ROBIN FISCHER 95/11

Burnaby, B.C.
Called to the Bar: May 14, 1979
Ceased membership: April 1, 1993

Discipline hearing panel: February 24 and July 7, 1994, February 21 and May 5, 1995
R.C.C. Peck, Q.C., Chair, H. Berge and N. MacDonald

R. ter Borg (findings of fact) and J. Whittow (verdict and penalty), for the Law Society
Mr. Fischer did not appear, though duly notified

Summary

In undertaking legal work for a business transaction on behalf of himself and Ms. S, with whom he had a personal relationship, Mr. Fischer failed to ensure that Ms. S obtained independent legal advice. While making a mortgage loan application in this transaction, Mr. Fischer falsely asserted that he owned $24,000 in gold bullion, when he did not, and he failed to disclose to the mortgagee that he was an undischarged bankrupt. Mr. Fischer also misled his trustee in bankruptcy by failing to disclose ownership of $54,000. In another matter, while representing the judgment debtor in the appeal of a judgment, Mr. Fischer released to his client the funds that he had committed to holding in trust as security for judgment under a court order. He also misled two lawyers respecting the status of those funds. After one of the lawyers obtained judgment against Mr. Fischer personally for the funds, Mr. Fischer misled the lawyer respecting the status of a claim he had made against his professional liability insurance. In another proceeding, during an examination in aid of execution, Mr. Fischer gave false evidence under oath. Mr. Fischer voluntarily ceased membership in 1993 and was disbarred on May 19, 1995.

Facts

Failing to advise independent legal advice and failing to disclose bankruptcy

In late 1989, Mr. Fischer and Ms. S, who had earlier formed a personal relationship, entered into a business arrangement to purchase property in North Vancouver for subdivision and resale.

On December 29 Ms. S made an offer to purchase the property. She agreed to register the property in her name because Mr. Fischer said that he wished to avoid interference with his interest in the property by his former wife.

On January 2, 1990 a subject clause was removed from the offer to purchase and the deposit increased to $10,000. Mr. Fischer paid the deposit.

On January 11 Mr. Fischer and Ms. S made a $140,000 mortgage loan application at a credit union. On the loan application Mr. Fischer claimed as assets 60 ounces of gold bullion valued at $24,000 and a T-bill savings account of $54,000. Although he listed the gold bullion as an asset, the gold in fact belonged to a friend.

The credit union approved the mortgage loan, with Ms. S as mortgagor and Mr. Fischer as guarantor.

Mr. Fischer and Ms. S signed a co-ownership agreement in January, 1990 which reflected their agreement to register the property in her name, to each contribute $50,000 toward the purchase price, to share expenses and to share profits after subdivision and resale.

Mr. Fischer did not disclose to the credit union or to Ms. S that he was an undischarged bankrupt. Had the credit union manager known this, he said he would have noted this on the loan application and, moreover, would not have accepted Mr. Fischer as guarantor on the loan to Ms. S. Had Ms. S known, she said she would have been reluctant to enter into the property purchase with him.

The property purchase completed on March 30, 1994 for $235,000 by way of $50,000 cash from Ms. S, $50,000 cash from Mr. Fischer and $140,000 mortgage money advanced by the credit union.

Mr. Fischer conveyed the property, while another lawyer prepared the co-ownership agreement. Mr. Fischer told Ms. S that she could speak to another lawyer about the co-ownership of the property and seek independent legal advice concerning the transaction. He did not recommend in writing that she obtain independent legal advice. Ms. S did call a lawyer about the agreement, but only to address her concern that Mr. Fischer had paid the $10,000 deposit without a receipt.

Mr. Fischer charged no fees for the conveyance. He paid the cost of the co-ownership agreement and split with Ms. S the cost of associated disbursements.

On July 30, 1990 Mr. Fischer and Ms. S sold the property. Ms. S had not wanted to sell the property because there would be a loss, but Mr. Fischer needed the money, and he persuaded her to sell on the promise that she would get back all the money she had paid into the venture. He reneged on his promise.

Ms. S lost $7,000 in the project. She was a sophisticated financial officer and had entered into the transaction on the basis of her commercial knowledge and her personal relationship with Mr. Fischer. Though Ms. S did not initially rely on Mr. Fischer as a lawyer, he assumed the status of a lawyer or at least had fiduciary obligations toward her after undertaking legal steps on their joint behalf.

Failing to disclose assets to trustee in bankruptcy

On December 28, 1989, the day before Ms. S made the offer to purchase the North Vancouver property, Mr. Fischer made an assignment in bankruptcy, declaring himself to be an insolvent person and unable to meet his financial obligations as they became due.

In making the assignment in bankruptcy, Mr. Fischer declared only $2,000 worth of household furniture and personal effects. He did not reveal his T-bill savings account of $54,000.

Mr. Fischer was discharged from bankruptcy on April 25, 1990, without having ever revealed these assets, or his subsequent co-ownership of property with Ms. S, to his trustee in bankruptcy.

Misleading other lawyers

In 1990 Mr. Fischer was retained by Mr. P on behalf of a company, P Inc., in appealing a judgment for $10,080 against the company. Mr. P paid Mr. Fischer a retainer of $1,500 on April 19.

Mr. Fischer's first step was to obtain an order of the Court of Appeal to stay execution proceedings pending the appeal.

On Mr. Fischer's advice that the Court of Appeal would likely order security for the judgment, Mr. P gave Mr. Fischer cheques for $8,619.45 and $1,459.66, representing the principal and prejudgment interest respectively. He therefore held in trust $10,079.11 as security for judgment and $1,500 as a retainer, a total of $11,579.11.

In Court of Appeal chambers on May 11, 1990, Mr. Fischer advised the Court that he had money in trust to secure the judgment and prejudgment interest. The Court ordered a stay of execution pending the appeal, provided that Mr. P instruct his lawyer to maintain in an interest-bearing account a sum equal to the judgment at trial, plus interest and costs to be taxed. These funds were to remain in trust as security for judgment until further court order or agreement of the parties.

On that same day, Mr. Fischer transferred out of trust $2,091.30 as fees for legal services rendered to Mr. P, thereby reducing the money held in trust as security for judgment to $9,487.81.

On May 15, the lawyer for the judgment holder wrote to Mr. Fischer to confirm that Mr. Fischer held in trust the full amount of the judgment plus interest. Mr. Fischer did not, in fact, still hold the full amount, and he did not respond to the letter.

On September 10 Mr. Fischer persuaded Mr. P that the appeal would not likely succeed and that, if Mr. P discharged him, Mr. Fischer would be able to return to him the money held in trust as security for judgment. That day Mr. Fischer wrote Mr. P a letter confirming his discharge and abandonment of the appeal. He transferred from trust a further $517.96 as fees for legal services, and he gave Mr. P a trust cheque for $9,148.24, which was then the balance of funds held as security for judgment.

Mr. P used the $9,148.24 to pay down the indebtedness of P. Inc to its bank.

On September 13, 1990 the lawyer for the judgment holder successfully applied to the Court of Appeal to have the appeal dismissed as abandoned. On the morning of the application, the lawyer received a letter from Mr. Fischer that said that he had been discharged by Mr. P. Mr. Fischer said in the letter that he had returned to Mr. P the money he had held in trust, even though he had advised both the court and opposing counsel that this money would be held in trust to secure the judgment, in compliance with the order for stay of execution.

Though Mr. Fischer later in an affidavit tried to justify his actions by saying that he told Mr. P on several occasions that Mr. P had not provided enough funds to meet the terms of the order, Mr. Fischer was clearly deceitful to his colleague and to the court.

The representation of the judgment holder was taken over by a new lawyer. That lawyer obtained a court order that Mr. Fischer personally pay to the judgment holder $10,080, plus interest and costs.

Mr. Fischer applied to his professional liability insurer to pay the judgment on his behalf. On December 18, 1990 the insurer wrote back to say that, given Mr. Fischer's claims history, delay in reporting and his handling of the claim, his deductible would be $11,000, and the insurer would extend coverage for the balance.

On January 29, 1991 Mr. Fischer asked the new lawyer for the judgment holder for a complete accounting, which Mr. Fischer said the insurer had requested to process the claim. In fact, the insurer had made no such request. On February 8 Mr. Fischer wrote to the lawyer for the judgment holder to say the insurer had denied coverage.

On March 8, 1991 the lawyer for the judgment holder wrote to Mr. Fischer to ask whether any portion of the trust funds held as security for judgment were used to pay legal fees. Mr. Fischer replied that legal fees were paid from a separate retainer. In fact, Mr. Fischer's accounts of $2,091.30 and $517.96 had more than exhausted the original retainer of $1,500.

Failing to report unsatisfied judgment and lying under oath

Mr. Fischer began and discontinued an action to recover from Mr. P and others the money he had paid out to Mr. P. The defendants in this action obtained an order for costs of $1,332.22 against Mr. Fischer. Mr. Fischer did not pay this judgment and did not notify the Law Society of this unsatisfied judgment, the circumstances of it or how he proposed to satisfy it, as required under Rule 510.

While examined under oath during an examination in aid of execution, Mr. Fischer swore that, at that time, he held no real property, owned no assets, had no debts owing and had no shareholdings outside his personal law corporation. He did not reveal that he owned shares in a company and held a half interest in the North Vancouver property, which was to be sold later that month.

Decision

The discipline hearing panel found that Mr. Fischer was guilty of professional misconduct in:

- failing to ensure that Ms. S obtained independent legal advice in his transaction with her;
- misleading other lawyers respecting the funds he was to hold as security for judgment and respecting the status of a liability insurance claim he had made;
- giving false evidence under oath in an examination in aid of execution, a proceeding that arose out of a solicitor-client relationship.

The panel found that Mr. Fischer was guilty of conduct unbecoming a member in:

- guaranteeing a mortgage and failing to disclose to the mortgagee that he was an undischarged bankrupt;
- giving false information in an application for credit by asserting that he owned gold bullion valued at $24,000 when he did not;
- misleading his trustee in bankruptcy by failing to disclose ownership of $54,000.

The panel also found that Mr. Fischer had breached Law Society Rule 510 by failing to notify the Law Society of an unsatisfied judgment against him, the circumstances of the judgment and his proposal for satisfying it.

Penalty

The discipline hearing panel ordered that Mr. Fischer:

1. be disbarred; and

2. pay $18,233.59 as costs of the proceeding.

The panel noted that Mr. Fischer's conduct was egregious and clearly demonstrated that he was unfit and unsuitable to engage in the practice of law.

Although it was unnecessary to decide penalty, the panel also noted that Mr. Fischer had previously undergone two conduct reviews on other matters in 1989 and 1990.

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