
CANADA / JUDGMENT

Spraggs & Company v. Carnaby

2015 BCSC 1504

COURT

Supreme Court of British Columbia

DECIDED

26 August 2015

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2015 BCSC 1504 Spraggs & Company v. Carnaby

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Spraggs & Company v. Carnaby,

2015 BCSC 1504

Date: 20150826

Docket: S147788

Registry: New Westminster

Between:

Spraggs & Company

Plaintiff

And

Stuart Roy Carnaby

Defendant

Before: District Registrar Nielsen

Reasons for Decision

Counsel for the Plaintiff:

P. Miller

Defendant Appearing in Person:

S. Carnaby

Place and Date of Hearing:

New Westminster, B.C.

October 7, 2014

January 5, 2015

August 18, 2015

Place and Date of Decision:

New Westminster, B.C.

August 26, 2015

introduction

- [1] This is an application by the lawyer to have his bill reviewed and to obtain a certificate for fees pursuant to the provisions of the Legal Profession Act, SBC 1998, c. 9.

background

- [2] The lawyer specializes in personal injury litigation and has practised exclusively in this field for the past 10 years of his career. The lawyer was retained by the client to pursue a legal action for damages following a motor vehicle accident. The retainer was in the form of a contingency fee agreement, signed on May 28, 2010, which provided for a 33 and 1/3 percent fee. The contingency fee agreement states in part:

IN CONSIDERATION OF THE PREMISES and of the following conditions, the parties agree as follows:

1. Spraggs agrees to undertake the carriage of the case for a fee based upon the total recovery obtained by way of award of the Court or by way of settlement exclusive of taxable costs and disbursements.
2. The Client agrees to pay Spraggs on the following basis:
 - a) Spraggs shall receive all disbursements and costs incurred by the firm; and
 - b) Spraggs shall receive a fee that shall represent 33 1/3% of the recovery exclusive of taxable costs and disbursements to the Client.

TOTAL = 33 1/3%

3. If Spraggs is requested to no longer act in the matter, then he shall be paid a final fee based upon the final settlement or recovery made exclusive of taxable costs and disbursements based upon the percentage of fee as outlined in paragraph 2 above, and in accordance with the principles as laid down in *McQuarrie Hunter v. Foote et al*, 41 B.C.L.R. 1983.

4. The Client acknowledges that Spraggs has brought to their attention Part 8 of the Law Society Rules, and, in particular, Section 8-4, which is attached hereto.
5. The Client acknowledges that they must pay G.S.T. and P.S.T. on Spraggs' fees and disbursements.
- [3] The lawyer is the second lawyer retained on the client's behalf. The first lawyer was also retained on a contingency fee basis. The file was transferred to the lawyer on the date the contingency fee was signed.
- [4] Upon transfer of the file, the lawyer reimbursed the first lawyer \$7,743.70 for disbursements incurred. Both lawyers have agreed to share the 33 and 1/3 percent contingency fee on a quantum meruit basis.
- [5] The client was injured in a motor vehicle accident that occurred on April 27, 2009. At the time of the accident he was 49 years old, unemployed, and on social assistance. In the circumstances, a contingency fee agreement was the only way in which the client could access the services of a lawyer.
- [6] At the time of the motor vehicle accident, the client had a pre-existing benign brain tumor which was unknown to him. The motor vehicle accident led to the discovery of the tumor which may, ironically, have saved the client's life. According to the medical evidence, if it were not for the fact that the impact mildly dislodged the tumor, facilitating its discovery and removal, the client may have died.
- [7] To complicate the matter further, the motor vehicle accident was categorized as a low-velocity impact collision by ICBC, as there was less than \$500 in damage to the client's vehicle.
- [8] At the time of the motor vehicle accident, the client was on social assistance and had been for an extended period of time prior to the collision. Although on social assistance, the client had planned to start a power washing business. A future loss of income claim was advanced on this basis.
- [9] The lawyer testified that his work and time devoted to the plaintiff's case included numerous meetings and phone and written communications with the client throughout the period of the lawyer's retainer. In addition, the lawyer provided "no interest compassionate loans" to the client. The lawyer filed the Part 7 Writ (the Writ and Statement of Claim commencing the action had already been filed by the prior lawyer). The lawyer arranged for medical examinations and reports by experts, obtained social services records, Workers Compensation Board records, and various clinical records. A Freedom of Information and Protection of Privacy Act request was also made to ICBC. The lawyer performed the necessary legal research and analysis of the claim, a risk analysis, the scheduling of a judicial management conference, and the scheduling of the trial.

- [10] The lawyer communicated with the ICBC adjuster and defence counsel throughout the course of the proceeding. Eventually, settlement discussions took place resulting in the defendant advancing an offer to settle of \$100,000 plus taxable costs and disbursements, by letter dated April 6, 2011.
- [11] The lawyer testified that the number of the hours invested in the claim by him and his Claims Manager exceeded 150, exclusive of the time spent by his other staff, which he opined exceeded 100 hours.
- [12] The lawyer described the client as an "extra care client", needing more attention and assistance than might otherwise be required. The lawyer gave evidence of the client being belligerent while in his offices and making sexual comments to his staff.
- [13] The lawyer was of the view that the client would not make a good witness at trial. He was also of the opinion that there would be difficulties in proving both causation with respect to the client's injuries, and the future wage loss claim based upon the proposed pressure washing business. The lawyer's opinion was that the settlement offer of \$100,000 plus taxable costs and disbursements was generous and "fell at the deep end of the pool".
- [14] The lawyer wrote to the client and met with him to explain the offer and canvass the relative merits and pitfalls of the claim. The lawyer testified that during the meeting the client accused him of being "without honour" and that he had previously "promised he'd get a recovery of \$3.0 million dollars". The lawyer denies he made any such promise and he states he advised the client to seek the advice of other counsel.
- [15] Following the meeting, the relationship between the lawyer and the client began to deteriorate. The client testified that on September 9, 2011, he advised the lawyer he wanted him "off the case". The client further testified that he attended the lawyer's office September 12, 2011, and confirmed he wanted the lawyer off the case. The lawyer wrote to the client September 13, 2011, confirming the client's wishes and provided a "strong recommendation that the client obtain legal advice". The letter enclosed a Notice of Intention to Act in Person for the client's signature, which the lawyer advised he would file upon receipt of the signed document.
- [16] When the lawyer felt that the client had lost confidence in him by requesting the termination of the solicitor-client relationship and refusing to communicate, or sign the Notice of Intention to Act in Person, a Notice of Intention to Withdraw as Lawyer was served on the client October 26, 2011, and finally, a Notice of Withdrawal of Lawyer was filed on November 7, 2011. It should be noted that this is not a case where the lawyer quit. It is a case where the client dismissed the lawyer, in no uncertain terms, following a breakdown in the solicitor-client relationship.

- [17] The client did not subsequently retain another lawyer, although he did consult with other lawyers concerning this possibility. The client testified that none were willing to act on his behalf. The client blamed this eventuality on the lawyer, and alleged a conspiracy in this regard.
- [18] The defendants brought an application for summary judgment which was heard on April 26, 2012. The client was unrepresented at the hearing. He was awarded a total of \$50,000 in damages, which the court described as "generous". No costs were awarded.
- [19] Upon being advised of the judgment, the lawyer presented his bill for 33 and 1/3 percent of the \$50,000 judgment awarded, being \$16,666.65.
- [20] The lawyer also sought reimbursement for all of his disbursements totalling \$17,047.98. The total bill presented to the client was \$35,714.65. As the client did not respond to the demand for payment, an appointment to review the bill and obtain a certificate was filed under the provisions of the Legal Profession Act.
- [21] There was considerable difficulty in locating and serving the client with the appointment. The client refused to provide an address for delivery. An order dated April 1, 2014, was made by Master Keighley which provides:
1. Pursuant to Rule 4-4 of the Rules of Court, the Plaintiff may serve the self-represented Defendant, Stuart Roy Carnaby, by an alternative method in the following matter:
 - a. Mailing copies by "regular" mail to his last known address of []
- and that such service shall be deemed good service upon the Defendant, Stuart Roy Carnaby.
- [22] A pre-hearing conference took place on June 30, 2014, which was attended by both the lawyer and the client. The following orders were made at the pre-hearing conference:
- (1) that the June 30, 2014 hearing be adjourned generally;
 - (2) that the Solicitor/Plaintiff provide further written particulars of the time spent and the results obtained for the Client/Defendant during the retainer as counsel by July 21, 2014;
 - (3) that the Defendant/Client provide written objections to the statement of account of the Solicitor/Plaintiff by August 18, 2014;
 - (4) that the Solicitor/Plaintiff set a further pre-hearing conference to occur after August 18, 2014; and
 - (5) that the Solicitor/Plaintiff use [] as the address for service of the Client/Defendant.
- [23] Despite the order that the claimant was to provide written objections to the statement of account by the lawyer, the client failed to respond.

[24] During the course of the review of the lawyer's bill, the client made general objections to the lawyer's account, centering on alleged promises that his case was worth \$3.0 million and that he should have received \$2.0 million after the deduction of the lawyer's fee. The client also made disparaging and insulting comments towards the lawyer without any evidence or justification in support.

analysis

Examination of the Agreement

[25] Section 65 of the Legal Profession Act allows a lawyer or a law firm to enter into an agreement with any other person, requiring the payment for services provided or to be provided.

[26] Section 68 of the Legal Profession Act allows a person who has entered into an agreement with a lawyer to have the agreement examined and cancelled if the agreement was unfair or unreasonable at the time it was entered into. However, section 68(3) of the Legal Profession Act provides a strict limitation period for such a review which has not been met in this case. The client's failure to properly challenge the agreement within the time provided by the Legal Profession Act is sufficient to dispose of this issue.

[27] Although the client did not specifically challenge the agreement by filing an appointment within the specified limitation period, he alleged he did not read, understand, or consent to the terms of the agreement. The client did admit he signed a contingency fee agreement, but testified that the signature on the agreement entered into evidence was not his and was forged after the fact. Given the client's allegations, the agreement was reviewed.

[28] The test for determining whether an agreement is fair and reasonable was established in *Commonwealth Investors Syndicate Ltd. v. Laxton*, 50 BCLR (2d) 186 (BCCA), leave to appeal refused [1990] S.C.C.A. No. 479 QL. The Court stated at pages 198 and 199:

In our opinion s. 99 contemplates a two-step enquiry.

The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents. The enquiry would include whether, at the time the contract was entered into, there was any lack of capacity on the part of the client, whether there was any undue influence exercised or unfair advantage taken by the solicitor, whether any mistake was made, or whether any other flaw arose in the formation of the contract which would indicate that the client did not understand and appreciate its content. The onus would be upon the solicitor to satisfy the foregoing requirements of the enquiry. Should any of those be found, the contract would not be "fair" in the sense of the statute and *Re Stuart*. The court would declare the contract cancelled, or would modify it, or the bill could be remitted for taxation.

The second enquiry, assuming the contract is found to be fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered, and each factor may be the subject of professional evidence to assist the judge in determining the reasonableness of the fee in the particular circumstances.

- [29] This approach continues to be endorsed by the court. See *Mide-Wilson v. Hungerford Tomy Lawrenson & Nichols*, 2013 BCCA 559, at paragraphs 22 and 23.
- [30] In considering the fairness issue, the Registrar may consider whether there was duress, misrepresentation, breach of fiduciary duty, and whether the client had the benefit of a review of the agreement with a lawyer at the firm.
- [31] In the present case, I accept the lawyer's evidence that the client had the contract explained to him by the lawyer prior to it being signed by the client. I also accept the lawyer's evidence that the signature on the agreement was that of the client. There are no factors which would indicate that the contingency fee agreement was unfair.
- [32] Having found the contingency fee agreement to be fair, the inquiry turns to a determination of reasonableness. The factors to be considered in determining reasonableness include the complexity of the case, the difficulty in establishing liability, the amount likely to be recovered, the time involved in completing the work, the potential risk to the lawyer of not recovering the fees or disbursements, and the special knowledge required by the lawyer.
- [33] In the present case, liability for the motor vehicle accident was admitted. However, the complexity of the client's medical condition, the speculative nature of the future income loss claim, the difficulty surrounding the issue of causation, the fact that the claim was a low-velocity impact, the impecunious state of the client, and the very real risk to the lawyer who carried the disbursements, advanced interest free compassionate loans, and took the risk of non-recovery, all combined to make the agreement reasonable in the circumstances.
- [34] This case is a classic example of the adage that "contingency fee contracts provide a key to the courthouse for impecunious plaintiffs" (see *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at para. 3). The importance of contingency fee contracts giving access to justice was noted in *Mide-Wilson*, *supra*, wherein the court stated at paragraph 89 "Contingency fee contracts are obviously an important means by which not only 'the poor' but the middle class may be enabled to bring their causes, public or private, to courts of law". If not for a contingency fee arrangement, the client wouldn't have had access to legal advice or representation, the value of which became painfully obvious as he proceeded to summary trial, contrary to the legal advice he'd been given, and without representation. The consequences were financially disastrous for the client.

Principles of Review

- [35] Having found the agreement to be fair and reasonable is not the end of the matter. It remains to be determined whether the agreement results in a "fair fee" (see Mide-Wilson, *supra*, at paragraphs 69 to 73, 76 to 77, and 100.
- [36] Section 71(5) of the Legal Profession Act provides that the discretion of the Registrar is not limited to the terms of an agreement between the lawyer and the client. Therefore, the bill is to be reviewed keeping in mind the principles of review which are summarized in s. 71 of the Legal Profession Act which provides:

71(1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
- (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
- (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
- (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.
- (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

Application of the Principles

- [37] Although the client's case involved a motor vehicle accident in which liability was admitted, it was not ordinary or run of the mill. The client's pre-existing brain tumour, the difficulty in asserting the future wage loss claim given the lengthy period during which the client was on social assistance, the issue of causation, and the fact the case involved a low-velocity impact, all combined to make the case somewhat complex and novel.
- [38] The lawyer was required to exercise skill, specialized knowledge, and bring his 10 years of experience in personal injury litigation to bear in dealing with the legal issues. In addition to the legal issues arising, the lawyer was required to invest considerable time managing the client whom he found to be in need of "extra care". The lawyer estimated the time invested by him and his claims manager exceeded 150 hours, which did not include the time spent by his other staff, which the lawyer opined exceeded 100 hours.
- [39] Having heard the client testify, it is apparent that he would have required a considerable amount of extra time and patience to maintain his confidence within the solicitor-client relationship. The client, although articulate, tended to ramble off topic, often repeated himself, made outrageous accusations without evidence in support, concocted conspiracy theories, and was repeatedly and unjustifiably rude towards the lawyer during the course of giving his evidence.
- [40] There is no question that the case was important to the client. The client was unemployed and impecunious. The client had expected, however unreasonably, to receive \$3.0 million dollars in the course of the litigation. The result which the lawyer obtained through settlement negotiations was an offer of \$100,000 plus taxable costs and disbursements, considerably less than what was expected by the client, but twice the \$50,000, without costs, the client was awarded through summary trial.
- [41] With the benefit of hindsight, the pre-trial offer obtained by the lawyer was "at the deep end of the pool" and ought to have been accepted. The lawyer exercised his skill and expertise to elicit the offer for the benefit of the client, and provided sound advice concerning why the offer ought to have been accepted. Advice that was proved to be correct.

Conclusion

- [42] Having considered the applicable principles in the circumstances of the case, there is no basis upon which to reduce the contingency fee agreement. The lawyer is entitled to the full 33 and 1/3 percent contingency fee on the \$50,000 court award, being \$16,666.07, together with applicable taxes of \$2,000, for a total of \$18,666.67.

- [43] This amount is the total owed by the client for fees, which is to be apportioned between the lawyer and the prior lawyer, on a quantum meruit basis, pursuant to their agreement.
- [44] Although the client did not take issue with any of the disbursements listed in the lawyer's bill, other than the photocopy charges, all the disbursements have been examined for the purpose of this review.
- [45] Considering the context and nature of the case, the amount of photocopies produced is high. The assessment of the reasonableness of photocopy charges is not an arithmetical exercise but rather requires a consideration of what is reasonable in the circumstances of the case. See *Sovani v Jin*, 2006 BCSC 855. Applying a rough and ready approach, the amount allowed for photocopies is reduced to \$2,000. All the remaining taxable disbursements are allowed as presented. The lawyer is therefore entitled to his taxable disbursements in the amount of \$2,127.56 plus \$255.30 in taxes. The non-taxable disbursements totalling \$14,509.92, as itemized in the bill dated November 21, 2012, and attached to the Appointment dated February 19, 2013, and filed February 22, 2013, are allowed in full.
- [46] The lawyer is entitled to court order interest in accordance with the Court Order Interest Act, RSBC 1996, c. 79, on both his fees and disbursements, exclusive of the costs of this review, calculated from November 21, 2012, to present.
- [47] As the lawyer has been successful on the review, he would ordinarily be entitled to costs. However, the lawyer has advised he is not seeking costs of the three day hearing, but is only seeking reimbursement of his disbursements incurred in the review, which total \$2,328.27. The bulk of these disbursements involved locating and serving the client for the purposes of this review. As a result of the client's failure to provide an address for delivery these disbursements were necessarily and properly incurred and are allowed in full.
- [48] A certificate can be submitted through the Registry for signature.

"District Registrar Nielsen"

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