

CANADA / JUDGMENT

Schwarz & Co. v. Funaro et al

2006 BCSC 122

COURT

Supreme Court of British Columbia

DECIDED

25 January 2006

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2006 BCSC 122 Schwarz & Co. v. Funaro et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The Legal Profession Act

Citation:

Schwarz & Co. v. Funaro et al,

2006 BCSC 122

Date: 20060125

Docket: L93490

Registry: New Westminster

Between:

SCHWARZ & CO. LAW CORPORATION

SOLICITORS

And

MICHELE L. FUNARO and

B.C. HANDCRAFTED STONE 2002 LTD.

CLIENT

Before: District Registrar Sainty

Reasons for Decision

Counsel for the Solicitors

J.M. Schwarz

Counsel for the Clients

D.H. Goodwin

Date and Place of Trial/Hearing:

December 29, 2005

New Westminster, B.C.

[1] This matter came before me as a review under the Legal Profession Act S.B.C. 1998, c.9 of unpaid invoices of Schwarz & Co. Law Corporation (the "solicitors") in respect of legal work performed by them on behalf of Mr. Michele Funaro and his company, B.C. Handcrafted Stone 2002 Ltd. (the "clients"). Pourazad. Three invoices (collectively the "Accounts") are involved in this review, as follows:

Date

Fees

Taxable Disbursements

Non-

Taxable Disbursements

GST

PST

Total

July 20, 2004

\$4,637.50

\$344.80

\$377.60

\$348.76

\$347.81

\$6,056.47

September 29, 2004

\$3,430.00

\$191.47

\$109.80

\$253.50

\$257.25

\$4,242.02

June 20, 2005

\$2,082.50

\$108.87

\$0.00

\$153.40

\$145.78

\$2,490.55

Total

\$10,150.00

\$645.14

\$487.40

\$755.66

\$750.84

\$12,789.04

- [2] A fourth invoice dated July 23, 2004 was attached to the appointment in the amount of \$480.77 (the "Chipperfield account"). That invoice (which remains unpaid) related to litigation involving the clients "Chipperfield". At the commencement of the hearing, the parties consented to that invoice being allowed by the registrar in the amount of \$443.32.
- [3] The client has paid the solicitors a total of \$4,000.00 towards the Accounts. The amount outstanding and claimed by the solicitors in this assessment is therefore \$8,789.04.
- [4] Mr. Schwarz has been in general practice for some 25 years and for 20 of those years Mr. Funaro and several of his companies have been his clients. Mr. Schwarz testified that Mr. Funaro always seemed to have "something on the go" and he often would be asked to do legal work on his behalf. From time to time Mr. Funaro sought other counsel but would more often than not bring his legal matters to Mr. Schwarz.
- [5] Sometime in 2002 or 2003, Mr. Funaro contacted Mr. Schwarz about a failed partnership with a Ms Ferron (phonetic). Ms Ferron sued Mr. Funaro. That matter went to trial and an accounting has been ordered which has not yet been completed.

- [6] After the partnership with Ms Ferron failed, Mr. Funaro apparently entered into a similar "partnership" with a Mr. Wissman. The partners were to produce and market concrete art products. Mr. Schwarz testified that Mr. Funaro told him that he (Funaro) and B.C. Handcrafted Stone 2002 Ltd. (the "Company") were to contribute expertise, premises, certain concrete moulds and some equipment to the new business, while Mr. Wissman (who had been operating his own concrete art business to that point) was to cease operations of that existing business and contribute his expertise, some equipment and moulds to the operation of the new business.
- [7] When Mr. Funaro came to see Mr. Schwarz about the Wissman matter, he told Mr. Schwarz that Mr. Wissman had removed partnership property from the business' premises which he wanted returned. He instructed Mr. Schwarz to commence an action for breach of the partnership agreement, damages and an order that the property be returned to the business premises.
- [8] Mr. Schwarz prepared a writ of summons and statement of claim. He then proceeded to court, without notice, on an injunction application. When he attended in court, the court refused to hear the application, insisting that notice be given to Mr. Wissman (although the court did grant "short leave" for the hearing of that application).
- [9] The materials were served and the motion was set to be heard before Bauman, J. On the day of the hearing, Mr. Wissman brought a cross-motion seeking that items he had left at the partnership's premises be returned to him. Bauman, J decided that there was no issue between the parties that could not be resolved by an accounting and an award of damages. He made an order that Mr. Wissman retain the items in his possession and that he be entitled to remove the additional items he was seeking from the partnership premises.
- [10] Shortly after that application was heard, the solicitors sent their first account to the clients. The clients did not complain about or question the account, although they were apparently not happy with the results. The clients wanted to appeal the order. Mr. Schwarz advised against that. Shortly thereafter, Mr. Funaro brought Mr. Schwarz some documents that he had not previously provided which Mr. Funaro said were evidence of the fact that the partnership had purchased at least one of the items (a cement mixer) that Bauman, J had ordered returned to Mr. Wissman.
- [11] Mr. Schwarz prepared an application (on the basis of this new evidence) and went before Singh, J seeking a variation of Bauman, J's order. Singh, J refused to reconsider the issue but directed that the parties re-attend before Bauman, J for reconsideration.
- [12] Bauman, J was not scheduled to sit in New Westminster for some time so the matter was set before him in Vancouver. His Lordship was not satisfied with the new evidence presented as it was not clear from the documents provided that either Mr. Funaro or the Company had paid for the mixer. He determined that the issue was one of credibility and, once determined, could be adequately addressed by an accounting and monetary compensation.

- [13] Subsequent to the re-attendance before Bauman, J, there was a great deal of correspondence between counsel to arrange when Mr. Wissman might attend at the premises to retrieve the items ordered to be given to him. Mr. Funaro did not cooperate and Mr. Wissman obtained a writ of delivery in respect of the items. He sent a bailiff to retrieve them. Mr. Funaro then tried to assert a right of distress in respect of the items and hired his own bailiff. I did understand that Mr. Schwarz did actively not participate in this process, although he did have discussions with the client about the appropriateness of his actions.
- [14] Part of Bauman, J's order was that an accounting be done in respect of the partnership. Mr. Schwarz had numerous discussions with counsel for Mr. Wissman, and with Mr. Funaro, regarding how to get the accounting underway. The parties could not agree on an accountant and I understand that, as yet, no accounting has been performed.
- [15] Mr. Schwarz sent accounts to the client throughout this matter. Those accounts were rendered on an hourly basis at \$175.00 per hour. Mr. Schwarz testified that his normal hourly rate for matters of this nature is \$225.00 per hour but, based on his long-term relationship with the clients, accounts on the Wissman matter were rendered on the basis of \$175.00 per hour.
- [16] Mr. Schwarz does not use an electronic time recording method. He simply notes in his file the time expended on a matter and prepares his accounts from a review of the file. The Accounts noted the total time expended by Mr. Schwarz but did not provide any further detailed breakdown of time spent on each specific task.
- [17] At no time did Mr. Funaro complain to Mr. Schwarz about the work performed or the costs.

The Issues

- [18] In respect of the fees charged by the solicitors, the clients' main complaints with respect to the Accounts may be summarised as follows:
- (a) The solicitors should not have proceeded to court on this matter in the face of a previous finding in the Ferron matter against Mr. Funaro's credibility;
 - (b) There was insufficient evidence firstly to bring the initial application without notice and, secondly the application for a rehearing, firstly before Singh, J and subsequently Bauman, J;
 - (c) The results achieved were poor;
 - (d) The lawyer failed to consider Mr. Funaro's level of education (minimal) and failed to ensure that the client understood the strengths and weaknesses of his case;
 - (e) Mr. Schwarz failed to prepare an outline, written argument or brief of authorities in respect of any of the court attendances; and
 - (f) The fees are simply too high.

[19] In addition, in respect of the disbursements, the clients questioned the following:

- (a) The administration and accounting fees of \$35.00 each charged on each of the Accounts;
- (b) The faxes charged at \$1 per page;
- (c) The number of photocopies made resulting in the charges listed;
- (d) On the June account, two charges for \$62.00 each for apparently filing two Notices of Motion when only one was filed;
- (e) Mileage charges at \$0.44 per kilometre.

The Law

[20] A review of solicitors' accounts is conducted in accordance with the provisions of the Legal Profession Act, S.B.C. 1998, c. 9. In determining the amount of fees properly chargeable by the solicitors to the clients, I must keep in mind the factors set out in s. 71(4) of that Act which provides as follows:

71(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

- (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.

[21] I intend to consider each of these factors as they apply to this case and then advise as to the amount of the fees which in my opinion are reasonable in the circumstances.

[22] Complexity: The issues involved were not particularly complex, difficult or novel. The solicitors had acted for the clients on a similar matter. Bauman, J held (more than once) that the issues could be resolved by an accounting and payment of damages.

[23] Counsel's skill: Mr. Schwarz testified that he has some 25 years at the Bar and that his practice is a "general" one. He had acted for Mr. Funaro for several years in respect of a variety of matters, including matters with similar issues. In my opinion, this case did not require any sophisticated level of skill or knowledge.

- [24] Mr. Goodwin argued that Mr. Schwarz did not exhibit any skill, specialised knowledge or expertise in the conduct of this matter. In fact, he intimated that Mr. Schwarz conduct of the matter was sorely lacking, particularly in proceeding without sufficient evidence. Mr. Schwarz' reply to this was that he did what his client asked him to do, using the evidence that he had.
- [25] In my view, Mr. Schwarz should have exercised more caution in proceeding firstly with the filing of the without notice application and then in respect of the further attendance before Justices Singh and Bauman. I was not satisfied on the evidence before me that Mr. Schwarz detailed to his clients the documentary evidence that might be required to prove their case or further that he fully explained to Mr. Funaro the costs/benefits of commencing the action and/or returning to court to deal with the issue of the cement mixer, particularly in the face of sketchy documentary evidence. Mr. Schwarz' explanation of "we went with what we had" was, to me, somewhat vague and unresponsive. Further, in respect of the second application before Bauman, J, Mr Schwarz was well aware of his Lordship's decision that the matter could be determined by an accounting and assessment of damages. There did not seem to be any particular reason for returning to court, although Mr. Schwarz did suggest that Mr. Funaro was insistent on retaining the cement mixer.
- [26] Further, there was no evidence before me that Mr. Schwarz carefully considered the clients' case and prepared extensively for the various applications. He prepared no outline, no written argument, and attended without a brief of authorities. In my view, it would have been prudent for Mr. Schwarz to have prepared these items which are most often invaluable to the judicial officer hearing a matter.
- [27] I do not, however, agree with Mr. Goodwin's submissions that the client was completely unsophisticated and uninformed. Mr. Funaro was a long-term client of Mr. Schwarz and had been involved in similar litigation immediately prior to the litigation with Mr Wissman. Further, the client was aware of the steps being taken by Mr. Schwarz - he signed the affidavits relating to the court applications. He could have questioned Mr. Schwarz more fully about the rationale for the various applications.
- [28] Counsel's Character and Standing: Mr. Schwarz' character and standing in the profession was not at issue in this hearing.
- [29] Amount Involved: Neither party provided any testimony in respect of the amount involved in the litigation. The Statement of Claim filed by the clients in the Wissman litigation seeks special damages of \$556,654.13.
- [30] Hourly Rate: There is no retainer agreement but the solicitor billed the client in accordance with past practice - at \$175.00 per hour. That hourly rate (of \$175 per hour) is well within the range for lawyers with his experience in general practice in the Fraser Valley area.

- [31] Time expended: Although each of the Accounts contains a notation of the number of hours spent during the time period covered by the Account, no evidence was led regarding the amount of time Mr. Schwarz spent on each specific task noted on each account. During the period May 4 - July 20, 2004, Mr. Schwarz apparently spent 26.5 hours on the clients' matters. Between July 20 and September 29, 2004, Mr. Schwarz spent 19.6 hours on the clients' matters and from September 30, 2004 to June 20, 2005, he spent a further 11.9 hours. I therefore calculate that Mr. Schwarz spent a total of 58 hours on this matter for the client.
- [32] For the time expended, Mr. Schwarz commenced the lawsuit on the clients' behalf, he appeared in court on five occasions (and prepared and responded to materials in respect of each of those applications), he corresponded with the client and with opposing counsel, dealt with a Labour Standards matter involving the Company and negotiated a settlement of costs awarded against the client.
- [33] In my view, there was a great deal of time recorded to this matter. Much of that time was in relation to the court applications - firstly the without notice application which was not allowed to proceed (although short leave was granted) and which subsequently did not proceed on the date fixed due to Mr. Wissman's cross-application; secondly, the return to court before Singh, J and subsequently Bauman, J (to deal with the cement mixer).
- [34] The clients must have had some idea as the matter progressed of the time being expended by Mr. Schwarz on their matters. The Accounts clearly indicate the time expended during the time period of Account. Further, Mr. Funaro was not, in my view, an unsophisticated client. He has been involved in litigation before and was aware of the time needed to bring matters before the court. He brought the documentation to Mr. Schwarz about the cement mixer and asked that Mr. Schwarz return to have the matter reconsidered. He must have known that that request would take time and effort and result in fees payable.
- [35] Mr. Schwarz billed the client on a strict hourly basis. No consideration appears to have been given to the factors set out in the Legal Profession Act in establishing a fee.
- [36] Importance to Client: This matter was of obvious importance to the client.
- [37] Results Achieved: The results were not good. The clients were unsuccessful on each of their applications. Mr. Schwarz submitted that all of the work done was reasonable and necessary and in accordance with the clients' instructions. He also submitted that there is no guarantee of success in legal matters and that, in each instance, he believed the clients' applications would be successful. He suggested that he was focussed on the merits of the case itself, as much as on the applications, individually. He further noted that he did achieve success on the first application before Bauman, J when his Lordship provided a solution to the matter - an accounting - which if followed would have brought the litigation to a timelier conclusion.

- [38] Mr. Goodwin submitted that the outcomes were particularly unfavourable. The work was not satisfactory in that it was based on insufficient materials and was bound to fail. Further, the time on the last account relates to enforcement of the Orders made and correspondence regarding the accounting, all of which went nowhere. He argued that it is counsel's responsibility to guide an action and Mr. Schwarz failed in that responsibility here.
- [39] In my view, the results were not what one might have hoped for in litigation of this nature. In my further opinion, it was unwise to bring the second application before Singh, J (and eventually Bauman, J) in respect of the cement mixer, although I find on the evidence before me that the client did instruct Mr. Schwarz to bring that application. Perhaps Mr. Schwarz should have been more persuasive in his advice to the clients that the application was ill-conceived, particularly in light of Bauman, J's determination that the matter could be dealt with by an accounting, and, more importantly as the documentary evidence provided by the client was clearly inadequate for his Lordship to draw a conclusion that either the Company or Mr. Funaro had paid for it, especially as the receipt was in Mr. Wissman's name.

Conclusion re Fees

- [40] At an assessment of a lawyer's bill under the Legal Profession Act, I must consider all of the circumstances of the matter, including the factors I have enumerated and commented on above. No one factor is more relevant than any other to my determination. All factors must be considered and weighed together equally. Charging simply on a basis of hours spent is not the main factor which determines whether a bill is proper.
- [41] Mr. Schwarz submitted that the fees are reasonable and should be allowed in the amount of the Accounts (\$10 - 150.00). Mr. Goodwin submitted that the entirety of the Accounts (inclusive of disbursements and taxes) should be reduced to the sum of \$4,000.00 (the amount the clients have paid to the solicitors to date in respect of the Accounts). In my opinion, the amount billed was not proportionate to the services received. The fees are out of line for the work done, but not to the level suggested by Mr. Goodwin. In my opinion, the appropriate fees that should have been billed to the clients for the work done by the solicitors are \$8,000.00. In setting this amount, I have taken into account all of the factors set out in s. 71(4) of the Legal Profession Act, each of which I have reviewed and discussed above.

Disbursements

- [42] I set out above (in paragraph 19), the disbursements challenged by the clients.
- [43] In respect of the "Administration & Accounting" fee of \$35.00 charged on each of the Accounts, Mr. Schwarz testified that he charges that fee to cover "odds and sods", such as postage, miscellaneous office supplies, file folders, tabs, etc. In my opinion, many of the items contained in this heading are, essentially, items of overhead and subsumed in the lawyer's hourly rate. Without a written retainer allowing a solicitor to charge for these specific disbursements, in my view they should not be allowed, although some recompense

should be given to the solicitors for those items which would normally be allowed on a review of a lawyer's bill, such as postage. I would allow a disbursement of \$10.00 per Account under this heading.

- [44] Regarding the faxes, Mr. Goodwin submitted that \$1.00 per page for faxes is simply too much. The client was charged \$87.00 for faxes on the first account (dated July 20, 2004), \$65.00 for faxes on the second account (September 29, 2004) and \$64.00 on the last account (June 20, 2005) for a total of \$216.00. In 444628 B.C. Ltd v. Hobbs (1998), 79 A.C.W.S. (3d) 837, [1998] B.C.J. No. 1095 (S.C., Registrar), it was noted that review officers "are in the habit of allowing one dollar for faxes sent and received" (paragraph 12, Q.L.). I am unable to determine on the evidence before me the number of faxes sent and received but, in my submission, \$1.00 per page is excessive (although I agree that \$1.00 for each fax sent and received, regardless of the number of pages is reasonable). I will allow a total of \$100.00 for faxes.
- [45] The client also questioned the numbers of photocopies charged, specifically as there was no evidence as to how the number of copies charged was arrived at. When questioned, Mr. Schwarz testified that when accounts are rendered, his assistant reviews the file and counts the number of copies made since the previous account. Mr. Schwarz also noted that this is consistent with previous accounts in respect of other matters handled for Mr. Funaro. Copies were billed to the client at \$.30 per page. That amount is reasonable. The number of copies totalled 844 (546 on the first account, 270 on the second and 28 on the third). In my opinion, that is a reasonable number of photocopies given the number of court appearances and the amount of correspondence on this file. I will allow the photocopies as claimed.
- [46] The clients also questioned the mileage charged at \$0.44 a kilometre. Mr. Schwarz testified that that is the amount allowed by the Legal Services Society for mileage and, as such, is reasonable. I agree and will allow the mileage as claimed.
- [47] The last disbursements questioned were in respect of an "agent's fee" of \$33.50, and a filing fee of \$62.00 allegedly for a Notice of Motion, charged on June 14, 2004 as noted on the first Account. When questioned about this disbursement, Mr. Schwarz acknowledged that a portion of that fee related to the agents obtaining copies of documents from the registry file as his office neglected to include them with the documents sent for filing. The additional fee charged for this service was \$16.00. The balance appears to relate to filing documents with the court registry. As for the \$62.00, Mr. Schwarz could not explain why two Notices of Motion were required. I had the benefit of having the Wissman litigation file before me at the hearing. I reviewed it and could only find one Notice of Motion filed by the plaintiffs (client). In my opinion, these disbursements should not be allowed.

Summary

- [48] The taxable disbursements totalled \$645.14. I have reduced those taxable disbursements by a total of \$224.50 consisting of a \$75.00 reduction for the "administration and accounting" charges ($\$35.00 \times 3 = \$105$ less \$30.00 allowed (\$10.00 per account) = \$75.00), a \$116.00 reduction for faxes (\$216.00 total faxes less \$100.00 allowed = \$116.00) and the \$33.50 reduction for the agent's filing fee referred to above. It follows that a reduction of \$15.72 must also be taken to reflect the taxes attributed to those disbursements. The taxable disbursements are therefore reduced by a total of \$240.22, leaving total taxable disbursements allowed of \$404.92. Non-taxable disbursements total \$487.40. I have disallowed the \$62.00 filing fee for the unexplained Notice of Motion. Non-taxable disbursements therefore total \$425.40. Accordingly, the total disbursements allowed, inclusive of applicable taxes is \$830.32.
- [49] Regarding the fees, the solicitor is entitled to \$8,000.00 in fees, plus taxes on those fees. The GST on the fees totals \$560.00. The first two accounts were rendered at a time when PST of 7.5 percent was chargeable on legal fees. The last account was rendered after the reduction of PST to 7 percent. I have not specifically reduced any one account over the other. In my view it is appropriate to apportion the reduction to all of the Accounts. Specifically, the fees charged on the first account (July 20, 2004) would be reduced from \$4,637.50 to \$3,655.16. On the second account (September 29, 2004) fees would be reduced from \$3,430.00 to \$2,703.48. In respect of the third account (June 20, 2005), fees would be reduced from \$2,082.50 to \$1,641.36. Accordingly, PST of 7.5 percent is payable on fees of \$6,358.64 (\$476.90) and of 7 percent on fees of \$1,641.36 (\$114.90).
- [50] Total fees and taxes allowed is therefore \$9,151.80 (\$8,000.00 + \$560.00 (GST) + \$476.90 (PST on the first and second account) + \$114.90 (PST on the third account) = \$9,151.80).
- [51] The total allowed in respect of the Accounts is \$9,982.12 (\$9,151.80 (fees, inclusive of GST and PST) + \$830.32 (disbursements inclusive of GST = \$9,982.12)). The amount consented to in respect of the outstanding Chipperfield Account (\$443.32) must be added to that amount such that the total allowed on this review is \$10,425.44.

Interest

- [52] Section 73(3) of the Legal Profession Act, *supra*, provides as follows:
- (3) If a registrar gives a certificate under subsection (2), the registrar must add to the amount certified an amount of interest calculated
- (a) on the amount the registrar has allowed the lawyer for fees, charges and disbursements, exclusive of the costs of the review,
- (b) from the date the lawyer delivered the bill to the date on which the certificate is given, and

- (c) at the rate agreed to by the parties at the time the lawyer was retained or, if there was no agreement, at the same rate the registrar would allow under the Court Order Interest Act on an order obtained by default.
- [53] I am not aware of any agreement made between the solicitors and the clients with respect to interest. Accordingly, the solicitors are entitled to interest on the unpaid balance of the Accounts as allowed at the rate set out in the Court Order Interest Act, R.S.B.C. 1996, c. 79 from the date the Accounts were rendered to the date of the certificate. That interest should be calculated on a pro rata basis, i.e. commensurate with the reductions being taken on each account as I have out in paragraph 49.

Costs

- [54] With respect to costs, s. 72 of the Legal Profession Act provides as follows:

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.

- [55] The Accounts reviewed totalled \$12,789.04. I have allowed \$9,872.12 in respect of the Accounts. I have therefore reduced the Accounts by a total of \$2,806.92. One-sixth of the Accounts is \$2,131.51. Absent special circumstances (and I do not find any here), the clients are therefore entitled to their costs of this review. I have not included the Chipperfield account in this calculation as the parties consented to the amount of that account at the commencement of the hearing.

- [56] Section 72(2) of the Legal Profession Act, *supra*, provides:

- (2) On a review under this Part, the registrar may

...

- (b) summarily determine the amount of the costs of the review and add it to or subtract it from the amount shown on the certificate.

- [57] In order to assist with the final resolution of this matter and to avoid an additional court appearance to assess costs, I am summarily fixing the clients' costs of this review at the sum of \$750.00. In fixing this amount, I am mindful of the fact that this hearing occupied one-half day before me. I have also considered the fact that the clients did not incur disbursements to file the appointment or to serve the solicitors, this being an appointment brought by the solicitors, not the clients.
- [58] The solicitors may prepare a certificate with an interest calculation attached, and forward it to me for my signature. That certificate should also credit the \$4,000.00 already paid by the clients towards the Accounts.

"District Registrar K. Sainty"

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