

2005 LSBC 45

Report issued: October 28, 2005

Oral Reasons: October 4, 2005

Citation issued: April 19, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Sidney Stephen Antle

Respondent

Decision of the Hearing Panel

Hearing date: October 4, 2005

Panel: G. Glen Ridgway, Q.C., Chair, Gordon Turriff, Q.C., Gregory M. Rideout

Counsel for the Law Society: Herman Van Ommen

Counsel for the Respondent: Geoffrey D. Cowper, Q.C.

[1] The citation issued with respect to the Respondent, dated April 19, 2005, provides at the Schedule that the conduct to be inquired into is as follows:

1. When appearing *ex parte* before Mr. Justice Hood on December 18, 2002, in the matter of *Evans v. Durante et al*, Action No. L001677 in the Vancouver Registry of the Supreme Court of British Columbia, contrary to your obligations to the court, you failed to disclose the following material facts:

(i) that the source of the funds deposited by Durante and held by Exchange Bank & Trust Inc. ("EBT"), making up the bulk of the funds which are the subject matter of the application, were asserted to be the product of Durante's fraudulent stock manipulations, for which he had pleaded guilty to securities fraud on December 7, 2001, in the New York District Court, which may make Durante's title to or property in, the funds questionable;

(ii) that three claimants opposed Evans's claims to the funds, and the nature of their claims to the funds, for example that the Securities Exchange Commission ("SEC") claimed the funds on behalf of the defrauded shareholders as equitable owners, in effect asserting that the funds in the hands of Durante, in the hands of the garnishee EBT, and in the hands of the Bank of Montreal, were trust funds, and as a matter of law;

(iii) that Evans and his counsel knew about proceedings in the New York District Court pertaining to Durante's fraudulent stock schemes, and, in particular, by October of 2002 knew that the District Court had ordered Durante and his offshore companies and EBT to disgorge the proceeds of the stock fraud for distribution to defrauded investors, that the SEC had obtained a default judgment against Durante and intended to trace the proceeds and enforce the judgment in British Columbia;

(iv) that the funds had been frozen by the British Columbia Securities Commission pursuant to the provisions of the *Securities Act*, and the Court of Appeal had declined to set aside the freeze orders

on application by EBT, placing in question the effectiveness of a garnishing order absolute and EBT's obligation to pay;

(v) that Evans' counsel including you and counsel for the other claimants were participating in a case management process before Madam Justice Kirkpatrick in which entitlement to the funds in the EBT account, and priorities if any, would be determined;

(vi) that Umbrella and Svete, while not parties in the Evans action, had entered an appearance in the action and had otherwise made it known to you that they wanted to be served with any notice of motion pertaining to the distribution of the funds;

(vii) that while the garnishing order sought was for \$63,944,583.52 U.S., Durante only deposited \$19,000,000 [sic] U.S. into the EBT account. That by December 18, 2002, some of those monies had been sent overseas to Durante and his companies, and that in the proceedings in the Court of Appeal it was EBT's position that only \$901,459 U.S. was on deposit in Durante's accounts at EBT;

(viii) that parties had entered into an agreement, originally made between counsel for Evans and counsel for the SEC, that each would give the other notice of any application with respect to the monies frozen in the EBT account.

[2] This matter came before the Panel pursuant to Rule 4-22. The Respondent had proposed a conditional admission, as well as disciplinary action, which the Discipline Committee had accepted.

[3] An Agreed Statement of Facts was filed as Exhibit 1 in this matter. It set out as follows:

1. Stephen Antle was called to the British Columbia bar on March 17, 1987, and has been a member of the Law Society of British Columbia in good standing since.
2. He practised with Davis & Company until July 29, 1987. Since August 10, 1987 he has practised with the firm now known as Borden Ladner Gervais LLP. He is a partner in that firm, concentrating on commercial litigation.
3. In 2001 – 2004 Borden Ladner Gervais acted for Michael Jason Evans (" Evans"), who had obtained a default judgment against Edward Andrew Durante (" Durante") in California in February 1999 for approximately US\$36 million on a counterclaim resulting from Durante's misappropriation of computer technology developed by Evans.
4. Durante has a lengthy history of criminal and regulatory penalties for fraud-related offences, and is currently serving prison time for stock fraud.
5. There was evidence Durante had approximately US\$19 million on deposit with Exchange Bank & Trust (" EBT").
6. EBT is an " offshore" bank, incorporated in Nauru with an office in St. Kitts & Nevis. It holds the funds of its depositors in " regular" banks. There was evidence that EBT held US\$18.2 million in an account at the Bank of Montreal (" B of M") in Vancouver, British Columbia. There was also evidence that EBT had money on deposit with other banks outside British Columbia and Canada.
7. The funds deposited by Durante with EBT were alleged by the U.S. Securities & Exchange Commission (the " SEC") to be proceeds of fraudulent stock manipulations by Durante and his associates. At the material time no party had taken any position on the effect of that allegation on EBT's US\$19 million debt to Durante.

8. The SEC was, to the knowledge of the Respondent, taking steps to try to obtain the US\$18.2 million held by EBT at B of M.

9. The British Columbia Securities Commission had issued an order on May 5, 2000 "freezing" the US\$18.2 million held by EBT at B of M, prohibiting EBT from withdrawing those funds and B of M. from paying them out.

10. Evans' California judgment had been registered in British Columbia. Borden Ladner Gervais obtained garnishing orders after judgment for Evans against EBT and B of M on May 8, 2001 and June 12, 2002. Borden Ladner Gervais served those orders on B of M at that time. It did not serve EBT, because it could not locate an address for proper service, but did send the orders to three contact addresses.

11. On September 13, 2002 Borden Ladner Gervais prepared a notice of motion seeking an order that "the garnishee Bank of Montreal, on behalf of the garnishee Exchange Bank & Trust pay ..." to Evans the US\$19 million owed by EBT to Durante. Borden Ladner Gervais delivered this notice of motion, and a supporting affidavit, to all parties it knew of who were interested in, or had made claims on, the US\$18.2 million (and, again, sent it to the three EBT contact addresses).

12. This provided the backdrop for Borden Ladner Gervais' application for case management of the litigation. In the Respondent's letter of October 24, 2002 to the trial co-ordinator, requesting the appointment of a case management judge, he stated:

"Several parties are disputing entitlement to the frozen money... Mr. Evans also expects several additional parties to apply for orders that they are entitled to all or some of the frozen money."

13. Kirkpatrick J. was appointed case management judge, to organize a hearing to determine entitlement to the US \$18.2 million and the priorities among the claimants to it. She was not seized of interlocutory applications in the litigation.

14. In October 2002, the Respondent realized that while Evans had a judgment against Durante, the US\$18.2 million was in the hands of B of M. While B of M owed a debt to EBT, Evans had no judgment against EBT. There was therefore no way of requiring that the money in B of M's hands be paid to Evans.

15. The Respondent and his colleagues decided to try to obtain a garnishing order absolute against EBT, pursuant to s. 11 of the *Court Order Enforcement Act*, which would function as a judgment in favour of Evans.

16. On November 6, 2002 Borden Ladner Gervais obtained an order permitting substitutional service of the garnishing orders, the September 13, 2002 notice of motion and supporting affidavit, and all future documents required to be served, on EBT.

17. On November 15, 2002 Borden Ladner Gervais served EBT substitutionally with the garnishing orders and the September 13, 2002 material. EBT neither paid money into court nor filed a dispute note in response to the garnishing orders, nor responded to the notice of motion.

18. Borden Ladner Gervais then applied for a garnishing order absolute against EBT for the full amount of Evans' B.C. judgment against Durante. It served that application substitutionally on both EBT and Durante. Neither responded.

19. The Respondent appeared before Hood J. on December 18, 2002. Neither EBT nor Durante appeared.

20. On December 19, 2002, Borden Ladner Gervais obtained a garnishing order after judgment against B of M, garnisheeing the debt B of M owed to EBT. B of M filed a dispute note and paid nothing into court. The dispute note raised the defence that the Securities Commission's "freeze order" prevented it from paying into court the money it owed to EBT.

21. On June 5 – 6, 2003, after the exchange of arguments for the entitlement hearing, when the Respondent had made it clear in Evans' argument that the effect of the garnishing order absolute was to make EBT liable directly to Evans, other claimants Umbrella Capital LLC and David Svete, and the SEC, applied to Hood, J. to set aside the order. (Although Umbrella Capital and Svete represented themselves throughout as "innocent depositors" of US\$3 million in EBT, on March 3, 2005 Svete was convicted in U.S. District Court on money laundering charges with respect to that US\$3 million.)

22. On June 18, 2003, Hood, J. set aside the garnishing order absolute. He held that Mr. Antle had not discharged his duty to disclose all material facts which might have influenced the exercise of his discretion in deciding whether to grant the order.

23. The Respondent was aware of his duty to disclose to Hood, J. all material facts that might influence his exercise of discretion.

24. The Respondent honestly intended to discharge that duty.

25. The Respondent accepts that he failed to advise Mr. Justice Hood of all material facts that may have influenced his exercise of discretion and that he ought to have disclosed the following:

(a) that the British Columbia Securities Commission had issued an order prohibiting EBT from withdrawing the funds and B of M from paying them out;

(b) that there were other claimants to the funds held by EBT at B of M;

(c) that other claimants alleged that those funds were the product of Durante's fraudulent stock manipulations and that the SEC's B.C. counsel had advised that they intended to trace the proceeds of Durante's frauds to the B of M claim that B of M held that money in trust for the SEC; and

(d) that he and counsel for other claimants were participating in a case management process to organize a hearing to determine entitlement to the funds and priorities between claimants.

26. The Respondent accepts that his failure to disclose to Hood, J. the facts in para. 25 above was professional misconduct.

27. The Respondent accepts that the appropriate penalty is a \$10,000 fine and an order that he pay the costs of the Law Society's investigation of this matter in the amount of \$5,000.

[4] Counsel for the Law Society referred the Panel to authorities, namely, *Hamilton 2005 LSBC 05*, *Moore-Stewart 89/5*, *Schiffer 93/11*, *Jeffrey 97/1*, *Hall 98/02*, and *Samuels 99/23*. These authorities relate to deliberate deception on the part of a member, whereas the failure of the Respondent to fully disclose to the Court was not a deliberate attempt to mislead. It is accepted that he honestly intended to discharge his duty. While he did not intend to mislead, he did mislead, and his conduct amounts to professional misconduct.

[5] The Panel accepts the agreement advanced by the Discipline Committee and the Respondent, and orders that the Respondent:

1. pay a fine of \$10,000.00; and
2. pay the costs of the Law Society in the agreed amount of \$5,000.00.

[6] The Panel further instructs the Executive Director to record the Respondent' s admission upon his professional conduct record.