2010 LSBC 16
Report issued: July 22, 2010
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Gary Russell Vlug

Respondent

Decision of the Hearing Panel
on Application to Adduce Rebuttal Evidence

Hearing date: April 13 and 14, 2010

Panel: Gavin Hume, QC, Chair, Bruce Lerose, QC, Thelma O'Grady

Counsel for the Law Society: Eric Wredenhagen
Appearing on his own behalf: Gary Vlug

Background

[1] After closing its case and after the evidence of the Respondent, Mr. Vlug, the Law Society applied for leave to adduce rebuttal evidence. This application proved to be a difficult one for the Panel to decide.

[2] Briefly, the circumstances that gave rise to this application arose as follows:

(a) The Respondent, representing certain clients in a personal injury claim, negotiated a settlement on behalf of those clients with ICBC. The Respondent subsequently received a cheque from ICBC for an amount that was in excess of the amount reflected in the exchange between the ICBC adjuster and the Respondent, which led to the settlement. This exchange also included the Release that was ultimately executed by the Respondent's clients and forwarded to the ICBC adjuster by letter with the request that the settlement funds be provided. In that same letter, the Respondent sought reimbursement for certain disbursements. The ICBC adjuster wrote to the Respondent enclosing a cheque to cover the settlement figure set out in the Release plus certain disbursements that she agreed to cover. The cheque enclosed was for an amount significantly larger than the settlement funds and agreed upon disbursements set out in the letter from the adjuster. This difference will be described as the "excess funds" in the balance of these reasons.

(b) The Respondent disbursed to his clients the amount reflected in the Release, less the fees and other expenses and monies owed to the Respondent.

(c) During the course of an audit under Rule 3-48, the Law Society auditor learned that the excess funds were recorded in the Respondent's accounting records as being held in trust for the Respondent's clients.

[3] The evidence during the course of the two-day hearing established that the Respondent's clients knew

of the excess funds held in the Respondent's trust account, though, contrary to Law Society Rule 3-48(1), it did not appear that that information had been accounted for in writing to the clients. The Respondent corrected that error upon this matter being drawn to his attention by the Law Society.

[4] There was no communication with the ICBC adjuster with respect to the excess funds until after the Law Society commenced its investigation regarding the excess funds.

[5] Ultimately the Discipline Committee decided to issue a citation against the Respondent as follows:

> In the course of representing your clients LP, VAP, VBP and RP (the "Clients") in a personal injury claim, you negotiated a settlement on behalf of the Clients, and received from ICBC a cheque for an amount which you knew or believed to be in excess of the settlement amount to which the Clients were entitled. Notwithstanding such knowledge or belief on your part, you took no steps upon receipt of the payment to clarify this apparent error with ICBC; instead, you paid to the Clients the amount you believed to be due them, and advised them that the apparent excess should be held in your trust account, without notifying ICBC, until the applicable limitation period had passed for ICBC to seek reimbursement of any excess payment. In so doing, you engaged in:
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> > (a) dishonourable or questionable conduct casting doubt on your professional integrity or competence, or reflecting adversely on the integrity of the legal profession or the administration of justice, or both;
> >
> > (b) sharp practice.

[6] The Panel received an Agreed Statement of Facts with 23 attached documents and two binders marked as Exhibits containing 74 additional documents.

[7] In addition, affidavit evidence was supplied from the adjuster and her retired assistant. The adjuster described the cheque, which included the excess funds, as being drawn as a result of errors. The Respondent subsequently communicated with the ICBC adjuster and then distributed the excess funds to his clients after deducting his fees.

[8] Subsequently, ICBC commenced a Small Claims action against the Respondent for the difference allegedly owing between the settlement funds reflected in the Release, together with additional disbursements, and the cheque that was forwarded to the Respondent. The pleadings with respect to that action were included in the Exhibits entered during the course of the two days of hearing.

[9] Two witnesses were called on behalf of the Law Society and cross-examined by the Respondent. By arrangement with the Respondent, the affiant adjuster was not called nor was she cross-examined.

[10] After the Law Society closed its case, the Respondent took the stand on his own behalf. Immediately upon the commencement of his evidence, he testified that, in his mind, the settlement funds that were forwarded, while not referenced in the Release or the correspondence, included a payment for bad faith. He further testified that, in his discussion with the adjuster whose affidavit was filed, she had indicated that, in effect, she was going to pay something for bad faith but would not reflect it as such.

[11] The Law Society did not object to the evidence of bad faith when the Respondent gave it in chief.

[12] The general rule is that a party cannot split its case by reserving part of its case for reply. This does not apply when the Respondent adduces "relevant but unforeseeable evidence" as part of its defence. The Respondent appropriately objected to the reply evidence. We concluded that the evidence of the Respondent with respect to bad faith was relevant to his defence. The issue then became whether the

calling of that evidence was reasonably unforeseeable to the Law Society. For the reasons set out below, and not without some difficulty, we have concluded the evidence was unforeseeable to the Law Society under the circumstances.

[13] Extensive review of all of the documentation referenced in paragraph [6] above indicates that at no time did the Respondent in his many communications to and from the Law Society reference the excess funds being paid as a result of a bad faith claim. However, there was some reference to bad faith in other materials obtained by the Law Society as a result of its investigations.

[14] The initial correspondence from the Respondent on behalf of his clients to the first adjuster in Vancouver, marked as Exhibit 6(a) Tab 1, makes reference to bad faith. All subsequent correspondence to and from the subsequent adjuster and affiant in the Statutory Declaration does not make any reference to bad faith. In addition, attached as exhibits to the Affiant adjuster's Statutory Declaration were the recorded transcripts of voicemail messages from the Respondent, none of which made any reference to bad faith.

[15] In addition to the foregoing, there is reference to bad faith in the Small Claims materials that were included in the binders of Exhibits.

[16] At the end of the Respondent's evidence, the Law Society indicated it would like to consider whether to apply to call rebuttal evidence. It was agreed that, if the Law Society decided to apply, the application would be made in writing and that the Respondent would have the opportunity to reply in writing to the application.

[17] The Law Society applied for leave to call rebuttal evidence from the adjuster. The Respondent replied in detail. Attached to his Reply was a Writ and Statement of Claim issued by the Respondent against the affiant adjuster and ICBC in which Statement of Claim the issue of the excess funds being paid in bad faith was set out. The Law Society did have a copy of that Writ and Statement of Claim, though it was not marked as an Exhibit. We concluded that it would have been marked as an Exhibit if the Respondent had so requested.

[18] When we had received the written Application with respect to rebuttal evidence, the Respondent's reply and the Law Society's response to the reply, we reviewed the material in detail. We noted in the Respondent's reply, a reference to the bad faith issue arising during the course of what were apparently "without prejudice" discussions to settle upon the Agreed Statement of Facts. As a result of that, the Panel sent the following memorandum to the Law Society and the Respondent:

> The Panel has had the opportunity to review the application of counsel for the Law Society and the response of Mr. Vlug, as well as the reply from the Law Society.
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> As was set out in the Law Society's application, the general rule is that a party cannot split its case by reserving part of its case for reply. However, this does not apply when the Respondent adduces "relevant but unforeseeable evidence" as part of its defence. The issue therefore, is whether the Panel should find that the evidence given by Mr. Vlug during the second day of hearing was "relevant but unforeseeable". The Panel is of the view that the evidence was relevant to Mr. Vlug's defence of the citation. The question, therefore, remains whether the Law Society should have foreseen that evidence would have been adduced.
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> Mr. Vlug argues that it should have been foreseeable to the Law Society that he would testify with respect to the bad faith discussions with the adjuster for ICBC. As a result, Mr. Vlug asserts that the Law Society should have addressed this issue when they put their case in. Mr. Vlug makes reference to three matters in support of this assertion.
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> First, Mr. Vlug argues that the Small Claims Reply and Application (Exhibit 6B, Tabs 67 and 68) which

reference "bad faith" and discussions with respect to bad faith should have put the Law Society on notice.

Second, Mr. Vlug argues that the Writ and Statement of Claim which were not marked as exhibits but instead were included in the List of Documents which the Law Society disclosed to Mr. Vlug, should also have put the Law Society on notice. In particular, the Law Society provided a List of Documents that it had in its possession as a result of documents received from Mr. Vlug or which the Law Society had obtained from other sources. One of those documents was the Writ and Statement of Claim, which Statement of Claim raises the issue of the extra funds being attributable to a bad faith claim against ICBC.

Third, Mr. Vlug alleges that during the communication to settle the Agreed Statement of Facts, the issue of a bad faith payment by ICBC was raised and that should have also put the Law Society on notice. The Law Society asserted that those communications were "without prejudice" and as a result Mr. Vlug cannot rely upon that.

The Panel has not reached a conclusion with respect to whether or not the Law Society was put on notice by the first two points raised above. However, we are concerned by the reference to the communications for the Agreed Statement of Facts with respect to the bad faith issue. The communications with respect to the Agreed Statement of Facts may determine the issue for the Panel. As a result, we have four questions that we would like counsel to address as follows:

1. How were the communications with respect to the Agreed Statement of Facts identified as "without prejudice"?

2. If the communications were not "without prejudice", what was the full scope or content of the communications with respect to bad faith?

3. If the communications were "without prejudice", what is the effect of those communications being "without prejudice"? In other words, does the fact that the communications were "without prejudice" preclude Mr. Vlug from making reference to those communications?

4. If the "without prejudice" nature of the communications does not preclude reference to this bad faith issue, what was the full content and scope of the communications with respect to bad faith?

We suggest that the Law Society address the issue in the first instance and that Mr. Vlug be given the opportunity to reply, after which the Law Society be given an opportunity to respond.

If there is any uncertainty with respect to the foregoing, please do not hesitate to raise it with us.

[19] The Law Society replied, as did the Respondent. Ultimately it would appear that any privilege associated with the communications between the Law Society and the Respondent with respect to the Agreed Statement of Facts was waived by the Respondent as well as the Law Society. As a result, we received correspondence from the Respondent to the Law Society with respect to the Agreed Statement of Facts. Again, there is no reference in that correspondence to the excess funds being attributable to a bad faith settlement.

[20] The Law Society and the Respondent provided us with the following authorities dealing with the question of when rebuttal evidence is permissible:

(a) *R. v. Aalders*, [1993] 2 SCR 482, para. 35;

(b) *R. v. Chaulk*, [1990] 3 SCR 1303, para. 119; and

(c) *Mayenburg v. Lu*, 2009 BCSC 1308.

[21] Mr. Justice Cory, writing for a the majority in *R. v. Aalders,* said as follows:

> In my view, the crucial question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is determinative of an essential issue, but rather whether it is related to an essential issue which may be determinative of the case. If the reply evidence goes to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, then it is generally admissible. Thus, if a statement is made during the course of a witness's testimony at trial which conflicts with other evidence relating to an essential issue in the case, reply evidence will be permitted to resolve the conflict.

[22] In *R. v. Chaulk,* Chief Justice Lamer, writing for the majority, said as follows:

> The principle that the Crown is obliged to adduce, as part of its case, only evidence that is relevant to an element of the offence that the Crown must prove is affirmed by the corollary principle that the Crown need not adduce evidence in chief to challenge a defence that an accused might possibly raise.

[23] We also reviewed *Mayenburg*. In this decision, Mr. Justice Myers was assessing damages under Rule 68 with respect to a motor vehicle accident. The Plaintiff relied upon a doctor who was a Physical Medicine and Rehabilitation specialist. During the course of the defence, the Defendant wished to call rebuttal evidence through the Plaintiff's family doctor. The Court objected to that on the grounds that no advance notice of the rebuttal evidence was provided, though the opportunity was available both prior to and at the time of the hearing when the openings were provided.

[24] We have concluded that rebuttal evidence should be permitted, as outlined in the Notice of Application of the Law Society. We have reached this conclusion for the following reasons:

(a) As outlined above, the Respondent did not at any time in his communications with the Law Society allude in any way to the proposition that the excess funds were attributable to a payment on the basis of bad faith. That includes the correspondence that we reviewed as a result of the exchange subsequent to our enquiries concerning the "without prejudice" negotiations.

(b) Rule 3-5(6) of the Law Society Rules reads as follows:

> The Executive Director may require the lawyer to whom a copy or summary of the complaint has been delivered under subrule (3) to respond to the substance of the complaint.

(c) The Respondent's initial communications with the Law Society pertained to the trust audit, which trust audit raised concerns about the failure to communicate with the Respondent's clients with respect to the funds in his trust account. At no time during those enquiries was any reference made to the funds being received as a result of a settlement with respect to a bad faith claim.

(d) Subsequently the Law Society commenced an investigation with respect to the reasons why the Respondent had not communicated with ICBC with respect to the excess funds. Again, in all of that correspondence that was entered as exhibits in these proceedings, there is no reference to any bad faith allegation in the communications from the Respondent to the Law Society.

[25] As indicated above, we were troubled by the assertions made by the Respondent concerning the bad

faith issue arising during the course of communications with the Law Society concerning the Agreed Statement of Facts. We have reviewed that correspondence and, as indicated, there is no reference in that correspondence to any evidence of payment respecting bad faith being the reason for receipt of the excess funds.

[26] Regrettably counsel made no opening statements in this proceeding, which might have alerted the Law Society to the issue before it closed its case. In addition, the Respondent had the affidavits prior to the hearing and decided not to cross-examine, knowing that the affidavit of the adjuster stated that the cheque was drawn in error. In our opinion, he should have insisted on cross-examination if he intended to give evidence about his bad faith discussions with her. On the other hand, the Law Society did not object to the evidence in chief of the Respondent with respect to bad faith and should have. This issue could have been dealt with without the efforts we have had to engage in, in view of the forgoing. The failure to cross-examine combined with the failure to object also contributed to our difficulty in reaching a decision on the application.

[27] The Respondent, in his evidence, made the issue of the payment being attributable to a bad faith payment as a key part of his defence. While the Law Society had in its possession some documents that referenced bad faith, we conclude that the Law Society could not have reasonably anticipated that that would be the defence. We reach that conclusion based on the extensive exchange that occurred between the Law Society and the Respondent, first with respect to the trust audit, secondly as a part of the investigation, and thirdly while this matter was being prepared for hearing.

[28] Under the circumstances we have concluded, and not without some doubt, that the Law Society is entitled to call rebuttal evidence. The cost of the rebuttal evidence will be borne wholly by the Law Society.

[29] This matter will now be set down for hearing in order to hear the rebuttal evidence and complete the case.