

2006: No. 4 September-October

Elmer Vernon Epp

Kamloops, BC

Called to the bar: May 12, 1981

Discipline hearing : November 17, 2005 and May 15, 2006

Panel : Ralston S. Alexander, QC, Chair, Dirk J. Sigalet, QC and G. Glen Ridgway, QC

Reports issued : January 24, 2006 (indexed as 2006 LSBC 05) and May 25, 2006 (indexed as 2006 LSBC 21)

Counsel : Brian McKinley for the Law Society; Jerome Ziskrout for Mr. Epp

Facts

Mr. Epp represented the owner of a home in a dispute regarding its construction. Lawyer C represented the contractor. On behalf of their clients, Mr. Epp and Lawyer C negotiated a settlement of the dispute, which was reduced to "minutes" and signed by the clients.

The relevant part of the settlement agreement provided, "upon installation of the siding and gutters, and receipt of proof of payment by the contractor of \$5,516.92 to (company) and \$2,235.77 to (company), Taylor, Epp and Dolder undertakes to forthwith forward \$9,452.94 to S.P. Law Corporation 'in trust,' for immediate release to the Contractor."

On May 31, 2004 Lawyer C delivered the required proof of the two payments to Mr. Epp and requested the \$9,452.94. Mr. Epp did not pay the money. Instead he took the position there was another term of the settlement that somehow required that proof of warranty coverage must also be provided. Mr. Epp further questioned whether the minutes of the settlement were binding on him because he had not signed them. Only his client had signed the minutes.

After an exchange of correspondence, Mr. Epp suggested in a letter dated June 16, 2004 that the materials be submitted to the Law Society for a determination of the question of whether his firm was bound by the minutes of the settlement, in light of the fact that he had not personally signed the minutes. Mr. Epp stated in this letter that if it was determined the undertaking was binding he would comply.

The following day, Mr. Epp drafted a letter to a Law Society practice advisor. In addition to asking whether the undertaking was binding, Mr. Epp also asked whether the undertaking had been "triggered" in the factual circumstances as outlined by Mr. Epp. The practice advisor indicated Mr. Epp was bound by the undertaking, but declined to advise whether it had been "triggered."

Mr. Epp told Lawyer C that his client was taking the position the undertaking had not been triggered. Lawyer C reported to the Law Society that, in her view, Mr. Epp was in breach of an undertaking. Law Society staff told Mr. Epp on March 17, 2005 that they did not agree with his interpretation that the provision of the warranties was a precondition to the payment of the funds. On May 25, 2005 Law Society staff wrote a letter to Mr. Epp telling him the matter had been referred to the Discipline Committee.

Mr. Epp admitted at the November 17, 2005 hearing that he was bound by the undertaking and admitted he had breached it by failing to forward the funds forthwith after receiving proof of payment. However, he argued his actions did not amount to professional misconduct because he had an honest, albeit mistaken, belief in the propriety of his actions, and he emphasized his responsibility to his client, as opposed to his

obligations pursuant to an undertaking.

Verdict

The panel noted Mr. Epp's initial response was to take or imply the position that he was not bound by the undertaking, as he had not signed the document, even though he had negotiated and prepared the terms of it with Lawyer C.

The hearing panel did not accept that Mr. Epp held an honest belief his actions were appropriate because his conduct did not measure up to that necessary for lawyers in observing an undertaking. The panel added Mr. Epp was trying to use technical arguments in an attempt to avoid the requirements of the undertaking and his obligations with respect to undertakings as set out in the *Professional Conduct Handbook*, Chapter 11, Rule 7. The panel concluded his conduct was far different from the clear obligation to scrupulously honour any trust condition and amounted to professional misconduct.

Penalty

The panel noted the letters of reference that spoke very highly of Mr. Epp, that he had no prior record of misconduct with the Law Society, that he was very active in community affairs and that he was a positive contributor to life in Kamloops.

The panel stated it was apparent Mr. Epp's error in judgement was a one-time occurrence and was not a situation likely to occur again. Nevertheless, the panel reiterated that compliance with undertakings is an essential ingredient to maintaining the public's trust in lawyers. The panel said the penalty imposed was necessary to safeguard the fundamental nature of undertakings in the practice of law and to preserve the requirement that all lawyers make serious and diligent efforts to meet all undertakings.

The hearing panel accordingly ordered that Mr. Epp:

1. be reprimanded;
2. pay a \$5,000 fine by June 15, 2006; and
3. pay \$5,000 in costs by June 15, 2006.