

CANADA / JUDGMENT

Jack Wang Law Corporation v. Du

2020 BCSC 272

COURT

Supreme Court of British Columbia

DECIDED

28 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 272 Jack Wang Law Corporation v. Du

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jack Wang Law Corporation v. Du,

2020 BCSC 272

Date: 20200228

Docket: S174677

Registry: Vancouver

In the Matter of the Legal Profession Act, S.B.C. 1998, c. 9

Between:

Jack Wang Law Corporation

Solicitor

And

Tong Du and Canada Shineray Suppliers Group Inc.

Clients

Corrected Judgment: The first page of this
judgment was corrected on March 5, 2020

Before: Master Elwood

(As Registrar)

Reasons for Decision

Counsel for the Solicitor:

T.G. Keast, QC

Counsel for the Clients:

J.R. Shewfelt

Place and Date of Hearing:

Vancouver, B.C.

December 9-13, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2020

Table of Contents

I. INTRODUCTION. 3

II. FACTS. 5

A. The Parties. 5

B. The Wrongful Dismissal Action. 5

C. The Retainer and Initial Instructions. 6

D. The Response to Civil Claim and Counterclaim.. 8

E. Settlement Offers / Amendment to the Pleadings / Summary Trial 10

F. The Adjournment Application. 13

G. The Trial Judgment 14

H. The Costs Judgment 15

III. RES JUDICATA. 21

A. Cause of Action Estoppel 22

B. Issue Estoppel 26

C. Conclusion on Res Judicata. 28

IV. FEE REVIEW.. 28

A. Complexity, Difficulty or Novelty. 29

B. Skill, Specialized Knowledge and Responsibility. 30

C. Character and Standing in the Profession.	30
D. The Amount Involved.	31
E. Time Reasonably Spent	31
i. Dealings with Opposing Counsel	32
ii. Pleadings.	34
iii. Summary Trial	35
iv. Adjournment Application.	36
v. Potential Appeal	36
F. The Retainer Agreement and Fees Estimate.	37
G. The Importance of the Matter	38
H. The Result Obtained.	38
V. CONCLUSION.	40
A. Fees and Disbursements Disallowed by Madam Justice Fisher	40
B. Fees Allowed under the LPA.	40
C. Result	41

I. INTRODUCTION

- [1] This is a review of a lawyer's bills, at the request of the lawyer, under s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9 ("LPA"). It raises an issue concerning the interaction between the registrar's jurisdiction under the LPA and the court's authority under Rule 14-1(33) of the Supreme Court Civil Rules to disallow fees and disbursements between a lawyer and the lawyer's client, and whether a client, having sought an order disallowing a share of the lawyer's fees under Rule 14-1(33), may seek a further reduction under s. 70 of the LPA.
- [2] The lawyer in this case acted as counsel in an action against the corporate client by a former employee for wrongful dismissal. His retainer began shortly following the commencement of the action, and continued through to the conclusion of a nine day trial. The trial judge awarded the employee damages for breach of a termination provision of the employment contract and aggravated damages for the circumstances of the dismissal, but dismissed a claim for a greater amount of damages based on a fixed term of employment, as well as a claim for punitive damages.

- [3] Following the trial, the lawyer, through his law corporation, commenced a review under the LPA seeking payment of unpaid legal fees, disbursements and taxes. The fee review was adjourned by Registrar Nielsen to allow the clients to seek relief from the trial judge, including an order pursuant to Rule 14-1(33)(c) disallowing 50% of the fees and disbursements billed by the lawyer's law corporation, or alternatively disallowing the fees and disbursements related to the first six days of trial, including preparation for those days.
- [4] Rule 14-1(33)(a) provides that if the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may disallow any fees and disbursements between the lawyer and the lawyer's client.
- [5] The trial judge determined that the entitlement of the lawyer and his law corporation should be reduced by the fees and disbursements relating to three days of trial, including the preparation for those three days. She found that the lawyer remained entitled to have his accounts reviewed by the registrar, and that the amount of fees disallowed pursuant to her order should also be determined by the registrar.
- [6] In reaching this decision, the trial judge found that the lawyer's conduct of the trial fell short of the standard the court expects of counsel, and that his disorganization and lack of understanding of basic trial procedures wasted time unnecessarily. At the same time, however, the trial judge also found that the corporate client must bear responsibility for positions taken on which it was unsuccessful at trial, and that those positions complicated what would otherwise have been a relatively straight forward wrongful dismissal action.
- [7] The clients now seek a further reduction of the lawyer's bills in this fee review, on the following grounds:
- a) the lawyer lacked the skill and specialized knowledge required of counsel in relation to pre-trial matters;
 - b) the lawyer did not discharge his services or provide his advice with dispassionate and objective impartiality;
 - c) the lawyer was disorganized and inefficient, and the amount of time he spent was unreasonable;
 - d) the total fees charged were well in excess of a fee estimate; and
 - e) the result he obtained was poor.
- [8] The lawyer says the clients' objections constitute an impermissible "second kick at the can". He argues that the clients are barred by the doctrine of res judicata from seeking a further reduction in his bills. Alternatively, he submits that, following the reduction ordered by the trial judge, the remaining fees were reasonably necessary or proper to the conduct of the proceeding as a whole.

II. FACTS

- [9] This fee review is based on a five day hearing which included testimony from the lawyer, his client and opposing counsel in the wrongful dismissal action.

A. The Parties

- [10] The lawyer was called to the Bar in Saskatchewan in 2004, Ontario in 2006 and British Columbia in 2009. He has had a varied practice, beginning with criminal defence work and moving to a mixture of criminal and civil litigation. Since 2011, the lawyer has practiced as a sole practitioner with an office in Port Coquitlam.
- [11] The client, Tong Du, is an entrepreneur and the principal of Canada Shineray Suppliers Group Inc. ("Shineray"). Mr. Du was born and lived much of his life in China. He immigrated to Canada in 2012. He does not speak or read English.
- [12] All of the communications between the lawyer and Mr. Du were in Mandarin. At times, Mr. Du's wife, daughter or nephew helped him with translating or drafting documents in English. All of the critical documents in the solicitor-client relationship, however, were originally written in Chinese and translated to English for this hearing.

B. The Wrongful Dismissal Action

- [13] Mr. Du and his family established a daycare facility through Shineray which they hoped would provide them with a steady income for their life in Canada. Lacking familiarity with the culture and regulatory environment in this country, Mr. Du sought out a qualified local person to manage the facility. He met Sian Lydia Davies in early 2015. At the time, Ms. Davies was operating a licenced daycare from her home.
- [14] Shineray entered into a contract for Ms. Davies' services in the form of a letter to Ms. Davies's personal company. The contract provided for monthly payments of \$5,000, and a term of five years. It included a provision which authorized Shineray to terminate the agreement with or without cause by providing three months' notice of cancellation.
- [15] On March 30, 2016, Shineray terminated the contract with five days' notice, citing a failure by Ms. Davies to provide well-organized reports or the "promised revenue". That evening, Ms. Davies removed materials and equipment she brought with her from her previous daycare business. Following these events, Shineray issued a letter to the parents, signed by Mr. Du, explaining the situation as "due to the sudden resignation of Sian Davis [sic] and the disappearance of our school equipment".
- [16] In a notice of civil claim filed April 16, 2016, Ms. Davies and her company sought damages from Mr. Du and Shineray in the amount of \$255,000, being the balance of the amount owing to the end of the term of the contract, as well as aggravated and punitive damages for the manner and circumstances of her dismissal.

- [17] The notice of civil claim alleged that the termination provision in the contract was unenforceable because it violated the Employment Standards Act, R.S.B.C. 1196, c. 113, and the Human Rights Code, R.S.B.C. 1996, c. c. 210.
- [18] The plaintiffs served the notice of civil claim on the defendants on June 9, 2016. The pleading made the action subject to the fast track litigation rule.

C. The Retainer and Initial Instructions

- [19] Mr. Du retained the lawyer to act for Shineray in the wrongful dismissal action. At the time, Mr. Du believed the case was a straight forward labour dispute. Mr. Du was not familiar with the lawyer or his work before he retained him. One of the main reasons why Mr. Du retained the lawyer was that the lawyer speaks Mandarin.
- [20] Mr. Du first met with the lawyer on June 10, 2016. He went to the lawyer's office with his wife and a friend. They provided the lawyer with a copy of the notice of civil claim and explained the background. The lawyer asked Mr. Du to set out the facts of the case and an explanation of his position in writing for the purpose of preparing a response to the notice of civil claim.
- [21] The lawyer explained the terms of his retainer and provided Mr. Du with a retainer letter in Chinese based on an English language precedent. Mr. Du returned to the lawyer's office on June 13 and signed the retainer letter. The retainer letter included the following "fair fee" provisions:

The total cost of your legal services will depend on what you want done and what must be done in accordance with the Rules of Court to properly advance or defend this case or related proceedings. The cost will also depend on the degree of urgency, the frankness with which disclosure is made by opposing parties, the need for expert reports, the need for interim applications to court, the number of documents involved and general level of co-operation between you and opposing parties. Accordingly, we cannot predict the total cost of your legal services. However, we will apprise you of the amount of your account as the matter progresses.

We require receipt of your minimum retainer of \$5,600. The retainer will be deposited to our trust account and will be used to pay our accounts. We will ask you to replenish your retainer as we render accounts to ensure that we always have \$5,600 on deposit. A higher retainer may be required for certain portions of our work in a lawsuit, such as examination for discovery.

We will base our accounts on various considerations to ensure they are fair and reasonable. The time spent by us on your behalf is a very important factor. The writer's current hourly rate is \$360.00. (emphasis added)

- [22] The lawyer testified that he based the initial \$5,600 retainer on his hourly rate and his estimate of the time to review the basic documents and prepare a response to the notice of civil claim.

- [23] Mr. Du testified that the lawyer provided a further fee estimate in the range of \$30,000 to \$40,000 to the end of the lawsuit. The lawyer denies providing any estimate of fees to the end of the case.
- [24] The lawyer testified that he advised Mr. Du during their first meeting that Ms. Davies was entitled to three months' notice under the contract, and that the cheapest way to resolve the dispute was to pay her \$15,000 in lieu of notice. The lawyer said he recommended that the defendants make a settlement offer of \$15,000 following the examinations for discovery. According to the lawyer, Mr. Du acknowledged the company's liability and that his accountant had told him he should pay Ms. Davies \$15,000, but he refused to pay her anything "out of spite" and said she should "beg for the money". According to the lawyer, Mr. Du felt strongly that Ms. Davies did not show him proper respect as the owner of the business and treated him like a "hillbilly" (a derogatory Chinese expression), and for those reasons he would not pay her even the \$15,000 to which he knew she was entitled.
- [25] Mr. Du denied making these statements to the lawyer. He testified that the lawyer called him following the initial meeting to report on a letter from plaintiffs' counsel outlining a possible settlement with three conditions: (a) the defendants would pay Ms. Davies \$15,000; (b) the defendants would provide Ms. Davies with additional "compensation" in an amount that could be negotiated; and (c) the defendants would pay Ms. Davies' legal fees. Mr. Du testified that he told the lawyer he was agreeable to paying Ms. Davies \$15,000, but he was opposed to paying her compensation over and above \$15,000, because he did not think she was entitled to it.
- [26] Mr. Du subsequently provided the lawyer with nine pages of written instructions in Chinese handwriting. Mr. Du included in his notes an explanation of his family's decision to establish a daycare centre, why they hired Ms. Davies to help manage the business, the terms of the agreement with Ms. Davies' company, and the decision to terminate her services. Mr. Du explained that he was dissatisfied with Ms. Davies's marketing, her lack of a proper management or financial system, health and safety concerns, and the poor performance of the business under her management during the first year.
- [27] Under a heading "Our Views", Mr. Du wrote that Shineray denied Ms. Davies' allegation she was an employee and entitled to three months salary if she was fired. Mr. Du also disputed that Ms. Davies had suffered any loss. He instructed the lawyer to make a counterclaim against Ms. Davies for failing to provide the anticipated profits, damage to the business and compensation for the property she removed after the contract was terminated.

D. The Response to Civil Claim and Counterclaim

- [28] On June 20, 2016, the lawyer called plaintiffs' counsel to request an extension of time to file a response to civil claim, and to discuss the length of the trial. Plaintiffs' counsel agreed to an extension for the response to July 13, but in an e-mail the following day, made this extension conditional on the lawyer providing his availability for a summary trial in September or October, 2016.
- [29] In subsequent correspondence, counsel debated whether the case was suitable for summary trial or fast track litigation, without reaching any resolution. Eventually, counsel entered into a consent order removing the case from fast track litigation, but continued to disagree over the summary trial and other procedural issues.
- [30] Following their initial telephone conversation, the correspondence between counsel was generally in writing. The correspondence on procedural issues was extensive, with some of the e-mail chains running to several pages.
- [31] On July 12, 2016, just 33 days after the action was commenced, and before the defendants delivered a response, the plaintiffs set the action down for a six day trial starting January, 9, 2017.
- [32] The lawyer prepared a response to civil claim and a counterclaim based on Mr. Du's instructions. The response alleged that Ms. Davies fraudulently misrepresented her experience and competence, and sought rescission of the contract. In the alternative, the response alleged that Ms. Davies was dismissed for cause. The counterclaim sought damages for misrepresentation in the amount of \$100,000.
- [33] Mr. Du reviewed the draft response and counterclaim with assistance from his wife, and approved them on behalf of the defendants. The pleadings were filed on July 25, 2016.
- [34] The defendants amended the response with the consent of the plaintiffs on September 8, 2016. The amendments were minor and cosmetic in nature.

E. Settlement Offers / Amendment to the Pleadings / Summary Trial

- [35] In late July of 2016, plaintiffs' counsel proposed a mediation. The lawyer did not recommend mediation to Mr. Du because, in his view, the parties were too far apart for a mediation to be productive. Also, according to the lawyer, Mr. Du said he was not interested in mediation.
- [36] In August of 2016, while preparing for examinations for discovery, the lawyer discovered that Ms. Davies' certificate in Early Childhood Education ("ECE") had expired approximately five months before Shineray terminated her contract. The lawyer sought and obtained instructions from Mr. Du to investigate this issue further and to consider an amendment to the response to include an allegation of after-acquired cause for dismissal.

- [37] The lawyer examined Ms. Davies for discovery on August 31, 2016, and asked her questions about the expiry of her ECE certification. According to plaintiffs' counsel, the lawyer was overly aggressive with Ms. Davies during the examination, raising his voice several times. The lawyer denies any inappropriate behaviour toward Ms. Davies.
- [38] Mr. Du testified that, following the examination, the lawyer became "excited" about the case and told Mr. Du that the expiry of the ECE certification provided grounds on which to argue that the contract was unenforceable and the claim should be dismissed in its entirety.
- [39] On September 2, 2016, the defendants made a formal offer to settle the case for \$15,000. On September 15, the plaintiffs made a counter offer of \$90,000.
- [40] Meanwhile, the plaintiffs pressed forward with the summary trial application. In early September 2016, Mr. Du provided the lawyer with further handwritten notes setting out his reasons for terminating the contract with Ms. Davies. His notes focussed on Ms. Davies' representation of her qualifications, the commitments she gave in terms of performance targets, her failings as Mr. Du saw them as a manager and the circumstances of her departure, including the chaos at the daycare the morning after she left.
- [41] The lawyer prepared a response to the summary trial application and a supporting affidavit by Mr. Du. The lawyer also prepared an affidavit by a former accountant of Shineray, verifying the financial losses of the daycare business.
- [42] The parties argued the summary trial application over three days on September 21 to 23, 2016. The primary position advanced by the lawyer, to the exclusion of any real submissions on the merits, was that the application should be dismissed because the matter was not suitable for summary trial. He argued that there were significant conflicts in the evidence and concerns about Ms. Davies' credibility. He also argued that the matter was premature for disposition because the defendants' pleading needed to be amended to allege after-acquired cause.
- [43] In reasons for judgment released on October 7, 2016, and indexed as 2016 BCSC 1853, Madam Justice Fleming dismissed the plaintiffs' summary trial application. In doing so, Madam Justice Fleming noted the conflicts in the evidence and the rapid pace of proceedings to date:
- [43] I agree with the defendants' submission that Ms. Davies' evidence on this issue [of the expiry of her ECE certificate] is inconsistent and raises concerns about her credibility.
- [47] The question becomes whether it would be unjust to determine the summary trial application. The issue of cause is a significant one in this case. The plaintiffs argued the defendants appear to have admitted that no single incident constituted just cause and have failed to present evidence in support of their obligation to provide an adequate warning and adequate opportunity to improve. At the same time, the plaintiffs seek contractual damages in the amount of \$255,000, on the grounds that the termination clause(s) are invalid and the Contract was for a fixed term of five years. Potentially then, the issue of after-acquired cause

could stand between no award for the plaintiffs and an entitlement to payment of the balance of a five-year period. I say this having come to no conclusions about the legal principles argued by the plaintiffs.

- [48] It is well settled that all parties to an action are obliged to take every reasonable step to ensure they come to a summary trial application prepared to prove their claim, or defence, "unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner": *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32. A party cannot frustrate the benefits of the summary trial process by failing to take reasonable steps. The plaintiffs argue this is precisely what the defendants are doing. I am not persuaded this is so.
- [49] Given the pace of this litigation and some of the steps taken to date, for example the early filing of the notice of trial, I do not regard the defendants' conduct as dilatory. The fact they did not apply to further amend their pleadings prior to or at the summary trial application is not, in my view, a failure to take reasonable steps. I accept that counsel for the defendants was unaware of the expired ECE certificate until shortly before Ms. Davies' examination for discovery on August 31, 2016. On that same day, the summary trial application was served. Understandably, responding to that application became the defendants' focus. In any event, I expect the defendants will have to obtain additional documents and seek evidence from third parties related to the expired ECE certificate. An application for third party records may be necessary. Further, given the chronology, I fail to see how the defendants reasonably could have served the proposed expert report prior to the commencement of the summary trial, in accordance with the notice requirements under R. 11-6.
- [50] Returning to some of the factors identified in *Inspiration Mgmt.*, there is no particular urgency in this case. I note that the plaintiffs quickly returned to operating a licensed child care facility from Ms. Davies' home. The course of the proceedings to date, as I have indicated, has been rapid if not expeditious. For these parties, the damages sought are significant. I should also say, I have enough concern about credibility and the efficient use of judicial resources to conclude that the plaintiffs' application must be dismissed rather than adjourned. The parties should proceed to the conventional trial scheduled for January 2017. (emphasis added)
- [44] On hearing this result, Mr. Du congratulated the lawyer on the outcome of the summary trial application.
- [45] On October 13, 2017, plaintiffs' counsel delivered a further offer to settle the action for \$90,000. According to the lawyer, Mr. Du flatly rejected any suggestion that the defendants make a counter-offer.

[46] Ms. Davies also contacted Mr. Du's nephew, William Du, and asked for his help with settlement discussions. William forwarded this communication to the lawyer. According to the lawyer, Mr. Du became very upset when he learned that William was involved, and instructed the lawyer to ignore William and any discussion through him of settlement with Ms. Davies.

[47] On November 7, 2016, Mr. Du sent the lawyer a text over WeChat. The translation of the text states:

You are to propose the following conditions in the letter to the lawyer of Xuer [meaning Ms. Davies]:

1. Our company Shineray will not pay any compensation to [Ms. Davies];
2. The parties will agree to withdraw of the lawsuit(s) regarding Shineray's termination of the agreement with her and with her company;
3. If she accepts the above conditions on or before the 18th of this month, each party will bear its own legal costs up to the termination of the lawsuit(s).

I hereby authorize you to send the above conditions to her lawyer. (emphasis added)

[48] That same day, the lawyer sent plaintiffs' counsel a letter with a formal offer to settle for the case for \$0.00. Needless to say, the offer was not accepted.

[49] In late October or early November, 2016, Mr. Du informed the lawyer that Shineray had discovered evidence that Ms. Davies had misappropriated \$1,000 from the company. He instructed the lawyer to amend the response to civil claim to raise the misappropriation.

[50] On November 16, 2016, the lawyer obtained an order granting the defendants leave to amend the response to civil claim and counterclaim. The amended response alleged after-acquired cause based on the expiry of Ms. Davies' ECE certification and the allegation that she misappropriated \$1,000 from the company. The amended counterclaim withdrew the claim in damages, and sought only restitution of the \$1,000.

F. The Adjournment Application

[51] On December 30, 2016, Ms. Davies applied for adjournment of the trial. The presiding master granted the adjournment. Tensions rose between the lawyer and the master, and sheriffs were summoned. Plaintiffs' counsel testified that the lawyer was rude and disrespectful to the Court. The lawyer states that he meant no disrespect; he simply felt that he was not given an opportunity to be heard on the application.

[52] Shineray appealed the master's decision. Mr. Justice Leask allowed the appeal and set a trial management conference at which the trial was reset for January 23, 2017, and extended to 7 days. While in the courthouse for one of these hearings, the lawyer got into an argument with plaintiffs' counsel over the endorsement of a court order.

G. The Trial Judgment

- [53] The trial began on January 23, 2017, and lasted almost 9 days. The trial judge was Madam Justice Fisher, who has since been appointed to the Court of Appeal.
- [54] In reasons for judgment released February 27, 2017, and indexed as 2017 BCSC 304 (the "Trial Judgment"), Madam Justice Fisher found that Ms. Davies was hired as an employee, not as an independent contractor as Shineray had argued. She found that Shineray breached the employment contract, but upheld the termination clause, limiting the plaintiffs' contractual damages to \$15,000 in lieu of the three months notice to which Ms. Davies was entitled had the clause been properly invoked. Madam Justice Fisher also awarded the plaintiffs \$30,000 in aggravated damages, based on the letter to the parents, signed by Mr. Du, which she found contained false statements made for the purpose of shifting blame for the chaos at the daycare to Ms. Davies and attacking her integrity.
- [55] Madam Justice Fisher also dealt with Ms. Davies' claim to punitive damages. She noted that Shineray initially defended the action and advanced a substantial counterclaim based on allegations of fraudulent misrepresentation, but later abandoned those allegations and shifted the focus of the defence to after-acquired cause or fundamental breach of contract, which was not pleaded. Madam Justice Fisher observed that a considerable amount of time at trial was spent on issues surrounding the alleged misappropriation of \$1,000, in particular, which she found was advanced by Shineray without adequate investigation or evidentiary foundation.
- [56] In conclusion, Madam Justice Fisher expressed concern with Shineray's conduct of the litigation, but declined to award punitive damages:
- [108] While it is apparent that Shineray's conduct of this litigation has been problematic in many ways, I am not satisfied that there is a proper basis on which an award for punitive damages should be made.
- [109] Issues related to abandoned claims can be addressed in a costs award. The only basis on which to consider punitive damages stems in my view from Shineray's conduct following Ms. Davies' termination regarding the allegation of misappropriation.
- [110] My concern about this allegation is not based on my finding in favour of Ms. Davies but rather on evidence that it was made without proper investigation .
- [113] The evidence shows that Shineray made this serious allegation against Ms. Davies before it had fully investigated where the \$1,000 may have gone. However, within several weeks, Ms. Davies confirmed that the money had initially been deposited into her personal account and Shineray discovered that no equivalent deposit had been made into its business account. It was not until the examination for discovery on January 13, 2017, that the factual dispute about the cash became known. In these circumstances, I do not consider Shineray's conduct to be "so malicious and outrageous" deserving of punishment on its own. Clearly, the principals ought to have taken more care in investigating this allegation, particularly

since Ms. Liu had played a role in the banking back in January 2016 and was fully in charge of it in April and following. It may be that Ms. Liu had the cash and forgot about it, but I do not consider the evidence before me to be sufficient to find that she, or anyone else in the company, acted maliciously in making this allegation against Ms. Davies.

[57] Madam Justice Fisher left the issue of costs to be spoken to.

H. The Costs Judgment

[58] Following the Trial Judgment, Ms. Davies and Shineray both brought applications relating to costs.

[59] Ms. Davies sought special costs of the action, or alternatively costs at Scale C, as well as double costs from the date of the offer to settle. Her submissions concerned conduct before and during the trial and did not differentiate between Shineray and the lawyer; however, she placed responsibility on the lawyer for conducting the litigation ineffectively. Her complaints about his conduct included the positions taken in settlement negotiations, his behaviour toward counsel, the plaintiff and the court, and recklessly maintaining claims that were bound to fail and carelessly conducting the trial.

[60] Represented by new counsel, Shineray sought an order that the lawyer be personally liable for 70% of any costs Shineray was ordered to pay, and that the fees and disbursements billed by the lawyer's law corporation be disallowed by 50%, or alternatively in respect of the first six days of trial. Shineray argued that the lawyer caused the trial to last six days longer than reasonably necessary through a lack of preparation, disorganization, incompetence and frequently being late for court. Shineray also argued that the lawyer incurred and wasted costs in an attempt to prove cause when the employment contract stated that Ms. Davies' services could be terminated with or without cause on three months' notice.

[61] Shineray relied on Rule 14-1(33), which provides that:

Disallowance of fees and costs

- (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:
- (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
 - (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
 - (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;

- (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.
- [62] In reasons for judgment released September 27, 2017, and indexed at 2017 BCSC 1729 (the "Costs Judgment"), Madam Justice Fisher determined that:
- a) Ms. Davies was not entitled to special costs;
 - b) Ms. Davies was entitled to costs against Shineray at scale C;
 - c) the lawyer was personally liable for the costs that Shineray was ordered to pay for three days of trial, including preparation for those days; and
 - d) an order would be made disallowing the fees and disbursements of the lawyer and his law corporation related to three days of trial, including the preparation for those days.
- [63] In so far as the Costs Judgment forms the basis for the lawyer's arguments of res judicata in this proceeding, it is important to review in some detail the reasons for judgment of Madam Justice Fisher as they relate to the issues before me.
- [64] In the context of Ms. Davies' application for special costs, Madam Justice Fisher rejected Shineray's argument that it bore no responsibility for any conduct of the lawyer which was the cause of unnecessary or wasted costs:
- [21] At this point it is important to note that Tong Du, the principal of the defendant, waived solicitor-client privilege over his communications with Mr. Wang. His evidence conflicted in a number of ways with the evidence tendered by Mr. Wang. The tenor of Mr. Du's evidence was that Mr. Wang was in the "driver's seat" regarding the conduct of the litigation; the tenor of Mr. Wang's evidence was that he was at all times acting on instructions from his client. Mr. Du deposed that he had no experience with the Canadian civil court system and relied on Mr. Wang's advice on how to proceed, which I accept. However, Mr. Wang's affidavit included copies of correspondence he received from Mr. Du, which shows that Mr. Du gave fairly detailed written instructions about the facts of the case and how he wished to proceed, including the scope of settlement offers. On this basis, the defendant must bear responsibility for the positions taken in this case. (emphasis added)
- [65] Addressing Ms. Davies' claim to special costs, Madam Justice Fisher found it difficult to assess the evidence of the lawyer's conduct before the trial, focussing instead on the manner in which the defendant and its counsel conducted the trial:
- [19] [S]ome of the pre-trial conduct complained of was not supported by evidence, and some was supported only by inadmissible hearsay. . . .
- [20] I have not considered any pre-trial conduct that was not supported by admissible evidence. . . .
- . . .

- [24] Other pre-trial conduct complained of - generally of Mr. Wang - was either unsupported by evidence or involved somewhat bizarre behaviour that, as I discuss below, cannot fairly be assessed in the context of an application for costs.
- [25] The plaintiff's remaining complaints concern the trial itself and the conduct of Mr. Wang. Her main concerns are that the defendant persisted with positions that were bound to fail and engaged in careless conduct that resulted in a substantial waste of court time, such as Mr. Wang's repetitive cross-examination, disorganization, lack of familiarity with basic principles of trial procedure, and continual tardiness. (emphasis added)
- [66] Madam Justice Fisher declined to award special costs against Shineray based on the manner in which it advanced its positions at trial:
- [27] I appreciate the plaintiff's frustration with the manner in which this case proceeded through to trial, but I am not satisfied that, overall, the conduct complained of is the kind of reprehensible conduct that justifies an order for special costs against the defendant. . . .
- [28] At trial, a number of positions taken by the defendant did lack merit The defendant was quite careless about the manner in which these issues were pursued at trial, but many of them may have been unnecessary had the plaintiff not claimed damages to the end of the contract's five-year term. This brings me back to the dynamics between the parties and the overall hard-fought nature of this litigation. At most, the manner in which the defendant advanced its positions at trial made it more complicated than it deserved. (emphasis added)
- [67] Madam Justice Fisher awarded Ms. Davies party-and-party costs at the higher scale C, reflecting the Court's view that the trial was three days longer than necessary:
- [35] My view is that the manner in which the defendant conducted this litigation turned a matter of ordinary difficulty into one of more than ordinary difficulty. Factual issues became unnecessarily complex. Despite the plaintiff's primary position regarding the validity of the termination clause, the defendant raised issues and defences that were not supported by evidence or not pleaded, abandoned positions that were pleaded, and conceded little to nothing throughout the entire process. The plaintiff was required to respond to differing positions which evolved over time, even as late as during final submissions at trial.
- [36] The trial was initially set down under Rule 15-1 (Fast Track Litigation) but soon after, plaintiff's counsel agreed to set it down for six days. The trial actually took almost nine days. Although this was not inordinately long, it should have concluded well within the six-day estimate given the real issues between the parties. (emphasis added)
- [68] Madam Justice Fisher also declined to order special costs against the lawyer personally, again indicating that the evidence of his conduct before the trial was difficult to assess:
- [55] I have already determined that the plaintiff is not entitled to special costs as against the defendant. In light of this, it would be most unusual, if at all appropriate, for special costs to be ordered payable by Mr. Wang. As I have found, Mr. Wang took positions in this litigation

based on instructions from the defendant. There is some evidence that Mr. Wang was prone to angry or unreasonable outbursts during the plaintiff's examination for discovery and when dealing with witnesses and opposing counsel, but none of this was in the presence of this Court. As I indicated above, it is difficult to assess such conduct in the context of these applications. Such matters may be more suitably addressed, if necessary, by the Law Society of British Columbia (a power parallel, and not mutually exclusive, to the Court's power to award costs against lawyers: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at para. 20). (emphasis added)

- [69] Madam Justice Fisher was critical of the lawyer's conduct at the trial itself, even if that conduct fell short of reprehensible conduct that required a sanction against counsel in special costs:
- [60] Mr. Wang's conduct of the trial did fall short of the standard the court expects of counsel. He did not adduce evidence to support some of the defendant's positions, some which were not pleaded. His cross-examination of the plaintiff was repetitive, he was consistently late for court, constantly disorganized, and was unfamiliar with some of the basic principles of trial procedure. All of this wasted time and costs but I would not go so far as to say that it was designed to frustrate or interfere with the administration of justice. It was not reprehensible conduct that requires punishment, but rather neglectful conduct that requires compensation. Thus, I decline to award special costs against Mr. Wang. (emphasis added)
- [70] Turning to the question of whether the lawyer should be personally liable under Rule 14-1(33)(c) for all or part of the costs the defendant was ordered to pay, Madam Justice Fisher made the following findings:
- [64] Both the plaintiff and the defendant have established that Mr. Wang caused costs to be incurred without reasonable cause or through delay and neglect. To his credit, Mr. Wang did not dispute that some of his inefficiencies wasted time at trial. Overall, Mr. Wang's disorganization and lack of understanding about appropriate ways to examine and cross-examine witnesses resulted in a very inefficient use of court time. Examples of his conduct include the following:
- while cross-examining the plaintiff, continually failing to properly put questions to her from her examination for discovery;
 - failing to appreciate the different uses of discovery in cross-examination and as evidence to be read-in as part of the defendant's case;
 - making unnecessary accusations or arguments during cross-examination and asking long, convoluted, irrelevant and repetitive questions;
 - being continually disorganized with exhibits and not having copies available for the witness, opposing counsel and the court;
 - putting documents to witnesses who could not testify about their creation or content;

- leading evidence for the defendant about matters that were not put to the plaintiff in cross-examination;
- conducting improper re-examination; and
- being continually late for court. (emphasis added)

[71] Notably, Madam Justice Fisher rejected both approaches recommended by the parties which would have required the lawyer to pay a share of the costs of the action as a whole, focussing again on the trial itself:

[68] I agree with counsel for Mr. Wang that the "holistic" approach proposed by the defendant would be unfair. Despite the fact that the plaintiff initially filed the Notice of Civil Claim under the fast track rule, her counsel later agreed (albeit reluctantly) to an estimate of a six-day trial and removal from Rule 15-1. This matter went to trial relatively quickly despite its hard-fought nature. Given the limitations of the evidence before me in the plaintiff's application, the only conduct which I can properly attribute to wasted costs is that which was before me at trial. (emphasis added)

[72] Recalling her view that the trial ought to have been completed within the original six day estimate, Madam Justice Fisher found that the fair result was to hold the lawyer personally liable for the costs that Shineray was ordered to pay for three days of trial, including preparation time for those days.

[73] Madam Justice Fisher turned lastly to Shineray's application for an order under Rule 14-1(33) (a) that the fees and disbursements of the lawyer be disallowed by 50%, or alternatively in respect of the first six days of trial. She rejected these approaches as unfair, preferring once again an order based on the time that she found was wasted by the lawyer's conduct at trial:

[73] The defendant attempted to justify the order sought on the basis that it was not responsible for any of Mr. Wang's conduct that unnecessarily incurred or wasted costs. However, as I have found, the defendant must be responsible for the instructions given to Mr. Wang about the positions it took in this litigation, while Mr. Wang must be responsible for the way in which he conducted it. Both factors caused costs to be incurred.

[74] I agree with counsel for Mr. Wang that an order disallowing 50% of fees and disbursements would be unfair, especially given the basis for my order above under Rule 14-1(33)(c). The evidence shows that over 60% of the fees and disbursements was billed to the defendant before trial. Moreover, an order disallowing fees for the first six days of trial is inconsistent with my assessment of the time wasted by Mr. Wang's conduct.

[75] I consider an order disallowing fees and disbursements related to three days of trial, including preparation for those days, to be appropriate here. Costs incurred due to a lawyer's conduct should not be borne by either party to the litigation. Mr. Wang remains entitled to have his accounts reviewed by the Registrar, and the amount of the fees and disbursements that are to be disallowed pursuant to this order should also be determined by the Registrar. (emphasis added)

[74] With this background in mind, I turn first to the lawyer's arguments based on *res judicata*.

III. RES JUDICATA

[75] The lawyer argues that the clients' entitlement to a reduction of fees was decided in a final way by Madam Justice Fisher in the Costs Judgment, and it is no longer open to them to raise any objection that could have been raised on that application.

[76] The lawyer emphasizes three considerations in support of this argument: (a) Shineray sought and obtained an adjournment of this review so as to bring the application under Rule 14-1(33) first; (b) Shineray placed before the court all of the lawyer's bills and evidence of Mr. Du's instructions and complaints with the lawyer's services both before and during the trial; and (c) Shineray asked the trial judge to reduce the fees and disbursements for the entirety of the retainer by 50%. Accordingly, the lawyer argues, the overall amount of legal fees payable by the clients to the lawyer was raised by the clients on the 14-1(33) application, and they had the opportunity at that time to advance all of the objections they now rely on for a further reduction of the lawyer's bills.

[77] As described by the Court of Appeal in *British Columbia v. Teklavec*, 2014 BCCA 444, the doctrine of *res judicata* has two forms, cause of action estoppel and issue estoppel:

[18] Cause of action estoppel prevents a re-trial of a cause of action that has previously been adjudicated. To avail oneself of this remedy a litigant must establish that there has earlier been a final decision by a court of competent jurisdiction on the same cause of action, in a proceeding that involved the same parties or their privies.

[19] Issue estoppel provides a similar remedy but, as the label suggests, applies to prevent re-litigation of a particular issue, even if it arises in a different cause of action. To establish issue estoppel a litigant must demonstrate that the same right, question, or fact was put in issue and finally determined in a prior judicial proceeding involving the same parties or their privies.

[78] In either form, the underlying purpose of *res judicata* is to balance the importance of finality in litigation against ensuring that litigants are not deprived of the right to have their cases decided on the merits. A party should not be "twice vexed" for the same cause; however, the doctrine of *res judicata* must not be applied mechanically so as to work an injustice: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 1, 18-19, 33; *Cliffs Over Maple Bay (Re.)*, 2011 BCCA 180, at para. 25-26.

A. Cause of Action Estoppel

[79] In *Mol v. University of British Columbia*, 2006 BCCA 70, the Court of Appeal, citing *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15, stated that cause-of-action estoppel "dictates that a final judgment bars a second claim for the same cause", and that:

[23] . . . The rule is stated in *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 at 104 (H.L.) in this way:

Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.

[24] The meaning of "cause of action" in this context is clear. In *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242-43 (C.A.), Diplock L.J. said, "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." In *Johnson v. Refuge Assurance Co. Ltd.*, [1913] 1 K.B. 259 at 264, 82 L.J.K.B. 411 (C.A.), Kennedy L.J. said that the word "action" in its usual meaning "refers to any proceeding in the nature of a litigation between a plaintiff and a defendant".

[80] In my view, the Rule 14-1(33)(a) application in this case was not a "cause of action" for the purposes of cause of action estoppel. It was an application in a cause of action between Shineray and Ms. Davies. The application gave rise to an order against the lawyer, but there was no proceeding in the nature of litigation between Shineray and the lawyer. The order was an exercise of the court's authority under the Rules to control its process, rather than an adjudication of a fee dispute between a lawyer and a client.

[81] Under Rule 14-1(33)(a), the court may disallow fees between a lawyer and a client "if the court considers that the lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". This authority is closely related to the court's authority to award costs as set out in Rule 14-1 as a whole. The purpose the costs authority was explained by the Court of Appeal in *Tanious v. The Empire Life Assurance Company*, 2019 BCCA 329, as follows:

[35] The court's power to order costs serves as a tool to further the efficient, fair and orderly administration of justice. The traditional purpose of a costs award is to indemnify the successful party to some degree for allowable expenses and services incurred in a civil proceeding. While the indemnification principle is a cornerstone of a costs award, in the ordinary course the costs regime provides only partial, not full, indemnity. The general objective is to reallocate some of the successful party's litigation costs to the loser, not to make the successful party whole. Without more, a discrepancy between actual costs and a costs award does not amount to an injustice or contravene the principle of indemnification: *Okanagan Indian Band* at paras. 20-21; *MacKenzie* at para. 81; *Asselstine* at paras. 4-6.

- [36] Costs awards also serve other purposes and objectives. For example, they may encourage settlement, deter frivolous actions or defences and sanction unreasonable conduct committed in the course of litigation. In addition, on occasion costs may be awarded to enhance access to justice, mitigate severe inequality between litigants and encourage socially desirable conduct. In other words, costs awards may be used as an instrument of policy to accomplish purposes and objectives the law seeks to foster and promote: *Okanagan Indian Band* at paras. 20-31; *MacKenzie* at para. 83; *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.); *Furtney v. Furtney*, 2014 ONSC 3774 at para. 33.
- [82] The authority to disallow fees is therefore found in the court's toolkit of powers to further the efficient, fair and orderly administration of justice. It serves the object of the Rules, which is "to secure the just, speedy and inexpensive determination of every proceeding on its merits" (Rule 1-3). The court may disallow fees so as to deter unreasonable or time-wasting conduct by counsel.
- [83] The authority to disallow fees in sub-rule (a) of Rule 14-1(33) is combined with the court's power in sub-rule (b) to order that a lawyer indemnify his or her client for costs that the client has been ordered to pay to another party, and the court's power under sub-rule (c) to order that the lawyer be personally liable for any costs the client has been ordered to pay to another party. These three sub-rules of Rule 14-1(33) provide the court with three means of addressing circumstances in which costs are incurred that should not be borne by either party to the litigation.
- [84] Read in this context and in light of the object of the Rules, the meaning of the "fees" a court may "disallow" under Rule 14-1(33)(a) is fees related to the conduct of counsel for one of the parties in a proceeding. It follows that there must be a proceeding in which the conduct of counsel caused delay or unnecessary expense. It could be an application or a trial, but there must be a proceeding before the court. Rule 14-1(33)(a) does not provide a mechanism to review lawyers' bills for matters unrelated to a proceeding. For example, the court could not be asked under Rule 14-1(33) to disallow fees for a real estate transaction that never resulted in litigation.
- [85] Rule 14-1(33)(a) provides the court with a broad discretion as to how best to remedy and deter the conduct of counsel for one of the parties in a proceeding. In this case, Madam Justice Fisher disallowed the fees for a portion of the trial, including preparation, based on her assessment of the amount of time he wasted at trial. The court could also adopt a more holistic approach, and disallow a percentage of the total fees charged by the lawyer from the start of the retainer. The court could also disallow a lump sum of fees. However, regardless of the approach, the basis of an order under Rule 14-1(33)(a) is the conduct of the lawyer in the proceeding, and not the terms of the retainer or a review of the legal services delivered over the course of the retainer.

- [86] The fee review provisions of the LPA are separate and distinct from the court's authority to disallow fees under Rule 14-1(33)(a). As Mr. Justice Butler explained in *Travelers Guarantee Company of Canada v. Ryan*, 2012 BCSC 43:
- [8] The LPA is aimed at regulating the monopoly the legal profession has on the delivery of legal services in British Columbia. Section 70 is aimed at ensuring that lawyers' accounts are fair and reasonable. It provides for independent review of accounts to ensure that bills issued for legal services are fair.
- ...
- [13] In this way, legal bills are not like other kinds of expenses incurred by litigants. As one of the checks on the monopoly lawyers have on the provision of legal services in the province, a lawyer's bill is always subject to independent review to ensure that the public is protected against unreasonable legal fees and disbursements.
- [87] Section 70 of the LPA provides both a summary procedure for a lawyer to enforce unpaid accounts, and a statutory right of the client to have the lawyer's accounts reviewed. In this case, the lawyer initiated a review of his unpaid bills.
- [88] A review of a lawyer's bills under the LPA is a "cause" and included in the definition of "proceeding" under Rule 1-1: *Holmes Greenslade v. Starcom International Optics Corp.* (1997), 49 B.C.L.R. (3d) 159, at para. 9. However, there would need to be clear overlap with a previous cause before I would be prepared to find that a client is subject to cause of action estoppel in a fee review under the LPA. As the Ontario Court of Appeal said in *McCarthy Tétrault LLP v. Guberman*, 2012 ONCA 679, at para. 13, albeit in a different context: "The right of a client to have a lawyer's account assessed is an important one, not to be taken away except in compelling circumstances." In this case, there was no overlapping cause of action between the clients and the lawyer.
- [89] In short, Shineray's right to have the lawyer's bills reviewed by the registrar is separate and distinct from its application under Rule 14-1(33)(a) in the wrongful dismissal action for an order of the court disallowing as much as 50% of those fees. Accordingly, cause of action estoppel does not apply.

B. Issue Estoppel

- [90] In *Mol*, the Court of Appeal adopted the following requirements for proof of issue estoppel:
- [27] The requirements of issue estoppel are set out in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2), [1967] 1 A.C. 853 at 935 (H.L.), *flld.* *Angle v. Canada* (Minister of National Revenue - M.N.R.), 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248 at 254:

- (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. . . .
- [91] The "same question" test is the focal point of issue estoppel. In *Danyluk v. Ainsworth Technologies*, 2001 SCC 44, the Supreme Court of Canada affirmed the view that the question must have been "distinctly put in issue and directly determined by a court of competent jurisdiction" before issue estoppel will apply. Unlike cause of action estoppel, issue estoppel does not extend to questions that could have been raised in the previous proceeding, only those which were actually decided: Lange. D.J., "The Doctrine of Res Judicata in Canada" 4th ed., at pp. 42-45.
- [92] In addition to the requirement that the question be actually decided, the question out of which issue estoppel is said to arise must have been fundamental to the outcome of the first proceeding: "It will not suffice if the question arose collaterally or incidentally in the earlier proceeding or is one which must be inferred by argument from the judgment": *Danylik*, at para. 24, citing *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at 255
- [93] In this case, Madam Justice Fisher did not actually decide whether the fees and disbursements billed by the lawyer were reasonably necessary and proper to the conduct of the proceeding, which is the overarching issue on a fee review under s. 70 of the LPA. Instead, she decided that the lawyer caused costs to be incurred at the trial without reasonable cause or through delay and neglect, which is a narrower question.
- [94] Moreover, Madam Justice Fisher did not actually decide any issue with respect to the bills rendered by the lawyer for work done before the trial began. At a number of places in her reasons, Madam Justice Fisher noted the difficulty of assessing the pre-trial conduct of the lawyer. In my view, she did not make any finding on whether the time he billed for that work was reasonably spent; nor did she apply any of the other factors a registrar is to consider under the LPA. Any overlap with the LPA factors was incidental or collateral to her exercise of discretion under Rule 14-1(33)(a).
- [95] It is also notable that Madam Justice Fisher confirmed that the lawyer remained entitled to have his accounts reviewed by the registrar. So long as the lawyer is entitled to have his accounts reviewed, the client must be entitled to raise any objection that was not actually decided by the trial judge. In my view, Madam Justice Fisher would not have confirmed the lawyer's right to have his accounts reviewed if she had already disposed of the issues on a fee review.
- [96] There are, however, relevant questions Madam Justice Fisher actually decided which were fundamental to the outcome of the application, including:
- a) the lawyer acted on instructions from Mr. Du;

- b) Shineray must bear responsibility for the positions taken in this case;
- c) the lawyer must bear responsibility for the way in which he conducted the trial; and
- d) the lawyer caused costs to be incurred at trial without reasonable cause or through delay and neglect.

[97] On these questions, both parties are bound by the Costs Reasons and the doctrine of issue estoppel. However, I do not agree with the lawyer that Shineray's objections to his bills constitute an impermissible "second kick at the can" by virtue of issue estoppel.

C. Conclusion on Res Judicata

[98] Madam Justice Fisher decided that the appropriate remedy for the time wasted by the lawyer's conduct of the trial was an order disallowing his fees and disbursements related to three days of trial, including the preparation for those days.

[99] This order does not give rise to cause of action estoppel; nor does it give rise to issue estoppel, except on the questions Madam Justice Fisher actually decided that were fundamental to the outcome of the Rule 14-1(33)(a) application.

[100] In my view, the decision by Madam Justice Fisher is more accurately viewed as a relevant circumstance the registrar must consider under s. 71(2) of the LPA. In this regard, I agree with the following statement in *Hungerford Tomyln Lawrenson and Nichols v. Wilson*, 2011 BCSC 1440:

[491] In addition to considering the "standard" Legal Profession Act factors, that Act directs me to consider "all of the circumstances". The phrase "all of the circumstances" has been held to mean "all factors essential to justice and fair play": see, *Diligenti v. McAlpine, Roberts and Poulus* (1978), 9 B.C.L.R. 153 (C.A.), at p. 156; and *Yule v. Saskatoon (City)* (1955), 16 W.W.R. 305 (Sask. Q.B.)). I am therefore not limited to the above factors in determining a fair fee.

[101] As a matter of fairness and justice between the parties, the lawyer should not have his fees reduced twice for the same work. Although the issues on the Rule 14-1(33)(a) application were different, it would be unfair to disallow fees and disbursements that have already been reduced by Madam Justice Fisher. For this reason, any further reduction of fees under the LPA will be limited to the time before and after the time period covered by Madam Justice Fisher's order.

IV. FEE REVIEW

[102] Section 71(2) of the LPA provides that the registrar must allow fees, charges, and disbursements for those services reasonably necessary and proper to the conduct of the proceeding to which they relate, and in so doing, must consider all of the circumstances, including those enumerated in s. 71(4):

- (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.

[103] The lawyer's bills in this matter totalled \$162,899.28, of which \$134,388 was on account of his fees. The clients have paid \$50,600, leaving an amount owing of \$112,299.28.

[104] The lawyer submits that nothing in the application of the LPA factors should change his fee entitlement beyond the disallowance made by Madam Justice Fisher.

[105] The clients seek a reduction of the total amount allowed to between \$75,000 and \$80,000, which they say also takes into account the order of Madam Justice Fisher. The further reduction they seek is based on fees; they take no issue with the pre-trial disbursements.

A. Complexity, Difficulty or Novelty

[106] At its core, this case was a straight forward wrongful dismissal claim. Ms. Davies challenged the enforceability of the termination clause in the employment contract and sought aggravated and punitive damages; however, none of her claims were complicated or novel in the context of a wrongful dismissal action. To the extent the case became more complicated, it was as a result of the various defences and counterclaims advanced by the defendant.

[107] In my view, the level of complexity or difficulty is a neutral factor for the purposes of this fee review. The difficulties that arose were a combined result of Mr. Du's instructions to pursue issues the trial judge found had little merit, and the lawyer's conduct of the trial, which the trial judge found confused or prolonged those issues. The same can be said of the pre-trial issues: the complexities or difficulties that arose were a combined result of the client's instructions and the lawyer's conduct of the file. The nature of the issues neither requires a reduction in the fees billed, nor justifies the full amount charged.

B. Skill, Specialized Knowledge and Responsibility

[108] This case required a lawyer with civil litigation experience, including knowledge of the rules of procedure and evidence. The lawyer had limited trial experience. Prior to this case, he had conducted just one civil trial in Ontario and two in British Columbia. His previous trials were short and uncomplicated.

- [109] Counsel for Mr. Du took me to passages in the transcript of the trial with the objective of demonstrating that the lawyer did not have the skill or knowledge required of a reasonably competent trial lawyer. As discussed, I am not prepared to reduce the fees for the trial further than what has already been ordered. However, I agree with Mr. Du that the conduct of the trial reflects on the level of skill and knowledge that the lawyer brought to the case as a whole.
- [110] Having said this, I do not agree with Mr. Du that the lawyer's skill and knowledge were significantly below average as they related to the pre-trial stages of the litigation. The lawyer completed the basic steps to prepare a case for trial. He also defended the summary trial application successfully.
- [111] In my view, the lawyer's limited civil litigation experience weighs against the total amount he billed, but standing alone does not require the dramatic reduction advocated by the clients.

C. Character and Standing in the Profession

- [112] The clients urge me to consider "character" as a stand-alone factor under s. 71(4)(c) of the LPA. They argue that the evidence of the lawyer's behaviour in this case demonstrates a notable lack of professionalism and objectivity.
- [113] In my view, "character and standing in the profession" is a factor to be considered at a general level, so as to assess the reasonableness of the fees charged, rather than an invitation for the registrar to pass judgment on the personal character or integrity of a lawyer on a fee review. The general concept, I think, is that a lawyer who is held in high regard by the legal community is entitled to demand a higher fee than one who has not earned that reputation.
- [114] I have not been provided with evidence of the lawyer's reputation in the legal community. Plaintiffs' counsel testified to his own experience with the lawyer in this litigation; however, I do not think opposing counsel's individual opinion of a lawyer's conduct in a particular case is admissible as evidence of the lawyer's "character and standing in the profession".
- [115] The evidence of the lawyer's conduct is better addressed, in my view, under subsection (e) - whether the time he billed was reasonably spent.

D. The Amount Involved

- [116] The amount involved in this case was significant to Shineray. Mr. Du acknowledged in his evidence that the plaintiffs' claim of \$255,000 or more was a significant potential liability for his company.

E. Time Reasonably Spent

[117] The lawyer argues that the time spent on the defence reflects the aggressive manner in which the case was pursued by Ms. Davies and her counsel. Ms. Davies commenced the action just two weeks after Shineray terminated the employment contract. Prior to serving the notice of civil claim, Ms. Davies attempted to garnish assets of Shineray. After the claim was served, plaintiffs' counsel agreed to a short extension for the response, but only on the condition that the defendants agree to a summary trial in just three months' time. Plaintiffs' counsel then filed the notice of trial before the defendants delivered a response, denying the defendants the usual first amendment as of right. Plaintiffs' counsel pursued the summary trial even as the parties were conducting the examinations for discovery. The aggressive pace of the litigation and multiple procedural disputes, the lawyer argues, added to the work required of counsel within the "pressure cooker" of a compressed timeframe.

[118] The clients argue that the amount of time the lawyer spent on this file was unreasonable.

i. Dealings with Opposing Counsel

[119] The lawyer testified that he found it difficult communicating with plaintiffs' counsel. The relationship got off on the wrong foot, he said, when he requested a reasonable extension to file a response, to which plaintiffs' counsel responded by accusing him of delay tactics. The lawyer found the e-mails from plaintiffs' counsel excessively long, and the tone of some of those e-mails condescending, patronizing or insulting. The lawyer acknowledged losing his temper once or twice with plaintiffs' counsel. He acknowledged yelling at plaintiffs' counsel at least once. However, the lawyer testified, he did not bill Mr. Du for the time spent "bickering" with opposing counsel.

[120] I do not accept the latter assertion. The evidence shows that the lawyer did bill the client for the time spent bickering with plaintiffs' counsel. For example, the lawyer billed 0.9 hours for a long chain of e-mails concerning whether the case was suitable for summary trial which descended into accusations of personal insults. In another example, the lawyer billed a total of 2.3 hours for an e-mail exchange in August 2016 that, while it included some important exchange of positions, also included repeated rejoinders by the lawyer that plaintiffs' counsel was insulting him or making false allegations about his conduct, going so far as to emphasize these complaints in red font. The lawyer also billed the client for an unnecessarily contentious exchange in December 2016 about an examination for discovery. That exchange was eventually terminated by plaintiffs' counsel because it became completely unproductive.

[121] The most striking example of correspondence of this nature is a letter from the lawyer to plaintiffs' counsel dated December 28, 2016, ostensibly related to case management issues. The lawyer billed 3.9 hours for the preparation of this three page letter. Its primary focus was to set out in some detail the lawyer's response to perceived false allegations and personal attacks by plaintiffs' counsel.

- [122] While it is not the role of a registrar on a fee review to decide matters of professional conduct, the question of whether legal services are necessary and proper is within the scope of the circumstances that may be considered by a registrar under s. 71(2) of the LPA: *Walker v. Schober*, 2008 BCCA 19, at para. 43-44, 50-51.
- [123] In my view, the time billed by the lawyer for correspondence of the nature referred to above was out of proportion with the objective benefit to the client. One of the roles of legal counsel, for which lawyers are paid by their clients, is to maintain objectivity in the face of difficult circumstances and vigorous opposition from opposing counsel. A lawyer does not serve the client well if he or she becomes part of the dispute.
- [124] On the other hand, I must be careful not to judge the lawyer's correspondence unfairly with the benefit of being removed from the dispute. As Madam Justice Southin famously said, "a trial is not a tea party" (*Middelkamp v Fraser Valley Real Estate Board* (1993), 83 BCLR (2d) 257 (C.A.), at para. 11). In this case, both Madam Justice Fleming and Madam Justice Fisher noted that the litigation was fought hard on both sides, from beginning to end. The relationship between counsel was difficult. The lawyer's style of correspondence was blunt and, at times, unnecessarily defensive. But plaintiffs' counsel was also assertive and pressed an aggressive timetable.
- [125] I find that the lawyer's bills must be discounted to reflect unproductive correspondence with opposing counsel; however, I would not go so far as to disallow the time on acrimonious correspondence altogether.
- [126] In addition to the time spent on correspondence, I heard evidence from plaintiffs' counsel of what he considered to be unreasonable and even "paranoid" inter-personal conduct by the lawyer. Plaintiffs' counsel testified that the lawyer displayed an "extreme level of anger" in his dealings with counsel, office staff and Ms. Davies. He gave a number of examples of unwarranted outbursts by the lawyer.
- [127] I don't think any useful purpose would be served by going into the details of these incidents, the worst of which are denied by the lawyer. My task on a fee review is not to police the collegiality of the Bar; my task is to determine whether the time billed by the lawyer was reasonably spent.
- [128] There is evidence that the lawyer's failure to control his temper added to the time spent on procedural issues. Many of those issues, such as whether the case was suitable for summary trial, would have arisen in any event. However, to the extent the lawyer's temper extended or complicated matters, it must weigh against the total fees he charged for pre-trial procedures.

ii. Pleadings

- [129] The lawyer billed approximately 18 hours for the preparation of the original response to civil claim and counterclaim, including time for instructions, document review, research, drafting and revising the pleadings.
- [130] The factual basis of the response and counterclaim is relatively straight forward, based largely on the written notes provided by Mr. Du. The legal basis of the response is brief and somewhat unclear in my view. No response is pleaded to the plaintiffs' central allegations that the contract was for a fixed term and the termination clause was unenforceable. The counterclaim appears to concede that \$15,000 was payable to Ms. Davies, contradicting the defence that Shineray was induced to enter into the contract by fraudulent misrepresentation.
- [131] In my view, 18 hours is unreasonable for the preparation of the original response and counterclaim, having regard to the nature and quality of the work product.
- [132] The first amendment to the response, which went by consent, was very minor. The lawyer testified that most, if not all of the amendments were made at the specific request of Mr. Du. The lawyer docketed 2.3 hours for these amendments, which I consider more than what was objectively necessary to make the minor changes Mr. Du requested.
- [133] The second amendment to the response required an application to the court to plead after-acquired cause. The lawyer billed 7.1 hours for the amendments alone, not including the application, an additional 1.3 hours to obtain instructions and 2.6 hours to research the law of after-acquired cause. This was excessive in my view. The amendments themselves are straight forward. Some of the amendments plead evidence rather than facts, which is unnecessary in a pleading. The amendments fail to plead fundamental breach of contract.
- [134] The lawyer testified that the issues around after-acquired cause were "nuanced", but did not explain what that nuance was or why it took so long to amend the pleadings to raise the defence.

iii. Summary Trial

- [135] The lawyer billed approximately 22 hours to prepare the response to the summary trial application, including a review of the plaintiffs' materials, legal research, drafting the response and preparing the affidavits of Mr. Du and the accountant.
- [136] The factual basis of the application response is largely cut-and-paste from the response to civil claim, with the exception of paragraphs referring to some of the plaintiffs' evidence on examination for discovery and the difficulty of obtaining an affidavit from William Du. The legal basis of the response is substantially cut-and-paste from a precedent provided to the lawyer by another lawyer. Although the lawyer testified that he considered the legal authorities from the precedent prior to including them in the response, there is nothing in the final product to indicate he applied independent analysis that would justify the amount of time billed.

- [137] The affidavit of Mr. Du is substantially cut-and-paste from the application response, which in turn is substantially cut-and paste from the response to civil claim. This is, of course, entirely appropriate if Mr. Du had knowledge of the facts pleaded in the response; however, the simple copying of the facts from the pleadings casts doubt on whether the client received value for the 7.9 hours he was billed separately for the preparation of the affidavit. To the extent the lawyer edited the content of the affidavit to ensure it was properly worded and relevant to the summary trial, those edits were minor.
- [138] Also, somewhat unusually, the lawyer exhibited the entire transcript of the examination for discovery of Ms. Davies to Mr. Du's affidavit. He did so, the lawyer testified, to demonstrate that Ms. Davies was not a credible witness. The entire transcript was unnecessary for this purpose in my view.
- [139] The accountant's affidavit was inadmissible at the summary trial because it was opinion evidence. While the affidavit may have served some purpose to demonstrate that the defendants required time to obtain a proper expert report, that does not justify the full time billed for preparing it.
- [140] Mr. Du is also critical of the lawyer's failure to argue the merits of the case at the summary trial application. I view this as a strategic decision by the lawyer. His objective, the lawyer testified, was to emphasize the importance of credibility and pleadings amendments to a proper disposition of the case. It is not my role to second guess this kind of decision by counsel.

iv. Adjournment Application

- [141] I do not consider the lawyer's conduct on the adjournment application relevant on the fee review. The lawyer was required to attend the application in any event of the unfortunate exchange with the master. The master had ruled on the application before the incident occurred. Although regrettable, I don't think the lawyer's conduct affects whether the time billed for the adjournment application was reasonably spent.

v. Potential Appeal

- [142] During the hearing of the fee review, the lawyer acknowledged that Mr. Du did not retain him to consider a potential appeal from the order of Madam Justice Fisher. Mr. Du's uncontradicted evidence was that he lost confidence in the lawyer during the trial and had no interest in using his services any further.
- [143] In my view, all of the billings by the lawyer after the final closing submissions in the trial on February 3, 2017, should be disallowed. This amounts to 4.5 hours.

F. The Retainer Agreement and Fees Estimate

- [144] No issue is raised by Mr. Du with the retainer agreement or the lawyer's hourly rate of \$360. However, Mr. Du relies on the fee estimate he says the lawyer provided as one of the circumstances to be taken into account under s. 71. Mr. Du cites the following passage from *Best Industries Inc. v. Fulton*, 2006 BCSC 611:
- [28] The other factor is the estimate itself. Although I have found that it is not a fixed fee quote nor even a true estimate, as the authorities define that term, but merely a preliminary or ballpark estimate, I conclude that this must still be taken into account in moderating the amount of fees that are properly charged in this matter. Even ballpark estimates give rise to expectations on the part of clients, expectations which can lead to most unpleasant surprises if the ultimate bill exceeds the estimate given by a material amount. The solution, of course, is for the solicitors to disabuse the client of those expectations as soon as it is reasonably known that the estimate is no longer accurate, even on a ballpark basis. Thus I have concluded that the fee estimate of \$30,000 must be taken into account in moderating the fee assessment in this case.
- [145] There is a dispute in the evidence as to whether the lawyer provided an estimate of the fees for the case as a whole. Mr. Du testified that the lawyer provided a fee estimate in the range of \$30,000 to \$40,000; however, he was unclear as to when the lawyer provided this estimate. In direct, Mr. Du said it was after he provided the notes setting out the facts of the case; in cross-examination, he said that it was given at the initial meeting before he provided the notes; in re-direct he said he was mistaken in his direct evidence and the estimate was provided at the first meeting. The lawyer denied providing Mr. Du with any estimate to complete the case; however, he acknowledged providing an estimate of \$5,600 to review the documents and prepare a response to civil claim.
- [146] The written retainer agreement is inconsistent with a fee estimate of the nature recalled by Mr. Du:

The total cost of your legal services will depend on what you want done and what must be done in accordance with the Rules of Court to properly advance or defend this case or related proceedings. The cost will also depend on the degree of urgency, the frankness with which disclosure is made by opposing parties, the need for expert reports, the need for interim applications to court, the number of documents involved and general level of co-operation between you and opposing parties. Accordingly, we cannot predict the total cost of your legal services. However, we will apprise you of the amount of your account as the matter progresses. (emphasis added)

[147] There is no evidence that Mr. Du raised the fee estimate with the lawyer when the lawyer delivered an account on November 1, 2016, which clearly exceeded the estimate Mr. Du says he gave for the case as a whole. Mr. Du did not mention the fee estimate in the affidavit he swore in support of the application to disallow a portion of the total fees and disbursements. The fee estimate is also not listed in the particulars of the clients' objections to the lawyer's accounts.

[148] In my view, the evidence of a fee estimate for the case as a whole is inadequate for me to use it to moderate the total fees charged. However, I think the fee estimate of \$5,600 the lawyer acknowledges he provided to the clients to prepare a response to civil claim should moderate the amount charged for that initial stage of the proceedings.

G. The Importance of the Matter

[149] As stated, this was an important case for Mr. Du and Shineray.

H. The Result Obtained

[150] Shineray was ordered to pay a total of \$45,000 to Ms. Davies for contractual and aggravated damages. Shineray failed to prove just cause, fundamental breach of contract or after-acquired cause. The counterclaim was dismissed. On the other hand, Ms. Davies' claim for \$255,000 in damages based on a fixed term contract was dismissed, as was her claim for punitive damages. Ms. Davies was substantially successful, but the case was not a complete loss for Shineray.

[151] The lawyer and Mr. Du disagreed in their evidence over whether one or the other was overly optimistic about the prospects of greater success at trial. Mr. Du testified that the lawyer told him "not a penny would be found owing" following the discovery that Ms. Davies' ECE certification had expired. The lawyer testified that Mr. Du was adamant Ms. Davies was incompetent and untrustworthy and, in particular, that she had misappropriated \$1,000 from the company. None of these defences proved successful at trial.

[152] From Mr. Du's perspective, the lawyer failed to focus on the "real reasons" why Shineray terminated Ms. Davies' contract, choosing instead to focus on the ECE certification and the \$1,000. However, Mr. Du acknowledges that he instructed the lawyer to pursue those latter two issues in the lawsuit.

[153] Mr. Du suggests that a better result might have been achieved through settlement. In my view, Mr. Du would have settled the case for \$15,000, if that was possible. I do not accept the lawyer's evidence that Mr. Du refused to even consider settling the case. The lawyer's evidence that Mr. Du was acting "out of spite", and worse, is not credible. For one thing, this evidence is at odds with the original offer to settle for \$15,000. Moreover, I accept Mr. Du's evidence that, while he was initially reluctant to pay Ms. Davies anything, because he did not think the company did anything wrong, he accepted early on that she was entitled to \$15,000 "severance". In my view, the lawyer misunderstood the subsequent instruction from

Mr. Du in November 2016, that "Our company Shineray will not pay any compensation to [Ms. Davies]". The "compensation" Mr. Du was unwilling to pay was compensation over and above the \$15,000.

[154] However, the evidence shows that Ms. Davies was not prepared to settle for anywhere near \$15,000. Her view, as set out in an e-mail to Mr. Du's nephew, William, was that \$15,000 represented the "worst possible result" if she went to court. The plaintiffs' best settlement offer was \$90,000. There is no evidence that Mr. Du would pay more than \$15,000. As Madam Justice Fisher found, compromise was difficult in these circumstances. It is very unlikely this case would have settled, even if the lawyer had put more effort into the settlement negotiations.

[155] Madam Justice Fisher found that "the defendant must take responsibility for the positions taken in this case". In my view, this includes some responsibility for the overall result. Although the lawyer clearly did not impress the trial judge, her decision was based on the evidence and the positions advanced by the defendant. However, the lawyer must also take some responsibility for the outcome; it was his job to prepare the best case possible based on his instructions.

[156] In the final analysis, the total fees charged by the lawyer seem high in relation to the result he obtained for the clients. Some reduction in the bills for the pre-trial period is justified to reflect the result obtained; however, not the dramatic reduction sought by the clients.

V. CONCLUSION

A. Fees and Disbursements Disallowed by Madam Justice Fisher

[157] Madam Justice Fisher directed that the registrar determine the amount of fees and disbursements that are to be disallowed for three days of trial, including the preparation for those days.

[158] The lawyer began preparing for trial on January 16, 2017. The trial started on January 23, 2017, and concluded on February 3, 2017. Over this period of time, the lawyer billed Mr. Du a total of 103.18 hours related to the trial, for total fees relating to the trial of \$37,144.80. In addition, the lawyer billed \$3,401.00 for the cost of interpreters at trial. Dividing these totals by three, I attribute \$12,381.60 in fees and \$1,133.67 in disbursements to three days of trial, including preparation. The taxes on the fees are \$1,133.67.

[159] Accordingly, the total fees, disbursements and taxes to be disallowed pursuant to the order of Madam Justice Fisher are \$15,001.06.

B. Fees Allowed under the LPA

[160] I would allow the remaining fees for the period of time covering the trial and preparation for the trial. However, I would disallow fees under the LPA for the period of time before and after the trial, on the following grounds:

- a) limited skill and expertise shown by the lawyer throughout the case;
- b) unproductive correspondence and arguments with opposing counsel;
- c) an unreasonable amount of time spent on the preparation of the original response and counterclaim;
- d) an unreasonable amount of time spent on the amendments to the response and counterclaim;
- e) an unreasonable amount of time spent preparing the summary trial response materials;
- f) the mixed result obtained in the case as a whole; and
- g) the lawyer was not retained to consider potential grounds of appeal.

[161] These deductions do not permit a precise calculation. Having taken into consideration all of the circumstances, I find that the lawyer's bills should be reduced by an additional \$40,000, inclusive of taxes.

C. Result

[162] The result of this fee review is therefore:

Total bills:

\$162,899.28

Disallowed pursuant to the order of Fisher J.:

\$ 15,001.06

Disallowed under the LPA:

\$ 40,000.00

Total amount allowed under the LPA:

\$107,898.22

Amount paid:

\$ 50,600.00

Amount owing to the law corporation:

\$ 57,298.22

[163] The parties may speak to costs of this review by way of written submissions. The lawyer will deliver his submissions on costs within 14 days of the date of these reasons. The clients will deliver their submissions within 14 days of receipt of the lawyer's submissions.

[164] I am grateful to counsel for an efficient and well-argued review.

"Master Elwood"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/02/2020BCSC0272cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jack-wang-law-corporation-v-du-2020>

Prepared on 29 October 2026 · Esheria