

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Yue Gu, Applicant

AND:

Fogler, Rubinoff LLP, Respondent

BEFORE: Associate Justice Jolley

COUNSEL: Yanan Li, counsel for the moving party applicant

Robert Macdonald and Max Samuels, counsel for the responding party respondent

HEARD: 19 January 2026

REASONS FOR DECISION

[1] The applicant seeks an order pursuant to rule 37.14 setting aside the administrative dismissal order issued on 6 June 2024 dismissing this bill assessment proceeding brought under the *Solicitors Act*. The applicant argues that he had no intention to delay or abandon the assessment but that the assessment was adjourned *sine die* in August 2019 at the request of the respondent firm (the “firm”) until his civil action against the firm was dealt with. That action was not finally disposed of until 3 October 2024 when the Supreme Court of Canada dismissed the plaintiff’s application for leave to appeal.

A. Request for Adjournment Denied

[2] As a preliminary matter, at the commencement of the motion, the applicant sought an adjournment of the motion until senior counsel, Mr. He, could attend to argue the motion. Ms Li advised that Mr. He had been called to another matter on short notice. I dismissed the request for three reasons. First, the motion had already been before me on 25 September 2025 and had to be adjourned because Mr. He failed to attend then. The applicant’s daughter advised at that time that Mr. He had been called away to court elsewhere that morning. I granted the adjournment but made it peremptory on the applicant. Second, before the new date of 19 January 2026 was chosen, Mr. He confirmed he was available. I have no confidence that Mr. He would necessarily attend on any new date, if something he considered more pressing arose. Lastly, Ms. Li, a lawyer in Mr. He’s office, was present as counsel and was capable of presenting argument on the material already filed.

B. The Assessment

- [3] The applicant commenced an assessment of the firm’s accounts in or about August 2017. He then commenced a separate negligence action against the firm in September 2018, on the basis that the firm’s alleged misconduct went beyond a fee dispute.
- [4] All material for the assessment was completed by August 2019 and the assessment was ready to be heard. The firm then brought a motion before the assessment officer seeking to stay the assessment pending the outcome of the negligence action. The assessment officer did not dismiss the assessment but adjourned it on 19 August 2019, ordering that: “This matter is adjourned *sine die* to allow the negligence action filed by the [applicant] to proceed and avoid any issues of *res judicata*.”
- [5] On 6 June 2024, while the assessment was stayed but before the negligence claim was finally concluded, the assessment proceeding was administratively dismissed. The applicant immediately sought the consent of the firm to restore the action but the firm refused to consent. The applicant then promptly brought this motion to set aside the administrative dismissal.
- [6] The respondent argues that the assessment application should not be restored, as the matter of fees and the conduct of the firm and Ms. Huang, the firm’s lawyer who had carriage of the various matters for the applicant, has already been determined in the negligence trial that took place. The firm was found not to have been negligent and the plaintiff’s action was dismissed with costs against him on 14 December 2022 and with reasons released on 21 December 2022 (*Gu v Huang* 2022 ONSC 7150).
- [7] I do not accept this argument for two reasons. First, the reasonableness of the fees was not before the trial judge. Second, the finding that the firm was not negligent is a significant factor but not the only factor an assessment officer may take into account when assessing the reasonableness of a lawyer’s fees.

The assessment of fees was not before the trial judge

- [8] The statement of claim makes it clear that the fees assessment was separate and distinct from the negligence action. Paragraph 33 of the statement of claim pleaded: “Parenthetically, Fogler’s bills of account are the subject of an assessment under the *Solicitor’s Act*, commenced on August 15, 2017, bearing Court File No. CV-17-00580885-00.”
- [9] This is also consistent with the finding of the trial judge. The trial judge clearly had in mind that this issue would still be dealt with by the assessment officer, stating at paragraph 4 of her decision that: “Mr. Huang’s legal bill is now under review and the Plaintiffs seek findings in this court to lower the bill at the assessment.”

- [10] While the firm argued that the applicant's negligence claim entirely overlapped this assessment because the only damages he sought was a return of the fees, based on his affidavit evidence at trial, the statement of claim was for "damages in the amount of \$3 million for negligence, breach of contract and breach of fiduciary duty". According to the trial judge, at paragraph 6 "by the time of trial, the damages sought were the difference between what security for costs motions the plaintiffs might have received and the actual security for costs order they received."
- [11] The respondent states in its factum that the assessment registrar "adjourned this proceeding in favour of the negligence action". I do not see that wording in his decision. What was adjourned to trial were the allegations of negligence. The assessment was not dismissed and not consolidated into the negligence action; it was simply adjourned *sine die*.

The finding of negligence is *res judicata* and binding on the applicant at the assessment

- [12] I agree with the firm that the issue of the firm's alleged negligence is *res judicata*. It is no longer open to the applicant to challenge the quality of the work done by the firm or allege that the firm was negligent. That has been determined by the trial judge who found that the firm was not negligent on any matter for which the applicant retained it. The applicant is now bound by those findings. All of the issues set out in Schedule C to the firm's factum appear to be covered by *res judicata*.

An assessment deals with more than the firm's conduct

- [13] Negligence or the firm's conduct is not the only factor that an assessment officer may consider in assessing a lawyer's account.
- [14] The degree of skill and competence demonstrated by the solicitor and the results achieved are two of the factors before the assessment officer that have already been determined by the court and the applicant is bound by the trial judge's findings on those points. However, the assessment officer will also consider other factors in assessing the reasonableness of the firm's fees. As the court noted in *Cohen v Kealey & Blaney* (1985) 26 C.P.C. (2d) 211 (Ont. C.A.) ("*Cohen*") at paragraph 11, the assessment officer will also look at the time expended on the matter, the legal complexity of the issues, the degree of responsibility assumed by the solicitor, the monetary value and importance of the matter to the applicant, the client's expectations regarding fees and the client's ability to pay.
- [15] Given the negligence action did not assess the fees charged and was not asked to do so, issue estoppel does not apply to the factors set out above, other than the firm's conduct. A lawyer can act without negligence and still be subject to a successful fees assessment.
- [16] This is consistent with the outcome in *Susin v Baker* 1997 CarswellOnt 685 (CA), on which the firm relies. In that case, the plaintiff had already concluded his assessment of the firm's account, covering all the factors set out in *Cohen*, including any alleged negligence by the firm. The firm's motion for a stay of the negligence claim was granted because the issue of negligence had been fully decided in the assessment and there were no further issues to be decided at the negligence trial. This is the reverse of the situation before me where

negligence was decided in the trial but the other *Cohen* factors were not. Had the firm proceeded with the assessment first, the negligence issues may have been *res judicata* as they would have been determined by the assessment officer and the negligence claim might have been stayed in its entirety. But the firm chose to proceed with the negligence action first rather than the assessment, leaving the *Cohen* factors still to be determined.

C. The administrative dismissal should be set aside

- [17] I am satisfied that the administrative dismissal should be set aside. There is an adequate explanation for the delay and the applicant has always had an intention to proceed with his assessment.
- [18] The dismissal order was issued in June 2024 and the applicant immediately sought the firm's consent to have it set aside. When the firm refused, the applicant brought this motion without delay.
- [19] Any litigation delay in the assessment is a result of the firm's request that the assessment be stayed pending the outcome of the negligence action. Otherwise, the assessment would have been heard in August 2019. The applicant could not have moved this assessment forward thereafter, if he had wanted to, in light of the terms of the assessment officer's adjournment.
- [20] There is no non-compensable prejudice to the firm as the assessment record is complete, and has been for some six years now, and the assessment would have already been heard, but for the firm's request that it be adjourned *sine die*.
- [21] The firm argues that the assessment should not be restored as there is no merit to the underlying proceeding. It argues that all issues that the assessment officer would determine have already been determined by the trial judge. For the reasons set out above, I do not agree.
- [22] I find that it would be unjust to deny the applicant his right to assess these fees in all the circumstances.

D. The applicant is not entitled to costs

- [23] Although the applicant succeeded on the motion, I order no costs of the motion in light of the applicant's conduct in submitting false case law in his factum. When the matter first came before me, the firm brought to my attention that it could not locate at least two of the cases, including fulsome citations and quotations that the applicant had included in his factum, prepared by his daughter, who is not a lawyer.

- [24] Ultimately the applicant's daughter conceded that the cases did not exist and were created by A1, presumably to bolster the applicant's argument. The applicant withdrew the factum in favour of an *aide memoire*. If the applicant or his daughter were a lawyer, the Law Society would have jurisdiction over this unacceptable conduct. Instead, this is a factor that I have considered and apply in denying the applicant his costs of the motion.
- [25] Additionally, the affidavit the applicant filed in support of his motion had no certificate of translation indicating that it had been translated to him before he signed it, despite his evidence that he does not read English. The affidavit was drafted again by his daughter and there is some question whether it is actually the applicant's evidence.

E. Conclusion

- [26] The applicant's motion to set aside the dismissal order is granted, without costs.

Associate Justice Jolley

Date: 23 January 2026