
CANADA / JUDGMENT

Kuo v. Waldmann

2020 BCSC 495

COURT

Supreme Court of British Columbia

DECIDED

1 April 2020

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2020 BCSC 495 Kuo v. Waldmann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kuo v. Waldmann,

2020 BCSC 495

Date: 20200401

Docket: S181880

Registry: Victoria

In the Matter of the Legal Profession Act,

S.B.C. 1998, Chap. 9, s. 70

Between:

Peter I. Waldmann

Law Firm

And:

Hunter Kuo

Client

Before: Master Bouck (as Registrar)

Reasons for Decision

Counsel for the Law Firm:

M. Armstrong

Counsel for the Client:

P. Harrison

Place and Date of Trial/Hearing:

Victoria, B.C.

June 18-20, 2019,

July 22-24, 2019,

October 28-30, 2019,

February 10-12, 2020

Place and Date of Decision:

Victoria, B.C.

April 1, 2020

Introduction

- [1] These reasons address a client initiated appointment brought pursuant to the Legal Profession Act, S.B.C. 1998, c. 9 (the "LPA"). The client seeks both an examination of contingency fee agreements dated February 15, 2007 (the "2007 CFA") and June 4, 2014 (the "2014 CFA"), respectively, as well as a review of the final bill issued by the Law Firm on January 2, 2018, pursuant to the 2014 CFA (the "Bill") and a more modest disbursement bill issued on August 11, 2016. The Law Firm seeks payment from the Client for fees, taxes and disbursements in the total sum of \$291,627.58.
- [2] The solicitor-client relationship began in or about early 2007, spanned more than a decade and led to at least four iterations of a contingency fee agreement governing payment for the Law Firm's services.
- [3] The relationship was complicated by Hunter Kuo being a U.S. citizen resident in Berkeley, California who mostly communicated with the Law Firm by facsimile and telephone and, by his own admission, not always reliably. Adding to the many challenges in the retainer was the Law Firm's choice to represent Freiya Kuo at certain points in the proceeding.
- [4] As will be further described below, the 2014 CFA is an agreement made between the Law Firm and both Hunter and Freiya Kuo under a joint retainer. Freiya Kuo was also issued a bill pursuant to that agreement. Freiya disputed the bill but resolved matters with the Law Firm without invoking LPA remedies.[1]

- [5] The fees charged in the Bill reflect a 33 and 1/3% value of Hunter's 1/3rd interest in both real property and some cash recovered on his behalf in the course of the retainer. The Client has made no payment to the Law Firm whatsoever and suggests that the amount owed for the legal services rendered should be the same as the lesser amount paid by Freiya.
- [6] For reasons that follow, I find that the 2014 CFA under which the Bill was issued must be cancelled and that the 2007 CFA need not be examined. I also find that the Client must pay the Law Firm fees of \$175,000 plus the claimed disbursements and applicable taxes.

Overview of the Retainer

- [7] Because both parties were in attendance throughout this lengthy hearing and know the evidence presented, what follows is a somewhat cursory description of the decade long relationship, highlighting only those facts that are most salient to the legal issues to be decided. As expected, the parties were the main witnesses, with one other witness called to support the Law Firm's case.
- [8] The main lawsuit which formed the basis for the retainer is described in the trial judge's reasons cited as *Kuo v. Kuo*, 2014 BCSC 519. To put this appointment in its proper context, I will adopt Bracken J.'s description of that litigation, including the challenging procedural history which was no fault of the parties:

Nature of the Action

- [1] The plaintiff John Kuo is one of four children of Yuan-Hsi Kuo who died October 5, 2005 leaving two wills. The first will is dated March 8, 1995 and in this action, the plaintiff seeks to have the court pronounce that will in solemn form. In that will Yuan-Hsi Kuo's left his entire estate to John Kuo with a gift over to Hunter Kuo.
- [2] The second will is dated June 16, 2004 when Yuan-Hsi was 100 years old. That will divides Yuan-Hsi's estate equally among the four surviving children. The defendant Freiya Kuo, one of the plaintiffs by counterclaim, is Yuan-Hsi's daughter and she asks the court to pronounce the 2004 will in solemn form and to declare it to be a valid will.
- [3] Much, if not all, of Yuan-Hsi's estate was in the plaintiff's name or in the joint names of John Kuo and Yuan-Hsi Kuo at the time of Yuan-Hsi's death. There is also a counterclaim by the defendants Freiya, David and Hunter Kuo for an order that certain properties be declared to be the property of Yuan-Hsi's estate and that they are held in trust by John Kuo for Yuan-Hsi's estate.
- [4] The defendants, in separate pleadings, seek an order that the properties be transferred to the estate and that there be a tracing order respecting all bank accounts and an order for an accounting of all funds that were in bank accounts in the name of Yuan-Hsi or jointly held by John and Yuan-Hsi at the time Yuan-Hsi died.

- [5] Also at issue in this action are claims for damages alleging that the plaintiff John Kuo is liable for a breach of fiduciary duty, claims of unjust enrichment against the plaintiff John Kuo, and claims for compensation for services that the defendants Hunter, Freiya and David Kuo have rendered to Yuan-Hsi prior to his death.
- [6] The defendants all claim that the 1995 will be declared invalid by reason of undue influence exerted by John Kuo upon Yuan-Hsi and upon his wife Louise who predeceased him in February 1999.
- [7] Alternatively, if neither will is valid, the defendants seek a declaration that Yuan-Hsi died intestate and that an administrator be appointed to manage and distribute the estate. They submit that Freiya Kuo be appointed as the administrator.
- [8] There are also other ancillary claims including claims by the defendants for general, special and aggravated and punitive damages, as well as interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79 together with costs.

Introduction

- [9] This matter has a long and unfortunate history. The action was commenced by the plaintiff May 18, 2006. The pleadings were completed relatively quickly, but the family dynamics are complicated and while counsel made efforts to resolve the issues between their clients, they were unsuccessful.
- [10] The plaintiff had commenced an earlier action seeking judgment against his brother David for a debt of \$52,464.12. That action was commenced September 30, 2003 under Action No. 03-3993. That action proceeded to trial in August 2006 and the plaintiff was successful. The defendant David appealed the trial decision on the basis of new evidence that was not available to the trial judge. The Court of Appeal ordered a new trial; however, the parties initially agreed to defer that matter until this case has been concluded. The plaintiff seeks to have that matter decided in this decision.
- [11] An attempt was made to resolve this matter by way of a mini trial or judicial settlement conference that was held on June 2, 2009. However, it very quickly became clear that the matter could not be resolved and the parties then proceeded to conduct examinations for discovery throughout 2009 and 2010.
- [12] The trial of the action was held before Metzger J. and began March 15, 2010 and ran for approximately 21 days. It concluded March 17, 2011. Judgment was reserved. However, in June 2011, Metzger J. suffered a serious health problem and was off work for several months. For some time, it was unclear if Metzger J. would return to work so he could render judgment in this case. It was several months later that it became clear that Metzger J. would not be able to render judgment and the matter stood in abeyance while counsel considered their positions. While the materials indicate that Metzger J. had reviewed the extensive material filed as exhibits and written submissions, he had not commenced writing the

judgment.

- [13] The case was then assigned to Macaulay J. to deal with. Case planning conferences were held in early 2012 and two trial management conferences in March and September 2012, all before Macaulay J. It was then agreed by all counsel that a further seven days of evidence would be heard and that evidence, together with the evidence presented before Metzger J., by then in transcript form, would become the evidence upon which judgment in this matter would be based. The matter was then assigned to me.
- [14] Additional evidence was heard November 19 to 27, 2012 and judgment was reserved. Counsel for the plaintiff produced electronic transcripts and submissions in searchable form which was extremely helpful. Nevertheless, the matter has been further delayed. Responsibility for any additional delay after November 2012 rests with me.
- [15] As a matter of convenience and with no disrespect intended, I will follow the example of counsel and refer to the parties in this litigation by their given names. This will also avoid confusion as each of the parties has the same last name.
- [9] Following Bracken J.'s lead, I will henceforth refer to the Kuo family members by their first names only. For ease of reference, Yuan-Hsi Kuo will be referred to as "Yuan".
- [10] Mr. Waldmann was working as an associate counsel for the Victoria law firm of Browne and Associates when he first heard about Hunter and the Kuo family legal entanglements. By that time, John had commenced the action seeking to prove the first will in solemn form. Mr. James Legh of Stevenson, Luchies and Legh acted for John throughout these proceedings. Another lawyer at Browne and Associates was in the process of preparing responsive pleadings on behalf of Freiya and Hunter and sought Mr. Waldmann's assistance in that task. Mr. Waldmann says that he provided that assistance but was never paid for his services.
- [11] At all material times, Hunter was essentially impecunious with no ability to pay for legal services. Mr. Waldmann's understood that Freiya was paying for all of the services provided by Browne and Associates.
- [12] As noted in the trial judge's reasons, the interests of Freiya and Hunter were mostly aligned. David was represented by separate counsel but sought the same outcome as Freiya and Hunter in terms of the distribution of Yuan's estate.
- [13] By January 2007, Mr. Waldmann, in his capacity as a sole practitioner, agreed to act for Hunter on a contingency fees basis. Around the same time, Freiya retained new counsel in Vancouver after paying some \$35,000 in fees to Browne and Associates.
- [14] There is a dispute in the evidence as to Hunter's understanding of this first contingency fee agreement (the 2007 CFA) and the circumstances surrounding the agreement's execution. Hunter says that he was never told to seek independent legal advice ("ILA") and there is no reference to ILA in the agreement. Mr. Waldmann says that he and Hunter had a number of

telephone conversations about the agreement, the specific content of which is lost in memory. However, Mr. Waldmann denies that there were any substantive concerns raised by Hunter regarding the 2007 CFA. Prior to execution, Hunter sent a revised version of the original agreement with a note to Mr. Waldmann asking whether certain changes made a "more realistically workable contract" and "suitable for the parties' signatures." The parties, however, did not meet in person until some time later and well after this agreement was executed. The Law Firm did not give Hunter any advice in writing on the merits of the case, the likely range of recovery, the risks of an adverse result, the prospects of a negotiated settlement or even the estimated legal fees.

- [15] The agreement states that the Law Firm's fees will be 33 and 1/3rd% of "all amounts recovered for you, including any amount recovered for interest, but excluding any amounts recovered for you specifically for costs, plus all applicable taxes including GST and PST (should PST be payable)." Additional terms addressed the grounds for terminating the agreement, the payment of the Law Firm's fees at an hourly rate of \$360 if termination occurs and that the agreement could be reviewed by a district registrar of the Supreme Court of British Columbia. It was agreed that Hunter was responsible to pay disbursements only out of the proceeds of any settlement, order or judgment.
- [16] There was never any discussion between the parties about what was meant by the words "amounts recovered".
- [17] The Law Firm did not issue any disbursement bills under the 2007 CFA as, in the words of Mr. Waldmann, "Hunter didn't have any money, ever". Later, Freiya and David paid the Law Firm's disbursements that allowed actions benefiting Hunter to proceed.
- [18] Over the next few years, discovery processes were undertaken and the parties met in person from time to time in Victoria, including for trial preparation. Mr. Waldmann says that some legal work was required to facilitate Hunter entering Canada for these visits.
- [19] Just before the trial commenced in 2010, Freiya found herself without legal representation having incurred tens of thousands of additional legal fees and being unwilling or unable to continue as a client of the Vancouver-based law firm. On March 5, 2010, Freiya entered into a retainer agreement with the Law Firm under which she would pay a set amount of \$25,000 plus GST and disbursements for "a two-week trial". The trial in fact consumed 28 days and did not conclude until November 2012.
- [20] At some point in time, Mr. Waldmann relayed offers of settlement to John's counsel on Freiya's behalf only. Mr. Waldmann acknowledges that the offers had no chance of being accepted and were made for "costs purposes" only. Hunter denies any knowledge of those offers.

- [21] On March 17, 2011, Mr. Legh relayed a settlement proposal on John's behalf. In that proposal, John offered to transfer any interest that he or the Yuan estate had in the following Victoria properties: 1133 Chapman Street ("Chapman"), 406-71 Gorge Road ("Gorge") and 433 Niagara Street ("Niagara"). The properties were to be transferred to the other Kuo siblings in accordance with those individuals' directions in exchange for a final release of all claims that any of them may have against John, including costs.
- [22] Mr. Waldmann did not recall receiving this particular offer. Mr. Waldmann does, however, recall hosting a meeting attended by Hunter, David and Freiya which resulted in a mutual agreement to reject any and all offers coming from John. Mr. Waldmann encouraged Hunter to make counter-offers and received instructions in that regard. Those offers were in turn rejected by John.
- [23] On February 19, 2012, the Law Firm and Freiya entered into a contingency fee agreement on similar but not identical terms to the 2007 CFA made between the Law Firm and Hunter. One difference is that Freiya's responsibility for the payment of disbursements differed from those of Hunter under the 2007 CFA. This 2012 agreement addresses the issue of a possible conflict of interest between Freiya and Hunter including that "...we [the Law Firm] are obligated to seek joint instructions from you and Hunter Kuo if any issue arises which has not already been agreed upon by you and Hunter Kuo."
- [24] The Law Firm did not advise Hunter of this arrangement in writing. However, Mr. Waldmann says that the topic must have come up in the "constant" telephone communications that he had with Hunter, with the latter initiating most of those calls. Mr. Waldmann says that Hunter was in favour of the Law Firm representing Freiya.
- [25] Freiya and Hunter's interests throughout this period were identical, at least in terms of ensuring that John did not retain any property received by right of survivorship. Freiya and Hunter each had a further objective in obtaining specific personal property that had belonged to their father and which was, to their belief, still in John's possession. That personal property was never valued and, in Mr. Waldmann's estimation, pursued for sentimental reasons only.
- [26] By July 2012, Mr. Waldmann had moved permanently to Toronto, Ontario to be closer to his family and continue his law practice there. Mr. Waldmann maintained a practice of sorts in Victoria and commuted back and forth between the two cities as necessary. Mr. Waldmann says that Hunter made no complaint about having to deal with a Toronto based lawyer.
- [27] Bracken J. released his lengthy reasons for judgment on March 27, 2014. The outcome is described in the reasons as follows:
- [248] In summary, the 2004 will of Yuan-Hsi is invalid on the ground that he lacked testamentary capacity at the time the will was made. The 1995 will of Yuan-Hsi is valid and the claims that he lacked testamentary capacity or was subject to the undue influence of John are dismissed. The properties at issue in this litigation are held on a resulting trust for the

estate of Yuan-Hsi. There will be orders for an accounting and tracing of any cash held in bank accounts in the name of Yuan-Hsi either in his own name or with any of the parties to this litigation jointly. The orders for an accounting and tracing also apply to any other personal property owned by Yuan-Hsi individually or jointly with any of the parties at the time of his death. All other claims brought by the plaintiff or by the defendants by way of counterclaim are dismissed.

- [249] The defendants' counterclaim seeking a variation of the 1995 will which has been found valid is not before me as it has been deferred to await this decision. However, given the unfortunate history of this matter, it is my view that issue should be resolved as quickly as possible. John has made submissions that by reason of his position in the family and his close relationship with Louise and Yuan-Hsi, that he was the favoured son and that the will should be upheld or at the very least, he should have a disproportionate share of the estate. The position of the defendants appears to be that each of the parties; Hunter, David and Freiya take the position that the children should each take an equal share of the estate.
- [250] So that there is some control over that matter, I direct that the parties attend upon the trial manager at Victoria within 30 days of the release of these reasons to schedule a judicial case conference before me to discuss further steps in this action. I will remain seized of the matter until further order. The issue of costs with respect to these reasons may be spoken to at the judicial case conference.
- [28] None of the Kuo siblings were satisfied with the findings of the trial judge or the orders pronounced. Appeals of those orders were launched by all parties.
- [29] On June 4, 2014, a now fourth version of a contingency fee agreement was proposed by the Law Firm to Freiya and Hunter as a replacement for all of the previous agreements. The draft agreement is addressed to both Freiya and Hunter, but the document was sent separately to each client. The agreement describes the Law Firm's possible conflict of interest in representing both Freiya and Hunter and seeks both of those individuals' waiver of this potential conflict. Freiya and Hunter agreed to the joint retainer and eventually executed and returned their separate documents to the Law Firm. Freiya made a number of handwritten changes to her version of the agreement before execution. Mr. Waldmann testified that the additions or changes to Freiya's version were "meaningless" and therefore no objection was taken by the Law Firm in incorporating these changes. Mr. Waldmann also says that "at some point" Hunter was provided with a copy of Freiya's version of the 2014 CFA but is unable to say when or even by whom. Hunter denies any knowledge of the existence of two versions of the 2014 CFA.
- [30] The fee portion of the 2014 CFA as agreed upon by Hunter provides that:

2.Fee

- a) My fee will be THIRTY-THREE and 1/3rd per cent (33 1/3rd %) of all amounts recovered for you, including any amounts recovered for interest, but excluding any amounts recovered for you specifically for costs, plus all applicable taxes including GST and PST (should GST or PST be payable).
 - b) In accordance with s. 1055.(1) of the Law Society Rules, I may elect by notice to you in writing to forego any remuneration based upon a proportion of the amount recovered and receive instead an amount equal to any costs awarded to you by order of a court, or in any costs settlement achieved.
 - c) You may within 90 days after this retainer agreement is made or this retainer agreement is terminated, whether terminated by you or by me, apply to a district registrar of the Supreme Court of British Columbia to have this agreement reviewed, notwithstanding that payment has been made under this agreement.
 - d) My hourly time charge is \$360.00. This rate may be modified, but I do not anticipate changes in the immediate future. If you should choose to terminate my services prior to the commencement of the trial, then you agree to pay to me, instead of the fee of 33 1/3rd % set out above, an amount equal to my time docketed in this matter at my hourly rate set out in this paragraph. If you should terminate my services during the course of the trial, or any appeal from the trial, I will be entitled to elect to recover either 33 1/3rd % of the amount recovered including for interest pursuant to paragraph 2(a) above, or to receive payment from the proceeds at my hourly rate for my full time docketed. This election is an addition to the election which I may make under paragraph 2(b) above, at my sole discretion;
 - e) Any costs awards made by the Court and received from John Kuo will be paid to me and paid and applied to my accounts irrevocably, subject to the amount of such awards being credited ultimately against the percentage fee of 33 1/3rd set out above in clause 2(a) of this provision; and
 - f) The \$25,000.00 retainer fee paid by Freiya Kuo prior to the commencement of the first trial before the Honourable Mr Justice Metzger will be repaid to her from any proceeds of the litigation and will be credited against the percentage fee of 33 1/3rd set out above in clause 2(a) of this provision;
- [31] Some of the alterations made by Freiya to her version of the 2014 CFA are with respect to terms 2(b) and (d) above. Freiya's version of the 2014 CFA also differs from Hunter's version with respect to the payment of disbursements, instructions and termination of legal services. Freiya notes in the agreement that "outside independent legal advice not undertaken due to keeping costs down."
- [32] By September 2014, the Kuo siblings were involved in six outstanding actions and four separate appeals. Bracken J. had reserved judgment on the question of costs related to the trial. On September 8, John reiterated his earlier settlement proposal.

- [33] By September 26, Hunter, Freiya and David had all agreed to the proposal and instructed their respective lawyers to draw up the necessary documents to finalize the settlement. On October 14, Mr. Legh circulated a draft release to all counsel asking for their input. However, on or about October 27, 2014, Mr. Legh's office sent out a revised release that now had the effect of making Hunter, Freiya and David responsible for capital gains tax and any other tax liabilities arising from the transfers of the three properties. The estimated tax burden was just over \$53,000. Hunter, David and Freiya all objected to this new term which had apparently not been a matter considered by any party or any counsel during the settlement negotiations. The settlement process then stalled.
- [34] David and Freiya eventually accepted John's terms and wished to proceed with the mechanics of the settlement; Hunter was not so agreeable. This development resulted in Freiya and Hunter parting ways in terms of legal representation. In February 2015, Mr. Waldmann filed a notice of withdrawal of solicitor at about the same time that Freiya filed a notice of intention to act in person. Freiya went on to be represented by other counsel but also acted on her own behalf from time to time.
- [35] On May 29, 2015, John had passed away unexpectedly. John left a Will naming one John Romashenko as both the executor and main beneficiary of his estate. Mr. Romashenko had for some time assumed the role of property manager for all of the properties that were the subject matter of the Kuo family litigation. The surviving Kuo siblings now turned their litigation sights on Mr. Romashenko. According to Mr. Waldmann, the siblings believed that Mr. Romashenko had at least neglected if not actually murdered John. David decided to adopt Hunter's position that the settlement agreement with John was not binding. Mr. Legh, who was by that time taking instructions from Mr. Romashenko, reiterated the settlement agreement but now proposed that John's estate would pay the capital gains tax.
- [36] Although the parties earlier advised the court that the actions were settled, no final orders had been entered. Thus, on December 4, 2015, Bracken J. heard three separate applications filed on Hunter's behalf for: an order rescinding the settlement; an accounting of all assets held by John Kuo and his estate; and an order removing John Romashenko as the property manager of the properties held in trust for the Yuan estate, with costs related to the application(s) to be paid by John's estate. In turn, Mr. Romashenko, as the representative of John's estate, sought an order confirming the settlement.
- [37] In reasons for judgment issued April 28, 2016, Bracken J. confirmed the settlement agreement and dismissed all of Hunter's cross-applications: 2016 BCSC 767. Costs relating to all applications were to be paid from Yuan's estate. Hunter decided to appeal those orders.
- [38] As described in the court's reasons for judgment and by the parties in their evidence in this proceeding, all of the legal disputes between the Kuo siblings were hard fought. Over the many years of this litigation, Hunter - and, according to the Law Firm's internal communications, Mr. Waldmann himself - developed a particular animus towards Mr. Legh. This animus arose, in part, from the discovery that Mr. Legh's fees were secured by a

mortgage on one of the estate properties. Hunter came to believe that Mr. Legh and his law firm had acted improperly. That point of view was not discouraged by the Law Firm. Indeed, Mr. Waldmann says that Hunter, David and Freiya all expressed an interest in pursuing a lawsuit against Mr. Legh. Mr. Waldmann prepared yet another contingency fee agreement and sent the document to the three Kuo siblings. Only Hunter returned the agreement, having executed the same on March 13, 2016. The agreement specifies that the retainer is "in connection with your possible claim against James Legh [and his law firm] in your capacities either as a possible trustee for the estate of Yuan or as potential beneficiary of the estate of Yuan-His Kuo or the Estate of John Kuo". Mr. Waldmann prepared and filed (in the Vancouver registry, for some reason) a notice of civil claim naming as defendants not only Mr. Legh and his firm, but also other lawyers, some legal assistants, Mr. Romashenko and the Saanich Police Department. At this hearing, the Client was highly critical of the content of the pleading and invited a finding that the document was essentially not worth the paper that it was written on. Following service of the pleading, counsel for the named lawyers advised that his clients would be pursuing security for costs. The action then went nowhere and was eventually dismissed by consent of all parties.

- [39] Meanwhile, the appeal of Bracken J.'s most recent orders was heard on December 2, 2016 and dismissed on June 28, 2017, for reasons cited at 2017 BCCA 245. Mr. Waldmann testified that the parties had several other appearances before the court of appeal, some of which related to the trial judgment although those appeals were eventually placed on the court's inactive list.
- [40] Mr. Waldmann next sought instructions from Hunter on settlement related issues. The Kuo siblings could not agree on how the titles to the three properties should be registered. That dilemma necessitated volumes of electronic and other forms of communications amongst the siblings' respective counsel. Mr. Waldmann says that Hunter expressed a desire to immigrate to Canada and some legal research was performed by one of the Law Firm's associates on that matter. Mr. Waldmann also pursued an opinion from another lawyer on the best means for Hunter to hold the newly acquired properties so that there was no risk of losing his social housing in California. As Hunter was a U.S. citizen, there were also tax related issues arising from the settlement. During the latter part of 2016, the Law Firm made efforts to communicate with Hunter about these issues via facsimile and telephone but largely to no avail. Meanwhile, Mr. Legh awaited advice from the Kuo siblings on the title transfer details and set deadlines for a response.
- [41] Eventually, having received no consensus from the Kuo siblings, Mr. Legh simply followed the court's order. The three properties were transferred to Hunter, David and Freiya, as 1/3 tenants in common on or about October 20, 2017.
- [42] In addition, the sum of \$44,915, being rents collected from the properties by Mr. Romashenko, was paid into court on November 16, 2017, for the benefit of the Kuo siblings.

- [43] On December 22, 2017, Mr. Harrison wrote to Mr. Legh, with copies sent to both Mr. Waldmann and the court of appeal registrar, advising that he had been consulted by Hunter and Freiya and received instructions to have the trial judgment's appeals removed from the inactive list. And, also, that David would also be retaining Clay & Co. to prosecute the appeals. This correspondence was the first indication to Mr. Waldmann that he may no longer be acting on Hunter's behalf. Mr. Waldmann was surprised by this development, having received only praise and gratitude from Hunter through the years, along with the latter's repeated promise of payment for the Law Firm's legal services once the Kuo family disputes were finally resolved.
- [44] The Bill was issued under a cover letter dated January 2, 2018, addressed separately to Hunter, but copied to Freiya. Similarly, the cover letter enclosing a bill sent to Freiya was copied to Hunter. Freiya eventually agreed to pay the Law Firm \$80,000 in fees plus half of the disbursements incurred under the 2014 CFA. Freiya also paid the Law Firm the full \$25,000 due under the February 19, 2012 fixed fee agreement.
- [45] The Chapman property was sold to a third party on April 27, 2018 for the price of \$1,071,200.00. On April 13, 2019, the Gorge property was sold to a third party for \$430,000.00.
- [46] On August 23 and October 6, 2018, the parties to this proceeding consented to the Law Firm's charging orders against Hunter's 1/3rd interest in the Niagara property, pursuant to s. 79 of the LPA. The charging orders are made in the 06-2299 action.

The Bill

- [47] The Bill claims the following amounts for payment:

Fees: \$251,257.22

HST:[2] \$32,663.44

Disbursements: \$6,238.08

Tax on Disbursements: \$54.00

Balance owing on 11 August 2016 account: \$1,414.84

TOTAL: \$291,627.58

- [48] The fees are based on the combined municipal assessment values of the three properties as of July 1, 2017, with Hunter's 1/3rd share being \$753,771.66. That last figure, together with some monies paid into court, is the purported "amounts recovered" under the 2014 CFA.

Credibility

- [49] There are significant discrepancies between the evidence of Mr. Waldmann and Mr. Kuo, especially over the verbal communications exchanged during the retainer. It is not surprising that these individuals have vague or incomplete recollections of matters given

that the communications spanned many years and there is no documentary evidence corroborating many of the conversations had. Hunter claims to have such documentary evidence but on paper that is located in a supposedly inaccessible storage unit near his home in California.

[50] There are inconsistencies and omissions in each of the parties' evidence. Some of these are more significant than others. Overall, I found the evidence of Mr. Waldmann to be more internally consistent and reliable.

Legal Framework

A. Review of the Agreement

[51] Section 68 of the LPA provides that:

Examination of an agreement

68 (1) This section does not apply to agreements entered into before June 1, 1988.

- (2) A person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined.
- (3) An application under subsection (2) may only be made within 3 months after
 - (a) the agreement was made, or
 - (b) the termination of the solicitor client relationship.
- (4) Subject to subsection (3), a person may make an application under subsection (2) even if the person has made payment under the agreement.
- (5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.
- (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.
- (7) If an agreement is cancelled under subsection (6), a registrar
 - (a) may require the lawyer to prepare a bill for review, and
 - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
- (8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.
- (9) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the examination of an agreement.

- [52] The examination of an agreement is a two step inquiry, with each step being a "water tight compartment". First, the examiner determines whether the agreement was fairly made applying the principles of contract. Second, the examiner must decide whether the compensation claimed in the agreement is reasonable. Questions concerning any ambiguity in the language contained in the agreement might be addressed in the second part of the inquiry: *Commonwealth Investors Syndicate Ltd. v. Laxton*, (1994), 117 D.L.R. (4th) 382 (C.A.), *Randall & Co. v. Hope* (1996) 13 E.T.R. (2d) 257 (B.C.C.A.). As specified by statute, the two-part inquiry addresses circumstances that existed when the contract was entered into, not how events unfolded subsequent to the document's execution.
- [53] The agreement may be cancelled if found to be unfair or unreasonable. If found to be fair, the registrar should only cancel the agreement if the terms are "beyond the limits of acceptability and fairness": *Long, Miller and Mullins v. Sawchuk*, 2002 BCSC 542. In that regard, there is a duty of fairness on the part of a lawyer to establish that the client understood the agreement, that the price was reasonable and "that the transaction was in all respects fair, and such as an independent solicitor who performed his duty would have advised his client to enter into": *Mide-Wilson v. Hungerford Tonym Lawrenson and Nichols*, 2013 BCCA 559 at para. 85. Whether the agreement maintains the integrity of the legal profession is also a consideration on this part of the examination, with it now being "more important than ever that lawyers be, and be seen as, trustworthy, independent and free from conflicts": *Mide-Wilson* at para. 86.
- [54] As for construction issues, if there is ambiguity in the language of the agreement, those words will be given their usual and ordinary meaning and the rule of *contra proferentem* will be applied: *Todd v. Guenard*, 2008 BCSC 1448, *Prodor v. Newell*, 1994 CanLII 2306 (BCCA) at pages 3 and 4.

B. Review of the Law Firm's bills

- [55] If the agreement is cancelled, the bills are reviewed pursuant to s. 71 of the Legal Profession Act which provides as follows:

Matters to be considered by the registrar on a review

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

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
- (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.

- (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
- (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
- (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.
- [56] No allowance for fees should be made when lawyers have acted without instructions or taken unnecessary or counterproductive steps: *Davies v. Hunter* (1995), 40 C.P.C. (3d) 273 (B.C.S.C.). However, the registrar has no jurisdiction to make findings of negligence or unprofessional conduct on the part of the lawyer: *Walker v. Schober*, 2008 BCCA 19.
- [57] At the end of the day, the registrar should allow a fair fee commensurate with the work performed in the retainer and taking into account all of the circumstances including the lawyer's duty of utmost good faith to the client.

Analysis

A. Examination of the Agreements

- [58] I agree with the Law Firm's submissions that a review of the 2007 CFA is statute barred. That agreement came to an end with the substitution of the 2014 CFA. In any event, no liability for payment arises under the 2007 CFA as both the Bill and the 2016 disbursement account were issued pursuant to the 2014 CFA.

- [59] The review of the 2014 CFA is not statute barred. I find that the solicitor-client relationship ended when Mr. Waldmann received Mr. Harrison's letter of January 8, 2018. The appointment was taken out less than 3 months later. While the style of cause in the appointment filed on March 22, 2018 is erroneous, this misstep is merely an irregularity and caused no prejudice to the Law Firm.
- [60] The circumstances surrounding the formation of the 2014 CFA were less than ideal. However, I am satisfied that Hunter entered into the 2014 CFA freely and voluntarily. I find that Hunter was advised of his right to obtain independent legal advice with respect to the terms of the agreement and nevertheless executed the agreement without pursuing such advice. There was no lack of capacity, undue influence or unfair advantage taken by the solicitor, nor was there any mistake or any other flaw arising in the formation of the contract indicating that the client did not understand and appreciate the content of the agreement. The construction issues are considered below. Although Hunter was an inexperienced litigant at the commencement of the retainer in 2007, by the time the 2014 CFA was entered into, Hunter was no longer naïve about his legal rights as a client and indeed asserted those rights by insisting on changes to the agreement.
- [61] Nevertheless, I find that the 2014 CFA is not reasonable for two principal reasons. First, the contract signed by Hunter differs from the terms agreed upon between the Law Firm and Freiya, even though the contract was to govern a joint retainer. As well, the 2014 CFA allows the Law Firm to charge each of the clients 33 and 1/3rd% of the "amounts recovered" even though the work to be performed for Hunter and Freiya was near identical. Essentially, the fee claimed in the 2014 CFA allowed the Law Firm to double its fee for the same work and thus represents a windfall that reflects poorly on the integrity of the profession. Second, there is ambiguity in the words "amounts recovered" with those words forming the basis for the Law Firm's fees: *O'Neill v. Kay* (unreported, November 20, 1997, S.C.B.C. New Westminster Registry no. S031905.). The ambiguity is plain on the face of the agreement, even if Hunter did not take issue with that element of the contract until the Bill was issued and this proceeding initiated. There is no explanation in the agreement of what is meant by "amounts". The plain meaning of that word is a "total number" or "quantity of something": Merriam-Webster dictionary. The only "amounts" recovered in the proceeding were the monies paid into court. Real property, whatever the value of that property, is not an "amount". Furthermore, even if the word "amounts" can somehow include real property, there is no mechanism in the 2014 CFA by which the lands are to be valued. The Law Firm's choice to use the assessed values as of July 1, 2017 is purely arbitrary and a valuation method never agreed to by the Client. For these reasons, the 2014 CFA does not pass the test of acceptability and fairness. There is no way for the 2014 CFA to be modified without essentially re-writing the terms of the parties' contract. The agreement is therefore cancelled.

B. Review of the Bill

[62] The cancellation of the 2014 CFA necessitates a review of the two bills in issue.

[63] In general terms, the work performed by the Law Firm for the benefit of the Hunter included[3]:

- preparing pleadings, conducting oral[4] and document discovery, issuing interrogatories, extensive correspondence, many lengthy discussions with Hunter and Freiya
- preparation for trial and 21 days of trial before Mr. Justice Metzger
- preparation and attendance at case management hearings before Mr. Justice Macaulay
- preparation for trial and 8 days of trial before Mr. Justice Bracken
- negotiating a settlement
- preparation and attendance at post-trial applications
- commencing and arguing an appeal of the trial judge's orders

Complexity, Difficulty or Novelty of the Issues Involved

[64] The trial judge's first set of reasons for judgment provide insight into the complexity and difficulty of the issues involved in the retainer.

[65] Mr. Waldmann described the litigation between the Kuo siblings as akin to a law school exam. The action to prove the first will in solemn form was not a particularly difficult claim to defend in terms of the law, but the peculiar facts of the case made that defence and prosecution of the counterclaims more complex. In addition, throughout the retainer, the Kuo siblings' allegiances to each other and their respective choices in legal representation changed with some regularity. Because of that circumstance, the Law Firm was never able to pursue Hunter's representation on a straightforward or linear path. As well, both Mr. Waldmann and Hunter found John's counsel to be a very difficult opponent.

[66] Communications between the Law Firm and Hunter were made more challenging because Hunter had only one telecommunication line in his home, with that line used for both telephone calls and facsimile purposes. Often the line rang busy or documents could only be partially faxed because of technical problems. This meant that the Law Firm made repeated attempts at what would otherwise be fairly simple communications. The Law Firm says that it copied and forwarded by mail to Hunter all emails and letters received from third parties. Hunter acknowledges receiving some of these packages, but denies that the Law Firm sent along all relevant written communications. I prefer the evidence of the Law Firm on this matter.

- [67] The delays in the proceeding that were no fault of the parties also contributed to the difficulty of the retainer as the Law Firm was required to repeat its preparation for trial and deal with an anxious Client in an uncertain procedural future. In addition, the law with respect to the adjudication of the will variation claims, with those claims dependant on the outcome of the appeals, was made more complicated with the introduction of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, part way through the retainer.
- [68] Nevertheless, some of the problems encountered by the Law Firm were due to its own actions or inactions, such as its representation of Freiya at various junctures that was inconsistent with its representation of Hunter, the failure to provide Hunter with ongoing assessments of the case in writing and taking steps without Hunter's specific instructions.

The Skill, Specialized Knowledge and responsibility of required of the lawyer

- [69] Specialized skill or knowledge might justify higher than ordinary fees for a lawyer. In this case, Mr. Waldmann acknowledges that he was inexperienced in wills and estates litigation, with Kuo v. Kuo being his first trial concerning this area of law. The prosecution of Hunter's claims did come with a heavy responsibility as the success of the claims would be both a moral and financial victory for the client.

The lawyer's character and standing in the profession

- [70] Mr. Waldmann has been a practicing lawyer for about 37 years. That practice has been conducted in Ontario, British Columbia as well as some jurisdictions in the United States. Although Mr. Waldmann has had a rich and varied career, these achievements do not objectively justify a higher than usual fee.

The amount involved

- [71] The amount involved in the retainer is at the heart of the fee dispute. That amount is not agreed upon by the parties, nor precisely determined by the adjudicators of the various disputes between the Kuo siblings. Mr. Waldmann says that John's inherited assets, largely made up of real property but also some GIC's, amounted to at least \$1.4 million.
- [72] For the purposes of this review, I find that the amount involved, being Hunter's best case recovery, is in the range between \$500,000 and \$750,000, depending on how the distribution of the Yuan estate unfolded.

The time reasonably spent

- [73] The Law Firm did not keep time records during the retainer. As a result of this proceeding, the Law Firm created such records retrospectively relying on the file content, internal records of tasks completed and, to some extent, memory of those who performed the work. The Law Firm's evidence is that close to 1100 hours were spent representing Hunter and Freiya. Based on Mr. Waldmann's hourly rate of \$360 that time equates to nearly \$400,000 in

fees. The Law Firm concedes that twice the amount of time was recorded with respect to Freiya's communications and other needs as opposed to the time recorded for tasks that benefitted Hunter only.

Agreement as to fee rate

- [74] The 2014 CFA contemplates Mr. Waldmann's fees to be billed at the hourly rate of \$360 if the agreement is terminated. That hourly rate is reasonable given Mr. Waldmann's years at the Bar and litigation experience.

Importance of the Matter to the Client

- [75] The resolution of these various lawsuits and the receipt of some financial inheritance was of utmost importance to the Client.

Result Obtained

- [76] The Client minimizes the Law Firm's effectiveness in the retainer. I find that the result achieved at trial and in the settlement was a very good one and could not have been achieved without the Law Firm's assistance. When the solicitor-client relationship began, the Yuan estate had no assets and there was no offer on the table from John to share any of the disputed property. The end result is that Hunter received real property and cash, with a now realized value of at least \$500,000.
- [77] Hunter is also critical of the Law Firm's conduct on the appeal and complains that his instructions to provide the court with certain information were ignored. I give no weight to those complaints as the information Hunter sought to provide was irrelevant to the appeal. There is no objective evidence to indicate that the Law Firm failed to provide adequate representation to Hunter on the appeal.

Other Circumstances

- [78] Much of the Client's submissions focused on the Law Firm's alleged breaches of its fiduciary duties to Hunter (and Freiya) in the joint or, at times, parallel retainers.
- [79] That the Law Firm accepted a lesser fee from Freiya than what is now being sought from Hunter weighs in favour of reducing the fee portion of the Bill. The Bill explicitly states that the Law Firm's fees are for "services rendered from February 2007 to November 2017, "(pursuant to the Contingency Fee Agreement dated June 4, 2014 replacing prior contingency fee agreement dated February 15, 2007)" (emphasis added). The Law Firm represented both Freiya and Hunter between March 2010 and February 2015. I agree with the Client's submission that there is no principled reason why Hunter should pay more to the solicitor than what it received from Freiya for the work performed during joint retainer. The utmost duty of good faith requires the Law Firm to treat clients under a joint retainer exactly the same. Moreover, not only did the Law Firm allow Freiya to make separate changes to the 2014 CFA, but it also failed to disclose to Hunter of its acceptance of a lesser

fee until compelled to do so in this proceeding.

Disbursements

[80] The Law Firm says that Hunter is responsible for half of the disbursements incurred during the joint retainer (i.e. from June 14, 2014 until February 2015). The Law Firm agrees that the two versions of the 2014 CFA differ in terms of payment for disbursements. However, the Law Firm further asserts that Hunter is fully responsible for all disbursements incurred outside of the joint retainer.

Result

[81] Given all of the circumstances of the retainer, I have determined that a fair fee for the work performed by the Law Firm on Hunter's behalf is \$175,000 plus applicable taxes[5]. This fee is more than Freiya has paid for the Law Firm's services but reflects an additional allowance for work done outside of the joint retainer solely for Hunter's benefit. I allow all of the disbursements claimed in the Bill as well as the amount outstanding on the 2016 disbursement bill. The Law Firm has made an effort to equally divide between Freiya and Hunter responsibility for the disbursements under the joint retainer. The additional disbursements were incurred on Hunter's instructions.

Taxes, Costs and Interest

[82] As noted, the Law Firm asserts a claim for HST on fees and certain disbursements even though the written agreements made throughout the retainer reference only charges for GST and PST. Costs and any claim for interest relating to this proceeding are governed by ss. 72 and 73 of the LPA. Unless there is an agreement reached, the parties shall provide written submissions addressing these three outstanding matters. The Law Firm may also provide a proposed certificate of fees with its submissions. The submissions shall be delivered to Supreme Court Scheduling in accordance with PD-27 by no later than June 15, 2020. In giving this deadline, I acknowledge that these reasons are issued at a time when the court and most of Canadian society are not functioning at a normal level due to the COVID-19 pandemic. Accordingly, if the parties are unable to meet the June 15 date, they may request another date for delivery of the submissions.

"Master C.P. Bouck"

[1] The Law Firm claimed privilege over its written communications addressing this settlement. The Law Firm provided the settlement information to Mr. Harrison in a letter dated August 21, 2018. After hearing submissions, I allowed the letter to be entered as an exhibit in this proceeding. The transcript of the proceedings sets out the parties' arguments on this issue. I accept the Client's argument on the admissibility issue as correct in law.

- [2] The Bill was issued from Ontario where Mr. Waldmann now operates his practice and, in contrast to B.C., where HST remains in force.
- [3] Taken from Mr. Waldmann's affidavit #1 made June 4, 2018, in the Kuo v. Kuo action no.062299, Victoria Registry and paraphrased but mirroring the oral evidence given at the LPA hearing.
- [4] Hunter was not examined for discovery.
- [5] The 2014 CFA stipulates that GST (and PST if applicable) will be charged on the fees.
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