

CANADA / JUDGMENT

Loxterkamp v. Cluff

2005 BCSC 937

COURT

Supreme Court of British Columbia

DECIDED

21 June 2005

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2005 BCSC 937 Loxterkamp v. Cluff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Loxterkamp v. Cluff

2005 BCSC 937

Date: 20050621

Docket: 20607/03

Registry: Prince George

Between:

Wayne Loxterkamp

Respondent

And

James H. Cluff and

James H. Cluff Personal Law Corporation

Appellant

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment

Appearing for the respondent:

No Appearance

Appearing for the appellant:

J.H. Cluff, In Person

Date and Place of Hearing:

May 24, 2005

Prince George, B.C.

- [1] Mr. Cluff has appealed Master Baker's decision (as Registrar) following a review of Mr. Cluff's accounts for services in a matrimonial matter. The Master reduced fees for services rendered at \$48,516.85 by \$5,000, plus taxes, providing written reasons in a 13-page decision.
- [2] The following paragraphs of the Master's decision are the most pertinent findings of fact.
- [6] The Loxterkamps separated in Quesnel, B.C., in February 2000 after approximately 12 years' marriage. They have five children. Shortly after separation Ms. Loxterkamp, represented by Ms. Schmit, commenced proceedings in the Quesnel Registry of the Supreme Court. At first Mr. Loxterkamp was not represented by counsel, a circumstance that caused, in my view, considerable difficulties for him, as will be explained below. Although there were some issues concerning the Loxterkamp children, most of the issues were financial in nature, relating either to the parties' assets (and dealings with them) or to Mr. Loxterkamp's income as a self-employed truck driver. It is a fair summary to say that the financial issues simply did not justify the amount of time and work consumed by counsel. That, however, as will also be seen, was generally not the fault of Mr. Cluff.
- [7] A quick tour of the litigation would be in order. In the approximately three years Mr. Cluff represented Mr. Loxterkamp, there were at least 13 notices of motion and two successful appeals by Mr. Cluff from interlocutory orders. There were 17 separate entered orders and at least 41 affidavits filed in total by both parties, of which 16 were by Mr. Loxterkamp. There were a total of six Form 89 Property and Financial Statements filed, and examinations for discovery were held. For reasons described below, Mr. Loxterkamp's brother was also joined in the proceedings. The matter was set for trial but settled.
- [8] As often happens in legal proceedings in Northern British Columbia, travel was also a factor as Mr. Cluff lives and practises in Prince George, approximately 125 kms. from Quesnel. Each hearing in Quesnel therefore required approximately 2 ½ hours of travel by him. The matter was eventually transferred to the Prince George Registry, but only after numerous hearings in Quesnel.
- ...
- [56] Mr. Cluff is not without sin in all of this. For him to incorporate the company at the time he did and in the circumstances of an active, confrontational lawsuit, and to expect that it would lie dormant or moribund until all matters were settled was, with respect, like expecting a starving person to ignore a steak. Mr. Cluff is seasoned and experienced counsel. He knew, both by his staff's advice and by his own experience with Mr. Loxterkamp, that Mr. Loxterkamp was a "difficult" client, and that his credibility was

constantly problematic.

- [57] Mr. Cluff sent no cautionary letter to Mr. Loxterkamp regarding the existence or use of the company. In this case, such a letter, it seems to me, was absolutely necessary, and that counsel's judgment and experience with the client would have led to that conclusion. The absence of this letter seems curious, particularly because Mr. Cluff, on more than one occasion, wrote very clear and direct letters to Mr. Loxterkamp, cautioning him about the negative implications of his failure to comply with orders or with disclosure requirements.
- [58] Providing Mr. Loxterkamp with this tool in these circumstances, and doing so without clear written advice and caution as to its use, was an oversight. Counsel's decisions in such cases can create problems that will reflect on the accounts charged. In *Walker v. Schober* counsel adopted a strategy that was, in the Registrar's view, "risky" (para. 63), and "there was also a risk that proceeding in this manner would erode or perhaps even poison the relationship between the parties" (para. 67). That, of course, is exactly what happened in the Loxterkamp matrimonial proceedings. On learning of the existence and use of the company, Ms. Loxterkamp and her counsel assumed evasion and deception on Mr. Loxterkamp's part. That occasioned substantial efforts by Mr. Loxterkamp and his counsel to try to rebut these presumptions and avoid negative conclusions by the court.
- [59] I accept, on balance, that Mr. Cluff did not, at the time of incorporation, advise Mr. Loxterkamp that the company would avoid FMEP enforcement, or that it was Mr. Cluff's advice that initiated the incorporation. Still, it was a lack of judgment that led to the incorporation without clear and emphatic warnings as to its use.
- [3] The Master then set out the provisions of s. 71(4) of the Legal Profession Act and dealt with each of the statutory considerations in turn. His concluding analysis is set out in paragraphs 72 - 74 as follows:
- [72] The statutory parameters, therefore, in large measure weigh in Mr. Cluff's favour. The singular exception is, as indicated above, the incorporation of Oswald Enterprises Ltd. without a clear, documented purpose, without disclosure to the other side, and without any documented cautions to Mr. Loxterkamp. The temptation to Mr. Loxterkamp was obvious. He used the company to confound Ms. Loxterkamp, creating serious and foreseeable problems in the litigation. Mr. Cluff's fees for the work and effort to rebut the presumptions and results from this event should be reduced. The appropriate reduction is the sum for a typical chambers hearing. Mr. Cluff's letter to Mr. Loxterkamp of July 31, 2002 confirms his estimate that his fee for a chambers matter in Prince George would be \$5,000.00.
- [73] Another point should be made. Much was made in evidence of the difficulties with Mr. Loxterkamp as a client. I have commented extensively, above, on this topic. Sometimes such difficulty would justify higher fees (especially if a cautionary letter contemplated by s. 71(3) (b) of the Act had been sent). The interesting aspect here, however, is that Mr. Cluff knew, from the very outset, that Mr. Loxterkamp would be difficult. The clear warnings and misgivings expressed by his staff, it seems to me, could not have been more obvious. Mr.

Cluff had the choice, of course, to decline the retainer at that time, yet he did not. That warning and choice, to a degree, must mitigate the problems with "the difficult client".

DECISION

- [74] Considering, therefore, the problem and fees occasioned by the incorporation, together with the clear warning and expectation of Mr. Loxterkamp being difficult, Mr. Cluff's fees will be reduced by \$5,000.00, together with the tax thereon. The balance of the accounts are confirmed.
- [4] Mr. Cluff agrees that the "clearly wrong" standard of review applies. The main allegation of error is that the Master failed to make an initial basic assessment of the total amount of fees rendered in relation to the total amount of work done. I read the opening words of paragraph 72 of the reasons as implying that, Master Baker did in fact make an initial assessment of reasonableness after applying the statutory considerations, but before assessing the impact of Mr. Cluff's "sin". I do not find error in that regard.
- [5] It is argued that the \$5,000 reduction is an unfairly severe penalty in light of the reasonableness of the total accounts in relation to the amount of work done for a difficult client.
- [6] Master Baker's comment in paragraph 72 that the appropriate reduction is the sum for a typical chambers hearing, which he sets at \$5,000 because of Mr. Cluff's letter of July 31, 2002 to his client providing that estimate, is somewhat at odds with the facts set out in paragraph 7. If Mr. Cluff's total accounts are divided by the number of entered orders (17) or the number of notices of motion and appeals (15) the fees per hearing would be in the range of \$3,000, assuming no other work at all was done, which obviously is not a valid assumption. I would infer that Mr. Cluff did not in fact charge \$5,000 per chambers hearing, notwithstanding his estimate provided on July 31, 2002.
- [7] Notwithstanding that apparent incongruity within the Master's reasons, the essence of his decision is that he faulted counsel for an error of judgment which allowed his client to confound the opponent and unnecessarily created more strife in the litigation and therefore unnecessary counsel work. He did not expressly find that one extra chambers hearing was made necessary, and he did not identify any specific hearing as caused by the error. I do not think that I can hold his assessment to be clearly wrong simply on the basis of this incongruity.
- [8] A good measure of deference should be accorded to Registrars who hear the evidence and delve into the detail of reviews of lawyers' accounts pursuant to the Legal Profession Act. On this review, the key question was factual, namely: what were the ramifications of counsel's error of judgment, and how much extra, needless work stemmed from incorporating the company too soon? There can be no precise answer to that question; at best it can only be a rough estimate.

- [9] Frankly, I take the view that it was somewhat harsh to reduce an apparently reasonable account by more than 10% because counsel, in effect, misjudged his client's propensity to abuse the new company as a "tool of evasion". It is regrettable that such client misbehaviour is effectively rewarded by the reduction.
- [10] However, the fact that I hold a contrary opinion does not make Master Baker's decision clearly wrong, and I do not find reversible error. It is clear from paragraph 72 of the reasons that Mr. Cluff's fees for the extra "work and effort to rebut the presumptions and results" were reduced, not wholly deducted, so the client was not fully exonerated. There is an insufficient foundation for me to find error on the Registrar's part in quantifying the appropriate reduction in fees. Clear error not being established, the appeal is dismissed.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

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