

CANADA / JUDGMENT

Bird v. E.S.C. Holdings Ltd.

2002 BCSC 1184

COURT

Supreme Court of British Columbia

DECIDED

8 August 2002

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Source record

2002BCSC1184

Citation:	Owen Bird et al v. E.S.C. Holdings Ltd. et al
Date:	20020808 2002 BCSC 1184
Docket:	L020658 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	OWEN BIRD AND JAMES L. CARPICK SOLICITORS
AND:	E.S.C. HOLDINGS LTD., EDWARD CHRISTIAN, 162147 B.C. LTD., DAVID HUTCHISON, PETER HORNSTEIN AND JENNIFER LYNN THOMPSON CLIENTS

REASONS FOR DECISION

OF

DISTRICT REGISTRAR BLOK

Counsel for the Solicitors:

Harvey Delaney

Appearing on her own behalf:

Jennifer Thompson

Appearing on his own behalf:

Ed Christian

Appearing on his own behalf:

David Hutchison

Appearing on his own behalf:

Peter Hornstein

Date and Place of Hearing:

June 6, 7 and 17, 2002

Vancouver, BC

Introduction

- [1] Four clients seek a review of 12 legal accounts totalling \$66,292.45 pursuant to the provisions of the Legal Profession Act, S.B.C. 1998, c. 9.

Background

- [2] The clients retained Owen Bird in July 1997 to represent them in a legal action arising out of the investment by the clients in a restaurant that later failed. The legal action had been commenced on behalf of these clients by a previous solicitor in June 1995.
- [3] The clients, having become dissatisfied with some aspects of the representation by the first solicitor, sought a second opinion from Owen Bird. The opinion was provided by James Carpick of that firm and, following the delivery of that opinion, the clients retained Owen Bird to represent them in the lawsuit.
- [4] Mr. Carpick amended the pleadings, interviewed witnesses and carried out discoveries. The action proceeded to trial on March 12 to 16, 2001. On March 20, 2001 the trial judge dismissed the clients' action on a no evidence motion brought by the defendants.
- [5] For these services the solicitors rendered accounts totalling \$66,292.45, of which \$48,222 was for fees. On May 30, 2002 the solicitors formally reduced their fees to \$26,500 to reflect the adverse result in the action. With disbursements and taxes the accounts were reduced to a total of \$41,529.39.
- [6] The clients have a number of complaints about the services provided, the most important of which are as follows:
- (a) Mr. Carpick amended the pleadings to plead fraudulent misrepresentation, thus increasing the plaintiffs' burden of proof and making it more difficult to win their case;
 - (b) the amendment of pleadings was done before evidence was obtained to back up the amendments;
 - (c) Mr. Carpick did not contact some potential witnesses and did not call other witnesses at trial;

- (d) Mr. Carpick did not conduct an examination for discovery of one of the defendants;
 - (e) in the case of Ms. Thompson, Mr. Carpick did not interview her or otherwise prepare her adequately prior to both her examination for discovery and the trial;
 - (f) Mr. Carpick "forgot" to call some evidence at trial and failed to emphasize other important evidence;
 - (g) although he was given advance notice of the no evidence motion, Mr. Carpick never mentioned it to the clients and did not seem prepared for it;
 - (h) an acceptance of an offer to settle did not bring about a conclusion to the matter which, according to the clients, Mr. Carpick said it would;
 - (i) Mr. Carpick's billing rates increased without notice.
- [7] The clients assert that they have been given no value whatsoever and thus feel that the accounts ought to be disallowed in their entirety.

History of the Case

- [8] Jennifer Thompson, who acted as the main spokesperson for the clients in the hearing before me, said that the legal proceedings in this matter first commenced in September 1994 when she filed, on her own, a petition seeking relief against Alan Merriman and Raquel Merriman, principals of the subject restaurant business. The petition alleged oppression under the Company Act.
- [9] Realizing that the conduct of legal proceedings was beyond her, Ms. Thompson, now with other shareholders joining, retained counsel to pursue legal action. The petition was discontinued and a writ of summons and statement of claim were filed on June 14, 1995. The statement of claim alleged that the defendants breached the Securities Act, S.B.C. 1985 c. 83, in soliciting investments by the shareholders, breached fiduciary duties owed to the plaintiffs and made representations to the plaintiffs about the management of the restaurant which were either negligent or which created a collateral contract between the parties.
- [10] Ms. Thompson stated that the client group paid their previous counsel about \$16,000 from late 1994 to mid-1997 in pursuing the action. This counsel commenced the action, carried out discovery of documents, did some legal research, set the matter for trial and generally had conduct of the matter for about two and a half years. Ms. Thompson agreed that prior counsel did not carry out any examinations for discovery, did not interview any non-party witnesses and did not provide a written legal opinion, although she said that prior counsel had interviewed the plaintiffs and provided a verbal opinion to the client group.
- [11] Ms. Thompson thus asserted that Mr. Carpick was provided with \$16,000 worth of work product when he took over conduct of the action in July 1997.

- [12] The clients met initially with a senior partner of the firm, Barry Kirkham, but his schedule could not accommodate the matter and Mr. Kirkham referred the clients to Mr. Carpick, a partner who had experience in commercial litigation.
- [13] Mr. Carpick was called to the Bar of Ontario in 1988 and the Bar of British Columbia in 1991. His area of practice is in commercial litigation.
- [14] Mr. Carpick reviewed the file of the previous solicitor and provided a 12-page opinion dated July 16, 1997. In that letter Mr. Carpick reviewed the facts, discussed some of the logistical difficulties in the litigation, explained and commented upon the existing and some potential new causes of action and discussed both damages and costs.
- [15] The amount at issue was about \$230,000. With interest the total claim was in the range of \$280,000.
- [16] In his opinion letter Mr. Carpick recommended that certain causes of action be dropped and certain others added. In particular, he recommended that the pleadings be amended to allege that the representations made to the plaintiffs were fraudulent and not merely negligent. He warned the clients that this could result in an award of a punitive level of costs in the event that these allegations were not made out.
- [17] Mr. Carpick demurred on the giving of an opinion on the prospects for success. He said:
- I cannot render a useful opinion about the prospects of being able to prove the facts necessary to establish the causes of action, and thus win the case, until I have conducted witness interviews and obtained written statements from the witnesses, and examined Mr. and Mrs. Merriman for discovery.
- [18] Later in the letter, however, Mr. Carpick said "the case has merit" if the plaintiffs' evidence concerning the alleged representations was accepted. He went on to warn of the costs consequences in the event of a loss at trial. He noted that "there is always some prospect of losing" and that the clients ought to consider the possibility of having to pay costs in deciding whether to proceed or to settle.
- [19] Following the delivery of the opinion letter the clients retained Owen Bird to represent them in the matter. The clients signed a retainer letter dated July 23, 1997. The retainer letter is in typical form. Although it indicates that, for the time being, the clients' instructions are limited to investigating the case and providing an opinion, it is common ground between the parties that the clients retained the firm to represent them generally in the lawsuit.
- [20] The retainer letter also notified the clients that Mr. Carpick's current hourly rate was \$205.00 and that "this may be increased from time to time."
- [21] The file transfer took place in July 1997. To that point, there had been no discoveries conducted, no witness statements prepared and a trial was set for November 1997 for 10 days, which itself was a rescheduling from an earlier trial date arranged for October 1996.

- [22] Mr. Carpick effected an extensive amendment of the statement of claim. Some of the named plaintiffs (none of the clients herein) had not retained Owen Bird and it was not clear whether they wished to continue as plaintiffs in the action. This was ultimately sorted out on a Chambers application on January 7, 1999.
- [23] Mr. Carpick stated that he sent a draft of the amended statement of claim to each of the clients and they consented to its filing.
- [24] In the meantime, Mr. Carpick interviewed certain non-party witnesses, chiefly two witnesses from Earl's Restaurants, a company that had granted an Earl's restaurant franchise to Mr. Merriman. The allegation by the clients was that Mr. Merriman had concealed from them a restriction on his ability to be involved in the new restaurant venture. The evidence from the Earl's witnesses indicated that although no written franchise agreement had been signed by Mr. Merriman or his company, which agreement would have prohibited any competitive activity, the executives at Earl's nonetheless took a very dim view of Mr. Merriman's involvement in a competitive restaurant. There was also a suggestion that Mr. Merriman had not been forthright in disclosing to Earl's his involvement in the new restaurant.
- [25] An examination for discovery of Mr. Merriman took place in April 1999. Mr. Carpick decided that there was no need to examine Mrs. Merriman for discovery as she was not a participant in the alleged conversations. The clients were examined for discovery by defence counsel shortly before trial.
- [26] The trial commenced on March 12, 2001. Mr. Carpick called as witnesses each of the plaintiffs and one of the executives from Earl's. He also did some read-ins of discovery evidence. Mr. Carpick closed his case on the Wednesday of the first week of trial and a no evidence motion was argued over the next two days.
- [27] At the conclusion of argument on the motion the trial judge called counsel into her chambers. She expressed her views on the case and encouraged the parties to consider settlement. Back in court, the trial judge indicated that she would give her judgment on the no evidence motion on the following Tuesday, March 20, 2001.
- [28] Following the discussion in the trial judge's chambers, Mr. Carpick reported to his clients. Opposing counsel had indicated that his settlement offer was "zero and dropping." Mr. Carpick discussed the options with the clients, those being to press ahead or to try to settle. Settlement did not seem very likely in view of opposing counsel's statement.
- [29] There was a third option. Prior to trial opposing counsel had delivered a formal offer to settle for \$2,500, but it contained a statement that each of the parties be responsible for their own costs. Mr. Carpick felt that the costs proviso in the formal offer to settle might take it outside of the confines of Rule 37 and render it an informal offer to settle that was still capable of being accepted.

- [30] After discussing the offer to settle with his clients Mr. Carpick received instructions to accept it. A letter of acceptance was sent March 16, 2001. However, opposing counsel took the position that since the offer to settle expired at the commencement of trial in accordance with Rule 37(13) there was nothing that was capable of being accepted.
- [31] Because of the dispute between counsel about the status of the offer to settle, counsel rightly agreed that they could not advise the trial judge that the matter had settled. The parties thus re-attended at court on March 20, 2001 for the rendering of the trial judge's decision.
- [32] In her oral reasons for judgment the trial judge held that while the plaintiffs had established that Mr. Merriman represented to them that he would "supervise" or "oversee" the new restaurant in which they were investing, each of the investors knew that others would carry out its day-to-day management and operation. She found that there was no evidence that Mr. Merriman did not do what he represented he would do to a substantial degree.
- [33] The trial judge also found that while Mr. Merriman represented that his ownership and operation of the White Rock Earl's restaurant was not a conflict with his involvement with the new restaurant, she also found that there was no evidence that this representation was untrue, inaccurate or misleading in any way. The action was thus dismissed with costs.
- [34] The loss came as a great shock to the clients. Clients and counsel thereafter had a falling out.
- [35] To add insult to injury, the clients later paid \$25,000 to settle the award of costs that had been made against them.

The Accounts

The following accounts were rendered in this matter:

Date

Fees

Disbursements

Taxes

Total

July 23, 1997

\$4,367.00

\$82.10

\$617.13

\$5,066.23

Sept. 29, 1997

3,895.00

249.75

562.78

4,707.53

Dec. 31, 1997

533.00

172.00

83.16

788.16

Sept. 30, 1998

1133.50

670.10

177.60

1,981.20

Dec. 22, 1998

966.00

411.08

163.99

1,541.07

March 22, 1999

1,749.50

324.62

263.25

2,337.37

June 3, 1999

2,398.00

769.55

385.19

3,552.74

Aug. 20, 1999

594.00

122.40

91.69

808.09

Dec. 22, 2000

300.00

245.07

44.59

589.66

Feb. 28, 2001

3,105.00

49.90

438.22

3,593.12

March 31, 2001

29,181.00

7,277.91

4,471.70

40,930.61

May 22, 2001

389.75

6.92

396.67

Total

\$48,222.00

\$10,764.23

\$7,306.22

\$66,292.45

[36] The total professional time billed on these accounts was 216.7 hours. The vast majority of billed time was that of Mr. Carpick.

Discussion

[37] Most of the complaints raised by the clients can be divided into three general areas: complaints concerning the preparation of the case, complaints regarding the presentation of the case at trial and objections to specific fees and charges.

A. Case Preparation

[38] The clients are critical of Mr. Carpick for amending the pleadings before interviewing witnesses. They also feel that their case was made harder to prove because the effect of the amendments was to increase the burden of proof upon them.

[39] Pleadings are almost always filed before the evidence has been obtained in full. Pleadings are not evidence; they are allegations that define the scope of the action. It was therefore not improper for Mr. Carpick to amend the pleadings without, for example, having interviewed witnesses from Earl's Restaurants or examining the main defendant, Alan Merriman, for discovery. The order in which Mr. Carpick completed these tasks was entirely typical.

[40] The clients gave Mr. Carpick instructions to amend the statement of claim as he recommended. At the review hearing Ms. Thompson, Mr. Christian and Mr. Hutchison each agreed that they were aware that the inclusion of the fraud allegations raised the stakes, and the risks, in the action. Mr. Carpick presented the clients with a litigation plan in the form of his opinion letter of July 16, 1997. The clients approved the plan and Mr. Carpick followed it in substance. They cannot now complain that the plan was unsuitable.

[41] I note, in any event, that in her reasons for judgment the trial judge did not mention an increased burden of proof as having influenced her in dismissing the claim. Her reasons for judgment indicate that, instead, she considered the representations, whether fraudulent or negligent, to ascertain whether or not they were untrue. There is therefore nothing to suggest that the inclusion of the claims in fraudulent misrepresentation had any bearing on the outcome of the case.

[42] The clients also feel that there were additional witnesses that Mr. Carpick ought to have interviewed, that interrogatories mentioned by Mr. Carpick at one point were never sent out and that Mr. Carpick failed to conduct an examination for discovery of Mrs. Merriman. In addition, Ms. Thompson was critical of Mr. Carpick for failing to prepare her properly in advance of both her examination for discovery and the trial.

- [43] Mr. Carpick testified that some of the additional witnesses mentioned were not central to the issues. Other witnesses who might have been considered central offered evidence that was already being given by others. One potential witness, Buzz Fuller, was the founder of Earl's Restaurants, but evidence favourable to the plaintiffs from this company was already available from Andrew Wilton, a senior executive with Earl's, and Stan Fuller, the president of Earl's and son of the founder. Mr. Carpick obtained statements from both of these witnesses.
- [44] There were other witnesses mentioned as well, but I am satisfied that the various potential witnesses mentioned by the clients would have added little or nothing in the way of proof of either the representations made or of the untruthfulness of those representations. As to the former, the only necessary evidence came from the plaintiffs themselves, plus any admissions obtained from Mr. Merriman on discovery. As to the latter, I had no evidence before me that established that the potential witnesses had anything material to say that was not already being obtained through the plaintiffs and the one witness from Earl's Restaurants, Mr. Wilton.
- [45] On the matter of the interrogatories, Mr. Carpick agreed that he mentioned these at the conclusion of Mr. Merriman's examination for discovery but, on reflection, he concluded that they were not necessary.
- [46] According to Mr. Carpick, Mrs. Merriman was not examined for discovery because she was a "minor player" and had not been a part of any of the representations. Evidence concerning her involvement with the running of the restaurant was available from the plaintiffs and through admissions made by Mr. Merriman at his examination for discovery. There was no evidence before me to show that Mrs. Merriman would have given evidence that would have affected the outcome of the case.
- [47] I note that the clients probably incurred no additional exposure by reason of the inclusion of Mrs. Merriman as a defendant since Mr. and Mrs. Merriman were represented by the same counsel.
- [48] The decision not to send interrogatories and the decision not to conduct an examination for discovery of Mrs. Merriman were both matters involving the exercise of judgment on the part of counsel. I cannot conclude on the evidence that these decisions of Mr. Carpick showed any want of care or skill or that they otherwise formed a basis on which to disallow or reduce his remuneration.
- [49] As for Ms. Thompson's preparation, Mr. Carpick interviewed the clients collectively, not separately, and she felt Mr. Carpick put her off when she tried to meet with him on the morning of trial. Her expectations as to the amount of preparation that was needed were not met and she felt unprepared as a result. She felt she had not had a proper interview either before her examination for discovery or before trial.

- [50] While there may have been a want of "deskside manner" (to modify the medical phrase) on the part of Mr. Carpick I cannot conclude that this impaired the quality of evidence that was placed before the court.

B. Presentation at Trial

- [51] The clients raise several matters of allegedly poor representation by Mr. Carpick at trial. They say he seemed ill-prepared for the no evidence motion despite the fact that he had been given advance notice of that motion a week earlier at a pre-trial conference. They again raise the matter of witnesses, complaining that Mr. Wilton was their only non-plaintiff witness. Mr. Carpick, they say, missed an important discovery read-in and he forgot entirely to lead evidence concerning a meeting at which Mrs. Merriman broke down.
- [52] The clients feel that Stan Fuller and Buzz Fuller of Earl's Restaurants should have been called at trial, as well as Dan Morton, the general manager of the subject restaurant. Mr. Morton was served with a subpoena but ultimately was not called at trial. Mr. Carpick felt there were risks associated with calling Mr. Morton as he was a friend of Mr. Merriman. He considered that since Mr. Morton's evidence was already being given by others the risks of calling Mr. Morton at trial outweighed the benefits. Similarly, Mr. Carpick felt that Stan Fuller had some downside risk. His evidence was somewhat equivocal and the helpful evidence that would be given by Stan Fuller was already being given by Andrew Wilton. Mr. Carpick testified that Stan Fuller had told him that his father, Buzz Fuller, had nothing additional to say than had already been said by Stan Fuller.
- [53] Mr. Christian stated that Mr. Carpick ought to have called more witnesses, such as "restaurant people and accountants." Ms. Thompson, Mr. Christian and Mr. Hutchison mentioned names of other persons whom they thought might have been helpful to their case, including two other investors and the corporate solicitor for the restaurant.
- [54] It may be that the clients now question whether further witnesses would have supplied the evidence that was found wanting by the trial judge. The clients evidently feel that the failure of their case on a no evidence motion shows that Mr. Carpick did not lead enough of the evidence that was available to him. However, the evidence before me did not show that the failure to call any witnesses caused the clients to lose the case or, indeed, had any effect on the outcome.
- [55] As noted earlier, the manner in which a case is prepared and presented is the result of a series of judgment calls that counsel must make. Mr. Carpick exercised his judgment as to which witnesses to call at trial. Additional witnesses such as "restaurant people and accountants" might have added to the quantity of the evidence but there is no evidence on which I can conclude that the quality of the evidence that might have been called would have changed the result of the case. I thus cannot find that Mr. Carpick exercised his judgment in a manner that resulted in the loss of the case or that would otherwise disentitle him from being remunerated.

- [56] Mr. Carpick acknowledged that, at one point, he forgot to read in one discovery admission, but he noted that he had referred to it in his trial opening and that he did, in fact, read it in at a later stage with leave of the court. He also emphasized the discovery admission during argument on the no evidence motion. I cannot conclude that this momentary lapse had any effect on the case.
- [57] The fault for failing to lead evidence of a meeting in which Mrs. Merriman broke down was disputed between Mr. Carpick and Mr. Hutchison. Mr. Hutchison maintained that Mr. Carpick acknowledged at a break in the trial that he forgot to lead this evidence; Mr. Carpick stated that Mr. Hutchison failed to give the evidence in response to relevant questions. Whatever the reason for the absence of this evidence, I am unable on the evidence led before me to discern its relevance let alone conclude that its absence contributed to the failure of the plaintiffs' case.
- [58] Lastly, I find no foundation for the clients' complaint that Mr. Carpick was unprepared for the no evidence motion. The written argument on file, the time entries and the evidence of Mr. Carpick show that he was well-prepared for the motion and that he simply accepted an invitation by the trial judge to take a little more time to assemble his argument before the motion was heard. The fact that Mr. Carpick did not inform his clients of this expected motion was a failure of communication on his part but it was not an indication that he failed to prepare for the motion.

C. Fees and Charges

- [59] There are four issues raised by the clients on the matter of specific fees and charges:
- (a) there was an unnecessary Chambers motion to remove plaintiffs from the action;
 - (b) real-time reporting at the trial was an unnecessary expense;
 - (c) There were some time entries which were not properly billed to this file; and
 - (d) Mr. Carpick's hourly rate increased without notice.
- [60] On the matter of the Chambers motion, I am satisfied that it was necessary to proceed with an application to remove several non-participating plaintiffs. The cost associated with this task was reasonable.
- [61] Real-time reporting is computer-aided transcript production that allows counsel to connect directly to the court reporter's computer. It enables counsel to have a fast and reasonably accurate record of the evidence as it is being given.
- [62] In this case Mr. Carpick sought and received permission from the clients to use real-time reporting. It appears that he disclosed the cost to the clients, which was in the order of \$800 per day. He testified that this service was not absolutely necessary but he thought it was appropriate and convenient. Mr. Carpick was able to use the resulting rough transcript on the no evidence motion.

- [63] Ms. Thompson and Mr. Christian each testified that they had been led to believe that real-time reporting was both normal and essential and that is why they gave their approval.
- [64] I am satisfied that this disbursement was approved in advance by the clients. However, on the evidence before me, I am not satisfied that Mr. Carpick gave his clients sufficient information upon which to make an informed judgment about the necessity and reasonableness of this expense, which at a total cost of \$3,308.50, was considerable. Real-time reporting is something of a litigation luxury and a lawyer must therefore do more by way of explanation than to say, in effect, "I want this, please approve." This is particularly so in this case where one client, Ms. Thompson, had expressed to Mr. Carpick concern about costs.
- [65] While this disbursement is allowed I consider that the circumstances surrounding the approval of this expense are matters which I may take into account in setting a reasonable fee.
- [66] Mr. Carpick agreed that two time entries in the account of March 22, 1999 were improperly billed to this file as they related to a different matter involving Mr. Christian or his company. The time entries total 2.5 hours, which were charged at \$550. Taxes on that sum would total \$77.
- [67] On the issue of the hourly rate increase, Mr. Carpick's hourly rate at the time of the retainer letter was \$205. The retainer letter stated that the hourly rate "may be increased from time to time." Mr. Carpick said that his hourly rate was typically reviewed in January or February of any given year and adjusted to conform to market conditions for lawyers of his experience.
- [68] In 1998 Mr. Carpick's hourly rate was \$210, in 1999 it was \$220, in 2000 it was \$240 and shortly before trial it was increased to \$270.
- [69] Had there been no rate increase for the final bill the resulting account would have been about \$3,000 less than it was.
- [70] In the retainer agreement the clients agreed that Mr. Carpick's hourly rate could be increased from time to time. They also knew from earlier accounts that this rate had increased annually as this had occurred on three prior occasions. Hourly rate increases were thus part of the contract between clients and counsel.
- [71] Mr. Christian pointed out that there is no apparent limit to the increases that could be imposed on the clients. While there may be no limits imposed within the retainer agreement itself, s. 71(4)(f) of the Legal Profession Act includes reasonableness of an hourly rate as one of the factors a registrar must consider in reviewing a lawyer's bill.
- [72] The only evidence given on this subject was that Owen Bird reviewed its hourly rates annually and adjusted them to reflect market conditions. From this I could infer that the increase in Mr. Carpick's hourly rate from 2000 to 2001 was reasonable. However, I also rely

on my own experience and expertise in these matters, as I am entitled to do, and I find that Mr. Carpick's hourly rate in 2001 was commensurate with the hourly rates of similarly situated Vancouver lawyers with his experience. His earlier rates also appear to be reasonable.

- [73] It should be noted, however, that the hourly rate charged is but one factor to be considered in the fixing an amount of a reasonable bill. I will discuss the various factors later in these reasons.

D. Other Issues

- [74] The clients feel that Mr. Carpick did not do enough to attempt to settle this case. They note that opposing counsel suggested arbitration as early as 1997, but Mr. Carpick advised them not to agree to it.
- [75] Mr. Carpick agreed that he never tried to hold a mediation session or settlement conference. He testified that settlement seemed highly unlikely in view of the vast gulf between the positions of the parties. Mr. Carpick had delivered an offer to settle in February 2001 in the range of \$150,000 while the only offer from the defendants was the formal offer to settle of March 6, 2001 in the amount of \$2,500.
- [76] There is no evidence on which I can conclude that any further settlement efforts on Mr. Carpick's part would have resulted in a settlement. As for arbitration, it was apparent to me that Ms. Thompson, Mr. Christian and Mr. Hutchison were under the misapprehension that arbitration is a form of settlement conference. It is, of course, nothing of the sort. An arbitration hearing is, in effect, a private trial. The defendants' offer to arbitrate this dispute was therefore not an indication of a willingness to discuss settlement but was merely an offer to resolve the matter through a private hearing.
- [77] Unfortunately Mr. Carpick's letter to the clients of September 9, 1997, reporting on the arbitration offer, does not explain the nature of arbitration proceedings. If Mr. Carpick gave this explanation elsewhere I was not told of it.
- [78] The final issue relates to the offer to settle. The clients testified that Mr. Carpick assured them that acceptance of the offer to settle would bring the case to an end with "100% certainty." Mr. Carpick testified that his opinion was conditional: if the offer to settle was still valid then acceptance of the offer would give "100% certainty."
- [79] I prefer Mr. Carpick's version of these events. It is not conceivable that Mr. Carpick would have thought the offer to settle, flawed though it was, was so clearly still in effect that it could be accepted without objection or controversy from defence counsel. While he may have conveyed his opinion that the better argument was that the offer to settle was still capable of acceptance, I find that he did not inform the clients that their acceptance of the offer to settle would bring the case to an end with "100% certainty."

Assessment

[80] Although I have now dealt with the specific arguments or complaints raised by the clients, I must still consider whether the accounts are reasonable in all the circumstances.

[81] Section 71(4) of the Legal Profession Act reads as follows:

(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

- (a) the complexity, difficulty or novelty of the issues involved,
- (b) the skill, specialized knowledge and responsibility required of the lawyer,
- (c) the lawyer's character and standing in the profession,
- (d) the amount involved,
- (e) the time reasonably spent,
- (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
- (g) the importance of the matter to the client whose bill is being reviewed, and
- (h) the result obtained.

[82] I consider that the clients' claim was one of moderate difficulty, although it did not involve more than the usual effort and skill for matters of this type. It was conducted by counsel reasonably experienced in commercial litigation. The amount involved totalled about \$280,000 with interest, and the action was of very high importance to the clients.

[83] I also take into consideration that this matter involved a commercial case that proceeded to a trial conducted over five days, with a further trial attendance to hear the reasons for judgment. Discoveries were conducted over two days. Counsel also provided an initial opinion letter, amended the pleadings, interviewed some witnesses, attended in Chambers to remove certain plaintiffs and attended a pre-trial conference.

[84] About 217 hours of time were spent on this file, of which 2.9 hours were those of a junior litigator, 26.2 hours were recorded by an articulated student and the remaining 187.6 hours were spent by Mr. Carpick. With the exception of 2.5 hours of incorrectly billed time, I find the time spent to be reasonable.

[85] As discussed earlier, I find the hourly rates of Mr. Carpick to be reasonable.

[86] The most significant factor in this matter is the result achieved. The clients were devastated by the loss. They felt that Mr. Carpick had misled them about the prospects for success. At an early meeting with the clients Mr. Carpick said that he had never lost a trial. This statement, while true, was unfortunate because, when taken together with Mr. Carpick's ongoing expressions of confidence in the action, it encouraged the clients to believe that they had a winning case. Instead, a case that they had been assured was meritorious was

dismissed on a no evidence motion.

- [87] The clients' complaints about the failure to interview and call at trial various witnesses may have been due to the fact that Mr. Carpick did not fully explain the reasons for the various judgment calls he had made. Whatever the reasons, the result is that the clients' disappointment is so profound that they feel the efforts of their counsel are entirely without value.
- [88] I do not agree that Mr. Carpick's services were valueless. The clients' case was prepared and presented as Mr. Carpick thought best. The decisions he made were the results of exercises of judgment. These judgment calls would have to be shown to be clearly wrong for me to find that the overall services were valueless. The evidence simply did not show that.
- [89] I do consider that a significant reduction in fees is warranted to reflect the adverse result in the case. Reduced fees are also warranted to take into account the circumstances surrounding the real-time reporting expense and the 2.5 hours of incorrectly billed time.
- [90] Shortly before the hearing of this matter the solicitors reduced their fees from \$48,222 to \$26,500, a difference of \$21,722. Having weighed all of the circumstances of this case, I consider that this reduction results in overall fees that are reasonable. Fees of \$26,500 are therefore allowed. Disbursements and applicable taxes are also allowed.
- [91] Although the solicitors have been successful on this review and would normally be allowed their costs as a result, I note that the clients had to initiate this review and take it to the brink of a hearing before a formal reduction in fees was made. In these circumstances I am inclined to order that the parties bear their own costs.
- [92] If the parties wish to make submissions on costs they may arrange a further hearing through the registry.

"District Registrar M. Blok"

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Prepared on 27 October 2026 · Esheria