
CANADA / JUDGMENT

MacAdams Law Firm v. Truong

2014 BCSC 184

COURT

Supreme Court of British Columbia

DECIDED

5 February 2014

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2014 BCSC 184 MacAdams Law Firm v. Truong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacAdams Law Firm v. Truong,

2014 BCSC 184

Date: 20140205

Docket: S026468

Registry: Chilliwack

In the Matter of the Legal Profession Act, S.B.C. 1998, Chap. 9, s. 70

Between:

Douglas Patrick MacAdams

doing business as MacAdams Law Firm

Solicitor

And

Kia Thi Truong and Len Ngoc Tran

Clients

Before: Registrar Sainty

Reasons for Decision

Counsel for the Solicitor:

G. Holeksa

Appearing on her own behalf:

Len Ngoc Tran

Appearing as agent for the client

Kia Thi Truong

Thuang (Thomas) Tran

Place and Date of Hearing:

Chilliwack, B.C.

January 2, 2014

Place and Date of Decision:

Chilliwack, B.C.

February 5, 2014

BACKGROUND

- [1] By way of a retainer agreement dated November 25, 2011, Kia Thi Truong ("Kia") and Len Ngoc Tran ("Len") retained MacAdams Law Firm (hereinafter referred to as "MLF") to act on their behalf in connection with a claim against property owned in joint tenancy by Kia, Len and Thuang (Thomas) Tran ("Thomas"). I will refer to the parties and those involved in this matter by their first names. In doing so, I mean them no disrespect; I simply do so for ease of reading.
- [2] The client, Kia, is the mother of Len and Thomas.
- [3] Thomas was born (in 1969) in Vietnam and lived there until 1979 when he left Vietnam (as a refugee). After spending some time in refugee camps, Thomas arrived in Canada and settled in Kitimat, British Columbia as a sponsoree of the local rotary club. He lived with his brother and uncle in Kitimat but moved to Abbotsford, British Columbia in the summer of 1987 where he completed his high school and graduated in 1988. Thomas became a Canadian citizen in 1989.
- [4] In the mid-1990s Thomas, with his brother, began the process of sponsoring Kia and Len, so that they could immigrate to Canada.
- [5] In April 1998, Thomas bought a home on Nanaimo Crescent in Abbotsford for \$182,500 (the "Abbotsford Residence"). Of the purchase proceeds, \$136,000 was secured by way of a mortgage against the property. In September 1998, Kia and Len immigrated to Canada and began living with Thomas in the Abbotsford Residence.

- [6] In the summer of 2001, Thomas travelled to Vietnam and met the woman who was to become his wife (Trang Phuong Tran ("Trang")). Thomas and Trang were married on December 30, 2001 in Vietnam. Trang eventually immigrated to Canada and arrived in March 2004 and began residing with Thomas, Kia and Len in the Abbotsford Residence.
- [7] In December 2002, Thomas purchased a business property on South Fraser Way in Abbotsford (the "Business Premises") and started a restaurant business (the "Restaurant") out of those premises. The financing for the Restaurant came from a mortgage on the Abbotsford Residence. Both Kia and Len worked in the Restaurant, although, I understand that, at the time the Restaurant business was commenced, neither Kia nor Len had any legal registered interest in the Restaurant or in the Business Premises.
- [8] In July 2005, Thomas transferred two-thirds of his interest in the Abbotsford Residence to his mother Kia, who, at the same time, transferred half of her newly acquired interest in that property to Thomas's sister, Len, with the result that each of the three of them were registered on title to the Abbotsford Residence, as joint tenants, each having a one-third interest in that Residence.
- [9] In that same year (2005), Thomas transferred two-thirds of his interest in the Business Premises to Kia and Len in equal shares. He converted the Restaurant business from a sole proprietorship into a partnership at the same time. Thomas retained a 70% interest in that partnership, with his sister Len holding the remaining 30% interest.
- [10] Thomas and Trang separated in 2007 and, on May 7, 2007 Thomas commenced an action in this court for a divorce, division of his and Trang's joint assets and determinations regarding their child (Tran v. Tran, Supreme Court of British Columbia, Chilliwack Registry Docket E6761) (the "FRA Action")). On August 20, 2007, an s. 57 Family Relations Act order was made in the FRA Action, declaring that there was no reasonable prospect of reconciliation between Thomas and Trang.
- [11] The FRA Action went to trial before Gaul J. in December 2008 and May 2009. His Lordship issued reasons for judgment on November 30, 2009 (Tran v. Tran, 2009 BCSC 1647). In that action, Gaul J. re-apportioned Thomas's remaining interests in the Abbotsford Residence and the Business Premises 100% from Thomas to his (now ex) wife Trang.
- [12] Neither Kia nor Len testified at the trial in the FRA Action and, in his reasons for judgment (at paragraph 41), Gaul J. drew an adverse inference due to their non-appearance. Specifically, his Lordship said:

In the circumstances of this case I draw the inference that their evidence would not have been favourable to the plaintiff's case.

- [13] In 2011 (November 18), Trang applied before Gaul J. for an order in the FRA action seeking:
- (a) a direction that both the Abbotsford Residence and the Business Premises be sold;

- (b) an order that the interests in the Abbotsford Residence and the Business Premises then vested in the names of Thomas, Kia and Len, be vested in Trang's name to the extent necessary to satisfy certain monetary awards made in Trang's favour pursuant to the trial judgment that Thomas had failed to pay;
- (c) an order that Thomas provide security for his spousal and child support obligations; and
- (d) an order that Thomas pay Trang's costs of the application.

[14] In his oral reasons for judgment, His Lordship held:

[20] I find s. 66 of the FRA allows the court to address and re-adjust an order after trial, in circumstances where it is necessary to give effect to the judgment. Moreover, I accept the submissions of counsel for Ms. Tran and agree that the preconditions set out in s. 66(3) of the FRA have been met.

[21] Mr. Tran has failed to live up to or abide by the terms of the judgment I rendered in November 2009. He has significant arrears of child support and spousal support owing, he has not paid the compensation order amount, and he has not paid Ms. Tran her costs. Based on what has been presented and said at this hearing, I am left with the clear belief that Mr. Tran is fundamentally unwilling to pay Ms. Tran anything.

[22] In my opinion, the circumstances of this case necessitate the sale of the Properties and I so order. Pursuant to s. 66(3) of the FRA, I further order that the portion of the Properties currently in the name of Mr. Tran, Kia Thi Truong and Len Ngoc Tran, sufficient to pay the amounts Mr. Tran owes Ms. Tran be vested in Ms. Tran. From the proceeds of the sale, Ms. Tran will be paid what Mr. Tran owes her.

[15] Almost immediately following the pronouncement of Gaul J.'s oral reasons for judgment, Kia and Len sought legal advice from MLF with respect to what rights they might have, as His Lordship's order had the effect of extinguishing their rights and ownership interests in the two properties, despite the fact that neither of them had been represented at the trial before Gaul J., nor at the subsequent application made by Trang to vest their interests in the Abbotsford Residence and the Business Premises in Trang's name.

[16] Neither Kia nor Len is fluent in the English language. Kia and Len's original contact with MLF was made by Thomas who telephoned MLF and spoke to Mr. MacAdams, the principal of MLF. During that phone conversation Thomas made an arrangement for Kia and Len to meet with Mr. Misner, an associate with MLF to see what MLF might be able to do for his mother and sister. Mr. Krentz, Thomas's lawyer in the FRA Action, recommended Mr. Misner to Thomas, Kia and Len. Knowing of the language barrier, MLF arranged for a court-certified interpreter to attend at the initial client meeting. Kia and Len met with Mr. Misner and the court-certified interpreter on November 28, 2011. Mr. Misner's evidence at the hearing before me was that, during that meeting, he reviewed MLF's standard retainer agreement with Kia and Len in the presence of the interpreter and, in addition, provided some general advice with respect to what rights Kia and Len might have if they wished to

appeal Gaul J.'s November 18, 2011 decision.

- [17] Kia and Len chose to retain MLF and signed MLF's standard retainer agreement wherein they agreed to retain MLF to act for them in the FRA Action specifically in relation to Trang's claim against their interests in the Abbotsford Residence and the Business Premises. Shortly after that initial meeting, MLF (and, in particular Mr. Misner) began the process of appealing Gaul J.'s decision.
- [18] First, Mr. Misner had to prepare and attend to argue a leave application before the Court of Appeal. He was successful on that application. Once leave to appeal had been obtained, Mr. Misner prepared the factum to be filed with the British Columbia Court of Appeal (*Tran v. Tran*, Court of Appeal for British Columbia, Action No. CA039559) (the "Appeal").
- [19] In addition to preparing the factum, Mr. Misner prepared materials for an application (to be argued at the same time as the Appeal itself) for leave to adduce fresh evidence in the Court of Appeal (on the basis that neither Len nor Kia had been represented at the trial; nor had they made any submissions at the subsequent application before Gaul J.). Those materials were voluminous and included affidavits of both Kia and Len setting out their contributions to both the Abbotsford Residence and the Business Premises, none of which evidence was before Gaul J. either at the trial or on Trang's subsequent application (the one that resulted in them losing their interests in the two properties).
- [20] At the same time, as preparing for the Appeal, Trang was, I understand, pursuing her remedies in the Supreme Court, including her application for sale of both the Abbotsford Residence and the Business Premises. To assist the clients, Mr. Misner appeared before Gaul J. seeking a stay of his order vesting Len and Kia's interests in the Abbotsford Residence and the Business Premises in Trang, which stay His Lordship was not inclined to grant.
- [21] The Appeal was heard on October 9, 2012 and reasons for judgment were issued on December 6, 2012 (*Tran v. Tran*, 2012 BCCA 492). It should be noted that on October 9, 2012, at the conclusion of the hearing, the Court of Appeal, allowed the Appeal, with reasons to follow. I understand that this was done because, particularly, Trang continued to press in the FRA Action for sale of the two properties and to enforce the order Gaul J. made on November 18, 2011.

THE ACCOUNTS

- [22] Throughout the matter, MLF issued a number of accounts to its clients, Len and Kia. The fees in those accounts totalled \$90,050. Disbursements were \$6,581.25 and taxes \$11,560.81. The invoices from November 23, 2011, when the file was opened, through to and including February 25, 2013, total \$108,192.06.
- [23] The clients made regular payments totalling \$15,850 towards MLF's accounts until April 2012. In April 2012 it became clear that the clients did not have sufficient resources to continue to pay MLF on a regular basis or to keep their retainer up to date. Accordingly, MLF

asked the clients to execute a mortgage in their favour in the amount of \$60,000 to secure their fees. The clients agreed to grant such mortgage to MLF and executed a mortgage in favour of MLF for the said \$60,000. That mortgage was registered against title to the Abbotsford Residence and the Business Premises.

- [24] Following the oral decision of the Court of Appeal (setting aside Gaul J.'s order of November 2011 insofar as it vested in Trang that portion of Kia and Len's interests in the properties sufficient to satisfy Thomas's outstanding obligations to Trang), both the Abbotsford Residence and the Business Premises were sold with the consent of Trang, Thomas, Len and Kia (November 20, 2012).
- [25] The proceeds of sale were apparently paid into trust with Trang's lawyer. MLF received \$60,000 from the proceeds of such sales to payout its mortgage which brought the amount then due and owing to MLF down to the sum of \$19,904.34. The balance of the sale proceeds were held pending a final resolution of all matters.
- [26] After receiving the funds to pay out its mortgage, MLF rendered two additional accounts to the clients (December 10, 2012 and February 25, 2013) each for \$5,000 in fees plus disbursements of \$129.20 and \$979.45 respectively, plus taxes. Those two accounts bring the total amount claimed by MLF as owed to them by the clients from \$19,904.34 to \$32,342.06.

TERMINATION OF THE RETAINER

- [27] On or about November 16, 2012, Thomas phoned MLF and told them to stop working on behalf of the clients. Mr. Misner was concerned that the telephone call came from Thomas and not from Kia and Len directly as, certainly, it could be said that Thomas's interests in the FRA Action and the Appeal were in conflict with those of Kia and Len. On receiving this phone call from Thomas, Mr. Misner attempted to set up a meeting with Kia and Len to discuss whether Kia and Len wished to continue to retain MLF or dismiss them; one or the other.
- [28] A meeting was set up for November 29, 2012 at MLF. Mr. Misner was there with a court-certified interpreter, ready to meet with Kia and Len to discuss MLF's continued retainer or dismissal. Thomas arrived with Kia and Len. As Mr. Misner had concerns about whether Thomas ought to meet with him and Kia and Len (as their interests were potentially adverse in interest), Mr. MacAdams met with Thomas alone for about 20 minutes.
- [29] During that meeting, Thomas articulated three complaints to Mr. MacAdams about MLF's handling of the matter. Those complaints apparently were:
- (1) The money from sale of the premises was held in trust by the lawyer acting for Trang and not by either Thomas's lawyer in the FRA Action or by MLF;
 - (2) Thomas's belief that there was some avoidable delays in attending to the settlement of matters;

- (3) The alleged failure by MLF to provide a payout statement in respect of the mortgage.
- [30] During the time Mr. MacAdams was meeting with Thomas, Mr. Misner was apparently ready, willing and able to meet with Kia and Len. However, Kia and Len refused to meet with Mr. Misner unless Thomas was also with them. Once Thomas concluded his meeting with Mr. MacAdams, the three of them (Thomas, Kia and Len) left MLF and did not return.
- [31] On December 5, 2012 a fax dated November 26, 2012 which purported to be from Kia and Len was received by MLF. The contents of that fax read:

Abbotsford BC

Kia Thi Truong

Len Tran

MacAdam Law Firm

Attn; Mark Miner

We called on Nov.,16, 2012 asking for you to stop working on our file.

We did not receive any reply, Diane said you would call us back.

As of this date we would like to terminate your services with us.

Yours Truly,

Kia Thi Truong

Len Tran

- [32] The fax appeared to be sent from Abbotsford Community Services and noted thereon that it had been translated for Kia and Len by a Vietnamese settlement worker who worked at Abbotsford Community Services.
- [33] Following receipt of the fax, MLF sent a fax to Abbotsford Community Services (which fax was directed to the person who had apparently translated the fax from Vietnamese to English for Kia and Len). MLF's letter to Abbotsford Community Services says:

We write further to your faxed correspondence of December 5, 2012 (12:20 PM). Thank you for contacting MacAdams Law Firm. As I am sure you are aware, MacAdams Law Firm has been trying to contact Kia Thi Truong and Len Ngoc Tran to obtain their instructions with regard to a legal matter.

Be advised that the laws in British Columbia set out very clear and strict guidelines with respect to a lawyer's commitment to a client. Communication between a lawyer and his or her client is of fundamental importance. A lawyer is not permitted to accept instructions from anyone other than the client. In this case it is especially important that the instructions be delivered in person for reasons including because there is money available for distribution.

If you are in contact with either Len Ngoc Tran or Kia Thi Truong, kindly advise them that they must arrange to meet with MacAdams Law Firm as soon as possible. If they fail to do so they may lose a legal advantage in their case or may have to pay extra money for failing to take a particular legal step.

- [34] While waiting to hear directly from Kia and Len (not just Thomas or some agency) whether MLF continued to be retained, Mr. Misner and Mr. MacAdams continued to work on the Appeal and other matters in relation to the FRA Action on the clients' behalf. That work included attempting to achieve an overall settlement with Trang's counsel in respect of all matters including the amount for costs for both the FRA Action and the Appeal and coordinating matters with respect to the sale of both of the properties. Mr. Misner and Mr. MacAdams also made continued attempts to speak directly with Kia and Len and determine whether MLF continued to be retained.
- [35] Matters culminated in a January 21, 2013 hearing before Bruce J. of Trang's application for payment out of the proceeds of sale of the properties. Mr. Misner attended and advised Her Ladyship that he was unsure of his retainer (having not heard directly from Kia and Len that he had been discharged). At the hearing Bruce J. confirmed that MLF was no longer required to act on behalf of Kia and Len in respect of the FRA Action. Her Ladyship also ordered that the net sale proceeds (held in Trang's solicitor's trust account) be paid out as follows:
- (a) \$155,052.63 to Trang;
 - (b) \$200,105.27 to Kia and Len; and
 - (c) \$50,000 to be paid into court to the credit of the FRA action.
- [36] As the Appeal had been concluded, there was no need for MLF to act any further and MLF considered itself discharged from and after that date.

THE APPOINTMENT TO REVIEW MLF's BILL

- [37] On May 14, 2013, MLF filed an appointment for review of its bills to the clients which appointment was taken out pursuant to the provisions of the Legal Profession Act (SBC 1998, c. 9) (the "Act"). The appointment was originally set for July 4, 2013. I was scheduled to sit in Chilliwack on that day and, rather than proceeding with the appointment, I confirmed that a pre-hearing conference was necessary because of the amount of the fees and I turned the hearing set for that day into a pre-hearing conference.
- [38] At the pre-hearing conference, I was advised by Thomas (who was in attendance on behalf of Kia and Len) that the clients' concerns with the accounts related to:
- (a) MLF's use of interpreters at the various meetings with the clients;

- (b) the fact that time was expending dealing with both the Appeal and the FRA Action - the clients said that MLF was hired only to deal with the Appeal and not anything to do with the FRA Action;
 - (c) too much time was spent on the Appeal; particularly, there was no need for the application for fresh evidence so the time associated with that was of no value;
 - (d) the fact that, according to Thomas, MLF had given an estimate of \$40,000 in total for its fees during his initial conversation with Mr. MacAdams;
 - (e) the fact that MLF did not stop work on the clients' matters immediately upon being advised by the clients of their desire to terminate the retainer.
- [39] The actual review of the accounts was then put over for a full-day hearing to January 2, 2014 and came on before me. Mr. Misner and Mr. MacAdams testified on behalf of MLF. Len was there representing herself, and Thomas was there representing Kia. We had some discussions in the early part of the hearing as to whether Thomas ought to be allowed to appear on his mother's behalf. Mr. Holeksa, who appeared on behalf of MLF, advised that he was not opposed to Thomas representing the interests of Kia at the hearing as their interests were not necessarily adverse in this hearing. As the question before me is the appropriate amount of fees to be paid by the clients, Thomas's interests could not be said to be adverse to those of Kia and Len in respect of the issues I am to determine in this appointment.
- [40] When I asked the clients to enumerate their specific issues with MLF's accounts, I was advised that they were no longer disputing the interpreter's expenses; nor were they disputing whether the application for fresh evidence ought to have been brought in the Appeal. Rather the two main complaints the clients had with respect to the fees were, firstly, in their view, MLF ought to have stopped work immediately upon being advised by the clients of the termination of the retainer (on November 16, 2012) and, secondly, they say the fees were substantially higher than the \$40,000 estimate of fees that Mr. MacAdams allegedly gave to Thomas during the initial conversation between Mr. MacAdams and Thomas when Thomas phoned MLF and arranged the initial appointment for his mother and sister with Mr. Misner.

THE LAW

- [41] I have outlined the basic facts and evidence that were before me and turn now to the law applicable to a review of this nature.
- [42] On a review of a lawyer's bill under the Act, a registrar must allow the lawyer to claim such fees, charges and disbursements as were "reasonably necessary and proper to conduct the proceeding" (Act, s. 71(2)(a)). Further, s. 71(4) of the Act provides:
- (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.

ANALYSIS

[43] I was told at the hearing that the clients did not take any issue with the disbursements that MLF incurred on the clients' behalf. Therefore, this review relates solely to the fees charged.

(a) The Complexity, Difficulty or Novelty of the Issues

[44] This matter was somewhat complex, difficult and novel, for a number of reasons. Firstly, it was novel in that it must be said to have been unusual for a judge to make an order divesting a person of their interests in property, without ever having heard from that person. I am advised as well that there are relatively few cases dealing with s. 66(3) of the Family Relations Act, the provision Trang and Gaul J. relied on to grant the order encroaching on the clients' registered interests in the two properties. Because of this, crafting the factum was not without its difficulties.

[45] The matter was complex because MLF was required to deal with two ongoing pieces of litigation; the FRA Action, and the Appeal. Counsel for Trang was apparently taking an extremely aggressive stance with respect to the FRA Action and was pushing to have both the Abbotsford Residence and the Business Premises sold even before the hearing of the Appeal. This necessitated the stay application; but, as Gaul J. appeared to be much more favourably disposed to Trang than to Thomas, that application was difficult and, as well, very hard-fought. In my view it was imperative that MLF take a stance on the clients' behalf in the FRA Action and, as well, that they seek a stay of Gaul J.'s order of November 18, 2011 as, without doing so, any "victory" the clients gained in the Court of Appeal might have been rendered moot, had the Abbotsford Residence and Business Premises been sold and monies paid to Trang, as recouping the money from Trang would likely have been difficult indeed.

[46] Added to the difficulties was the fact that neither of the clients spoke fluent English and, to ensure instructions were received and understood, advice was given and all matters were conducted through a court-certified interpreter. In addition, Thomas (whose interest was potentially adverse to that of Kia and Len) continued to insert himself, or attempt to insert himself, into the solicitor-client relationship, despite advice to him that such conduct was inappropriate.

(b) Skill, Specialized Knowledge and Responsibility

[47] Mr. MacAdams is senior counsel, having been a member of the Law Society of British Columbia since May 15, 1974. Since his enrollment as a member of the Law Society of British Columbia, Mr. MacAdams has practiced almost exclusively in the area of civil litigation. He was appointed Queen's Counsel in 2001. It has been said that such an appointment is a positive measure of a lawyer's integrity and character (see *Hill v. Gibbs*, 2003 BCSC 1563 (Registrar)).

[48] Mr. Misner was apparently specifically recommended to the clients by Mr. Krentz, Thomas's counsel in the FRA action. Mr. Misner was called to the Bar of British Columbia in May 2006 and practiced with two different firms before becoming an associate with MLF in March 2008, where he remained until September 2013. He is now, I understand, a sole practitioner in Abbotsford. Since his move to MLF, Mr. Misner has focused his practice solely on the area of civil litigation. This was his first appeal on his own; although he told me that he had previously acted on an appeal as junior counsel.

(c) The Lawyer's Character and Standing in the Profession

[49] I am of the understanding that both Mr. MacAdams and Mr. Misner are members in good standing of the Law Society of the Province of British Columbia.

(d) The Amounts Involved

[50] The amount involved in this proceeding was not insignificant. According to the order of Bruce J. made on January 21, 2013, it appears that the properties were sold for net proceeds of approximately \$405,000 from which amount the sum of some \$200,000 was ordered to be paid out to the credit of Kia and Len. In addition to those proceeds, I was told that Kia and Len were entitled to some costs in respect of the successful Appeal, but I was not advised what the amount of those costs might be.

(e) The Time Reasonably Expended

[51] There were three timekeepers at MLF who recorded time to the file: Mr. Misner; Mr. MacAdams; and a certified paralegal, Debra Werk. Mr. MacAdams' role appears to mostly have been supervisory in respect of Mr. Misner. Ms. Werk did (mostly) work properly delegated to a senior paralegal. Mr. Misner did the bulk of the "heavy lifting", so to speak.

- [52] Mr. Misner told me during his evidence that it is MLF's policy to ensure that accounts are sent to the client on a "value billing" basis. By that he meant that he often reduces the fees to be billed to something less than a straight hours times hourly rate amount if, in his view, the time was not all useful for advancing the clients matter. For example, in respect of the largest account - the one of November 22, 2012 for fees of \$55,000 - I was advised that the actual recorded time during the timeframe encompassed by that account was, in fact, \$64,532.50.
- [53] At the hearing, I pointed out to Mr. Misner that there appeared to be time recorded to the file that, in my view, ought not to properly be billed to a client. Specifically, I referred to the fact that the clients appeared to have been billed for the time Mr. Misner spent preparing the retainer agreement and reviewing it with Len and Kia. In answer to my query, Mr. Misner confirmed that on the account that included that time (the first one), he reduced the time spent and, further, that the meeting to review the retainer letter was for more than just that; he also discussed with the clients their options in respect of the proposed appeal of Gaul J.'s November 18, 2011 decision.
- [54] While I understand that certain reductions were taken to account for given to the fact that Mr. Misner was quite junior in relation to preparation of factums and the like, I am of the view that there may have been instances where insufficient reductions were taken from the time recorded to the fees billed. This view accords with the clients' concerns that MLF continued to bill for matters undertaken by MLF after MLF received notice (albeit not from the clients directly) of the termination of their retainer. For example, in my review of the accounts, I noted that time was recorded to such things as receiving a Notice of Intention to Act in Person, receiving the fax from Abbotsford Community Legal Services, preparing for the aborted meeting on November 26 (the one where Thomas met with Mr. MacAdams while Mr. Misner waited to, but did not, meet with Len and Kia). Time was also recorded to preparing for and attending at the hearing before Bruce J. In addition, in my view, a great deal of time was recorded (60 some odd hours) to preparing the factum. Some of that time was discounted but certainly that amount of time is disproportionate to the work product, even though billed at a lower hourly rate than more senior counsel who likely could have achieved the same result in far less time.
- [55] Further, although I was assured at the hearing that Ms. Werk's time was all in the nature of paralegal time, based on the time descriptions in the accounts, it appears to me that some of her time may have been purely secretarial or administrative in nature and thus ought to have been subsumed in the hourly rates of counsel: *Paterson & Associates v. Haynes*, 2004 BCSC 1178 (Registrar), at para.38; and *Cook Roberts LLP v. Buchholz*, 2012 BCSC 1940 (Registrar), at para. 115.

(f) Hourly Rates

[56] As for the hourly rates of the timekeepers, Mr. MacAdams' hourly rate was \$450 per hour; Mr. Misner's hourly rate was \$275 per hour and Ms. Werk's \$225 per hour. Generally speaking, the hourly rates charged by the timekeepers on this matter are within the range of what I would expect to see from counsel with their experience in matters of a like nature.

(g) The Importance of the Matter to the Clients

[57] The matter was clearly of great importance to the clients. In essence, this was all or nothing litigation, in the sense that, had the Appeal been unsuccessful, Len and Kia would have received nothing; they would have lost their interest in their properties which, I understand, represented their lives' work and into which they had put their life savings.

(h) The Results obtained

[58] The result for the clients was no doubt excellent.

(i) Other Factors

[59] In addition to the factors set out in s. 71 of the Act, as noted earlier, a registrar on a review of this nature is to consider "all of the circumstances". In my view, "all of the circumstances" in this particular instance would include the estimate (or not) Mr. MacAdams allegedly made during his initial telephone conversation with Thomas and, as well, the fact that MLF continued to work on the clients' behalf in the face of an apparent termination by the clients of their retainer.

[60] As regards the estimate, the clients did not call any evidence of the estimate. Thomas did not testify and he is the person to whom Mr. MacAdams allegedly gave the estimate. Only in his opening submissions did Thomas suggest that Mr. MacAdams had given him an estimate of the legal fees.

[61] Mr. MacAdams was called to testify and produced a memorandum to file he wrote shortly after he concluded his telephone call with Thomas on November 18, 2011. In his note to file, Mr. MacAdams said:

I said if matters proceed to an appeal the mother and sister should plan on paying \$10,000 to \$20,000.

[62] That is significantly less than the \$40,000 estimate that Thomas suggested he received from Mr. MacAdams and I am not sure where Thomas's number comes from.

[63] In his submissions, Mr. Holeksa asserted that the clients were well-aware at all times throughout the retainer as to the amount of the fees. Furthermore, Mr. Holeksa emphasized that, certainly in April of 2012, when MLF asked for a mortgage in the amount of \$60,000 to secure its fees, the clients knew or ought to have known that at least an additional \$60,000 of fees was anticipated before the matter concluded.

[64] Generally speaking, a fee estimate is not "something written in sand which can be washed away by the shifting tides of litigation": *Mura v. Archer Daniels Midland Co.* (2003), 18 B.C.L.R. (4th) 194, 2003 BCSC 1164 (S.C.), at para. 8. However, estimates are also not guarantees or warranties that the work will be performed for the amount specified: *Price v. Roberts & Muir*, [1988] 1 W.W.R. 689, 19 B.C.L.R. (2d) 375 (C.A.). In that case, the court also held at para. 13:

Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work. Such work would not fall within the estimate.

[65] The evidence before me is insufficient to establish that MLF gave the clients any estimate as to the costs of the legal services. Certainly, Mr. MacAdams made an indication of potential costs but there was never an intention on the part of MLF to be bound by such indication; nor did the clients ever treat Mr. MacAdams's comment to Thomas to as an estimate of any sort.

[66] As for the termination of the retainer, in my view, at the very least, once MLF received the fax from Abbotsford Community Services they ought to have stopped working on the clients' matter until they could confirm (or not) their retainer. Further, amounts recorded to attempting to have discussions with the clients about whether MLF continued to be retained are, in my view, not billable to the clients. I am of the view that, generally speaking, it is not appropriate for solicitors to bill clients for discussing retainer arrangements, be they in the initial stages of the retainer, or at the end.

[67] Accordingly, certainly some additional reductions ought to be taken to the last two accounts to account for the time recorded that relates to MLF seeking the clients' instructions, preparing for the aborted meeting and all additional discussions with the clients regarding the termination of their retainer.

[68] At the pre-hearing conference and while cross-examining Mr. Misner, the clients raised the issue of Trang's solicitor holding the net sale proceeds of the Abbotsford Residence and the Business Premises. They indicated that they were somehow disadvantaged by this. I do not agree. No doubt Mr. Pederson (Trang's counsel) was put on undertakings as regards these monies. A court order (that of Bruce J. of January 21, 2013) was made disbursing those sale proceeds. It is clear on the evidence before me that the clients' interests in those funds were, at all times, protected.

- [69] Finally, MLF have suggested that, as part of "all of the circumstances", I ought to take into account in determining the "fair fee" the fact that, had the clients not been successful on the Appeal, MLF was at great risk of non-payment of their accounts in that, other than their equity in the two properties, the clients had no resources available to pay MLF and the mortgage granted by them to MLF would have yielded no funds if Trang had successfully defended the Appeal.
- [70] In support of this submission, Mr. Holeksa referred me to a decision of the Ontario Court of Appeal: *Desmoulin (Committee of), v. Blair* (1994), 21 O.R. (3d) 217. In *Desmoulin*, the court increased a solicitor's fees determined on an hourly basis from \$92,172.50 to the amount of \$150,000 on the basis that the solicitors had a significant risk of non-payment, confirming that risk is a relevant factor to the determination of a fair fee.
- [71] I agree with that proposition and, in fact, such has also been held to be the law in this province: see, for example, *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, at para. 78.

CONCLUSIONS

(a) Fees

- [72] Having considered "all of the circumstances", as well as the factors enumerated in s. 71(4) in the Act as I am required to do, I find that a fair fee payable by the clients to MLF for the work done in respect of this matter is the sum of \$88,000 plus taxes on such amount. As noted earlier, disbursements were not in issue and thus the disbursements as set out in the accounts are awarded to MLF in their entirety.

(b) Costs of this Review

- [73] MLF has been successful on this application and, accordingly, pursuant to the provisions of s. 72(1)(a) of the Act, it is entitled to its costs at Scale B of this assessment.
- [74] In order to avoid the necessity for an assessment of costs, I will fix MLF's costs in relation to this matter at the sum of \$1,000 plus an amount of \$200 for disbursements (see s. 72(3)(b) of the Act).

(c) Interest on the Amount Due to MLF

- [75] MLF seeks interest on its outstanding fees as set out in the retainer letter at the rate of 19.6% per annum. The clients signed the retainer letter and agreed to pay interest. However, in my view, that agreement was superseded by the mortgage MLF took to secure its fees. The mortgage does not contain a provision for interest. If MLF wished to maintain its rights to seek interest from the clients on its outstanding accounts, in my view, it ought to have included a provision in the mortgage for interest at the contractual rate.

- [76] Agreements in respect of interest on outstanding legal fees must be unequivocal to be enforceable: Gregory & Gregory v. Chen, 2005 BCSC 1505 (Registrar), at paras. 29-32. In my view, the clients may have believed the interest provisions of the retainer agreement were replaced by those set out in the mortgage. Accordingly, in respect of interest, MLF is entitled to interest on its unpaid fees at the rates set pursuant to the Court Order Interest Act in accordance with s. 73(4) of the Act; such interest shall accrue on the new balance outstanding (calculated in accordance with these reasons) from the date of the last account to the date of these reasons.
- [77] MLF may prepare a calculation of the interest and submit it together with a certificate of fees for my consideration and execution.

"Registrar Sainty"

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