IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smeets Law Corporation v. Abbott Estate,* 2023 BCSC 1062

Date: 20230621
Docket: S216035
Registry: Vancouver

Between:

Smeets Law Corporation

Plaintiff

And

Estate of Mary Jean Abbott, Deceased, by its personal representative David Lorne Dickinson, Executor

Defendant

Before: The Honourable Justice Blake

Reasons for Judgment

Counsel for the Plaintiff: V.S.W. Chan

Counsel for the Defendant: A. Maheem

Place and Date of Trial: Vancouver, B.C.
February 21–24, 2023

Place and Date of Judgment: Vancouver, B.C.
June 21, 2023

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I. INTRODUCTION

[1] This is a claim in debt. Specifically the plaintiff, Smeets Law Corporation (the "Law Firm") seeks recovery from the estate of Mary Jean Abbott (the "Estate") under a contingency fee agreement Ms. Abbott entered into with the Law Firm on March 26, 2014 (the "Agreement"). Ms. Abbott died on July 2, 2019, and David Dickinson is the executor of her Estate (the "Executor").

[2] Ms. Smeets retained the Law Firm, and in particular her friend and former lawyer, Larry Smeets ("Mr. Smeets"), under the Agreement. Ms. Abbott wished Mr. Smeets to represent her in a claim against the Vancouver International Airport (the "YVR Action") and a claim pursuant to the *Health Care Costs Recovery Act,* S.B.C. 2008, c. 27 (the "*Health Care* Action"). The Law Firm represented Ms. Abbott from approximately November 2013 to September 2019.

[3] Unfortunately, Ms. Abbott fell seriously ill in 2019, and ultimately decided to avail herself of medical assistance in dying ("MAiD"). After filling out the necessary paperwork for MAiD, Ms. Abbott instructed Mr. Smeets to negotiate with the defendant in her case to arrange for a discontinuance of her YVR Action on a no-costs basis, and Mr. Smeets began those negotiations with counsel on June 24, 2019.

[4] Ms. Abbott also asked Mr. Smeets to prepare the Law Firm's final account in this matter, and he prepared his final account dated June 28, 2019 (the "Account"). The total amount due and owing under the Account was $37,201.94, plus interest of 1.5% per month if not paid within 30 days. He rendered the Account to her by way of a cover letter dated June 28, 2019, and presented both to her in person on July 1, 2019. The Account was not paid by Ms. Abbott before her death on July 2, 2019, and since her death the Executor has refused to pay it. In closing argument, counsel for the Executor admitted that the disbursements, plus interest, were properly due and owing to the Law Firm pursuant to the terms of the Agreement, but maintains the position that the legal fees are not properly payable.

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[5] As of trial, the total amount, plus interest, due and owing under the Account, is $61,125.34. This amount remains unpaid by the Executor.

II. BRIEF BACKGROUND

[6] Mary Jean Abbott ("Ms. Abbott") sustained an injury while at Vancouver International Airport on November 6, 2013, as a result of an incident with her walker on a moving sidewalk. She contacted her friend and lawyer, Mr. Smeets, to ask whether he would represent her in suing as a result of the injuries she sustained in the incident.

[7] Mr. Smeets and Ms. Abbott had been friends since approximately 1993, and he had represented her in two previous ICBC cases. He discussed the potential case Ms. Abbott had against the Vancouver Airport Authority as a result of the incident with her, and he had an articling student prepare a memo on her potential claim against the Vancouver Airport Authority. He forwarded a copy of the memo to Ms. Abbott by way of letter dated February 27, 2014, and asked her to advise him if she wished to proceed. In his cover letter he noted:

> In our view, while you certainly have a case, were the case to proceed on to trial your case is not so strong as to ensure that you definitely will be awarded compensation. On the other hand, it may be that there is a history of similar types of accidents on the escalator that you were using at the time of your own fall. Were that to be so, your legal position would strengthen. While we do not know the answer to such questions now, we probably will know them after the case has proceeded.
>
> Our firm is willing to represent you in the case. However, if you are not able to negotiate a settlement, and are required to proceed on to trial to enforce your claim, we will have to revisit the propriety of continuing.
>
> Please review the enclosed legal opinion memo, and then let me know whether you wish to proceed. If you decide you do want to go forward with your claim for compensation, I will have a standard-form Contingency Fee Agreement prepared for your review and signature.

[8] Ms. Abbott did wish to proceed, and so Mr. Smeets forwarded her a proposed contingency fee agreement, together with two authorizations for medical records, by way of letter dated March 17, 2014. In the letter he advised her to review the documents, and if acceptable, sign and return them. He further wrote "If you wish

to seek independent legal advice before signing them, please feel free to do so". On March 26, 2014, Ms. Abbott executed the Agreement, and she returned it to Mr. Smeets, who signed it on April 17, 2014. On the same day Mr. Smeets sent Ms. Abbott a copy of the fully executed Agreement.

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[9] The Agreement provided, in part:

> IN THE EVENT OF NO RECOVERY I shall owe nothing to Smeets Law Corporation as legal fees for the legal services that the firm has rendered. It is understood that legal fees do not include disbursements or taxes. It is also understood that if this agreement is terminated in any manner contemplated by other terms of this agreement, then I may still be required to pay legal fees to Smeets Law Corporation.
>
> DISBURSEMENTS incurred by Smeets Law Corporation to assist or facilitate the prosecution of my claim are payable by me in addition to any fees that are owing. Such disbursements, which should be billed at the usual rate charged by Smeets Law Corporation, shall be paid by me within 10 days of a request for such payment being forwarded to me or communicated to me by my lawyer. UNPAID DISBURSEMENTS shall bear interest at the rate of 18% per annum.
>
> I confirm that I have been advised that while I am not required to pay legal fees, I still must pay disbursements; and that the purpose for which this money is being provided is to cover the costs of disbursements that will be incurred by Smeets Law Corporation from time to time in the course of working on my case.
>
> …
>
> IN THE EVENT that I elect not to proceed with my claim or refuse to follow my lawyer's advice, or should I elect to change lawyers, or should I provide faulty information to my lawyer, I will promptly pay for legal services performed up to that time at an hourly rate of $260.00, plus applicable taxes and disbursements.
>
> …
>
> IF A SETTLEMENT PROPOSAL is made by the other side and is recommended by my lawyer and then is rejected by me, I will pay to Smeets Law Corporation legal fees which are calculated on the basis of that proposal, and legal fees at the rate of $260.000 per hour, plus applicable [taxes] and disbursements, for legal services thereafter.
>
> …
>
> IN THE EVENT OF MY DEATH before the completion of my claim, it is understood and agreed that Smeets Law Corporation will be entitled to present to the Administrator, Executor or other representative of my estate a solicitor-client account for services performed and disbursements incurred with respect to my claim up to the time of her death.

[10] On November 4, 2015, Mr. Smeets filed the YVR Action, naming the Vancouver Airport Authority as a defendant, and seeking damages for Ms. Abbott as a result of the injuries she sustained at Vancouver International Airport on November 6, 2013.

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[11] Mr. Smeets acted on behalf of Ms. Abbott from November 2013 through to her death on July 2, 2019. Over that period, he conducted legal research into the merits of her case, drafted and filed a notice of civil claim, amended the notice of civil claim, dealt with the Ministry of Health in relation to her separate *Health Care* Action*,* requested and obtained medical records, interviewed witnesses, engaged in document production, conducted an examination for discovery of a witness on behalf of the Vancouver Airport Authority, and prepared Ms. Abbott to be examined for discovery (and attended that examination for discovery) on February 23, 2017 and September 6, 2017. Further, Mr. Smeets retained an expert in environmental design, and obtained an expert report from her on the adequacy of signage and warnings around moving sidewalks. He engaged in settlement discussions with the Vancouver Airport Authority and he ultimately scheduled a five-day trial, which was to begin on December 9, 2019.

[12] In late May 2019, Mr. Smeets was advised by a mutual friend that Ms. Abbott was in Lions Gate Hospital and in a coma, as a result of kidney failure. He went to visit her but she was still in a coma. She awoke at the end of May 2019.

[13] On June 20, 2019, Mr. Smeets received a telephone call from Ms. Abbott, advising him that her kidneys were failing and that she wished to avail herself of a medically-assisted death, as was authorized by recent changes to the *Criminal Code*. She requested that he visit her at the hospice she was living in in North Vancouver.

[14] On Saturday June 22, 2019, Mr. Smeets went to see Ms. Abbott and they discussed Ms. Abbott's decision to end her life. At that time, Ms. Abbott had submitted the necessary paperwork to begin to determine whether she would qualify to avail herself of MAiD, but she did not know whether she would qualify or when the

medically-assisted death would occur. She asked Mr. Smeets, whom she considered to be a close friend, to be with her when she passed away. At that time, she also spoke to Mr. Smeets about her two outstanding actions.

[15] Ms. Abbott's niece and the residual beneficiary of her Estate, Kathleen McArthur ("Ms. McArthur"), testified for the plaintiff. She was present at the meeting with Mr. Smeets and Ms. Abbott, and she confirmed that Ms. Abbott asked Mr. Smeets what would happen to her claim against the Vancouver Airport Authority after her death, and Mr. Smeets "indicated the case would be dead in the water". Mr. Smeets testified that he thought that without Ms. Abbott to testify as the "star witness", she would not prevail at trial, and so recovery would have been unlikely.

[16] After hearing this, Ms. Abbott told Mr. Smeets to settle the matter as cost-effectively as possible, and to bring her his bill. Mr. Smeets' notes of this conversation record "She will speak to her invest. adviser, who will be executor of her estate; she will see what he says about paying our account out now or after she dies; she would like account now".

[17] Ms. McArthur also confirmed that Ms. Abbott wanted to attend to all of her "unfinished business", which she characterized as everything from the subscriptions on her credit card to her invoices from Mr. Smeets. She testified that Ms. Abbott wanted to make things as easy as possible after her death. Ms. McArthur could not recall if there was a conversation between Ms. Abbott and Mr. Smeets as to whether Ms. Abbott's estate could have carried on with the claim and potentially have obtained a damage award notwithstanding her death.

[18] Mr. Smeets testified that Ms. Abbott instructed him to negotiate a discontinuance of her two cases on a no-costs basis, as she wanted to minimize any financial losses or delay resulting from the continuance of her cases after her death. Mr. Smeets also testified that Ms. Abbott asked him to determine whether counsel for the Vancouver Airport Authority would meet with her personally after the case was discontinued, as she wanted to advise him in person of her reasons for discontinuing her claim. Ms. Abbott and Mr. Smeets agreed that the discontinuance

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of the case on a no-costs basis should be negotiated before Mr. Smeets advised counsel that Ms. Abbott would most likely not be available for trial.

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[19] Pursuant to Ms. Abbott's instructions, Mr. Smeets contacted counsel for the Vancouver Airport Authority on June 24, 2019, and advised that she would not be proceeding on to trial with her case and inquired as to the position of the Vancouver Airport Authority if Ms. Abbott were to discontinue her case for medical reasons. Counsel was on vacation when they spoke, and confirmed he would not be able to get back to Mr. Smeets until sometime after July 2, 2019.

[20] Mr. Smeets also contacted counsel for the Ministry of Health on June 24, 2019, and likewise inquired whether they would agree to a discontinuance of the action on a no-costs basis. He heard back from counsel on June 26, 2019, who confirmed he had received instructions from his client to agree to the settlement proposal.

[21] Mr. Smeets prepared the Account as of June 24, 2019, and the date on the Account was June 28, 2019. The Account was based on an hourly rate for Mr. Smeets of $260.00. Five articling students had worked on the file, and they were all billed at an hourly rate of $150.00. The legal fees bill totalled $27,022.00, and included two hours of Mr. Smeets' time after June 24, 2019 as "Estimated fees to conclusion". Legal fees were billed in the amount of $27,022, disbursements in the amount of $6,519.21, plus applicable taxes. The total of the Account was $37,201.94, with interest accruing 30 days after it was rendered (or as of August 1, 2019), at a rate of 1.5% per month.

[22] Mr. Smeets presented the Account to Ms. Abbott on July 1, 2019. In the cover letter he presented with the Account (dated June 28, 2019) he wrote:

> Due to very unfortunate health setbacks you have made the very difficult decision not to proceed on to trial with your case. You have instructed me to arrange the discontinuance of the case, preferably with the Vancouver Airport Authority agreeing to do that on a no-costs basis. …
>
> …

> You have advised me that you are taking steps to undergo a medically-assisted suicide perhaps as soon as during the first week of July 2019. You have requested that my firm provide you with our final account on your case. Further to those instructions, please find enclosed our account for all services rendered on your case. Given that this will be the final invoice issued on your case, we have included additional charges we estimate will be required to conclude the matter before the Supreme Court of B.C. and with the Legal Services Branch, Province of B.C.
>
> It has been our pleasure serving you over the years. You are not only a valued client but a treasured friend. Obviously I would much rather be concluding this case after having run the trial (or negotiated a settlement, which at this time is not possible). Thank you for your patronage. If there is anything I can do to ease your burden at this difficult time, please do not hesitate to let me know what it is.

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[23] At that time, Ms. McArthur was present. Mr. Smeets testified that Ms. Abbott approved the Account. I heard a great deal of evidence about Mr. Smeets bringing Ms. Abbott a bottle of whiskey and sharing a small drink with her, and the appropriateness of this behaviour given she was in end-stage renal failure. This evidence was not germane to the issues before me, and I find Ms. McArthur's response when asked if this was advisable—"It was not inadvisable at that time" — to be appropriately pragmatic in all of the circumstances.

[24] Ms. Abbott died the following day, July 2, 2019, through a medically-assisted death, in the presence of Mr. Smeets and other friends. At the time of her death, the offer made by Mr. Smeets on June 24, 2019, to settle the YVR Action on a no-costs basis if she were to file a notice of discontinuance remained *extant.* Mr. Smeets acknowledges that at the time of her death, he had not reached a settlement with counsel for the Vancouver Airport Authority. On July 8, 2019, he received a letter from their counsel, advising they had instructions to waive costs incurred to date if Ms. Abbott would consent to a dismissal of the action on a without costs basis and sign a release in favour of the Vancouver Airport Authority in a form satisfactory to them. He spoke with counsel the same day, telling them Ms. Abbott had died and so she could not sign a release.

[25] Mr. Smeets testified that after Ms. Abbott's death, he contacted her Executor on numerous occasions, to update him and get his input. He said that he called him

approximately a week after her death, on July 8 or 9, and left a message. Mr. Dickinson called him back and they had a brief discussion. The parties agree Mr. Smeets spoke to Mr. Dickinson on July 9, 2019. Mr. Smeets asked Mr. Dickinson if he could provide him with a copy of Ms. Abbott's last will and testament, and Mr. Dickinson said he would. That never happened, and Mr. Smeets did not in fact get a copy of the Will until May 2020, when he asked Ms. McArthur for a copy and she emailed him one. During that same telephone call, Mr. Smeets said Mr. Dickinson told him "You will have an account" and he confirmed he did, that he had given the Account to Ms. Abbott, and she had approved it. Mr. Smeets testified that he tried to have a discussion with Mr. Dickinson as to whether to continue to settle the case or not, but Mr. Dickinson did not seem to want to interact with him. Mr. Dickinson did not testify at trial, and the defendant did not call any other witnesses.

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[26] On July 31, 2019, Mr. Smeets sent back to counsel for the Vancouver Airport Authority an endorsed Consent Dismissal Order.

[27] Mr. Smeets wrote to Mr. Dickinson on October 4, 2019, enclosing a copy of the Account and advising:

> My firm represented Ms. Abbott in this case on a contingency fee basis. The case was scheduled to proceed for trial in the Vancouver Supreme Court on December 9-13, 2019. Under the Contingency Fee Agreement that was signed by Ms. Abbott, a copy of which is enclosed with this correspondence, Ms. Abbott agreed to pay for our services on an hourly basis if she decided at some point not to continue the case. Prior to her death we discussed how her decision to end her life would impact on the agreement we had. At her request I prepared for her an account for all services rendered on the case. She reviewed the account and approved it. You will find a copy of the account enclosed with this correspondence.
>
> This account is now owing by Ms. Abbott's estate. It would be appreciated if you would provide my firm with the estate's position on the account.
>
> It would also be appreciated if you would provide me with evidence that you are the lawfully-appointed executor of the Estate of Mary Jean Abbott. A copy of Ms. Abbott's will would suffice in this regard.

[28] The parties agree Mr. Smeets spoke to Mr. Dickinson by telephone on November 4, 2019, "with respect to the October 4, 2019 letter" and that Mr. Smeets then mailed a copy of the Agreement to Mr. Dickinson on November 4, 2019.

[29] Mr. Smeets testified that after Ms. Abbott's death, Mr. Dickinson told him at least twice that there were no problems with the Account and it would be paid, but it never was. This is, of course, hearsay evidence. Mr. Smeets says he asked for it to be paid some 20 or 30 times, but the Account still has not been paid by the Estate of Ms. Abbott.

[30] The parties agree that:

a) Mr. Smeets spoke with Mr. Dickinson on January 30, 2020, who confirmed probate had not yet been granted, and that Mr. Smeets again requested a copy of the will;

b) an associate of Mr. Smeets called Mr. Dickinson on July 3, 2020, to inquire whether probate had been granted and when they could expect payment of the Account;

c) an associate of Mr. Smeets called Mr. Dickinson on July 15, 2020, to inquire who his lawyer was, and he advised it was "Hambrook"; and

d) Mr. Hambrook confirmed by email on August 17, 2020, that his firm was retained to act on behalf of Mr. Dickinson.

[31] After repeated attempts to contact Mr. Dickinson, Mr. Smeets' colleague wrote to Hambrook & Co. on July 20, 2020, who they understood to represent Mr. Dickinson, asking for Mr. Dickinson's position on the Account. Hearing nothing, she then wrote directly to Mr. Dickinson on August 7, 2020, advising:

> On November 4, 2019, we served on you the account dated June 29, 2019, owing by the estate of Mary Jean Abbott to Smeets Law Corporation. In a phone conversation with Larry Smeets, you informed him that you would file for probate in January or February 2020, and that Smeets Law Corporation would receive payment on its account by March 15, 2020 at the latest. As this did not happen, we reached out to you again on July 3, 2020. At that time,

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> you indicated that you had retained a lawyer who would contact us to follow up on this matter. On July 15, 2020, you advised that your lawyer was Hambrook.
>
> Based on that information, we have attempted to communicate with your lawyer regarding this matter to no avail. To date, we have not received any response from Mr. Hambrook or Hambrook & Co. despite multiple attempts to contact him. Given these circumstances, we are writing to you directly. If you have retained counsel, we urge you to share this letter with them.

She then went on to advise that they were proceeding to set down a taxation hearing before the registrar for the Account, and asked for his, or his lawyer's, availability.

[32] On August 13, 2020, Mr. Dickinson wrote to confirm that Hambrook & Co. was representing him in connection with the matter, and on August 17, 2020, Mr. Hambrook confirmed his retainer, and noted while they were agreeable to having the Account reviewed on October 13, 2020 "[i]t may be necessary for probate to be obtained before the Registrar will hear this matter".

[33] Ultimately, on August 19, 2020, Mr. Smeets filed an appointment for a review of the Account pursuant to the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*], set for October 13, 2020 (the "Review"). A pre-hearing conference was scheduled for October 8, 2020, and at that pre-hearing conference the appointment for the Review was adjourned, as probate had not yet been granted for the Estate, and a notice of dispute had been filed in the probate file.

[34] The Law Firm filed the within notice of civil claim on June 25, 2021, and discontinued the Review. While initially Hambrook & Co. confirmed they would accept service "of legal documents on behalf of the estate of Mary Jean Abbott", after service of the notice of civil claim on June 25, 2021, they failed to file a response to civil claim in accordance with the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*].

[35] Probate was granted by this Court, appointing Mr. Dickinson as the executor of Ms. Abbott's Estate, on October 6, 2021.

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[36] Mr. Smeets testified he followed up with Hambrook & Co. on November 4, 2021 as to when a response to civil claim would be filed, and again asking "…what is the estate's position on payment of its outstanding account with my firm? Please advise. If the estate is refusing to pay out on the account please provide details on why that position is being taken". The parties agree that on November 4, 2021, Mr. Maheem (counsel for the Executor) informed Mr. Smeets that probate had been granted, and that Mr. Dickinson was appointed as the executor of the Estate.

[37] Ultimately, by way of letter dated December 23, 2021, Mr. Chan, a colleague of Mr. Smeets, advised Mr. Maheem that if they did not receive a response to civil claim, or the address of Mr. Dickinson so they would be able to personally serve him, by January 7, 2022, they anticipated obtaining court orders to assist "to move the matter along and costs for the same". Despite an assurance from Mr. Maheem on January 10, 2022, that the response to civil claim would be filed by January 19, 2022, it was not done. Mr. Chan then received another telephone call from Mr. Maheem on January 20, 2022, advising that he anticipated finishing the response to civil claim that evening, and would send an unfiled copy as soon as it was ready. Despite follow ups on January 20, 2022, and February 2, 2022, a response to civil claim was not received. On February 8, 2022, Mr. Maheem wrote and advised he was still awaiting instructions on particular aspects to finalize and file the response to civil claim.

[38] On May 6, 2022, the Law Firm drafted a notice of application for substituted service of the amended notice of civil claim on Mr. Dickinson, returnable May 13, 2022, and Mr. Maheem confirmed receipt of the emailed materials on May 9, 2022. Ultimately, the order for substituted service went by consent, but the Master ordered the Law Firm to be entitled to their costs in any event of the cause, payable forthwith. Ultimately the Executor filed his response to civil claim on May 13, 2022, and the parties agreed he served it on the Law Firm on May 22, 2022.

III. ISSUES

[39] I must address the following issues:

a) the admissibility of hearsay evidence, and the weight I may put upon it;

b) Mr. Smeets' credibility and reliability as a witness;

c) whether the Law Firm has a valid claim in debt against the Estate pursuant to the terms of the Agreement;

d) if so, whether the Executor has a valid defence to the Law Firm's claim in debt; and

e) is the Law Firm entitled to the special costs of this proceeding, or in the alternative, to their costs of this proceeding.

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IV. ANALYSIS

[40] The Law Firm's position is the terms of the Agreement entitled them to payment of the outstanding Account. The Executor's position is that Mr. Smeets failed to clearly and adequately set out for Ms. Abbott that her Estate could continue the claim on her behalf; and they argue as a result, the Account is either not payable by the Estate, or alternatively, Mr. Smeets must disgorge to the Estate any legal fees he receives.

A. Admissibility of hearsay evidence of Ms. Abbott

[41] At trial, the plaintiff called two witnesses: Mr. Smeets and Ms. McArthur. The defendant did not call any evidence. Counsel were aware that both witnesses would testify as to discussions they had with Ms. Abbott, and counsel both agreed that they would allow evidence of those discussions to be admitted, and would reserve their right to address the use and weight I may place on those conversations in closing argument.

[42] The plaintiff says three declarations made by Ms. Abbott are relevant to the matters at issue:

a) her request of Mr. Smeets for the Law Firm's Account;

b) her statement that the Account should be paid; and

c) her request that Mr. Smeets take steps for the YVR Action and the *Health Care* Action to be discontinued.

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[43] It is trite law that facts must be proven by admissible evidence: *Pfizer Canada Inc. v. Teva Canada Limited,* 2016 FCA 161 at para. 79, leave to appeal to SCC ref'd, 37162 (19 January 2017).

[44] An out-of-court statement which is admitted for the truth of its contents is hearsay. As clearly explained in Sidney N Lederman, Michelle K Fuerst and Hamish C Stewart, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at para. 6.2:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

[45] The reasons underlying the rule of hearsay are foundational to the truth seeking function of the court. Any statement carries risk of inaccuracies, mistakes, misperceptions, or falsehoods. When the declarant is not present to be observed by the court and challenged on their statement through cross-examination, the court's ability to test the reliability of the statement is hampered: *R. v. Khelawon*, 2006 SCC 57 at para. 2 [*Khelawon*].

[46] For a hearsay statement to be admissible for the truth of its contents, it must fall within a recognized exception. First, the hearsay statement may fall under one of the many traditional exceptions to hearsay. Second, the hearsay statement may be admitted under the "principled approach", if it is found to be sufficiently necessary and reliable. The traditional hearsay exceptions are applied in light of the indicia of reliability and necessity as required by the principled approach: *R. v. Starr*, 2000 SCC 40 at paras. 191–192.

[47] The onus is on the party tendering the hearsay statement to establish both necessity and reliability on a balance of probabilities. The court must assess both

the threshold reliability of the statement, and also the statement's ultimate reliability, having regard to the entirety of the evidence: *Khelawon* at para. 2.

[48] I am satisfied that the plaintiff has established the threshold reliability of the three declarations of Ms. Abbott as set out above. Neither Mr. Smeets nor Ms. McArthur had any concerns with respect to Ms. Abbott's mental capacity in the days before her death. Further, both testified that Ms. Abbott made clear to them she was settling her unfinished business in the days before her death, to ensure her affairs were in order.

[49] I am also satisfied that the three declarations are sufficiently necessary and reliable. They are clearly necessary, as Ms. Abbott is not able to testify. They are also reliable, to the extent that the declarations were corroborated by handwritten notes made by Mr. Smeets contemporaneously. Finally, all three of the declarations were also corroborated by way of the letter dated June 28, 2019 from Mr. Smeets to Ms. Abbott, the details of which are set out in para. 22 above.

[50] In all of the circumstances, I am satisfied that these hearsay statements attributed to Ms. Abbott should be admitted into evidence, and I am satisfied that I may give them significant weight. I note that counsel for the Executor does not disagree with this, but merely stresses that these statements should be read in the context of what he says is missing from the evidence.

B. The reliability of Mr. Smeets

[51] The caselaw recognizes that credibility and reliability are separate concepts. Credibility relates to honesty and the willingness to speak truthfully, whereas reliability relates to a party's ability to accurately observe, recall and recount the events in issue: *Radacina v. Aquino*, 2020 BCSC 1143 at paras. 94–95 [*Radacina*]. A party whose evidence is not credible cannot give reliable evidence on the same issue. Credibility is not, however, a proxy for reliability, as a credible witness may nonetheless be unreliable: *Mather v. MacDonald*, 2016 BCSC 948 at para. 18, quoting *R. v. Perrone,* 2014 MBCA 74 at paras. 25–27, aff'd 2015 SCC 8.

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[52] A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated, nor lightly made: *Hardychuk v. Johnstone,* 2012 BCSC 1359 at para. 9 [*Hardychuk*].

[53] The starting point in a credibility assessment is to presume truthfulness: *Hardychuk* at para. 10. However, when a party's evidence "is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way": *Hardychuk* at para. 10.

[54] In assessing reliability, the trial judge should consider whether the witness lacks the perceptive, recall or narrative capacity to provide reliable testimony and whether he or she may be unconsciously indulging in the human tendency to "reconstruct and distort history in a manner that favours a desired outcome"; when assessing credibility, the trial judge should consider whether the witness is choosing, consciously and deliberately, to lie out of a perceived self-interest: *Hardychuk* at para. 10.

[55] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

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[56] Counsel for the Executor argues that Mr. Smeets was not always a reliable witness. He argues Mr. Smeets refused, at times, to answer straightforward questions until directed to do so by this Court, and had difficulty in answering some questions. He also argues that Mr. Smeets' recollection of events at the key time was vague, but that he remained firm in his recollection that Ms. Abbott approved the Account. Finally, he argues that Mr. Smeets changed his evidence on certain aspects from his evidence upon his examination for discovery to his evidence at trial: he agreed he had not discussed the recoverability of the costs by the estate after Ms. Abbott's death with her, but at trial his evidence was more equivocal.

[57] Credibility and reliability are not all or nothing propositions, and a trier of fact may accept all, part, or none of a witness's evidence, and may attach varying degrees of weight to different parts of a witness's evidence: *Radacina* at para. 96.

[58] However, I am not obliged to reject all of a witness's evidence simply because I have concluded the witness is not credible or reliable: *McPhail v. Ross*, 2019 BCSC 21 at para. 101; see also *Rab v. Prescott*, 2021 BCCA 345 at para. 51.

[59] I do not accept that Mr. Smeets was an unreliable witness; rather I find he was both a reliable and credible witness. While he had some difficulty answering questions, when those questions were clarified, he provided clear answers. He testified in a forthright and candid manner in both direct and cross-examination, notwithstanding that he underwent a lengthy and thorough cross-examination. While I accept that some of his evidence was vague, particularly when it came to questions of what specific legal advice he gave to Ms. Abbott at specific times, I find he did not attempt to fabricate nor expand on his evidence, and was clear when he could not recall specifics. Likewise, I do not accept that he unequivocally agreed on his examination for discovery that he had not discussed the potential for Ms. Abbott's estate to recover costs after her death, and changed that testimony at trial. Rather, it is clear upon a review of that portion of the examination for discovery transcript and his evidence at trial, that Mr. Smeets was consistent that he did not recall discussing with her that her Estate could have carried on with her claim.

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C. Does the Law Firm have a valid claim in debt against the Estate

1. Applicable Law

[60] It is trite law that an agreement is binding where parties have reached the mutual intention to enter into an agreement, and there is agreement on the terms of that agreement. The Agreement, as it is an agreement for the provision of legal services, is also subject to the provisions of the *LPA* (in particular s. 65, which governs retainer agreements, and s. 66, which governs contingency fee agreements) and the *Law Society Rules* governing contingency fee agreements. Section 69 of the *LPA* provides for the manner of delivery of a legal account, the form of a legal account, and when a lawyer may sue to collect money owed on a legal account. Part 8 of the *Law Society Rules* sets out the maximum amount of remuneration a lawyer may receive pursuant to a contingency fee agreement.

[61] The interpretation of contracts involves a practical, common sense approach, and the overriding concern is to determine the intent of the parties. The trial judge must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *1050438 B.C. Ltd. v. Penguin Enterprises Ltd.,* 2019 BCSC 2138 at para. 31.

[62] When there is ambiguity in a contract, then the canon of construction *contra proferentum* applies, which provides that where a provision suffers from ambiguity, that provision is to be construed against the interest of the person who drafted the contract: see *McClelland & Stewart Ltd. v. Mutual Life*, [1981] 2 S.C.R. 6 at 15, 1981 CanLII 53; John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc., 2020) at 825–6.

2. Analysis

[63] I am satisfied that the Agreement complied with the requirements of the *LPA* and the *Law Society Rules*. The fundamental issue is not whether the Agreement was valid, but rather, how to properly interpret the terms of the Agreement.

[64] The Agreement contained a number of clauses which dealt with the potential situations whereby the Agreement would come to an end, and the circumstances in which a legal bill would be rendered.

[65] First, the Agreement provided:

> IN THE EVENT OF NO RECOVERY I shall owe nothing to Smeets Law Corporation as legal fees for the legal services that the firm has rendered. It is understood that legal fees do not include disbursements or taxes. It is also understood that if this agreement is terminated in any manner contemplated by other terms of this agreement, then I may still be required to pay legal fees to Smeets Law Corporation.
>
> (the "Termination Term").

[66] Second, the Agreement provided:

> IN THE EVENT that I elect not to proceed with my claim or refuse to follow my lawyer's advice, or should I elect to change lawyers, or should I provide faulty information to my lawyer, I will promptly pay for legal services performed up to that time at an hourly rate of $260.00, plus applicable taxes and disbursements.
>
> (the "Discontinuance Term").

[67] Third, the Agreement provided:

> IF A SETTLEMENT PROPOSAL is made by the other side and is recommended by my lawyer and then is rejected by me, I will pay to Smeets Law Corporation legal fees which are calculated on the basis of that proposal, and legal fees at the rate of $260.000 per hour, plus applicable [taxes] and disbursements, for legal services thereafter.
>
> (the "Settlement Term").

[68] Finally, the Agreement provided:

> IN THE EVENT OF MY DEATH before the completion of my claim, it is understood and agreed that Smeets Law Corporation will be entitled to present to the Administrator, Executor or other representative of my estate a solicitor-client account for services performed and disbursements incurred with respect to my claim up to the time of her death.
>
> (the "Death Term").

[69] The meaning of the Discontinuance Term is plain on its face, and requires no extensive interpretation. It is clear that should the client decide to discontinue their

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claim, then they will have to pay for all legal services performed at an hourly rate of $260.00, plus applicable taxes and disbursements. Similarly, the meaning of the Death Term is plain on its face, and if a client died before the completion of their claim, then the Law Firm is entitled to present a solicitor-client account for services incurred up to the time of death.

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[70] The defendant argues that as the Death Term did not expressly refer to the specific hourly fee of $260.00 for Mr. Smeets, it was ambiguous. I do not agree. The Death Term clearly referred to a “solicitor-client account for services performed and disbursements incurred” up to the date of death. The fact the Death Term did not specifically state $260.00 per hour is not ambiguous, when taken in the context of the entirety of the Agreement.

[71] I am satisfied that the Agreement was terminated by Ms. Abbott pursuant to the Discontinuance Term, before her death; and it was also terminated as a result of her death pursuant to the Death Term. Accordingly, I find the Law firm has a valid claim in debt as against Ms. Abbott, and so as against her Estate.

D. Does the Executor have a valid defence to the claim in debt

[72] The defendant raises several defences to the debt claim, both in his response to civil claim and in submissions. He says that based on these defences, the Agreement must be set aside or, in the alternative, Mr. Smeets must disgorge the profits he receives pursuant to the terms of the Agreement.

[73] Prior to assessing the defences, I will first clarify which defences are properly before me for determination.

1. Defences to the debt claim advanced by the defendant

[74] An effectively pleaded cause of action must include sufficient material facts pleaded to support each element of the cause of action: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54; *Basyal v. Mac’s Convenience Stores Inc.,* 2018 BCCA 235 at para. 39; *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 25. The material facts giving rise to the claim, or that relate to the matters raised in the claim,

must be concisely set out. Neither evidence nor argument is appropriate: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at para. 44 [*Mercantile Office*]. This holds equally true for a response to civil claim. The defences being raised, and the material facts supporting those defences, must be clearly and concisely set out. A plaintiff must be able to understand the defences being advanced in response to their claims.

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[75] The British Columbia Court of Appeal in *Mercantile Office* recently explained the fundamental issue of sufficiency of pleadings:

> [21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.
>
> [22] Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22-23. They enable the parties and the court "to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.,* 2015 BCCA 182 at para.55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75-76.
>
> [23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15-22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para.30; *Weaver v. Corcoran*, 2017 BCCA 160 at para.63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice,* 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006 (loose-leaf updated 2021) at 3-6; *Simon v. Canada (Attorney General),* 2015 BCSC 924 at paras.17-18, aff'd 2016 BCCA 52.

[76] The Legal Basis in the response to civil claim filed by the Executor was brief:

> 1. The Defendant relies upon the abovementioned facts.
> 2. The Plaintiff's action is without legal basis or merit.
> 3. Further or in the alternative, the defendant denies that the plaintiff has suffered any loss or damage, as alleged or at all.
> 4. The Plaintiff acted in a conflict with its client, the Deceased, to whom it owed a fiduciary duty by seeking a gift from the Deceased.

> 5. The Plaintiff seeks to unjustly enrich itself as it had not earned any fees relating to the Litigation at the time of the Deceased's passing.
> 6. The Plaintiff acted without any authority in compromising the Deceased's claim after her passing.
> 7. The Defendant pleads and relies on the provisions of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 and amendments thereto.

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[77] The response to civil claim was inadequate in its failure to clearly identify the defences being raised by the Executor. In his response to civil claim, the Executor did not seek a set-off of any sort against the Law Firm, nor did he bring a counterclaim against the Law Firm. The lack of either was notable, as it was clear through the lengthy cross-examination of Mr. Smeets that the Executor was making serious allegations that Mr. Smeets provided inaccurate, incomplete and misleading information in the legal advice he gave to Ms. Abbott at the time she chose to avail herself of MAiD and he tendered the Account to her. Further, the Executor made the serious accusation that Mr. Smeets misrepresented information to Ms. Abbott, and coerced her into giving up her claims. No such allegations were pleaded, nor was any legal basis set out arising from these allegations. Accordingly, I will make no determination on these unplead allegations.

[78] In addition, the defences included at paras. 4–6 of the response to civil claim were not strenuously advanced as central defences by the Executor:

a) In regard to para. 4 of his response to civil claim, the Executor pleads that Mr. Smeets acted in a conflict with Ms. Abbott by seeking a gift from her, and Ms. Abbott's agreement to pay the Account was a gift in contemplation of her death to Mr. Smeets, and so should be set aside. He abandoned the position it was a gift in closing argument.

b) In regard to para. 5 of his response to civil claim, the Executor pleads that Mr. Smeets sought to unjustly enrich himself as he had not earned any fees relating to the litigation at the time of Ms. Abbott's death. He did not pursue this defence at trial, nor raise it in closing argument.

c) In regard to para. 6 of his response to civil claim, the Executor pleads that Mr. Smeets acted without authority in settling the YVR Action after Ms. Abbott's death. In closing argument admitted that he was no longer pressing this as it was not a "central argument".

[collectively, the "abandoned defences"]

[79] I will make no determination on the abandoned defences. However, there are several defences advanced by the Executor at trial that I will address, notwithstanding they were not properly set out in the response to civil claim.

[80] First, the Executor argues that Mr. Smeets acted in a way that either breached the fiduciary duty he owed to Ms. Abbott as her lawyer or acted in an unconscionable manner, so this Court must set aside any agreement to pay the Law Firm upon the discontinuance of the YVR Action. In the alternative, the Executor says Mr. Smeets is accountable for the disgorgement of the legal fees claimed pursuant to the Agreement. In particular, the Executor says Mr. Smeets, knowingly or unknowingly, misrepresented to Ms. Abbott the potential of her claim surviving her death and took advantage of the asymmetry of knowledge as between them.

[81] Throughout his lengthy cross-examination, Mr. Smeets was repeatedly asked the state of his knowledge, at the relevant time, of whether Ms. Abbott's claim for non-pecuniary damages in the YVR Action would survive her death. He admitted that he was under the mistaken belief that the claim would survive her death, if she prevailed at trial.

[82] The Executor is critical of Mr. Smeets' actions after Ms. Abbott instructed him to discontinue the YVR Action and the *Health Care* Action on a no-costs basis. He says that Ms. McArthur's evidence establishes that Ms. Abbott reached out to determine what would happen to her claim after her death, and Mr. Smeets told her it would be "dead in the water". The Executor says that Ms. Abbott was reliant upon Mr. Smeets for legal advice, and he is very disparaging of Mr. Smeets' advice to Ms. Abbott. He says Mr. Smeets provided her "with inaccurate, incomplete, and

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misleading information about the merits of her case continuing after her passing”. In particular, he stresses that Mr. Smeets:

a) failed to recommend she get independent legal advice before making any decisions to instruct Mr. Smeets to negotiate to end her claim on a no-costs basis;

b) failed to recommend she instruct him to either attempt to reignite a previous settlement offer from YVR she had previously rejected, or enter into any other settlement negotiations; and

c) failed to recommend that she allow both the YVR Action and the *Health Care* Action to continue on after her death.

[83] Specifically, the Executor says Mr. Smeets failed to advise Ms. Abbott that her Estate could have carried on the YVR Action after her death, and if successful, her Estate could have recovered court costs and disbursements after her death, and potentially her special damages.

[84] The Executor, in closing argument, stated his argument thus:

> 11. Through misrepresentation, denying the Deceased access to information within the knowledge of the Plaintiff, and raising the threat of adverse costs in the YVR Action, as set out below under evidence, the Plaintiff coerced, knowingly or unknowingly, the Deceased into making a decision that was in the Plaintiff’s interests but not the Deceased’s interests.

[85] Second, the Executor argues that in settling the YVR Action after her death Mr. Smeets rescinded the Agreement, and so he should not be entitled to any legal fees as a result of doing so. The Executor says that the Agreement provided an opportunity for Mr. Smeets to rescind the contract, if after investigation it appeared to him “that the claim is not reasonably recoverable” and in those circumstances, no legal fees would be payable. The Executor argues that as Mr. Smeets believed the claim was not worth pursuing after Ms. Abbott’s death, this clause allowed him to rescind the contract. He says:

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> 82. By compromising the Deceased's claim without authority, the Plaintiff did rescinded [sic] his contract and he should not be entitled to any fees per his own clause. Any ambiguity in the interpretation of this clause should be construed in favour of the Defendant.

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[86] In summary, while I will not consider the abandoned defences, I will consider the following three defences that the Executor argued in closing argument:

a) that Mr. Smeets acted in an unconscionable manner;

b) that Mr. Smeets breached his fiduciary obligation to Ms. Abbott; and

c) that Mr. Smeets rescinded the Agreement.

2. Applicable Law

a) Unconscionable Agreement

[87] The Executor argues that Mr. Smeets, knowingly or unknowingly, took advantage of the asymmetry between he and Ms. Abbott's knowledge about the merits of continuing with the YVR Action, and so says any agreement by Ms. Abbott to pay the Account was unconscionable, and so must be set aside.

[88] The law is clear that there are two necessary elements required for a finding that an agreement is unconscionable: first, an inequality of the bargaining powers of the parties; and second, proof of an improvident or unfair bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 64.

b) Breach of Fiduciary Duty

[89] The Executor argues that Mr. Smeets breached his fiduciary duties to Ms. Abbott by "putting his own interests in obtaining his legal fees before that of his client". He argues that a breach of these fiduciary duties disentitles Mr. Smeets from collecting any fees, as set out in the Account.

[90] While a lawyer's retainer by a client is governed by the retainer agreement (in these circumstances the Agreement) the solicitor-client relationship created by contract is overlaid with certain fiduciary responsibilities, imposed as a matter of law:

Strother v. 3464290 Canada Inc., 2007 SCC 24 at para. 34. The source of these fiduciary duties is not the retainer agreement, but rather of all the circumstances which create a relationship of trust and confidence, from which flow obligations of loyalty and transparency: *Strother* at para. 34.

c) Rescission of Agreement

[91] Finally, the Executor argues that Mr. Smeets had no authority to settle the YVR Action, and to sign the consent dismissal order, after Ms. Abbott's death. By doing so, he argues Mr. Smeets rescinded the Agreement, and so he should not be entitled to any legal fees per his own Agreement.

3. Analysis

a) Unconscionable Agreements

[92] While I accept that there was inequality as between Ms. Abbott and Mr. Smeets at the end of her life, and in particular, between June 22, 2019 (the date of their meeting when Ms. Abbott discussed the YVR Action with Mr. Smeets) and July 1, 2019 (the date Mr. Smeets presented her with the Account), I do not accept that Ms. Abbott's approval of the Account represented an improvident bargain.

[93] First, the Agreement itself provided for numerous eventualities, as already set out above. Of note, however, if one of those eventualities came to be, there was no requirement for the Account presented to be approved. The remedy, if Ms. Abbott were dissatisfied with the Account, was to undertake a review of the Account, pursuant to the *LPA.* In circumstances where there was no need for Ms. Abbott's approval of the Account, I cannot accept that an Account being rendered and approved by Ms. Abbott was an improvident bargain.

[94] Second, I do not accept the Executor's argument that Mr. Smeets took advantage of Ms. Abbott, and that the advantages to him were disproportionate to those of Ms. Abbott. Ms. Abbott asked Mr. Smeets his legal opinion as to the strength of her claims after her death, and he explained he thought there was little likelihood of success. This opinion was informed by his belief that her claim for non-

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pecuniary damages would survive her death, which he later realized was incorrect. As he noted, the fact that s. 150(4)(a) of *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 clearly states that a claim for damagers in respect of non-pecuniary loss cannot be continued after death, ironically substantiates his advice to Ms. Abbott. In all of the circumstances, where Ms. Abbott had determined to avail herself of MAiD, had submitted all of the necessary paperwork and received all the necessary medical support for her application, and was wishing to arrange her affairs so that they were orderly, I do not accept Mr. Smeets took advantage of Ms. Abbott, nor do I accept that her decision to instruct him to arrange for a settlement of her claims on a no-costs basis was an improvident one.

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[95] I am not satisfied that either the Agreement itself, nor Ms. Abbott's agreement to approve the Account (which was not necessary) were unconscionable.

b) Breach of Fiduciary Duty

[96] The Executor says that Mr. Smeets failed to inform Ms. Abbott, in any significant substance, of any potential merits of continuing on with the YVR Action after her death, and in failing to do so, he breached his fiduciary duties to her, and benefitted himself, and so "he is accountable for disgorgement of any fees". His position is that he did not need to make a claim of set-off to be able to seek disgorgement of the legal fees, but rather says it is a defence such that Mr. Smeets should not be entitled to payment of the legal fees set out in the Account. He admits he has found no case law directly on this point.

[97] Again, in all of the circumstances, I do not accept that Mr. Smeets breached his fiduciary duties to Ms. Abbott. She had made the decision to avail herself of MAiD, and filled out all of the necessary applications, and obtained all of the necessary medical opinions, before she advised Mr. Smeets of her decision to do so by way of a telephone call on June 20, 2019. She and Mr. Smeets then met on Saturday June 22, 2019, and at that meeting Ms. Abbott made clear she wanted Mr. Smeets to be with her when she passed away. She also raised the issue of the YVR Action and the *Health Care* Action, and she instructed him to negotiate a

discontinuance of her case on a no-costs basis, as she wanted to minimize any financial losses or delay resulting from the continuance of her cases after her death.

[98] The Executor's argument is that Mr. Smeets' acceptance of these instructions placed him in a conflict of interest with Ms. Abbott, and that he should have set out for her, in detail, the potential benefits of her Estate proceeding with these actions after her death, and should have recommended independent legal advice. I cannot accept this argument for two reasons.

[99] First, Mr. Smeets and Ms. McArthur both testified that Ms. Abbott wanted to deal with her unfinished business, and that included both her outstanding claims, and the invoice she knew would be due and owing to Mr. Smeets. It is perfectly reasonable for someone who knows their death is imminent to wish to attend to unfinished business, and it is to Ms. Abbott's credit that she attempted to do so. It would not be reasonable in these circumstances to find that a fiduciary duty existed to ensure that Ms. Abbott had carefully analyzed all potential outcomes if her claims survived her, particularly, as those outcomes had a range of possibilities. Mr. Smeets' belief that without her *viva voce* testimony her claim would not be successful cannot be said to be unrealistic. To say that she required independent legal advice to consider this opinion appears to imply either that Ms. Abbott lacked mental capacity to consider and analyze Mr. Smeets' advice, or that Mr. Smeets was knowingly taking advantage of her. There is no evidence to support either allegation.

[100] Second, pursuant to the Death Term of the Agreement, if Ms. Abbott had died without instructing Mr. Smeets, or died while obtaining independent legal advice, Mr. Smeets would have been entitled to render an account to the Estate. I cannot accept that Mr. Smeets, rendering an Account to Ms. Abbott (upon her request) the day before her death, breached his fiduciary obligations to her, when he would have been entitled to render the same account to her Estate the day after her death, pursuant to the terms of the Agreement.

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c) Rescission of the Agreement

[101] The Executor argues that by settling Ms. Abbott's claim without authority, Mr. Smeets exercised his right to rescind the Agreement as set out in the Agreement; specifically:

> Larry W.O. Smeets accepts these instructions on the condition that Smeets Law Corporation will accept the claim and, if the claim appears to be a recoverable claim, will proceed to conduct the claim; but if after investigation it appears to Larry W.O. Smeets that the claim is not reasonably recoverable, then Larry W.O. Smeets shall have the right to rescind this agreement, and no fees shall be payable.

The Executor argues that Mr. Smeets "…should not be able to recover any fees due to his one-sided and self-serving position that he conveyed to the Deceased regarding the merits of the YVR Action".

[102] I do not accept that the evidence supports this argument. I find that Ms. Abbott asked for Mr. Smeets' advice as to the likelihood of her Estate prevailing with the YVR Action after her death, and he advised he believed it was unlikely to be successful. At that time, Ms. Abbott instructed Mr. Smeets to settle her two actions on a no-costs basis, and to provide her with the Account. Mr. Smeets did not rescind the Agreement.

[103] While the Estate may have had a valid legal claim against Mr. Smeets for the actions he took after Ms. Abbott's death to continue on with the settlement negotiations and to implement the settlement, the Executor has not brought such a claim, either as a counterclaim nor an independent notice of civil claim. Accordingly, any such claim is not before me and I need not address this issue further.

[104] Given my findings, there is no basis to an argument that Mr. Smeets must disgorge any profits he received as a result of my determining the Estate must pay the Account.

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E. Is the Law Firm entitled to the special costs of this proceeding

1. Applicable Law

[105] The plaintiff seeks special costs of this proceeding. The court may award special costs where a person's conduct is found to be "reprehensible". Reprehensible conduct captures both scandalous and outrageous conduct, as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.,* 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.); *Westsea Construction Ltd. v. 0759553 B.C. Ltd.,* 2013 BCSC 1352 at paras. 28, 31–33, 43. Reprehensible conduct will likely be found when there is evidence of an improper motive, an abuse of the court's process, misleading the court, and persistent breaches of the rules of professional conduct and the rules of court: *Westsea* at para. 73. Special costs may also be awarded:

a) where a party has a reckless indifference to the merits of the claim, or persists with a claim that is clearly deficient;

b) where there is misconduct of a witness or a party; or

c) where there are serious and unproven allegations that do not have a reasonable prospect of success.

See *Neural Capital GP, LLC v. 1156062 B.C. Ltd.,* 2022 BCSC 1800 at para. 14.

[106] In addition, serious and unproven allegations made against a lawyer may attract special costs. A lawyer relies on their reputation for integrity, and "[w]hile not every accusation against a lawyer will lead to special costs, when a lawyer's reputation is falsely assailed, the court's reproof should be felt": *Gichuru v. Smith,* 2014 BCCA 414 at para. 80, leave to appeal to SCC ref'd, 36221 (16 April 2015).

2. Analysis

[107] The Law Firm argues that the Account was rendered to Ms. Abbott and she approved it, but the Estate has avoided paying the Account due and owing. They

stress that the Estate failed to pursue an *LPA* Review of the Account, which they were entitled to do if they believed the Account was not properly due and owing and was unreasonable.

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[108] The Law Firm says that the Executor failed to adhere to the *Rules*, and failed to file a response to civil claim in accordance with the timelines set out in the *Rules.* The Law Firm stresses that it was only when they filed a notice of application, seeking substituted service of their notice of civil claim, that counsel for the Executor provided an undertaking to file and serve a response to civil claim. The Law Firm also argues that the Executor failed to produce appropriate documents, although there was no evidence of such a failure.

[109] Further, the Law Firm argues that many of the defences raised by the Executor are not proper defences; but rather, were causes of action in the guise of a defence: in particular, the abandoned defences I address at para. 78.

[110] I am satisfied that these defences were not properly brought as a defence to the debt claim, but rather, ought to have been pursued by way of either a counterclaim or separate notice of civil claim. However, notwithstanding that, I find that many of these allegations were extremely prejudicial to the Law Firm, and to Mr. Smeets, and the Law Firm was obligated to respond to them, particularly with respect to allegations akin to negligence on the part of the Law Firm and Mr. Smeets. These allegations go to the heart of Mr. Smeets' reputation, which is the cornerstone upon which every lawyer builds their practice.

[111] Counsel for the Executor admits that the response to civil claim could have been filed faster, but maintains that the Executor has not engaged in conduct that is reprehensible. He argues that the Executor "…has also been mindful of the costs of litigation and has not pursued separate claim(s) against the Plaintiff aside from denying the existence of the alleged debt related to the Plaintiff's legal fees".

[112] I am satisfied that the Executor raised a number of causes of action inappropriately in the guise of defences and made very serious allegations,

tantamount to negligence, against both the Law Firm and Mr. Smeets, but failed to bring a proper counterclaim or separate notice of civil claim. The allegations made by the Executor that Mr. Smeets misrepresented information to Ms. Abbott, and provided her with inaccurate, incomplete and misleading information about the merits of her case, and coerced her to settle the two actions, are grave ones.

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[113] I also note the Executor at no time amended his response to civil claim to remove these causes of action as defences; but rather only in closing argument abandoned a number of defences. These were meritless defences, in that they clearly were not proper defences to the debt claim brought by the plaintiff, but rather were stand alone causes of action that the Executor chose not to bring against the Law Firm. Finally, in closing argument, for the first time, the Executor agreed that the disbursements, and the applicable interest, were properly payable.

[114] In these circumstances, I find that the Executor had a reckless indifference to the merits of the defences set out in his response to civil claim, and chose to pursue those alleged defences right up until his closing argument, at which point he abandoned many of them. This forced the plaintiff to conduct the trial on the basis of the abandoned defences and it caused the trial of this matter to be longer than necessary. I am satisfied that this is misconduct which deserves rebuke by this Court. Further, I am also satisfied that the Executor made very serious allegations as to Mr. Smeets' advice, tantamount to an argument he was negligent, while failing to set out a proper pleading alleging the same. The totality of these circumstances amounts to conduct that deserves rebuke.

[115] Notwithstanding I am mindful that the court must exercise restraint in awarding special costs, and the party seeking special costs must demonstrate exceptional circumstances to justify such an award, I find that in these circumstances the plaintiff is entitled to their special costs of this proceeding. These costs are referred to the Registrar for assessment, failing agreement between the parties.

V. CONCLUSION

[116] In conclusion, I find the Law Firm has a valid claim in debt as against Ms. Abbott, and so as against her Estate. I find that Mr. Smeets neither breached his fiduciary duties to Ms. Abbott, nor acted in an unconscionable manner. Further, I find that Mr. Smeets did not rescind the Agreement. In all of the circumstances, there is no legal basis upon which to conclude that Mr. Smeets breached any of his obligations to Ms. Abbott, and so there is no basis for the argument he should disgorge any legal fees due and owing to him under the Account.

[117] The plaintiff is granted the relief they seek, namely:

a) a declaration that the Executor owes the outstanding amount of $37,201.94 as set out in the Account, plus interest on the Account at 1.5% per month accruing from August 1, 2019 to the last day of trial, in the amount of $23,923.40, for a total outstanding amount of $61,126.45;

b) an order that the Executor pay to the plaintiff the amounts set out above; and

c) an order that the plaintiff is entitled to their special costs of this proceeding, which costs are referred to the Registrar for assessment, failing agreement between the parties.

"Blake, J."

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