

CANADA / JUDGMENT

Carphin v. Braich

2020 BCSC 1844

COURT

Supreme Court of British Columbia

DECIDED

26 November 2020

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2020 BCSC 1844 Carphin v. Braich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carphin v. Braich,

2020 BCSC 1844

Date: 20201126

Docket: S192242

Registry: Vancouver

Between:

James Greer Carphin, Q.C.

Lawyer

And

Herbishan Singh Braich and H.S. Kenny Braich, in their capacities as Litigation Representatives for the Estate of Herman Singh Braich Jr., Deceased

Clients

Before: Master Vos

Reasons for Decision

Counsel for the Lawyer:

B.E. McLeod

Counsel for the Clients:

M.S. Kerwin

K. Mansveld

Place and Date of Hearing:

Vancouver, B.C.

October 5-8, 2020

Place and Date of Decision:

Vancouver, B.C.

November 26, 2020

INTRODUCTION

- [1] This hearing proceeded pursuant to an appointment the lawyer, James Carphin, Q.C., scheduled to review bills he delivered to Herman Singh Braich Jr. ("Herman Jr."), now deceased. The clients, Herbishan Singh Braich ("Bobby") and H.S. Kenny Braich ("Kenny"), are brothers of Herman Jr. and are the Litigation Representatives for his estate.
- [2] The review is pursuant to an order made by Justice Gerow on February 27, 2019. The order provides:

THIS COURT ORDERS AND DIRECTS that:

1. there be a reference to the registrar pursuant to s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9, to review the unpaid bills rendered by Fasken Martineau DuMoulin LLP to Herman Braich, Jr. between 2003 and 2010 (the "Bills") for review and issuance of a certificate;
- [3] By way of an order made May 3, 2019, Mr. Carphin was granted leave to file an amended appointment adding four specified paid bills for review, for the sole purpose of determining the interest to be charged on those bills.

BACKGROUND

- [4] Mr. Carphin provided estate litigation legal services to Herman Jr., as trustee of the estate of his father, Herman Singh Braich Sr. ("Herman Sr.).
- [5] Herman Sr. died on May 21, 1976, leaving a valid will dated February 1, 1963 (the "Will"). He was survived by his wife, Surjeet Kaur Braich ("Surjeet") and their six children.
- [6] The estate of Herman Sr. (the "Estate") included corporate assets and the family homestead in Mission, BC.
- [7] Herman Sr.'s Will provided Surjeet a life estate in the family homestead and income from one-quarter of Estate assets. The Will also provided Herman Sr.'s first wife, Barchan Kaur, with income from a further one-quarter of Estate assets.

- [8] Pursuant to a settlement of the claims of Herman Sr.'s first wife, and a court order made November 6, 1989 under the Variations of Trust Act, the remainder of the Estate was devolved as follows:
- (a) Surjeet would be entitled to a life interest in the Braich family homestead and a life interest in 37.5% of the residue of the Estate, including all income derived therefrom (the "Spousal Trust");
 - (b) The remaining 62.5% of the residue of the Estate would devolve to the children of Herman Sr. and Surjeet as follows:
 - (i) 3/16 to Erwin Singh Braich ("Erwin");
 - (ii) 3/16 to Herman Jr.
 - (iii) 3/16 to Herjiwan Singh Braich ("Jim");
 - (iv) 3/16 to Herbishan Singh Braich ("Bobby");
 - (v) 3/16 to Herkenn Singh Braich ("Kenny");
 - (vi) 1/16 to Reita Kaur Braich ("Reita"); and
 - (c) Upon the death of Surjeet, the capital of the Spousal Trust would devolve as described in subparagraph (b).
- [9] On May 26, 1988, Herman Jr. was appointed an executor and trustee of the Estate. His brother, Erwin, was appointed an executor and trustee of the Estate on December 15, 1989.
- [10] In 1988 Herman Jr. retained the predecessor to Fasken Martineau DuMoulin LLP ("Faskens") as his lawyers with respect to his role as trustee of the Estate. Mr. Carphin was a lawyer at the firm. He has worked extensively on matters relating to the Estate, over a period of more than 20 years.
- [11] The Estate held 50% of the shares in Herman Sawmills Ltd. plus the shares of an estate holding company, Herman Enterprises Ltd., which owned the other 50% of the shares in Herman Sawmills Ltd. After Herman Sr.'s death, Herman Sawmills Ltd. was sold for approximately \$15 million. Income tax arising from the sale was paid in excess of \$6 million. In 1995 almost \$8 million of the balance from the sale of Herman Sawmills Ltd. was paid to Surjeet and her six children.
- [12] The administration of the Estate has been contentious.
- [13] Differences arose between the trustees in the 1990s. In 1999 Erwin assigned his interest in the Estate to Clock Holdings Ltd. ("Clock Holdings"). He also was petitioned into bankruptcy. Erwin attempted to remove Herman Jr. and Surjeet as executors. Applications were filed to try to remove Erwin as executor.

- [14] Clock Holdings, as Erwin's assignee, proceeded to trial in 2008 on an action against Surjeet, Herman Jr. and the Estate concerning lands in Mission. Mr. Carphin was counsel for Herman Jr., as Executor and Trustee of the Estate, and for Herman Enterprises Ltd., at the Clock Holdings trial. The claim of Clock Holdings was dismissed.
- [15] Herman Jr. died intestate on February 4, 2012, without a spouse or children. Pursuant to the Estate Administration Act, the sole beneficiary of his estate was his mother, Surjeet.
- [16] Surjeet suffered a stroke on April 4, 2015 and became incapable of managing her affairs. She passed away on July 11, 2018.
- [17] As Surjeet was incapable of handling her affairs and Erwin remained an undischarged bankrupt, in January 2017 the court made an order removing Erwin and Surjeet as personal representatives of the Estate and appointed Bobby and Kenny as the successor personal representatives.
- [18] The administration of the Estate has not been completed. The main asset in the Estate is the Braich family homestead. It currently is listed for sale at \$13.9 million, but remains unsold.

ANALYSIS

- [19] In this proceeding, Mr. Carphin claims \$269,422.55 for unpaid principal owing on the bills issued by Faskens over the period from December 22, 2004 to October 21, 2010. He also claims interest pursuant to a letter from Faskens to Herman Jr. dated March 31, 2006. The bills that are to be reviewed for the sole purpose of determining applicable interest are dated from September 10, 2003 to December 16, 2008. The total of the principal plus 8% interest, compounded annually to October 9, 2020, adds up to \$895,448.35.
- [20] Mr. Carphin advised that for the purposes of this review he waives his right to compound interest and seeks approval of a claim for unpaid principal and interest at 8% simple interest. That claim totals \$675,999.76.
- [21] The clients have an objection with respect to the fees billed, challenge some disbursements charged to them, and dispute the interest claimed by the lawyer.

A. Fees Billed

- [22] In his first affidavit, made September 16, 2020, Mr. Carphin, describes the legal services he provided:
41. The main tasks for which I provided estate litigation services in outline are these:
- (a) dealing with the proceeds of sale of estate lands in New York;
 - (b) responding to issues arising from Erwin's ongoing status as undischarged bankrupt;

- (c) assisting Herman Jr. with respect to corporate matters regarding Herman Enterprises Ltd., an estate asset wholly owned by the trustees, where conflicts arose between the trustees-directors;
- (d) preparation and filing of Herman Jr.'s trustee accounts for passing of accounts;
- (e) responding to applications by Erwin Singh Braich or Clock Holdings Ltd. to remove Herman Jr. as trustee, and making applications on behalf of Herman Jr. to remove Erwin as trustee;
- (f) responding to litigation brought by Erwin Singh Braich regarding ownership of real property (Lot 64) adjacent to the [Homestead] Lands in Braich v. Mission Development Corporation, SCBC Action No. S088350 (Vancouver Registry);
- (g) responding to litigation regarding claims of trustee breach of duty in transfer of real property brought in Clock Holdings Ltd. v. Braich, SCBC Action No. S0233255 (Vancouver Registry), in which Herman Jr. in his representative capacity succeeded at trial and we recovered on behalf of the Estate an award of special costs. Clock Holdings sued Herman Jr. personally. Herman Jr. represented himself at trial.

[23] Matters to be considered by registrar on a review of a lawyer's bill are set out in s. 71 of the Legal Profession Act, S.B.C.1998, c. 9. It provides:

71(1) This section applies to a review or examination under section 68(7), 70, 77(3), 78(2) or 79(3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
 - (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
 - (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
- (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.

(5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[24] As the factors set out in s. 71(4) must be considered on this assessment, each will be addressed. They are:

(a) The complexity, difficulty or novelty of the issues involved;

[25] The litigation relating to the Estate was complex and difficult. There were a number of court appearances. There also were personal animosities between the Braich family members and challenges in dealing with Erwin.

(b) The skill, specialized knowledge and responsibility required of the lawyer;

[26] During the time he acted on matters relating to the Estate, Mr. Carphin was a very experienced estate litigation specialist. There is no doubt that he had the skill, specialized knowledge and responsibility required to conduct the case.

(c) The lawyer's character and standing in the profession;

[27] Mr. Carphin was called to the bar of British Columbia on May 14, 1969. Throughout his long career he practised in the field of estate litigation with Faskens or its predecessor, Russell & DuMoulin. He was appointed Queen's Counsel in 2001 as "a recognized leader in estate litigation." He was elected to international organizations in the trusts and estates fields and was recognized by the British Columbia Law Institute for contributions in the field of estate litigation. He held high standing in the legal profession.

(d) The amount involved;

[28] The amounts involved were substantial. The Estate included Herman Sr.'s ownership of a sawmill in Mission, which sold for approximately \$15 million in the 1990s, and the homestead in Mission, which is now listed for sale at \$13.9 million.

(e) The time reasonably spent;

- [29] A review of the time spent working on this matter involves consideration of the information in the bills, the evidence regarding the work done, and the complexity, difficulty and novelty of the issues. After considering those matters, I find that the time billed was for legal services reasonably necessary for the proper conduct the case.
- (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;
- [30] This factor is not applicable.
- (g) The importance of the matter to the client whose bill is being reviewed;
- [31] The matter was very important to the clients. At the hearing, Bobby testified that Herman Jr. was immersed in dealing with the estate in his later years and appears to not have worked other than on matters relating to the Estate and possible opportunities with regard to music. The volume of litigation generated in relation to the Estate is an indicator of its importance to the clients.
- (h) The result obtained.
- [32] Mr. Carphin obtained impressive results while he acted for the Estate. In the period under review he provided representation on a number of matters, including applications to remove trustees, preparation for the passing of accounts, and participation in the Clock Holdings litigation. The Clock Holdings action proceeded to trial and was dismissed with special costs, and Mr. Carphin collected a substantial portion of those special costs.
- [33] The Statement of Particulars the clients provided prior to the hearing sets out potential issues relating to the work done. At the hearing those complaints had been distilled into one objection: the clients submit that the amount billed should be reduced because Mr. Carphin did not delegate work to a junior. They point out that Mr. Carphin performed 100% of all work done on Estate matters after 2004 and argue that tasks which can be delegated to a junior should be, in order to ensure "an appropriate and cost efficient division of labour"; *Owen Bird Law Corporation v. Patterson*, 2014 BCSC 553, at para. 41.
- [34] Mr. Carphin submits that he had the necessary experience and familiarity with the case to effectively provide the services detailed on the bills in question on this review. He argues that it may be a false economy in complex, lengthy litigation for the lead lawyer to engage other lawyers. He indicates that the delayed payment of fees would discourage other lawyers from becoming involved in the file. He points out that Herman Jr. presumably knew he alone would be doing the work on the matter when elected to continue to retain him after his retirement from Faskens.

- [35] Mr. Carphin acted on Estate matters for a very long time. It was a complex and difficult file. His in depth knowledge of the matter would have been a benefit to the clients as the matter progressed. Herman Jr. clearly wanted Mr. Carphin to personally continue to act for him in relation to Estate matters. In addition, the clients have not established in their evidence or their cross examination of Mr. Carphin any significant tasks that could have resulted in fee savings if delegated to junior.
- [36] In all the circumstances, the fees charged by Mr. Carphin should not be reduced because tasks were not delegated to juniors. The amount billed was appropriate for the complexity of the issues involved, the nature of the work done, the amount involved, the importance of the matter to the client and the results obtained. The fees are allowed as billed.

B. Disbursements

- [37] The clients' Statement of Particulars sets out some potential issues relating to the disbursements billed. The clients note that 30 cents per page was charged for photocopies and laser printing and submit that the charge should be reduced to 25 cents per page, in accordance with Supreme Court Administrative Notice AN-5. The clients also submit that charges for QuickLaw, Carswell or other electronic legal research services should not be allowed as disbursements they must pay, and argue those charges should be regarded as part of the office overhead expenses a lawyer is expected to provide to a client. I agree with both of these submissions.
- [38] Counsel for Mr. Carphin provided a letter to the court dated October 13, 2020, which indicates that Mr. Carphin concedes these deductions. The letter helpfully states that the deductions are \$1,138.37 for QuickLaw and other electronic legal research and \$1,095.84 for the reduced per page rate applicable to photocopies and laser printing. I accept these calculations.
- [39] The disbursements Mr. Carphin may recover from the clients on bills 1-12 therefore total \$9,758.11 (\$11,992.32 claimed minus \$1,138.37 for electronic legal research minus \$1,095.84 for photocopies).
- [40] The clients' Statement of Particulars alleges that Faskens did not obtain all disbursements it might have been able to recover as part of the special costs award made as a result of the Clock Holdings trial. There was a settlement of that special costs claim. The clients did not specify disbursements they allege should have been included in the settlement, but weren't. More importantly, the settlement was made while Herman Jr. was alive. There is no evidence indicating that Mr. Carphin did not have Herman Jr.'s authority to agree to the settlement. Therefore, even if there was a potential issue with respect to the disbursements claimed, the resolution of the matter was authorized by the client. Accordingly, the disbursements claimed will not be reduced due to this complaint.

C. Interest

- [41] The most contentious matter in issue between the parties is Mr. Carphin's claim for interest on the unpaid fees and disbursements. The hearing mainly focussed on that claim.
- [42] The history of the billing procedures and matters relating to bill payments provides some insight into the dispute concerning the interest claimed.
- [43] In his first affidavit, Mr. Carphin indicates that his retainer agreement with Herman Jr. was oral. Faskens would bill Herman Jr., in his capacity as trustee of the Estate, for legal fees, disbursements and taxes, with fees billed at the standard hourly rates of the lawyers involved (para. 28). Mr. Carphin states it was implied that Herman Jr. would pay the bills with Estate funds promptly upon receipt and the invoices stated that the accounts were due when rendered (para. 28).
- [44] Mr. Carphin did the majority of the legal work on Estate matters (Mr. Carphin's first affidavit, para. 29). He only provided legal services for Herman Jr. in his capacity as trustee of the Estate and only provided legal services with respect to Estate litigation matters (para. 30).
- [45] By September 2003 the trustees had distributed substantially all of the assets of the Estate, including the liquid assets from which Estate bills could be paid. The assets had been distributed primarily, but not exclusively, as advances on inheritance to the beneficiaries (Mr. Carphin's first affidavit, para. 31). The primary remaining Estate assets were the lands and premises that are the Braich family homestead. Under the terms of Herman Sr.'s Will, Surjeet was to use the homestead property as her place of residence and, on her death, or at an earlier date if she ceased to use the lands as her residence, the homestead property was to be sold (para. 32).
- [46] In his first affidavit Mr. Carphin deposes:
33. In or about October 2003 I discussed with Herman Jr. the following:
- (a) I would continue to provide legal services pursuant to the retainer,
 - (b) [Faskens] would continue to render statements of account to Herman Jr. in his capacity as Trustee of the Braich Estate,
 - (c) He would pay the accounts with estate funds as and when he was able.
 - (d) If the bills were not paid in full beforehand, the outstanding balance would be paid from the sale proceeds of the [homestead] Lands when no longer used as residence of Surjeet.
34. Herman Jr. later gave security for the payment of the bills by Assignment executed 30 September 2004 to [Faskens] of his beneficial interest in the estate . . .

[47] In January 2006 Mr. Carphin retired from full time work at Faskens. In order to complete the legal services Herman Jr. required for the Estate, Mr. Carphin agreed to continue to provide estate litigation services to Herman Jr. through Faskens and Faskens would bill the Estate. Mr. Carphin wrote to Herman Jr. to confirm the terms of the retainer. The letter is dated March 31, 2006 and is attached as Exhibit "A" to Mr. Carphin's first affidavit. The letter states:

Dear Herman:

Re: Estate of Herman Singh Braich, Deceased

We write to confirm the terms of our retainer. All of our accounts to you are due and payable upon receipt. If our accounts are not paid within 30 days of their date, interest is charged from the date of the account on the outstanding balance at the rate of 8%, compounded annually, until paid. We may change this rate upon at least 30 days prior written notice to you of a change. Interest will be charged on all accounts outstanding as at January 31, 2006 commencing February 1, 2006. No interest has accrued on such accounts to date.

Kindly confirm your acceptance of these terms by signing the enclosed copy of this letter and returning it to the writer at your earliest convenience. If you have any questions regarding the above, please do not hesitate to contact the writer.

Yours truly,

James G. Carphin, Q.C.

[48] The copy of this letter attached as Exhibit "A" bears the signature of Herman Jr. and the handwritten words "(Trustee) The Estate of Herman S. Braich (d. May 21, 1976)"

[49] Mr. Carphin deposed the following in his first affidavit:

36. Based on Herman Jr.'s agreement as executor to pay interest and his personal assignment of his beneficial interest as security [Faskens] continued to provide legal services to Herman Jr. in relation to the estate of Herman Sr. I relied on these agreements in deciding to continue to work on behalf of the Estate.

[50] From September 10, 2003 to October 21, 2010 Mr. Carphin approved issuance of 16 statements of account from Faskens to Herman Jr. Those accounts include the bills that are the subject of this review, which relate exclusively to Estate matters (Mr. Carphin's first affidavit, para. 37).

[51] Mr. Carphin deposed that: "Herman Jr. did not at any time question or dispute the amounts billed" (Mr. Carphin's first affidavit, para. 43).

[52] In 2015 Faskens assigned to Mr. Carphin all its rights, title and interest in the amounts recoverable on the bills in question.

- [53] The clients challenge whether Faskens has a contractual right to charge compound interest. If Faskens does have the right to charge compound interest, then the clients argue that it waived any contractual right to interest or is estopped from relying on the interest provision.
- [54] The onus is on the lawyer to prove the retainer; *Cox Taylor v. Cochrane*, 2007 BCSC 432, para. 33. The lawyer also bears the burden to prove an agreement to pay interest on legal bills; *Davis & Company v. Jiwan et al*, 2006 BCSC 658, at para. 298.
- [55] There is no doubt that Faskens was retained by Herman Jr. to act on matters relating to the Estate or that the terms of the retainer were as described by Mr. Carphin. There is no evidence indicating that there was any uncertainty about the terms of the initial retainer.
- [56] The clients point out that prior to March 31, 2006 Faskens did not require Herman Jr. to pay his bills on a timely basis and did not charge interest on bills. For instance, bills Faskens rendered in 1999 were not paid until 2001 or 2002 and no interest was charged on them. In October 2003 Mr. Carphin had a discussion with Herman Jr. during which he indicated that Faskens would not require immediate payment of the bills, that Herman Jr. could pay the bills with Estate funds as and when he was able, and if the bills were not paid beforehand the outstanding balance could be paid from proceeds of the sale of the homestead property.
- [57] The claim for interest on the bills starts after Mr. Carphin retired from Faskens in early 2006. The interest provision is set out in Mr. Carphin's letter to Herman Jr. dated March 31, 2006, reproduced above. The letter asked Herman Jr. to confirm his acceptance of the terms of the retainer by signing and returning a copy of the letter. He did so. It is not disputed that the signature on the letter entered in evidence is Herman Jr.'s. The interest provision therefore is part of an agreement between a lawyer and a client who had been involved in a matter for about 18 years and wanted to continue their lawyer/client relationship after the lawyer was to retire from the partnership of the law firm that had previously done the work.
- [58] The clients submit that Mr. Carphin and/or Faskens had a duty to advise Herman Jr. that he could, or should, have obtained independent legal advice before signing Faskens' March 31, 2006 letter signifying his agreement to the interest provision. They contend that the important fiduciary duties a lawyer has to a client include a duty of utmost good faith and a duty of candor and transparency. They say the duty of candor Faskens owed to Herman Jr. required them to advise Herman Jr. of all matters concerning the retainer and required them to ensure that Herman Jr. was fully informed of, and received appropriate advice on, any transaction they would benefit from. They submit that these heavy duties upon counsel create a rebuttable presumption of undue influence concerning transactions which arise in a solicitor-client relationship. They acknowledge that this presumption may be rebutted by the lawyer establishing that the client had honest and competent legal advice.

- [59] The clients also submit that Mr. Carphin should have disclosed to Herman Jr. that he entered into a fee split agreement with Faskens when he agreed to continue to act on matters relating to the Estate after he retired from Faskens. Mr. Carphin was to receive 70% of the fees billed from then on, and Faskens would receive 30% of those billings.
- [60] During his testimony at the hearing, Mr. Carphin admitted that he did not advise Herman Jr. to obtain independent legal advice before signing the March 31, 2006 letter concerning the interest to be charged. His counsel submitted that a change to the original retainer to specify a rate of interest does not rise to the level of a factor that might amount to the lawyer taking advantage of the client, thereby necessitating independent legal advice. He characterizes the amendment of the retainer agreement to include the interest charge as being similar to a change of the hourly rate charged.
- [61] Counsel for Mr. Carphin takes the position that the clients should not be entitled to argue that Mr. Carphin must rebut a presumption of undue influence in relation to the interest provision, as that issue was not identified in the clients' Statement of Particulars and Mr. Carphin therefore did not have an opportunity to address it. I agree with that position. The clients were required to identify the matters that would be in issue at this hearing. The Statement of Particulars they provided in response to that requirement did not indicate that Mr. Carphin needed to rebut a presumption of undue influence in relation to the interest provision. The issue arose for the first time during the clients' closing submissions. An allegation of possible undue influence is very serious. As indicated in *Robert Hungerford Law Corporation v. Stenner*, 2016 BCSC 1685, at para. 98, the foundation of undue influence is coercion of the will so as to invalidate consent. If the clients wished to pursue this issue as against Mr. Carphin they were obliged to provide him with notice of the allegation, so he could address it.
- [62] Bobby testified that Herman Jr. told him about the interest provision and his assignment of his beneficial interest in the Estate to Faskens as security for payment of the fees owing. Bobby also indicated that Herman Jr. told him that he was not in a hurry to pay the bills because he believed that Faskens would accept payment of the fees without interest. Counsel for Mr. Carphin objected to this evidence, on the basis that it is hearsay. Counsel for the clients submits that Herman Jr.'s statements to Bobby fall within the "state of mind" exception to hearsay.
- [63] These statements by Herman Jr. to Bobby support the view that Herman Jr. clearly knew of the interest provision he had agreed to when he signed the copy of Faskens' March 31, 2006 letter. There is no evidence that Herman Jr. had entered into a subsequent agreement with Faskens or Mr. Carphin whereby the interest charges would be waived. The reminder letters Faskens sent to Herman Jr. concerning the outstanding fees included a clause stating that if the account was not paid within 30 days of the date of the letter, "interest will be charged from the date of the account on the outstanding balance at the annual rate of 8%, compounded annually, until paid."

[64] Herman Jr. may have hoped that Faskens would waive or reduce the interest charges. The clients may have been encouraged in this regard by a letter Mr. Carphin sent to Bobby dated July 9, 2012, attached as Exhibit "V" to Mr. Carphin's first affidavit, which stated:

As of approximately two months ago there was owing principal of \$272,790.00 and interest of \$178,201.00 for a total of \$450,991.00. As I mentioned during our telephone conversation, if the liability could be extinguished in the near future, I could possibly convince Faskens to significantly reduce the interest. My influence at Faskens diminishes the longer I'm away.

[65] The evidence is that Herman Jr., and later Bobby, understood that interest was to be charged on the terms set out in Faskens' March 31, 2006 letter and there never was an agreement that those interest charges would be abandoned. Mr. Carphin's July 9, 2012 letter to Bobby can be seen as nothing more than a willingness to provide a longstanding client with a financial accommodation if the matter could be resolved soon.

[66] The clients also say that Faskens and Mr. Carphin did not calculate, confirm or otherwise advise Herman Jr. of the amount of interest they were claiming before Herman Jr. died. They ask the court to infer that Herman Jr. died thinking that he (and the Estate) only owed the outstanding fees (\$269,422.55) and no more. With respect, I disagree. The evidence overwhelmingly indicates that Herman Jr. knew there was an agreement that the Estate would pay interest on the outstanding legal fees. He signed Faskens' March 31, 2006 letter indicating so. The account letters Faskens sent to him clearly set out the interest agreement. He told his brother, Bobby, about the interest agreement. Although he may have hoped that he might have been able to negotiate a waiver or reduction of the interest, there is no evidence that there ever was any such agreement.

[67] Mr. Carphin did not advise Herman Jr. about the 70/30 fee split he had with Faskens after his retirement from the partnership in early 2006. He submits there was no reason for him to have advised Herman Jr. about that matter, as it would not affect the fees charged. I agree with this submission. There is no evidence of the way Estate legal fees were divided between Mr. Carphin and Faskens before the fee split agreement, so no indication of whether this was a significant change. There is no convincing evidence this factor would alter the retainer in a manner that would call for Mr. Carphin to advise Herman Jr. to obtain independent legal advice.

[68] An agreement between a lawyer and a client may provide for interest on fees and disbursements. The term "charges" in s. 71(2) of the Legal Profession Act is defined in s. 64(1) as including interest on fees and disbursements.

[69] In this case, the clients take issue with the lawyer's claim for interest and the amount of interest claimed. In response to those submissions, the lawyer referred the court to the following passages in *Sokolowski v. Lorne N. MacLean Law Corporation*, 2016 BCSC 1035, where Registrar Neilsen said:

- [47] The client takes issue with the 18% per annum interest rate stipulated in the signed retainer agreement and applied to the lawyer's unpaid account. The issue of interest rates charged by law firms on unpaid accounts often arises in the context of a review under the LPA. The common complaint is that the rate of interest charged by a law firm typically far exceeds that charged by a bank. Another argument often advanced is that lawyers are well compensated in their hourly rate and ought not to make additional profit through the levy of interest rates far in excess of that charged by banks.
- [48] Law firms are not banks, and for the most part, do not want to be treated like a bank. The smaller the firm, the more difficult it is to carry a client's unpaid fees, particularly if the firm is faced with a number of clients who are not paying their bills in a timely fashion. This can put a strain on the firm's line of credit.
- [49] An interest rate on unpaid accounts in excess of the rate provided by a bank is meant, in part, to encourage the client to borrow from a financial institution to cover the cost of fees, rather than relying on the law firm to carry the unpaid account. A financial institution is in a better position to underwrite debt, assess and assume financial risk, or absorb a loss occasioned by bankruptcy.
- [70] Mr. Carphin agreed to continue to act on matters relating to the Estate after his retirement from full time work at Faskens in January 2006. He had extensive experience with the case. There was no realistic prospect of timely payment of the accounts. Mr. Carphin carried on providing legal services on the disputes while carrying the client's unpaid fees. This was an admirable act of loyalty by Mr. Carphin to Herman Jr.
- [71] Mr. Carphin has established that he has a right to charge interest on the outstanding legal bills. Herman Jr. confirmed his acceptance of the clearly stated interest provision, as set out in Faskens' letter to Herman Jr. dated March 31, 2006. He and the clients, his brothers, chose to let interest charges accrue rather than obtain financing to simply pay the outstanding accounts. Faskens and Mr. Carphin did not waive their claim to the interest they were entitled to pursuant to the March 31, 2006 retainer.
- [72] Mr. Carphin submits that the rate of interest charged, 8%, was fair and reasonable and points out that the BC Courts' website indicates that the Bankers Prime rate in March 2006 was 5%.
- [73] The interest Mr. Carphin seeks on this hearing, 8% simple interest, is a fair and reasonable rate in the circumstances of this case. It is the rate that is to be applied to the outstanding legal fees.
- [74] The clients raise concerns about interest relating to a write-off of fees made by Faskens, in the amount of \$79,000.
- [75] As a result of an error made by Faskens, Mr. Carphin's Law Society fees were not paid for the period beginning January 1, 2008. Mr. Carphin was involved in significant work for the Estate during early 2008. He prepared for and then acted as counsel at the 10-day Clock

Holdings Ltd. v. Braich trial, which proceeded from February 4 -15, 2008. During this hearing Mr. Carphin testified that soon after the conclusion of the trial he learned that he had been unauthorized to practice due to the non-payment of Law Society fees. He promptly took action to become re-instated as a practising member of the Law Society of BC.

- [76] At para. 48 of his first affidavit, Mr. Carphin indicates that he wrote to Herman Jr. with respect to the inadvertent failure to maintain his standing with the Law Society. He confirmed that Faskens would not require payment of the amount he billed while unauthorized to practise. That amount was determined to be \$79,000.
- [77] The \$79,000 was written off by Faskens against the fees owing. However, the interest calculation before the court includes interest on the \$79,000 from the time of the original billing to the time of the write-off. At para. 57 of his outline of closing argument, Mr. Carphin's counsel has determined that component of interest to total \$23,700, calculated as 8% simple interest. He submits that this claim for interest should be allowed to Mr. Carphin, as it is more than compensated by Mr. Carphin's waiver of his right to claim compound interest.
- [78] The claim for interest is based on Faskens' letter to Herman Jr. dated March 31, 2006. It provides that interest would be charged on "all accounts outstanding". If an account, or part of an account, is written off, it cannot be regarded as an account outstanding. Mr. Carphin will therefore not be entitled to recover from the clients interest relating to the legal fees totalling \$79,000 written off by Faskens.

RESULT

- [79] The amount claimed by Mr. Carphin for unpaid principal on the bills is \$269,442.55. To be deducted from that amount is \$1,138.37 for QuickLaw and other electronic legal research and \$1,095.84 for the reduced per page rate applicable to photocopies and laser copies. Mr. Carphin is therefore entitled to recover \$267,188.34 from the clients for unpaid principal on the bills reviewed.
- [80] Mr. Carphin's claim of 8% simple interest on the principal amount is allowed. Pursuant to s. 73(3) of the Legal Profession Act, that interest is to be calculated to the date of the issuance of the certificate, which is the date of this decision. The claim for interest is not to include any interest on the \$79,000 in fees written off by Faskens. In his outline of closing argument, Mr. Carphin's counsel indicated this finding would reduce the interest component of the principal and 8% simple interest calculated to October 9, 2020 (\$675,999.76) by \$23,700.
- [81] I will leave it to counsel to calculate the exact amount of interest owing. If a certificate is required, it should be approved by both parties and submitted through the registry.
- [82] The costs provisions that apply to a hearing to review a lawyer's bill are set out in s. 72 of the Legal Profession Act. If the parties are unable to resolve costs with respect to this hearing, they may contact the registry to schedule a hearing on that matter.

"Master Vos"

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