

CANADA / JUDGMENT

Matthews v. Stikeman Elliott LLP

2020 BCSC 581

COURT

Supreme Court of British Columbia

DECIDED

16 April 2020

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2020 BCSC 581 Matthews v. Stikeman Elliott LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matthews v. Stikeman Elliott LLP,

2020 BCSC 581

Date: 20200416

Docket: S1711714

Registry: Vancouver

Between:

Daniel Matthews, Ecoasis Developments LLP, Ecoasis Properties Limited, Ecoasis Bear Mountain Developments Ltd., BM Clubhouse 40 Ltd.,

BM Mountain Golf Course Ltd., BM 81/82 Lands Ltd., BM 83 Lands Ltd.,

BM 84 Lands Ltd., BM Capella Golf Course Ltd., BM Highlander Development Ltd., BM Highlands Golf Course Ltd. and BM Highlands Lands Ltd.

Clients

And

Stikeman Elliott LLP

Law Firm

Corrected Reasons for Decision: The content of the Reasons for Decision was corrected at paras. 9, 46, 79, and 90 on July 13, 2020

Before: Master Harper

(As Registrar)

Reasons for Decision

Counsel for the Clients:

P.K. Sandhu

Counsel for the Law Firm:

H. Poulus, Q.C.

J.R. Buysen

Place and Dates of Hearing:

Vancouver, B.C.

May 6-10, November 18, December 12, 2019

February 12-14 and 18-19, 2020

Place and Date of Decision:

Vancouver, B.C.

April 16, 2020

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Introduction

- [1] This is a review of lawyers' fees pursuant to the Legal Profession Act, S.B.C. 1998, c. 9 (the "LPA").
- [2] The clients were defendants in a complex commercial lawsuit commenced by McCredie Investments Inc. (the "plaintiff"), the principal of which was Ross McCredie. The clients retained Stikeman Elliott LLP (the "law firm") to defend the action.
- [3] The plaintiff advanced claims related to a real estate development at Bear Mountain near Victoria, British Columbia ("Bear Mountain") framed in fraud, breach of contract, and unjust enrichment. In addition, the plaintiff sought the return of a deposit of \$150,000 (the "deposit") that it had paid Ecoasis Properties Limited ("Ecoasis Properties") for the purchase of six lots at Whistler, BC (the "Kadenwood lots").
- [4] Daniel Matthews was named as a defendant in his personal capacity. Ecoasis Properties was owned by Mr. Matthews (50%), Andy Szocs (20%), and Tom Kusumoto (30%). The other corporate defendants, described as the "Bear Mountain Defendants", were owned by Mr. Matthews (50%) and Mr. Kusumoto (50%). Despite Mr. Matthews having two business partners, the lawsuit primarily involved Mr. Matthews' own dealings with Mr. McCredie. As a result, only Mr. Matthews signed the retainer agreement and only he directly instructed the law firm.
- [5] The senior lawyer on the file was Hein Poulus, Q.C., assisted by an associate, Jonathan Buysen, and occasionally by articling students and a paralegal, all of whom billed their time on an hourly rate basis.
- [6] The lawsuit was settled in late October 2017 in unusual circumstances. Unbeknownst to both Mr. Matthews and the law firm, Mr. Szocs and a representative of Mr. McCredie (thought to be Mr. McCredie's father-in-law) settled the case for \$200,000 all-inclusive. Although the rationale for the settlement amount was not explained at the hearing, I infer that the settlement comprised the deposit plus \$50,000 for costs or unspecified damages, or a combination of both. Mr. Kusumoto called Mr. Matthews to inform him of the settlement. Mr. Matthews was upset that the matter had not been settled through the existing negotiation channels, namely, through counsel. Mr. Matthews was furious about the

settlement, maintaining his position that Mr. McCredie did not deserve to be paid anything, but he respected his partners' wishes and grudgingly accepted the settlement. Besides, Mr. Matthews had a lot going on with his business at the time and there was a benefit in not having the lawsuit hanging over him.

- [7] The law firm worked on the file from September 2016 to November 2017, billing the clients regularly. The law firm issued eleven invoices in total. On December 7, 2017, Mr. Poulus terminated the retainer for non-payment of legal fees.
- [8] All accounts were based on the hourly rates of the lawyers and others who did work on the file. The legal fees totalled about \$372,000 plus taxes and disbursements for a grand total of about \$425,000. The clients paid all but about \$121,000. The law firm took out an appointment to review the unpaid accounts, following which the clients took out their own appointment to review all of the accounts. There is no issue with respect to disbursements. The position of the law firm is that all the legal fees should be allowed. The position of the clients is that \$120,000 plus taxes should be deducted.
- [9] Pursuant to a pre-hearing conference direction, the clients delivered a written statement of their objections to the fees. Given that no formal pleadings are filed in a review of lawyers' fees, a statement of objections is an important document that informs the law firm about the client's complaints and puts the law firm on notice as to what evidence it will need to lead in order to address the complaints. It also serves to narrow the issues and streamline the hearing. In this case, the statement of objections was wide-ranging. The clients have put in issue virtually every hour spent and every dollar charged by the law firm. The hearing was protracted, to say the least. There were 12 hearing days spread over nine months, hundreds of documents tendered as exhibits, and mid-hearing conferences held to manage the process, including a mid-hearing application by the clients for leave to tender an expert report. Through the course of the hearing and in submissions, some objections seem to have been dropped and others added. This unfocussed inquiry contributed to the hearing taking longer than necessary and made it more difficult to assess the merits of the clients' complaints.
- [10] Mr. Poulus and Mr. Buysen testified on behalf of the law firm. Mr. Matthews testified for the clients. Each party tendered an expert report: J. Kenneth McEwan, Q.C. for the law firm, and H.C. Ritchie Clark, Q.C. for the clients. Each expert was required for cross-examination.

The Law

- [11] Section 71 of The LPA sets out the principles that govern a fee review.
- [12] Sections 71(2) and (3) provide:

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- (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.

[13] In determining the necessity and propriety of steps taken in a matter, the registrar is to consider all of the circumstances including the following factors set out in s. 71(4):

71 (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.

[14] As Master MacNaughton (as she then was) put it succinctly in *Owen Bird Law Corp. v. Patterson*, 2014 BCSC 553 at para. 11, my role is to determine the reasonable necessity and propriety of the steps taken by the law firm on the clients' behalf and to assess a fair fee for the value of the legal services they received.

[15] The clients, the law firm, and both experts agree that my consideration of "all of the circumstances" as required by the LPA is not to involve a line-by-line analysis of each billing entry. Rather, I am to make a global assessment that will lead to the end result: a fair fee.

[16] Despite the common ground that a global assessment is the correct approach, the clients undertook a detailed examination of the work done and the hours recorded, provoking a similar approach by the law firm in response. In other words, the clients and the law firm undertook the line-by-line analysis that they agreed was not appropriate, an exercise that contributed to the large volume of documents produced, the length of the hearing, the complexity of the arguments, and the time required to produce these reasons.

Removal of Certificates of Pending Litigation

[17] Before Mr. Matthews signed the retainer agreement on October 3, 2016, there was urgent legal work to be done.

[18] The plaintiff had filed certificates of pending litigation ("CPLs") against the Kadenwood lots and Bear Mountain. This was a crisis for the clients. Mr. Poulus acted quickly to reach an agreement with plaintiff's counsel, David Crerar, as he then was, to have the CPLs removed on the condition that as land was sold, a portion of the proceeds would be locked up based on an agreed-upon formula. The consent order for the removal of the CPLs took concerted effort over a short period of time. Mr. Matthews was pleased with the result. The clients now complain that a court application should have been made, but, in my view, a court application would not have achieved a better result. Mr. Clark agreed on cross-examination that the decision to resolve the removal of the CPLs by agreement rather than by court application was not unreasonable.

[19] The fees for this work were about \$13,000. The result obtained was excellent and the fees charged were reasonable. In fact, if removing the CPLs had been the only work done by the law firm, there is a good argument to be made that on a "fair fee" basis, the law firm could have justified charging a higher fee.

[20] The work done by the law firm after the removal of the CPLs was, in summary:

- close pleadings;
- obtain security for costs;
- provide and obtain document disclosure;
- prepare Mr. Matthews for, and attend, his examination for discovery;
- prepare for and conduct the examination for discovery of Mr. McCredie; and
- prepare for and attend an application to strike the appointment to examine Mr. Kusumoto for discovery.

Section 71(4) Factors

- [21] I must consider all of the circumstances including the factors set out in s. 71(4). Before turning to the scope of the retainer and a review of the work done, it is convenient to dispose of the s. 71(4) factors that are not at issue or that I can determine summarily. These are the factors set out in s. 71(4)(a) through (d), and (g), leaving the time reasonably spent and the result obtained for more detailed consideration.
- [22] The issues involved in the litigation were only as complex and difficult as would be expected in so-called complex commercial litigation. The complexity and difficulty are reflected in the hourly rates and by the time reasonably required to accomplish the tasks required by the litigation. I would rate this factor as neutral.
- [23] There is no doubt that the work required skill, specialized knowledge, and responsibility so that is not a factor I will need to address further. Similarly, the lawyer's character and standing in the profession are not at issue.
- [24] The clients say that the amount realistically involved was the amount of the deposit claim as the other claims had no reasonable prospect of success. The clients say that the amount of the actual settlement is evidence of the amount involved. I disagree with the clients' characterization of the amount involved.
- [25] The amount involved is determined by the pleadings. The claims, if successful, could have amounted to a judgment against the clients for \$10 million to \$20 million for the fraud claim, \$3 million for the unjust enrichment (or quantum meruit) claim, and \$150,000 for the deposit claim.
- [26] The work the law firm did prior to settlement may have influenced Mr. McCredie's decision to settle for the amount he did. The amount of the settlement cannot reasonably be considered the amount involved.
- [27] For these reasons, I conclude that the total amount involved was significant.
- [28] In the midst of the CPL crisis, the law firm was formally retained. The retainer agreement provides that Mr. Poulus would be responsible for the engagement as assisted by other lawyers as may be required. Mr. Matthews was an experienced, sophisticated businessperson, although he had never been involved in a lawsuit before. He was familiar with working with law firms and knew that they charged by the hour. He also knew that the more senior the lawyer, the higher the hourly rate.
- [29] Although the retainer agreement should have set out the hourly rates of the lawyers, students, and paralegals who would be working on the file, the retainer agreement does say, "we are pleased to indicate the current hourly rates applicable for those lawyers expected to be involved in this matter." Before Mr. Matthews signed the retainer agreement, he asked Mr. Poulus what his hourly rate was and Mr. Poulus told him it was \$620. The hourly rates of all "billers" were clearly set out in the pre-bills that accompanied each invoice. It was

obvious from the pre-bills when hourly rates were increased. I find that the hourly rates of all counsel, students, and the paralegal were reasonable in that they were in the range of hourly rates for a downtown Vancouver law firm retained in a complex commercial lawsuit.

- [30] It is beyond doubt that the matter was very important to the clients. Mr. Matthews was incensed by the litigation, especially by the fraud claim. I will address the importance of the matter to Mr. Matthews in more detail below.

Mr. Matthews' Approach to the Litigation

- [31] In order to put Mr. Matthews' complaints about the legal fees into perspective, it is important to understand Mr. Matthews' frame of mind and, consequently, his instructions throughout the litigation.
- [32] In July 2016, before Mr. McCredie commenced his lawsuit, he wrote Mr. Matthews an email in which he stated that all he wanted was the deposit back. Despite Mr. McCredie making a clear offer and a clear threat of litigation, Mr. Matthews refused to accept the offer. He felt that since Mr. McCredie failed to complete the purchase of the Kadenwood lots, and wasted two years, Mr. McCredie did not deserve to get the deposit back. Mr. Matthews' evidence was that his corporate solicitors' opinion was that Mr. McCredie was not entitled to the return of the deposit. Mr. Matthews figured the threat of litigation was bluster.
- [33] Mr. McCredie, of course, did follow through with his threat of litigation, but being sued did not change Mr. Matthews' attitude. Mr. Matthews was stunned by the "outrageous" claims made in the notice of civil claim. He saw the claims as completely without merit. He was deeply offended by the allegations of fraud. He was insulted that Mr. McCredie alleged that he had done any work on the Bear Mountain project. It was "painful" to see Mr. McCredie taking credit for work he did not do. On a personal level, Mr. Matthews wished to punish Mr. McCredie.
- [34] Mr. Matthews' determination to vigorously defend the lawsuit is reflected in his deep involvement in the conduct of the litigation. He reviewed draft letters to ensure they were accurate. He made suggestions on various topics, some of which were helpful and some of which were not. Mr. Matthews saw his involvement as providing assistance to the law firm. I would not describe Mr. Matthews as a difficult client. Rather, he wanted to be closely involved in the case at all times because the litigation was of great importance to him. I do not criticize Mr. Matthews for wanting to be closely involved in the defence of the lawsuit. However, such close involvement by a client in the lawyer's work will inevitably increase the amount of time the lawyer spends on the file and therefore increase the legal fees.
- [35] The litigation plan developed by the law firm and agreed to by Mr. Matthews, refined as the litigation proceeded was:

- mount a strong defence;

- get Mr. McCredie spending money on legal fees early on in the proceeding in the hope that the economics of the litigation would persuade him to drop the case;
- failing an early discontinuance, get Mr. McCredie into examination for discovery and disprove his claims.

[36] At the same time, however, Mr. Matthews was looking for a "sensible outcome". Mr. Matthews' dual desires of punishing Mr. McCredie on the one hand, and reaching a "sensible outcome" on the other, ebbed and flowed throughout the litigation. This duality is illustrated by an email exchange Mr. Matthews had with Mr. Poulus in October 2016 in which Mr. Matthews says:

[W]hile I am looking for the most sensible outcome McCredie deserves to also be made to feel uncomfortable and vulnerable.

and Mr. Poulus responds:

Happily, the goals of causing McCredie discomfort and of getting to a sensible solution at the least possible cost in time and money are pretty consistent: what will motivate McCredie to turn tail is becoming convinced that he is faced with very deep-pocketed opponents who don't care what they have to spend to see him in hell. So I propose to press hard once we get organized. I am confident Crerar will let me know when his client has had enough.

[37] Mr. Matthews accepted Mr. Poulus's advice about strategy and paid the law firm's accounts, although late at times, without protest, through most of the retainer.

[38] What Mr. Matthews means by "sensible outcome" is difficult to determine, especially since he attaches no dollar amount to the phrase. A sensible outcome would have been to offer Mr. McCredie his deposit back at the beginning of the lawsuit (perhaps after the CPLs had been removed), but Mr. Matthews did not provide those instructions to the law firm.

[39] Mr. Matthews' mixed emotions (defeat the claim versus reach sensible outcome) are illustrated in Mr. Poulus's email to Mr. Buysen June 16, 2017, in which Mr. Poulus describes Mr. Matthews as wanting to "crucify" Mr. McCredie. In the same email, however, Mr. Poulus says that Mr. Matthews' wife has talked to him about "offers to settle" (no details provided as to the amount the clients would be willing to offer).

Mr. Matthews' Approach to LEGAL Fees

[40] Mr. Poulus testified that he told Mr. Matthews shortly after the CPLs were removed that the fees could be "seven figures". Mr. Poulus testified that this is what he would generally tell clients involved in similar litigation early in the retainer when he did not know much about the case.

[41] Mr. Matthews denies Mr. Poulus told him the legal fees could be "seven figures". Mr. Matthews does recall a conversation in which Mr. Poulus indulged in a bit of self-promotion by telling an anecdote about another client who was charged a large amount for legal fees

where the client said publicly "it was worth every dime". Mr. Poulus says this is the same conversation in which he advised Mr. Matthews of the likely "seven figure" legal fees. Mr. Poulus says that Mr. Kusumoto was present during this meeting. Mr. Kusumoto's recollection of the conversation might have been helpful; however, he was not called as a witness at this review. I do not fault either side for not calling Mr. Kusumoto because the hearing was long enough as it was, but I am left with little objective evidence to assist me in resolving this issue.

- [42] Given that Mr. Matthews recalls part of what Mr. Poulus said (the part about the other satisfied client), I think it is likely that Mr. Poulus referenced "seven figures" in the same conversation in the context of what commercial litigation might cost. However, I doubt that Mr. Matthews paid any attention to the passing comment about "seven figures" because his mind was focussed on defeating the lawsuit.
- [43] As a sophisticated client who was deeply invested in defending the lawsuit, Mr. Matthews must have known that the legal fees would be greater than \$150,000. Despite the flamboyant language used by Mr. Poulus in his email quoted at para. 36 above, Mr. Matthews did not object to the clients being characterized as "deep-pocketed opponents who don't care what they have to spend to see him in hell."
- [44] However, in my view, even deep-pocketed clients who do not care what they have to spend to see the opposing party in hell are not expected to "write a blank cheque" to their legal counsel. Mr. McEwan says it is best practice for a law firm to put expected legal fees in writing. I agree. Even though I have found that Mr. Poulus did tell Mr. Matthews that the litigation could cost seven figures, a passing comment about seven figure legal fees is no substitute for a written fee estimate. "Seven figures" could mean anything between \$1,000,000 and \$9,999,999.
- [45] In Mr. Poulus's experience, most clients do not ask for budgets, but some do. Given the lack of complaint by Mr. Matthews about the legal fees and, indeed, given his expressed satisfaction with the work done, the law firm would have no reason to suspect that their legal fees might ultimately end up being put under a microscope at a registrar's hearing. Even though Mr. Matthews did not ask for a budget at the beginning of the retainer, a written fee estimate accompanied by a litigation plan, revised as necessary as the case developed and as new information came in, would have clearly spelled out for Mr. Matthews the cost of being aggressive and would have gone a long way to protect the law firm on this fee review: *Davis & Company v. Jiwan et al*, 2006 BCSC 658, at paras. 192-194. At the very least, if Mr. Poulus had taken notes of the conversation (taking notes not being a practice of Mr. Poulus's, except when he is in court), the controversy over what Mr. Poulus did or did not say about expected legal fees might have been avoided.

- [46] In the absence of a written record, I am required to look at all of the circumstances, including evidence of discussions and emails and draw conclusions based on the client's actions and instructions. This is certainly a more complicated and time-consuming exercise than if a written fee estimate were available.

The Deposit Claim

- [47] In the context of the removal of the CPLs in October 2016, Mr. Crerar proposed that Mr. Matthews make a realistic offer. Mr. Poulus testified that Mr. Crerar gave a "broad hint" that if Mr. Matthews just gave back the deposit, the lawsuit would be over. Mr. Poulus testified that he told Mr. Matthews about the "broad hint" in the same conversation in which he told Mr. Matthews that the legal fees would be "seven figures", but Mr. Matthews "wouldn't give [Mr. McCredie] a nickel". This exchange was not reduced to writing. Mr. Matthews says it did not occur. I have already determined that Mr. Poulus told Mr. Matthews about the "seven figures". I agree with Mr. McEwan that it would have been good practice to put in writing that the case could be settled for \$150,000. The client would have cause for complaint if there was an opportunity to settle and the client was not informed. I also agree with Mr. McEwan that the written record protects the lawyer. Weighing the evidence before me, I accept Mr. Poulus's evidence that he told Mr. Matthews about the "broad hint" because it makes sense that that comment would be linked with the "seven figures" comment.
- [48] Counsel for Mr. Matthews put the following question to Mr. Matthews after I determined that the question, although inviting a self-serving answer and a revisionist view of history, was permissible:

If you had been advised shortly after the CPLs were removed in October 2016 that the lawsuit could be settled for \$150,000 and that the legal fees for defending the lawsuit would be in the seven figure range, what instructions would you have given to the law firm?

- [49] Mr. Matthews' answer was, "Settle the matter".

- [50] The difficulty I have with this evidence is that Mr. Matthews did not say that his instructions would have been to settle the matter by offering to return the deposit. His evidence was simply that he would have instructed the law firm to "settle the matter", but "settle the matter" for how much money? It would have been obvious to Mr. Matthews that defending the lawsuit would be costly and that he would quickly spend more than \$150,000 in legal fees. Mr. Matthews never instructed the law firm to offer anywhere close to \$150,000, despite mounting legal fees. For these reasons, even if I am incorrect in my finding that Mr. Poulus did tell Mr. Matthews about the "broad hint", I do not accept the assertion that Mr. Matthews would have instructed Mr. Poulus to offer to repay the deposit in or around October, 2016.

SPECIFIC COMPLAINTS

- [51] The clients complain about the law firm's practice of "peer review". This expression, although an unusual one for a law firm to use, just means that more than one lawyer works on the file. The retainer agreement specifically provides that Mr. Poulus would be assisted by other lawyers as required. Mr. Matthews was well aware that Mr. Poulus and Mr. Buysen worked closely together on the file. Mr. Buysen was at every meeting. As the litigation progressed, Mr. Matthews asked if Mr. Buysen could handle more of the work on his own because Mr. Buysen was very competent and because it would keep legal fees down. The law firm complied with this request.
- [52] Mr. Clark criticizes multiple lawyers working on the file. There were not, in fact, "multiple lawyers" working on the file. Apart from Mr. Poulus and Mr. Buysen, the only other "billers" on the file were a paralegal and students from time to time. Mr. Poulus and Mr. Buysen did not duplicate each other's efforts, rather, each added value to the work done on the clients' behalf.
- [53] I accept Mr. Poulus's evidence that if Mr. Matthews had objected to two lawyers working on the file because of cost, Mr. Poulus would have terminated the retainer because the law firm would not be able to meet the level of quality it expected of itself.
- [54] Having reviewed the work done by each of the lawyers, it is my view that the use of two counsel was not excessive or unnecessary. The stakes were high and the clients could afford the legal fees. There was no reason for the law firm to insist the clients fly economy when the case justified, and the clients could afford, first class. I do not accede to the argument that too many lawyers worked on the file.
- [55] The time spent by the law firm's paralegal added value to the file was not secretarial in nature. The fees billed for the students' work was not out of line.

Security for Costs

- [56] Mr. Poulus negotiated an agreement requiring Mr. McCredie's companies to post security for costs. Mr. McCredie personally undertook to the court to maintain a certain bank balance. Mr. Matthews, on the strength of Mr. Clark's opinion, criticizes this agreement and says that an application to court should have been made.
- [57] If the clients had made an application for security for costs, and the plaintiff had been able to demonstrate it could pay the costs, the application would probably have been unsuccessful.

- [58] Even if a court application had been successful, the amount that the court would order for security for costs would have been modest, based only on the amount of a reasonable bill of costs. In this case, the draft bill of costs came in at \$121,000. I agree with Mr. Poulus that the security for costs issue was a lever, but a small one, in the context of a multi-million dollar lawsuit.
- [59] The agreement reached was better than a risky court application and the monetary result was just as favourable to the clients. The legal fees charged for obtaining the agreement for security for costs were reasonable. If this had been the only task undertaken by the law firm, the law firm could have justified charging a higher fee on a "fair fee" basis.

Document Disclosure

- [60] The litigation was document heavy. Mr. Poulus warned Mr. Matthews that the obligation to disclose documents was a painful (because expensive) necessity. The time spent was reasonable given the efforts that were required to obtain, review, and list the relevant documents. The law firm received 15,000 documents from the clients. The law firm had to review them all and determine which ones were required to be produced. The plaintiff produced 2,000 documents
- [61] The law firm's use of electronic tools to organize document production, prepare chronologies and assist in Mr. Matthews' preparation for his examination for discovery was sensible and reasonable. The assistance of a skilled paralegal was also sensible and reasonable.
- [62] I find all the time spent and legal fees charged pertaining to obtaining and disclosing documents necessary and proper.

Examinations for Discovery

- [63] The examinations for discovery took place in June 2017. The overall amount of the legal fees attributable to the examinations for discovery is about \$100,000. Mr. Clark's evidence was that \$100,000 for examinations for discovery "seemed to cry out for explanation".
- [64] Mr. Matthews was informed about the schedule for the preparation and agreed to it. Mr. Poulus and Mr. Buysen did a great deal of preparation for Mr. Matthews' examination for discovery, including role-plays. It would have been obvious to Mr. Matthews that both Mr. Poulus and Mr. Buysen were involved in preparing for and attending his discovery. There was no duplication of effort.
- [65] Mr. Matthews' examination for discovery was a success. As Mr. Poulus put it, Mr. Matthews survived the examination for discovery "pretty intact".

- [66] There was a similarly high level of preparation for the examination for discovery of Mr. McCredie. Mr. Poulus thought the discovery went really well. He thought the plaintiff's case had been "trashed", except for the deposit claim. Mr. Buysen felt they got good admissions from Mr. McCredie, but told Mr. Matthews that he thought he would have to return the deposit.
- [67] Mr. Clark agreed that it would have been unwise to assume before the examinations for discovery that there was nothing to the plaintiff's case. If the law firm had skimmed on preparation, perhaps the ultimate outcome would not have been as favourable and Mr. McCredie would not have settled for the amount he did. Mr. Matthews never expressed any concerns that the extensive preparation was too expensive.
- [68] I agree that the legal fees for the discoveries are high but I am satisfied with the law firm's explanation. The stakes were high. Mr. Matthews benefited from extensive preparation. Potentially problematic areas in his evidence were identified and overcome, and the lawyers worked to ensure his evidence was accurate. Mr. Matthews never challenged the legal fees charged and the lawyers would reasonably have concluded that the "Cadillac" approach that the clients signed up for was what the law firm delivered.

Summary Trial Work-Up

- [69] Mr. Matthews complains that the law firm did not advise him they were going to do work on a potential summary trial. I do not accede to this complaint.
- [70] The law firm did preliminary feasibility work that did not require specific instructions from the clients. In my view, it would be part of a commercial litigator's general retainer to explore all available strategies, including a summary trial. Besides, Mr. Matthews could see what work was being done and charged for in the accounts sent to him and made no complaint.

CASE SUMMARY

- [71] In July 2017, Mr. Matthews asked for a summary of the case to take to his business partners.
- [72] The case summary went through three iterations with Mr. Matthews reviewing each one. All three drafts point out the risk that the plaintiff might succeed at trial on the deposit claim. The final version was provided to Mr. Matthews in late July 2017.

- [73] The assessment of the deposit claim is as follows:

When McCredie was dithering over whether to remove conditions, Dan told McCredie that he would not leave him exposed. Although there are plenty of good reasons to have kept the deposit, ..., there is a risk that a judge will order it to be repaid.

- [74] As to fees, the case summary stated "we expect they will be around (or above) \$300,000 through October and will obviously rise as the lawsuit carries on."

- [75] The law firm sets out the options for moving forward. One option is for the clients to offer to repay the deposit, saying, "there is no real downside to trying this before we incur significant cost". The law firm's opinion at that point is, essentially, that having disproved the big claims, Mr. McCredie might be willing to settle for the return of the deposit as that is what he wanted before he commenced the lawsuit.
- [76] Despite receiving the advice that there was no downside to offering to repay the deposit and that the legal fees would be around or more than \$300,000 through October 2017, Mr. Matthews did not instruct the law firm to offer to return the deposit. The litigation continued.
- [77] I cannot determine from the evidence when Mr. Poulus formed the opinion that Mr. Matthews might lose at trial on the deposit claim. Mr. Buysen's evidence was that after the examinations for discovery, he thought Mr. Matthews would have to pay back the deposit. This evidence was not pursued in cross-examination.
- [78] I am left with an unclear picture as to whether the law firm advised Mr. Matthews of its opinion, or its revised opinion, on the deposit claim as the case developed. It would have been advisable for the law firm to put its opinions as to the merits of the deposit claim in writing so that Mr. Matthews' instructions in light of the advice on the merits were made clear.
- [79] Despite the wide-ranging statement of objections and the enormous amount of time spent on this review, one obvious question remains unanswered because it was not put in issue by the clients: why didn't the law firm provide a formal legal opinion on the merits of the deposit claim, revised as the case developed, together with a recommendation to make an offer to settle based on the risk that the plaintiff would win at trial on the deposit claim? Mr. Matthews' complaint about the deposit claim is that the law firm should have advised him to offer to return the deposit as a business decision given that the legal fees would far exceed \$150,000 (in other words, as a nuisance claim), but not that the law firm should have advised him to repay the deposit because the plaintiff might succeed on the claim at trial. It would not be fair to either party to introduce an element into this review that the clients have not put in issue. Therefore, the question I pose will remain unanswered and will have no impact on my determination of a fair fee.

FEE ESTIMATE

- [80] Mr. Matthews was not concerned about the legal fees until the summer of 2017 when his chief financial officer brought the latest invoice to his attention, not because of the size of the fees, but because the entities from which the legal fees had been paid up to that point were now wound up and not producing cash flow. As a result, Mr. Matthews would have to ask his business partners to contribute directly to the legal fees. Understandably, this was an uncomfortable position for Mr. Matthews to find himself in. Mr. Szocs's share of Kadenwood was only 20%. Therefore, his maximum exposure on the deposit claim was only \$30,000. Mr.

Szocs would naturally be reluctant to contribute to funding the rest of the lawsuit because he had no involvement in the Bear Mountain claims and therefore minimal exposure.

- [81] Mr. Matthews' evidence as to why he was not concerned about the legal fees before his chief financial officer came to him was contradictory. He said that he did not see the invoices because they went straight to his accounting department. It was up to his chief financial officer to review the invoices and ensure everything was in order. Mr. Matthews said he did not even sign the cheques payable to the law firm. However, Mr. Matthews also said he was not concerned about the legal fees because they were not very high. If Mr. Matthews did not see the invoices and did not sign the cheques, he would not be in a position to form an opinion as to whether the legal fees were high or not. Evidence established that Mr. Matthews in fact did sign the cheques. I find, therefore, that it is likely that Mr. Matthews was aware of the legal fees as the accounts were delivered, and that he concluded that they were "not very high". The fact that he thought he had not seen the invoices or signed the cheques is a strong indication that the amount of the legal fees was of no concern to him.
- [82] Mr. Matthews did not voice any objection to the legal fees charged until September 2017 when he disclosed to the law firm that the amounts billed to date had raised concerns with his business partners, although, at the same time, Mr. Matthews did promise to pay the outstanding accounts.
- [83] Although the case summary provided an estimate for legal fees through October 2017, Mr. Matthews asked for a more detailed fee estimate to take the case through to trial, addressing certain milestones along the way. Mr. Matthews understood that the estimate was not fixed and that the fees would depend on the work required. The law firm provided the fee estimate on September 21, 2017.
- [84] In an email to Mr. Matthews on September 21, 2017, Mr. Poulus said, "the budget is in line with cost expectations at the outset" and a pretty strong argument for finding an exit ramp.
- [85] The budget item that Mr. Matthews paid most attention to was the one million dollar figure for going to trial. The budget did focus Mr. Matthews' attention on the exit ramp and likely sparked the settlement discussions between Mr. Szocs and Mr. McCredie's representative.

The Application to Strike the Appointment to Examine Mr. Kusumoto for Discovery

- [86] On June 23, 2017, the plaintiff served an appointment to examine Mr. Kusumoto for discovery. Mr. Matthews was adamant that Mr. Kusumoto not be dragged into the lawsuit because Mr. Kusumoto was elderly, he had a peripheral involvement in the lawsuit, and he had never met Mr. McCredie. Mr. Matthews did not want Mr. Kusumoto to go through what he himself had gone through during his own discovery. Mr. Poulus confirmed Mr. Matthews' instructions to "move heaven and earth" to set the appointment to examine for discovery aside, but advised Mr. Matthews that the chances of success were less than 50/50. The application was heard in October 2017 and was successful.

- [87] The result had a benefit over and above preventing the examination for discovery of Mr. Kusumoto. Mr. Poulus felt that the chambers judge's reasons cast doubt on the merits of the options claim, making the timing ripe for settlement discussions.
- [88] The legal fees attributed to the Kusumoto application were around \$77,000. Mr. McEwan's opinion is that, taken alone, the legal fees for the Kusumoto application are too high. However, Mr. McEwan's opinion is that viewed globally, the overall legal fees are reasonable.
- [89] I agree with Mr. Clark that these fees are very high for a chambers application on an interlocutory issue. The question is whether the high legal fees were justified in all of the circumstances, especially in that the application was of the utmost importance to Mr. Matthews.
- [90] Mr. Clark's view is that the law firm ought to have refused to produce Mr. Kusumoto for examination for discovery and forced the plaintiff to seek a court order permitting the discovery. I cannot conclude that such a strategy would have been cheaper since the parties would have been in chambers on a contested application, doing the same amount of work, regardless of who the applicant was. Counsel for the clients submitted that there was a strong chance that Mr. McCredie would not have bothered to apply to examine Mr. Kusumoto. I cannot reach that conclusion as it is wholly speculative. Mr. Poulus's evidence is that he did not think there was legal justification for Mr. Kusumoto to refuse to attend the discovery. In my view, Mr. Poulus's decision to apply to set aside the appointment was not incorrect. The registrar should not disallow legal fees just because another lawyer may have chosen a different strategy.
- [91] The budget provided by the law firm put the fees for the Kusumoto application at a high of \$17,500. Mr. Clark's opinion is that estimates give rise to reasonable expectations and should only be deviated from minimally absent unforeseen circumstances. I agree with that proposition. However, I must first determine what the fee estimate actually was and how much greater than the estimate the legal fees were. The law firm and the clients disagree on how I should approach this question. The law firm says that since the budget was a "looking forward" budget, it did not include legal fees already charged. There would be no point in giving the clients a budget for legal fees already incurred because the clients could readily see what fees they had incurred by looking at the invoices they had received. The law firm says the clients were already charged fees for the preparation of the Kusumoto application to the tune of about \$36,000. The budget of \$17,500 was for the remaining work bringing the overall budget to \$53,500, making the overall legal fees over budget by about \$23,500. I agree with the law firm's approach because Mr. Matthews knew about the previously incurred legal fees having received the accounts, and was focussed only on the going-forward budget.
- [92] As to whether there were unforeseen circumstances that justify the law firm exceeding the estimate, the law firm explains the discrepancy between the budget and the actual legal fees by the plaintiff bringing the merits into the application which greatly expanded the scope of the responding affidavits and legal argument. I agree that this circumstance was unforeseen.

The law firm further relies on the fact that the application was bumped once for lack of a judge, which added time. An application being bumped for lack of a judge is relatively commonplace and therefore not unforeseen.

- [93] To the point that estimates give rise to reasonable expectations, the question now becomes, did Mr. Matthews rely on the budget for the Kusumoto application? When Mr. Matthews got the budget, he paid attention to the million dollar estimate to take the case through a conventional trial. He did not pay attention to the budget for the Kusumoto application. Therefore, it cannot be said that he relied on the estimate. Ideally, the law firm should have informed Mr. Matthews that the budget for the Kusumoto application was being exceeded, but Mr. Matthews was closely involved with the preparation for the application and was able to observe the amount of work required to counter the arguments and affidavits produced by the plaintiff. An updated fee estimate would not have caused Mr. Matthews to instruct the law firm to drop the application or do less work than the law firm deemed necessary.
- [94] The fact remains, however, that the legal fees for the Kusumoto application are very high and will be taken into account when I determine a fair fee.

Settlement Negotiations

- [95] In an email dated August 26, 2017 to Mr. Poulus and Mr. Buysen, Mr. Matthews says, "while maddening to the core, settling is the most sensible path forward". Again, there is no mention of what dollar figure Mr. Matthews had in mind that he would be willing to pay.
- [96] The fee estimate motivated Mr. Matthews and his business partners to seek "an exit ramp". On October 11, 2017, Mr. Poulus and Mr. Buysen met with Mr. Crerar to discuss settlement although without any instructions to make a specific offer. According to Mr. Poulus, Mr. Crerar all but conceded that the contract claim would be unsuccessful, but there was no concession on the quantum meruit or fraud claims. No settlement offers were exchanged at the meeting.
- [97] Mr. Matthews was optimistic that after the success of the Kusumoto application (reasons were given by the chambers judge on October 16, 2017), the case was ripe for settlement. Mr. Poulus recommended making a formal offer of \$50,000 including costs. Mr. Matthews and Mr. Kusumoto discussed between themselves settlement instruction parameters. They established a range of \$25,000 to \$50,000. Despite the option set out in the case summary of offering to return the deposit, Mr. Matthews and Mr. Kusumoto declined that option, deeming appropriate a much lower offer.
- [98] On instructions from Mr. Matthews, the law firm made a formal offer to settle for \$25,000 on October 20, 2017. Mr. Poulus did not explain why he recommended \$50,000 and he was not cross-examined on this point. The \$25,000 opening offer Mr. Matthews instructed was too low in Mr. Poulus's opinion and would not be enough to get negotiations going. The offer was not well-received and no counter offer was made.

The Settlement

- [99] The case was settled over the heads of both Mr. Matthews and Mr. McCredie in late October 2017. The factor of "result obtained" can only be applied to the discrete tasks the law firm undertook and not to the final result since the law firm did not have anything directly to do with the final result. I cannot draw any conclusions about the legal fees in relation to the settlement amount. It is tempting on a fee review to rewrite history. Mr. Matthews testified that if he had been told at the outset that a trial would cost seven figures and Mr. McCredie would settle for \$150,000, he would have instructed the law firm to "settle the matter". Mr. Matthews, however, did not say he would have instructed the law firm to pay \$150,000, or any other amount. If Mr. Matthews had wanted to offer \$150,000 in order to staunch the flow of legal fees, he could have done so at any time. But, of course, there was no guarantee that Mr. McCredie would have accepted \$150,000 any earlier than he did.
- [100] Mr. Matthews knew before the litigation commenced that Mr. McCredie only wanted his deposit back, but Mr. Matthews adamantly refused to return it. Before the settlement negotiations were taken out of Mr. Matthews' hands, the law firm recommended a settlement offer of up to \$50,000 but Mr. Matthews only authorized an opening offer of \$25,000 with a maximum of \$40,000. This negotiating stance indicates that Mr. Matthews was not prepared to offer anywhere close to \$150,000 despite being well aware of the legal fees he had already incurred. Mr. Clark agreed that the low offer was a mark of aggressiveness. Further, Mr. Matthews made this low offer in the face of the case summary in which the law firm advises of the risk that the clients might lose on the deposit claim at trial.
- [101] Mr. Matthews was very upset about the settlement. He called Mr. Buysen to say he was too upset to talk. He was not happy that Mr. McCredie was getting any money and that the fraud claim would not be formally withdrawn. He was concerned he would be seen as paying money to settle a fraud claim. Mr. Buysen persuaded Mr. Matthews that the settlement was a good outcome. It was apparent to me from Mr. Matthews' demeanour and tone of voice when testifying that he is bitter about the settlement even to this day.
- [102] After the settlement was reached, Mr. Matthews did not complain about the legal fees or refuse to pay. In email exchanges with Mr. Poulus all the way through to November 21, 2017 or so, Mr. Matthews promises to pay. Finally, Mr. Poulus terminated the retainer on December 7, 2017 for non-payment of legal fees.

A Fair Fee

[103] The lawyers' fees were charged on an hourly rate basis with no adjustment up or down for the "fair fee" factors embodied in s. 71(4) of the LPA and the retainer agreement. I do not fault the law firm for rendering accounts on an hourly rate basis, especially since the accounts were all interim. As the registrar did in *Jiwan*, I must look at the ongoing results, not just the end result, as those ongoing results are part of the overall picture: *Jiwan* at para. 240.

[104] Mr. Clark's opinion is that the legal fees should be reduced by \$120,000. He says he did not arrive at that figure by way of a precise calculation. Mr. Clark captures neatly the "on the one hand, on the other hand" nature of the task before me at para. 44 of his opinion:

It is my opinion that the Kusumoto discovery fees exceed what is reasonable by \$50,000 and the fees for examinations for discovery exceed what is reasonable by \$50,000 to \$55,000. There is some duplication, some secretarial work billed for, and extremely high fees charged for document handling. On the other hand, the firm achieved success in virtually all that it did on behalf of the client, the matter was of great significance to the client, the claims, although weak, were substantial and sounded in fraud, and the firm deserves fair compensation.

[105] Although I have not found the legal fees for the examinations for discovery and document handling to be unreasonable, or that there was duplication, or that the paralegal's work was secretarial in nature, I do agree that a fee reduction is justified. First, the legal fees for the Kusumoto application were very high. Second, the law firm should have informed the clients in writing that the plaintiff had given a "broad hint" that it would accept \$150,000 to settle the claim and confirmed in writing the clients' refusal to settle on those terms. Third, the law firm should have provided a formal fee estimate at the beginning of the retainer and updated it as the case progressed even without being asked to do so by the clients. "Seven figures" to play the hand out is insufficient information for a lawyer to give a client.

[106] Mr. Poulus thought Mr. Matthews had a tendency to only see things his way; he had trouble seeing other points of view. Commercial litigators are not psychotherapists, but every lawyer is required to try to manage the client's expectations and to appeal to the client's rational mind if the client's emotions are running high. Putting in writing the cost of litigating versus the cost of settling would have driven the point home to Mr. Matthews that his desire to penalize Mr. McCredie was costly. A written record of advice given and instructions received helps educate the client and protects the law firm.

[107] In all of the circumstances, I consider a reduction of \$22,500 from the overall fees plus taxes to be appropriate.

Costs AND INTEREST

[108] As the reduction has been less than one-sixth of the total amount billed, pursuant to s. 72(1) (b) of the LPA, the clients are responsible for the law firm's costs.

[109] However, the law firm has asked that costs be spoken to due to "special circumstances": s. 72(2). Also, the calculation of interest is to be determined. The court's operations are currently reduced due to the COVID-19 health emergency. Costs and interest are not urgent or essential and, therefore, do not justify an oral hearing. If the parties are unable to agree on costs or interest, they may make written submissions in electronic format only. The law firm must file its submissions and deliver them to counsel for the clients within 14 days from the release of these reasons. The clients have 14 days after receipt of the law firm's submissions to file and deliver their submissions. The law firm will have seven days after receipt of the clients' submissions to file a reply. I will make my ruling based on the written submissions.

"Master Harper"

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