
CANADA / JUDGMENT

Farber & Folk v. Diep and Diep

2010 BCSC 1427

COURT

Supreme Court of British Columbia

DECIDED

23 March 2010

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2010 BCSC 1427 Farber & Folk v. Diep and Diep

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Farber & Folk v. Diep and Diep,

2010 BCSC 1427

Date: 20100323

Docket: S095253

Registry: Vancouver

Between:

Farber & Folk

Solicitors

And:

Ly Xuan Diep and Hoa Xuan Diep

Clients

Before: Registrar Sainty

Oral Reasons for Decision

In Chambers

Appearing on her own behalf and

on behalf of Farber & Folk:

F. Folk

Appearing on his own behalf:

Hoa Xuan Diep

Place and date of Hearing:

Vancouver, B.C.

November 30, 2009, March 8, 2010 and March 23, 2010

Place and date of Decision

Vancouver, B.C.

March 23, 2010

- [1] THE REGISTRAR: This matter first came before me on November 30, 2009. An appointment was taken out by the clients, Ly Xuan Diep and Hoa Xuan Diep, (also known as Jack Diep) for a review by the registrar of three legal accounts rendered by the solicitors to the clients in respect of the estate of Nissim Max Ezerzer. We were unable to complete the hearing in November and it was adjourned over to March 8, 2010. At the end of that day, as I wanted some time to consider the issues, I set the matter over to today for oral reasons and decision. So what I am doing right now is providing the parties with an oral decision. Therefore if anybody were to order a copy of these reasons, I reserve the right to edit them for syntax, grammar, and so on, but I would of course never change the result.
- [2] This matter is somewhat complex and I will begin by setting out briefly some of the facts.
- [3] Ly Diep was the common-law spouse of Nissim Max Ezerzer. At the time of Mr. Ezerzer's death he was, I think I heard, 65 years of age. He had immigrated to Canada from Morocco, but in the interim he had also lived in Israel and perhaps in some other countries. When he died, he was the owner of a building at 20 East Hastings Street in the Downtown Eastside, as it is called, in Vancouver, where he had lived on and off with Ly Diep. I also understand that Ly Diep was about 28 years old at the date of Mr. Ezerzer's death. Ly and her father, Jack -- and I am going to call Mr. Diep either Mr. Diep or Jack during these reasons, because it is easier, as I believe that is what he is known as. I do not mean him any disrespect by using "Jack", as opposed to his given name. I just think it is easier for the parties and anyone reading this decision to understand who I am referring to if I call Mr. Diep, Jack.
- [4] Ly and her father Jack first came to see the solicitors to deal with some issues that Ly was having relating, I was told, to some criminal charges (I think it was possession for the purposes of trafficking) that she was facing. Ly and Jack were referred to the Farber & Folk law firm by a Mr. Daitchman, who I understand was Mr. Ezerzer's bookkeeper and who knew the lawyers. Mr. Farber initially met with Ly and Jack. Ms. Folk later came into the meeting once there were some discussions between the parties about the issues of Mr. Ezerzer's estate.

- [5] Mr. Farber and Ms. Folk, both of whom testified at the hearing before me, said that when she came for their initial meeting, Ly was emaciated and appeared to be having some difficulties. She was in a wheelchair and the lawyers were told that she was facing some upcoming surgery.
- [6] Initially Mr. Farber met with Ly (as he had some background in criminal matters) During the meeting Ly, or maybe her father, mentioned Ly's relationship with Mr. Ezerzer and the fact that Mr. Ezerzer had passed away. Mr. Farber was also told that Ly had retained a Mr. Ritson, of Kowarsky & Company, to bring an application seeking to have Ly appointed as the administrator of Mr. Ezerzer's estate. I understand that, at that point in time, no one knew of anyone else besides Ly who could take on that role. Mr. Ritson was retained. He had brought an application to the court to appoint Ly as the administrator of the Ezerzer estate but he was unsuccessful. I do not know the reason behind the lack of success, but I do know that the application was not successful.
- [7] Once Mr. Farber heard about the estate and these issues he brought Ms. Folk into the meeting, as her expertise lies more in the estate area and Mr. Farber's I think is in the criminal area. Once Ms. Folk came into the meeting, they discussed possibly reapplying or reopening the application to appoint Ly as the administrator. They also, I think, discussed the possibility of having Jack Diep appointed as the administrator of the Ezerzer estate, as he might be someone who could deal with matters, despite his having no personal relationship with Mr. Ezerzer. At the meeting it was agreed that the solicitors would act for Ly and Jack, and would bring that application, or at least would consider bringing the application and start working on estate matters.
- [8] Mr. Diep provided a \$5,000 retainer to the lawyers and Ms. Folk started preparing the materials for the application for Jack to be appointed as the administrator. As I have already mentioned, there was some degree of complexity with this application because Jack had never met Mr. Ezerzer and was completely at arm's length from him, other than through his daughter's relationship with him. When the application came on, it was successful and Jack was appointed the administrator of the Ezerzer's estate.
- [9] Shortly after the initial meeting, Ms. Folk also started the process of looking for Mr. Ezerzer's children. It was thought that perhaps Mr. Ezerzer had a couple of children, maybe a son and a daughter, but no one seemed to know how to locate them. Ms. Folk contacted several people in the Jewish community as she did know that Mr. Ezerzer was a member of that community. She also spoke to Mr. Daitchman and others who had had relationships with Mr. Ezerzer to see if she could find any of his alleged children or at least get some information that would allow her to do some additional investigations to find the children.
- [10] During the retainer, the solicitors dealt with a number of matters in respect of the estate. Those matters included the successful application to have Mr. Diep appointed, apparently without bond, as the administrator of the Ezerzer estate, as well as renewal of the mortgage over the building at Number 20 East Hastings Street. I pause to note that that mortgage was

held by Mr. Kowarsky who was reluctant to renew it, and that created some complications with that mortgage. The solicitors also dealt with some issues with the City of Vancouver regarding the state of the East Hastings Street property, although Jack Diep, once he was appointed, took on a number of things relating to the building on his own.

- [11] Ms. Folk, at one point during the retainer, spoke to someone who was interested in leasing some parts of the building, as well as someone who appeared to be interested in arranging for it to be sold at auction. At one time there had been two tenants in the building. There was The Only Seafood restaurant and another tenant. The Only had been shut down, I understand, because of issues (or thoughts) that there had been some drug dealing out of that venue, so that complicated matters. The other tenant, and I apologize, I do not have all my notes here, but I have some recollection, had either left or -- so at one point in time the building was not tenanted, and that created some further difficulties, of course, with respect to the mortgage. It seems Mr. Kowarsky had been collecting the rents and using the rent to pay the mortgage. Then those funds were no longer available and the question arose as to how the mortgage could be paid. The solicitors had to deal with that, although, as I say, they worked with Mr. Diep who dealt with some of the other building issues, including bylaw infractions and with some cars, I think, in the basement that had to be removed.
- [12] One of the most interesting aspects of the retainer, and of course this estate, was the fact that on opening two safety deposit boxes Mr. Ezerzer kept (one at the Scotia bank and another at the TD Bank) large, and by large I mean like in excess of \$180,000 in one and \$100,000 in another, I think, or around those amounts, amounts of cash were found in each of those two boxes. This created a great deal of consternation on behalf of the bank employees, who were there when the boxes were opened and who were surprised and concerned about the amount of cash found in those boxes. This discovery of all that cash created a lengthy procedure that had to be gone through in order for those funds to be transferred from those banks to the estate.
- [13] Mr. Diep is of Vietnamese origin. On the second day of hearing before me he came with a Vietnamese interpreter although he appeared on day one on his own. Mr. Tran, who is a legal assistant with the Farber & Folk firm, is apparently fluent in Vietnamese and often met with or spoke with Mr. Diep and translated documents, including affidavits, for him, so he would understand the nature of what was being done.
- [14] Three accounts are before me. The first is dated April 15, 2009. The fees on that account total \$9,900 plus taxes, and the disbursements are \$27.02. The second account is dated June the 2nd, 2009. It is for \$16,920 in fees plus taxable disbursements of \$259.34, and non-taxable disbursements of \$29.65 and it totals \$19,252.36, inclusive of fees and disbursements. The final account is dated June 30th, 2009. It totals \$6,422.35, and is made up of fees of \$5,720 plus \$15.19 of disbursements and applicable taxes.

[15] It was difficult for me to discern exactly what the clients' issues were with the accounts. I understand that the estate is not yet completed, or certainly the solicitors here did not complete their retainer. By that I simply mean that they did not finish up the estate as, sometime at the end of June 2009, they were asked to transfer their file to Davis & Company, who have since taken over as the solicitors for the estate.

[16] The only real specifics I have of the clients' concerns with the account are set out in a letter dated October 20, 2009 from Davis & Company to the Farber & Folk law firm. That letter states and I am going to read it into the record, because I think it actually does set out Mr. Diep's concerns and a good way to note those concerns is to read it in:

The administrator's main objections to your accounts is that \$32,540 in fees is excessive for the amount of service provided and the results obtained. Specific points of objection include:

- (1) Mr. Ritson had already completed, and the estate had already paid for, a large portion of the work required to prepare an application for a grant of letters of administration which your firm appears to have relied on for Mr. Diep's application. Mr. Ritson also dealt with the tenants and creditors of the estate, made attempts to locate Mr. Ezerzer's children, and communicated with the court registry with respect to the application for a grant. For over eight months of work, Mr. Ritson charged \$5,180 in legal fees. By comparison, your firm charged over \$32,000 in legal fees for three months of service, which only partially advanced the administration of the estate.
 - (2) Legal fees of \$400 per hour were charged for straightforward, non-legal or non-billable tasks, and therefore were excessive in the circumstances. For example:
 - (a) \$1,600 to prepare form letters seeking creditors' consents to the administrator's application;
 - (b) \$3,200 to attend at the banks to empty out and list the contents of the safety deposit boxes;
 - (c) \$1,200 to obtain bank drafts for payment of estate debts;
 - (d) \$300 to pick up the grant of letters of administration from the courthouse;
 - (e) over \$3,000 to prepare the file for transfer to a new solicitor.
 - (3) Estate charged legal fees for time spent preparing a bill for services.
- [17] On that last point -- and I am thinking ahead as to what I have to consider --the solicitors said that they did not charge legal fees for billing this file and I believe them. I will deal with a part of this complaint later, but I will just note right now, that the solicitors told me they did not do that. It is not appropriate to charge legal fees for preparing a bill, but Ms. Folk testified that no fee for that was included. It might have been listed on the account as something that was done, but no actual fees were charged for that. I am not going to deal with that any further than just to say that I believed her evidence that the client was not charged for it.

- [18] At the hearing, I specifically asked Mr. Diep if he could delineate for me any other concerns he had with the accounts. He advised me that he thought he had been over-billed, that the accounts were simply too much money, and that he wanted me to be fair in deciding these issues. He did, however, spend considerable time cross-examining, particularly Ms. Folk, in relation to a number of the time entries on the accounts, and I believe I can infer from that questioning that Mr. Diep also believes that the solicitors recorded too much time to many of the items set out on the accounts.
- [19] As I said earlier, Ms. Folk testified at the hearing and was cross-examined at length by Mr. Diep. I also heard from Mr. Farber. He was asked a few questions by Mr. Diep. Mr. Tran, the legal assistant, also testified. Mr. Diep chose not to cross-examine him.
- [20] At the end of the solicitors' case, I asked Mr. Diep to provide his testimony. During his testimony, Mr. Diep continually attempted to make submissions to me or requested that he be allowed to ask the solicitors additional questions relating to matters on the accounts. I explained to Mr. Diep the difference between evidence -- facts on which a decision is to be made -- versus submissions -- the parties' summary of the evidence and application of the facts to the law, followed by a suggestion as to what decision I might reach. I advised Mr. Diep, as well, that he had had an opportunity to ask his questions after the solicitors testified and while they were under cross-examination, and that we were now in his evidentiary portion of the hearing and told him that his portion was to be confined to his evidence only.
- [21] I was, however, satisfied that Mr. Diep was given an opportunity to raise his concerns through his questions, and also that his concerns were raised through the letter that he had written (or had his new solicitors write). He spent quite a bit of time questioning Ms. Folk with respect to her evidence, and he questioned many, many of the individual time entries on each of those pre-bills and asked Ms. Folk to elaborate on the work that was done in respect of each of those time entries. As well, in my view, the Davis & Company letter, which I have read into the record, to a great extent, summarizes what I think are Mr. Diep's issues with the accounts.
- [22] So, that is a brief summary of the evidence and the issues as I see them. I will now embark on the review of the actual accounts that are before me.
- [23] A review of a lawyer's account is undertaken pursuant to the provisions of the Legal Profession Act. That Act contains, in s. 71(4), a number of factors that a registrar must consider in making her decision as to what the fees were that were reasonably necessary and proper to conduct the matter for which the lawyers were retained. Those factors include: the complexity, difficulty or novelty of the matter; the skill, specialized knowledge and responsibility required of the solicitor; the solicitor's character and standing in the legal profession; the amount involved in the proceeding for which the solicitors were retained; if there was an agreement to charge fees on an hourly rate basis, whether or not the hourly rate was reasonable in the circumstances; the amount of time reasonably expended by the solicitors in carrying out their retainer; the importance of the matter to the client; and

finally, the results that were obtained.

- [24] I intend now to review each of these factors that I have just set out and apply the evidence and the facts in this case to those factors.
- [25] This matter was complex. I have set out earlier some of those complexities: the fact that Mr. Diep was not known to the deceased; the issues that were faced by Ly Diep; the mortgage renewal difficulties; the discovery of the large amounts of cash and the complications that that created. There were some other additional complexities. There were six major violations of zoning and bylaws that had to be dealt with in relation to the building, although, as I have said, I think Mr. Diep dealt with the majority of those issues. Documentation had to be prepared to transfer the building from Mr. Ezerzer's estate or from the deceased to Mr. Diep. There was not much information about Mr. Ezerzer anywhere in the documents. Mr. Daitchman did not have much information and certainly Mr. Diep was not able to give the solicitors any information about Mr. Ezerzer.
- [26] Also, the insurance on the building expired early in the retainer. Ms. Folk arranged for that insurance to be renewed by the insurer, without the need for payment of a premium until such time as the estate funds could be freed up. There was also an issue about an account in the name of a society that had its offices in the building but which was really Mr. Ezerzer's account or something. I am just again recollecting that right now and I do not have a clear recollection of the name of it, but I do not think that matters. Anyway, that account had to be dealt with and dealing with it created some additional difficulties.
- [27] Ms. Folk testified that she was called to the bar of Ontario in 1974, and to the British Columbia bar in 1976. Since 1976, she has been in practice continually, except several months in and around the births of her children. Between 1993 and 2005, she was a practice advisor for the Law Society of British Columbia. In 2005, she returned to private practice, and since then has been engaged mostly in estate planning and probate matters.
- [28] Mr. Farber was called to the bar of Ontario in 1972, and that of British Columbia in 1975. He has been in full-time practice since that date. His focus is on litigation.
- [29] I find that both of the solicitors who dealt with this matter had the necessary skill and expertise to act on the client's behalf in relation to it. No issue was taken with respect to either of the solicitors' character and standing in the legal profession, and that is really a non-issue in this proceeding.
- [30] As for the amount involved, it is not completely clear to me. There was the cash that was found in the boxes -- I think maybe around \$250,000 all told -- and then there was the building. At one point in her evidence Ms. Folk suggested that the building was worth some one million dollars, but that, if it were cleaned up or sold in the right circumstances, it might even sell for as much as two and a half to three million dollars. Clearly it is the major asset of the estate. So we are looking at an estate worth probably somewhere between 1.2 and 3.2 million dollars. The value ultimately depends on what happens with that building and

whether or not there might be some other cash out there that I do not know about and that might not yet have been found. So, not an insignificant amount.

- [31] As Mr. Ezerzer's common-law spouse -- I should also make a note that the issue of whether Ly was actually a common-law spouse was one of the issues that the solicitors faced and had to deal with and they did deal with it. They were successful in having her found to be a common-law spouse. So she is going to get a fairly significant amount of money, I think, from this estate. She stands to receive a substantial amount of money.
- [32] I also understand from the testimony of both counsel that Mr. Diep's main reason for taking on this matter was to assist and protect his daughter, who was in difficult circumstances at the time. I should also note that it is my understanding that Ms. Diep has recently gone through a rehabilitation process. She is now clean and sober, and in much better health than she was when this matter was originally taken on by the solicitors, and for that I commend her.
- [33] Both of the solicitors charged their time at the rate of \$400 per hour. That might be somewhat on the high side for lawyers at a small boutique firm in the downtown Vancouver core, but I cannot say that it is outside of the amount that I might have expected a lawyer to charge for matters of this nature. It is within the range, I would say.
- [34] As for the time that was involved and that was recorded, that is the area on which Mr. Diep concentrated most of his efforts, and which appears to have caused him the greatest concern. On the accounts, large blocks of time were recorded to the matter for groups of items that are then listed on the account. In his cross-examination, Mr. Diep took Ms. Folk through a number of these grouped listings and questioned what was done and why these things took so much time. Ms. Folk reviewed the items listed and confirmed that, if the account said that much time was spent, then that much time was spent. In fact, I recall that she also said that, on occasion, not all of the time for things that were done was necessarily recorded.
- [35] I followed up Mr. Diep's inquiries by specifically questioning Ms. Folk about these block entries or group listings, as I wondered how it was that she came up with an amount of time for a particular set of work done that was described on the pre-bills. Ms. Folk advised me that the software program that she uses allows her to keep a client's time file open, per se, on a daily basis, and that, as she undertakes tasks on a client's behalf, she inputs the description of that task, as well as the time spent, into the computer system. The computer system then keeps a running total of the time and the descriptions input by the lawyer (in this case Ms. Folk). Then one block time entry is created from these daily descriptions, and that time is then posted to the account at the end of the day.

- [36] On occasion there was more than one entry on a particular day. In explaining those second or third entries, Ms. Folk said that they likely occurred on occasions when, for example, she had closed out her timesheet for the day and then something else came up. I was satisfied on the evidence before me that the time recording was accurate.
- [37] Mr. Diep also made it clear during his cross-examination that he was concerned that some of the things undertaken by the solicitors were things that he, as the administrator of Mr. Ezerzer's estate, could and maybe should have done himself, rather than having the solicitors do them at great cost to the estate. This is particularly the case in respect of the amount of time spent attending at the Bank of Nova Scotia and TD Bank to deal with the safety deposit boxes.
- [38] Ms. Folk testified that normally she would not attend a bank with an executor or administrator to oversee the opening of safety deposit boxes and listing of their contents. However, in these particular circumstances and in this particular case, she felt that it was prudent for a number of reasons. Firstly, Mr. Diep's English is not that fluent. Although she believes he can read English and understand it for the most part, Ms. Folk was concerned that Mr. Diep might not recognize the importance of documents that might be found in the safety deposit boxes. This was especially important as they were desperate -- I mean, desperate is not necessarily the right word, but extremely concerned -- one of the most important things in this estate was trying to find Mr. Ezerzer's children in order that that they could be informed of his death and appropriate provisions made for them. And proper efforts have to be made, because if they are not made then the court will not allow the estate to be distributed.
- [39] So Ms. Folk was concerned that Mr. Diep might go and look at the safety deposit box and not recognize or realize the importance of these items in the box. She said that she knows that banks are notorious for not properly or well describing documents that are found in safety deposit boxes. Because she felt that she needed information about Mr. Ezerzer's children or his family, or maybe information about other potential beneficiaries of the estate might have been found in the safety deposit boxes or, they might have found information about some of his additional businesses, she believed that, in these particular circumstances, it was important for her to go with Mr. Diep to open the boxes and see what was inside. I agree that these were unusual circumstances and I think it was prudent for Ms. Folk to go to the banks with Mr. Diep.
- [40] Ms. Folk also testified that when she and Mr. Diep were discussing the options relating to Mr. Ezerzer's estate, including the application that I have spoken about to have him appointed as the administrator, they specifically discussed as well the possibility of having Solus Trust Corporation appointed as the administrator. I think Ms. Folk told me that Solus Trust is a trust company that sometimes comes in and is appointed as an administrator of an estate where there appears to be no one who is readily available to undertake such task. Apparently Solus Trust advised that if they were to be appointed as the administrator of Mr. Ezerzer's estate, they would seek remuneration of between three and four percent of the

value of the estate.

- [41] Ms. Folk told me, and this was not denied by Mr. Diep in his testimony or at all, that she told Mr. Diep that, rather than the estate paying Solus Trust, he could make his own application to be appointed administrator, and then use the solicitors to do some of the work that might normally be done by an administrator. In those circumstances, the solicitors would charge their time and be paid their hourly rate for undertaking such work, but it was likely that those hourly fees would add up to less than the three or four percent that Solus Trust Corporation would charge the estate, so it would be cheaper to use the solicitors to do some of this work.
- [42] Ms. Folk testified that once Mr. Diep, who always, she says, had Ly's well being and financial security in mind, was told the cost that Solus Trust might charge to the estate for undertaking such work, he then instructed the solicitors to bring the application to appoint him, and he further instructed them to take on some of the tasks that might more normally be handled by an administrator, such as attending at the bank with him regarding the safety deposit boxes, attempting to locate Mr. Ezerzer's children, and dealing with the mortgages and the insurance. These issues are ones that I think Mr. Diep might have had difficulty with and he likely would not have had the degree of success, had he dealt with them, as the solicitors did. I do not think Mr. Diep would have been successful at negotiating, for example, the insurance company placing insurance on the building without any payment. So he would have either had to leave the building uninsured, which would have been a terrible mistake in his position as administrator, or he would have had to have come up with money out of his own pocket to pay the insurance, which, although he would have been able to recoup it later on as the administrator, he would have had to put out of his own pocket pending finalization of the estate.
- [43] The same with the mortgage negotiations. Ms. Folk and Mr. Farber were in a far better position to negotiate with Mr. Kowarsky than was Mr. Diep personally, both because I think of their position as solicitors (and well-known and well-respected solicitors in this city) but also because of their command of the English language and their expertise in dealing with people. I am not trying to say that Mr. Diep could not have done it, but I am saying that it was much easier, it probably flowed better, and it created far less hassle for him to have the solicitors do that. I am talking, as well, about some of the other things that the solicitors did - the discussions with the Israeli Consulate and those kinds of things. Again, they were in a far better position, I think, to undertake those matters and to deal with them. Based on their experience in dealing with administrations of estates, they would have known where to go, the people to talk to, and how to conduct the investigations necessary.

- [44] Yes, it costs money, but it is a balancing act that everybody always has to undertake with respect to an estate. It may well be that, when this estate is finally dealt with and the accounts are passed, someone might say, "Well, Mr. Diep, you might get a little bit less of an administrator's fee, because the lawyers did some of the work you should have done as administrator," but there is no question in my mind that it was prudent to have the lawyers do some of this work.
- [45] I will also note that Ms. Folk said, when she testified, that she did not expect it to take the time that it did to attend at the bank to deal with the safety deposit boxes. She was as surprised as anybody else. Normally this would have taken maybe half an hour. You go into the bank, open the box, list the documents and figure out if there is anything in there that was necessary or that would have helped with respect to administering the estate. Then you move on; you go to the second bank. So, in "normal" circumstances maybe two hours in one day at a cost of \$800.00 to attend both banks, open the boxes and list their contents. But what happened here is that when boxes were opened they opened Pandora's Box, to some extent, as, once the boxes were opened everyone said: "holy goodness, look at all this cash". Immediately then the bank employees became extremely concerned. They did not know what to do. They called in an assistant manager and then a manager. Ms. Folk told me that at one bank they were taken into the employees' lunch room, the blinds were closed, and the employees who were in the room were asked to leave. All of the cash was then counted. It was counted once. It was counted twice and maybe even a third time. A machine was brought in to count it, then it was counted by hand. That process took quite a long time -- much, much longer than anybody could have ever anticipated it would take.
- [46] Sometimes it is not possible to anticipate these things or know what might be coming up. When Ms. Folk and Mr. Diep went to the bank I do not think Mr. Diep had any idea what was going to happen either. I think that, in some ways, having Ms. Folk there likely paved the way for it to have gone even smoother than it did. There might have been some real concerns with Mr. Diep there and just a bank employee thinking "What are we going to do? How are we going to deal with this?" So, as I said Ms. Folk's presence likely assisted and paved the way to some extent.
- [47] The letter from Davis & Company that I referred to earlier contained a complaint against the solicitors for "over recording or excessive time recording" in the circumstances. I have dealt with some of the instances where Mr. Diep seemed to think this happened, but I am going to just keep going and deal with the rest of the specific complaints. One of those specific complaints was "\$1,600 to prepare form letters seeking creditors' consent to the administrator's application". In response to this allegation, Ms. Folk testified that each of the letters to creditors was crafted separately. Initially, letters had been sent to creditors by Mr. Ritson, asking for their consent to Ly's appointment as the administrator of the estate. As I have noted, the application that Mr. Ritson brought to have Ly appointed administrator was unsuccessful. Ms. Folk told me that, to avoid confusion and to fully apprise the creditors as to the facts of this matter, she created new letters from scratch asking that the creditors

consent to Mr. Diep's appointment as the administrator of the estate. Ms. Folk said that it was important, in her view, to ensure that the creditors understood what they were being asked to consent to and why, and therefore drafting these letters took longer than might have been the norm.

- [48] I agree that it was important to craft new letters and to advise the creditors as to what was happening, but it seems to me that there ought to have been some economies of scale, in the sense that once one letter was prepared, that letter could have been re-used and maybe just massaged slightly in order for it to be sent out. I agree that \$1,600 is on the high side for the work that was done.
- [49] The second item specifically complained of in the Davis & Company letter was the monies that were spent for the bank visits. I have already set out the solicitors' reasons for that and my reason for holding that the time was reasonable, and I am not going to repeat it. An adjunct to that time, as expressed in the letter from Davis & Company, was a further \$1,200 to obtain bank drafts for payment of estate debts.
- [50] Mr. Farber told me that he went with Mr. Diep to pick up one of the bank drafts from one of the banks, and that despite several calls to Mr. Diep to make arrangements, he was not asked to accompany him to the second bank to retrieve the draft. Mr. Farber, in his testimony, described the process he went through with Mr. Diep as being quite complicated. He said that when they went to the Scotiabank in Richmond, they were taken into a separate room with an assistant manager, and the process relating to opening the safety deposit box and counting the cash was repeated. In essence, the same rigmarole that had already taken place when Ms. Folk had gone with Mr. Diep the first time was repeated when Mr. Farber and Mr. Diep went to the Scotiabank. Not until the process of counting the cash was repeated and some releases and an indemnity agreement signed were the funds made available to Mr. Diep, although not directly. I was told that the bank issued a bank draft. I think that the funds first went into Mr. Ezerzer's account and then were transferred, by way of bank draft, to the Farber & Folk firm. It appears that the bank had some concern about giving the monies directly to Mr. Diep and preferred to pay them to the lawyers, in trust.
- [51] I cannot really fault the solicitors for this lengthy process. It appears that the bank was concerned and followed a complex and time-consuming procedure to release the monies. Again, I think that the way might have been paved, to some extent, by having Mr. Farber assist with this. Now, I do not know what happened when Mr. Diep went to the TD Bank, because he did not provide any testimony about that, and so I do not know whether it was a simple process or not, but in any event, on the basis of the evidence that I have, I find that it was likely helpful for Mr. Farber to go to the Scotiabank with Mr. Diep.

- [52] Another complaint set out in the Davis & Company letter was "\$300 spent to pick up the grant of letters of administration from the courthouse". Mr. Farber testified that he personally came to pick up the documents. However he did not satisfy me that it was necessary for him to do this personally or that there was some reason this could not be done by an agent or at least by Mr. Tran, the legal assistant. So, I think that that small bit of time might have been excessive or not appropriate in the circumstances.
- [53] The client has also suggested that he should not pay for the time expended by Ms. Folk to prepare the file for transfer to the new solicitors, Davis & Company. Ms. Folk testified that it was extremely important, in her view, to provide the new solicitors with information in regards to the state of the estate, the things that had been undertaken, what remained to be done, and so on. That being said, while it might have been a good idea and perhaps might have saved the new solicitors time and effort, this was done without the client's instructions. Once a retainer is terminated, in my view, without a client's express instructions to undertake additional work, even including preparing the file for transfer, such work ought not to be undertaken and the solicitors are not entitled to recover fees for such work. That time ought not to have been billed, as closing the file and tying up loose ends is simply a cost of doing business.
- [54] Although counsel referred me to the case of *Fellowes, McNeil v. Kansa*[1] as authority for the proposition that a law firm is entitled to transfer fees for the time required to put files in order for the benefit of a client's new solicitors, I believe that case either ought to be distinguished or is, in fact, not applicable for a number of reasons.
- [55] Firstly, the case is a decision of the Ontario Court's General Division and it is not binding on me. Secondly, the court in *Fellowes, McNeil* allowed the transfer fees on the basis that the solicitors acted for the client in a number of matters, some of which were extremely complex and, as such, the work by the old counsel would be of direct benefit to the new counsel. There is no evidence here that new counsel required any assistance from the Farber & Folk firm in taking over the retainer. Finally, in the *Fellowes* case, it was the solicitors who terminated the retainer without advance notice to the client. Here it was the client who told the solicitors to down tools, per se. He did not request, having done so, that the solicitors in any way prepare the file for transfer.
- [56] Accordingly, the client cannot have expected or authorized any further fees after he released the solicitor or terminated the retainer. Therefore, the time spent by the solicitors doing that, in my view, is not recoverable as fees by them.
- [57] It appears that, in addition to this specific complaint, the client also has a concern about the time spent by the lawyers overall. I say this because of the comment in para. 1 of the letter from Davis & Company that talks about the work done by Mr. Ritson in comparison to the work done by the solicitors, and the difference in cost between the two firms. On cross-examination, when specifically asked by Mr. Diep why the solicitors' bills were so much higher than those of Mr. Ritson, Ms. Folk provided a lengthy and reasoned response. She

specifically reviewed all of the work undertaken by the solicitors. That work, in my view, was substantially more work than was undertaken by Mr. Ritson, who simply made an unsuccessful application to have Ly appointed as the administrator of Mr. Ezerzer's estate and, I believe, began some of the processes required to find the Ezerzer children.

- [58] As I knew that Mr. Diep was concerned about the time spent, I reviewed all of the solicitors' time entries, and I have made some comments about some of them in this decision; in particular I have tried to deal specifically with Mr. Diep's individual concerns. However other than those items that I have suggested might have been unnecessary, I found very little else that was of concern to me, except one instance. There was one occasion where Mr. Farber and Ms. Folk recorded and billed time for the same meeting with the client. I think it was the initial meeting. Generally speaking, it is not appropriate for two solicitors to charge their time for meeting with a client, unless both are offering some form of value to the client. Here I find, on the evidence before me that most of Mr. Farber's time in that meeting related to Ly's criminal issues, not the Ezerzer estate. I think that time ought not to have been billed to the estate matter as Mr. Farber's role in regards to that was minimal. In fact, I think he simply acted as a conduit between the clients and Ms. Folk. He might have been able to send a bill to Ly for his time discussing the criminal charges with her (or it may have been an initial consultation at no charge), but I do not think that he should charge the estate file for his time.
- [59] There is no doubt that this matter was of some considerable importance to Mr. Diep, as it related to his daughter, Ly, particularly when one considers her physical and mental state and issues at the time the solicitors were at first retained.
- [60] As for the results, which is the last factor that I have to consider, in my view the solicitors achieved excellent results in the timeframe that they were given to perform their work. They got Mr. Diep appointed as the administrator of the estate in unusual circumstances. They made some headway in finding Mr. Ezerzer's family, something that I have already noted is a major obligation of an administrator. They started preparing the estate accounts. They entered into discussions regarding the potential sale or lease of the building. They dealt with the issues of the mortgage with Mr. Kowarsky. They arranged for the insurance to be placed on the property without payment. They dealt with HRDC with respect to a possible survivor benefit for Ly -- I do not think I have said that before. They put together the evidence necessary to prove Ly's status as Mr. Ezerzer's common law spouse. They contended with the licensing bodies for the City of Vancouver. They met with Mr. Diep on a number of occasions to discuss matters. And they actually did all of this in a very short period of time.
- [61] I think it is important to recognize that even though Mr. Ritson's retainer was for eight months and the Farber & Folk firm's was for three months, I must look at the work that was done and what was achieved during the time, not the fact that Mr. Ritson might have had the file for a longer period of time, because he certainly did not do the same amount of work that the Farber & Folk firm did.

- [62] As I said earlier, the total fees (before taxes) that were charged by the lawyers for their work was \$32,540. In my view, applying the Legal Profession Act factors I have set out in this decision to the evidence, I consider the more appropriate amount billable by Farber & Folk to their client for the work done is the sum of \$28,000. I have reduced the accounts, taking into account the transfer fees charged, some of the time recorded by Mr. Farber, and a few other bits and pieces, but nothing major. In my view, the law firm pretty much did what they ought to have done. The biggest issue for me was the transfer fees, and that was a big block, but other than that, I do not have any real concerns with this bill. In fact I think the lawyers did a good job for their client.
- [63] The fees are set at \$28,000. We have to add tax to that, and so we get fees and taxes of \$31,360.
- [64] Now, as for disbursements, the client did not raise any issues with the disbursements. I reviewed them and the disbursements charged are the types and amounts I would expect to see in a matter of this nature. Accordingly, I will allow the disbursements as presented in the amount of \$346.28, inclusive of taxes.
- [65] That results in a total allowed to the solicitors of \$31,706.28.
- [66] I think if I recall, there is a \$5,000 retainer and that would be applied to those fees.
- [67] MS. FOLK: It's been returned.
- [68] THE REGISTRAR: Oh, it was returned to the --
- [69] MS. FOLK: That was returned.
- [70] THE REGISTRAR: Okay, so all right, so in fact -- I just wanted -- I knew I had to confirm that, my brain said there was something. All right, so the amount that is due and owing then to the solicitors is \$31,706.28.
- [71] Then there are two items that remain to be dealt with. The first has to do with the costs of this procedure. The solicitors are entitled, in fact the Legal Profession Act says that if I reduce this account by less than one sixth, then the solicitors are entitled to their costs for preparation and attendance at the hearing before me.[2]
- [72] Now, in order to make this simple and to deal with it quickly, the Legal Profession Act also provides[3] that I can summarily assess those costs, and it is my intention to do that. I am going to use Schedule 3 of Appendix B, which basically sets the costs at \$500 per half day, and I am going to set the costs, it was one and a half days: there was the half day on November the 30th and then basically the full day March the 8th. I am going to set those costs at \$1,500.00. I am also going to allow some disbursements at \$120, again a "reasonable" amount. Therefore I award \$1,620 total in costs. There is no tax on the tariff items or the amount I have assessed for that, because there is no tax paid by the lawyers to themselves for the time that they expended. The costs are to be added to the amount I have awarded for fees.

- [73] What about interest? I did not hear anything about that. The Legal Profession Act[4] says that, once I decide on an amount, I must add interest to it at either contractual rates or pre-judgment interest rates.
- [74] MS. FOLK: The first two bills were paid from monies in trust.
- [75] THE REGISTRAR: Oh.
- [76] MS. FOLK: So it is only the third bill that has not been -- that had not been paid.
- [77] THE REGISTRAR: Okay, that is what I was asking you, Ms. Folk. It is not \$31,000 that is owed. How much has been paid? So we have \$31,706.28 which is allowed, so if the first two -- and I am sorry, I did not bring the file, so how much --
- [78] MS. FOLK: I did not bring the file either. I had anticipated that --
- [79] THE REGISTRAR: Oh wait; do we have the file, Madam Clerk?
- [80] MS. FOLK: -- we would simply -- it is in fact going to be Farber & Folk that pays, from money we hold in trust, because we held back the amount of the third account in our trust account, so we in fact will be paying Mr. Diep --
- [81] THE REGISTRAR: Okay.
- [82] MS. FOLK: -- the balance. So if Your Honour simply makes the order as to the total amount, as you have done, with respect to the amount payable to us, we will then undertake to pay Mr. Diep the difference, once our costs are calculated in.
- [83] THE REGISTRAR: Plus interest on the amount I have reduced it by.
- [84] MS. FOLK: Yes, yes.
- [85] THE REGISTRAR: So he gets interest on the amount that I have reduced it by, because --
- [86] MS. FOLK: Yes.
- [87] THE REGISTRAR: -- it goes both ways.
- [88] MS. FOLK: Yes.
- [89] THE REGISTRAR: All right, so, in fact the full amount was paid, 31 --
- [90] MS. FOLK: No, no.
- [91] THE REGISTRAR: No, so more than the full amount has been paid or held back essentially.
- [92] MS. FOLK: No. The first two bills --
- [93] THE REGISTRAR: Well, you have the money though, Ms. Folk, right?
- [94] MS. FOLK: We have the money, yes.
- [95] THE REGISTRAR: Okay, so I call that paid.

[96] MS. FOLK: Yes.

[97] THE REGISTRAR: All right, so in my -- because Mr. Diep has been without that money, so whether you have actually physically applied it to the account, I call it paid --

[98] MS. FOLK: Yes.

[99] THE REGISTRAR: -- as far as the Legal Profession Act is concerned. So I am going to direct you to prepare a certificate and on that certificate put the amount allowed at \$31,706.28. Then put the amount that has been paid, that will be the total of the three accounts: I could probably do it now, but I am just going to get you to do it. In essence, Mr. Diep has been, or the estate has been, deprived of those monies for however long, right. So there would be a balance, a refund, of probably about \$4,000, I am thinking.

[100] All right, but then there are the costs of \$1,620. The interest that would be paid to the estate, I guess, would be on the -- I will call it the \$4,000, because the costs do not attract interest -- plus pre-judgment interest on the amount of the refund before deducting the costs. So the balance due to the client will be the refund amount, plus the pre-judgment interest. All right, and so then just give me a number at the end.

[101] MS. FOLK: Yes.

[102] THE REGISTRAR: All right, so if you do that math --

[103] MS. FOLK: Yes.

[104] THE REGISTRAR: -- and if you could please send in a letter, Ms. Folk, with your certificate that says, "Here is how we calculated the interest," and show me that as well.

[105] MS. FOLK: Yes.

[106] THE REGISTRAR: And then I will sign the certificate, all right.

[107] MS. FOLK: Yes, and just for the sake of the record and to make it clear --

[108] THE REGISTRAR: Yes.

[109] MS. FOLK: -- that the -- it is not actually a refund on the third part, because we had held the money in trust. We did not pay ourselves the last of the --

[110] THE REGISTRAR: I appreciate that, Ms. Folk, because you are absolutely right. I know that once this process was started, you did not feel that it was --

[111] MS. FOLK: Yes.

[112] THE REGISTRAR: -- appropriate to actually pay the account, and I agree with that, but the only thing is, I think that, from a technical perspective, you held that money, and he has not had it, so he gets that little bit, and I think --

[113] MS. FOLK: I take no issue with that.

- [114] THE REGISTRAR: -- it is .25 percent, Ms. Folk, so we are not talking lots of money.
- [115] MS. FOLK: Oh no, I take no issue with that. It is simply for -- I just want it to be clear that the appropriate steps were taken with respect to --
- [116] THE REGISTRAR: I do not --
- [117] MS. FOLK: -- the funds.
- [118] THE REGISTRAR: I do not dispute that and thank you, and I appreciate you clearing that up.
- [119] All right, so Mr. Diep, do you understand? You are going to get ... or the estate, I guess, will get some refund back, because the Farber & Folk firm, they paid the first two accounts, they have held in trust the balance, so the difference between what they owe you, that I have decided, or between what you owe them, as I have decided, and the amount that they have held back, plus some interest, will be paid to you, less the \$1,620 that I have said you need to pay them for their costs of this process.
- [120] HOA XUAN DIEP: Thank you.
- [121] THE REGISTRAR: Do you understand, sir? All right, is there anything else then? Thank you.
- [122] MS. FOLK: Thank you, Your Honour.

"Registrar Sainty"

- [1] Fellowes, McNeil v., Kansa General International Insurance Co., [1997] O.J. No. 4541, 45 O.T.C. 279 (Ont. Gen. Div.).
- [2] See Legal Profession Act, [1998] c.9, s. 72(1)
- [3] See section 73(2)(b)
- [4] See Legal Profession Act, s. 73(3)

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