IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of Section 70 of the
***Legal Profession Act*, SBC 1998, c. 9**

Citation: ***Davis & Company v. Jiwan et al,***
2006 BCSC 658

Date: 20060425
Docket: L012539
Registry: Vancouver

Between:

Davis & Company, a Partnership

Solicitors

And

Aly F. Jiwan, Abdul F. Jiwan and
Redbrick Properties Inc.

Clients

Before: District Registrar K. Sainty

Reasons for Decision

Counsel for the Solicitors	Gordon Turriff, Q.C.
Counsel for the Clients	Paul Kent-Snowsell
Date and Place of Hearing:	May 2, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, 24, 25, 26, 27, 30, 31, 2005 June 1, 2, 6, 7, 8, 9, 24, 2005 July 15, 19, 20, 2005 September 7, 2005 November 7, 8, 21, 22, 23, 2005 December 2, 2005 January 16, 17, 18, 19, 20, 2006 Vancouver, B.C.

INTRODUCTION

[1] This case is about legal fees. The clients filed an appointment on September 18, 2001 pursuant to the ***Legal Profession Act***, S.B.C. 1998, c. 9 ("***LPA***") to review a lawyer's bill. Specifically, they seek a review of all of the accounts rendered to them by the solicitors under s. 70(1) of the ***LPA***, which provides:

> Subject to subsection (11), the person charged or a person who has agreed to indemnify that person may obtain an appointment to have a bill reviewed before
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> (a) 12 months after the bill was delivered under section 69, or
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> (b) 3 months after the bill was paid,
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> whichever occurs first.

[2] The accounts were rendered by the solicitors for their representation of the clients in various civil litigation matters over the course of approximately six years. The fees incurred by the clients were calculated by the solicitors to be approximately $1 million. My task is to determine the reasonable legal fees (if any) payable by the clients to the solicitors for legal work done by the solicitors during the course of their retainer.

[3] The hearing occupied 40 days. Approximately 79 exhibits, consisting of numerous, dense binders of materials were filed, as well as extensive testimony heard and submissions made. Both parties were ably represented by their respective counsel – Mr. Kent-Snowsell on behalf of the clients and Mr. Turriff, Q.C. on behalf of the solicitors.

[4] Messrs. Albi, Dunlop and Morgan and Ms Brown (now Madam Justice Brown) are lawyers with the solicitors, who testified on their behalf. Mr. Aly Jiwan ("Aly"), his brother Mr. Abdul Jiwan ("Abdul"), and Redbrick Properties Inc., are the clients. Aly and Abdul, as well as Mr. Andison (a solicitor) and Mr. Affleck (an expert witness), testified on behalf of the clients.

[5] During the hearing, Mr. Turriff and Mr. Kent-Snowsell confirmed that the parties had reached an agreement on the amount of disbursements to be paid by the clients. Specifically, the parties agreed that the solicitors would abandon the sum of $36,462.86 in outstanding disbursements and taxes. In addition during the hearing, the solicitors withdrew their claim for charges on the accounts by "XLS" (which represents "litigation support") in the amount $3,204.00. This review therefore relates solely to legal fees and not disbursements.

[6] The solicitors rendered regular accounts to the clients throughout the retainer. On several occasions, Aly complained about the size of the accounts. In response, the solicitors made a series of "accommodations" relating to the accounts. The solicitors maintain that there were three types of adjustments made to the accounts. First, they would bill an invoice at an amount that was less than the initial "work in progress" ("WIP") recorded to the clients' matters. Second, they would create a series of new accounts replacing withdrawn accounts. Third, they would actually write-off receivable amounts from existing accounts. According to Mr. Albi, all of the adjustments, with the exception of the reductions in "WIP" which he made after reviewing the pre-bills, were made on the basis of client relations not as a result of any inefficiencies.

[7] According to Mr. Turriff, the solicitors recorded a total of $1,017,978.60 in time to the clients' matters. The initial fees billed, prior to any accommodations being made, totalled $994,460.00. The total amounts initially billed inclusive of fees, taxes and disbursements were $1,151,479.36. Following the accommodations, the fees ultimately billed totalled $915,889.88, a reduction of $78,570.12 or approximately 8%. The total amounts ultimately billed were $1,062,978.76.

FACTUAL BACKGROUND

[8] I do not propose to set out every communication made between the clients, solicitors, counsel and others – to do so would turn this decision into a lengthy novel. A description of the matters undertaken in the litigation is found in the volumes of exhibits and the transcripts of this proceeding. I will however, give an overview of the circumstances leading to the present review. Where applicable, I will make additional findings of fact as they relate to the particular issues in this review.

[9] Aly and Abdul are the sons of Rashida ("Rashida") and Fatehali (also known as Fateh) ("Fateh") Jiwan. Rashida and Fateh separated in 1992. Rashida retained Mr. Albi of the solicitors to act as her counsel in respect of her separation and eventual divorce from Fateh.

[10] During the marriage and most of the matrimonial proceedings, Fateh was the directing mind of a company called FRJ Enterprises Ltd., now Redbrick Properties Inc. For ease of reference, I will refer to that corporate entity as "FRJ" in these reasons.

[11] FRJ was a one-third partner in a partnership known as the Fraserview Partnership ("Fraserview"). Dallo Enterprises Ltd. ("Dallo Enterprises") was also a one-third partner in Fraserview. Dallo Enterprises was owned and controlled by Fateh's brother, Abdul Jiwan, known as Dallo. I will refer to him as "Dallo" in these reasons and to Dallo and Dallo Enterprises collectively as the "Dallo Group." The remaining one-third interest in Fraserview was owned by two companies: 4J Enterprises Ltd. ("4J") and JoLynne Enterprises Ltd. ("JoLynne Enterprises"). 4J and JoLynne Enterprises were controlled by John Hoegg. I will collectively refer to 4J, JoLynne Enterprises and John Hoegg as the "Hoeggs" in these reasons.

[12] Fraserview's assets consisted of:

1. Cedar Park Apartments located in Burnaby, B.C. ("Cedar Park");
2. Holly Park Lane Estates Ltd., located in Surrey, B.C. (the "Surrey Property"); and,
3. Three apartment buildings in Fernie, B.C., owned through numbered companies and held in trust for Fraserview (the "Fernie Properties").

[13] In 1991, Fateh established a family trust (the "Trust") with himself and Rashida as trustees and Aly and Abdul as beneficiaries. The Trust's principal asset was a beneficial ownership in FRJ.

[14] As part of the matrimonial litigation, Rashida, on the advice of Mr. Albi, retained a forensic accounting firm, Linquist Avey and specifically Mr. Kerry Winkler, to review the books and records of FRJ. During his review of the books and records, Mr. Winkler discovered a number of irregularities in the finances of FRJ and

Fraserview consisting of forged cheques, kickbacks from suppliers, extraordinary management fees and secret commissions (the “misappropriations”).

[15] Having learned of the misappropriations, Aly met with Mr. Albi and Mr. Dunlop of the solicitors who explained to him that he and his brother Abdul, as beneficiaries under the Trust, had potential actions against their father, the Dallo Group and the Hoeggs to recover the monies misappropriated from Fraserview. Mr. Albi and Mr. Dunlop recommended that Aly and Abdul consider suing. As the solicitors were concerned about a potential conflict of interest since Rashida, as a trustee of the Trust, was a potential defendant, they recommended that Aly and Abdul seek independent legal advice about the conflict of interest issue, which they did.

[16] On October 12, 1995, Davis & Co. (on behalf of Aly and Abdul, as beneficiaries of the Trust) commenced an action (the “trust action”) against Fateh and the Dallo Group, seeking compensation for the misappropriations.

[17] Eight actions were brought during the course of the retainer, consisting of:

(i) the trust action;

(ii) an oppression action commenced on October 20, 1995 with Aly and Abdul as petitioners against FRJ and Fateh;

(iii) a court application on February 22, 1996 for leave to commence a derivative action by Abdul and Aly on behalf of FRJ, against Fateh and the Dallo Group;

(iv) a promissory note action commenced on September 21, 1998 by the Dallo Group against Fateh and FRJ, seeking a monetary judgment, interest and costs in respect of loans allegedly made;

(v) a misappropriation action commenced on February 18, 1999 by FRJ against the Dallo Group, Niele Jiwan (Dallo’s son), and the Hoeggs;

(vi) a tracing action commenced on October 1, 1999 by Dallo Enterprises against 551828 B.C. Ltd. and 573917 B.C. Ltd. (two companies of which Fateh was the sole director and shareholder), seeking a declaration that the two numbered companies held partnership property in trust for the plaintiffs, certificates of pending litigation, interest and costs;

(vii) a winding-up action filed by Jo Lynne Enterprises and 4J as petitioners against Dallo Enterprises, FRJ, and four other corporate entities whereby Jo Lynne Enterprises and 4J sought a declaration dissolving the partnership, an order winding up the partnership's affairs and appointing John Bottom of Bottom & Associates as receiver, and costs;

(viii) a foreclosure action brought by HSBC Trust Company (Canada) against, among others, FRJ, the Dallo Group, the Hoeggs and Fateh in respect of the Fernie Properties.

[18] Throughout his evidence, Aly reiterated that he and Abdul would not have considered commencing any legal action were it not for the advice given to them by Messrs. Albi and Dunlop. Further he insisted that, at the time of their initial meeting, Mr. Dunlop advised that the bulk of the hard work had been done by Mr. Winkler in his report and that the matter should be relatively straightforward and finished in one to one-and-a-half years. Aly testified that on the basis of that information he assumed the costs of the litigation would be somewhere between $50,000 and $75,000. He insisted the clients would never have embarked on the litigation had they known it would take six years to resolve and cost in the range of $1,500,000.

[19] At the time the first actions were commenced, Aly was 28 years old and studying towards his Doctoral degree at Queen's University in Kingston, Ontario. Abdul was 25 years old and was working for a company known as Monitor Company in Toronto, Ontario, having received his Bachelor of Commerce from the University of British Columbia in 1992.

[20] In early 1998, Aly gave up his studies and returned to Vancouver to assist in the litigation and to assist his mother with managing her affairs. In 1997 (after a backpacking trip in 1996), Abdul went to the Fuqua School of Business at Duke University in North Carolina and obtained an M.B.A. from that institution (with a major in Finance) in 1999. After that, he worked as a financial analyst with Microsoft in Redmond, Washington until February 2002 when he returned to Vancouver to assist his brother and mother.

[21] Throughout the retainer Aly played a very active role with the solicitors and in the litigation – he was given the authority to do so by his brother. Abdul's role was limited, although he testified that Aly confirmed most of the major decisions relating to steps in the litigation with him. Also involved in the litigation were the "uncles" – two of Rashida's brothers who were wealthy Kenyan businessmen. Most involved was Uncle Amin Juma.

[22] During the retainer, Aly communicated regularly with Mr. Dunlop, Mr. Albi and several other persons at the law firm by phone, fax and later by e-mail. Many of the communications sent to the solicitors by Aly were marked "urgent" in one way or another. In addition, Aly provided his own drafts of letters and documents to be sent to others on numerous occasions. He carefully reviewed all of the documents prepared by his counsel and made suggestions for changes. He also noted legal issues, read the memoranda prepared on the law and offered his comments and suggestions.

[23] The exhibits filed in this proceeding contain countless examples of documents Aly participated in drafting. In many instances, the solicitors made the changes requested by Aly and sometimes sent correspondence effectively identical to that suggested by Aly. In the early stages of this matter, most of the communications between Aly and the solicitors were long distance – between Kingston and Vancouver. After Aly's relocation to Vancouver in 1998, the barrage of correspondence continued but Aly also had innumerable meetings with Mr. Dunlop and others at the firm, some on his own instigation. In fact, on more than one occasion, Aly suggested the members of the firm who should attend and for what purpose they might be required. At most times there was daily (and sometimes hourly) contact, either by phone call or fax, between Aly and the solicitors – mostly Mr. Dunlop, Ms Brasil and Mr. Albi.

[24] Aly went over everything done by the solicitors with a fine toothed comb. He considered every angle and did his own research on issues. For example, when Mr. Taylor (counsel for the Dallo Group) suggested using a particular firm to do an independent forensic accounting, Aly looked the firm up in the yellow pages, called their offices and determined that they were bankruptcy experts, rather than forensic accountants.

[25] The solicitors were no less involved than Aly. They employed a team of lawyers to deal with the clients' matters. In fact, Mr. Kent-Snowsell prepared a list of 62 sets of initials representing "billers" at the firm each of whom had recorded time on the clients' file. These included senior and junior counsel, articled students, legal assistants and secretaries. As well, there were entries by "WP" and "XLS." Neither

Albi nor Mr. Dunlop was able to explain whose initials those were but it became clear through the hearing that "WP" was "word processing" and "XLS" was "litigation support". As I previously noted, Mr. Turriff confirmed during the hearing that the solicitors were withdrawing their claims for fees billed by "XLS" and constituting litigation support.

[26] In mid-September 1997, Mr. Roos (counsel for Fateh) called Mr. Dunlop and advised him that Fateh was "exhausted from the litigation." On September 15, 1997, Mr. Roos sent Mr. Dunlop a handwritten note from Fateh in which he expressed his desire to step down as trustee of the Trust since his sons' wishes and peace of mind were of paramount concern to him.

[27] In spite of Fateh's apparent "capitulation," Aly recommended that the litigation continue "at full steam".

[28] Fateh and Rashida settled the matrimonial litigation shortly thereafter on favourable terms to Rashida. Part of that settlement was payment to Fateh for his interest in FRJ and Fraserview and transfer of that interest to Rashida. Shortly after Rashida became the owner of FRJ, she appointed Aly as president with her and Aly as its two directors. Fateh then agreed to assist his sons in the prosecution of their claims against the Dallo Group and the Hoeggs. Fateh, however, remained a defendant in the actions as it was determined that many of the actions could not proceed without the claims against him remaining in place.

[29] In April 1998, Mr. Dunlop faxed a document entitled "Summary of Damages" to Aly and Abdul in Nairobi where they were visiting their uncles. That summary

documented particulars from the forensic accounting report and enumerated the amount of damages encapsulated in the litigation. It showed total damages of $1,832,193.01 which included a claim for legal fees and costs to date in the amount of $636,431.31 – $323,057.34 in fees and disbursements of the solicitors for the current litigation and $313,373.97 paid in respect of "litigation investigation" billed as part of the matrimonial action. The "Summary of Damages" was increased to $2,247,966.46 in June 1999. In that second summary, the claim for legal fees and forensic accounting fees had grown to $900,000.

[30] In December 1998, FRJ sent a letter to the Dallo Group and the Hoeggs terminating the Fraserview partnership. By this time it was clear that the partnership was dysfunctional. No decisions were able to be made without unanimity of the partners and, with them embroiled in the ongoing litigation, they obviously could not deal with partnership matters.

[31] Throughout 1999 the litigation continued at full steam and settlement negotiations were ongoing. Several issues arose with respect to the co-ownership of Fraserview and Aly gave the solicitors instructions to attempt to resolve them with the other two partners. Resolution appeared to require that one of the partners buy out the others' interests in Fraserview's assets. Unfortunately, such outcome needed to occur contemporaneously with resolution of the litigation and none of the owners was prepared to resolve all issues at the same time. In particular, the Dallo Group refused to consider paying any sums to compensate FRJ, Aly and Abdul for their losses for the misappropriations as claimed in the various pieces of litigation.

[32] On December 2, 1999, Mr. Veinotte was appointed as the solicitor for the Dallo Group. Mr. Veinotte took a very aggressive stance from the moment he was appointed as counsel. He sent innumerable pieces of correspondence to the other parties – sometimes more than one a day.

[33] On February 22, 2000 Mr. Dunlop prepared a memorandum to file in which he estimated (with a number of qualifications) that further fees to take the matter to trial would be $229,000.00 (the "February 2000 estimate").

[34] In May 2000, Mr. Holburn, counsel for the Hoeggs, approached Mr. Dunlop to determine if the clients might consider settling with the Hoeggs independent of the Dallo Group. That suggestion was refused.

[35] During the spring and summer of 2000, the parties prepared for a series of motions to be heard. Numerous pieces of correspondence were exchanged. Particularly, Mr. Veinotte continued to send almost daily correspondence about a variety of matters.

[36] In July 2000, ten motions had been filed in the various lawsuits and were awaiting hearing. Much posturing took place between the counsel as to when they might be heard and whose might have priority. One of those motions was an application by the Dallo Group to remove certificates of pending litigation (the "CPLs") that the clients placed on Dallo's personal property to secure payment of damages. In July 2000, Lowry J. dismissed the Dallo Group's application to remove the CPLs. The Dallo Group appealed. In October 2000, on a renewed application, Smith J. cancelled the CPLs. The clients instructed the solicitors to appeal her

decision. The solicitors then brought a successful application to stay the order and ultimately succeeded on appeal.

[37] On August 20, 2000, the Hoeggs filed a petition seeking the dissolution and winding up of Fraserview and appointment of Bottom & Associates as receiver to effect same. On receipt of the petition, Aly questioned Mr. Dunlop as to whether it might be reasonable to simply consent to the petition. Mr. Dunlop advised Aly that the winding up could be extremely costly. An expert report was prepared by a Mr. Topley who suggested that the costs of winding-up and a receiver could reach $500,000. On that basis, Aly instructed the solicitors to resist the Hoeggs' application although Mr. Bottom, the intended receiver, suggested the costs would be significantly lower (around $20,000, or so).

[38] The Hoeggs' petition was heard and on November 21, 2000 Clancy J. ordered that Fraserview be wound up and that Mr. Bottom be appointed as the receiver. In his reasons, he noted that the litigation had poisoned the partnership relationship to the point where the partnership could not be maintained. He concluded that an ongoing partnership relationship was impossible and ordered the partnership wound up. He was not in the least persuaded by FRJ's argument that the costs of the receivership could reach $500,000. He specifically noted that Mr. Bottom's figure of $20,000 was much more realistic. Finally, he awarded the Hoeggs their costs of the application as against FRJ.

[39] Towards the end of December 2000, Aly suggested a meeting between himself, Mr. Dunlop and Mr. Albi to consider where the litigation was and discuss the

potential for settlement. He confirmed that the time might be ripe for settlement, despite the posturing of the opponents and the fact that they had been "trigger happy" for some months.

[40] Mr. Albi agreed to a meeting and a conference was set for early January 2001. Prior to that meeting, Mr. Albi reviewed the current WIP on the clients' matter. He testified that he was surprised at the number of resources that had gone into the matter in the Fall and that there needed to be significant effort towards getting the case resolved. Specifically he noted: "The economics that had been suspect and uncertain throughout were clearly more so now."

[41] On January 10, 2001, Aly met with Messrs. Albi and Dunlop ("the 2001 meeting"). During that lengthy meeting, they discussed the current state of affairs. Mr. Albi recommended that the litigation be settled as it was clearly uneconomical to proceed, particularly with a trial date looming and considering the work that would need to be done to prepare the matter for trial. During the meeting, Mr. Albi provided Aly with an account for work done between October 26 and November 30, 2000 in the amount of $119,679.40, of which fees constituted $97,190.00.

[42] In his evidence, Aly described feeling "sucker-punched" after the 2001 meeting. He said that he was told at the meeting that the litigation was not economical and that the clients must settle "at all costs," something which he had not been made aware of previously. He was very upset with this news.

[43] A case management conference was scheduled for March 23, 2001. On the advice of all counsel, the parties agreed to meet at the solicitors' offices on March

21, 2001 to attempt to resolve all matters. By this point, many offers had been made by all sides. A day long meeting was held at Davis & Co. and a final omnibus settlement was reached. The meeting at Davis & Co. was attended by representatives of each of the parties and their respective counsel.

[44] The settlement provided for wind-up of Fraserview and distribution of its assets to the partners. It also provided for FRJ (or its nominee) to purchase Cedar Park and for Dallo Enterprises to purchase the Fernie Properties. The Surrey Property was to be sold and the monies shared between the partners. FRJ was to receive $400,000 from Dallo and $100,000 from the Hoeggs (as "settlement contribution amounts") to settle all of the actions, inclusive of costs – which funds were to be adjusted in accordance with the partners various capital accounts in the partnership. The settlement contribution amounts were to be secured by promissory notes.

[45] A case management conference was held on March 23, 2001 before Clancy J. at which the parties advised of the settlement and spoke to the terms of orders embodying the agreements reached. Orders were then drafted and circulated for signature.

[46] Shortly after the settlement was reached, Aly found out (as he was not able to arrange financing for the proposed purchase) that the use of Cedar Park violated the City of Burnaby's zoning bylaws. The proposed lender required that a comfort letter be obtained from the City of Burnaby (confirming that the City would not enforce the

zoning bylaw). Aly was unable to obtain such comfort letter and therefore could not purchase Cedar Park.

[47] Soon afterward, the Dallo Group made an offer to buy the Fernie Properties and Cedar Park and were able to secure the financing to do so.

[48] In early May 2001, Aly told the solicitors that he intended to deal with all remaining matters (except finalising the promissory notes and orders from the case management conference) on his own and instructed that all legal costs cease immediately.

[49] As the closing date for the purchase approached, the promissory notes for the settlement contribution amounts were sent to the solicitors on "conditions".

[50] Aly was extremely upset by this development as he believed that the notes were payable on demand and would be paid out on the sale/purchase as was contemplated by the settlement agreement. He was worried that he (and his brother) would end up with no properties and no immediate funds. He instructed the solicitors to demand payment of the notes on closing as contemplated in the settlement agreement. Ms Brown (who was handling the final matters for the clients on behalf of the solicitors) recalled that, at the settlement meeting, some restrictions might have been placed on the timing for payment of the notes. This did not accord with Aly's recollection of what had occurred during that meeting. Aly suggested to Ms Brown that perhaps the solicitors had in some way "screwed up." On the basis of that allegation, Ms Brown advised Aly that the solicitors were withdrawing as

counsel for the clients because she understood the clients to be making an allegation of negligence against them.

ISSUES

[51] Both the solicitors and the clients made several arguments in relation to the scope of the review and the reasonableness of the fees charged by the solicitors. As a result, there are several issues to be determined:

1. Which of the accounts ought to be reviewed?

2. Are the solicitors precluded from claiming fees?

3. What effect, if any, does the February 2000 estimate have on the amount of fees payable?

4. What is the reasonable amount of remuneration that the solicitors should be paid, if any?

5. How much was actually paid to the solicitors by the clients?

6. What is the rate of interest the solicitors are entitled to on the unpaid balance of the fees?

ANALYSIS AND FINDINGS

1. Which of the accounts ought to be reviewed?

[52] Before proceeding on anything else in this review, I first must determine which of the accounts are reviewable. In so doing, I will consider the numerous arguments and issues raised by counsel.

i. Were the accounts interim or final?

[53] Section 70 of the ***LPA*** provides that final bills must be reviewed within 12 months of being delivered and paid bills must be reviewed within 3 months of payment. The characterization of whether the accounts were interim or final consequently limits the scope for review within prescribed time limits: if they were final, only the last three (unpaid) accounts would be reviewable, the appointment for review having been delivered less than 12 months following delivery of the accounts; if they were interim accounts, then they would all be reviewable.

[54] As I have described above, the solicitors issued a series of accounts to the clients throughout the retainer and the solicitor and the clients made several "accommodations" in respect of accounts rendered.

[55] The first fee accommodation was made in or about April 1996 when the solicitors reduced the fees portions of their accounts dated February 21, 1996 and March 18, 1996 from $8,440.00 to $6,589.97 and $15,125.00 to $13,124.50 respectively – a total reduction of $3,850.53.

[56] In early 1999, as a result of Aly's questioning several of the solicitors' accounts, the solicitors gave the clients the second major accommodation – six accounts were withdrawn and replaced by accounts in which a reduction of approximately 28 percent in fees was given.

[57] Again, in January 2000, Aly advised Mr. Albi that in his opinion the fees for October through December were excessive. He particularly queried the efficiencies of using several members of the "team" to do what appeared to be duplicative tasks

and confirmed his previous instructions (at the time of the February 2000 estimate) that the file be managed more efficiently in terms of costs. He then requested an accommodation in respect of those fees of some $85,000.00. An accommodation was later reached to reduce the fees billed on the December 4, 2000 and January 3, 2001 accounts from $162,291.00 to $113,540.00, a reduction of 30 percent. In addition, the firm billed a reduced amount from WIP (again 30 percent) on its account dated January 30, 2001 such that $29,815.00 was billed, rather than WIP of $42,590.

[58] The solicitors submit that the accommodations were intended to render the accounts "final bills" within the meaning of the ***LPA*** and thus the accommodated accounts are not reviewable. Further, they submit that the parties had a clear understanding that if the clients had any issues with respect to accounts sent from time to time, those issues had to be raised within 30 days or such accounts would be considered final. Therefore, they argue that where no issues were raised within 30 days with respect to an account rendered, that account ought to be considered "final" and thus not reviewable as part of this proceeding.

[59] Accordingly, the solicitors claim that only the last three accounts (totalling $204,057.50 in fees) are reviewable as they remain unpaid and the appointment to review those accounts was filed within the time limits set out in section 70(1)(a) and (b) of the ***LPA***. They argue that all other accounts were either paid and not queried and are thus outside the time limitation for review or were settled so as to preclude subsequent review.

[60] The clients however, submit that all of the accounts are reviewable as the retainer was a "continuing retainer" and essentially the accounts constitute one "bill" under the ***LPA***, regardless of any accommodations or their decisions during the retainer not to question any particular account.

[61] As noted in ***Nathanson, Schachter & Thompson v. Levitt***, [2005] B.C.W.L.D. 425, 2004 B.C.S.C. 1402 at ¶14:

> [I]t is a regrettably common debate between lawyer and client as to whether prior accounts are periodic final accounts (that is, in effect, a series of retainers, or a retainer for a separate series of matters) or whether they are interim accounts rendered on an overall retainer.

[62] The term "lawyer's bill" in the ***LPA*** has been subject to extensive judicial review. The leading case on point is ***Ladner Downs v. Crowley*** (1987), 14 B.C.L.R. (2d) 357, 41 D.L.R. (4th) 403 (S.C.). In that case, Mr. Crowley (the client) had retained Ladner Downs (the solicitors) to act on his behalf in a matrimonial proceeding. During the retainer the solicitors sent the client some eight accounts which he paid. Following the solicitors' discharge, the client took out an appointment to review all of the solicitors' accounts, including those he had previously paid. The solicitors argued that the client had no right to review the paid accounts. The registrar held that he did. The solicitors appealed the registrar's decision. The appeal came before Southin J. (as she then was) who first reviewed the history behind the ***LPA*** and its predecessors. She held that in matters of a specific retainer, such as for a piece of litigation, the retainer between the solicitors and client does not terminate until settlement or entry of the judgment following a trial of an action.

In determining the issue of interim or final, she referred to the decision of Kay L.J. in ***In Re Romer & Haslam*** [1893] 2 Q.B. 286 (C.A.) and stated at p. 372:

> While all the judges in ***Romer & Haslam***, were saying the same thing, Kay L.J. said it, in my view, in a more succinct and understandable way.
>
> He said, in effect, this:
>
> > 1. Whether bills are several separate bills or one bill is partly a question of law and partly a question of fact.
> >
> > 2. If a solicitor is retained in a civil action prima facie the contract is entire; it is a contract to carry the matter to a conclusion.
> >
> > 3. Therefore, he has no right to payment until he has performed his contract.
> >
> > 4. Where, however, there are natural breaks in the retainer, he is entitled to be paid at a break. (I take that to mean that if the retainer is to sue A and A is sued to judgment, there may be a break even if A appeals. That may be because impliedly such a retainer does not include a retainer for the appeal. See the ***Sunder Singh*** case, *supra*). [***Singh v. McRae*** (1922) 31 B.C.R. 67, 65 D.L.R. 392].
> >
> > 5. Where, however, the retainer although apparently entire, e.g., to act in a complex matter involving many proceedings against various persons, can be fairly taken to be a multiple retainer, the solicitor can recover his costs for each as each is concluded.

[63] Following her review of the history of the law, Southin J. summarised the current state of the law (at p. 375). The following of her conclusions bear emphasis in the present case:

> 1. A contract of retainer for a single transaction, e.g., a common law action, is an entire contract. In that context, a common law action means the trial and does not include appeals which ordinarily are the subject of a separate retainer.

> 2. A retainer to conduct a suit in equity might encompass several separate entire contracts.
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> 3. A solicitor is not entitled to the consideration due him under his contract of retainer until he has performed his part, e.g., in a common law action by going to judgment.
>
> 4. Nonetheless, the client has an obligation to furnish the money necessary for disbursements.
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> 5. If a solicitor terminates an entire contract without cause, he cannot recover at all.
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> 6. If the client terminates an entire contract without cause, the solicitor is entitled to recover for work done.
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> 7. Payment of a "bill" deprives the client of any right to tax under the ***Solicitors Act*** [now the ***LPA***] but payment of money on account of fees or disbursements or both during the course of an entire contract does not.
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> 8. There is nothing to prevent a solicitor from asking for money on account of fees during the course of an entire contract.

[64] On the specific issue of solicitors advising clients of their right to review,

Southin J. made the following comments at p. 378:

> In my opinion, any contract entered into by a solicitor with a client, or any act or omission by a solicitor in his dealings with his client, which deprives the client or is asserted to deprive a client of any of his legal rights existing under the principles of entire contract, can only be given effect to if the solicitor establishes "that [it] ... preclude[s] any suspicion of an improper attempt to benefit himself at his client's expense".
>
> In "act or omission" in that formulation, I include insisting on payment during the course of an entire contract and then taking the position that the client has no right to tax. A solicitor might be able to "preclude any suspicion" by showing that the client with full knowledge and understanding made a bargain giving up his right to tax.
>
> […] The real question is whether a client can lose his right to taxation by an act done by him while the contract of retainer (it being an entire contract) is subsisting. I say the solicitor cannot establish that the client has lost his right unless he shows that the client was properly advised as to his rights before the act which is asserted to bar him was done.

[65] It is undisputed that the above-stated principles in ***Ladner Downs v. Crowley*** are still good law in British Columbia. In spite of this, however, the application of ***Ladner Downs v. Crowley*** must be dictated by the facts of this case. In fact, Southin J. confirmed this at p. 372 when she applied the principle set out by Kay L.J. in ***Re Romer*** that the question of "whether bills are several separate bills or one bill is partly a question of law and partly a question of fact."

[66] In ***Ace Asphalt & Maintenance Ltd. v. Goodfellow MacKenzie*** (1984), 56 B.C.L.R. 169 (C.A.), Lambert, J.A. stated, albeit in a dissenting opinion, at p. 173 [emphasis added]:

> But short of such express agreement and short of a factual matrix that would result in the implication of such an agreement, the law is that periodic statements of account rendered during the course of carrying out an entire contract for a particular piece of work by a solicitor for a client are interim statements of account only, and are not bills within the meaning of s. 92 of the *Barristers and Solicitors Act* [now s.69 of the ***LPA***]. Any other conclusion would, in the first place, be contrary to the principles set out in *Yule v. Saskatoon* (1955), 16 W.W.R. 305, affirmed 17 W.W.R. 296, 1 D.L.R. (2d) 540 (Sask. C.A.), because a periodic statement, by its nature, can not take into account the result achieved, and may well not be able to reflect adequately the other factors referred to in *Yule v. Saskatoon*, and would, in the second place, operate to permit the circumvention of the client's right to tax his solicitor's account when the work was completed, the time the taxation ought to occur. I add that the right to tax a solicitor's account is of fundamental importance to both solicitors and clients and is one of the cornerstones of the administration of justice.

[67] While his Lordship dissented in the result, in my opinion, his statement of the law is accurate. This case requires a determination of whether there is a "factual matrix" that would support an implied agreement between the parties that the periodic accounts rendered during the course of the retainer were final bills.

[68] The registrar is charged with ascertaining the facts on which to determine whether the accounts are interim or final and thus reviewable or not: ***Ace Asphalt***, at p. 172.

[69] The use of the word “interim” on the bills themselves or in correspondence is not determinative of the matter: ***Morin, Grant v. Olsson*** (1994), 37 C.P.C. (3d) 130 (B.C.S.C.) at p. 138.

[70] A determination of the facts relies heavily on a finding of credibility in this case. In assessing who should be believed, regard must be had to the witness – what he or she is saying, his demeanour in saying it, coupled with such things as body language and sheer believability, based on a “preponderance of probabilities.” ***Faryna v. Chorny***, [1952] 2 D.L.R. 354, 4 W.W.R. 171 (B.C.C.A.) at ¶10.

[71] It has been my experience that in most instances, even where one person’s testimony is to be preferred over another’s, neither witness can be said to be deliberately deceitful. In many instances a witness’ recollection is simply different, usually coloured in a much more favourable manner to his/her case than the testimony of the other party.

[72] Generally speaking, in cases involving solicitors and their clients, “a solicitor who knows or ought to know how easily misunderstandings arise, and how honest men may have different recollections of past events, must bear the brunt of a difference in recollection if he fails to make proper confirmation”: ***Waldock v. Bissett*** (1992), 67 B.C.L.R. (2d) 389, 92 D.L.R. (4th) 532 (C.A.) at ¶16; ***Kay v. Randell*** (1997), 70 A.C.W.S. (3d) 363 (B.C.S.C.) at ¶32.

[73] The burden of proving the terms of the retainer is on the solicitors: ***Coates v. Bucholz and Arbutus Bay Estates Ltd.*** (9 September 1991), Victoria No. 903846 (B.C.S.C.) at p. 3. If the retainer is not in writing, the client's version is more likely to be accepted, given the onus on the solicitor. In ***Re Dickie, De Beck & McTaggert and Sherman*** (1916), 23 B.C.R. 538 (C.A.), McPhillips J.A. stated at p. 541 [emphasis added]:

> On the question of retainer, the onus is on the solicitor that there was a retainer, and not being in writing, it is not accepted against the client's statement. I am putting both parties upon an equal ground of credibility. There runs through all cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with a client, then he must be able to shew what that agreement is, and if it is not in writing, then it seems that the client's statement must be accepted. If he makes an agreement, then let him make it in writing as a prudent solicitor with a client, disclosing all the facts and circumstances.

[74] In ***Stedman v. Collett*** (1854), 17 Beav. 608, 51 All E.R. 1171 (C.A.), the plaintiff solicitor acted for the defendant client for some time and then withdrew his services when it became clear the client had no funds to pay for his services. The parties subsequently entered into an agreement whereby the client would receive his papers from the solicitor upon payment of the sum of £200. The solicitor later sued for specific performance of that agreement. The matter came before Sir John Romilly, Master of the Rolls who reviewed the facts and held that the client was bound by the terms of the agreement. In so holding, he noted at p. 1174 [emphasis added]:

> Looking at this transaction, therefore, with great suspicion, I proceed to consider whether I ought to act upon and enforce it. The first question to be considered is, was it obtained by pressure on the client?[...]

> I am of the opinion, in this case, that the Defendant has not made out a case of pressure […]. It is true that the Defendant had no professional assistance in this matter, but I do not find that he was ignorant of what he was about. He was conversant with legal matters, he understood the agreement fully; he did not apply for further time to consider the matter, he believed, and stated his belief at the time, that the bill of costs could not amount to so large a sum […]. It is next to be observed that the Defendant has had the full benefit of the agreement; he obtained the papers, he prosecuted his claim and he succeeded.

[75] Mr. Turriff submits that the preponderance of evidence favours the solicitors' view – that any unquestioned accounts and those that were accommodated were final and that the clients knew that they were intended to be so. In this regard he suggests that Aly and Abdul should be considered sophisticated clients – unlike the "dairyman" client he described in ***Ladner Downs v. Crowley***. He suggests that as astute, smart, capable men of business, they knew what they were doing in making business decisions to reduce the accounts and in agreeing to pay and not question several others. They were not "ignorant of what they were about." They knew (and they agreed) that the accounts were final and I should not disturb that agreement. On this basis, Mr. Turriff argues I should not "throw aside" the agreements made in respect of the fees.

[76] Conversely, the clients submit that I should find that the accounts are interim and thus reviewable since they were completely unaware that any agreements they made with respect to the accounts or their failure to question accounts rendered would affect their ability to challenge such accounts in the future, particularly on the basis of the duty of "utmost good faith" owed by solicitors to their clients.

[77] Mr. Albi's testimony was clear on how he and the solicitors perceived matters. His understanding can be summarized as follows:

- Even before the clients retained the solicitors (based on a pattern in the matrimonial litigation between Rashida and Fateh), it was clearly understood by Aly and Abdul that the firm would deliver periodic accounts for its work, usually every month; that the accounts would have to be paid (or challenged) within 30 days of delivery; that the accounts were not subject to change by the firm at any future date or because of any future event; that interest would be charged on overdue amounts; and, that the firm could, at its election, withdraw its services if overdue amounts were not paid.

- It was both his and Aly's clear understanding that once an accommodation was made that was the end of the matter and there would not be any further alterations to the accounts. Specifically, he noted that if there were no concerns expressed within 30 days an account would be treated as final, and if concerns were expressed, then those concerns would be addressed and, once resolved, an account would be treated as final. The firm and the clients acted in accordance with that understanding. The clients never objected to the arrangements in any way.

- The accommodations made were the result of negotiations between Aly, for himself and on behalf of the clients, and Mr. Albi. These negotiations were always conducted in a respectful and professional manner and were understood by all to be a pure matter of business.

- None of the clients ever advised the firm that, despite the accommodations, they intended to revisit the settled charges at any future time or on the happening of any future event.

- Aly never said for himself or on behalf of any of the clients that it was necessary for them to know the ultimate outcome of the proceedings before determining what amount should be paid on any questioned or periodic account or overall.

- On the one occasion that Aly did suggest that the solicitors work on a contingent basis or that fees be tied to performance, that suggestion was never turned into an agreement between them.

- During the discussions about the accommodations, Aly always distinguished "outstanding accounts" from "future fees" and spoke of "finalising" and "resolving" the charges.

[78] Conversely, Aly's understanding of the arrangements and which he testified to may be summarized as follows:

- He was not a sophisticated consumer of legal services at the time the retainer began and, although he learned much about how solicitors bill their clients over the course of the retainer, he had little or no other experience with lawyers.

- At no time was he advised by any lawyer at the firm that he had a right to "tax" the solicitors' accounts. Nor was he advised by any lawyer that by negotiating the accommodations with the firm or by paying accounts rendered without questioning them the clients were absolutely giving up any rights to later challenge the accounts, either in whole or in part. He made business decisions with Mr. Albi and Mr. Morgan relating to the accounts as he did not understand that he had any other choice (specifically, to have the accounts reviewed by a registrar). If he had understood this, he would never have agreed to that.

- The size of the bills and the lack of progress on the matters was always a point of contention between Mr. Albi and himself.

[79] Abdul agreed with Aly. Specifically, he stated that he was never advised by anyone at the firm of the right of a client to "tax" his lawyer's bills; nor was he advised that by paying any accounts or agreeing to the accommodations the clients were giving up a legal right to have the accounts reviewed.

[80] Mr. Albi did acknowledge on cross-examination that he never advised Aly or Abdul that if they did not submit an appointment to review bills within certain time limits they would have to get a special order of the court to initiate any review of the accounts. He was unable to recall any conversation with Aly or Abdul in which a possible review by the registrar of the accounts was discussed, except close to the end of the retainer when Aly suggested that all the accounts might have to be reviewed.

[81] Mr. Turriff suggests that I should not believe the testimony of either Aly or Abdul. Specifically, Mr. Turriff submits that I should not believe Aly's statement that he was not made aware of the possibility of "taxing" the solicitors' accounts until

Spring 2001. Instead he argues I should prefer the evidence of Mr. Dunlop who deposed in his affidavit that Aly fully understood what taxation was and how the taxation process worked, particularly by the time the misappropriation action had begun in February 1999. He referred to a number of conversations between himself and Aly in which he suggests Aly's understanding of the taxation process was clear.

[82] Aly vehemently denied any such conversations. Unfortunately, the solicitors could not produce any notes to file, memoranda or documentation made contemporaneous with these alleged conversations from which I could conclude that the conversations took place.

[83] I agree with Mr. Turriff's characterisation of Aly in particular. He was not, as he attempted to portray himself, a university student during much of the litigation. He was not unsophisticated. Clearly he understood the litigation and he understood what it was the solicitors were doing. He also had more than a superficial grasp of the strategies being employed – in fact, I find that he drove much of the strategy and was a shrewd tactician. As for Abdul, he, too, was an astute man of business, although I do not believe that he was intimately involved in any of the negotiations relating to the accommodations. The question of whether the accounts were considered by both parties to be final, in my mind, depends in part on my perception of Aly and his understanding of the negotiations with the firm. It also depends, in my view, on how the solicitors viewed the accounts and what advice they gave the clients during the retainer regarding the finality of the accounts.

[84] I have no doubt that the solicitors now intend that all paid accounts and those that were accommodated be final. It is clear that they wished the negotiations to resolve matters of the accounts but I do not believe that they specifically intended the accounts to be final in the manner required by the ***LPA*** such that review would be precluded. At no time did they advise the clients of the finality of the matter. While they understood that the negotiations were undertaken on a business basis and to keep the solicitor-client relationship intact, the solicitors did not, at any time advise any of the clients that the accommodations would preclude any future review of the accounts. Nor did they confirm to the clients that by simply paying (without question) an account rendered they were foreclosed from any future review of such accounts.

[85] There is some evidence that the accounts were considered interim by the solicitors. Mr. Morgan, in a letter to FRJ of December 21, 2000 states [emphasis added]:

> Re: Your Account with Davis & Company
>
> I refer to our (Jiwan/Morgan) telephone conference held earlier today during the course of which you advised that your uncle would be unable to deal with our interim bill for $95,000.00 that is presently due until January of next year. We understand, but draw to your attention the fact that by mid-January our subsequent interim bill will have become due and the total outstanding at that time will be $177,332.14. We ask that both bills be covered by the January payment.

[86] That letter was copied to “P. Albi” who did not communicate to the clients an understanding of the accounts being anything other than interim.

[87] I note as well that much of the correspondence (including the letter reproduced above) refers to the clients "account" with the solicitors – not "accounts," indicating that the clients had a running account with the solicitors, not a series of them.

[88] During the time that the negotiations for the accommodations were occurring, the solicitors considered whether the clients might have a right to have the all of the accounts reviewed at the end of the matter. On July 5, 2000, Luciana Brasil wrote a memo to file in which she noted the possibility that the accounts may be taxed at the conclusion of the proceedings.

[89] In terms of whether Aly knew of the right of a client to "tax" his lawyers' bills, I believe that Mr. Dunlop did explain to Aly, on different occasions, the availability of the right to "tax" lawyers' bills. Aly was the kind of client who insisted on full details of everything. Mr. Dunlop knew that and would have been cautious to explain everything to Aly. I also believe that Aly was not as naïve on legal matters as he attempted to portray himself – while he was a student at the time the retainer commenced, he had some experience with solicitors (albeit only these solicitors) as part of the matrimonial litigation. As well, he clearly understood economic realities.

[90] Nevertheless, on the preponderance of probabilities, I find that while Aly knew of the right to taxation, he did not understand, as relating to his business relationship with the solicitors, that in paying an unquestioned account or making the accommodations the clients would be precluded from their right to have all of the

accounts reviewed; i.e. that they were giving up a legal right to which they were entitled.

[91] I intend to deal with the first two prongs of Mr. Turriff's argument on this issue of the interim or final nature of the accounts together.

[92] Mr. Turriff's first submission is premised on the principles of equity, which he argues are of assistance to the solicitors and apply in the present case. In this regard he relies on the decision of ***Abel v. Burke*** (2000), 75 B.C.L.R. (3d) 297, 2000 B.C.C.A. 284, and specifically highlights the statement by Hall J.A. (concurring in the result) at p.305 when he said:

> The broad equitable principles that are specifically applicable to this rather unique class of contract [retainer agreements between a solicitor and his client] considerably modifies the objective theory of contract in a case like the instant case.

[93] On this basis, Mr. Turriff submits that I should give effect to the agreements reached between the solicitors and the clients regarding fees as those agreements were made in good faith with the clients. The solicitors should not be prejudiced by relying on agreements made openly and honestly in the course of the retainer. Therefore, he says the clients should be "estopped" from arguing that the agreements were not true agreements foreclosing the clients' right to review the accounts.

[94] In further support of his estoppel argument, Mr. Turriff refers to the decision in ***Amalgamated Investment & Property Co. Ltd. (in liquidation) v. Texas***

Commerce International Bank, [1981] 3 All E.R. 577 (C.A.). In that case, Lord Denning explained at p. 584:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases […]. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[95] In ***Tyo Law Corp. v. White*** (1999), 1 C.P.C. (5th) 323 (B.C.S.C.), Master Baker accepted that the principle of estoppel can apply to reviews under the ***LPA***. In that case, the solicitor commenced small claims proceedings against a former client to recover fees billed respecting two unpaid accounts. After discussions with his client, the solicitor agreed to accept a lesser sum in satisfaction of the accounts. The client then filed an appointment before the registrar for a review of the solicitor's accounts. Master Baker decided at ¶7 that the solicitor was entitled to "accord and satisfaction" in respect of the accounts. He also concluded, as an alternative basis for his finding, that the client was estopped from proceeding with a review in respect of the accounts that were the subject of the settlement between the parties.

[96] Mr. Turriff makes the further submission in the event I am unable to find that the clients are estopped (on the basis of equity) from arguing that the accounts are interim, that I ought to find that the solicitors and the clients had reached an "accord and satisfaction" in respect of all of the unpaid accounts. In this regard, he refers me to ***D. & C. Builders, Ltd. v. Rees***, [1965] All E.R. 837 (C.A.). In that case, the

parties made a bargain whereby a creditor accepted less than the amount which he was owed in settlement of an account. Lord Denning acknowledged at p.841:

> The creditor is barred from his legal rights only when it would be *inequitable* for him to insist on them. Where there has been a *true accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts on* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor to afterwards insist on the balance. But he is not bound unless there has truly been an accord between them.

[97] As I have noted, the solicitors made several fee accommodations in respect of the accounts. "Accommodation" is defined as:

> **2:** the act of accommodating: the state of being accommodated: as a: the providing of what is needed or desired for convenience; b: adaptation, adjustment; c: a reconciliation of differences: settlement […]
>
> *Miriam Webster Dictionary*, *s.v.* "accommodation," online:
>
> <http://www.m-w.com/dictionary>

[98] "Accord and satisfaction," in a legal sense is defined as:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative:
>
> ***British Russian Gazetter and Trade Outlook, Limited v. Associated Newspapers, Limited; Talbot v. Same***, [1933] 2 K.B. 616 (C.A.) at 643-4.

[99] Mr. Turriff argues that in bargaining for reduced accounts and paying those reduced amounts, the parties reached an "accord and satisfaction" in respect of the accommodated accounts. He says that in this instance both parties intended to arrange, settle or compromise a dispute between them over legal fees. Further, he

says no formal document is necessary – all that is required is an offer (a bargain made) and an acceptance (a payment following the bargain). In addition to the ***Tyo*** decision, which held that the solicitor and client had reached an "accord and satisfaction," he refers to two cases – ***Murphy v. Dunnaway*** (2001), 103 A.C.W.S. (3d) 677, 2001 B.C.S.C. 418 and ***McRudden v. Berge & Co.*** (2001), 107 A.C.W.S. (3d) 373, 2001 B.C.S.C. 978 – both of which acknowledge that the principle of "accord and satisfaction" may apply in the context of agreements between a solicitor and client.

[100] Applying these principles, Mr. Turriff argues that, where a creditor has acted on an accord to accept a lesser sum (*i.e.*, a solicitor continuing to act for the client by making fee accommodations), the debtor should not be allowed to set aside a bargain made (*i.e.* the client insisting on a review of all accounts after accommodations are made).

[101] In response to both of these arguments, Mr. Kent-Snowsell submits that while the principles in ***Amalgamated Investment*** and ***D. & C. Builders*** are good law, they are tempered by the unique nature of the relationship between solicitor and client. In this regard, Mr. Kent-Snowsell, refers to the reasons of Mackenzie J.A. in ***Abel v. Burke***, who noted at p. 301, the "special character of a contract for legal services which is governed by equitable considerations which temper the application of strict contract law."

[102] Mr. Kent-Snowsell also emphasizes that the relationship between solicitors and clients is one of "utmost good faith," relying on the decision in ***Ladner Downs v.***

Crowley. In doing so, he highlights the aforementioned comments by Southin J. in that decision wherein she held, at p. 378, that in order to enforce an agreement that deprives a client of any of his legal rights, a solicitor must establish that the agreement "precludes any suspicion of an improper attempt to benefit himself at his client's expense."

[103] The theme of "utmost good faith" can also be found in a number of other authorities referred to by Mr. Kent-Snowsell. In ***Knock v. Owen*** (1904), 35 S.C.R. 168, 24 C.L.T. 287, the Supreme Court of Canada expounded on the relationship between a solicitor and his client. In this decision, the court quoted at p.172, the following passage from ***Re Whitcombe***, 8 Beav. 140, in which the Master of the Rolls stated:

> I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in satisfaction of all demands for costs, is an agreement which may be perfectly good; but this court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right; still it exposes the conduct of the solicitor to suspicion and naturally awakens the vigilance and jealousy of this court, seeing that one party has all the knowledge, and the other is in ignorance…

[104] The court then confirmed at pp. 173-4:

> […]The relations existing between solicitor and client are peculiarly sacred. The latter has a right to receive from the former not only his best judgment and skill, but the strictest integrity and the most scrupulous good faith in dealing with his clients' rights and business. […] I adopt the language used by the Lord Chancellor in delivering the judgment of the House of Lords in ***Tyrell v. Bank of London*** [10 H.L. Cas. 26, at p. 44]:
>
> > My lords, there is no relation known to society, or the duties of which it is more incumbent upon a court of justice strictly to

> require a faithful and honest observance, than the relation between solicitor and client; * * * a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.

[105] Clearly the clients paid a number of the accounts throughout the retainer and Mr. Kent-Snowsell agrees that accommodations were made. He argues however, that those payments and accommodations were made without the client having full knowledge of the consequences intended by the solicitors – that is, that upon payment, the clients would lose their right to have the accounts reviewed if appointments for review were not filed within the time limitations set out in the ***LPA***. On that basis, he argues, it would be improper for me to estop the clients from arguing that the accounts are interim.

[106] Alternatively, he says there can be no "accord" between the parties as there was no consensus *ad idem* to the terms of the alleged bargain in that the clients did not understand that by paying the accounts or agreeing to an accommodation that the clients were giving up a legal right to have the accounts reviewed by a registrar.

[107] In ***Abel v. Burke***, Hall J.A. stated in his concurring reasons at p. 305:

> Here the trial judge found no consensus *ad idem*. Thus there was a defect going to the root of the agreement in a type of contract where a solicitor must ensure that there is not a misapprehension by the client of essential terms. […] the proper result in law is that this agreement between the solicitor and client must be found fatally defective on account of failure of the parties to agree on an important term. The broad principles that are specifically applicable to this rather unique class of contract considerably modifies the objective theory of contract in a case like the instant case […]

[108] In respect of both of these issues – estoppel and accord and satisfaction, I agree with the submissions of Mr. Kent-Snowsell. Agreements of this sort between solicitor and client are tempered by the overarching principle of the duty of utmost good faith owed by the solicitors to the clients. Here, while the solicitors did bargain with the clients in good faith, I am unable to find that the clients knew, without a doubt, that any bargain they made with the solicitors would result in the clients giving up their right to formally review the accounts. Despite Aly and Abdul both being relatively sophisticated clients, their particular knowledge on their ability to review the accounts was lacking. In my opinion, if the solicitors wanted to rely on the bargains they ought to have reduced that fact to writing and explained to the clients the specific rights they were giving up in making the bargains.

*ii. Did the accommodations represent "agreements" pursuant to s. 65 of the **LPA?***

[109] The clients' appointment in this matter seeks a review of the accounts pursuant to s.70 of the ***LPA*** which specifically provides for a review by a registrar of a lawyer's bill. A solicitor and client may make an agreement respecting payment for legal services under s. 65 of the ***LPA***. Such agreements are then reviewable by a registrar under s.68 of the ***LPA***. Because the procedure and time limits for reviews of bills (under s. 70) and examinations of agreements (under s. 68) are different, it is necessary that the appointment for review clearly set out what is sought to be reviewed – an agreement or a lawyer's bill: ***Podovennikoff v. Altman, Kahn, Zack*** (1995), 9 B.C.L.R. (3d) 332, 56 A.C.W.S. (3d) 953 (S.C., Registrar).

[110] Subsection 86(3) of the ***LPA*** provides that applications for review of an agreement between a solicitor and a client respecting fees, may only be made within three months after:

(a) the agreement was made, or

(b) the termination of the solicitor client relationship.

[111] Mr. Turriff argues that despite a finding that the accounts as a whole are interim, the accommodated accounts ought not to be reviewable in that the accommodations constitute agreements within the meaning of s. 65 of the ***LPA***. He submits that, in respect of those agreements, the clients have failed to file their appointment for review within the time limits set out in s. 68 and are therefore precluded from a review.

[112] Reviewable agreements with respect to legal fees must be written: ***Russell & DuMoulin v. City Club Development (Middlegate) Corp.*** (1996), 22 B.C.L.R. (3d) 330, 62 A.C.W.S. (3d) 176 (S.C.). But such written agreement may be found in correspondence: ***Kong v. Fan***, [1974] 3 W.W.R. 730, 45 D.L.R. (3d) 293 (S.C.) at ¶23. Although no particular form of writing is required, there must be certainty of the terms and subject matter of remuneration as well as a valid offer, acceptance, consideration.

[113] Furthermore, the principle of *contra preferentem* applies to resolve ambiguities in agreements. Specifically, the court will not “complete documentation” or “fill in the gaps” where lawyers have not properly recorded the terms of

agreements alleged with clients: ***Prodor v. Newell*** (1994), 93 B.C.L.R. (2d) 98; 47 A.C.W.S. (3d) 860 (C.A.) at ¶7.

[114] As previously stated, lawyers have an obligation to fully and fairly advise their clients about the terms of retainer agreements and their necessary results: ***Waldock v. Bissett***, *supra* at p. 398, ¶33; ***Ladner Downs v. Crowley****, supra* at p. 378. This includes the obligation to advise clients if proposed agreements will deprive the clients of legal rights they would otherwise have: ***Ladner Downs v. Crowley***, *supra,* at p.378.

[115] Agreements are enforceable against clients even if they do not obtain independent legal advice regarding the agreement, but the absence of such independent advice is a cogent circumstance against the enforcement of agreements and may be fatal: ***Waldock v. Bissett***, *supra* at p. 396; ***Commonwealth Investors Syndicate Ltd. v. Laxton***, [1991] W.W.R. 315, 74 D.L.R. (4th) 260 (B.C.C.A.), leave to appeal to S.C.C. refused, 79 D.L.R. (4th) vii.

[116] As noted, any agreement between solicitor and client must be subject to the scrutiny of determining whether the parties formed a consensus *ad idem* to the terms of the contract: ***Abel v. Burke****, supra* at p. 305.

[117] Mr. Turriff submits that the “accommodations” constitute “agreements” – he suggests that there was sufficient evidence in writing of agreements between the solicitors and the clients. He maintains that all terms were agreed to and were unambiguous. Accordingly, he says in respect of the accommodated accounts the clients erred in filing an appointment for a review of the accounts. What they should

have done, he submits, was file an appointment for a review of the agreements within the time limits set out in s. 68 of the ***LPA***. He submits that their failure to do so should not prejudice the solicitors.

[118] In my view, there is clear evidence that the accommodations were made and that they were made after discussions between the parties. In fact, the clients do not dispute that the accommodations were made. What I am unable to find is that all of the terms the solicitors seek me to find in respect of the accommodations were agreed to. As I have noted, there was no consensus as to the finality of the agreements in the sense that they would foreclose the clients' right to a review of those accounts. In my view, the clients were not made unconditionally aware of the solicitors' intention and, accordingly, I cannot find that the parties made agreements pursuant to s. 65 of the ***LPA*** that are reviewable under s. 68 of that ***Act***. In my judgment, the alleged contract between the solicitors and clients is rendered fatally defective due to the fact that I have found no consensus *ad idem* as to its essential terms.

iii. Were there "natural breaks in the proceeding?

[119] Mr. Turriff's final submission regarding the finality of the accounts requires a consideration of whether there were "natural breaks" in the retainer which, if I so find, would result in only some of the accounts being reviewable.

[120] Mr. Turriff suggests that I should infer a pattern from the accommodations that would lead me to the conclusion that those bills which were the subject of accommodations should be treated as completely self-contained bills covering the

period to which they relate as they were rendered at "natural breaks" in the proceedings. In this regard he relies on ***Davidsons v. Jones-Fenleigh*** (1980) Costs L.R. (Core Vol.) 70 (C.A.) at p. 72. In that case, the court held that it may be possible to infer from the conduct of the parties that certain accounts rendered should be treated as completely self-contained bills covering the period for which the account was rendered.

[121] In ***Davidsons***, which was decided under the ***Solicitors Act*** 1974 (U.K.), the solicitors in question were retained in connection with the defendant's matrimonial affairs not a single piece of litigation (per Eveleigh L.J. at p. 77). The court held (at p. 76) that a "natural break" might be inferred by reference to one or more particular points in time. Such determination is to be based on the particular facts of each case.

[122] In ***Architectural Institute of British Columbia v. McAlpine, Roberts & Co.*** [1982] 5 W.W.R. 470, 37 B.C.L.R. 332 (C.A.), the court noted at p. 473, that: "A periodic account, if it relates to all the professional services performed within the period and is not subject to being changed, may also be a bill."

[123] The decision in ***In re Hall & Barker*** (1878), 9 Ch. D. 538 (C.A.) noted that there may be circumstances where the solicitor's services, although nominally related to one matter, may be considered in relation to a succession of matters rather than one contract. Specifically the court noted at p. 545:

> It is not reasonable that a solicitor should engage to act on for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself. In my opinion it would be

> not only wise but an improper extension of the doctrine of entire contract to apply it to such a case as this. But, even if it were right, there must be a break somewhere…Is it to be supposed that, because a few matters are undisposed of, the solicitor is not to be paid until the final termination?

[124] In ***Re Romer*** the court held that there may be "natural breaks" in a proceeding that allow the solicitor to claim a fee. However, the court also noted that the onus is on the solicitor to establish whether there have been natural breaks, which is always a question of fact: ***Re Romer***, *supra* at p. 298.

[125] In my opinion, I am unable to conclude that the solicitors have met the burden of convincing me that there were "natural breaks" in the proceeding. They did not point me to any specific "breaks" in the matter, nor have they satisfied me that the parties were *ad idem* as to the accounts being final. Specifically, the solicitors billed the client, fairly consistently, on a monthly basis – not after having completed any particular portion of the litigation. Further, in my view, the accommodated accounts do not relate to specific matters undertaken by the solicitors, they simply represent work done within a specific time frame.

[126] For the reasons set out above, I am unable to conclude that the accommodations represent an intention on the parties to treat those accounts which were the subject of those agreements as final.

[127] Accordingly, I am unable to accede to any of Mr. Turriff's arguments that only the last three accounts be reviewed. In my view all of the accounts are reviewable under ss. 70 and 71 of the ***LPA***.

iv. Should the solicitors be able to withdraw those accommodated accounts which were replaced and reinstate the original accounts rendered?

[128] In the alternative, Mr. Turriff submits that the solicitors should then be able to withdraw the accounts wherein they made accommodations for the client and replace them with the accounts originally sent to the clients. He submits it would be unfair to allow the clients to "have it both ways," *i.e.* have the accounts be considered interim and then review those accounts based on the accommodated amounts when the solicitors intended those accommodated accounts to be final.

[129] Mr. Turriff directs me to ***Re Sara*** (31 January 1975), Vancouver X6943/74 (B.C.S.C), in which Toy J. confirmed that a registrar possesses exclusive jurisdiction to decide whether a solicitor can "withdraw" his first bill and substitute a second bill. Mr. Kent-Snowsell made no submissions on this point. I agree with Mr. Turriff's submissions that it is reasonable that the solicitors be allowed to withdraw the accommodated accounts and replace them with the original ones.

[130] The fees ultimately billed (after the accommodations were made) totalled $915,889.88. The initial fees billed, before any accommodations were made totalled $994,460.00. Therefore, the amount of fees in issue in this review and which the solicitors are seeking be upheld is the initial amount billed – less the $3,204 of "XLS" withdrawn - such that the total fees under consideration is $991,256 ($994,460 - $3,209 = $991,256).

2. Are the solicitors precluded from claiming fees?

[131] The clients submit that the solicitors are precluded from claiming fees for two reasons: first, they say that the solicitors withdrew from the retainer without cause; and, second, they maintain that this review is based on the equitable principles of *quantum meruit* and, as the solicitors did not come to this Court with "clean hands," they should not be able to rely on this equitable remedy and should not receive any fees for their work as counsel.

i. Did the solicitors have cause to withdraw from the retainer?

[132] The law stipulates that a solicitor who terminates an entire contract of retainer without justification is not entitled to any fees: ***Ladner Downs v. Crowley***, *supra* at p. 375; ***Pierce, Van Loon v. Edwards***, [1998] B.C.J. No. 2212 (S.C.) at ¶19 (Q.L.); ***McGarvey v. MacKinnon*** (2001), 2 C.P.C. (5th) 287, 2001 B.C.S.C. 88, at ¶38.

[133] The clients maintain that this was an entire retainer and the solicitors had no cause to withdraw from that retainer. In withdrawing, the clients say, the solicitors deprived themselves of the right to claim any fees from the client. In turn, the solicitors maintain that they had cause to withdraw; specifically a clear allegation of negligence by the clients. In response, the clients argue that the solicitors have pointed to a spurious and contrived allegation of negligence as a way of absolving them of their duty to continue to act for the client and they are therefore not entitled to any fees whatsoever.

[134] The question of whether the solicitors did in fact have legitimate cause to withdraw is answered in the series of correspondence directed from Aly to Ms Brown

in which Aly queried whether the solicitors had somehow "screwed up" in respect of the Settlement Agreement by failing to ensure that the promissory notes granted by the Dallo Group and the Hoeggs as part of the settlement of the litigation were payable on demand.

[135] The series of correspondence began with a handwritten note on a copy of a fax dated July 2, 2001 sent by FRJ to Mr. Ray Schachter (then solicitor for Niele Jiwan), copied to Ms. Brown. The handwritten note on the fax indicates it is "URGENT!" and is followed by a note which reads:

> Dear Brenda,
>
> I need to speak to you ASAP. I hope we have not screwed up in some way ~~to allow~~ in the Settlement Agreement. I cannot believe that Schacter is right & HIS notes are not payable but OUR [sic] are!
>
> Ajiwan

[136] Next is an e-mail from Aly to Ms. Brown of July 5, 2001 which says, in part:

> I hope there wasn't a screw up on our side in the settlement agreement that would allow Schachetr [sic] to close without paying his notes. Our note is due on closing (otherwise we don't get the funds distributed).

[137] Following receipt of this second email, Ms Brown sent a letter to Mr. Schachter confirming that the Settlement Agreement did not contemplate waiting until the various properties were sold before payment of the promissory notes, although she advised Aly that her recollection did not accord with his in that she believed Mr. Schachter had noted some restrictions during the settlement conference as to when the promissory notes were payable.

[138] Aly then sent a further email to Ms. Brown on July 12, 2001 in which he wrote:

> Between you and I, my concerns are as follows:
>
> 1. I want the sale to proceed – I have always wanted this as you know. i [sic] also want the notes in our hands so that we can demand them at any time.
>
> 2. there was no requirement in the settlement agreement that the notes be held by anyone under any condition(s).
>
> 3. the settlement agreement requires “immediate” distribution to frj [sic].
>
> 4. it is now 4 months since the setltment [sic] agreement was excuted [sic] and we still do not have the notes issue resolved.
>
> 5. this is a royal screw up.
>
> […]

[139] Ms. Brown then terminated the retainer with the client on July 13, 2002 when she sent an e-mail to Aly in which she wrote, in part:

> When allegations of negligence are made against the firm, we must report to our insurer and cannot continue to act on behalf of the client. I have reported this matter. We cannot continue to act for you, but will assist your new counsel in any way we can.

[140] The clients now argue that the solicitors were looking for an excuse to terminate the retainer and used the allegation of negligence as an excuse. They base this on a number of factors.

[141] First, the fact that a ‘Notice of Intention to Act in Person’ was not prepared contemporaneously with the withdrawal, but one month in advance. This, they say is indicative of the solicitors’ intention to cease acting prior to any allegation or suggestion of negligence by the clients.

[142] Second, they maintain that the solicitors had "screwed up" before and had not withdrawn from representing the clients. In particular, they referred to three previous incidents:

(a) In the early part of the retainer Aly had a "crisis of confidence" with Mr. Dunlop. He did not believe that he had the necessary skills to understand all of the economics of the issues and the misappropriations. After discussions with Mr. Albi it was agreed that Mr. Dunlop would continue to be lead counsel, but that Mr. Albi would step in, as needed, to assist with the economics.

(b) In December 1998, FRJ sent a notice to the other partners dissolving the partnership. In his letter, Aly referred to a specific section of the ***Partnership Act*** based on advice received by him from Mr. Swift, a lawyer with the solicitors. That section number was incorrect. FRJ, based on revised information, then sent a further letter correcting the section number.

(c) In October 1999, Aly suggested to the solicitors that they garnish some or all of the amounts claimed from the Dallo Group. Ms Brown advised that she did not believe this was an appropriate course of action. Aly refused to accept Ms Brown's advice on the matter and several conversations took place about it. Eventually, Aly agreed not to pursue garnishment.

[143] Third, they argue that the solicitors were aware that the clients had engaged Mr. Andison to act for them in respect of the conveyancing of the properties and they therefore had no desire to continue to act for the clients.

[144] Alternatively, Mr. Kent-Snowsell argues that even if the solicitors had cause to withdraw, they ought to have provided notice to the client of their intention to withdraw and in not doing so they failed in their duty to their client.

[145] I am unable to agree with the clients' submissions on this point. For the reasons that follow I find that the solicitors had cause to withdraw from the retainer and that the clients were not left without counsel following that withdrawal.

[146] First, in my view, the determination of whether the client was alleging negligence is subjective and rests on whether the specific lawyer to whom the allegation was made honestly believed that negligence was being alleged. Ms Brown testified that she believed that Aly, in suggesting there was a “screw up”, even a “royal screw up”, was alleging negligence. I have no reason to find that Ms Brown did not honestly believe that Aly was alleging some sort of carelessness or imprudence on her behalf which was tantamount to negligence. Regardless of any previous issues between the solicitors and the clients, Ms Brown personally felt that an allegation of negligence was made. That, in my view, was sufficient grounds for the solicitors to withdraw.

[147] Second, the majority of cases wherein it has been held that a solicitor is prevented from claiming fees when he withdraws without cause are based on contingency fee contracts between a solicitor and client. In my view, those agreements are a special category of agreements. They are used when a person may have no other recourse to the courts absent an agreement with counsel to act on the basis of a contingent fee where the solicitor has no right to a fee unless he/she is successful in prosecuting a client’s claim. Here, the clients had recourse to other counsel (and in fact had retained other counsel to act on their behalf to conclude the property transfers). They were not left “high and dry” and without counsel.

[148] Third, it is my view that, just as the law will protect a solicitor whose client discharges him on the eve of trial and attempts to avoid paying him a fee, (***McQuarrie Hunter v. Foote*** (1982), 41 B.C.L.R. 123, 143 D.L.R. (3d) 354 (C.A.) at

¶148), the law should also protect a solicitor who withdraws from a substantially completed retainer from a client even if there is no cause to withdraw.

[149] Finally, the clients here had advised the solicitors that they retained Mr. Andison to conclude the conveyancing of the various properties. Ms Brown, in her email to Aly confirmed that she was prepared to assist any new counsel in whatever way possible. Mr. Andison was able to keep the deal together. I reiterate that the clients were not left "high and dry" with no recourse following the solicitors' withdrawal. In fact, from May through to July, Aly had been acting for the clients in person. He had instructed the solicitors to do no further work, except on his instructions. He personally wrote to Mr. Schachter about the issue of the promissory notes. He only asked Ms Brown to assist in confirming his recollection of the terms of the Settlement Agreement.

ii. Does "quantum meruit" preclude the solicitors from claiming fees?

[150] There was no written retainer agreement between the solicitors and the clients in respect of this matter. Accordingly, I must determine the fees properly chargeable on the basis of *quantum meruit*. *Quantum meruit* is essentially defined as "the reasonable value of services," see: ***Black's Law Dictionary***, 2nd ed., *s.v.* "*quantum meruit*."

[151] Mr. Kent-Snowsell argues that *quantum meruit* is an equitable remedy and directs me to several Canadian authorities which confirm that it is in fact an equitable remedy in certain instances. As a result, he argues that the solicitors must come to this hearing with "clean hands" in order to claim any fees from the clients on the

basis of *quantum meruit*. He submits that the solicitors acted in "bad faith" and cites several examples of such behaviour such as:

(a) not advising the clients that if an account were not questioned it would be deemed final and the clients would lose their right of review;

(b) billing for non-existent people ("XLS" and "WP");

(c) increasing billers hourly rates without advising the client of such increases; and,

(d) showing a lack of attention to detail in testimony given in affidavits and *viva voce* evidence in this proceeding.

[152] In turn, Mr. Turriff submits that *quantum meruit* is not an equitable remedy and actually has no application in this matter. He refers me to excerpts from several texts on point including: Cheshire, Fifoot and Furmston's, *Law of Contract*, 14th ed. (London: Butterworths, 2001) at p. 737, and *Chitty on Contracts*, 24th ed. (London: Sweet & Maxwell, 1977) at p. 906; both of which refer to *quantum meruit* as a contractual remedy.

[153] G.H.L Fridman's text *Restitution*, 2nd ed. (Ontario: Carswell, 1992) at pp. 285-287 reviews the principle of *quantum meruit*. I find the following passages from the author's analysis to be useful in the present case:

> (i) *Quantum Meruit*.
>
> In Canada, where the law of restitution has undergone greater development than in England, the courts have accepted the idea that, in certain circumstances, one who works or provides services for another to that other's benefit may obtain compensation from that other in an action to recover the reasonable value of such work or services. A *quantum meruit* action of this kind is quasi-contractual or restitutionary in character…

> [The author then reviews the English situation.]
>
> The position in Canada is very different. Since the decision of the Supreme Court of Canada in ***Deglman v. Guaranty Trust Co. of Canada***, [1954] S.C.R. 725] *quantum meruit* for work or services performed by one person for another in the absence of a valid, enforceable contract between them has been recognised and actions have been allowed in a variety of situations. As expressed in a later case, *quantum meruit* is a separate and distinct cause of action from either contract or tort. It is founded upon an obligation imposed by law when there would otherwise be an unjust enrichment of one party at the expense of the other. A series of decisions of the Supreme Court of Canada ultimately laid down the general principles governing recovery for unjust enrichment by an action for restitution in such terms that actions of this kind may be successful, whatever the factual situation, as long as the elements of such action can be established by the plaintiff, *viz*., the unjust enrichment of one party, a corresponding deprivation suffered by the plaintiff, and the absence of a juridical reason justifying such enrichment.

[154] Also useful is Fridman's, *The Law of Contract*, 4th ed. (Ontario: Carswell, 1999) at p. 12, in which Fridman confirms that a contract stems from an agreement between parties. Restitution, on the other hand, stems from the idea of unjust enrichment at another's expense. The learned author then states [emphasis added]:

> A complication or confusion arises from the fact that there is a contractual *quantum meruit*, as well as a restitutionary *quantum meruit*. <u>In some circumstances, where there is a contract between the parties but they have not agreed upon a price for goods or services to be delivered or rendered by one party to the other, the court must award money to the unpaid party on the basis of a reasonable amount for the goods or services. This is a liability that arises from a truly contractual relationship, and the situation between the parties is founded upon the concept of contract as it has been expounded earlier.</u> Where no contract exists between the parties, or such contract as there is cannot be recognized or enforced, for example, because it does not comply with the provisions of the Statute of Frauds, the courts have allowed a deserving party to recover something on a *quantum meruit* basis, which is not the same as what might have been recovered if there had been a valid, enforceable contract upon which the successful party could have sued. The distinction between these cases, as between

> contract and quasi-contract, lies in the idea that there has to be agreement, between the parties, and such agreement must be in the form of an enforceable contract, to which the law will give effect.

[155] In my opinion, *quantum meruit* is a hybrid remedy. It is an equitable remedy in certain instances and a contractual remedy in others.

[156] Clearly there was a contract of retainer here, despite there being nothing in writing. The clients contracted with the solicitors to undertake the litigation for them and the solicitors agreed to act for them. What is missing from the contract is the terms of the remuneration for the work to be done. That solicitors and clients often enter into such contracts where no specific agreement is made with respect to remuneration is readily apparent by the number of cases that come before the registrar to fix appropriate remuneration. In my opinion, in this instance, it is the contractual remedy of *quantum meruit* that applies – that which requires that I determine the missing piece of the contract: what are the reasonable fees payable by the clients to the solicitors for their work during the retainer?

[157] Even if I am incorrect in my decision that, here, *quantum meruit* is a contractual rather than an equitable remedy, I do not agree with Mr. Kent-Snowsell's argument that the solicitors came to this hearing with "unclean hands" so as to preclude the equitable application of *quantum meruit*. I reviewed each of the examples of bad faith provided by Mr. Kent-Snowsell and I am not persuaded that any of them demonstrate bad faith on the part of the solicitors such that they ought to be deprived of any fees in this matter.

3. What effect, if any, does the February 2000 estimate have on the amount of the fees payable?

[158] As I have noted, the clients were concerned with the amount of the legal fees throughout the retainer. In early 2000, Aly suggested to Mr. Albi that fees be based on performance. He said: "the incentives will be in the right directions – whether it be achieving a settlement (with all parties) or litigating". He then suggested that the solicitors agree to be paid a mutually agreed upon percentage of any outcome – either a judgment or settlement.

[159] Mr. Albi was not prepared to agree. In his response to Aly he noted the following:

> It is my view that this matter is not conducive to any type of contingency arrangement. There is a history of irrational response on the other side and, quite frankly, it is impossible to estimate fees with a satisfactory degree of confidence.
>
> If you feel that you must have a fee arrangement based on contingency, you should seek alternate counsel. If you have concerns about the manner in which this matter is being handled you should also seek an opinion from alternate counsel. Your continuing comments on the subject of garnishing orders is one obvious area, as it is clear that you are not accepting our advice.

[160] By fax to Mr. Albi dated January 28, 2000, Aly responded as follows:

> Further to our last discussion, I wanted to communicate to you what I have been thinking about in relation to estimating future fees.
>
> You said to me (and also you indicated in your fax to me) that it is impossible to predict future fees because you can't predict what actions (frivolous or otherwise) that the opposition is going to take in response to our actions (or otherwise) and, therefore, cause us to expend money. That is true. You also indicated to me that this is one reason why you will not agree to a contingency-based fee arrangement. But, what I am asking you to do (and what I was referring to in my fax/proposal to you) is to estimate what **our actions**

> are going to cost in terms of hours billed so that I can at least try to evaluate what course to take – i.e. summary judgement, etc… By this I want to focus on fees for what **we initiate** in terms of litigation. Perhaps this way we can separate what they force us to do and what we initiate.

[161] On February 22, 2000 Mr. Dunlop prepared a memorandum to file (the "February 2000 Estimate") in which he estimated that a total of 59 days of work would be required up to trial. That estimate included: (1) 12 days of preparation for, and attendance at, examinations for discovery of the Dallo Group and the Hoeggs; (2) six court applications or case management conferences each with a day's attendance and a day's preparation; and, (3) 21 days of trial and two weeks (14 days) of trial preparation. Mr. Dunlop then estimated he would spend ten hours a day at ($300 per hour) for 59 days on the litigation, totalling fees of $177,000. He estimated that Ms Brasil would spend a total of 350 hours on the matters at $150 per hour, totalling $52,000. The "Total Fees Estimate" was therefore set at $229,000. The memorandum also contained the following notes:

> **TOTAL FEES ESTIMATE: $229,000**
>
> **NOTES:**
>
> The above estimate of fees cannot be read without taking into account the following:
>
> 1. This estimate of fees only takes into account lawyers' time, and the fees will likely be increased if it becomes necessary to involve legal assistants and students. We estimate that some additional legal research will be required as the trial approaches.
>
> 2. As with all litigation matters, the fees ultimately incurred may be significantly lower in the event that some or all of the issues are resolved or simplified closer to trial; conversely, the fees incurred may also be significantly higher should the court applications be complex or hotly contested.

> 3. The estimate of time required for trial preparation is quite conservative. The actual time spent in trial preparation may double depending on the [sic] what issues are being tried, and what evidence is put forward by the parties.

[162] At this hearing, Aly testified that the estimate given by Mr. Dunlop was an "omnibus" estimate – meant to predict all legal fees expected from the date of the estimate through to trial, not simply an estimate for actions initiated by the clients. On the contrary, Mr. Dunlop and Mr. Albi testified that it was simply impossible to predict what the Dallo Group or the Hoeggs might do as their responses to the litigation had, to that time, been out of proportion with what one might expect from a reasonable and rational opponent. According to them, the estimate was simply an indication of what fees might be expected for actions undertaken by them on the clients' behalf.

[163] Generally speaking, a fee estimate is not "something written in sand which can be washed away by the shifting tides of litigation:" ***Mura v. Archer Daniels Midland Co.*** (2003), 18 B.C.L.R. (4th) 194, 2003 BCSC 1164 at ¶8.

[164] That being said, estimates are also not guarantees or warranties that the work will be performed for the amount specified: ***Price v. Roberts & Muir***, [1988] 1 W.W.R. 689, 19 B.C.L.R. (2d) 375 (C.A.). In that case, the court also held at ¶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.

[165] Was the February 2000 estimate then an “estimate” by which the solicitors ought to be bound?

[166] Throughout the matter, Mr. Kent-Snowsell refers to the February 22 memo to file as an “estimate.” Mr. Turriff, on the other hand, calls it a “prognostication.” Aly’s version of the matter – that the estimate was an “omnibus” estimate was not put to either Mr. Albi or Mr. Dunlop in cross-examination.

[167] Mr. Kent-Snowsell argues that the document is clear on its face – it says that it is an “estimate” and it does not contain any limitation on its scope. Specifically, it does not say that it is limited to the actions undertaken by the clients. On that basis, and on the basis of Aly’s testimony and certain documentary evidence, he submits I should find that the February 2000 estimate was an estimate by which the solicitors ought to be bound.

[168] In response, the solicitors first argue that the estimate was not a true estimate; rather it was a “prognostication” of what fees might be expected for the work done in respect of actions initiated by the clients. Second, they argue that Aly’s testimony should not be believed; and, third, that the documentary evidence favours the solicitors’ version of events.

[169] In respect of the documentary evidence, Mr. Kent-Snowsell refers to a fax sent by Aly to Messrs. Dunlop and Albi on January 11, 2001 in which Aly wrote in part:

> My other comments to you yesterday surrounded the previous estimate of fees you provided me early last year that indicated total

> costs of $250,000 to go to the end of trial. The billings for the two months alone are nearly $190,000. While I understand that this was just an estimate and that you could not be precise in knowing what the other party would do between then and now, I am still frustrated that it was not more clearly thought out. Certainly their previous irrational actions were known to us at the time.

[170] Mr. Turriff, on the other hand, refers to two pieces of correspondence – a fax from Aly to Mr. Albi of January 14, 2001 and one from Mr. Dunlop to Aly of January 29, 2001.

[171] In the January 14 fax, Aly, in remarking on the large amount of fees accumulated in September through December 2000, notes Mr. Albi's advice that much of the work during that period related to two collateral issues:

> (1) an application by the Dallo Group to remove the CPLs placed against title to Dallo's personal property by Aly, Abdul and FRJ as plaintiffs in the various litigation; and
>
> (2) the Hoeggs' petition for dissolution of the partnership and appointment of a receiver.

He conceded that the CPL issue could be "collateral," but suggested that the Hoeggs' petition was part of the litigation, being a series of disputes between the partners, and inferred that the work in connection with that petition ought to have been included in the "estimate."

[172] In the January 29 letter to Aly, Mr. Dunlop wrote in part:

> Your letters refer to an estimate of $250,000.00 fees provided to you early last year. At that time you asked us to estimate the legal costs required to prove your claims if able to proceed on only the strongest claims in a cost efficient manner. You and I discussed the difficulty involved in providing this estimate given the extensive number of issues involved in your claims, the position of the defendants and the cross claims.

> I told you that assuming a reasonable defence, it may be possible to limit your legal expenses to approximately $250,000.00. Contrary to a statement in your January 14, 2001 letter, it has always been fundamental to our advice that this case is an economic risk, particularly with respect to the Hoegg's. However, you have told us that if [sic] proceeding to trial would be worth it to you for various reasons assuming you could obtain a damage and cost award of between $300,000.00 and $600,000.00.
>
> As you have acknowledged, our estimate of $250,000.00 was not put forward with any kind of guarantee that it could be achieved or that we could control the process…

[173] Mr. Dunlop then confirmed that, at the time the estimate was given, it was not anticipated that the Dallo Group would launch an "all out offensive." Nor was it anticipated that, in the Fall of 2000, the Hoeggs would file their petition or that the Dallo Group would bring an application to remove the CPLs.

[174] In my view, in addition to reviewing collateral documentation and considering the parties' testimony, it is most important to look at the "estimate" itself. The document clearly notes that it is an "estimate." It does, however, contain a number of provisos or contingencies that might affect the amount of fees expected.

[175] I am satisfied, on the preponderance of the evidence, that the "estimate" was not an "omnibus" estimate for all matters in the litigation and by which the solicitors may be bound. I do not believe Aly's testimony that Mr. Dunlop told him that the "estimate" related to all matters. The evidence simply does not support that view. I believe Mr. Dunlop' testimony that he advised the client of the difficulties of predicting legal fees, particularly in respect of these opponents. The estimate was made after those conversations and after Aly requested an estimate for those items the client might initiate. As well, it was limited to matters that might have been

initiated by the client in that it does not refer to any actions that might be taken by the other parties such as “continued examinations for discovery” of any of the clients or applications by the Dallo Group such as the removal of the CPLs or the Hoeggs’ application to wind-up the partnership. It does not specifically mention costs for settlement negotiations. It also notes that, “fees incurred may also be significantly higher should the court applications be complex or hotly contested”, which this litigation clearly was.

4. What is the reasonable amount of remuneration that the solicitors should be paid?

[176] Having decided that the solicitors are entitled to be paid fees and are not bound by the February 2000 estimate, I must now decide what those fees ought to be. As I have noted above, absent a written agreement setting out the basis on which fees may be charged, I must determine the fees on the basis of *quantum meruit*. The *quantum meruit* factors applicable to a review of this nature have been codified in s. 71(4) of the ***LPA***, which 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.

[177] The phrase "all of the circumstances" in section 71(4) has been held to mean "all factors essential to justice and fair play," see: ***Diligenti v. McAlpine***, [1978] 1 A.C.W.S. 55, 9 B.C.L.R. 153 (C.A.) at ¶8; ***Yule v. Saskatoon (City)*** (1955), 1 D.L.R. (2d) 540, 17 W.W.R. 296 (Sask. C.A.) at ¶8. I am therefore not limited to the factors set out in s. 71(4) as there may be other factors to consider in determining the appropriate fees.

i. The complexity, difficulty and novelty of the issues

[178] Mr. Turriff emphasizes that the parties were involved in a very complex piece of civil litigation, which was further complicated by the actions of the other parties. On the other hand, Mr. Kent-Snowsell submits that the matter was not in the least complicated. He says most of the preliminary work was done by Mr. Winkler, the forensic accountant hired by Rashida in the matrimonial proceedings, and then bolstered by the work done by Mr. MacKay who was appointed to do a forensic accounting pursuant to Tysoe J.'s order of April 1, 1996. Specifically, Mr. Kent-Snowsell says that the "estimates of damages" prepared during the litigation in the amounts of $1,832,193.01 (April 1998) and $2,247,966.46 (June 1999) were based on Mr. MacKay's report. They contained page references to the report wherein Mr. MacKay had documented each of the misappropriations. Therefore proving the damages would be quite a simple task. It was, he submits, not necessary to expend

the time and resources used to bring about a final and "disastrous" result for the clients.

[179] With respect to this factor, Mr. Affleck, who testified as to the reasonableness of the fees incurred, stated in his expert letter of opinion:

> There can be no doubt that the several proceedings brought by Davis on behalf of the Jiwan Brothers and FRJ raised difficult and complex issues of fact and law. However, my review of the materials which I have been provided leaves me to believe that, although difficult and complex, the issues were not beyond the range of difficulty commonly encountered by experienced counsel involved in commercial litigation in British Columbia. In my opinion, although difficult and complex and although apparently vigorously defended (a not unusual phenomenon), the factors of complexity and difficulty ought not to be given much weight in determining what is a fair and reasonable fee. I have no reason to believe the issues in the litigation raised novel issues within the jurisdiction.

[180] In my view, the proceedings were complicated as is all litigation which, almost always, is hard fought and difficult, as it was here. In my view, this matter was of more than average complexity. The documents were numerous. The applications were, for the most part, hotly contested. There were no agreements on any matters between the parties. Eight different actions were commenced or defended during the retainer. The opposing parties were difficult and obstreperous. Aly, at one time described both his cousin Niele and his counsel, Mr. Veinotte, as "insane". The Hoeggs vigorously defended the allegations against them. Both the Dallo Group and the Hoeggs were reluctant to pay any monies to the clients for the actions taken against them. In the initial stages of the litigation, Fateh was also uncooperative.

[181] In addition, it is my opinion that the solicitors' tasks were further complicated by the very active role played by Aly. He reviewed much of the correspondence to

be sent. He made suggestions on letters and wrote several pieces of correspondence which he instructed the solicitors to send. He was completely immersed in the litigation. He spent hours of time in the solicitors' offices working hand in hand with them. He instructed the solicitors to "squeeze them [the other parties] like a lemon" and to proceed with "full steam" litigation on several occasions. Almost every piece of correspondence sent by him to the solicitors was marked "urgent" in some way.

[182] In turn, the solicitors jumped to his every request and were no less enthusiastic and aggressive than Aly himself. Ms Brown described this litigation as the biggest she had ever been involved in and Aly as unlike any other client she had ever seen – intelligent, well-spoken, very committed to the litigation with a great facility for accumulating information. She recalled that he spent hours going through the partnership records and was very keen. She also confirmed that he was very involved in discussing and developing strategies in the litigation. The solicitors however did not warn or discuss with Aly the financial consequences of his active involvement.

ii. Skill, specialized knowledge and responsibility required of the lawyer

[183] Mr. Turriff submits that the solicitors exhibited a high degree of skill and specialised knowledge and undertook a large responsibility.

[184] In respect of this factor, Mr. Affleck stated:

> Again I have no doubt that the lawyers at Davis demonstrated a considerable degree of skill. However, I do not detect that the skill

> displayed went beyond the ordinary for senior, experienced and able counsel which several of those involved were.
>
> So far as specialized knowledge is concerned I believe the issue involved fell within the type of issues commonly encountered by experienced counsel involved in commercial litigation in this city.
>
> As with all such litigation involving substantial sums of money counsel take on a heavy responsibility.
>
> Again it is my opinion that the factors of skill, specialized knowledge and responsibility should not be given anything more than the usual weight to determine what is a reasonable fee.

[185] Mr. Kent-Snowsell, on the other hand, suggests that the solicitors did not exercise the necessary and requisite skill in prosecuting the clients' various claims to justify such "exorbitant fees."

[186] Other than the suggestion that the solicitors "screwed up" in respect of the settlement agreement and complaining about the fees charged, the clients were generally satisfied (and even pleased) with the work done by the solicitors. At various times during the retainer, each of Aly, Abdul and Uncle Amin Juma made favourable comments about the solicitors. Mr. Kent-Snowsell says that they were mistaken in their compliments as they did not, at the time they were made, have full knowledge of the final results of the matter and the funds that would be required to bring about a final resolution of the matter.

[187] With the benefit of hindsight and having had the opportunity in the past four to five years to completely replay ever aspect of the litigation as well as what could have or should have happened, the clients are now saying that the solicitors failed in discharging their duties to them. It is very easy to be critical with the benefit of hindsight.

[188] A lawyer's role is to present the case, to the best of his ability, in the manner he believes will be the most persuasive for the client and based on instructions received by him from his client, having advised the client of the risks and benefits of decisions taken along the way. In doing so, counsel bring skills and expertise to the table and must exercise judgment to determine what evidence to tender in favour of the clients' case, the extent and manner in which the opponents' case ought to be attacked and the emphasis to be given to particular facts and propositions of law. A registrar, conducting a review under the ***LPA***, should be cautious about reducing a lawyer's bill on the basis that some other lawyer might have conducted the case somewhat differently perhaps with different results: ***D. Brent Adair Law Personal Corp. v. Warren***, [1996] B.C.J. No. 2818 (S.C.) at ¶22 (Q.L.).

[189] Nevertheless, it is still incumbent upon me to review the conduct of this case and consider the skill set brought to prosecution of the litigation by these counsel. In fact, it is required of me under the ***LPA***. In this hearing, I heard numerous days of evidence and reviewed copious documents, most with a view to understanding how the case was conducted and with what skill level.

[190] The clients were critical of a number of things in the solicitors' conduct of the case. Specifically they made the following allegations with respect to the solicitors' conduct:

- They were generally inefficient in the prosecution of the various claims.
- They should not have referred the matter to Mr. Dunlop who had little experience in matters involving misappropriation, fraud,

derivative and oppression actions and the like, nor with lengthy trials.

- They failed to maintain an accurate record of communications or meetings with clients and did not send reporting letters to the client at any stage of the proceedings noting decisions taken or advice given.

- They did not advise the clients, in response to the various offensives being mounted by the opposing parties, that proceeding as instructed would drive the costs up and make the litigation uneconomic.

- They sought to protect their own interests, to the clients' detriment, in electing to seek the clients' legal fees as costs, rather than liquidated damages, so that their accounts would not be scrutinised.

- They wrongly suggested that the clients oppose the Hoeggs' application to appoint a receiver for the partnership, specifically on the basis of the expected costs of that receivership which were ultimately not accepted by the court.

- They failed to consider the tax consequences to FRJ of the settlement reached, particularly relating to balancing the deficiencies in the partners' capital accounts.

- They failed to advise the clients of the fact that the settlement agreement did not specifically provide for recompense for the costs expended by the clients on the litigation, including significant disbursements.

- They did not assist the client in securing financing to purchase the Cedar Park property in the face of the zoning problem.

[191] In his testimony, Aly denied receiving appropriate advice from the solicitors. He said that it was not until the meeting of January 10, 2001 with Messrs. Albi and Dunlop that he was told that the litigation was uneconomic, that only certain of the claims were easily proved and that the clients ought to settle at all costs. He also testified that he believed throughout that the clients would recover their legal costs and disbursements as part of their claims in the litigation. He said that the

"Summaries of Damages" specifically included those costs and disbursements and that he relied on those in making decisions as to how to proceed against his opponents. Abdul's testimony basically agreed with Aly's.

[192] In my view, while I do not believe that the clients (particularly Aly) intended to be deliberately deceitful, I found the evidence of the solicitors generally more compelling in this review and, specifically, in respect of the matters of the advice given to the clients. Considering Aly's high level of sophistication and involvement, which I have previously discussed, I am of the view that now, with the benefit of hindsight and, frankly, having had a significant length of time to dwell on matters, Aly, and Abdul to some lesser extent, have each reconstructed the facts such that in their version, all things favour their view of matters.

[193] That does not mean, however, that the solicitors were untarnished in this matter. I was very concerned in this hearing that the solicitors were not able to provide me with any reporting letters to the clients confirming their advice with respect to such things as the economics of the litigation, what the clients might reasonably be expected to achieve (as damages and costs) from the lawsuits, what their overall theory of the litigation was, or any other matter specifically related to the litigation. Nor were there any notes to file made by Mr. Dunlop (Ms Brasil made some) after discussion with the clients or after team meetings outlining the discussions, advice given, instructions taken and decisions made. There was innumerable correspondence between counsel. There was also a plethora of letters and faxes between the solicitors and the clients relating to fees but very, very little between the solicitors and the clients about the advice being given or the choices

made, other than what was contained in the correspondence addressing fees. Mr. Dunlop and Ms Brown testified that they discussed strategy with Aly on an almost daily basis. Mr. Dunlop said he did not feel any need to put these things in writing as Aly was well aware (as he was so immersed in everything) of what was going on in the file. In particular, he did not specify what the clients might expect and what decisions (strategic and otherwise) were being made from time to time.

[194] In my opinion, it is incumbent on solicitors, particularly in circumstances such as these, to record, in writing, their advice to clients about matters such as the economies of litigation and expected results. Had these things been recorded in writing, I expect this hearing might not have been necessary.

[195] Mr. Dunlop, at the time he started the file, had been a practicing lawyer for about 15 years. Most of his experience was in the labour law area, but he testified that he had experience in corporate matters. I was impressed by his general demeanour and presentation during his testimony. There may have been counsel with more experience at the firm but I believe that he had the basic skill set to handle this matter effectively for the clients.

[196] As for the suggestion that the solicitors were protecting themselves rather than their clients in electing to seek the clients' legal fees as costs, this is not tenable. To allow the opposing parties access to the accounts and records of the solicitors would have been a huge error. Mr. Schachter, then counsel for the Dallo Group, was pressing the solicitors to release documents relating to costs and had prepared and served a motion seeking such documents. Had the motion proceeded

and been successful, all of the clients' strategy in the litigation would have been laid open for scrutiny by their opponents. Undoubtedly this would not have been appropriate in an on-going and hard fought litigation matter.

[197] It is my view that, at the time the settlement was reached, Aly would have understood that the numbers were "omnibus" numbers and represented the full amount that would be paid to the clients. He would have understood that the amounts encompassed all costs. He and Mr. Dunlop had, on several occasions, discussed the issue of costs so he would have known what was being given up. The clients took what they were offered and the amounts paid were within the range of the "hard claims" (those easily proved) as described in Mr. MacKay's report. He also would have been clear on the tax consequences. As is disclosed in the pre-bill to the last account, prior to the settlement meeting, Aly reviewed the tax consequences of the proposed settlement with Mr. Lailey, a tax lawyer at the firm.

[198] Finally, in respect of the complaint that the solicitors did not assist the client in arranging financing so that they could proceed with their offer to purchase Cedar Park, in my view it was not incumbent on the solicitors to do this. It was up to the clients. The solicitors might have directed the clients to someone who might be able to assist, but it was not part of their retainer.

[199] All in all, I do believe that, generally, the solicitors exhibited an appropriate skill level in discharging their retainer.

iii. The lawyer's character and standing in the profession

[200] There was no evidence before me to suggest that any of the lawyers who worked on the clients' matters are anything other than members in good standing of the Bar of the Province of British Columbia.

iv. The amount involved

[201] In his affidavit sworn September 30, 2002, Mr. Albi stated at ¶4 [emphasis added]:

> From the fall of 1995 until the first half of 2001, a team from Davis & Company (headed, under my general supervision, by Scott Dunlop, an experienced commercial counsel), acted for Aly and Abdul and for FRJ in a later set of very hard-fought and extremely complex commercial proceedings which involved amounts in the millions of dollars and multiple parties, […]

[202] Mr. Dunlop said that the partnership assets consisted of very valuable revenue-generating residential apartment complexes, of which FRJ was a one-third owner. He deposed that he had advised Aly that if the clients were successful at trial they could expect to recover somewhere between $600,000 and $1,000,000, including costs.

[203] Aly testified that, in making decisions to go forward in the litigation, he understood the range of damages to be those included in the summaries of damages prepared in 1998 (and sent to Nairobi) in the amount of $1,832,193.01 and in 1999 (as later updated) in the amount of $2,247,966.46. As far as the properties, he testified that FRJ's one-third share was not worth as much as the solicitors say, as equalisation of the capital accounts was required and, in the end, much was lost to tax on sale. Aly also noted that, at all times, the clients had the right to purchase

the others' interests in the partnership at fair market value and that any increase in the value of the partnership's assets was not due to anything done by the solicitors. Rather, it resulted from Aly's management of the assets during the litigation and general increases in the real estate market.

[204] Nevertheless, I accept the position of the solicitors that there was a significant amount at stake in the litigation.

v. Time reasonably spent

[205] On this point, I am convinced by the submissions of Mr. Kent-Snowsell that the time expended and billed by the solicitors was excessive and inappropriate.

[206] Much of Mr. Kent-Snowsell's submissions were focused on this factor. Broadly speaking, he argues that time was used inefficiently by members of the firm. Specifically, he points to the following circumstances in which the solicitors inappropriately charged the clients:

- The solicitors charged for secretarial or clerical tasks. For example, in some instances lawyers or legal assistants typed their own correspondence and charged the clients their time for doing so. In addition, more than once, articled students or lawyers conducted searches or delivered documents and charged the client their hourly rates for doing so.
- Excessive time was spent in conferences between team members, each of whose time spent in those conferences was billed to the clients.
- The clients were billed for research in areas that senior counsel (such as Mr. Dunlop) should have been knowledgeable.
- The solicitors did not advise Aly that his immersion in the file and his review and commentary was unnecessary and increased the costs substantially.

- The solicitors should not have advised the clients to resist the Hoeggs' receivership application, especially after Aly suggested they consent.
- Mr. Swift provided Aly the incorrect section for dissolution of the partnership under the ***Partnership Act*** and then billed for the time to provide the correct section number.
- Time was sometimes "over-recorded." For example, on more than one occasion, Ms Brasil billed 14 hours to the file in a day.

[207] Mr. Kent-Snowsell further argues that the solicitors here were "mesmerised by the ticking of the clock," relying on ***Re Solicitors***, [1971] 3 O.R. 470 at p. 472, and that no thought was given to the overall progress, economies or results achieved from time to time for the clients in setting their fees. He says that it was not appropriate for counsel to simply bill the time recorded and make no adjustments for inefficiencies or other factors.

[208] Further, he submits that the firm made no effort to value their legal services but relied entirely on the time spent as a basis of the accounts. This is, he says, inappropriate. Here, he argues, accounts based solely on time expended do not provide for reasonable compensation for the solicitors. He argues the firm ought to have recognized that, given the amount involved, too many resources were being applied to the matter and that the accounts were, quite simply, unreasonable and ought to have been reduced. In this regard he relies on ***Clark, Wilson v. Information Highyway.com Inc.*** (2002), 112 A.C.W.S. (3d) 447, 2002 B.C.S.C. 407 (Master, as Registrar).

[209] Finally, Mr. Kent-Snowsell submits that the solicitors ought to have clearly stipulated that the clients were being billed for the services of non-lawyers or else

should not have billed the client for such services, similarly relying on ***Clark, Wilson v. Information Highway.com Inc.*** In that case, the court drastically reduced the lawyers' fees from $56,434 to $24,300. Although the matter involved novel issues and required a reasonable level of skill or specified knowledge, the solicitors only considered time spent in setting their fees. The court held that the solicitors ought to have realized it was applying too many resources to the case and reduced their fees accordingly.

[210] Not surprisingly, the solicitors take a view quite contrary to that of the clients. Their arguments can be summarized as follows:

- The matters involved were difficult and complex and therefore required a great number of resources to prosecute properly.
- The results were excellent for the clients in that they received damages of an amount approximately equal to the "hard claims" and they were put in the position of obtaining the "jewel" property of the partnership, Cedar Park.
- The clients were regularly and consistently informed of the cost of legal services and accommodations were made along the way for "business relationship" reasons, not as a result of any inefficiencies on the part of the firm.
- All work was undertaken with the client's express instructions and agreement with respect to the scope of that work. In fact, the solicitors did not actually bill all of their work in progress.

[211] On this last point, the amount of time recorded by the time keepers to the file (the WIP) was $1,017,978.60. The fees initially billed (*i.e.* the original accounts) were $994,460.00. Therefore the solicitors provided reductions of $23,518.60 to the client, before any accommodations were made. A further $78,570.12 in reductions

was made as part of the accommodations. Accordingly, if the accommodations are taken into account, reductions from WIP totalled $102,088.72.

[212] Mr. Kent-Snowsell argues that the solicitors simply looked at the WIP and rounded it up before sending out the accounts. No thought was given to what was done or achieved in setting the fees to be billed.

[213] My review of the list of accounts in evidence accords with Mr. Kent-Snowsell's submissions. For the most part, the solicitors simply took their WIP and rounded it – usually up – and sent an account for an amount very close to the WIP amount for the period in question. Reductions in WIP were taken on only a very few occasions. The most significant reduction was taken on the June 1999 bill for which WIP shows as $22,130.50 and the initial fees billed were $14,755 – a difference of $7,675.50. This reduction from WIP was taken in respect of a portion of the time spent by Monica Gehlen (a junior lawyer) on research. Mr. Albi wrote to Aly before sending the account and advised that he was reducing the time spent by Ms Gehlen as he did not want there to be issues about the account at a later date. A further significant reduction is shown in respect of the January 30, 2001 account for which WIP shows $42,590 and the initial fees billed were $29,815 – a reduction of $12,755. I believe, however, that this account is actually part of the accommodation reached with the clients in respect of the October, November and December 2000 accounts. Mr. Turriff's submission that these reductions from WIP somehow show that the solicitors treated the clients reasonably with respect to the fees by not simply billing all of their WIP does not persuade me in the least.

[214] On balance, I accept that Aly was a very "high maintenance" client who insisted on being constantly involved and that this, in turn, consumed a great deal of the solicitors' time. Aly must have known of this as he received accounts regularly which detailed the telephone calls, faxes and emails to and from him. He ought to have understood (and I am sure that he did) that his involvement cost money as he understood that the solicitors were billing on the basis of time spent by them on the file, which included the time spent in communicating with him.

[215] Nevertheless, in my view, it is incumbent on solicitors when faced with a client of this sort to advise the client that his persistent involvement in the file and desire to know everything contemporaneous with the solicitors would lead to higher accounts. Ms Brasil recognized this (but did not so advise the client) in her memo to Mr. Dunlop of July 5, 2000 wherein she expressed a concern regarding Aly's instructions to be copied on and have faxed to him all correspondence sent and received by the solicitors.

[216] Furthermore, the solicitors continually have maintained throughout this hearing that the accommodations made did not reflect a reduction based on any inefficiencies, but were made purely for business reasons. This, combined with my view of the reductions made to WIP, suggests that the solicitors failed to adequately take inefficiencies into account when billing the clients. It is inevitable in this sort of litigation file, involving multiple parties and counsel carrying out various tasks, that there are going to be inefficiencies. In my view, the solicitors did not adequately account for inefficiencies and in a sense, just "let the bill run" so to speak.

[217] The main tasks in the litigation were fact finding, evidence building and procedural wrangling. The client was "high maintenance," intelligent and astute. He wanted to be informed of all matters and be involved in developing and discussing strategy. Similarly, the Dallo and Hoegg sides were difficult to deal with and they each mounted impressive (and costly to the clients) defences to the claims against them.

[218] In respect of this factor, Mr. Affleck said in his letter of opinion:

> I understand from a reading of *Yule v. Saskatoon* and from my general experience that the time spent on a file does not necessarily permit a bill to be rendered automatically for all of that time. It is my understanding that the law is that: "what the lawyer has done … what the lawyer has accomplished, the magnitude of the interests concerned … the skill which the lawyer manifests on behalf of the client", are the things which count most in the assessment of the lawyer's fee (this is the language of *Yule v. Saskatoon*). The number of interviews the lawyer may have or the amount of time spent do not count most in the assessment of the fee. In my opinion this is a factor which leads to a concern that billing for all the time spent by a number of lawyers was not reasonable in the circumstances.

[219] As stated, a determination of the reasonableness of fees requires consideration of various factors, none of which are more important than the others. I believe that each factor should bear equivalent weight in my determination of the ultimate result. Time recorded is simply one of those factors.

[220] Furthermore, fee reviews under the ***LPA*** are not intended to be an audit with every minute justified only with a connected result. "The practise and business of law are simply too complex and variable to measure them by that simple index": ***Fiddes Van Der Flier Law Corp. v. Lamoureux***, [2005] B.C.W.L.D. 5428, 2005 B.C.S.C. 981, at ¶63.

[221] Setting fees simply by reference to the amount of time expended is, in my view, not appropriate. Solicitors should, in setting fees, give regard to all of the factors enumerated in ***Yule v. City of Saskatoon*** and set out in the ***LPA***.

[222] This file saw many hands. A total of 63 "billers" recorded time to the file. Mr. Turriff notes that the "top five" lawyers (Mr. Dunlop, Ms Brown, Ms Brasil, Mr. Albi and Ms Branch) performed 80% of the work on the file. The "top seven" (those already enumerated plus Mr. Lailey and Ms Gehlen) recorded 86% of the time. This is, he says, how it should be. A file, even though parcelled out to a team, should be dealt with by the responsible lawyer and his closest assistants.

[223] I also agree that it is often a good idea to involve junior counsel (at a lower hourly rate) to perform tasks that might otherwise be performed by senior personnel at a higher hourly rate. Southin J. (as she then was) recognised this in ***Roberts & Muir v. Price*** (1986) 7 B.C.L.R. (2d) 211, 1 A.C.W.S. (3d) 395 (S.C.) at ¶44, when she said:

> As to Mr. Kuchta's point that two counsel were not necessary, I disagree. When I was at the bar, I considered it a disservice to a client in any matter of moment not to have a junior assisting me. Two heads are usually better than one. Sometimes, of course, the client simply cannot afford two counsel and must then, so to speak, travel economy rather than first class.

[224] Still, it is not always appropriate to charge the clients for the time expended by two or more counsel meeting to discuss the clients' matters. In ***Shrum Liddle & Hebenton (Re)***, [1990] B.C.J. No. 78 (S.C.) (Q.L.), Master Patterson (as Registrar) commented on the practice of some law firms charging when two lawyers attend at a conference concerning the client's file. At p. 4 of his reasons, he said:

> The habit of lawyers to discuss files amongst themselves is one that is commendable. What cannot be commended is the fact that the client often gets charged for these interoffice conferences. The result frequently in this case is that the client was charged both by Mr. Shatford and by some other member of the firm for the same conference. This practice is not justified.

[225] In my view, although there were instances in this matter where two or more counsel were necessary; for instance when Aly invited more than one counsel to participate in giving advice on a particular issue; there were other occasions in which the use of multiple counsel was excessive or unnecessary. Ms Brown, Mr. Dunlop, Ms Brasil, Ms Smith, Mr. Lailey, Mr. McLean, and some others whose initials are on the time sheets but whose names I do not know, all billed time for preparation and review of settlement materials and court materials, including discussions with each other and the client. Mr. Albi, although he was the relationship lawyer, often billed for being updated on the file's progress and conferences with Mr. Dunlop. Ms Brasil attended at the hearing of the appeal with Mr. Groberman (as he then was). Several different people were involved in reviewing and summarising documents, preparing court materials and doing legal research. Each person who had a hand in the file recorded his or her time and, for the most part, the client was billed for that time.

[226] Further, I am of the view that too many juniors were used for varying and often small tasks. Although Aly did agree with the solicitors that it was a good idea to utilize Ms Brasil on the file as "she is smart and her hourly rate is low," most assuredly, the clients received "Cadillac service" from the solicitors in that the multiple lawyers partook, often at the same time, in conducting services for the clients.

[227] In addition, Ms Jones, a legal assistant, as well as other secretarial staff, recorded hours of time to the file for “document management” and for “case management” when managing the file. Clearly this was a very document intensive case as the seventh supplemental list of documents lists documents up to number 15273. It was no doubt necessary to keep track of the documents and maintain the file in good order so that the clients’ claims might be proved easily.

[228] It is my view, and I so held in ***Morrie Sacks Law Corp. v. Korbin*** (2005), 139 A.C.W.S. (3d) 372, 2005 B.C.S.C. 396 at ¶37, that “time expended by legal assistants where it contributes to the client's overall objectives may be considered by a registrar in the overall determination of what amount is reasonably chargeable to a client for work done by a solicitor”.

[229] On the last account dated August 28, 2001, Ms Jones recorded 76 hours to the file – much of which time was described as “case management.” In fact, there is one entry for 5.2 hours for “file closure; cleanup” that was noted as “non-billable” but which was not deducted from the amount billed to the clients. Mr. Dunlop testified that Ms Jones is a very senior legal assistant and she performed many tasks on the file which, but for her, would have to have been performed by counsel. I believe him. Aly testified that, although he knew that Ms Jones was working on the clients’ matters (and billing the clients for that work), he did not know that she was a legal assistant. I do not believe him on that point as Ms Jones sent letters to Aly which indicated her position with the firm.

[230] Nevertheless, the time expended by Ms Jones (and others) for "case management" was extraordinary in my opinion. To some degree as well, the reason for hourly rates in the high range (as Mr. Albi and Mr. Dunlop's were) is because a certain amount of staff time and effort is subsumed in those hourly rates. Also, based on my review of the timesheets, there were occasions when Ms Jones or Ms Brasil billed for letters that they typed themselves. The clients argued that this was inappropriate. In my view, the composition of the letter is clearly billable but typing it is not. No specific evidence was before me (as neither Ms Jones nor Ms Brasil testified at the hearing) as to how much of the time billed was spent composing the letter and how much time was spent typing it – it may be that the letter or document was composed and typed at the same time but I am not able to deduce that from the evidence at the hearing.

[231] Both Aly and Abdul testified to a "meeting" by the elevator at the firm when Mr. Albi assured the clients that they would not be billed for the time in educating students and juniors who might be working on the file. Mr. Albi could not recall any such conversation. In my view, it is likely that, at some time, Mr. Albi did tell Aly and Abdul that they would not pay for education of students. This does not mean however, that the clients should not pay for work done by students and juniors which contributed to the prosecution of the clients' litigation.

[232] There were also entries by time recorders for things that are without a doubt not legal (or appear not to be). For example entries which recorded time for:

- delivering documents to court;

- "miscellaneous organizational matters;"
- "creation of argument" billed by WPX (which I assume to be word processing);
- "prep room organisation;"
- "continue work on chart" and "amending chart", which shows as "desk top publishing" on the pre-bill;
- "document management;"
- "document data entry;" and,
- photocopying documents;

[233] The above examples come from my cursory view of but two of the pre-bills – one in respect of the account dated January 31, 2001 and one in respect of the account dated February 27, 2001. On each of these two accounts, Ms Jones' billings were 42 hours – $3,990 and 64.7 hours – $5,499.50 respectively, mostly for "document management". I note that many of the above descriptions were redacted out of the account sent to the clients so that, absent a pre-bill, they would not know of the charges relating to these items.

[234] Thus, the time recorded was excessive and inappropriate, particularly that recorded by non-lawyer members and for what must be seen as clearly non-legal work (although I do not believe that any of the "billers" over-recorded their time as was alleged by the clients). Document management is important – this was a very document intensive case – but the number of hours recorded is simply not reasonable in my view. As well, it is not appropriate to bill for inter-office conferences and "team meetings" unless specific tasks are dealt with, discussed and assigned. There are no notes to file as to what took place at these meetings and I

am at a loss to conclude whether value was added by each member of the team attending.

vi. The reasonableness of a fee rate if applicable

[235] Mr. Turriff submits that there was no agreement with respect to hourly rates as there was no written retainer agreement between the clients. Mr. Kent-Snowsell submits that there were some agreements made with respect to hourly rates in that, on one occasion after discussions with the clients about the accounts, the solicitors agreed to maintain Mr. Dunlop's hourly rate at $250 for six months. Also, in the estimate, the solicitors intimated that Mr. Dunlop's hourly rate would be $300 per hour and Ms Brasil's $150, which the clients say was not followed.

[236] In my opinion, this was not an instance where there was a specific agreement with respect to hourly rates, even though the solicitors most assuredly billed the clients by the hour. There were some "side agreements" relating to rates – the one with respect to Mr. Dunlop's rate particularly, but they did not turn this retainer into an "hourly rate retainer" in my view.

vii. The importance of the matter to the client

[237] This is a curious parameter. One assumes that a rational person would not bring a matter to counsel and court unless it was important. Thankfully, the exceptions to that are few.

[238] There is no doubt in my mind that this matter was all consuming in so far as Aly was concerned. Even though initially the solicitors brought the litigation to the clients, once it was underway, it steamrolled ahead. After Aly returned to Vancouver

from Kingston, the litigation became his life as I have noted throughout this decision. In my view, this litigation became a dog-fight, first between the clients and Fateh, then between them and the Dallo Group (particularly Niele) and later, the Hoeggs. In my view, Aly failed to distinguish the forest from the trees. To a certain extent, Mr. Dunlop got caught up in this as well. In essence the clients were "in for a penny, in for a pound". They found themselves unable to settle because of the sometimes intransigent positions taken by the other parties, and unable to walk away because of the possibility of costs being awarded against them.

[239] Whether the clients simply wanted to be paid damages, resolve the dysfunctional partnership issues or purchase some of the partnership assets at an advantageous price (about which I will say more below), the litigation was of great importance to them throughout the six years of the retainer.

viii. The result obtained

[240] In my view, in considering this factor, I must look at the results throughout the matter, not just the end result, as those on-going results are part of the overall picture of what the solicitors achieved for the client. I must also consider the results achieved at the time of the settlement agreement, as well as the role played by counsel to assist the client once it became clear that the settlement would not conclude as planned.

[241] The solicitors say that they achieved an excellent result for the clients. Mr. Dunlop, in his affidavit material and testimony, said that the clients' primary goal was to negotiate a recovery of FRJ's share of the partnership assets at the highest

possible value for FRJ and to secure the "jewel" of the partnership's properties – Cedar Park Apartments in Burnaby. According to the solicitors, the litigation was simply a tool to provide the clients leverage to negotiate a favourable buyout. He stated, at paragraphs 27-29 of his April 9, 2003 affidavit:

> At the end of the day, in March 2001, all the proceedings were settled on terms that were better than what the Clients had hoped for. They recovered an amount of $500,000.00 in damages and costs, a share of the partnership cash and the "jewel" property in Burnaby, the property considered by Aly to be the most coveted asset from the partnership real estate. Aly believed that that property had a net market value of about $7,100,000.00, […]
>
> Aly was absolutely delighted with the settlement outcome and it was never suggested that Abdul was not absolutely delighted as well.
>
> When the settlement concluded, Aly believed that he had convincingly defeated the Dallo side. He had also achieved his financial goal. It was only later, as the loose ends of the settlement were being tied up, that Aly began the process of dismantling the Clients' relationship with our firm. And it was later still before he indicated to anyone at the firm any intention of challenging the firm's charges.

[242] The clients, however, say that the results were abysmal. They were charged some $900,000 in legal fees by the firm and spent an additional $1,000,000 (approximately) to obtain $500,000, inclusive of damages, costs and disbursements. They say that $500,000 was later reduced by another $103,000 set off against the amount payable to them by the Hoeggs, to equalize the capital accounts in the partnership. The clients say that, at all times, they were advised by the solicitors that they had a very good case against the Dallo Group and the Hoeggs for damages and that they could also expect to recover the legal fees and disbursements incurred. They said they believed the range of damages to be that included in the "Summary of Damages" prepared by their counsel and which

indicated recovery in the neighbourhood of $2.2 million. They maintain it was never their ultimate goal to achieve a favourable buyout of the "jewel" partnership property. Their goal was always to recover the monies misappropriated by the partners from the partnership. It would be ludicrous, they submit, for them to spend such high amounts of money to recover such a minimal amount.

[243] In respect of this factor, Mr. Affleck said in his letter of opinion:

> It is this factor which in my opinion must count heavily against the fairness and reasonableness of the Davis fees. A settlement of $500,000 achieved by other counsel after the virtual abandonment of the clients by Davis was a great disappointment to the Jiwan Brothers. This is particularly so when they had been led to expect until almost the eve of trial that their much larger claim in excess of $2,000,000 was likely to be successful.
>
> In my opinion, to spend over $1,000,000 in fees to obtain well over $2,000,000 by way of recovery of damages or otherwise would be looked upon as perhaps excessively expensive litigation. Even more so to incur a great deal in excess of $1,000,000 in fees disbursements and taxes and then on the eve of trial to be advised that there was no option but to settle for whatever could be achieved not only made the litigation expensive it made it imprudent. In my opinion the fees were excessive unless some matter of principle was involved so making the cost in relation to the result largely immaterial. I know of no such matter of principle. Although this was a dispute at least in part within a family it was essentially a dispute over money.

[244] Mr. Turriff submits that I should not (except where it is favourable to the solicitors) accept Mr. Affleck's opinion because it is based on incorrect assumptions of fact. In particular he notes that Mr. Affleck did not review the entire file kept by the solicitors but only the "pertinent materials" extracted by counsel for the clients. The specific facts that Mr. Turriff submits are incorrect are:

(a) in October 1997, Fateh resigned as director of FRJ not as a consequence of the oppression action but as a result of the matrimonial settlement;

(b) the Jiwan brothers were repeatedly assured that they had a good claim for the sum of $2,373,970;

(c) the solicitors' advised the clients up to the meeting of January 10, 2001 that they had a good claim and were likely to succeed at trial;

(d) the settlement of the litigation was effected by another law firm after the solicitors withdrew.

[245] Mr. Kent-Snowsell suggests that I draw an inference from the fact that the solicitors did not produce their own expert in this proceeding that, somehow, they were unable to find anyone who could say that the accounts as rendered were reasonable. Mr. Turriff advises me that experts were considered but not retained.

[246] I refuse to adopt Mr. Affleck's opinions in the proceeding. I note however, that generally speaking, a registrar has broad experience in matters of this nature and is, in many ways, considered an "expert" in his/her own right in determining matters of legal fees. Experts reports may be of assistance but, in my experience, unless such expert has had the benefit (as I have in this matter) of hearing all of the evidence and reviewing all of the documents, his opinion is of limited value. That being said, I did find some of Mr. Affleck's commentary useful but not compelling.

[247] The solicitors brought about resolution of matters with Fateh in 1997. In my view, that settlement was achieved partly as a result of Mr. Albi's efforts in the matrimonial proceeding, as well as those of the solicitors in the litigation. Fateh became "exhausted" by the litigation and the pressure put on him from all directions. That result was advantageous (to both the clients and to their mother) as I

understand that it left Rashida with more than one-half of the family assets and gave Aly and Abdul control (through their mother) of FRJ, which was of assistance in prosecuting the litigation.

[248] The solicitors were generally successful on court applications throughout the litigation. Mr. Dunlop testified that the solicitors were successful on all of the court applications brought – whether they were brought by or opposed by the clients. On the one occasion where the Dallo Group was successful (before L. Smith J. who ordered that the CPLs be removed from Dallo's property) the solicitors successfully appealed her decision and the CPLs remained on title. This was important to the clients as they had instructed the solicitors to maintain financial pressure on the Dallo Group as they believed that would assist them in ultimately resolving the litigation.

[249] After Fateh's "capitulation," the solicitors attempted to negotiate a settlement with both the Dallo Group and the Hoeggs but were met, at varying times, with significant resistance from one or the other or both of them. Finally, after years of effort, the solicitors were able to effect a settlement which provided the clients with:

(a) $100,000 from the Hoeggs and $400,000 from the Dallo Group to settle all issues in the litigation, inclusive of damages, costs and disbursements;

(b) the right to purchase (at fair market value but with favourable tax consequences) from the Dallo Group and the Hoeggs their interests in Cedar Park;

(c) the proceeds of sale of the Fernie and Surrey properties;

(d) legal fees paid and payable of some $842,057.38 (this amount does not include fees from the last account of August 28, 2001);

(e) FRJ's share of monies accrued in the partnership but unpaid during the course of the litigation.

[250] Candidly, the above results do not convey a particularly good outcome unless the clients' goals were to somehow use the litigation as leverage to gain control of Cedar Park.

[251] I should also note that, while the settlement achieved at the March meeting later proved to be impossible to effect, that failing was not, in my opinion, the fault of anything done (or not done) by the solicitors as the financing and arrangement of a comfort letter were things not within their control. I am therefore not considering the breakdown of that settlement as a "result" achieved (or not achieved) by the solicitors.

[252] Ultimately, the clients actually received:

(a) on the sale of the Fernie Property to the Dallo Group, the sum of $714,236.28, being FRJ's one-half of the sale proceeds as adjusted ($719,729.64), less Mr. Andison's account to complete that sale ($5,493.35);

(b) on the sale of Cedar Park to the Dallo Group and the Hoeggs, the sum of $1,620,764.70 being FRJ's share of the sale proceeds ($1,235,866.70) plus monies from the Dallo Group in payment of the promissory note ($392,199.37), less Mr. Andison's account to complete the sale ($4,239.27) and $3,062.00 paid to the Hoeggs to balance their promissory note ($100,000) with the Hoeggs adjusted capital account in the partnership;

(c) on the sale of the Surrey lands by court order to an arms' length third party, the sum of $128,109.34, being FRJ's share of the sale proceeds ($132,191.36), less $4,082.02 to pay Mr. Andison's account to complete that sale.

[253] I understand that as the sales were of assets as opposed to shares, FRJ did not receive favourable tax treatment on sale.

[254] With respect to the clients' goals, at the start of the retainer there is no doubt in my mind that Aly and Abdul wanted recompense for the monies misappropriated from the partnership. In my view, they also wanted to assist their mother in resolving her matrimonial proceeding with Fateh and saw the litigation as assistance to her in that goal.

[255] Mr. Kent-Snowsell submits that Aly's intimate involvement in the litigation disproves the solicitors' theory that the ultimate goal was the purchase of the "jewel" property, being Cedar Park. This, he submits, is not borne out by the evidence. He states:

> Only a fool on a frolic of his own, which Mr. Jiwan [Aly], an educated and astute person, certainly was not, is going to seek to spend $82,917.00 on an expert report from Mackay and a further $86,604.00 to Lindquist Avey in furtherance of the damages claims and $1 million in legal fees and additional disbursements to leverage a discounted tax-advantageous buyout of a property in which he holds a one-third interest worth just over $500,000.00.

[256] I have carefully reviewed all of the testimony and documents relating to the clients' "goals" in the litigation and I have no doubt that, at the time the retainer commenced until at least the time that Fateh "capitulated", the clients' goal was to be paid damages by the defendants for their misappropriations from the partnership. Thereafter, in my view, the "goal" continued to be resolution of the litigation with payment of some funds to the clients for the damages for the misappropriations. As late as November 1999, the clients were willing to sell their interests in the

partnership to the others upon payment of fair market value for such interest and a contribution from each of the other sides towards the damages claims. In my view, thereafter, the goal became two-fold: (1) to resolve the dysfunctional partnership issues and purchase the other parties' interest in Cedar Park; and (2) to receive appropriate compensation for the damages in the lawsuit.

[257] Clearly in 1999, the clients considered (in their offers) that they would not receive the $2.2 million in damages that they were claiming. They offered to accept $425,000 (collectively) from the Hoeggs and the Dallo Group. That offer did not specifically claim anything in addition to that amount for the costs of the litigation.

[258] All of the parties agreed that the litigation was hard fought and that, at various and different times, each side was difficult and unwilling to deal rationally with the issues, particularly the Dallo Group after Niele took over instructing counsel. In this regard, Mr. Albi said that the proceedings developed a "life of their own".

[259] Nevertheless, I do not agree with the solicitors' submissions that the clients' ultimate goal was to purchase Cedar Park. The evidence does not favour that. I do believe that the clients were interested in effecting that result as part of the overall matter, but I cannot say that that was the "ultimate goal". However, I also do not agree with the clients' contention that their only goal was to be paid a significant amount of damages for the misappropriations. They cannot have believed (and the evidence does not accord with their story) that they had a good claim for each and every item of damages and that they would be fully compensated for all expenditures on the litigation to the tune of some $2.2 million. By suggesting a

summary trial on the claims that were certain in 2000, Aly most assuredly recognised that not all of the claims were certain. Further, by proposing the various settlement amounts to the Hoeggs and the Dallo Group (none of which were even remotely close to the $2.2 million he says the clients expected), he indicated his clear understanding that the clients would not receive that amount (or anything near to it). I believe Mr. Dunlop's testimony that he advised Aly throughout what the "hard" and "soft" claims might be.

[260] In my view, Aly was consumed with the litigation. He made it his life. He was adamant that he would win, which is evidenced by his instructions to the solicitors to "squeeze them like a lemon" and continue the litigation "at full steam," even during negotiations for settlement. He also suggested various ways to put pressure on the Dallo Group and bring them to the bargaining table, such as fighting the CPL removal application, garnishing applications and summary judgment.

[261] In my view, there were matters of principle involved in this litigation. Aly clearly wanted to win. He did not, however, want to incur the level of fees incurred to get there as is evidenced by his continual conversations with Mr. Albi about the accounts.

[262] All in all, the results were to be expected. They were neither (as the solicitors' claimed) excellent, nor were they (as the clients' claimed) abysmal. It took, however, an extraordinary amount of time and resources to conclude the matter to the point of the settlement agreement. In my view, the resources expended were not appropriate for the results. Some of the blame for that must be attributable to

the clients (who also fought their opponents every step of the way) but much of that is attributable to the solicitors who should have made it abundantly clear, as early as 1997, that the resources to be expended would clearly outweigh any results to be achieved, and the client should have been advised of that, in writing and in no uncertain terms, such that they could consider their options and decide whether they wished to continue with the litigation.

[263] As I have noted above, the complete lack of reporting to the client concerns me greatly in this matter. While I believe that Mr. Dunlop did explain to Aly that some claims were better than others and that they could not reasonably expect to recoup all of their legal costs and disbursements at trial (or even on a settlement), this should have been clearly and unequivocally communicated to the client in writing. The client should have been reminded of this (again in writing) throughout the retainer as different steps were taken, instructions sought and new offences or defences mounted by the Dallo Group and the Hoeggs.

[264] In my view, had the clients and, perhaps Uncle Amin who was advising the Jiwan brothers, been told in writing of the risks involved and the recovery that might be expected, they might have considered other options. Having said that, much of the expense was directly as a result of the actions of the others, particularly the Dallo Group who appeared to be conducting a “deep pockets” defence.

ix. Additional factors that may be considered

[265] As I have noted above, on a review of this nature, a registrar must consider “all of the circumstances,” including those factors enumerated in s. 71(4) of the ***LPA***.

"All of the circumstances" has been held to mean "all factors essential to justice and fair play: ***Diligenti v. McAlpine***, *supra* at ¶8. Additional factors that have been held to apply to a review of this nature include the following:

- "the difficult client", see: ***Montaine, Black and Co. v. Osadchuck***, [1985] B.C.J. No. 1906 (Q.L.) (C.A.) at ¶33;
- "the risk factor", see: ***Pierce Van Loon v. Davro Investment Ltd.*** (1997), 45 B.C.L.R. (3d) 344, 72 A.C.W.S. (3d) 1263 (S.C.) at ¶47; ***Deans v. Armstrong*** (1983) 149 D.L.R. (3d) 295, 46 B.C.L.R. 273 (S.C.) at ¶44; ***Re Goode*** (1987) 11 B.C.L.R. (2d) 112, 2 A.C.W.S. (3d) 416 (C.A.) at p. 116;
- to some extent, "the client's ability to pay", see: ***Diligenti v. McAlpine***, *supra* at ¶8; ***Re Norton, Stewart, Norton & Scarlett*** (1989), 40 B.C.L.R. (2d) 168, 17 A.C.W.S. (3d) 1144 (C.A.) at ¶21.

(a) Other Counsel's Accounts

[266] Mr. Kent-Snowsell submits that I should also consider the accounts of other counsel involved in the litigation. I agree that I may consider them. They should, however, not be given disproportionate weight: ***Hornsby v. Clark Kenneth Leventhal***, [2000] 2 Costs L.R. 295, 4 All E.R. 567 (Q.B.) at p. 304

[267] What is charged to another party by his solicitor is of some general interest but it is most assuredly not conclusive. "It is not a sound principle of taxation to treat the fee paid by the other party as the appropriate yardstick; indeed, the application of such a principle would lead to obviously undesirable consequences:" ***Simpsons Motor Sales (London) Ltd v. Hendon Corp (no 2)***, [1964] 3 All E.R. 833 at 839, [1965] 1 W.W.R. 112 (C.A.) at 119-120.

[268] In evidence in these proceedings were the accounts rendered by Mr. Roos to Fateh for the period between June 1995 to February 28, 2000 (in which fees total

$54,538) and by Mr. Bacon to Fateh for the period between October 1999 to and including April 2001 (in which fees total $69,976). As well, I was provided with the accounts rendered by Mr. Andison to complete the sale of the various properties by the clients to the Dallo Group and the Hoeggs, as well as the sale of the Surrey property by Mr. Bottom to an unrelated third party. I have set out the amounts of those accounts above.

[269] It is always important to note that in any litigation it is the plaintiff who bears the burden of proof. Defendants (usually) are less active. The plaintiffs' burden is to prove the claims. If such claims are not proved, the plaintiff may be liable in costs to the defendants for pursuing claims that were not able to be substantiated.

[270] Here, there were several pieces of litigation, most commenced by the clients. Mr. Roos and Mr. Bacon each acted for Fateh in the litigation at different times. The fees charged by each of them to Fateh were not, in themselves, insignificant although notably less than those charged by the solicitors to the clients for the same time frame. It is, however, impossible for me to compare the work done by Messrs. Roos and Bacon with the work done by the solicitors without having heard specifically from them about the work undertaken and the instructions given. Although Mr. Bacon was called as a rebuttal witness in this proceeding by the solicitors, he claimed privilege relating to matters he discussed with Fateh about representing him in this proceeding. He did not, therefore, provide (nor should he have) any evidence about his instructions from Fateh or their retainer arrangements.

[271] Further, Mr. Andison really only assisted the clients in negotiating the payment of the promissory notes and then acted for them in completing the property transfers. His role, in my view, was very limited. He did not, as suggested by Mr. Affleck, achieve the settlement of the matter for the clients.

[272] In my opinion Messrs. Roos, Bacon and Andison's accounts are of little or no assistance to me in this review.

(b) The estimate

[273] In addition to the above-noted factors, it is my opinion that the February 2000 estimate given by the solicitors, although not binding, may be taken into account in determining the reasonableness of fees in this case.

[274] The estimate sets Mr. Dunlop's hourly rate at $300 per hour and Ms Brasil's at $150. In actual fact, the pre-bills disclose that Mr. Dunlop's hourly rate as applied on the accounts was as follows:

Date of Account	***Hourly Rate***
March 29, 2000	$250.00
April 26, 2000	$289.64
May 25, 2000	$289.64
June 22, 200	$295.00
July 21, 2000	$295.00
August 24, 2000	$295.00
September 29, 2000	$295.00
October 26, 2000	$310.27
December 4, 2000	$347.41
January 3, 2001	$350.00
January 30, 2001	$350.00

Date of Account	***Hourly Rate***
February 27, 2001	$359.01
March 20, 2001	$360.00
August 28, 2001	$360.00

[275] I note that the December 4, 2000, January 3, 2001, and January 30, 2001 bills were all subsequently accommodated by an overall fee reduction of 30 percent.

[276] Ms Brasil's hourly rate as shown on the pre-bills was $143.42 for the March 29, 2000 account and $150.00 per hour thereafter until February 2001, when her hourly rate as shown on the pre-bills increased to $170.00 per hour and remained at that rate until the end of the retainer.

[277] While this was not an hourly rate retainer, the clients were provided with the estimate which indicated an expected hourly rate. Clearly the solicitors gave little regard to the "estimate" in setting the fees chargeable, particularly as it related to the hourly rates set out thereon. In my view, they should have had some regard to counsel's hourly rates quoted on the estimate in determining the fees chargeable, particularly in the later accounts where those rates were higher.

(c) <u>The accommodations</u>

[278] I had considered that a factor to take into account might be the accommodations made in respect of the accounts. However, as I have decided that the solicitors may withdraw the accommodated accounts and replace them with the original accounts rendered, in my view, the accommodations have no application.

(d) The difficult client

[279] I have said above that, in my view, Aly (in particular) was a difficult client in the sense that he was intimately involved in every aspect of the solicitors work. In that way, I find that he was "difficult." However, I cannot say that he was interfering in any way, he simply wanted to maintain an active role in the litigation.

[280] Mr. Dunlop testified that it was not in his nature to simply take a case and then advise the client on its outcome when concluded (as some counsel are wont to do). He said that he wanted his client(s) to be advised of all the happenings on the file and to participate actively in making decisions as to how to proceed with each step. In this case however, in many instances, Aly was the driving force behind letters and documents and settlement proposals (many of which he drafted himself). Aly's ongoing involvement in the litigation substantially increased the time spent by the solicitors on the clients' matters and to some extent justifies higher fees than normal. However, as I have already said, the solicitors should have made it abundantly clear to Aly that his very active role would lead to substantially increased fees.

(e) The risk factor

[281] This factor is most often considered in cases where there exists a contingent fee agreement. Essentially, it is to be considered when counsel are at risk of non-payment and non-recovery of expenses paid out on behalf of a client and discharged before trial without an opportunity to complete the retainer in the most advantageous way. When the solicitors took on this matter, they had as clients two young men; one a university student and the other just at the start of his career. Neither of the

brothers, to my knowledge, had any significant assets or income of their own. There was, therefore, at the very early stage of this matter, some risk that the clients might not be able to pay their legal accounts. However that did not prove to be a factor throughout most of this matter. On several occasions, when the accounts became overdue, Uncle Amin Juma stepped in and sent significant sums from Kenya to the solicitors to pay their outstanding accounts. It was not until close to the end of the matter, when the most significant resources were put in, that the solicitors went unpaid for a significant time. Further, the clients were required to (and did) personally pay many of the significant disbursements – Mr. MacKay's and Mr. Winkler's fees, for example – so that the solicitors were not out-of-pocket for those amounts.

(f) The client's ability to pay

[282] The ability of the client to pay was one of the factors set out in ***Yule v. City of Saskatoon*** as a factor to be taken into account by a registrar on a taxation of a lawyer's bill. While the statement did not find its way into the present codification of the ***Yule*** factors in s. 71(4) of the ***LPA***, it is a factor essential to "justice and fair play" and ought to be considered here. Nonetheless, in my opinion, a client's ability to pay should not be a "critical factor leading to a major reduction of, or dismissal of, a lawyer's bill, whose only "sin" was to take on an impecunious client:" ***Kowarsky & Co. v. Williams*** (1998), 78 A.C.W.S. (3d) 614 (B.C.S.C., Registrar) at ¶68.

[283] As I have noted, in the early stages of the litigation, the clients had little ability of their own to pay the solicitors' accounts. Without the intervention of their wealthy Kenyan uncle, likely the solicitors' accounts would have gone unpaid. Likewise,

even after Fateh's capitulation when Rashida gained control of FRJ and its control fell to the clients, FRJ had little ability to pay until the issue of the dysfunctional partnership was resolved. In this matter, it seems to me that, other than in respect of the accommodations, the solicitors' conduct of this matter took little notice of the clients' ability to pay for their services.

(g) Reasonable fees determined by the court in other reviews

[284] In his submissions, Mr. Kent-Snowsell refers me to a number of decisions in which lawyer's bills have been reviewed and fees assessed. For example, in ***Nathanson, Schachter & Thompson v. Sarcee Indian Band***, [1994] 6 W.W.R. 213, 90 B.C.L.R. (2d) 1 (C.A.) the court upheld a fee of approximately $560,000 in circumstances where the lawyers achieved an excellent result for their client (a recovery of some $3 million in costs and $25 million in land) after having been retained for approximately three years. In ***Campney & Murphy v. Arctic Installations (Victoria) Ltd. et al***, [1994] 3 W.W.R. 178, 109 D.L.R. (4th) 609 (B.C.C.A), the court allowed fees of approximately $170,000 in a protracted litigation (over a 10 year period) in circumstances where the solicitors were held to have achieved "an astonishing victory" for their clients (recovery of some $1.4 million). In ***Diligenti v. McAlpine***, where the solicitors garnered $114,000, plus costs for their clients after a 22 day trial, the court reduced the fees charged from $34,922 to $29,992.

[285] Mr. Kent-Snowsell argues that I should take account of those decisions in assessing the reasonable fees here. These cases, he suggests, are indicative of what the court feels are reasonable fees in lengthy, hard fought cases. Mr. Turriff,

on the other hand, submits that each case must be decided on its own particular facts and that these decisions are of no assistance.

[286] I agree with Mr. Turriff. Reviews of lawyer's bills are subjective. They are based on what a particular client is prepared to pay his own counsel for the work done, based on instructions given by that client to that counsel: ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 B.C.L.R. (2d) 309, 48 C.P.C. (2d) 74 (S.C.). Thus, what the court may have determined are reasonable fees in another case based on the particular facts before the court is of no assistance to me in making my decision here.

x. Combining all factors

[287] In my opinion, taking into account all of the factors set out above and which are applicable to this matter, I find the reasonable fees payable by the clients to the solicitors is $700,000.

5. How much was actually paid to the solicitors by the clients?

[288] The solicitors say that the clients have paid a total of $645,584.13. The clients, on the other hand, say that they have paid the solicitors a total $629,396.29, a difference of $16,187.84.

[289] The clients have the burden of proving the payments made: ***Banton v. Amar Chand***, [1922] 1.W.W.R. 929 at p. 930.

[290] The clients rely on the evidence of Aly and a document entitled "Payments to Davis & Co. from FRJ: 1998 – 2001" entered as an exhibit in this proceeding. That

document notes that until 1998, the parties were in accord with the payments made by the clients. Thereafter, according to Aly, $195,000 was paid by FRJ (and there are cheques in evidence to support that) and $250,000 was paid by the "uncles" by wire transfer. This, Mr. Kent-Snowsell argues is sufficient for the clients to discharge their burden as the solicitors did not provide contradictory evidence.

[291] The solicitors called Mr. Morgan to testify to this issue. Mr. Morgan is the firm's administrative partner. Mr. Morgan testified that the firm had apparently received two wire transfers in September and October 2000: one in the amount of $75,990.00 and the other for $69,990.00. These transfers were allegedly applied to the clients' outstanding accounts. Mr. Morgan's evidence was based on documents he received from personnel at the firm and he had no direct knowledge of either the receipt of such funds or the application thereof. What he was able to indicate was that the client number on the documents was the same client number assigned to these clients' matters.

[292] In addition, Mr. Morgan referred to two additional documents titled "open invoices," one in respect of FRJ Enterprises and one in respect of Rashida Jiwan. Those documents appear to indicate payments made and credited against invoices sent by the solicitors to the clients and to Rashida. In making submissions as to whether the second document should be entered as an exhibit in this proceeding, Mr. Turriff advised in his closing submissions that he would show me, based on these documents, what he believed happened with the funds delivered. He did not do so.

[293] The two documents evidencing the wire transfers do not accord with the dates on the document submitted by the clients, nor do the amounts correspond to the amounts the clients claim to have paid. In addition, the dates on the "open invoices" documents do not accord with any of the dates on either the cheques.

[294] I believe I am able to surmise from the documents that the wire transfer amounts did not always accord with the amounts agreed to be transferred, likely as a result of currency fluctuations. Further, it is also likely that the solicitors applied a payment by the "uncles" to an account owed by Rashida, and not by these clients.

[295] I have no reason to believe that the solicitors received funds for which they have not accounted in this matter. Thus I am not satisfied, on the balance of probabilities, that the clients have paid the amount claimed since the burden lies on them to prove as such. Therefore, the amount to be credited to the clients as payments on the accounts is the amount submitted by the solicitors, $645,584.13.

6. What is the appropriate rate of interest to which the solicitors are entitled?

[296] Section 73(3) of the ***LPA*** provides:

> (3) If a registrar gives a certificate under subsection (2), the registrar must add to the amount certified an amount of interest calculated
>
> (a) on the amount the registrar has allowed the lawyer for fees, charges and disbursements, exclusive of the costs of the review,
>
> (b) from the date the lawyer delivered the bill to the date on which the certificate is given, and
>
> (c) at the rate agreed to by the parties at the time the lawyer was retained or, if there was no agreement, at the same

> rate the registrar would allow under the *Court Order Interest Act* on an order obtained by default.

[297] The solicitors submit that there was an agreement here for the clients to pay interest ("late charges") on outstanding accounts at the rates set out, from time to time, on the various invoices sent to the clients. The clients disagree. They submit that they did not pay late charges at any time and they never entered into an agreement with the solicitors to pay interest or "late charges".

[298] There is no requirement that an agreement to pay interest be in writing: ***Feller Meyer Drysdale v. Piper*** (1984), 28 A.C.W.S. (2d) 373, 59 B.C.L.R. 24 (S.C.) at 26. However, proof of an agreement to pay interest rests on the solicitors. Such an agreement must be proven unequivocally: ***Gregory & Gregory v. Chen*** (2005), 143 A.C.W.S. (3d) 762, 2005 B.C.S.C. 1505, at ¶32.

[299] Here, there was no written retainer agreement between the solicitors and the clients which set out that interest would be charged on overdue accounts. Further, while there is evidence that, in respect of some of the accommodations, the solicitors forgave "late charges" which had been imposed on the clients, there is no evidence, in my view, that the parties agreed that the clients would pay interest on any outstanding balances from time to time. There is nothing setting out any interest rate (except the accounts) which provide: "This account is payable on receipt. If not paid within 30 days from the invoice date, interest at the rate of prime plus 2% will be charged from the invoice date". However, a simple statement in the accounts that interest is chargeable is not an agreement to pay interest.

[300] The clients did not, at any time, acknowledge that interest would be payable (or paid) from time to time at that amount (or any amount).

[301] In my opinion, the solicitors have not proven unequivocally that interest was payable at a contracted rate and accordingly, the solicitors are entitled to pre-judgment interest on any unpaid balance at the rates set from time to time pursuant to the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

COSTS

[302] Section 72 of the ***LPA***, provides:

> (1) Costs of a review of a lawyer's bill must be paid by the following:
>
> (a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
>
> (b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
>
> (c) a person who applies for a review of a bill and then withdraws the application for a review.
>
> (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

[303] The total fees sought by the solicitors are $991,256, being the amount of the "initial bills" ($994,460) less the "XLS" amount withdrawn of $3,204. I have allowed fees of $700,000, a reduction of $291,256, which amount is more than one-sixth of the total bill. It follows, therefore that absent any "special circumstances," the clients are entitled to their costs of this review.

[304] I am not aware of any special circumstances which would lead me to depart from the rule set out in s. 72 of the ***LPA*** and, accordingly, the clients shall have their costs of this review. I am not seized of any application to assess such costs.

[305] I also note that if the lower accommodated accounts had been used to determine the issue of costs, I would still be required to find in favour of the clients as those amounts also would have been reduced by more than one-sixth of the total bill.

[306] The parties may prepare a certificate based on these reasons and forward it to me for my signature. If the parties are unable to agree on the contents of the certificate, they may set the matter down before me.

"District Registrar K. Sainty"

May 4, 2006 – ***Revised Judgment***

On the front page of the Reasons for Decision, under the heading of Date and Place of Hearing should read:

"May 2, …., 12, ***15, 16***, 17, …"