
CANADA / JUDGMENT

Farris & Company v. Strother

2010 BCSC 1517

COURT

Supreme Court of British Columbia

DECIDED

8 September 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 1517 Farris & Company v. Strother

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Farris & Company v. Strother,

2010 BCSC 1517

Date: 20100908

Docket: S098879

Registry: Vancouver

Between:

Farris & Company

Plaintiff

And

Robert C. Strother

Defendant

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D.B. Kirkham, Q.C.

Counsel for the Defendant:

R. Grant

Place and Date of Hearing:

Vancouver, B.C.

September 7, 2010

Place and Date of Judgment:

Vancouver, B.C.

September 8, 2010

Introduction

- [1] The Applicant (the "Client") contests his liability to pay accounts rendered by the Respondent (the "Firm") for legal services provided between 2000 and 2007. He has initiated a review of the accounts before the Registrar. This is an application by the client, pursuant to section 70(12) of the Legal Profession Act, S.B.C. 1998, c. 9, for an order staying proceedings in this action until the Registrar has issued a certificate on the review of the accounts or until the application for review is withdrawn.

The Action

- [2] The writ and statement of claim were issued on December 2, 2009. The Firm claims that the Client has paid all accounts due except one half of an account rendered on June 18, 2007 in the amount of \$1,012,396.38. The account was for legal services provided pursuant to a contract in writing entered into on March 7, 2005 that provided for payment of double fees in the event of substantial success (the "Doubling Agreement"). The services were rendered in the period from the date of the Doubling Agreement to December 15, 2005. The Client has paid half the account but has objected to the doubling and purported, on paying the Firm's accounts, to reserve his right to tax them.
- [3] The Firm says the account rendered on June 18, 2007 is due and owing and seeks judgment for \$506,198.19 plus interest and a declaration that the appointment taken out by the Client to review the account is statute-barred. No other declaratory relief is sought by the Firm. In particular, no declaratory relief in relation to the contract or its terms is described in the prayer for relief.
- [4] In his defence, the Client denies the agreement to pay double fees. He says if there was such an agreement there was not substantial success or that, because some aspects of the litigation continued after the rendering of the account, it is too soon to say whether there has been substantial success. He says the action should be stayed pending the review of the accounts by the Registrar.

- [5] The trial of this action is set for November 2, 2010. There have, as yet, been no discoveries. Trial preparation is now urgent if a stay is not issued.

The Review before the Registrar

- [6] On June 16, 2008 the Client filed an appointment under s. 70 of the Legal Profession Act for a review of the Firm's accounts commencing from the 1999 retainer. There is some disagreement in the material on the date of the initial retainer.
- [7] There has apparently been little progress on the review. There has been a pre-review conference but no hearing. The issuance of a certificate is apparently some time away. There is no indication that the review has been or will be withdrawn. The Firm says the appointment is a purely tactical ploy by which the Client seeks to deter the Firm from pursuing its claim under the Doubling Agreement.

The Client's Position

- [8] The Client says that the legislature has, in enacting the Legal Profession Act, demonstrated an intention to have disputes arising out of accounts for legal services considered, in the first instance, by the Registrar. This is reflected both in the provision he relies upon, s. 70(12) of the Act, and in ss. 70(6) to (8) of the Act. These provisions read as follows:
- (6) If a lawyer has sued to collect on a bill, the court in which the action was commenced may order that the bill be referred to the registrar.
- (7) The court may make an order under subsection (6) whether or not any party has applied for an order.
- (8) On a referral under subsection (6), the registrar may
- (a) review the bill and issue a certificate, or
 - (b) make a report and recommendation to the court.
- ...
- (12) If a lawyer sues to collect money owed on a bill, the lawsuit must not proceed if an application for review is made before or after the lawsuit was commenced, until
- (a) the registrar has issued a certificate, or
 - (b) the application for review is withdrawn.
- [9] The Client says that where an appointment has not been taken out by the solicitor or the client the court may, on its own initiative, refer the bill to the Registrar. Where an appointment has been taken out, the Client says s. 70(12) is applicable and there is no discretion; the matter simply must not proceed until the issuance of a certificate or the abandonment of the review.

[10] The Client takes an expansive view of the registrar's jurisdiction. He says issues such as whether the Client agreed to the terms of the Doubling Agreement and whether it was rescinded may be determined by the Registrar. He goes further however, and says even if there are issues in this Action that are outside the jurisdiction of the Registrar to determine, that is immaterial. There is no doubt the Registrar has jurisdiction to address some issues; there is no basis to say a review cannot proceed before the Registrar; and s. 70(12) is applicable.

The Firm's position

[11] The Firm says that this action does not fall within the ambit of s. 70(12), as it cannot be characterized as a suit by a lawyer to collect money owed on a bill. The Firm says this is an action "to determine the existence and enforceability of an agreement".

[12] Section 68 of the Act provides for an application to the Registrar to review an agreement. The Plaintiff says this section is the only provision of the Legal Profession Act permitting a review of the propriety of an agreement and its enforceability. The Firm says that the time within which it might have been invoked by the Client has expired and that there is no remaining jurisdiction in the Registrar to consider most of the issues in the Action. Section 68 reads, in part, as follows:

68 (2) A person who has entered into an agreement with a lawyer may apply to the registrar to have the agreement examined.

(3) An application under subsection (2) may only be made within 3 months after

(a) the agreement was made, or

(b) the termination of the solicitor client relationship.

(5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.

(6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.

(7) If an agreement is cancelled under subsection (6), a registrar

(a) may require the lawyer to prepare a bill for review, and

(b) must review the fees, charges and disbursements for the services provided as though there were no agreement.

(8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.

[13] Section 70 provides for the review of legal accounts as opposed to the review of the reasonableness of contracts referred to in s. 68. The relevant subsections of s. 70 read as follows:

70 (1) Subject to subsection (11), the person charged or a person who has agreed to indemnify that person may obtain an appointment to have a bill reviewed before

- (a) 12 months after the bill was delivered under section 69, or
- (b) 3 months after the bill was paid,

whichever occurs first.

...

- (3) Subject to subsection (11), a lawyer may obtain an appointment to have a bill reviewed 30 days or more after the bill was delivered under section 69.

...

- (6) If a lawyer has sued to collect on a bill, the court in which the action was commenced may order that the bill be referred to the registrar.
- (7) The court may make an order under subsection (6) whether or not any party has applied for an order.
- (8) On a referral under subsection (6), the registrar may
 - (a) review the bill and issue a certificate, or
 - (b) make a report and recommendation to the court.
- (9) When making an order under subsection (6), the court may direct that the registrar take action under subsection (8) (a) or (b).

...

- (11) In either of the following circumstances, the lawyer's bill must not be reviewed unless the court finds that special circumstances justify a review of the bill and orders that the bill be reviewed by the registrar:
 - (a) the lawyer has sued and obtained judgment for the amount of the bill;
 - (b) application for the review was not made within the time allowed in subsection (1).
- (12) If a lawyer sues to collect money owed on a bill, the lawsuit must not proceed if an application for review is made before or after the lawsuit was commenced, until
 - (a) the registrar has issued a certificate, or
 - (b) the application for review is withdrawn.

- (13) The procedure under the Rules of Court for the assessment of costs, review of bills and examination of agreements applies to the review of bills under this section.
- (14) The registrar may refer any question arising under this Part to the court for directions or a determination.

[Emphasis added.]

[14] I was referred to a number of cases on the interaction of ss. 68 and 70, including *Boe v. Waters* (1998), 23 C.P.C. (4th) 395 (S.C.); *Kern v. Watson* (1993), 85 B.C.L.R. (2d) 289 (S.C.); *Coad v. Rizk* (1999), 68 B.C.L.R. (3d) 340 (S.C.) and *Fasken Martineau v. Bastion Development Ltd.*, 2001 BCSC 1694. The Firm's counsel acknowledges that the state of the law appears now to be as stated in *Coad* by Collver J.

[15] In that case the Court noted:

10 Sections 78 [now s. 70] and 87 [now s. 68] serve separate and distinct purposes. While s. 78 provides a statutory means by which a lawyer's bill can be taxed and reviewed to ensure that costs, fees, charges and disbursements are reasonable and appropriate, s. 87 exists to enable monitoring of lawyers' contracts for remuneration. More particularly, s. 87(15) empowers a registrar to vary, modify or cancel an agreement, including a contingent fee agreement, if it is found to be unfair or unreasonable.

11 Some registrars have concluded that they are without jurisdiction to review a bill which has been issued pursuant to an agreement, where the agreement itself has been found to be fair and reasonable. Other registrars have concluded that bills presented as a consequence of such agreements are reviewable pursuant to s. 78, with the interjection of the contract wholly or partially in the place of s. 79(2) factors.

[16] The Court then reviewed the decisions in *Kern* and *Boe*. In *Kern*, Master Patterson held that where an agreement was fair and reasonable he lacked jurisdiction to review or tax accounts from a fixed fee contract, because there is no provision in the Act for taxation or review of accounts issued pursuant to a contract, if the contract is found to be fair and reasonable. In *Boe*, Registrar Horn upheld the fee agreement pursuant to s. 87 (now s. 68), but found that it remained within a Registrar's jurisdiction to review the reasonableness of a bill on an application. Upon reviewing these decisions, the Court in *Coad* concluded :

16 Consistent with the approach taken in *Boe v. Waters*, it is my view that a Registrar has the jurisdiction to review a bill issued pursuant to an agreement, including a contingent fee agreement, upon proper application under s. 78. This would include situations where the agreement in question was held to be "fair and reasonable" pursuant to s. 87 either in a previous or concurrent application. These provisions are not mutually exclusive, but can work in concert to ensure that both the initial fee agreement and what is subsequently billed pursuant to that agreement are appropriate. An application under s. 78 in no way precludes pursuit of a remedy under s. 87 by review of the validity of an agreement the bill was issued from, nor does a s. 87 review prohibit a further application for taxation under s. 78 should the s. 87 application not

succeed.

17 To trigger these sections according to the language of each provision, applications for each must be made in order to permit a registrar to make an assessment. Absent such an application, a registrar is without jurisdiction to conduct a review under the respective section. Only when a client applies for a s. 87 review and the agreement is held to be unfair (s. 87(15)) may a registrar circumvent s. 78 and proceed to tax a bill from that agreement without a s. 78 application.

18 Consideration of the language in sections 77, 78, 79 and 87 leads me to conclude that neither these provisions nor any other provision in the Legal Profession Act prevent a client and lawyer from seeking review pursuant to ss. 78 and 87 where a fee agreement exists. Section 77 sets out what is necessary for a bill to be in reasonable form. As with s. 87, there is nothing in that provision prohibiting a bill issued pursuant to an agreement, including a contingent fee agreement, from being a "bill" for the purposes of s. 78.

- [17] In light of the decision in *Coad*, the Firm acknowledges there is some jurisdiction in the Registrar to review its accounts under section 70 but says the scope of the Registrar's review is dramatically limited by the contract entered into by the Client. The Firm says the Registrar's role is limited to consideration of the factors enumerated in s. 71 (essentially the factors enumerated in *Yule v. Saskatoon (City)* (1955), 17 W.W.R. 296 (Sask. C.A.)), and does not extend to many of the questions raised in the defence to the claim. These are described by the Firm as "pure contract issues" that must be determined by the court.
- [18] The Firm relies upon *Kong et al. v. Fan*, [1974] 3 W.W.R. 730 as authority for the proposition that the mechanism of a review under the Legal Profession Act was not intended and is ill-suited to resolve legal issues such as the validity and enforceability of a contract for legal services. In both *Kong* and the case upon which *Bouck J.* relied in that case, *Re Malone* (1961), 34 W.W.R. 699 (Sask. C.A.), the courts held that there was no provision in the Act which would give the taxing officer the right to determine the issues between the parties.
- [19] In my view, as set out below, the Registrar is able to determine certain of the fundamental issues on the pleadings in the case at bar. In coming to this conclusion I place some weight upon s. 71(5) which expressly provides that the discretion of the Registrar under the subsection describing the criteria to consider on review of a bill is not limited by the terms of an agreement between the lawyer and the lawyer's client.
- [20] The Firm says this is a case of first instance, there being no prior case in which s. 70(12) has been considered. Some weight is placed upon the consideration of the section in *Russell & DuMoulin v. City Club Development* (1996), 22 B.C.L.R. (3d) 330 (S.C.). As I read that case, however, it is unhelpful as it appears to have been decided on the chambers' judge's view that the appointment to review (or tax) the solicitor's account was a nullity and the appointment did not pose an obstacle to the Firm's 18A application: *Russell* at 341.

Analysis

[21] In response to the Firm's position that this action is not a suit by a lawyer to collect money owed on a bill, the Client says s. 70 must be read together with the preceding section of the Act. Section 69 requires lawyers to issue bills to their clients as a condition precedent to demanding payment or commencing an action. The Client says the provisions of this section make the issuance of a bill a prerequisite to an action on a contract to provide legal services, thereby bringing any action where the relief sought is a money judgment on a bill for legal services within s. 70(12). Section 69 reads as follows:

69 (1) A lawyer must deliver a bill [defined in s. 64: "bill" means a lawyer's written statement of fees, charges and disbursements] to the person charged.

...

- (5) A lawyer must not sue to collect money owed on a bill until 30 days after the bill was delivered to the person charged.
- (6) The court may permit a lawyer to sue to collect money owed on a bill before the end of the 30 day period if the court finds that
 - (a) the bill has been delivered as provided in subsection (1), and
 - (b) there is probable cause to believe that the person charged is about to leave British Columbia other than temporarily.

[22] Even in the absence of this section it is difficult to see how the Firm's action could be characterized as anything other than a suit to collect money owed on a bill. The only declaratory relief sought by the Firm is in relation to the question of whether the review is statute-barred. The bar is said to arise from the passage of time since the issuance of the first bills and/or as a result of payment of bills. Both these issues in my view are matters within the jurisdiction of the Registrar on taxation.

[23] In *Knott Pollard & Morgan v. Offers* (1984), 56 B.C.L.R. 166 and *Ace Asphalt & Maintenance Ltd. v. Goodfellow MacKenzie* (1984), 56 B.C.L.R. 169, the Court of Appeal held that it is within the jurisdiction of the Registrar to determine on the facts whether bills are interim or final accounts. Implicit in those judgments is the Court's conclusion that the Registrar should weigh evidence and make factual findings with respect to the scope and terms of the solicitor's retainer.

[24] The Firm says s. 70(12) should be read narrowly because its effect is to limit this court's jurisdiction and limit or restrict its common law right to access the courts to resolve a contractual dispute. The Firm says common law rights should not be restricted or impaired except in the clearest possible language.

- [25] In response the Client says the right is not substantially impaired. The legislature has not denied access to the courts but simply established a procedure for assessment and stayed proceedings in this court pending the assessment, and has expressly confirmed the right to appeal from the Registrar's certificate by s. 75. In any event the Client says that the legislature's language is clear and this action is stayed by that clear language.
- [26] In my view, the action is clearly captured by the wording of s. 70(12) of the Act. The fact that defences are raised by the Client that the Registrar may not have jurisdiction to address does not take the action outside s. 70(12). I see no reason to construe s. 70(12) narrowly, but even a narrow construction would in my opinion catch a claim such as this, brought by a firm for judgment for the amount set out in its account for legal services rendered to a specific date. I accept the submission of the Client that s. 70 must be informed by the statute as a whole and s. 69 in particular. Given the necessity of delivering a bill before bringing suit and given that the lawyer's claim in debt is an action for payment of a bill, s. 70 must apply to all claims said to arise from the rendering of an account (as opposed to claims arising from a judgment or a promise to pay).
- [27] There will be an order staying proceedings pending the issuance of a certificate by the Registrar.
- [28] The parties have suggested that it would be helpful in these reasons to define the Registrar's jurisdiction; in my view it is unnecessary to do so in order to address the application, other than to say that the appointment is not a nullity. In light of my finding that the section in question precludes further action in this court for the time being, I decline to say anything further with respect to the scope of the Registrar's jurisdiction to address the matters in issue. The Act provides that the Registrar may refer any question arising on the review of an account to the court for directions or a determination. That mechanism for addressing jurisdictional disputes remains available to the parties.

"Willcock J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/15/2010BCSC1517.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/farris-and-company-v-strother-2010>

Prepared on 29 October 2026 · Esheria