

CANADA / JUDGMENT

Wood v. Ho

2001 BCSC 705

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Epstein Wood v. Ho et al Date:

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2001 BCSC 705 Docket:

L001021

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EPSTEIN WOOD
SOLICITORS

AND:

JOHN HO AND QUON CHOW
CLIENTS

REASONS FOR DECISION

OF

MASTER BARBER

(AS REGISTRAR)

Counsel for the Solicitors: J. Lew

Appearing on his own behalf: John Ho

Appearing on his own behalf: Quon Chow

Dates and Place of Hearing: March 26, 27, 28,
29 and 30, 2001

Vancouver, BC

- [1] This is a review of the solicitor's bills to the clients pursuant to an appointment taken out by the solicitor.
- [2] The clients first contacted the solicitor on March 20, 1997 because of a notice placed by the Tsung Tsin Association (hereinafter called "the Society") in the Ming Pao newspaper on March 9, 1997 which notice, as alleged in the statement of claim, read in translation from the original Chinese:

NOTICE OF DISCHARGING MEMBERS FROM THE SOCIETY

- (1) The members of this Society, John Ho (HO, Ho-Wei) and Q Chow (CHOW Chun) were discharged from this society on March 2 at an emergency meeting of this Society.
- (2) Regarding their and related people's various illegal activities which have caused great damage to the reputation of this Society, now in accordance with the Law, a legal action against them is in process.

This was issued by CHIU, Kuo-Hun

Guest Chairman of Vancouver Tsun Tsin Association

March 7, 1997

- [3] The clients explained to the solicitor that they felt that they had been harmed by the notice and that they wished to clear their names. They told her that they had contributed a great deal to the Society over time, that there was a power struggle within the Society and that they did not understand why the notice had been placed in the newspaper.
- [4] On April 7, 1997 the solicitor entered into a retainer agreement on a 50% contingency basis which provided:

...authorize you to act for me generally with respect to any claim I have arising out of the publication of defamatory materials advertised in the Ming Pao on March 9, 1997. Without limiting the generality of your instructions, you are more particularly authorized to represent me with the defamation action I have against Ming Pao and/or its agents, employees and servants, and against John Cheng Yau, also known as K.W. Yau, and the Tsung Tsin Association, and its directors. I also authorize you to do anything else you think necessary for the protection of our interests and to act as our solicitors in such manner as you consider expedient and proper.

Mr. Ho signed that agreement, Mr. Chow did not. (See Exhibit "3")

- [5] On April 24, 1997 the solicitor issued a writ and statement of claim wherein both clients were named as plaintiffs and Ming Pao Newspapers (Western Canada) Limited, Tsung Tsin Association, and K. Woo Yau, also known as John Cheng Yau, and Kuo-Hun Chiu were named as defendants. The claims were, inter alia, that the statements and actions of Tsun Tsin Association as reported in the Ming Pao newspaper were defamatory in that they were false and malicious and that the plaintiffs had been gravely injured. On June 2, 1997 the

defendants, other than Ming Pao newspaper, filed their statement of defence, alleging, inter alia, that the March notice by the Society in the Ming Pao newspaper was true. Particulars of the alleged illegal acts of the plaintiffs were set out in the statement of defence. Those illegal acts were, in brief:

1. that the plaintiff Ho wrote to the Registrar of Companies about a misappropriation of funds in December of 1996;
2. that the plaintiffs put notices in the Sing Tao Daily Newspaper on February 21, 1997 and February 28, 1997 which they were not authorized to place and which were incorrect;
3. that Mr. Chow changed the locks of the office of the Association without authorization; and,
4. that Mr. Ho caused the Society's bank accounts at Canada Trust to be frozen.

The Society counter-claimed against the plaintiffs that the notices by the plaintiffs in the February 21 and 28 issues, of the Sing Tao Daily were defamatory and that the allegations therein were false and malicious. The Society claimed damages.

- [6] On June 18, 1997 Ming Pao filed their statement of defence claiming truth and qualified privilege. On May 19, 1998 the Society filed an amended statement of defence and counterclaim adding a further allegation of illegal activity on the part of the plaintiffs. The Society claimed that it had been defamed as a result of allegations in the plaintiffs' letter to the Registrar of Companies of November 25, 1996.
- [7] The case went to trial before Mr. Justice Thackray on October 18, 1999 ending on December 17, 1999 after 20 days of trial. Reasons were filed on January 5, 2000 - see Exhibit "12". The client's claim was dismissed and the counterclaim allowed with damages assessed at \$1,000. In addition, the clients were ordered to pay costs.
- [8] In paragraph 1 of his reasons, Mr. Justice Thackray said:
- [1] The plaintiffs say that the defendant Association was being run by a group of "rogues". The defendants (other than the Ming Pao Newspaper) say they were doing nothing more than defending themselves against two "neurotics". Those submissions set the tone for this lawsuit in which the plaintiffs claim that they were defamed by a notice that appeared in the Ming Pao newspaper on March 9, 1997. The defendant Association counter-claims that it was defamed by a letter written to the Registrar of Companies by the plaintiffs, by statements made to Canada Trust and by notices published in the Sing Tao Daily Newspaper.
- [9] Much of the case dealt with the issue of illegal activities, i.e., how they should be defined, and whether or not they had occurred.
- [10] One of the issues was whether or not elections held by the Association were illegal. The plaintiffs had determined that the election held by the Society was illegal on the basis of what was said by the Registrar in the letter of December 10, 1996. The defendants pled that the letter to the Registrar of Companies of November 25, 1996 was an "illegal act" by the

plaintiffs. At trial, Mr. Ho testified that he had not been involved in any illegal matters. He said that illegal meant very serious matters. He apparently further said that if he had been guilty of any illegal activities he would have been arrested. However, commenting on his cross-examination Mr. Justice Thackray said:

- [28] In cross-examination it was pointed out to him that the notice alleges "illegal conduct" by the Association and that as a result the election is invalid. Mr. Ho said that illegal in that sentence means "to have done something wrong, out of order, not according to rule, not according to procedure." He said that voting by mail was not according to the rules and "similar to illegal".
- [11] Mr. Chow also felt he had done nothing illegal but his definition of illegal as commented upon by his lordship was that "illegal" means "doing things that are wrong".
- [12] Ultimately, the definition of illegal was found to be one closer to Mr. Chow's than what Mr. Ho first testified to in chief. Mr. Justice Thackray commented at length in his reasons, but paragraphs 101 and 102 are instructive:
- [101] The majority of the witnesses, including the interpreter Mr. Lee who was called as a witness by the plaintiffs, testified that in Chinese the words "illegal" and "unlawful" are used interchangeably.
- [102] I am satisfied that in the Chinese speaking community a charge of breach of by-laws is considered to be an illegal or unlawful act. It may leave open an inference of criminal activity but the evidence established to my satisfaction that the word "illegal" is commonly used in the Chinese speaking community to describe non-criminal activities.

Therefore, he found the substance of the notice in the Ming Pao newspaper to be true.

- [13] With respect to the counterclaim, Mr. Justice Thackray said at paragraphs 108, 131, 132 and 133:
- [108] The plaintiffs submit that the contents of the letter to the Registrar are true. However, Mr. Ho's basis for this came down to little more than his philosophy that "everything must be true because there were so many complaints from members." For the most part these members were unidentified and often their alleged complaints came to Mr. Ho third hand from other unidentified sources. Mr. Chow similarly relied upon alleged complaints to defend the truth of the contents of the letter to the Registrar.

. . . .

- [131] Many of the statements in the letter to the Registrar and in the Notices published by the plaintiffs have been shown to be untrue and not capable of being thought to be true. Mr. Peter Chong's explanations of some of the events outlined by the plaintiffs in their letter to the Registrar came across as reliable.

- [132] I am unable to hold that the Sing Tao notices were published on an occasion of qualified privilege. The chronology of events must be kept in mind. The Sing Tao notices were published in February 1997. This was before the Ming Pao notice. The Association had not gone "public" at that time. For the plaintiffs to publish in a newspaper read well beyond Association members was excessive. (See *Whittaker v. Huntington* (1980), 15 C.C.L.T. 19 (S.C.B.C.).
- [133] The letter to the Registrar probably qualifies for the defence of qualified privilege but in both the letter and the Sing Tao notices the excesses were such that the limits of the duty were exceeded. Furthermore, the plaintiffs could not have held an honest belief in the truth of their assertions. They must have been motivated by malice. Because of both the excesses and the malice any privilege that attached was lost.
- [14] As a result, his lordship found for the defendant Society and assessed damages at \$1,000 with costs to follow the event. A disastrous result for the clients.
- [15] Costs were ultimately assessed and awarded at \$71,545.44 for the Society with allowance for double costs from the date of the offer; and, \$37,298.60 for Ming Pao newspaper.
- [16] The solicitor's bills to the clients were \$84,173.79, plus hearing fees of \$3,100, with the result that the clients were responsible in total for \$71,545.44, plus \$37,298.60, plus \$87,273.79, plus \$1,000, totalling \$197,117.83.
- [17] In the first instance the solicitor agreed to commence the action against the Ming Pao newspaper and the Society on a contingency basis at 50%. She later voluntarily reduced that to 45%. When the statement of defence was delivered along with the counterclaim the solicitor said she discussed the matter with her clients and informed them that she could not continue on a contingency basis with respect to the counterclaim. She told them that if they wished her to continue that she would pursue the claim on the contingency as agreed but would defend the counterclaim on a fee for service basis. She thought they understood and accepted this. It turned out they did not. Part of the reason I am sure was due to the language difficulty. The review before me took five days and it was clear that Mr. Ho had a reasonable facility with English but was not completely fluent in it. I accepted that even though he could read some of the English words in a letter I asked him to read, I was not completely sure that he understood them all. Mr. Chow on the other hand did not speak English except to say "thank you", and had no ability so far as I could determine to read English.
- [18] The solicitor informed me she spoke a smattering of Chinese but was by no way fluent in the language and had virtually no ability to read Chinese. As a result, Mr. Chow required an interpreter in order to take part in the proceedings. The solicitor had required an interpreter at various times throughout her interactions with the clients and at trial. The clients did though have access to others who could assist them with the interpretation of any documents or any letters sent to them in the English language. They in turn had documents and letters drafted in English such as the letter of November 25, 1996 to the Registrar of

Companies. Nevertheless, it was clear that throughout the solicitor's involvement with the clients that they either did not understand or refused to understand everything that was put to them orally by the solicitor.

[19] This was abundantly clear to the solicitor when she issued an account on March 25, 1998 in the amount \$6,340.04 for fees, taxes and disbursements for work done on the counterclaim. The clients attended and said they thought that in fact she had agreed to work on a contingency basis and they disputed any liability to pay that account.

[20] The solicitor discussed the matter with them further and another retainer agreement was drawn dated June 11, 1998 (Exhibit "6"). The solicitor and both clients signed the agreement, the clients dating it June 15, 1998. The description of services in that agreement is:

1. Description of Services

You retain us to represent you in connection with the defence of the Counterclaim brought on by the Defendant, Tsung Tsin Association.

....

2. Lawyers

We expect that most of the work will be performed or supervised by myself (an associate in this firm) who will be occasionally assisted by Laureen D. Dubois, a legal assistant in this firm. I have already advised and you agree that co-counsel is necessary. I have advised and you agree to having Irvine Epstein, Q.C., act as co-counsel in this matter. At present, his hourly rate is \$250.

[21] As a result of the misunderstanding the solicitor wrote off the fees on the counterclaim to March 25, 1998. This though was not the only misunderstanding between the solicitor and the clients.

[22] I will list the solicitor's bills to the clients, after write-offs, first of all, with respect to the claim, and secondly, with respect to the counterclaim:

The Claim: (Bills for Disbursements and Tax)

March 9/98: \$ 642.45

November 9/99: 10,687.14

December 9/99: 8,189.08

January 17/00: 1,533.29

Total: \$21,051.96

(In addition Hearing Fees which were unbilled but deducted from Trust were claimed of \$3,120.)

Total claimed: re The Claim:

3,120.00

\$24,171.96

The Counterclaim: (Bills for Fees, Tax Disbursements and Tax)

March 25/98: \$ 151.96

January 5/99: 6,911.00

November 22/99: 30,509.26

January 17/00: 25,529.61

Total: \$63,101.83

Total of claim and counterclaim: \$87,273.79

The solicitor was paid a total of \$48,790, therefore, according to the solicitor, there is a balance due of \$38,483.79.

[23] Out of the total of \$87,273.79 the solicitor had billed the clients \$7,705.41 prior to trial. The solicitor had told the clients that she would send periodic accounts.

[24] The clients presented the following issues:

1. the bills in general are too high;
2. the solicitor promised that Mr. Epstein, Q.C., would be counsel at trial and did not arrange for that;
3. the solicitor said on more than one occasion that the clients would win and they did not, and in fact had to pay damages and costs;
4. the solicitor lied;
5. the solicitor did a lot of preparatory work that was not used at trial;
6. the solicitor was not prepared for trial;
7. the clients wished to settle and the solicitor would not let them;
8. the retainer agreement was not signed by Mr. Chow; and
9. the clients did not initial the change in the first retainer agreement from 50% to 45%.

In addition, the clients presented other issues throughout the hearing. I do not intend to comment on most of those other issues as they do not affect the outcome, and secondly, if they were to be considered, that consideration should be in a different context other than a review under the Legal Profession Act.

[25] Section 71(4) and (5) of the Legal Profession Act provides:

- (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- (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.

The complexity, difficulty or novelty of the issues involved

[26] In argument, the solicitor in support of her bills said, *inter alia*:

It is trite to say that with both the claim and counterclaim relating to defamation, special care and attention had to be given to drafting of the pleadings.

It is submitted that the tort of interference with economic relations is a relatively "new" tort and therefore is of some novelty.

It is submitted that the claim and counterclaim were factually and legally complicated by language. For instance, the ordinary meaning ultimately imputed to certain words written in Chinese and alleged to be defamatory turned on both a Chinese interpretation and their legal interpretation.

It is submitted that the claim and counterclaim was made more complex due to the number of allegations involved, the volume of evidence and the time over which it spanned.

[27] I agree entirely with the solicitor. This was not challenged by the clients and in fact was emphasized by them.

Skills, specialized knowledge and responsibility required of the lawyer

[28] In my view, the lawyer certainly required some specialized knowledge in handling the roles she took on as both solicitor and barrister in this case. She was called in 1996 and took on the case in March of 1997. The area of law, i.e., defamation is a difficult one due not only to the high emotions of the clients but also because of the intricacies in this area of the law. The matter was set for two weeks of trial but the solicitor estimated it would take longer and she was correct in that it did take 20 days of trial. At the time the matter went to trial, the solicitor had not junioried on any defamation trials but had appeared in Supreme Court on

one or two occasions on other trials of a maximum of three days duration. The solicitor informed me she did not feel this was a problem as she had appeared frequently in Provincial Court and said "The formula was the same for Provincial Court and Supreme Court."

The lawyer's character and standing in the profession

[29] There was no evidence given of any substance under this heading.

The amount involved

[30] The solicitor advised the clients that the damage award if they were successful would not be high. In the counterclaim the defendant Society asked for \$100,000 in damages. Once it was determined that the trial would take in excess of two weeks, which was relatively early on, the major exposure of the clients, besides the possibility of the counterclaim being successful, was to costs. Not only their own solicitor's account but the costs they might have to pay to the defendants if in fact their claim was not successful and the counterclaim was. The cost exposure then was a major one.

The time reasonably spent

[31] The clients complained that too much time was spent by the solicitor in pre-trial preparation with witnesses who were not used at trial. The solicitor countered by saying that she could only tell if any witnesses were going to be of assistance by interviewing them. She found many whom the clients identified to not have direct evidence but only hearsay evidence, and correctly pointed out that she could not use them. In addition, the clients point out that on some trial days the solicitor claims for more hours than what she spent at trial. With the exceptions of the time the solicitor voluntarily agreed to write off during trial days, there was only one other event that I would comment on. On one trial date she put in over 19 hours. That was December 13, 1999. On that day she recorded 1.7 hours preparing for the cross-examination of Mr. Chong, 6 hours at trial, and 11.5 hours preparing casebooks and doing research, coming to a total of 19.25 hours. This would leave her 4 3/4 hours during the 24-hour period for doing all the other necessities of life, including going to and from the courthouse. While I acknowledge that during a difficult trial one often spends evenings burning what is called "the midnight oil", some of these hours are not very productive. In addition the preparation of casebooks should have been done long before that. I also query why she was doing such extensive research at this time and not earlier.

[32] The solicitors research times are as follows:

The claim :

March 20, 1997: .5

April 8, 1997: .5

April 13, 1997: 1.5

April 14, 1997: .75

April 17, 1997: 1.0

June 5, 1997: .85

August 29, 1997: 1.0

November 3, 1997: .3

July 14, 1998: .2

September 2, 1999: .5

Total hours:

7.1

The counterclaim:

July 8, 1997: reproduction, .8

December 16, 1998: 4.0 including preparation for hearing

September 2, 1999: .25

December 13, 1999: 11.5 including time preparing preparation of case books

Total hours: 16.55 (of which a major portion was spent during trial)

The trial ended on December 17, 1999. The time the solicitor spent up to the day trial commenced was in my view reasonably spent. With respect to the time from the date of trial onward, the allowance for that time will be determined with respect to comments I will make later.

The rate of the solicitor

[33] The rate of the solicitor in the contingency agreement really is not in question. In my view, the fact that the solicitor reduced her fee from 50% to 45% unilaterally without one of the client's concurrences is of no import in itself. There was some evidence that the clients wished her to have the whole of the damages awarded for the claim. It was stated that they were not really interested in the damages only in vindication. However, that evidence was not clear. In my view, the high percentage of the contingency was more indicative of the risk involved. It was though, in the final analysis, impossible to assess why the percentage was set at either 50% or 45%. Therefore, I did not really take it into account in coming to the ultimate decision.

[34] The fee in Exhibit "6" that the lawyer set for herself was originally \$115 per hour going ultimately to \$125 per hour. That hourly rate was not out of line with the lawyer's experience. The retainer agreement of June 11th (Exhibit "6") provided, "I have already advised you and you agree that co-counsel is necessary. I have advised you and you agree to have Irvin Epstein, Q.C., act as co-counsel in this matter. At present his hourly rate is \$250." Mr. Epstein, had minimal time on this file, and although there was some minor dispute as to his time, I do not accept the clients' objections in that regard. Mr. Epstein did not give testimony and there was only the testimony of the solicitor who rendered the accounts as to his experience. She testified that he was a very experienced solicitor and barrister. I accept that testimony. With that in mind, his rate of \$250 per hour is in accord with what a senior solicitor and barrister would charge. I will have more to say later about the role the clients wished Mr. Epstein to play in this matter.

Importance of the matter to the client whose bill is being reviewed

[35] Both the solicitor and the clients testified that this matter was in the words of the solicitor "of extreme importance to both the clients as they had a lengthy involvement and showed a peculiar interest in the affairs of the Association." The solicitor elicited from the clients on cross-examination the following:

With respect to Mr. Ho that:

1. he felt that he could not continue in the door business because of the notice in the Ming Pao paper;
2. his family and friends saw him in a different light;
3. friends in Malaysia heard about this notice and that affected Mr. Ho; and
4. in general he felt his reputation had been severely damaged.

With respect to Mr. Chow that:

1. because of the Ming Pao notification if he wanted to carry on business no one would trust him;
2. his reputation was ruined;
3. his family and friends talked about it; and
4. he felt his grandchildren and children had lost face.

With respect to the last, Mr. Justice Thackray said in his reasons at paragraph 142:

Furthermore, as I have been telling the parties for the past year, this case is not about money. It is about "loss of face."

The result obtained

[36] In the result, the clients' claim was dismissed and they had to pay damages of \$1,000 and costs of \$71,545.44 to the Society, costs of \$37,298.60 to Ming Pao newspaper, and had bills from their solicitor totalling \$87,273.79. A disastrous result for the clients.

ANALYSIS

[37] When the clients came to see the solicitor in the first instance they showed her the notice in the Ming Pao newspaper; but did not tell her of:

- (a) the notices in the Sing Tao newspaper;
- (b) that they had changed the locks on the Association premises;
- (c) that they had arranged for freezing of the Association's accounts; and
- (d) the letter to the Registrar of November 1996.

This changed when the statement of defence and counterclaim was delivered. The solicitor then learned of these events, except for the November 1996 letter, in June of 1997. By the fall of 1997 she knew of the November 1996 letter to the Registrar. Even if this had seemed a relatively straightforward defamation case in the beginning, it was clear by July of 1997 that it was not simple and that the issues of fact and law were complex.

[38] It was also clear from a relatively early date, due to the difficulties with respect to the retainer agreement, that the clients did not fully understand all that the solicitor said. In these circumstances she should have written lengthy opinion letters to the clients which would include most, if not all, of the following:

- (a) the difference between the contingency and the fee for service arrangement;
- (b) the facts as she knew them;
- (c) what could be proved and on what basis;
- (d) what had to be proven with discussion of the legal principles and case law involved;
- (e) what she counted on the clients supplying by way of witnesses, facts, documents, etc.;
- (f) the relative merits of the clients' case as opposed to the defendants', along with any comments on credibility, and how findings in this regard could affect the outcome;
- (g) the prospects for success or failure; and lastly,
- (h) a detailed estimate of the costs both as to their own responsibility to their solicitor and what they might incur if their claim or counterclaim failed.

[39] The solicitor wrote one opinion letter pre-trial dated January 5, 1999. In it she wrote, inter alia:

At the conclusion of the application, Mr. Yun and I discussed the progress of this action. We each recognize that there are significant costs to be borne by each of the parties, including yourselves. The cost, i.e. my fees and disbursements, are minuscule to date. In fact, the costs which have been incurred to date are minimal compared to what will come as we approach the trial. At this time, you have each had enormous difficulty in paying my account. As you will recall, my account relates only to the defence of the counterclaim. As you can imagine, most of my time has been devoted to the defence of the counterclaim, as opposed to advancing your claim against the Defendants.

Again, I remind you that you would be wise to consider alternatives to proceeding to trial, given the risk as to costs. I cannot guarantee success at the conclusion of the trial, and you will have to be reminded again that you do face the risk of losing and therefore being held responsible for any damages sustained by the Defendants, and paying their legal fees and mine.

Defence counsel and I have broached the idea of taking this to a Settlement Conference. The object of a Settlement Conference would be to present the case before a Judge and have that Judge provide his advice as to how the Court action might conclude at trial. The opinion is not binding on the parties. Alternatively, there is the option of Mediation, although it is not compulsory.

Mr. Yun advises that he will seek instructions from his clients in this regard, although I understand from speaking to him that his clients would expect some cash payment forming part of the settlement. I have unequivocally rejected this, but nonetheless seek your instructions otherwise.

(emphasis added)

[40] Pleadings were closed and examinations for discovery had been concluded in March of 1998. In my opinion, a full and complete opinion letter on all matters should have been sent, if not in April of 1998, then certainly in July of 1998, when she learned of the clients' misunderstanding with respect to her retainer. This was not done, and in fact all the solicitor really said is that she could not guarantee success at the conclusion of the trial.

[41] The issue of an adequate retainer for the solicitor was a constant issue between her and the clients. The clients felt that they did their best in supplying funds but said they never really knew what the solicitor did. While the solicitor did supply some pre-bills to the clients, it is noteworthy that her actual bills prior to trial only amounted to something less than \$8,000.

[42] During the middle of trial the solicitor did write an informative letter to the clients. It was dated November 11, 1999. In it she told the clients that the trial was going very badly. She analyzed the trial to date and said on page 4:

It is expensive for you to continue to trial, although I recognize that you still feel that you are fully justified and right in what you did. That having been said, it is apparent that the judge is not going to find in your favour on the counterclaim, as he has already indicated in his numerous comments. I understand that Cliff Cheng has interpreted these to you. I would strongly suggest

that you try to settle both the claim and counterclaim, given the increased risks of losing. Although I think that you will ultimately succeed on your claim, I think that any award will only be nominal. It is my opinion that you stand to lose more in proceeding, as I do not think there is much I can do to salvage your credibility with the judge, nor come up with any evidence to support some of your actions. For instance, you accused Stephen Chong of embezzlement. If the judge should find that was defamatory of the Association, you will be falling well short of proving that there was embezzlement of funds. Because the counterclaim contains so many causes of action against you there is a real risk and likelihood that you will end up paying damages to the Association.

As it is you are unable to pay my bill, let alone provide me with an adequate retainer. I do not see you can afford to see this trial to its conclusion and then pay damages on top of that. Again, I would recommend your best option is to settle both the claim and counterclaim against Tsung Tsin Association, because any damages that might be awarded to the Association will outweigh any damages that might be awarded to both of you. Even if you do succeed in proving your claim, it is my opinion that the costs are so great, that it does not justify continuing.

....

If I do not receive prompt payment of my account, I will not continue to subsidize your court case, nor will I be inclined to represent you in the fullest manner possible. I hope I can expect your cooperation in this regard.

Having said all that to her clients, I do not know how she could maintain the opinion that they might succeed on their claim. This is the type of opinion letter, except for the last paragraph, that she should have sent much earlier. But when precisely?

[43] I would suggest that a full opinion letter was called for in the beginning. However, I recognize that many lawyers do not maintain this practice. Nevertheless, when a clear misunderstanding arose with respect to the retainer, there is no question in my mind that the solicitor should have realized that the clients did not understand all of her oral statements to them. Therefore, a full opinion informing them of all matters should have been supplied to them on at least two occasions. The first was in July of 1998 and the second was in August of 1999.

[44] In June of 1998 the solicitor took the precaution of getting a further retainer agreement because it was clear to her at that time that the clients had misunderstood the difference between acting on contingency and acting on fee for service. At that time she should have taken the opportunity to write a full opinion letter to them on all matters as the pleadings were closed and all discoveries concluded. It was only in that way that the clients would be able to make an informed decision as to whether or not they wished to proceed.

[45] In *Aydin & Company v. Ruth Schaber*, April 16, 1999, New Westminster Docket No. S033394, Registrar Wellburn said at paragraph 161:

Mrs. Schaber was never able to make an informed decision as to whether or not it was appropriate to commence litigation because she was never given a reasoned analysis of the case.

In *Richards Buell Sutton v. Cypress-Batt Enterprises Ltd. and Nathan Batt*, May 14, 1996, Vancouver Docket No. J940585, Registrar Wellburn said at paragraph 85:

[85] The agreement to proceed cautiously with the lawsuit with a minimum of expense and to re-assess the matter after discoveries was a reasonable course. I accept Mr. Gleig's evidence that at no time did he tell Dr. Batt that his chances of success were better than 50/50. I find that the solicitors advised Dr. Batt of his chances of success realistically and gave a reasonable estimate of the cost of proceeding through examinations for discovery and trial. However, they did not give details of the costs which might be payable to the defendant if the clients lost, which was a real possibility. I find that the solicitors ought to have confirmed in writing the risk the clients were taking in proceeding to trial, the expense of the trial, the ramifications in costs if the claim was unsuccessful, and the solicitors' strong advice to make an offer of settlement in the circumstances, particularly when the chances of success dropped as the evidence unfolded and Dr. Batt refused to make the first offer of settlement.

And finally in *Trower, Burke & Jones v. Sally Haugen*, June 7, 1991, Vancouver Docket No. J900503, Master Bolton said on page 19, beginning at line 13:

It is this failure to give proper advice that is, in my judgment, the crux of the case. A solicitor is not a guarantor of success when he embarks on litigation with his client, and if he gives reasonable efforts and advice to the client he is entitled to charge fees accordingly. Nor can counsel necessarily predict how the facts will emerge in the crucible of the courtroom, and sometimes not even how the court will interpret the facts that do emerge. But a solicitor must, in my respectful opinion, bring professional analysis and judgment to bear on allegations recounted to him by his client, and then give measured, reasoned, and when necessary researched, advice about the likelihood of success, the possibilities of failure, and in very general terms the likely cost of the various options.

[46] There are many cases where a written opinion with a reasoned analysis is not necessary. This was not one of them.

[47] The second time a written reasoned analysis of the position of the clients was indicated was in August of 1999. At that time the *Ming Pao* newspaper offered to settle if each "walked away". The other defendants provided a written offer i.e. 'they paid \$10 and the plaintiff paid \$10'. There is some conflicting testimony about the solicitor's advice with respect to this offer. The clients say that the solicitor would not let them settle. The solicitor said in the first instance that she left it up to the clients and never received any instructions to accept. She said she "explained to them if they didn't accept there could be an adverse costs aspect." It was at that time known that the trial would take in excess of two weeks and probably closer to three weeks. In addition, the solicitor's testimony was that after the examinations for discovery in March 1998 she found there was a conflict between the testimony of her clients and the testimony of the defendants. Nevertheless, she thought her clients would be

believed over the defendants.

- [48] One of the main issues at trial was whether or not there had been any "illegal acts" and what the interpretation of "illegal" would be. She said "They would ask me about their prospects for the litigation. I never guaranteed them success. I would have told them what I thought about the case. I believed, absent credibility, we had a good case. From the beginning the relations between the parties were acrimonious."
- [49] No written analysis was provided to the clients. Later Mr. Chow in cross-examination through an interpreter queried why the solicitor did not discuss the risks of the case with him. This question was explicitly directed to the August 1999 offer. She said "My advice was to reject based on what I knew they would be comfortable with." Therefore, when the clients say that the solicitor would not let them accept the offer, I took that to mean that she had advised them to reject it.
- [50] While the clients have certain issues with the solicitor's work pre-trial, their main complaint is that they did not have counsel of their choice at trial. That counsel was Mr. Epstein. In the evidence before me there was no indication that the solicitor at any time prior to trial stated in writing to the clients that Mr. Epstein, would not be appearing as their counsel. In fact, the written evidence is to the contrary. The evidence as to this issue is as follows:

Solicitor's Evidence:

1. She acknowledged that it was contemplated that Mr. Epstein would be co-counsel. One of the considerations was costs. She testified that Mr. Epstein, was not prepared to represent the clients without an adequate retainer. She stated that close to trial Mr. Epstein did attend at one meeting and he explained to the clients that they were in "good hands". She said there was never any discussion that he would be at the trial.
2. In the letter of June 11, 1998 (Exhibit "6") the solicitor confirmed "I have already advised and you agree that co-counsel is necessary. I have advised and you agree to having Irvin Epstein, Q.C., act as co-counsel in this matter. At present, his hourly rate is \$250."
3. The solicitor vetted the pleadings with Mr. Epstein, and discussed the matter from time to time with him.
4. In cross-examination Mr. Ho said "You promised to hire a Q.C." - the solicitor answered "Initially when served with the counterclaim I thought I would like to have co-counsel. We discussed it and we felt it best to proceed without Mr. Epstein, Q.C. The first day of trial you asked me 'where's the big guy?' - I reminded you of our earlier discussion".
5. In later cross-examination by Mr. Ho he said, questioning the solicitor, "You said Q.C. not act (at trial) because of conflict of interest, but you wanted agreement that Q.C. be there (indicates retainer agreement). You said let them be surprised by Q.C." In response the solicitor said "With the retainer agreement at the beginning I thought I would need an assistant. Later I didn't. You were there when it was discussed whether Mr. Epstein, Q.C.,

would be involved. You never met with him until just before trial. He said to you, you're in good hands." She said that "the clients realized I would be running the trial and there was no misunderstanding. Mr. Epstein vetoed the idea of his doing the closing if would not be there at the trial." Concerning the issue of not telling anyone else about having Mr. Epstein, Q.C., she said "Yes, I did say this because I thought if we did have Mr. Epstein, Q.C., play a role it would be better to keep this from them" (meaning the defendants).

6. Mr. Ho said, "But at the last minute you tell me Q.C. not be involved." The solicitor responded "Yes, the day of trial when you asked about 'the big guy' it was clear to me that you had misunderstood."

Clients' Evidence:

1. Mr. Ho testified that he expected Mr. Epstein, Q.C., to be counsel at trial. He was not surprised that Mr. Epstein had not been involved beforehand and he acknowledged that he only met Mr. Epstein for the first time shortly prior to trial.
2. Mr. Chow testified that he had some concerns about the solicitor being young and inexperienced. However, he said that she told him that her boss was a Q.C. and that he would accompany her to trial and because of this Mr. Chow said he had much confidence since a Q.C. is a big lawyer, and if he accompanies the solicitor then they have a much better chance. Mr. Chow further testified that he had to borrow money from his sons for this case. He said that his sons did not want to loan him the money but when he told him they had a Q.C., a big lawyer, and the other party had not engaged a Q.C., they thought their chances were much better.
3. Mr. Chow further testified that since he was told they were getting a Q.C. and they were going to trial with a Q.C. he did his best to provide money for the trial. He said it was very unexpected that they lost the case.

Neither Mr. Chow nor Mr. Ho were shaken on cross-examination as to whether or not they expected Mr. Epstein to be there as their trial counsel.

- [51] Even though Mr. Chow and Mr. Ho were not shaken on the issue of whether or not they expected Mr. Epstein to be counsel at trial, the solicitor questions whether in fact I should accept that testimony. In commenting on the evidence of her clients at the review, she stated that the clients relied on only their recollection and memory of events that happened fully more than one year ago and that their recollection and memory is dim at best. It is true that Mr. Ho had suffered a stroke, and that both Mr. Chow's and Mr. Ho's memories of certain events were questionable. It is also true that Mr. Chow changed his evidence on more than one occasion and that on some matters neither Mr. Ho's testimony nor Mr. Chow's testimony was reliable. However, the solicitor herself testified that on the day of trial the clients asked "where's the big guy?" She admitted in cross-examination that on the first day of trial she realized that her clients were under a misapprehension in that they thought Mr. Epstein would be counsel at trial.

- [52] The solicitor stated that the clients had complained to the Law Society about the way she handled the case. She said that they did not complain about Mr. Epstein not being counsel at trial. She argued that that was evidence that they had not really intended that Mr. Epstein would be there. The complaints to the Law Society were not exhibited.
- [53] The clients were entitled to have the solicitor of their choice, i.e., Mr. Epstein, at trial. The solicitor could have made sure the clients understood she would be trial counsel by setting out in writing exactly what was going to happen. Instead, her letter of June 11, 1998 indicated to the clients that Mr. Epstein, Q.C., would be counsel. She further indicated that it would be wise not to tell the others so that there would be the advantage of surprise. It is not sufficient for her to say that she told the clients on the day of trial that Mr. Epstein would not be attending. That ought to have been confirmed in writing at the latest by September 1999.
- [54] Throughout it was clear that the clients were neither understanding nor accepting all of what the solicitor discussed with them. The solicitor had one last chance to correct this at trial when the client said "where's the big guy?" She then should have discussed the matter in full with her clients and preferably received written instructions on whether or not to proceed. Alternatively, she should have at least asked the trial judge for an adjournment. She did none of the foregoing. Nor did she inform the clients of their right to an adjournment so far as I am aware. Naturally, it could be argued that the clients might have proceeded in any event if the decision had been left up to them.
- [55] In addition, as stated earlier, the clients were entitled to a proper analysis and written opinion. If they had been given that advice in a timely fashion they may have dropped the case or tried to settle, or possibly even accepted the defendants' offer. It is also entirely possible that the clients felt strongly enough about the alleged defamation that they would have proceeded anyway. The solicitor should bear the consequences of this uncertainty. She is the professional and being paid for her expertise and advice and should have made sure all the options were properly understood. Since she did not, it is appropriate to resolve the uncertainty in favour of the clients, i.e., by determining that they would not have proceeded in such a dubious case where the damages in comparison to the cost exposure would be comparatively small.

In conclusion:

- [56] As a result, it is my opinion that the solicitor is not entitled to any of her fees, taxes or disbursements from the first day of trial onwards. This is so both because of her failure to give a reasoned analysis of the case to the clients on even one occasion, and because they were deprived of counsel of their choice at trial. The solicitor made the choice for the clients to proceed with the trial.
- [57] The bills of the solicitor have to be reduced. I will deal with the bills first of all with respect to the claim and then secondly with respect to the counterclaim. First of all, with respect to the claim:

1. The first bill of March 9, 1998 is allowed at \$642.45.
2. The second bill of November 9, 1999 of \$10,687.14 is adjusted. Although there was no list of disbursements with their dates immediately afterwards, by perusing the paid bills and noting the date they were incurred in the solicitor's blue binder, I was able to determine that \$6,964.75 was incurred after the beginning of trial with the result that that should be deducted from the account leaving a total allowed of \$3,722.39.
3. The next bill on November 9, 1999 is allowed to October 17, 1999 (the first day of trial was October 18, 1999). Therefore, of this bill, \$59.92 is allowed.
4. The last bill of January 17, 2000 of \$1,533.29 contains some charges incurred prior to October 18, 1999 that were not previously billed. They were allowed at \$7.70.

There was no explanation for some of the items therefore they were not allowed. The hearing fees were not allowed as they were incurred after October 18, 1999. I was not presented with any bill with respect to the hearing fees. Therefore, with respect to the claim, the bills were allowed at \$4,432.46.

[58] With respect to the counterclaim:

1. the first bill of March 25, 1998 after the solicitor's write-off is allowed at \$151.96.
2. The second bill of January 5, 1999 of \$6,911 (allowing for the solicitor's write-off) is allowed.
3. The third bill of November 22, 1999 is allowed to October 18, 1999, and therefore is reduced from October 18 forward by the amount of \$14,784.38. Therefore, that bill is allowed at \$15,724.88.
4. The last bill of January 17, 2000 is disallowed in its entirety.

The total allowed is \$22,787.84.

[59] The sum allowed on the claim and the counterclaim is \$4,432.46, plus \$22,787.84 making a total of \$27,220.30. The solicitor acknowledges that the clients had paid \$48,790. Therefore, the solicitor is to return to the clients \$21,569.70. In addition, the clients are entitled to their costs of this review.

"Master Barber as Registrar"

July 5, 2001 -- Corrigendum to the Reasons for Decision issued by Master Barber as Registrar advising that to amend the amounts appearing on page 12, lines 10 and 14 to \$3,120 and not as previously written in Reasons for Decision dated May 11, 2001, and should read as follows:

(In addition Hearing 3,120.00

Fees which were

Unbilled but deducted

From Trust were claimed

Of \$3,120.)

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Prepared on 29 October 2026 · Esheria