
CANADA / JUDGMENT

Sales v. Fisher

2019 BCSC 1050

COURT

Supreme Court of British Columbia

DECIDED

27 June 2019

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2019 BCSC 1050 Sales v. Fisher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sales v. Fisher,

2019 BCSC 1050

Date: 20190627

Docket:

Registry: Kamloops

Between:

Carol Louise Sales by her litigation guardian

Edward Thomas Sales

Petitioner

And

Crystal Fisher

Respondent

Before: Master McDiarmid

Reasons for Judgment

Counsel for the Petitioner:

J.A. Marr

No one appearing on behalf of the Respondent

Place and Date of Hearing:

Kamloops, B.C.

June 24, 2019

Place and Date of Judgment:

Kamloops, B.C.

June 27, 2019

[1] This is a Notice of Application brought by the petitioner seeking the following orders:

1. A declaration that the Applicant, Edward Thomas Sales ("Ted"), in his capacity as attorney and litigation guardian for Carol Louise Sales ("Carol"), steps into the position of Carol with respect to any privileged communications made during or arising from the representation of Carol and her husband, Ronald Thomas Sales, deceased (the Representation).
2. A declaration that Ms. Shawlee is at liberty to communicate concerning the Representation with the Applicant, as attorney and litigation guardian for Carol, and with counsel for the Applicant.
3. An order pursuant to section 36 of the Power of Attorney Act, RSBC 1996, c. 370. s. 20 (the "Act") that Ms. Rose Shawlee release to counsel for the Applicant copies of all documents arising from the Representation, including but not limited to emails, attachments, letters, enclosures, faxes, memoranda and notes relating to or arising from the Representation, all in complete and unreacted form.
4. A declaration that the solicitor-client privilege arising from the Representation as between Ms. Shawlee and Carol, and between Ms. Shawlee and Ronald Thomas Sales ("Ronald"), remains in force notwithstanding the above orders for:
 - (a) production of Ms. Shawlee's file for the Representation; and,
 - (b) communication between Ms. Shawlee and the Applicant or Applicant's counsel.

and that neither such production nor such communication amounts to a breach, termination, release or waiver of such solicitor-client privilege.

5. A declaration that the Applicant, in his capacity as attorney for Carol, has the authority to waive any privilege that could have been waived by Carol if she had capacity to do so, if he reasonably determines that such waiver is in Carol's best interests.
 6. Costs of this application from Ms. Shawlee.
- [2] No Response has been filed to the Notice of Application. I understand from submissions that it is the intention of the respondent in the Petition to await the outcome of this application prior to filing a Response.

- [3] The underlying petition is for a declaration that the petitioner is the sole beneficial owner of certain real property. The factual basis for the petition is set out as follows:
1. The Petitioner Carol Louise Sales is a retired person who currently resides at the Madison Care Centre located in Coquitlam, British Columbia.
 2. The Petitioner is a person under legal disability due to dementia.
 3. This proceeding is brought on the Petitioner's behalf by her power of attorney and litigation guardian, Edward Thomas Sales, a son of the Petitioner (the "Litigation Guardian").
 4. The registered owners of the Property are currently the Petitioner and the Respondent as tenants in common, each as to an undivided 1/2 interest.
 5. The Respondent is the daughter of the Petitioner. The Petitioner also has two sons, one of whom is the Litigation Guardian herein. The other son, Russell David Sales, is the Petitioner's representative pursuant to a representation agreement under section 9 of the Representation Agreement Act, RSBC 1996. c 405.

The Property

6. From 1956 until 2008, the Property was held in joint tenancy between the Petitioner and her husband, Ronald Thomas Sales ("Ronald").
7. In or about 2008, the Petitioner and Ronald added the Respondent to title to the Property as a joint tenant (the "Transfer").
8. The Respondent provided no consideration for the Transfer.
9. The Petitioner and Ronald's intention in making the Transfer was that:
 - (a) the Respondent would hold title to the Property in trust for the Petitioner and Ronald during their lifetimes;
 - (b) the Respondent would not obtain any beneficial interest in the Property during the lifetimes of the Petitioner and Ronald: and,
 - (c) Probate fees for the Property would be avoided upon the Petitioner and Ronald's deaths.
10. Since the time of the Transfer, the Respondent has not resided at the Property and has paid no expenses for the Property
11. In December 2016, Ronald passed away.
12. On or about January 27, 2017, title to the Property was transferred to the Petitioner and Respondent as surviving tenants.

Respondent's Refusal

13. In the fall of 2017, the Petitioner demanded that the Respondent relinquish her title to the Property by transferring title to the Property to the Petitioner.
14. In breach of her obligation to hold the Property in trust for the Petitioner pursuant to the Transfer, the Respondent has refused to transfer the Property's title back to the Petitioner.
- [4] In support of the Notice of Application the petitioner/applicant relies on an affidavit of Linda DeCicco, legal assistant employed by the solicitors for the petitioner. Paragraphs 3-8 of the affidavit are as follows:
 3. I am advised by our client that Carol Sales, who is the Petitioner by her litigation guardian Edward Sales, along with her husband Ronald Sales, did estate planning with Ms. Rose Shawlee, a solicitor (the "Representation").
 4. In the course of the Representation. Carol Sales made the power of attorney which appoints Edward Sales as her attorney. A true copy of the power of attorney is attached as Exhibit "A" to this Affidavit.
 5. I am advised by our client that he understands that, during the course of the Representation, Carol and Ronald discussed with Ms. Shawlee the intention behind the Transfer.
 6. By a letter dated January 23, 2019, counsel for the Petitioner requested that Ms. Shawlee release her relevant file materials. Enclosed with the letter was a Direction to Release Ms. Shawlee's file, as well as a copy of the executed Power of Attorney to demonstrate the Petitioner's right to those materials. Attached and marked Exhibit "B" to this affidavit is a true copy of the January 23, 2019 letter from Mr. McNeil-Hay to Ms. Shawlee.
 7. Mr. McNeil-Hay and Ms. Shawlee then corresponded by email concerning the request for file materials. Attached and marked Exhibit "C" to this affidavit are true copies of those email communications, along with attachments.
 8. To date, we have not received from Ms. Shawlee any file materials in response to our request, nor any further correspondence since her email of June 7, 2019,
- [5] The power of attorney is entitled "ENDURING POWER OF ATTORNEY". Those words are reproduced in the body of the document three times. It was given on January 8, 2016, appoints Edward Thomas Sales as attorney, and was signed in the presence of Rose Shawlee, the lawyer from whom the documents and other communications are sought.
- [6] The body of the enduring power of attorney is as follows:

I appoint the following person:

my son, Edward Thomas Sales, Forestry Consultant, of 438 McGill Road, Kamloops, British Columbia,

to be my attorney in accordance with the Power of Attorney Act, and authorize my attorney:

- (a) to make decisions on my behalf; and
- (b) to do anything that I may lawfully do by an agent:

in relation to my "Financial Affairs" (as defined in the Power of Attorney Act) which includes my business and property, and the conduct of my legal affairs.

In accordance with the Power of Attorney Act, I declare that:

- (a) my attorney may exercise authority pursuant to this Enduring Power of Attorney while I am capable of making decisions about my Financial Affairs; and
- (b) the authority of my attorney shall continue despite my incapability.

This Enduring Power of Attorney is subject to the following conditions and restrictions: NONE.

This Enduring Power of Attorney expressly excludes the effect of s 56 of the Land Title Act, RSBC 1996 c. 250, and shall be valid notwithstanding the expiration of three years from the date of its execution.

[7] The materials show that on January 23, 2019, Mr. McNeil-Hay sent a letter to Rose Shawlee setting out the background of the dispute. The last two paragraphs of his letter are as follows:

Our current instructions are to investigate the facts and evidence underlying this dispute. We anticipate that during your estate planning work for Ms. Sales, there may have been discussions about the intention behind the 2008 transfer of the Property to Ms. Fisher which may assist our investigation. Accordingly, we have prepared and Mr. Sales has signed the enclosed document directing you to release file materials concerning estate planning work you did for Ms. Sales, and discuss the matter freely with us. (We also enclose a copy of the power of attorney itself.)

Please advise whether you have any concern with releasing your file contents to us on the strength of the enclosed direction. If not, please advise when we may expect to receive the file contents. We undertake to pay reasonable copying charges for those contents (although if feasible for you, we would prefer to receive them electronically).

[8] The letter was accompanied by a direction to release files sent to Ms. Shawlee, signed by the Edward Thomas Sales (Ted Sales). He requests release to Mr. McNeil-Hay of the entire contents of any files Ms. Shawlee has for Carol Louise Sales. He writes:

I, the undersigned, also do hereby authorize you to speak freely about your conversations and communications with Carol Louise Sales (i.e. unbound by any duty of confidentiality or privilege you might otherwise owe) to Tyson McNeil-Hay at Fulton & Company LLP.

[9] Ms. Shawlee initially responded by email saying that she had imminent travel plans and ongoing communications with a practice advisor with respect to the request and did not anticipate being able to respond until late in February.

[10] On February 26, 2019, Ms. Shawlee sent an email stating:

I have been exploring this matter but have been unable to locate authority that would permit disclosure in light of the fact that my engagement was joint between Mr. and Mrs. Sales and my file contents therefore are not distinct to Mrs. Sales".

[11] This is puzzling, because the law has long been settled that joint retainers are not confidential with respect to all of the parties who are involved in that joint retainer. This settled law has been summarized succinctly by The Code of Professional Conduct for British Columbia, (The Law Society of British Columbia: Vancouver 2013).

[12] On February 27, 2019, shortly after receiving Ms. Shawlee's email, Mr. McNeil-Hay sent an email back reproducing the relevant Code of Professional Conduct section which is as follows:

Joint retainers

3.4-5 Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

- (a) The lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[13] There followed over the next several days exchanges of emails in which Ms. Shawlee took the position that a court application would be needed. She referred to commentary from the Law Society Ethics Committee with respect to disclosure.

[14] Ms. Shawlee was understandably cautious when privilege issues arose. She did the right thing in seeking advance from the practice advisor. However, the issue with respect to joint retainers is trite law. It is set out in the extract from the Professional Conduct Handbook cited earlier in these reasons. That is essentially, "codification" of the evidentiary rule set out in Phipson on Evidence, 10th ed., recited by Aikins J. in *Chersinoff v. Allstate Insurance Co.*, 69 D.L.R. (2d) 653, at para. 27 as follows:

This being so, it is my view that the rule in respect to privilege in the case of joint retainer is applicable. The rule is stated in Phipson on Evidence, 10th ed., p. 253, para. 589, a portion of which I now cite:

Joint Retainer. When two parties employ the same solicitor, the rule is that communications passing between either of them and the solicitor, in his joint capacity, must be disclosed in favour of the other -- e.g., a proposition made by one, to be communicated to the other; or instructions given to the solicitor in the presence of the other; though it is otherwise as to communications made to the solicitor in his exclusive capacity.

[15] That decision was appealed and the appeal was allowed in part (see *Chersinoff v. Allstate Insurance Co.*, 3 D.L.R. (3d) 560) but the Court of Appeal decision of Mr. Justice McFarlane did not affect this aspect of Aikens J.'s decision.

[16] At the hearing before me, I was provided with a letter from Ms. Shawlee to Mr. McNeil-Hay dated June 14, 2019. In the letter she advises that she will not be filing an Application Response but requests that the letter be brought to the court's attention, which it was. Paragraph 4 of the letter is as follows:

We trust you appreciate that our concern about production of our clients' file materials results from our professional and ethical obligations to protect privileged communications, and not any desire to be obstructionist or unreasonable.

[17] After that is a paragraph which discusses the Petition and contains the clarification that Ms. Shawlee is not raising issues to suggest that the client's application is being brought for an improper purposes. I find that odd - it is abundantly clear that the application was not brought for an improper purpose.

[18] It illustrates, though, the cautious approach. The petitioners say "overly cautious". Ms. Shawlee, had she made submissions, would probably have said "properly cautious". Ms. Shawlee writes "we had taken a cautious approach in the circumstances".

[19] Whenever issues of privilege arise, a cautious approach is appropriate, but "the circumstances", referring to the matters at issue, do not justify taking an approach beyond that of ensuring that the ability to disclose privileged materials, in a way which maintains the privilege, is being conducted appropriately. In this case, it is.

[20] The letter goes on to cite an October 2014 document from the Law Society's Ethics Committee attached to an email provided to Ms. Shawlee by a Law Society practice advisor. I was not provided with the communication from the practice advisor. I did review the email communications and letters which have been exchanged between Fulton & Company LLP and Ms. Shawlee's firm, Richards Buell Sutton LLP.

[21] In her letter, Ms. Shawlee writes in reference to the October 2014 Law Society Ethics Committee document the following:

In particular, we draw your attention to the final two paragraphs of that document, which state:

If the client, while capable, did not provide clear consent in the enduring power of attorney to provide the confidential or privileged information or documents to the attorney, the lawyer should not provide the information or documents to the attorney.

It is not improper for a lawyer to require an attorney to obtain a court order compelling the lawyer to provide the confidential or privileged information or documents to the attorney if the lawyer is uncertain as to whether there is an identity of interest between the client and the attorney or where the lawyer is unsure if the information requested relates to the client's incapability or an area of authority granted to the attorney.

[22] It seems to me that it would be hard to find clearer consent than was given by Carol Louise Sales to Ted Sales in her Enduring Power of Attorney, which appears to have been drafted by Ms. Shawlee. The third page of the exhibits sets out that it was prepared by Richards Buell Sutton LLP and then there is reference to a file number and the initials "RZS". As noted, it specifically references "conduct of my legal affairs".

[23] As is apparent from the wording cited by Ms. Shawlee, while it is not improper for a lawyer to require an attorney to obtain a court order, it also is not necessarily required that a court order be obtained.

[24] The letter goes on to submit that it is highly inappropriate to seek costs against the solicitor (or firm) for refusing to produce file materials, where the refusal results from concerns regarding solicitor-client privilege.

[25] With that concept I am in general agreement.

[26] However, the letter goes on to suggest that the refusal is also resting on the fact that there was a joint retainer and that the production is sought in the context of a dispute between family members of a former client.

[27] Those comments, in my view, are largely irrelevant to the analysis.

[28] Ms. Shawlee then seeks that the order require the petitioner pay the usual hourly rate of the members of Ms. Shawlee's firm, including the writer, for any time spent reviewing the matters and communicating with respect to the application representation and that the petitioner pay reasonable copy and reproduction costs in relation to file production.

[29] Counsel on behalf of the petitioner submits that in fact, this application was unnecessary, and that Ms. Shawlee/her firm should pay costs of the application.

[30] Sections 20 and 32 of the Power of Attorney Act, R.S.B.C. 1996, c. 370 [Act], are as follows:

20

(6) Subject to subsection (7), a person having custody or control of property belonging to an adult must deliver the property promptly, on request of the adult's attorney, to the attorney.

- (7) A person must not deliver, to an adult's attorney, a will made by the adult if the adult has given instructions to a lawyer or notary public who holds the adult's will, or the will contains instructions, prohibiting delivery of the will to the attorney.

Access to information

32(1) An attorney may request information and records respecting the adult for whom the attorney is acting, if the information or records relate to

- (a) the incapability of the adult, or
 - (b) an area of authority granted to the attorney.
- (2) An attorney has the same right to information and records described under subsection (1) as does the adult for whom the attorney is acting.
- (3) A qualified health care provider or other person who is responsible for assessing the adult's incapability has the right to all the information necessary to enable the qualified health care provider or other person to perform his or her duties under this Act or an enduring power of attorney.
- (4) Any person who has custody or control of information that a qualified health care provider or other person is entitled to under subsection (3) must disclose that information to the qualified health care provider or other person.
- (5) Subsection (4) overrides
- (a) any claim of confidentiality or privilege, except a claim based on solicitor-client privilege, and
 - (b) any restriction in an enactment or the common law about the disclosure or confidentiality of information, except a restriction in section 51 of the Evidence Act.
- [31] In this case, where the power of attorney was prepared by the lawyer from whom the documentation is now requested, the costs of ensuring protection of the former client's privilege, and the due diligence required of the lawyer, are, I think, to be borne by that lawyer as part of her professional responsibilities.
- [32] Requiring an application to be brought, while cautious, it is the best way to ensure that the court can exercise oversight with respect to dealings with privileged documents and communications.
- [33] It is appropriate that the order be directed to the law firm, not Ms. Shawlee.
- [34] Accordingly, I grant the following orders:
1. Ms. Shawlee is at liberty to communicate concerning the representation with the applicant as attorney and litigation guardian for the petitioner, Carol Louse Sales, and with counsel for the applicant.

2. Richards Buell Sutton LLP must release to counsel for the applicant copies of all documents arising from the representation, including but not limited to email, attachments, letters enclosures, faxes, memoranda and notes relating to or arising from the representation, all in complete and unreacted form.
 3. There will be a declaration that the solicitor-client privilege arising from the representation as between Ms. Shawlee and Carol Louise Sales and between Ms. Shawlee and Ronald Thomas Sales remains in form notwithstanding the above orders for:
 - (1) Production of Richards Buell Sutton LLP's file for the representative; and
 - (2) Communication between Ms. Shawlee and the applicant or applicant's counsel.
 4. There will be a declaration that the applicant, in his capacity as attorney for Carol Louise Sales, has the authority to waive any privilege that could have been waived by Carol Louise Sales if she had capacity to do so, if he reasonably determines that such waiver is in Carol Louise Sales' best interests.
- [35] The petitioner is entitled to its costs of this application as costs in the cause. It is not entitled to costs from Ms. Shawlee or Richards Buell Sutton LLP. Richards Buell Sutton LLP and Ms. Shawlee are not entitled to be paid for dealing with these matters. They were presumably paid when the power of attorney was granted. There are some aspects of being a professional that "go with along with the job", and for which the professional is not entitled to be remunerated. In the circumstances of this case, Ms. Shawlee described in her letter as a "cautious approach". That goes along with the professionalism attended upon being a barrister and solicitor. The costs of that cautious approach ought not to be borne by the petitioner.
- [36] The petitioner is to pay Richards Buell Sutton LLP's reasonable copying/reproduction costs in relation to file production, with liberty to apply to have those costs assessed by a registrar if issues arise.

"Master R.W. McDiarmid"

MASTER MCDIARMID

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