. He was found not guilty with regard to loan No. 1.

In determining the appropriate penalty the Committee took into account Mr. Frohlinger's unblemished record before the Law Society and his valuable contributions to the Society in the Bar Admission Course, with the Faculty of Law at the University of Manitoba and his other volunteer and community work.

The Committee also took into consideration that during the hearing there was no recognition by Mr. Frohlinger of an error on his part.

A fine of \$8,500.00 was imposed by the Committee.

The Committee also directed payment of costs pursuant to rule 64(7) restricted to 50% to take account of the finding of "not guilty" with respect to loan No. 1. The Committee reserved jurisdiction over the issue of costs and time to pay.

Note

The costs payable pursuant to Rule 64(7) were subsequently agreed upon at \$29,000.00.

On May 7, 1996 Mr. Frohlinger filed an appeal of the conviction and penalty to the Manitoba Court of Appeal. The matter was heard on May 5, 1997 and in decision dated May 28, 1997 the Court of Appeal dismissed the appeal of the conviction and the appeal of the penalty. The Court also ordered that the appellant pay costs which were taxed and allowed at \$2,171.19.

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