

David Stephen Rulton Burgess

Kelowna, BC

Called to the bar: June 13, 1986

Discipline hearing : December 2, 2010

Panel : David Renwick, QC, Chair, Patricia Bond and Benjimen Meisner

Application for stay of penalty : January 28, 2011

Chambers Benchler (stay of penalty) : Alan M. Ross

Report issued : February 3 (2011 LSBC 03) and February 22, 2011 (2011 LSBC 07)

Counsel : Jaia Rai for the Law Society; Henry Wood, QC for David -Stephen Rulton Burgess (discipline hearing) and Burgess on his own behalf (application for stay of penalty)

FACTS

David Stephen Rulton Burgess acted for a client who had entered into a separation agreement with her husband. The agreement, dated June 27, 2007, provided that the husband would buy out the wife's interest in a rental property by way of payments that were to take place over time.

The agreed purchase price was \$180,000. Burgess was to hold the funds in trust until the final payment was made, at which time the property would be transferred into the husband's name. Burgess was familiar with both the husband and the wife and knew their families.

During a meeting with his client and her husband in April 2008, the husband unexpectedly produced \$50,000 cash. Although Burgess initially indicated he could not accept the cash, he deposited the funds into his trust account, pending registration of the transfer of the property and ultimate payout to his client.

Two days after Burgess deposited the cash into his trust account, he asked his assistant to contact the Law Society. She spoke with a practice advisor who advised that the circumstances did not fall within any exception to the Law Society's no-cash rule. Burgess did not speak to the practice advisor, as requested, and did not report his acceptance of the cash until he filed his trust report in 2009.

DETERMINATION

Burgess argued that no breach occurred because there was virtually no risk that the husband was using laundered funds. As the husband had received the funds from a financial institution, an exception to the no-cash rule should be invoked.

The panel stated that Burgess would have to receive cash directly from a financial institution in order to fall within the rule. If the rule were to be interpreted as suggested by Burgess, the onus would be on a lawyer to determine where funds originate and whether they were legitimately gained. While there will be instances where that is readily done, the panel believed that there are many more instances in which it will be impossible for a lawyer to determine the source and legitimacy of funds.

The panel found that it was not acceptable to read into the rule further exceptions where a lawyer believes that no money laundering or fraud has occurred. The Law Society created this rule to secure an exception from federal legislation that would breach solicitor-client privilege and compromise the independence of the bar. While the rule may be inconvenient at times, it was invoked for good reason and should be enforced.

Accordingly, the panel determined that Burgess breached the Law Society's no-cash rule.

While Burgess' actions were deliberate, he was well-intentioned. He did not personally benefit from the receipt of the cash, and no one was harmed, nor were anyone's interests compromised as a result of his actions. On the contrary, Burgess' client was very appreciative of his legal services.

Burgess realized he was in breach of the no-cash rule, but he was not diligent in discussing the matter with the Law Society. However, he did report the breach in his trust report at the end of the year.

The panel also took into consideration that Burgess had no relevant -conduct history and that the breach of the rule did not amount to professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Burgess pay:

1. a \$750 fine; and
2. \$1,500 in costs

applications for REVIEW

In December 2010, Burgess filed a Notice of Review seeking to set aside the adverse determination made by the hearing panel as well as the costs.

In January 2011, Burgess applied for a stay of the fine until the Bencher review was complete. He submitted that he had suffered serious and significant financial hardship and a tremendous loss of time from his law practice addressing the no-cash rule issues with the Law Society.

The Chamber Bencher found no suggestion that harm would come to Burgess or to others if the fine was paid as ordered by the hearing panel, pending the outcome of the review. Burgess' application for a stay of the imposition of the penalty was denied.

Burgess subsequently decided to abandon the Bencher review.