

*A section 47 Benchers review:
see DCD 00/04 for a summary of the hearing panel decision.*

Vancouver, B.C.

Called to the Bar: January 10, 1980

Non-practising member: January 1, 1996

Disbarred: November 5, 1999

Benchers review:

Date: February 13, 2001

Panel: (*Majority*) Howard R. Berge, Q.C., Chair, Peter J. Keighley, Q.C., Robert W. McDiarmid, Q.C., Dr. Setty Pendakur, D. Peter Ramsay, Q.C., Patricia L. Schmit, Russell S. Tretiak, Q.C. and Ross D. Tunnicliffe

Report: April 27, 2001

Report indexed as [2001] LSBC 6

Todd R. Follett, for the Law Society

Lawrence E. Pierce, for Mr. Kierans

Summary

On application by Mr. Kierans, the Benchers reviewed the decision of a discipline hearing panel that had found Mr. Kierans guilty of conduct unbecoming a member and of professional misconduct and had ordered his disbarment. That hearing panel found that Mr. Kierans had improperly billed both executor and legal fees on certain estate files. On one estate file he misappropriated \$5,500 to his own use. In this regard he prepared, but did not send, an account and withdrew the funds from trust, although his firm had not performed any significant legal services to support the account: see *DCD 00/04*.

On review, the Benchers rejected Mr. Kierans' argument that the participation of one of the hearing panel members had created a reasonable apprehension of bias. In relation to a review of the findings of the hearing panel, Mr. Kierans sought to introduce new affidavits from three lawyers of his former firm respecting unbilled work they claimed they had done on the estate file. The Benchers noted that the evidence failed to meet any of the tests for admissibility and was not reliable or reasonably capable of belief. Moreover, even if all these claims of unbilled time were accepted, this would not change the finding that Mr. Kierans had misappropriated funds but would, at most, reduce the amount of the misappropriation. The Benchers confirmed the hearing panel's decision on verdict and penalty. The Benchers noted that disbarment was appropriate in cases of misappropriation, in the absence of exceptional circumstances, and where a pattern of unprofessional conduct establishes dishonesty.

A hearing panel found that Mr. Kierans had improperly billed both executor and legal fees on certain estate files and that he misappropriated funds on one file (P Estate) for his own personal use to pay off a pressing creditor's claim. He had prepared, but did not send, an "interim statement of account" for \$5,500 and withdrew the funds from trust even though his firm had done no significant legal work in support of this account. He was found guilty of conduct unbecoming a member and professional misconduct: see *DCD 00/04*.

Mr. Kierans applied to the Benchers for a review of the verdict and penalty imposed by the hearing panel, and sought to introduce new evidence.

He alleged that one of the hearing panel members should have been disqualified by reason of an earlier connection to an employment dispute involving Mr. Kierans' sister. Mr. Kierans contended that participation of that panel member led to a reasonable apprehension of bias against him.

The Benchers admitted as new evidence an affidavit from Mr. Kierans' sister, but they could not find that a reasonable and informed person, viewing the matter realistically and practically, would have felt the panel member could not fairly and in good faith execute the duties required of a panel member. Mr. Kierans' submissions were based on surmise and conjecture and did not lead to a reasonable apprehension of bias.

Mr. Kierans also sought to introduce as new evidence the affidavits of lawyers who had been employed by Mr. Kierans' former law firm and had worked on the P Estate file. The lawyers deposed that they had not accounted for all of their time on that file. The Benchers refused to admit these affidavits as new evidence because 1) the evidence, by due diligence, could have been adduced at the hearing, 2) the evidence lacked relevance, 3) the evidence was not credible or reasonably capable of belief and 4) the evidence, if accepted, would not change the finding of misappropriation but would, at most, reduce the amount of the misappropriation from \$5,500 to \$2,500.

Respecting the credibility of the evidence, the Benchers noted that the lawyers' affidavits were prepared 10-11 years after the events in question, were purportedly based on reviews of notes and other file materials (even though Mr. Kierans was unable to reference timekeeping records at the hearing) and appeared to contradict Mr. Kierans' evidence at the hearing.

The Benchers did not accept the argument that Mr. Kierans' firm had provided significant legal services on P Estate to justify the account prepared. The Benchers also could not find from the evidence that Mr. Kierans had overdraft coverage on his account or that it would have covered his withdrawal of funds to pay the claim of his creditor. Finally, the Benchers upheld the finding of the hearing panel that Mr. Kierans was aware of his obligation not to charge legal fees in addition to executor fees in the absence of a charging clause.

The Benchers confirmed the verdict of the hearing panel.

The Benchers further confirmed the hearing panel's decision to disbar Mr. Kierans. They noted that disbarment was appropriate, given the seriousness of his misconduct with respect to P Estate and given his pattern of unprofessional behaviour over four separate estate matters. Disbarment was the appropriate penalty for misappropriation in the absence of exceptional circumstances, and there were none in this case.

Mr. Kierans intentionally, systematically and without apparent regret or remorse appropriated estate funds to which he had no right. His victims were unsophisticated in matters in which he was expert, and he abused their trust. He was unrepentant. He sought to justify his misconduct on the basis of a medical condition, which he claimed clouded his judgement and impacted his memory, but that explanation was not supported by the evidence.

Discipline Case Digest — 2001: No. 17 July (Kierans)