

CANADA / JUDGMENT

Shagoras Enterprises Ltd. v. Lindsay Kenney, LL.P

2008 BCSC 950

COURT

Supreme Court of British Columbia

DECIDED

18 July 2008

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2008 BCSC 950 Shagoras Enterprises Ltd. v. Lindsay Kenney LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shagoras Enterprises Ltd. v.

Lindsay Kenney, LL.P,

2008 BCSC 950

Date: 20080718

Docket: 0526174

Registry: Prince George

Between:

Shagoras Enterprises Ltd.

doing business as Lotus Care

Client

And:

Lindsay Kenney, LLP

Law Firm

Before: District Registrar Bouck

Reasons for Decision

Counsel for the Client

L. A. J. Dunn

Counsel for the Law Firm

S. W. Urquhart

Date and Place of Hearing:

March 5, 6 and June 12, 2008

Prince George, B.C.

Introduction

- [1] This is a client-initiated review of the Law Firm's bills (the "Bills") pursuant to s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9. (the "Act"). Chief amongst the Client's complaints is that the Bills exceed the Law Firm's estimate of its charges.
- [2] The events precipitating the Law Firm's retainer occurred almost ten years ago. In the retainer, the Law Firm represented the Client in a claim against the Northern Interior Regional Health Board and others (the "NIRHB Action"). It was alleged that the defendants were responsible for the failure of a long-term care facility built by the Client. The NIRHB Action was resolved following a mediation held in early July, 2005. The solicitor-client relationship ended shortly after that settlement.
- [3] The appointment to review the Bills was taken out on December 13, 2005, but in the NIRHB Action. The appointment was then amended to name Lindsay Kenney, LLP as "defendant". After two pre-hearing conferences and changes of counsel by the Client, the matter came before me in March 2008. During the course of this hearing, I directed that the appointment be further amended to name Shagoras Enterprises Ltd. doing business as Lotus Care as the Client and Lindsay Kenney, LLP as the Law Firm.
- [4] The hearing of this review has been unusually delayed, commencing 27 months after the appointment was taken out. I make note of this fact not as a criticism to either party but rather to make the perhaps obvious point that witnesses' memories of events have necessarily faded over time. In reaching my conclusions, therefore, I have chosen to rely on the documentary evidence to resolve discrepancies over the timing of certain events or conversations. For example, the Law Firm states in its evidence that the mediation occurred in May 2005, but its Bills show that event to have occurred in early July of that year.
- [5] In addition to the various documents presented, oral evidence was given by Mr. Roy Stewart, Q.C., Dr. G. Bhanwath and Mr. Dan Marcotte.
- [6] The review occupied 3 days.

The Bills

[7] The Appointment appends a series of bills issued to the Client between February 2003 and July 2005. Roy Stewart, Q.C., is the signatory to the Bills.

[8] The particulars of those bills are as follows:

Date

Fees Billed

Disbursements

Billed

G.S.T. Billed

P.S.T. Billed

Total Amount Billed

Feb. 27, 2003

4,783.00

11.93

335.65

358.73

5,489.31

Apr. 29, 2003

885.50

62.14

66.33

66.41

1,080.38

May 30, 2003

2,841.00

133.68

208.23

213.34

3,396.25

June 27, 2003

1,098.00

488.11

111.08

82.35

1,779.49

July 31, 2003

1,869.50

148.83

141.28

140.21

2,299.82

Aug. 29, 2003

2,127.00

129.04

157.92

159.53

2,573.49

Sept. 30, 2003

2,258.50

68.79

162.91

169.39

2,659.59

Oct. 31, 2003

1,756.50

36.96

125.54

131.74

2,050.74

Nov. 26, 2003

659.00

129.16

55.17

49.43

892.76

Jan. 5, 2004

339.00

30.26

25.85

25.43

420.54

Jan. 30, 2004

1,627.50

160.07

125.13

122.06

2,034.76

Feb. 27, 2004

302.50

102.05

28.32

22.69

455.56

Mar. 30, 2004

5,956.50

778.51

471.45

446.74

7,653.20

Apr. 30, 2004

706.50

79.55

55.02

53.55

894.62

May 31, 2004

833.00

22.60

59.89

62.48

977.97

June 28, 2004

381.50

325.42

34.92

28.61

770.45

July 29, 2004

1,067.00

242.14

87.30

80.03

1,476.47

Aug. 30, 2004

1,804.00

65.29

130.85

135.30

2,135.44

Sept. 30, 2004

1,365.50

451.11

127.16

107.46

2,051.23

Jan. 5, 2005

360.00

401.75

53.32

43.40

858.47

Jan. 31, 2005

1,636.00

53.13

118.24

114.52

1,921.89

Mar. 31, 2005

21,821.50

991.09

1,595.90

1,528.56

25,937.05

Apr. 29, 2005

21,430.50

2,441.62

1,666.22

1,502.76

27,041.11

May 31, 2005

4,058.00

2,714.51

474.08

284.06

7,530.65

June 29, 2005

3,527.50

393.43

259.63

246.93

4,427.49

July 27, 2005

3,340.50

331.34

242.47

233.84

4,148.15

TOTALS

\$88,835.00

\$10,792.51

\$6,919.86

\$6,409.55

\$112,956.88

[9] In addition, the Client says that he paid bills issued on September 20 and November 25, 2005. Indeed, the Law Firm's ledger shows that the Client has been billed the total amount of \$114,411.42, and that sum has been paid in full. For the purposes of this review, I find that the Client has paid the Law Firm the sum of \$114,411.42, and that the last two bills should be subject to this review.

The Issues

[10] The Client seeks to have the Bills reduced for various reasons, including that:

1. The Law Firm breached its contract with the Client by making demands for additional monies late in the retainer resulting in the Client settling the NIRHB Action when it ought not to have;
2. The Law Firm is bound by its estimate of charges given at the commencement of the retainer and, further, the work performed did not include many of the steps contemplated by the estimate, including a trial. Thus, the charges must be proportionately reduced;
3. The Law Firm did not follow a cohesive game plan or strategy in the prosecution of the NIRHB Action and the Client was misled as to the viability of its claim;
4. The Law Firm did not understand the experts' reports prepared on the Client's behalf and relied on this erroneous understanding in recommending settlement of the NIRHB Action;
5. The Bills charge for duplicative or unnecessary work performed by lawyers and a legal assistant at the Law Firm. Furthermore, the Law Firm is not entitled to be paid for work by its legal assistant that was secretarial in nature; and
6. The disbursements are not supported by the evidence presented at this review.

[11] The Client submits that it is entitled to return of all monies paid under the retainer as a result of the Law Firm's breach of contract. In the alternative, the Client submits that there should be a substantial reduction in the Bills.

Pre-Retainer Events

[12] Dr. Gokul Bhanwath is a physician and the principal of Shagoras Enterprises Ltd. ("Shagoras"). He is a long time Prince George resident, having operated a medical clinic in the city for over twenty years.

- [13] In or about 1998, Dr. Bhanwath began investigating the possible expansion of his business operations with the opening of a long-term care facility. The proposal was spawned by a shortage of "beds" for such care in the Prince George area.
- [14] The facility would be located in a vacant building in Prince George owned by Dr. Bhanwath and would have 21 beds for patients. Of those beds, 15 would be publicly-funded, with 6 available for private use. In order to be profitable, the facility required funding from the local health authority.
- [15] Dr. Bhanwath believed that he had been given assurances of such funding during discussions with representatives of the Northern Interior Regional Health Board (the "Board").
- [16] Under the auspices of Shagoras, Dr. Bhanwath embarked on the renovation of the building. The renovation was funded in part by a loan from the Business Development Bank of Canada ("BDC"). The cost of the renovation was approximately \$1,000,000. Dr. Bhanwath named the facility Lotus Care.
- [17] A manager was hired for Lotus Care. That manager undertook some public consultations. As a result of those consultations, it was determined that the privately funded beds would be difficult to fill.
- [18] The public funding was not forthcoming. Depending on who is to be believed, the Board either never gave any assurance of funding or simply told Dr. Bhanwath that it was unable to provide funding until it had issued a Request for Proposals (an "RFP") for such a facility to the community at large. The Board proceeded with the RFP process and Shagoras tendered a bid. That bid was rejected by the Board.
- [19] Shagoras was unable to meet its obligations with the BDC. Foreclosure proceedings with respect to the Lotus Care building were commenced sometime in 2002.
- [20] Throughout this period, Dr. Bhanwath discussed the project and its difficulties with a local solicitor, Mr. Dan Marcotte. Mr. Marcotte is a patient of Dr. Bhanwath's and describes the latter as his client. Dr. Bhanwath viewed the relationship perhaps more casually, referring to Mr. Marcotte as his friend and advisor. Regardless, Mr. Marcotte had an active role in both the promotion of Lotus Care and the attempts to secure funding through the Board.
- [21] After Shagoras' bid was rejected, Dr. Bhanwath asked Mr. Marcotte to negotiate with the Board. In conjunction with these negotiations, another lawyer in Mr. Marcotte's office drew and filed a writ and statement of claim naming as defendants the Board, David Richardson (then "CEO" of the Board), Tim Rowe (Director of Community and Senior Services) and two unknown persons (John Does) who were members of the RFP evaluation team. Although the pleadings in the NIRHB Action were not before me, I understood from Mr. Stewart's evidence that there was a claim made for both general and punitive damages.

- [22] According to Mr. Marcotte, the writ was issued primarily as a bargaining tool and intended to put pressure on the Board to reconsider its rejection of Shagoras' bid.
- [23] The statement of claim alleges two main causes of actions:
- i) first, an allegation of negligent misrepresentation by the Board and various of its members in giving the Client assurances of funding (the "misrepresentation claim"); and
 - ii) second, breach of contract by the Board in rejecting the Client's bid (the "tender claim")
- [24] Mr. Marcotte does very little litigation work. When negotiations with the Board failed, another Prince George lawyer, Mr. Richard Foulston carried on with the NIRHB Action. Mr. Foulston's work included obtaining document disclosure and conducting an examination for discovery of the defendant Rowe. That examination did not address the misrepresentation claim.
- [25] In an attempt to expedite the lawsuit, Shagoras made an application for judgment pursuant to Rule 18 with damages to be assessed. In addition, or in the alternative, Shagoras sought production of documents from the Board. The Board brought a cross-application for security for its costs.
- [26] These applications were heard by Master Baker over four days in April and May, 2002. Master Baker dismissed the Rule 18 application and adjourned generally the application for production of documents. He did order Shagoras to post the sum of \$27,000 as security for costs: *Shagoras Enterprises Ltd. v. Northern Interior Regional Health Board et al*, 2002 BCSC 967.
- [27] Dr. Bhanwath was disappointed with this result and decided to seek other counsel. According to Dr. Bhanwath, the Client had incurred about \$68,000 in legal fees by this time.

The Retainer

- [28] Dr. Bhanwath next approached Mr. Dick Byl, a senior lawyer in Prince George. Mr. Byl reviewed the documents in Dr. Bhanwath's possession and recommended that the Client retain the services of Mr. Stewart, who was then practising with the Law Firm in Vancouver.
- [29] Mr. Stewart had practiced in Prince George for some twenty years. He joined Lindsay Kenney as an associate counsel in 2001.
- [30] Mr. Stewart's litigation practice focussed on contractual disputes including those involving publicly regulated bodies. By the time of the Client's retainer, Mr. Stewart had been involved in a number of complex trials with multiple defendants and voluminous documents. Over the years, Mr. Stewart developed what he describes as "systems" to deal with such actions.

- [31] Dr. Bhanwath knew of Mr. Stewart and regarded him as an experienced commercial law litigator. Dr. Bhanwath has no misgivings about retaining Vancouver counsel. He contacted Mr. Stewart in early 2003 and made arrangements to meet while in Vancouver for a medical convention.
- [32] Dr. Bhanwath and Mr. Stewart met at the latter's office on January 10, 2003. Dr. Bhanwath's request that the Law Firm take the matter on a contingency fee basis was rejected.
- [33] A retainer letter was prepared following this initial meeting. The letter sets out the scope of the retainer as follows:

Scope of Retainer

You have authorized us to do the following:

1. to provide you with our opinion regarding your action, including the viability of the action and an estimate of the costs of proceedings, and
2. subject to your additional instructions to pursue the action, you authorize us to perform such legal services and to undertake such investigations, preparation and legal process as we think necessary to provide you with effective representation. You further authorize us to engage such agents, consultants and experts as we may think necessary.

At this time you have not retained us to represent you generally or in connection with any matter other than that specified above.

We will notify you promptly of all significant developments and obtain your instructions in advance with respect to any significant decisions attendant upon those developments.

- [34] Under the terms of the retainer letter, Mr. Stewart's fee was to be based "principally" on an hourly rate of \$300, with associate lawyers billed out at \$190/hour and paralegals at \$90/hour. As it turned out, Mr. Stewart's services were billed out by the Law Firm's accounting department at \$275 per hour. The Law Firm says that this error resulted in an overall "savings" to the Client of some \$5,800.
- [35] The letter also requires the Client to reimburse the Law Firm for all out-of-pocket expenses incurred on the Client's behalf. The letter does not contain an estimate of either fees or any other charges.
- [36] Dr. Bhanwath agreed and accepted the terms of the retainer by signing the letter both on Shagoras' behalf and as a personal guarantor. A retainer of \$1,000 was provided to the Law Firm in February 2003.
- [37] There was very little discussion between Dr. Bhanwath and Mr. Stewart regarding the terms of the retainer letter. Dr. Bhanwath perceived the letter as a standard form issued by the Law Firm to its clients.

- [38] The first meeting between Mr. Stewart and Dr. Bhanwath was brief. Mr. Stewart was asked to provide an opinion on the viability of the lawsuit. In addition to the oral instructions of Dr. Bhanwath, Mr. Stewart reviewed the writ and statement of claim. He subsequently spoke with Mr. Marcotte who provided some additional information and documentation. He reviewed the transcript of the Mr. Rowe's examination for discovery.
- [39] In order to provide a comprehensive opinion, Mr. Stewart needed to see Mr. Foulston's file. Mr. Foulston was not willing to release the file until his account was paid in full, and Dr. Bhanwath refused to pay that account. In a letter to the Client dated February 7, 2003, Mr. Stewart advised that he had spoken with Mr. Marcotte about a "taxation" of Mr. Foulston's account and that this matter was left with Mr. Marcotte's office to pursue.
- [40] Mr. Stewart proceeded with the opinion based on the material received to that date. The opinion letter dated February 24, 2003 (the "Opinion Letter") is lengthy and detailed. It discusses both the viability of the various causes of action and the cost of the litigation. With respect to costs, the letter provides:

ASSESSMENT OF COSTS

This matter will involve a trial which may be of 10 to 15 days duration. Such a trial will be preceded by applications in court to deal with further discovery of documents, discovery of witnesses, a Rule 18A, and other more minor matters. Examination for discovery is incomplete, and will require significant effort to refine and complete the discovery process.

The costs of doing all this work will be in the order of \$100,000.00.

You have expended a great deal of money to date. You may be able to recover some of it, based on taxation.

What is missing from the information we have reviewed is a comprehensive clear statement of what your losses are or will be because of the alleged breach of contract or tort claims involving the Health Board.

A starting point for you is to weigh in the balance the costs of proceeding against what could be recovered. In order to assist you in this analysis, we need to review the losses. Please provide us with a comprehensive list of losses and backup information as to the quantification of such losses.

A second point for you to analyse is what it would cost if you lose the lawsuit. After a 10-15 day trial and all of the preliminary matters, you are likely to face a bill of about \$50,000.00 on top of whatever you have expended.

We recommend that you decide how you wish to deal with this matter only after we discuss with you and are able clearly to define the losses which you can claim in this suit.

This is our preliminary evaluation. Please feel free to contact the writer to deal with the matters raised in this letter.

- [41] Neither this letter nor any subsequent correspondence address whether "costs" meant all charges or only legal fees. Dr. Bhanwath understood the letter to mean that the entire piece of litigation, including the trial, would cost \$100,000.
- [42] Mr. Stewart says that the \$100,000 figure was intended to be a "statement" of the legal fees only. He is sure that this fact was relayed to Dr. Bhanwath in a telephone conversation following delivery of the Opinion Letter. Dr. Bhanwath denies such a conversation.
- [43] Dr. Bhanwath instructed the Law Firm to proceed with the lawsuit and carry out the necessary investigations to support the claims.
- [44] An associate lawyer, Jeff Smith, and Mr. Stewart's paralegal, Ellen Sandberg, were assigned to the file. Mr. Stewart has not billed for his time spent instructing either of these individuals. Mr. Smith was given the task of locating documents and interviewing witnesses with a view to corroborating the allegations found in the statement of claim.
- [45] In March 2003, Mr. Stewart met with Dr. Bhanwath and Mr. Marcotte while in Prince George on another matter. Mr. Stewart recalls that the tender claim was discussed briefly but the meeting was more of a social occasion. Mr. Marcotte recalls a discussion of both claims, with Mr. Stewart offering the opinion that the misrepresentation claim was weak but the tender claim strong.
- [46] In May of that year, Mr. Smith carried out some interviews in Prince George while in that city with respect to another file. The Client has not been billed for Mr. Smith's air travel but is billed for Mr. Smith's taxi rides to the Vancouver airport.
- [47] Dr. Bhanwath was not given any details of the results of these interviews. He says that he was not advised that the results presented difficulties with the misrepresentation claim. If he had known that these interviews were not helpful, he may have chosen to "re-think" pursuit of misrepresentation claims.
- [48] In June 2003, the Law Firm, on behalf of the Client, obtained an order allowing for the release of Mr. Foulston's file.
- [49] In the meantime, foreclosure proceedings commenced by BDC were continuing. In 2002, Dr. Bhanwath had offered to purchase the building for over \$5 million and placed an \$80,000 deposit with the BDC for that purpose.
- [50] Mr. Marcotte was initially consulted by Dr. Bhanwath regarding those proceedings. In or about late May 2003, Dr. Bhanwath instructed Mr. Stewart to contact BDC's solicitors and negotiate a payment schedule. Some of Mr. Stewart's time relating to his dealings with this matter is found in the Bills. Although a separate file was eventually opened at the Law Firm with respect to the foreclosure, Mr. Stewart says that the billing in this file is appropriate. The foreclosure was a result of Lotus Care's lack of funding and thus tied to the lawsuit against the Board.

- [51] The file material received from Mr. Foulston was voluminous. Ms. Sandberg was given the task of organizing the documents according to Mr. Stewart's preferred system. The Client has been billed for Ms. Sandberg's time conducting this reorganization, including the time spent unpacking the file boxes.
- [52] By October 2003, the Law Firm was continuing to review the documents obtained from Mr. Foulston and considering what further investigations would be necessary. In late October 2003, Mr. Stewart travelled to Prince George to interview a witness with whom Mr. Smith had already spoken.
- [53] In a letter dated October 31, 2003, the Law Firm reports to the Client on its efforts to "finalize [its] opinion". Those efforts included the above noted interview as well as following up on requests for documents through the Freedom of Information and Protection of Privacy Act and from the BDC. These BDC documents were being pursued on the premise that the bank may have an independent record of the alleged representations made by the Board. Mr. Stewart surmised that the bank would not have proceeded with the loan absent some due diligence in ensuring that the funding representations had occurred.
- [54] The Law Firm also confirms in that letter that without corroboration, the misrepresentation claim is unlikely to succeed. Only with the success of this claim could the Client hope to recover some or all of its investment in building Lotus Care.
- [55] Furthermore, the Client needed to decide whether it was economically viable to proceed with the tender claim. The Law Firm notes that there would be "limited recovery" under that part of the Client's claim. It does not say what that limited recovery might be.
- [56] By this time, the Client had received seven bills from the Law Firm. None of the bills were questioned by the Client.
- [57] Dr. Bhanwath acknowledges receiving the interim bills. He assumed that the Law Firm was simply carrying out the necessary investigations to support the Client's claims. He saw no need to ask about costs, nor seek a "final" opinion on the viability of the claims.
- [58] The Law Firm's actions in the latter part of 2003 and early 2004 were directed towards obtaining additional documentary evidence. None of the documents obtained assisted in the corroboration of the alleged representations.
- [59] In January 2004, Mr. Smith left the Law Firm and Mr. Stewart assumed full conduct of the file.
- [60] In March 2004, Mr. Stewart prepared for and attended the examination for discovery of David Richardson. In that examination, Mr. Richardson denied that there had ever been any representations made by the Board with respect to funding Lotus Care.

- [61] In the absence of admissions or documents corroborating Dr. Bhanwath's allegations, the misrepresentation claim appeared weak. Other witnesses suggested by Dr. Bhanwath did not prove helpful to the claim. Mr. Stewart verbally advised Dr. Bhanwath of the challenges faced in proving the misrepresentation claim.
- [62] In light of these challenges, Dr. Bhanwath instructed the Law Firm to complete the examinations of the defendants and then reassess the strength of this aspect of Shagoras' claim.
- [63] The Client had still not provided details of its losses to support the claim for damages. According to Mr. Stewart, repeated requests to Dr. Bhanwath for such information went unanswered. By this time, the Law Firm was aware of at least the loss associated with the foreclosure on the Lotus Care building.
- [64] In the spring of 2004, the Law Firm contacted the Prince George registry to obtain possible trial dates. Investigations of the claim continued.
- [65] In the summer of 2004, Mr. Stewart contacted Robert McKay, a well-known chartered accountant, to calculate the Client's losses. Dr. Bhanwath was advised of the retainer, and indeed paid for Mr. McKay's services directly. Mr. McKay was to deliver his report by the end of 2004.
- [66] Mr. Stewart was still unclear of the Client's expectation of recovery should the lawsuit succeed.
- [67] After October 31, 2003, no other letters were issued by the Law Firm specifically addressing the viability of the Client's claim. Mr. Stewart maintains that the viability (including pitfalls) of the claim was discussed with Dr. Bhanwath over the phone or at one or two in-person meetings. It may have been suggested during one of those conversations that the misrepresentation claim be dropped. This would shorten the trial length.
- [68] The Law Firm carried on with its trial preparation, including attending a case management conference in September 2004. The defendants were by this time seeking additional security for their costs. That information was relayed to Dr. Bhanwath.
- [69] In October 2004, Mr. McKay advised Mr. Stewart that he was not comfortable offering a comprehensive opinion on the economic loss suffered by the Client. While he was prepared to address some aspects of that alleged economic loss, Mr. McKay recommended that the Client retain Thibault & Co. Appraisals Inc. to prepare a retrospective appraisal estimating the market value of the Lotus Care facility had it been fully funded and operating as originally conceived.
- [70] Dr. Bhanwath agreed to retain this second expert.

- [71] Still not certain of the Client's actual losses, the Law Firm set the matter for a 30-day trial to commence in June 2005. Dr. Bhanwath was made aware that the trial would now take up 30 days, or double the original estimate given in 2003. Despite the additional trial days, Dr. Bhanwath did not believe that the fee estimate of \$100,000 had changed, nor did the Law Firm advise him of any cost increase.
- [72] Few steps were taken by the Law Firm between October to December 2004, and Mr. Stewart was engaged in another trial.
- [73] In January 2005, yet another case management conference was held and Mr. Stewart began preparations for trial.
- [74] On January 31, 2005, the Law Firm wrote the Client enclosing a Trial Budget representing an estimate of the disbursements related to the trial. Those disbursements amounted to \$34,690. The Client was told that it was the Law Firm's practice to have the full amount paid into its trust account prior to trial. There is no mention made of fees.
- [75] By this time, Dr. Bhanwath had been billed approximately \$43,000 in fees, disbursements and taxes.
- [76] In March 2005, the Law Firm undertook the most intensive work on the file.
- [77] A formal instructing letter was issued to Mr. McKay on March 1, 2005. It was not explained why the instructing letter was issued more than six months after the Law Firm initially contacted this expert. However, the Law Firm was engaged in ongoing discussions with Mr. McKay since the summer of 2004. Reports from both Mr. McKay and Ms. Thibeault arrived at the Law Firm in mid-March 2005.
- [78] From Mr. Stewart's perspective, the McKay report was not encouraging. It appeared that Lotus Care was never going to be profitable even with the public funding.
- [79] Mr. Stewart says that he discussed these concerns with Dr. Bhanwath whose response was that the BDC must be blamed for this poor business decision. Dr. Bhanwath denies that such a discussion took place.
- [80] Around the same time, the Law Firm sought and obtained documents from the BDC. The BDC documents disclosed that the loan arrangements were made by the Client before any of the alleged representations were made by Board members. As well, the facility was proposed in the loan application as a private, not publicly-funded, clinic. This caused Mr. Stewart some concern as it appeared to contradict the Client's assertion that funding was obtained in reliance of the public funding promises.

- [81] Nonetheless, Mr. Stewart continued to prepare for trial, including "nailing down" the evidence. Letters or subpoenas were delivered to various witnesses and arrangements made to meet with these individuals in Prince George the following month. A witness then resident in New Brunswick was seen to have some promising evidence to support the Client's claim. Arrangements were made to obtain the evidence by videoconferencing. The witness subsequently recanted his evidence.
- [82] According to the Bills issued, there were only two or perhaps three conversations with Dr. Bhanwath during the month of March. Those discussions, as described in the Bills, pertained to the payment of the experts' fees.
- [83] Two letters issued to the Client sought details of Dr. Bhanwath's evidence. The purpose of the letters was to assist Mr. Stewart in preparing for the examination of discovery of another Board representative.
- [84] In a letter dated March 9, 2005, Mr. Stewart posed a series of questions to Dr. Bhanwath. Those questions are as follows:
1. When did you meet with representatives of the NIRHB in 1998 (please state the day and month for each meeting)?
 2. Where did such meeting(s) take place?
 3. Who was present at such meeting(s)?
 4. How much time did such meeting(s) consume?
 5. What role did Bonnie Shill play in such meeting(s)?
 6. Who spoke in such meeting(s) on behalf of the NIRHB?
 7. Was Fergus Foley present at such meeting(s)?
 8. If so, why was he there?
 9. If so, what did he say?
 10. To whom did he address his remarks, if any?
 11. Was there any discussion resulting from those remarks?
 12. If so, what was the discussion; who was involved in it?
 13. Was Harry Backlin present at such meeting(s)?
 14. If so, why was he there?
 15. If so, what did he say?
 16. To whom did he address his remarks, if any?
 17. Was there any discussion resulting from those remarks?

18. If so, what was the discussion; who was involved in it?
 19. Was Elio Azara present at such meeting(s)?
 20. If so, why was he there?
 21. If so, what did he say?
 22. To whom did he address his remarks, if any?
 23. Was there any discussion resulting from those remarks?
 24. If so, what was the discussion; who was involved in it?
 25. Was Paul Ramsay present at such meeting(s)?
 26. If so, why was he there?
 27. If so, what did he say?
 28. To whom did he address his remarks, if any?
 29. Was there any discussion resulting from those remarks?
 30. If so, what was the discussion; who was involved in it?
 31. Was David Richardson present at such meeting(s)?
 32. If so, why was he there?
 33. If so, what did he say?
 34. To whom did he address his remarks, if any?
 35. Was there any discussion resulting from those remarks?
 36. If so, what was the discussion; who was involved in it?
 37. Was Tim Rowe present at such meeting(s)?
 38. If so, why was he there?
 39. If so, what did he say?
 40. To whom did he address his remarks, if any?
 41. Was there any discussion resulting from those remarks?
 42. Was anyone else not named in prior questions at such meeting(s)?
 43. If so, provide details in accordance with the foregoing questions about each participant you name here.
- [85] Dr. Bhanwath responded to this letter but not to Mr. Stewart's satisfaction. A second letter dated March 21 seeks clarification on various points.

[86] In neither of the letters does the Law Firm raise a concern regarding the experts' reports or the proposed claim for damages. Nor does the Law Firm caution the Client about proceeding to trial.

[87] In the related foreclosure matter, Mr. Stewart met with BDC's lawyer on March 30, 2005. Mr. Stewart sought to delay any further collection proceedings until the NIRHB Action went to trial. It was apparent by this time that if the Client succeeded in its claim, much of the award would flow back to the BDC.

[88] Following this meeting, Mr. Stewart wrote to Dr. Bhanwath as follows:

We indicated that we had no instructions other than to explore the necessity of BDC making an accommodation with you such that it would be worthwhile for you to continue to pursue this claim. We pointed out to him that BDC has indicated that approximately \$1 million is owed on account, and that the estimated total value of the claim is \$1.5 million. Considering the risks you are taking, and the costs you will incur, it would not make economic sense for you to pursue the matter, in light of the value of the claim and the amount BDC will seek to recover from the Plaintiff.

[89] In early April, Mr. Stewart travelled to Prince George and met again with those individuals earlier interviewed by Jeff Smith. Dr. Bhanwath says that he questioned Mr. Stewart about the necessity (and associated costs) of these supplemental interviews. Mr. Stewart responded to the question in an angry manner and queried whether he should "drop the case". Mr. Stewart does not recall the conversation but denies that he ever spoke to Dr. Bhanwath in anger.

[90] On April 11, Mr. McKay delivered a supplemental report, incorporating in part the findings of Thibeault & Co.

[91] This second McKay report opines that the total economic loss to the Client was over \$2 million. That opinion was conveyed to Dr. Bhanwath.

[92] On April 12 and 14, Mr. Stewart prepared for and conducted an examination for discovery of one of the Board representatives.

[93] Dr. Bhanwath attended at the examination. He recalls Mr. Stewart inquiring about payment of the Law Firm's bills and being told that the March account would reflect about \$21,000 in fees. Dr. Bhanwath says that in answer to his concerns about those fees, Mr. Stewart gave assurances that there would be recovery for the Client, going so far as stating that the Client would "win" the tender claim. Mr. Stewart does not recall the specifics of this conversation, but acknowledges that he always felt positive about the evidence supporting the tender claim.

[94] Following the examination of the Board representative, Mr. Stewart advised Dr. Bhanwath that he was still unable to find corroboration of the Client's allegations. The misrepresentation claim should not be pursued and the trial time would be reduced by half.

- [95] It was at this point that, according to Mr. Stewart, Dr. Bhanwath changed his evidence, insisting that the funding assurances had been given in a "private" meeting with Mr. Richardson, not at a Board meeting as previously alleged.
- [96] Mr. Stewart was both surprised and disillusioned by this change in the evidence. He now had serious doubts about Dr. Bhanwath's credibility should the matter proceed to trial. In addition, Mr. Stewart became aware (it is not clear when) of another case in which Dr. Bhanwath had been involved. The court in that case found Dr. Bhanwath to be a less than credible witness. Mr. Stewart was reluctant to proceed to trial relying on Dr. Bhanwath's evidence alone.
- [97] Dr. Bhanwath says that his evidence never changed. No one at the Law Firm had ever asked him about a second meeting. Besides the questions posed in the March 9 letter, no one at the Law Firm had ever interviewed him or requested a statement from him. The Law Firm does not refute this statement.
- [98] On April 21, 2005, Mr. Stewart presented Dr. Bhanwath with a trial and fee budget. The fee budget showed that the Client had incurred almost \$94,280 in fees, taxes and disbursements to that point, including \$18,000 in unbilled fees.
- [99] The budget estimated that trial-related disbursements alone to be \$33,840.
- [100] The total estimated fees, disbursements and taxes after April 21, 2005, through to the completion of trial was estimated at \$139,020.00. That estimate is based on a 30-day trial.
- [101] It was now Dr. Bhanwath's turn to be disillusioned. The budget was more than double the initial estimate given by the Law Firm for the entire piece of litigation including completion of a 10 to 15-day trial. Dr. Bhanwath says that he had no notice or expectation of the magnitude of these additional costs. As well, Mr. Stewart had led him to believe that the Client would easily succeed on the tender claim with "significant recovery" based on the "good report" from the experts.
- [102] The Law Firm carried on with trial preparations.
- [103] The defendants continued to threaten an application for increased security for costs. They also wished to complete Dr. Bhanwath's examination for discovery. The Law Firm's examinations of the Board representatives were yet to be concluded. Defence counsel proposed that the trial be adjourned in order to complete the examinations.
- [104] It is not clear when and by whom mediation was suggested. According to Mr. Stewart, the proposal came from the defendants. The Bills indicate that the Law Firm was preparing for mediation in March and April, parallel to its trial preparations. A Notice to Mediate was drafted by the Law Firm on March 22nd.

- [105] In any event, from Mr. Stewart's perspective, it was time to attempt to settle the claim. Mr. Stewart agrees that he continually expressed confidence in the tender claim, but denies giving any assurances on a monetary recovery.
- [106] By this time, Dr. Bhanwath had some definite financial problems. His practice was in receivership and the BDC was pressing to recoup in excess of \$1 million. The \$80,000 payment made by Dr. Bhanwath towards the proposed purchase of the Lotus Care building had been forfeited. The building had, in fact, been sold to a third party. As well, the Client had now fallen behind in the payment of the Law Firm's Bills.
- [107] Dr. Bhanwath felt he had little choice but to attend mediation and attempt to settle the claim.
- [108] On May 30, the trial was adjourned to dates in 2006. The mediation was scheduled for July 5th.
- [109] Dr. Bhanwath and Mr. Marcotte (who was still acting in an advisory capacity) met with Mr. Stewart prior to the mediation. According to both Dr. Bhanwath and Mr. Marcotte, there was very little discussion about the case in general. The meeting lasted about 20 or 30 minutes. Dr. Bhanwath told Mr. Stewart that he needed a recovery of \$800,000 to \$900,000 to "break even". Neither Mr. Marcotte nor Dr. Bhanwath recall any discussion about frailties in the damages aspect of the claim. Nor did Mr. Stewart make any recommendations on an appropriate settlement figure.
- [110] According to Mr. Stewart, there were specific discussions about the frailties of the Client's claim, including the difficulty in proving an actual loss based on the defendants' actions or inactions. During this meeting, Mr. Stewart again proposed dropping the misrepresentation claim and thus shortening the trial length.
- [111] The Client's starting demand at the mediation was \$1.5 million. The defendants' final offer was \$125,000. Dr. Bhanwath was not willing to accept this final offer, but Mr. Stewart persuaded defence counsel to leave the offer open post-mediation.
- [112] According to Mr. Stewart, the defendants' position was premised in large part on the frailties in the damages claim. The assumptions in the experts' reports were strongly critiqued.
- [113] According to both Dr. Bhanwath and Mr. Marcotte, this point of difficulty was first raised by Mr. Stewart in discussions held after the mediation. Specifically, Mr. Stewart advised that more work needed to be done to address the likelihood of private patients in the facility.
- [114] Dr. Bhanwath was not happy with the defendants' final offer and was willing to take his chances at trial. However, efforts to obtain financing for the trial were unsuccessful. The Law Firm was not willing to proceed to trial without additional funds.

[115] About three weeks after the mediation, Dr. Bhanwath agreed to accept the defendants' final offer.

[116] The settlement funds went entirely towards the mediator's fees (nearly \$16,000) and outstanding legal fees (including those of Mr. Foulston).

DISCUSSION

[117] Section 71 of the Act governs this review. It provides as follows:

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.
- [118] The onus is on the Law Firm to demonstrate that its charges are proper and fitting in all of the circumstances. However, the first issue to be determined is whether the Law Firm breached its contract with the Client.
- [119] The Client submits that the Law Firm is not entitled to any remuneration because of its actions in allegedly pressuring the Client to settle the claim. It relies on the decision of *Aydin & Co. v. Schaber*, [1999] B.C.J. No. 863 (QL) (SC) for the proposition that all monies paid in the retainer should be returned to the Client. I reject this submission.
- [120] First, I find that Dr. Bhanwath had a choice not to agree to the settlement and was fully aware of the weaknesses in the Client's claim when the \$125,000 was accepted. Second, I find that the majority of the steps taken by the Law Firm were authorized by the Client or reasonably necessary for the conduct of the proceeding: see *Norton Stewart and Scarlett v. Mercier Estate* (1989), 40 B.C.L.R. (2d) 148 (C.A.). This is not a case as in *Aydin & Co. v. Schaber* where the solicitor was seen to have taken advantage of an unsophisticated or unstable client.
- [121] If there is no breach of contract, the Client says that the overriding factor to be considered in this review is the Law Firm's estimate of its charges given in the Opinion Letter. That consideration falls within either s. 71(4)(f) or "all of the circumstances" of the retainer.
- [122] As already noted, the Client submits that while the \$100,000 represents a ceiling on the Law Firm's charges, not all of the work contemplated for in the estimate was performed. As well, other factors such as the poor result support a substantial reduction in the Bills.
- [123] In British Columbia, a solicitor's estimate of charges is contractual in nature and the solicitor may well be bound by that estimate. However, the estimate is not a guarantee and can be subject to variation depending on how the retainer unfolds. For example, the client may request extra work that was not contemplated for in the estimate.
- [124] In the seminal authority on the question of estimates *Price v. Roberts and Muir*, [1988] 1 W.W.R. 689 (B.C.C.A.) affirming [1987] 1 W.W.R. 374 (S.C.). McLachlin J.A. (as she then was) says this:

8 The issue before us is simply stated. Did the contract set a limit beyond which the fees could not go? The appellant says it did not, emphasizing the proviso in the letter of 26th January 1984 that the estimate did not constitute a guarantee. The Client says it does. She concedes that the limit, being in the nature of an estimate and stated to be approximate, permitted of some variation. The amount of variation represented by the bill as taxed, however, exceeds this limit, in her submission.

9 I have concluded that the Client's position represents the correct construction of the contract. Clearly the estimate was not a guarantee. However, the effect of that is not to denude the estimate of all contractual effect, as contended by the Law Firm. Rather, the effect is to confirm that it was a true estimate, subject to minor variations.

10 The argument that the words excluding a guarantee negate the effect of the estimate cannot succeed. At law, an estimate is not a guarantee or warranty: see *Saxby v. Fowler* (1977), 3 Alta. L.R. (2d) 47, 2 C.C.L.T. 195 at 202, 3 A.R. 607 (C.A.); *Hodgins v. Hydro Elec. Comm. of Nepean*, [1976] 2 S.C.R. 501, 60 D.L.R. (3d) 1 at 4, 6 N.R. 451. Viewed thus, the words excluding a guarantee are mere surplusage, and neither add nor detract from the force of the estimate.

11 I conclude that it is a term of the contract between the parties that the Law Firm's charges after January 1984, calculated on the specified hourly basis, would be subject to the approximate limit, \$28,000. The chambers judge, aware that some variation was permissible and that the fee properly should reflect the success achieved, awarded \$33,000. In my opinion that approach was correct. The registrar's approach, which proceeded on the basis that the denial in the contract that the estimate was a guarantee meant it could not be relied on at all, was in error.

12 In my opinion, there is no contradiction between the contractual term that the Law Firm's charges would be calculated on the basis of the specified hourly rates and the imposition of an approximate limit on those charges. If, however, an ambiguity did exist, I agree with the chambers judge that it would fall to be resolved against the Law Firm on the basis of the contra proferentem rule.

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. Such factors, however, do not figure in the case at bar. This was a case of the Law Firm significantly underestimating the work entailed in taking the Client's case to trial.

[125] Of perhaps more specific application to this case are the words of Southin J. in the chambers decision appealed from:

What one cannot imply into a contract such as this, for no sensible client would ever agree to it, is a term that if the lawyer discovers he has seriously underestimated the amount of work required, he is not bound by the figures which he has given. That kind of implied term would put the client in an impossible position.

There is another way of looking at the matter. The solicitor has a duty of reasonable care and skill. Surely it is part of the reasonable care and skill of a solicitor to estimate accurately the fees which any particular piece of work will entail.

The burden should lie upon the solicitor to show how the "deficiency", i.e. the error in the estimate arose and that the solicitor was not at fault. I do not think a solicitor can discharge the burden simply by saying, "I underestimated the work involved". Perhaps, he may discharge it by

showing that the client gave him misinformation or, if the retainer is to act for a plaintiff, that the defendant or his solicitor was recalcitrant to an extent that could not reasonably be foreseen or something of the sort. But the solicitor is the expert and he is supposed to get things reasonable right.

(my emphasis)

Roberts and Muir v. Price, (1986) 7 B.C.L.R. (2d) 211 at pp. 219-20.

[126] More recently, it has been said that an estimate "is not something that is written in sand which can be washed away by the shifting tides of litigation": *Mura v Archer Daniels Midland Company*, 2003 BCSC 1164.

[127] The Client bears the onus of proving that the Law Firm gave a "true estimate" as defined in *Price v. Roberts and Muir*.

[128] The Law Firm concedes that the figure of \$100,000 is an estimate but "preliminary" and for its fees only.

[129] The Law Firm further asserts that it should not be bound by that preliminary estimate as:

- Dr. Bhanwath knew the estimate was based on a 10 to 15 day trial and the matter was, with the Client's knowledge and consent, set for 30 days;
- The Trial Budget issued in January 31, 2005, and the defendants' earlier request for additional security must have alerted Dr. Bhanwath to the increase in legal costs;
- Despite the size of interim billings, Dr. Bhanwath raised no issue with respect to the Law Firm's fees and simply told the Law Firm to carry on with its work. Thus, by his own actions, Dr. Bhanwath acknowledges that the preliminary estimate is not binding;
- Dr. Bhanwath is a sophisticated consumer of legal services and must have known that the original estimate was preliminary in nature;
- Dr. Bhanwath's conduct in "telling a story that was not true" increased the work to be done by the Law Firm in that it was required to pursue unexpected avenues to corroborate the Client's version of events.

[130] On that final point, the Law Firm fails to acknowledge that the \$100,000 estimate anticipated extensive investigations including "significant effort to refine and complete the discovery process". Furthermore, the issue of damages had yet to be addressed at all when the Opinion Letter was issued.

[131] It cannot be said that the work performed was outside the ambit of that described in Opinion Letter. The contents of the letter show that the Law Firm was aware of the challenges, weaknesses and "unknowns" in the Client's case when the estimate was provided. As in the *Price* case, the Law Firm simply underestimated the work to be performed.

- [132] I have also concluded that on the plain reading of the Opinion Letter, the \$100,000 in "costs" is not restricted to fees alone. There is no distinction made in the letter between fees and disbursements--or taxes, for that matter. Objectively, the reader would have no basis for concluding that the reference is for fees alone. This may have been what Mr. Stewart had in mind when he wrote the letter, but the Client is entitled to rely on the letter's plain language. Furthermore, the letter speaks of the Client facing a "bill of about \$50,000" should it lose the lawsuit. Again, there is no distinction between fees and disbursements in regard to that particular bill. In any event, if there is any ambiguity about the meaning of "costs" in the letter, the contra preferentem rule favours the Client: *Price v. Roberts and Muir* at p. 3.
- [133] The Law Firm may not resile from the estimate simply because it describes the estimate as "preliminary" in the Opinion Letter. If it was intended as preliminary, then the Client is entitled to a clear and unequivocal statement of a new estimate and the reasons for this change in the parties' contractual relations.
- [134] At no time did the Law Firm advise the Client in writing that it was revising or revisiting the original cost estimate. The delivery of the Trial Budget may have alerted the Client to the cost of proceeding to trial. However, it is not reasonable to suggest that the Trial Budget effectively negated the estimate. The Law Firm's charges to that date amounted to \$43,864. This sum, together with the Trial Budget, amounts to \$78,554. This sum is still below the \$100,000 cost estimate. While the Law Firm says that a sophisticated Client like Dr. Bhanwath must have known that the additional pre-trial and trial work would surpass the estimate, it is equally plausible that Dr. Bhanwath relied on the Law Firm to abide by its estimate, even if that meant reducing its fees.
- [135] I also find that the delivery of the April 21st budget letter does not constitute a modification of the estimate. There is no reference to the original estimate. The budget does not address any new or unforeseen circumstances. It fairly warns the Client of its intended charges should the matter proceed to a 30-day trial, but that does not mean it usurps the Law Firm's contractual obligations to the original estimate.
- [136] I am satisfied that there was ongoing contact between Dr. Bhanwath and Mr. Stewart regarding the progress of the lawsuit and some of its challenges. I am not satisfied, however, that Dr. Bhanwath was ever specifically told prior to April 21st that the costs of the trial would be anywhere near the budget presented on that date.
- [137] There is no question that Dr. Bhanwath was experienced in litigation and legal bills. Throughout the retainer, he had the benefit of Mr. Marcotte's advice and guidance. Nonetheless, that experience does not mean he should not or could not rely on the Law Firm's estimate. Even a sophisticated consumer of legal services is entitled to clear and unequivocal advice of changes in anticipated legal costs: *Scarlett Manson Angus v. Battrum*, 2001 BCSC 865.

- [138] I am not satisfied that any "change" in Dr. Bhanwath's evidence late in the retainer justifies abandonment of the estimate.
- [139] The Law Firm relied on the statement of claim and information from Dr. Bhanwath and Mr. Marcotte in formulating the Opinion Letter and the estimate. Information from Dr. Bhanwath came in answer to specific questions posed by the Law Firm. Throughout 2003 and 2004, the Law Firm pursued the extensive discovery process described in the Opinion Letter but at no time ever conducted an extensive "discovery" of Dr. Bhanwath. If it had, the letters of March 9 and 21, 2005, would not have been necessary.
- [140] The Law Firm neglected to obtain the particulars from the Client of this critical evidence until the eve of trial. This was not an unforeseen circumstance in the retainer.
- [141] Furthermore, the alleged "change" in Dr. Bhanwath's evidence did not require additional work on the part of the Law Firm. The Law Firm's discovery process focused on finding corroboration for any assurances of funding.
- [142] The Law Firm's approach and communication with the Client on the issue of damages was equivocal. It requested additional information from the Client but then went ahead and retained experts to address the issue. Mr. Stewart says that he was uncertain of the losses claimed by the Client but was aware of the Client's investment through dealings with the BDC. The BDC information was available to the Law Firm (and the experts) by the summer of 2004.
- [143] Until March 2005, there were no warnings to the Client of a poor (as opposed to uncertain) recovery. The October 31, 2003 letter warns the Client that its full investment could not be recouped if success was had on the tender claim alone. However, at no time was the Client told that the tender claim or, indeed, the lawsuit was doomed to fail.
- [144] Despite the fact that the lawsuit was premised on a substantial recovery of damages, the issue of damages was not fully addressed until two years into the retainer. The Law Firm blames the Client for the unrealistic expectations and false premises of the claim, but does not explain why an issue so fundamental to the success of the claim was not addressed before undertaking the extensive efforts to prove the alleged misrepresentations.
- [145] As I read the experts' reports, all of the facts necessary for their respective opinions were known by August 2004 at the latest (when the BDC received the net proceeds of sale of the Lotus Care building). If the opinions had been obtained earlier in the retainer, both the Law Firm and Dr. Bhanwath would have been alerted to the potential difficulties in the damages claim.
- [146] I conclude that the apparent frailties in the damages claim (based on the experts' reports) were not fully particularized or canvassed with the Client until after the mediation was concluded. Mr. Marcotte's evidence was of assistance in this regard. While he is a friend and advisor to Dr. Bhanwath, I did not detect any element of bias in his evidence. He was frank in admitting that he could not recall details of certain events and not all of his

evidence favoured the Client. He was certain, however, that any concern regarding the reports' assumptions was first broached following the mediation.

- [147] This might be seen as a case of not seeing the forest through the trees. The Law Firm was alert to the damages issue from day one, yet proceeded to set the matter for trial, attend at case management conferences, pursue extensive document disclosure and conduct examinations for discovery without certainty on this essential element.. The Law Firm began preparations for trial without knowing whether this essential element to the claim could be proven.
- [148] The Law Firm's conduct in carrying on with the various investigations (and at a significant cost) could easily have left the Client with the impression that the question of damages was going to be resolved by the experts and to the Client's benefit.
- [149] The Client's expectations needed to be managed and it was the Law Firm's responsibility to do that managing: *Winstanley v. Oldaker and Monk*, 2006 BCSC 1246.
- [150] In summary, I find that the Law Firm is bound by the estimate given in the Opinion Letter.
- [151] Does then the \$100,000 represent a ceiling on the fees and charges to be allowed the Law Firm?
- [152] In *Price v. Roberts and Muir*, the court found that an estimate could be subject to variation, subject to additional factors set out in the retainer letter and the fact that the estimate was described as "approximate". In that case, the chambers judge found that the excellent result obtained by the solicitors justified fees over and above the estimate. The court of appeal did not disturb that finding.
- [153] The Opinion Letter in this case does not use the word "approximate" or provide any other specific qualifications to the \$100,000 figure. The words "in the order of" might be considered synonymous to an approximation. If so, reference should be made to the retainer letter which provides for the Law Firm's fees to be billed based on time and certain hourly rates but that:
- .consideration will also be given to the novelty or complexity of the matter, the magnitude of the matter or the degree of skill required, the preclusion of other engagements, customary fees for similar services, and the results achieved.
- [154] Those factors mirror some of the criteria listed in s. 71(4) of the Act.
- [155] The legal issues involved in the claim were not particularly complex, particularly given Mr. Stewart's experience. The discovery of documents was more complex than what might be encountered in a typical commercial case. It involved various sources besides the defendants, some of whom were not entirely cooperative. As already stated, the Law Firm knew that the discovery process would be significant when it provided the \$100,000 estimate.

- [156] The dealings with BDC perhaps added to the complexity of the matter, but those dealings were the subject matter of a separate file and charges.
- [157] As for the magnitude (by definition, "size and importance") of the matter, the Client's expected recovery was between \$800,000 and \$2 million. The success of the claim was extremely important to the Client. The Law Firm may not have had full particulars of losses when the estimate was given, but it knew that the Client's claim involved the loss of a significant business enterprise.
- [158] As for skill, the Law Firm demonstrated its ability to carry this litigation, but there is no evidence of any extraordinary skill brought to bear on the retainer.
- [159] There is no evidence that the Law Firm was required to turn away other work because of this file.
- [160] The Law Firm did not address the effect of "customary fees for similar services".
- [161] With respect to the result, the Law Firm argues that it was a very good one in all the circumstances. It argues that the Client risked getting nothing if it proceeded to trial. The misrepresentation claim was bound to fail (if it proceeded at all). The tender claim may have succeeded on the facts, but the claim for damages was weak if not non-existent.
- [162] The Client says that the Law Firm is mistaken in its analysis of the damages claim. The experts' reports could easily have supported an award in excess of \$125,000.
- [163] While I agree that there could be different interpretations of the experts' reports, the Client's interpretation is not foolproof. I am not prepared to find that the Client would have definitely succeeded in recouping his investment should the claim have proceeded to trial. On the other hand, I am not persuaded that the Client's claim was bound to fail.
- [164] The Client characterizes the result from its perspective as "disastrous". That description goes too far. A truly disastrous result would have the Client being encouraged to proceed to trial, failing in its claim and having to pay both its own legal fees and the defendants' costs.
- [165] The result was better than the worst case scenario but not one that would favour a variation of the estimate. It is a neutral factor.
- [166] Upon consideration of these additional factors, I find that the \$100,000 estimate is the proper ceiling for all of the Law Firm's charges.
- [167] The Law Firm's total charges to the Client exceed the estimate by approximately \$14,000. However, that does not mean that the Law Firm's Bills should simply be reduced by that amount and all charges allowed at \$100,000.
- [168] The Law Firm still needs to justify its Bills based on a consideration of the s. 71(4) factors. Some of those factors have already been discussed above.

[169] Mr. Stewart's character and standing was not attacked. I accept that he is a knowledgeable and skilled commercial litigator.

[170] The hourly rates charged by the Law Firm are reasonable. While the rate charged for Mr. Stewart's fees is below that agreed upon by the Client, the Law Firm must bear the consequences of its erroneous billing practice.

[171] Other considerations which impact on the amount to be allowed within the estimate are as follows:

- The Law Firm did not perform all of the work contemplated for in the \$100,000 estimate. Specifically, it did not pursue a summary trial, complete all examinations for discovery or proceed to trial. The estimate included the projected cost of a 10 to 15-day trial at a minimum cost of \$20,000 to \$30,000 (based on Mr. Stewart's proposed \$2,000 per day trial fee). Arguably, the cost of the mediation (including preparation) is an appropriate substitute for this cost.
- The interviewing of witnesses was duplicated. The results of Mr. Smith's interviews were not disclosed in detail. However, the witnesses apparently did not support Dr. Bhanwath's version of events. While it is important to prepare your own witnesses in advance of trial, a second interview seems unnecessary and redundant in this case. Mr. Stewart did not say that he was dissatisfied with Mr. Smith's work.
- The Law Firm has charged for work of the legal assistant that is indeed secretarial in nature, such as the unpacking of boxes. These charges are, however, fairly nominal.
- The Law Firm is not entitled to fees for any work related to the payment of its fees, including preparation of the retainer letter: *In re Webb* [1893] 1 Ch. 73 @ p. 87 (C.A.)

[172] Taking into consideration the estimate and other circumstances described, I find that the Law Firm is entitled to fees of \$75,000.

[173] The \$100,000 costs estimate includes the disbursements charged by the Law Firm. Those disbursements amount to \$11, 634.79 (exclusive of taxes but including charges from the September and November, 2005 bills). With the exception of the Quicklaw charges (\$330.84) some BC Online charges (\$98.00), I find that the disbursements were necessarily and properly incurred and the amounts claimed reasonable. The Law Firm was not able to justify the Quicklaw charges on the bases described in various decisions including *Denmar Equipment Rentals Ltd. v. 342699 B.C. Ltd.*, 2004 BCSC 1169. Nor were the BC Online charges justified as either necessary or proper for the lawsuit. In the result, the disbursements are allowed at \$11, 209.54.

[174] The Law Firm is also entitled to charge and receive the applicable taxes on its fees and the taxable disbursements. The PST rate changed during the retainer (from 7.5 % to 7% after January 1, 2005). The GST remained constant at 7%.

[175] The tax related to the disbursements is \$745.84 (7% on \$10,654.94).

[176] The calculation of taxes on fees does not lend itself to as simple a calculation as charges have been disallowed at various points in the retainer. I have considered the reasons for disallowance and when those fees were charged. In the result, I calculate the taxes owing on the fees at \$10,500.

[177] In summary, the Law Firms Bills are allowed at:

Fees:

\$75,000.00

GST/PST on fees:

\$10,500.00

Disbursements:

\$11,209.54

GST on taxable disbursements:

\$745.84

TOTAL:

\$97,455.38

Costs

[178] The Bills have been reduced by less than 1/6th ($\$114,411.42 \times .84 = \$96,105.60$). Accordingly, the Law Firm should receive its costs for this review at Scale B: s. 72 of the Act.

[179] The Client may wish to make submissions that another order of costs should be made: s. 72(2) of the Act. Those submissions shall be in writing and delivered to the Law Firm and the Trial Coordinator's office in Victoria no later than 30 days from the issuance of these reasons. The Law Firm's reply can be delivered within 14 days of receipt of those submissions. The Client should notify the Prince George Trial Coordinators office if it does not intend to make any submissions.

Summary

[180] The Law Firm's charges are allowed at \$97,455.38, inclusive of fees, disbursements and taxes.

[181] Unless the parties agree otherwise or there is a finding of special circumstances, the Law Firm is entitled to its costs of this review at Scale B.

[182] The Law Firm is to refund monies paid by the Client in excess of the charges allowed. The Client is also entitled to interest on those monies from the date of payment to the date of issuance of these reasons: s. 73 (4) of the Act. For the purposes of calculating that interest, the date of payment is July 27, 2005.

[183] If necessary, and once the issue of costs is resolved, either party may forward a Certificate of Fees for my endorsement (Form 68A). The interest calculation should be appended to that Certificate.

"C. Bouck"

D/Registrar C.P. Bouck

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