

CANADA / JUDGMENT

Matthews v. Stikeman Elliott LLP

2020 BCSC 967

COURT

Supreme Court of British Columbia

DECIDED

29 June 2020

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2020 BCSC 967 Matthews v. Stikeman Elliott LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matthews v. Stikeman Elliott LLP,

2020 BCSC 967

Date: 20200629

Docket: S1711714

Registry: Vancouver

Between:

Daniel Matthews, Ecoasis Developments LLP, Ecoasis Properties Limited, Ecoasis Bear Mountain Developments Ltd., BM Clubhouse 40 Ltd.,

BM Mountain Golf Course Ltd., BM 81/82 Lands Ltd., BM 83 Lands Ltd.,

BM 84 Lands Ltd., BM Capella Golf Course Ltd., BM Highlander Development Ltd., BM Highlands Golf Course Ltd. and BM Highlands Lands Ltd.

Clients

And

Stikeman Elliott LLP

Law Firm

Corrected Reasons for Decision: The content of the Reasons for Decision was corrected at para. 30 on July 13, 2020

Before: Master Harper

(as Registrar)

Reasons for Decision Re: Costs and Interest

Counsel for the Clients:

P.K. Sandhu

Counsel for the Law Firm:

H. Poulus, Q.C.

J.R. Buysen

Written Submissions filed by the Law Firm:

April 29 and May 20, 2020

Written Submissions filed by the Clients:

May 13, 2020

Place and Date of Decision:

Vancouver, B.C.

June 29, 2020

Introduction

[1] In this review of the law firm's bills pursuant to the Legal Profession Act, S.B.C.1998, c. 9 ("LPA"), I reduced the bills by less than one-sixth of the total amount (reasons indexed at 2020 BCSC 581). Therefore, the law firm is entitled to costs pursuant to s. 72(1)(b) of the LPA. In accordance with my direction, the law firm and the clients submitted written submissions on costs and the interest that should be added to the outstanding accounts.

[2] Section 72 of the LPA provides:

72 (1) Costs of a review of a lawyer's bill must be paid by the following:

- (a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
 - (b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
 - (c) a person who applies for a review of a bill and then withdraws the application for a review.
- (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

[3] Section 73(2) of the LPA provides that the registrar may summarily determine the amount of the costs of the review and add it to the amount shown on the certificate.

- [4] The law firm seeks special costs or, alternatively, costs at Scale C. The clients say that the law firm should be deprived of costs altogether. Alternatively, the clients say costs can only be awarded on Scale B because a registrar has no jurisdiction to award special costs or to fix the scale of costs other than at Scale B.
- [5] The clients' argument that the law firm should be deprived of costs because of criticisms the law firm levels at the clients and their counsel is entirely without merit. The clients have established no "special circumstances" within the meaning of s. 72(2) of the LPA that would disentitle the law firm to costs.

Registrar's Jurisdiction to Determine the Level of Costs on an LPA Review

- [6] The registrar's authority to determine the level of costs on an LPA review derives from ss. 72 and 73 of the LPA. The term "costs" is not defined in the LPA. There are sound policy reasons to conclude that the legislature intended to grant registrars the ability to fix the scale of costs at other than Scale B, or to award special costs. The factual and legal issues can be as complex as in civil trials. Large sums of money may be involved. The hearing process looks much like a trial if the parties and witnesses testify in person and are cross-examined, as occurred in this case. The pre-hearing process can involve discovery of documents that mimics the discovery requirements of a conventional pre-trial process. The registrar performs a judicial function in hearing evidence, considering legal arguments, and rendering a decision. The judicial nature of the registrar's duties is reflected in s. 13(4) of the Supreme Court Act, R.S.B.C. 1996, c. 443, which states:

Registrars and district registrars must devote themselves exclusively to judicial duties and must not engage, directly or indirectly, in any other occupation, profession or business.

- [7] In principle, I see no reason why a registrar should be deprived of the authority to award costs on Scale C and to consider an award of special costs in appropriate circumstances. As the court noted in *Holmes Greenslade v. Starcom International Optics Corp.* (1997), 49 B.C.L.R. (3d) 159 (S.C.) at para. 15:

The registrar must have the power to control those proceedings that are within his or her jurisdiction otherwise he or she becomes a mere spectator. A review of a solicitor's bill is such a proceeding. Reviews such as the review in this case, are often long, complex and may take many days, in some cases weeks, and involve large sums. The fees in this case totalled some \$500,000. The registrar must have power to control the course of the review.

- [8] Costs are one manner in which the registrar can control the review process. There may be a more than ordinary level of difficulty justifying costs on Scale C. Lawyers or clients may behave in such a way as to merit a special costs order being made against them. In my view, the registrar ought to have jurisdiction to fix the scale of costs or to award special costs. The question is whether the registrar does, in fact, have such jurisdiction.

Positions of the Parties

The Clients' Position

- [9] The clients' position is that only a court can award costs on other than Scale B. The argument follows a winding path from the LPA through the Supreme Court Civil Rules.
- [10] Rule 1-1(1) defines "court" as "the Supreme Court of British Columbia and, if a master has jurisdiction, includes a master of the Supreme Court". A registrar is not included in the definition of "court".
- [11] An LPA review is a proceeding as defined in Rule 1-1(1) because it is a "cause" or "matter": Holmes Greenslade at para. 17. Costs of a proceeding are governed by Rule 14-1. Therefore, Rule 14-1 applies to an assessment of costs in a legal fee review.
- [12] Rule 14-1 provides that costs must be assessed in accordance with Appendix B - Party and Party Costs unless certain circumstances exist, such as if the court orders that costs be assessed as special costs:
- 14 (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
- (b) the court orders that
 - (i) the costs of the proceeding be assessed as special costs,
- [13] Because a registrar is not the "court", Rule 14-(1)(b)(i) does not permit a registrar to order special costs.
- [14] Section 2(4) of Appendix B provides that if an order for costs is made and no scale is fixed, the costs must be assessed under Scale B, unless a party, on application, obtains an order of the court that the costs be assessed under another scale. Because a registrar is not a "court", the clients' argument goes, a registrar has no jurisdiction to assess costs on other than Scale B.
- [15] In support of their position, the clients rely on *Aydin & Co. v. Schaber*, 2000 BCSC 925. In that case, the registrar found the lawyer's conduct to be "outrageous and unprofessional". The registrar referred the question of a registrar's jurisdiction to award special costs or, alternatively, increased costs to a judge. The judge held that only the court can award special costs or increased costs, which means that a registrar may not. The judge opined that the need for an "expedient and straightforward process to review lawyers' accounts" is a policy consideration that militates against permitting a registrar to consider special costs.

The Law Firm's Position

- [16] The law firm agrees that a registrar is not a "court", but argues that a registrar's jurisdiction to award special costs and costs on Scale C does not turn on that fact. The law firm emphasizes that the registrar's jurisdiction to award and assess costs, and by necessary extension to set the level of costs, is found in ss. 72 and 73 of the LPA and that higher case authority than Aydin supports the conclusion that a registrar on an LPA review may award any level of costs available under Rule 14-1, including costs on any scale and special costs.

Discussion

- [17] Aydin does not resolve the question of jurisdiction in the case before me. Aydin has been overtaken by a later and higher authority: *Shpak v. Institute of Chartered Accountants of British Columbia*, 2003 BCCA 149. The Institute took disciplinary proceedings against Mr. Shpak. A discipline tribunal ordered Mr. Shpak to pay 80% of the Institute's costs incurred in connection with the complaint, "costs" meaning the actual out-of-pocket expenses paid by the Institute, including legal accounts. An appeal committee reduced the costs order to 70% of actual costs. Mr. Shpak appealed. The chambers judge, relying in part on Aydin, held that the tribunal did not have jurisdiction to award anything other than party and party costs at Scale 3 of Appendix B.
- [18] The Court of Appeal allowed the Institute's appeal. The Court of Appeal held that where the provisions for costs in the constituent statute, or rules properly passed pursuant to the statute, do not indicate otherwise, the provisions of Rule 57 (now Rule 14-1) will govern the tribunal's award of costs. "In those cases, Rule 57 will define the nature of the costs available, including special costs. The court's power to award special costs under Rule 57 translates, by analogy, into the tribunal's power to award special costs under the tribunal's constituent statute": *Shpak*, para. 56.
- [19] In my view, if the court's power to award special costs translates, by analogy, into the tribunal's power to award special costs under the tribunal's constituent statute, then that power must, by extension, translate into the registrar's power to award costs pursuant to the authority of the LPA. Because the LPA does not define costs, "costs" means the costs available under Rule 14-1. The costs available under Rule 14-1 include costs on Scale C and special costs. Although *Shpak* was about special costs and not the scale of costs, the Court of Appeal's rationale must logically extend to jurisdiction to fix the scale of costs.
- [20] The traditional meaning of costs where costs are not otherwise defined is governed by the provisions of Rule 14-1: *Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd.* (1990), 70 D.L.R. (4th) 148 (C.A.). It cannot have been the intention of the court in *Ridley Terminals* to limit the discretion of the registrar in applying Rule 14-1. If the "tradition" is to look to Rule 14-1, then the tradition must include the discretion to assess Scale C or special costs. For example, a master sitting as a registrar ordered costs on Scale C due to a party's conduct having "considerably lengthened the proceedings": *CIBC Mortgages Inc. v. Pond*, 2015 BCSC

1012, para. 29.

- [21] If a registrar is to apply the costs rules contained in Rule 14-1 as per *Ridley Terminals*, then the registrar must consider which scale to apply since "costs" in the LPA are undefined. However, the hurdle to overcome is how to reconcile the direction as per *Ridley Terminals* to use Rule 14-1 to assess costs when Rule 14-1 itself provides that the "court" can fix the scale of costs. If a registrar is not considered the "court" for the purposes of applying the governing principles of Rule 14-1, then the registrar is hamstrung and is unable to fix costs on any scale. For the purposes of applying *Shpak*, a registrar is, to all intents and purposes, a court and therefore has the authority to fix the scale of costs.
- [22] The clients argue that a registrar does not have the jurisdiction to award costs at Scale C on the basis that s. 2 of Appendix B provides that only a "court" can fix costs at a scale other than Scale B. Section 2(4) of Appendix B provides that if an order for costs is made, and if no scale is fixed in the order, the costs must be assessed under Scale B, unless a party, on application, obtains an order of the court that the costs be assessed under another scale. Section 2(4) does not apply in the present context. It is incorrect to say that the order I made following the review of the law firm's bills is silent as to costs. The order is not yet entered because the outstanding issues concerning costs had not been determined. My ruling on costs was that the clients were responsible for costs because of the operation of s. 72 of the LPA and that the parties could make further submissions on costs generally.
- [23] Sections 72 and 73(2) of the LPA provide that a registrar can order the payment of costs and summarily determine the amount. To exercise such authority, the registrar has to be able to determine the level of costs (special or party and party) and to fix the scale (A, B, or C). On a summary assessment, the registrar traditionally looks to the scale of costs for guidance. If the clients' position were correct, the registrar would be unable to determine the scale on which to summarily assess party and party costs. Such a result would be absurd.
- [24] I conclude that on a review of a lawyer's bills, a registrar has the authority to order costs on any level available under Rule 14-1, which includes special costs as well as costs on any scale.

Is the Law Firm Entitled to Special Costs?

- [25] The law firm takes the position that the clients' conduct during the fee review and the hardline positions they took amount to reprehensible conduct worthy of rebuke and therefore special costs. Early in the proceedings, the clients, through their counsel, demanded a full refund of all legal fees they had paid, being some \$432,000. The clients made no effort to narrow their focus of complaint and put the law firm to the effort of justifying every dollar billed. I agree that the clients unnecessarily complicated and prolonged the proceeding. However, having considered all of the law firm's complaints about the clients' conduct, I do not think that the conduct rises to the level required to justify special costs.

[26] Although I have determined that special costs are not appropriate in this case, I will briefly address the law firm's argument that the registrar may assess special costs summarily pursuant to s. 73(2) of the LPA. Although the party in whose favour special costs are awarded may understandably wish to avoid the time and expense of an assessment before the registrar, it is inappropriate to assess special costs summarily. The rough and ready approach that a summary assessment entails is inappropriate on an assessment of special costs. Evidence as to the legal fees actually incurred is required: *Gichuru v. Smith*, 2014 BCCA 414, para. 157.

What is the Appropriate Scale of Costs?

[27] I turn now to consider whether costs should be awarded on Scale B or Scale C. Scale B is for matters of ordinary difficulty; Scale C is for matters of more than ordinary difficulty. I agree with the law firm's position as set out in its submissions:

[T]he law firm was required to lay before the court substantially the entirety of its work on a complex commercial litigation matter and to explain and justify, in detail, substantially every strategic and tactical call that it made. The effect was to turn what might have been a matter of ordinary difficulty into one of more than ordinary difficulty.

[28] The hearing became a full-scale trial. Further, and by way of example, the clients' mid-hearing application for leave to tender an expert report, which I granted, contributed to the level of difficulty rising to "more than ordinary". The law firm was required to re-calibrate its position in light of the clients' late delivery of their expert report. My findings and observations set out in my reasons for judgment on the review of the law firm's accounts reflect the overall "more than ordinary difficulty" level of this proceeding. I fix costs at Scale C.

[29] The law firm has presented a bill of costs. The law firm and the clients have each made thorough submissions on the bill of costs.

Tariff Items

[30] Section 3(3)(b) of Appendix B provides that if there is a range of units for a tariff item, the maximum number of units is for matters on which a great deal of time should ordinarily have been spent. Where I allow the maximum number of units, it is because the law firm was required to spend a great deal of time on the matter covered by the tariff item.

Item 1:

The law firm claims 7 units out of a maximum of 10 units. I agree and allow 7 units.

Item 2:

The law firm claims the maximum 30 units. The fee review took around two-and-a-half years from start to finish. I accept the law firm's position that the maximum should be allowed.

Item 6:

The law firm claims 5 units out of the maximum of 10. This is reasonable and I allow 5 units.

Item 11:

The law firm claims the maximum of 30 units for giving discovery and inspection of over 5,000 documents. Specifically, the law firm disclosed more than 4,000 documents from its file and, at the clients' request, a further 16,000 documents from the underlying litigation. The clients take the position that this item cannot be claimed on an LPA review. I disagree. The clients' demand for a full refund of the legal accounts paid put every document in the lawyers' files at issue. The documents were essential for both the hearing and my decision-making. The clients' approach to the fee review was the cause of the vast numbers of documents needing to be produced. I have no hesitation in allowing 30 units.

Item 17:

The law firm claims the maximum 10 units. The clients say that since only one expert was retained and his report was not complex, only 2 units should be allowed. Here, I go back to the clients' approach to this fee review: every aspect of the law firm's work was at issue. The law firm was required to prepare a detailed instruction letter and provide the expert with all relevant documents so that the expert would be in a position to opine on everything the law firm did in the course of the retainer. I accept that this work was substantial. I allow 10 units.

Items 21 and 22:

The law firm claims for four days for the hearing of applications and cross-applications before judges of the court, all of which relate to the law firm seeking an order that the clients be held in contempt of court for failing to deliver an expert report. The clients cross-applied for an order that Mr. Buysen be cross-examined on his affidavit. Justice Funt heard applications on June 6, 7, and 14, 2018. In his reasons for judgment issued July 20, 2018 (indexed at 2018 BCSC 1219), he made certain orders with costs to be in the cause. My interpretation of this ruling as to costs is that costs will be in the cause as to the law firm's contempt application. In my view, the costs the law firm claims for Items 21 and 22 are covered by the decision of the chambers judge who heard the contempt application and the clients' cross-application. Justice Schultes ordered each party to bear their own costs (reasons for judgment indexed at 2020 BCSC 878). Therefore, no units are allowed for Items 21 and 22.

Items 24 and 25:

The law firm claims for preparation for and attendance at pre-hearing conferences February 19 and March 13, 2018 before Registrar Nielsen and for the law firm's applications for directions which I heard on June 10, August 16, and November 1, 2019.

I do not accept the clients' argument that preparation for and attendance at pre-hearing conferences cannot be allowed.

The applications for directions which I heard on June 10, August 16, and November 1, 2019 took place after the first five days of the hearing of the fee review were completed. The applications were based solely on the difficulties the law firm encountered in moving the proceeding forward. From my perspective, the clients were responsible for these appearances and they were part and parcel of the fee review hearing itself.

The law firm is entitled to claim for preparation and attendance at all five hearing dates. Each hearing was less than half a day. Therefore, preparation is 1.5 units times 5 and attendance is 3 units times 5. The total for Items 24 and 25 is 22.5.

Items 26 and 27:

The law firm claims for preparation for and attendance at the twelve days of hearing of the review. Item 27 applies to a "hearing of a proceeding". The clients say that the hearing of a review of lawyers' accounts is covered under items 24 and 25. Item 25 applies to a "hearing before a registrar with or without witnesses". Items 24 and 25 allow for fewer units than Items 26 and 27. If the clients' position is correct, preparation is 3 units, not 5, and attendance is 6 units, not 10. The hearing before me was just as complex and time-consuming as a hearing under Item 27. There is no logical reason why the law firm should be deprived of the units available under Items 26 and 27. However, I am constrained by the plain words of the tariff. To the extent there is unfairness in its application, such unfairness is ameliorated by costs being awarded on Scale C. I allow 36 units for preparation under Item 24 and 72 units for attendance under Item 25.

Item 28:

The law firms claims 4 units for preparation for the law firm's adjournment application filed August 7, 2018 which arose in connection with the contempt application, and the clients' recusal application set for August 16, 2019, neither of which proceeded. As to the adjournment application, it is covered by the order as to costs made by Justice Schultes. As to the recusal application, counsel for the clients did not file a formal notice of application, but gave verbal notice during the course of the hearing that she intended to seek my recusal. The law firm prepared for that application, but the clients did not proceed with it. The law firm was put to the effort of preparing and, therefore, I allow 2 units for preparation.

[31] I would point out that the law firm would be entitled to claim under Item 23 (application by written submission) for their submissions on this assessment of costs. The unit range is 1 to 5. I would have allowed 5 units. The law firm did not claim Item 23 and the clients have therefore received a benefit.

[32] The total number of units I allow is 214.5. At \$170 per unit, the total is \$36,465 plus tax. To put this amount into perspective, if I had determined that my jurisdiction was limited to assessing costs on Scale B, the costs would have been \$23,595 (214.5 units x \$110 per unit), a difference of \$12,870. The higher amount is more than justified in my view because of the more than ordinary difficulty of the entire proceeding.

Disbursements

- [33] The law firm claims \$4,469.60 for black and white photocopies at 30 cents per page and \$2,499.60 for colour copies at 50 cents per page. The clients say these expenses are excessive. The assessment of internal photocopying is not a scientific exercise. It is a matter of judgment and discretion. Having observed the large number of copies that were necessitated by the clients putting the law firm's entire work product at issue, I find that the number of photocopies is justified. However, I allow them at 25 cents per page for both black and white and colour copies. Accepting the law firm's re-calculation at 25 cents per page as set out in its submissions, I allow \$4,974.47 plus taxes.
- [34] The clients object to the law firm's claims for \$347.39 for scanning, \$694.80 for BC Online fees, \$316.89 for process serving, \$990.03 for agents' fees, \$173 for delivery, and \$806.54 for online legal research. The clients say that these disbursements are unsupported by evidence. In response, the law firm says that it has provided the pre-bills which were made in the course of business and which record the disbursements. Further, the law firm says that I am able to determine summarily whether the disbursements should be allowed, especially as it is in the interests of both the firm and the clients to bring this matter to a conclusion. I agree that I am able to assess these disbursements summarily in accordance with the authority granted by s. 73(2)(b) of the LPA. Further, the principles of proportionality set out in Rule 1-3(2) support a summary process. I find that the disbursements are reasonable and in proportion to the amount at issue. Further, these disbursements are somewhat balanced out by the law firm not claiming Item 23.

Interest

- [35] The clients have raised no objection to the law firm's claim to pre-judgment interest. Accordingly, pre-judgment interest will be added to the unpaid portion of the bills at the prevailing rate from the date of the last bill to the date of reasons for judgment being April 16, 2020.

Summary

- [36] Costs are assessed at \$36,465 plus tax for the tariff items. I will leave it to counsel to re-calculate the disbursements in accordance with the adjustments I have made to the photocopy expenses.
- [37] Pre-judgment interest is to be calculated and added to the amount owing.
- [38] If a certificate of costs is required, the law firm should first provide it to counsel for the clients to review for accuracy. The law firm may then submit the certificate to the registry for my signature.

"Master Harper"

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