
CANADA / JUDGMENT

Jordan v. Fairs

2007 BCSC 1491

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1491 Jordan v. Fairs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jordan v. Fairs,

2007 BCSC 1491

Date: 20071004

Docket: 07/2785

Registry: Victoria

Between:

John E. Jordan (Stevenson Luchies & Legh)

Solicitor

And:

John Fairs and Dawn Plensky

Client

Before: District Registrar Bouck

Reasons for Decision

Counsel for the Solicitor

J. E. Jordan

John Fairs and Dawn Plensky

Appearing In Person

Date and Place of Trial/Hearing:

July 19 and August 29, 2007

Victoria, B.C.

INTRODUCTION

- [1] This is a client initiated review of the Solicitor's bill issued February 13, 2007 (the "Bill"). The Bill was issued by Mr. Jordan on behalf of Stevenson Luchies and Legh for the amount of \$4,671.55. The Bill remains unpaid.
- [2] Although the style of cause refers to both Mr. Jordan and Stevenson Luchies and Legh as parties, only the latter is properly named in this proceeding. I refer to Stevenson Luchies and Legh as the Solicitor in these reasons.
- [3] Initially, there was some confusion as to who the Client was in this matter. Both Mr. Fairs and Ms. Plensky (husband and wife) are named as the Client in the style of cause. As well, the Solicitor issued bills, including the Bill, to both Mr. Fairs and Ms. Plensky.
- [4] Ms. Plensky was certainly involved in the retainer and, indeed, was the primary contact for the Client due to Mr. Fairs' work commitments. However, during the course of the hearing, the parties acknowledged that only Mr. Fairs retained the Solicitor. The services performed by the Solicitor were not for Ms. Plensky's benefit, nor did she agree to pay the Solicitor's Bill. Thus, all references to the Client in these reasons are to John Fairs only.
- [5] Finally, it should be noted that the issuance of these reasons was delayed due to the Solicitor's neglect in tendering a book of documents as evidence. The book was tendered after the hearing concluded and without any objection from the Client. However, the title page to the book shows the style of cause in a related action. The book was, therefore, filed by the registry in that other action. This error compounded the delay in delivering the book to me for consideration. The registry staff is to be credited for locating the book.

THE ISSUES

- [6] The Bill is the third of three bills issued by the Solicitor. The Client takes no issue with the amount charged in the first or second bill and both have been paid in full. Mr. Fairs suggests that the amount already paid represents fair compensation for all of the Solicitor's work in connection with this retainer.
- [7] Mr. Fairs says that the Solicitor should be bound by the estimate given at the commencement of the retainer. That estimate suggested fees of between \$5,000 and \$7,000 plus disbursements and taxes. If the Bill is allowed, the fees charged will amount to \$11,200. Mr. Fairs also suggests the Mr. Jordan was dilatory and inattentive to the Client and, as a result, failed to complete the retainer.

THE RETAINER

- [8] The Solicitor's retainer involved a committee application. Mr. Fairs wished to be named committee of the person and estate of his mother, Lisa Fairs. Mrs. Fairs was then a resident of Victoria.
- [9] In April 2006, Ms. Plensky contacted the Solicitor's office seeking advice on the committee process. Ms. Plensky advised Mr. Jordan that her husband wished to be named committee due to his mother's failing mental health.
- [10] Following telephone discussions, Mr. Jordan attended at the home of Ms. Plensky and Mr. Fairs to discuss the matter in detail. During this meeting, Mr. Jordan was advised that Mrs. Fairs had already executed two powers of attorney. The second did not specifically revoke the first power of attorney.
- [11] The first power of attorney was executed when Mrs. Fairs was of sound mind, and named Mr. Fairs and his brother, Thomas, as the attorneys.
- [12] Although Thomas Fairs and his wife Joy resided in Vancouver, both brothers (and their spouses) were involved in Lisa Fair's physical care and the management of her finances. Unfortunately, the couples did not always get along.
- [13] By June 2005, Mrs. Fairs' mental health had significantly declined. That same month, a second "enduring" power of attorney was executed by Lisa Fairs, this time naming John and his sister-in-law Joy as the attorneys.
- [14] Because of his own state of mind at the time, John Fairs did not know why the second power of attorney was executed.
- [15] Ms. Plensky was disturbed that Joy Fairs was named an attorney. She did not trust her sister-in-law, particularly when it came to Lisa Fairs' finances.
- [16] With this history in mind, Mr. Jordan explained the committeeship process to Mr. Fairs and Ms. Plensky. He estimated that legal fees for the application would be about \$5,000 or "at most" \$7,000. That estimate is greater than the fees typically charged by Mr. Jordan for committeeship applications, but opposition to the application was expected. Mr. Fairs recalls the fees estimate given at between \$4,000 and \$6,000.
- [17] On April 27, 2006, John Fairs executed a written retainer agreement with the Solicitor. A retainer of \$1,000 was delivered. The agreement states that further retainers may be requested from time to time. Mr. Jordan's services were to be billed at \$250 per hour, but no written estimate of fees is given. In addition, Mr. Fairs agrees to pay interest on outstanding accounts at the rate of 18% per annum.
- [18] Relying almost exclusively on Ms. Plensky's instructions, Mr. Jordan prepared affidavit material in support of the committeeship application. He personally served the motion and supporting affidavits on Joy and Thomas Fairs.

- [19] Joy and Thomas Fairs retained counsel who, in turn, prepared an application to have Thomas appointed committee. This motion, together with the supporting affidavit, was delivered by Mr. Jordan to the Client with an invitation to provide instructions.
- [20] The hearing of the Client's committee application was to occur on August 10, 2006. The hearing was adjourned to consider a response to the opposing application.
- [21] In the meantime, Mr. Jordan issued the first bill. The cover letter with that bill states that this particular retainer required "an inordinate amount of work other than the more usual procedure to prepare a Committee application". As noted, the first bill of \$6,949.73 was paid in full.
- [22] In the same letter, Mr. Jordan states:
- "Most of the work that will be necessary to be done to support your application is enclosed in this statement of account. There will, of course, be the time spent in Court on the date of the Hearing and if the application is contested, there could be further costs surrounding the negotiation/litigation process."
- [23] In late July, the solicitor for Joy and Thomas Fairs proposed a resolution to the contest without litigation. It was suggested that the two brothers and their respective wives negotiate a protocol to work together. Mr. Jordan was instructed to reject that proposal.
- [24] By early August, Mr. Jordan was making inquiries with the Client about certain payments authorized by Mr. Fairs under the second power of attorney. Mr. Jordan expressed concern that the Client had not been completely frank regarding the circumstances surrounding the second power of attorney.
- [25] Regardless of these concerns, the Client instructed Mr. Jordan to proceed with the committee application.
- [26] The Solicitor issued a second bill on August 3, 2006 in the amount of \$1,721.20. That bill was paid in full.
- [27] On August 10, 2006, Mr. Jordan had a lengthy telephone conversation with Ms. Plensky concerning the content of the Joy and Thomas Fairs' affidavits. Over the next month or so, Ms. Plensky provided various and voluminous documents to Mr. Jordan addressing the allegations contained in those affidavits.
- [28] It was Mr. Jordan's intention to use this material to draft rebuttal affidavits.
- [29] At an early point in the retainer, Mr. Jordan told the Client that the court might choose to appoint the Public Guardian and Trustee (the "PGT") as Lisa Fairs' committee, particularly given the family dysfunction and events surrounding the second power of attorney. The opinion was bolstered by a letter from the PGT stating that it was prepared to act as committee if the court believed such an appointment to be in Mrs. Fairs' best interests.

- [30] By early August 2006, the Client had an expectation that the committee application would proceed sometime in the next month. All that was left was the preparation of the rebuttal affidavits.
- [31] Indeed, it appears from the Bill that the Solicitor was working towards a hearing date. The work performed in August 2006 includes the preparation of a response, outline, notice of hearing and a pleadings index. There are also references to conversations with Ms. Plensky regarding rebuttal affidavits.
- [32] Nonetheless, both committee applications were adjourned pending the completion of the rebuttal affidavits.
- [33] In late August, Mr. Jordan received instructions to add Ms. Plensky as a co-committee in the application. This step was never taken.
- [34] By his own admission, Mr. Jordan was dilatory in preparing the necessary rebuttal material. Other seemingly more pressing matters occupied his time in the months following. He was also receiving new information from Ms. Plensky on a regular basis, most of which addressed Joy Fairs' involvement in their mother-in-law's affairs.
- [35] By November 18, 2006, Mr. Jordan had attempted to draft the responsive affidavit material and met with Ms. Plensky and Mr. Fairs in their home to discuss that response. Some errors were noted and Mr. Jordan agreed to make the corrections without charge. The Client suggested that additional sources of information should be pursued to counter Thomas Fair's application. Mr. Jordan pursued these investigations.
- [36] By late December 2006, the rebuttal affidavit material was prepared in more or less final form for the Client's review. The material included affidavits from third parties. Four draft affidavits were sent to the Client as attachments to an electronic message. The Client was unable to open some of the attachments and, thus, the material was sent by facsimile as well.
- [37] Ms. Plensky complained to Mr. Jordan that the affidavits were not as complete as they should be and still contained errors. She threatened to report Mr. Jordan to the Law Society.
- [38] It was as a result of this conversation that Mr. Jordan surmised the retainer was at an end. The Client was encouraged to find other counsel.
- [39] In a letter dated January 25, 2007, Mr. Jordan summarizes these events and takes issue with Ms. Plensky's assertion that the Solicitor deserved no further compensation.
- [40] The bill issued to the Client on January 25, 2007 (and marked "draft") claims fees of \$8,375 plus disbursements and taxes for a total of \$9,613.40. Mr. Jordan was willing to discuss a compromise or reduction of that bill and invited the Client to telephone him to discuss "what might be acceptable".

- [41] The Client balked at the bill and asserted that he had, in fact, fired the Solicitor in early January 2007. A facsimile letter to that effect is dated January 5, but Mr. Jordan did not receive that document until after the Bill was issued.
- [42] In the January 5 letter, Mr. Fairs suggests that the Solicitor agreed not to charge "anymore due to the many errors in the beginning". Mr. Jordan denies giving any such assurance.

POST-RETAINER EVENTS

- [43] Objectively, the retainer came to an end on January 25, 2007. However, Mr. Jordan continued to communicate with the Client regarding the merits of the claim.
- [44] Mr. Jordan rejects the suggestion that the material prepared to that date was faulty in any way. The material was in place to proceed with the committeeship applications, although Mr Jordan had some reservations about the Client's chances for success given the facts disclosed in the various affidavits.
- [45] With respect to the Bill, Mr. Jordan wrote to the Client on February 13, 2007, offering to accept the sum of \$4,000 for his fees. Thus, the Bill presented at this review reflects that reduction.
- [46] The Client had in the meantime retained other counsel. That counsel negotiated a resolution whereby the PGT became Mrs. Fairs' committee. The Client was charged \$5,000 by the new lawyer of whom both Mr. Fairs and Ms. Plensky are highly complimentary.
- [47] At this hearing, Mr. Jordan expressed regret that he was not more assertive with the Client (Ms. Plensky, in particular) in suggesting that a negotiated settlement be pursued.
- [48] In a letter dated May 18, 2007, Mr. Fairs confirms that he, and not Ms. Plensky, was the Solicitor's client. He also alleges that Mr. Jordan agreed to do the "the work at no charge because of the extreme amount of errors made". The specific errors are not identified in that letter. Mr. Jordan replied to Mr. Fairs in a letter of May 31, 2007, denying that he either agreed to work for free or committed any errors. Mr. Fairs is again invited to resolve the fee dispute by paying the third account which had been reduced "by over half of the time spent".

DISCUSSION

- [49] This review is governed by s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9. (the "Act"). The factors that I am to consider in determining whether the Bill is fair and reasonable are as follows:
- (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.

[50] The committee's application was not legally complex. However, it was made more difficult by the Client's inability to explain his involvement in the second power of attorney and the family acrimony, particular between Ms. Plensky and Joy Fairs. It should be observed, however, that the Solicitor was aware of the family dynamic from the outset of the retainer.

[51] I find that the hourly rate charged by Mr. Jordan is fair and reasonable given his experience and knowledge in estate matters.

[52] The Solicitor completed the retainer but for the hearing of the matter in court. The fact that the Client was able to reach a negotiated settlement is not justification to reduce the Bill. The Client earlier rejected settlement proposals that could have avoided additional fees. As well, the Solicitor advised the Client that the court may well decide to appoint the PGT as the committee.

[53] There is no question that Mr. Jordan performed the services described in the Bill. I also conclude that the work was performed on the Client's instructions. That work included reviewing the affidavits of Thomas and Joy Fairs, receiving instructions from the Client on those affidavits and drafting responsive materials. It also included receiving various electronic and other communications from Ms. Plensky on such matters as Lisa Fairs' missing clothing and diet.

[54] Other factors which I have considered are as follows:

1. the delay in preparing the rebuttal material;
2. whether the time spent by the Solicitor after August 2, 2006 was reasonable; and/or
2. whether the Solicitor is bound to the original verbal estimate of fees.

[55] The delay is acknowledged by the Solicitor. The delay was a significant factor in the Client's decision to retain other counsel. However, I am unable to say what if any portion of the \$ 5,000 paid to this second lawyer represents a duplication of the Solicitor's work. It might be expected that the new lawyer charged for review of the file material, but that is speculation absent further details of the second lawyer's charges. In any event, I am satisfied that the reduction of the charges from \$ 8,300 to \$ 4,000 recognizes the prejudice that the Client may have suffered as a result of the change of counsel.

- [56] I have reviewed the Solicitor's time records. Of the approximately 34 hours spent by Mr. Jordan after August 2, only 10 or 11 hours is devoted to the drafting of the responsive affidavit material. The balance of time was primarily spent communicating with Ms. Plensky and various third parties on Ms. Plensky's instructions. It is apparent from the descriptions of services in the Bill, as well as the other evidence presented at this hearing, that Ms. Plensky wished to be as detailed as possible in rebutting the allegations of Joy and Thomas Fairs. Some of that detail, I conclude, was not essential to the committee application. I am not persuaded that Mr. Jordan encouraged this detailed response, although he may not have discouraged it either.
- [57] Indeed, at this hearing, Mr. Jordan expressed remorse in not being more assertive with Ms. Plensky. Upon reflection, he might have placed a limit on the communications and documentation received. This is not, in my view, a justification in reducing the Bill. The Client must have been aware that the time spent communicating with Mr. Jordan would result in additional fees.
- [58] The Client is not a sophisticated consumer of legal services. However, he and Ms. Plensky were aware that the Solicitor was charging fees based on time spent. Indeed, by the beginning of August 2006, the Client had received two bills which together exceeded the initial verbal estimate. In fairness, the Client may have believed that the bulk of the work for the committee application was completed by August 2, 2006. However, there was clearly more work to be done given Thomas Fairs' position. The verbal estimate of fees given at the commencement of the retainer did not include work for Thomas Fairs' counter application.
- [59] Nor do I accept the suggestion that the Solicitor agreed to perform work after August 2 for free. In its letter of August 2, 2006 to the Client, the Solicitor requests an additional retainer "in anticipation of the Committee Hearing".
- [60] The Bill under review has already discounted Mr. Jordan's time significantly. That discount is appropriate in the circumstances of this retainer. I decline to reduce that amount further simply because Mr. Jordan chose to follow the Client's instructions rather than insist Mr. Fairs follow another route.
- [61] The amount charged in the Bill (as reduced by the Solicitor) is allowed. The Solicitor is entitled to contractual interest of 18% per annum on the amount outstanding.
- [62] As the Bill has not been reduced, the Solicitor should be entitled to its costs for this review: s. 72 of the Act. Given the recent amendments to the Tariff, those costs could well exceed \$3,000 for this full day hearing. Nonetheless, I decline to award the Solicitor its costs. I find that the Solicitor's failure to warn Mr. Fairs in writing of the potential costs of his instructions amounts to special circumstances under s. 72(2) of the Act. Accordingly, each party is to bear its own costs.
- [63] If necessary, the Solicitor may submit a Certificate of Fees with the interest calculation attached. The Certificate earlier forwarded contains the wrong style of cause.

D/Registrar C. P. Bouck

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