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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Robert Lloyd Woolner v. Norah Theodora D'Abreau

BEFORE: Justice D. M. Brown

COUNSEL: D. Marcovitch, in person

P. Koven, in person

D. Hiltz, independent counsel for Norah D'Abreau

DATE HEARD: January 19, 2009

E N D O R S E M E N T

I. Issue

[1] On January 19, 2009, I conducted a hearing under Rule 57.07(2) of the *Rules of Civil Procedure* to inquire whether I should disallow any costs as between the respondent, Ms. Norah D'Abreau, who is 83 years old, and the two lawyers who provided her with legal services on this application, Messrs. Marcovitch and Koven. Mr. Marcovitch acted both as Ms. D'Abreau's lawyer and as her attorney of property.

[2] For the reasons set out below, I conclude that I should disallow some such costs.

II. Overview

[3] The history of this application is contained in my endorsement of December 17, 2008: 2008 CanLII 7043 ON S.C.; [2008] O.J. No. 5436 (S.C.J.). Norah D'Abreau executed a Continuing Power of Attorney for Property in favour of the applicant, Robert Woolner, a lawyer, as well as another person, under which Mr. Woolner began to manage Ms. D'Abreau's property and financial affairs.

[4] Ms. D'Abreau subsequently retained another lawyer, Mr. Marcovitch, who began to ask Mr. Woolner questions about how he was handling Ms. D'Abreau's financial affairs. Mr. Woolner suggested that Ms. D'Abreau undergo a capacity assessment; Mr. Marcovitch communicated that Ms. D'Abreau saw no need to do so. Ms. D'Abreau then appointed Mr.

Marcovitch as her attorney, whereupon Mr. Woolner brought this application to compel Ms. D'Abreau to submit to a capacity assessment.

[5] Shortly after an initial adjournment of the application before Strathy J. in late March, 2008, Mr. Marcovitch retained Mr. Koven as litigation counsel for Ms. D'Abreau. Mr. Koven recommended that she undergo an assessment. Ms. D'Abreau did so, and the assessment found her to be capable of managing her own affairs.

[6] Counsel then debated the issue of costs of the application for the better part of half a year. Finally, that issue came before me last December. Mr. Woolner sought costs of $28,647.74 from the property of Ms. D'Abreau; through her counsel Ms. D'Abreau sought costs of $23,766.40 against Mr. Woolner. In my December endorsement I concluded that this application had turned into a "classic case where early in the proceedings the parties completely lost sight of the principle of proportionality" and, in the result, I ordered no costs of the application.

[7] I paragraph 46 of my endorsement I turned to the issue of the ability of Ms. D'Abreau's lawyers to recover their fees from her. I wrote:

> [46] As to Ms. D'Ambreau, although I have ruled that she cannot recover her costs against Mr. Woolner, I harbour serious concerns about the legal fees incurred on her behalf in this application. I have noted the absence of any affidavit from her. She is 82 years old. From the evidence before me she does not have any immediate family or friends with whom she can consult. I think some obligation rests on the court, when, as here, it has strong concerns about the incurrence of disproportionate costs, to see that the interests of the vulnerable in our society are protected. Consequently, I am exercising my powers under Rule 57.07(2) of the *Rules of Civil Procedure* to inquire whether I should make an order under Rule 57.07(1)(a) disallowing any costs as between Messrs. Marcovitch and Koven, on the one hand, and Ms. D'Ambreau, on the other.

[8] I directed Mr. Koven to deliver a copy of my endorsement to the Public Guardian and Trustee and to Ms. D'Abreau. He did so. As a result the PGT requested Mr. D'Arcy Hiltz to act as independent counsel for Ms. D'Abreau.

III. Costs in issue: $23,766.40

[9] The costs incurred by Messrs. Marcovitch and Koven on behalf of Ms. D'Abreau and claimed against the applicant at the December hearing totaled $23,766.40. Mr. Marcovitch paid himself $6,250.00 from Ms. D'Abreau's property for his fees. On July 8, 2008, Mr. Koven rendered an account to Ms. D'Abreau for $3,184.65, for which Mr. Marcovitch arranged payment. The sum of $14,331.75 remains unbilled, apparently broken down as follows: $10,438.75 in respect of work performed by Mr. Koven, and $3,893.00 for Mr. Marcovitch's work. I say apparently because neither lawyer filed a detailed breakdown of the unbilled amounts or copies of their dockets.

IV. Evidence of the parties on the Rule 57.07(2) hearing

A. Mr. Marcovitch

[10] Mr. Marcovitch filed an affidavit and made submissions before me. He deposed that the litigation "troubled me from the outset", "it upsets me that (Ms. D'Abreau) is tangled up in this matter through no fault of her own", but "I do not know if further expenditure of funds could have been avoided" because Mr. Woolner was not prepared to resolve the application.

[11] Turning to his dealings with Ms. D'Abreau about the litigation, he described her as "determined, headstrong and driven" and that she was angry at the manner in which her affairs were being managed by Mr. Woolner.

[12] Mr. Marcovitch deposed that Ms. D'Abreau intended to terminate Mr. Woolner from the outset, as a result of which she was not prepared to cooperate when he requested an assessment. He deposed that after Mr. Woolner commenced the application, he and Ms. D'Abreau "agreed to let matters play themselves out". Although he acknowledges that an assessment might have resolved the litigation, he states Ms. D'Abreau was not prepared to agree to one.

[13] Mr. Marcovitch's time ledger for the period January 23, 2008 to March 31, 2008 (the date of the attendance before Strathy J.) records 23 telephone calls with Ms. D'Abreau, but no meetings with, or letters to, her.

[14] Mr. Marcovitch deposed that following the adjournment before Strathy J. he retained Mr. Koven on behalf of Ms. D'Abreau and the two of them discussed the litigation with her "during conference calls on a number of occasions". Mr. Koven suggested obtaining an assessment of Ms. D'Abreau's capacity to appoint or revoke a power of attorney for property and she agreed to such an assessment.

[15] Mr. Marcovitch deposed that on June 20, 2008 he wrote a comprehensive letter to Ms. D'Abreau discussing the litigation. Extracts from that letter dealing with the litigation were attached to his affidavit, but he did not include the first page of the letter. In his letter Mr. Marcovitch advised Ms. D'Abreau that he had received a bill of costs from Mr. Woolner for $16,735.50. Mr. Marcovitch expressed the view that the whole application had been unnecessary, that Mr. Woolner was not entitled to his costs, and that Ms. D'Abreau was entitled to her costs which would include the fees of Mr. Marcovitch and Mr. Koven. Mr. Marcovitch then discussed some of the pros and cons of contesting Mr. Woolner's bill of costs and concluded:

> I am not sure how to advise you. As I have mentioned many times, I have issues with Mr. Woolner. He challenged your basic abilities, he took over your life, and he refused to give it back. He should be challenged.
>
> But the fees to date are substantial. In addition to Mr. Eisner's fees, there are my fees and Mr. Koven's. I have not yet tallied my account nor has Mr. Koven provided his bill, but

> much time has been spent. I am angry with Mr. Woolner but am cautious to add fee upon fees upon fees.
>
> We will have to discuss this next time we meet.

In the extract of the letter filed before me no details are given about the amount of the fees incurred up until that point of time by Mr. Marcovitch or Mr. Koven.

[16] Mr. Marcovitch deposed that he discussed the letter with Ms. D'Abreau the next time they met. According to him, Ms. D'Abreau was not prepared to pay Mr. Woolner's account:

> Ms. D'Abreau and I discussed that additional fees would be incurred by opposing Mr. Woolner's account. Ms. D'Abreau acknowledged that. We also discussed the "worst case" scenario, that Ms. D'Abreau could be responsible for both Mr. Woolner's fees as well as her own. She acknowledged that as well.

[17] Mr. Marcovitch instructed Mr. Koven to attempt to settle the matter, but the latter advised that Mr. Woolner was not prepared to settle for less than full payment of his costs. A return date for the application was set. Mr. Marcovitch deposed:

> Since no material on behalf of Ms. D'Abreau was before the court, we [Mr. Marcovitch and Mr. Koven] concluded that a full response was required to allow the court to fully consider all the issues. I prepared the affidavit, completed the research and prepared the factum.

In his affidavit Mr. Marcovitch does not indicate whether he discussed this work with Ms. D'Abreau.

[18] Mr. Marcovitch deposed that the rising fees incurred by Ms. D'Abreau were causing him concern:

> During the course of the litigation, I discussed my fees with Ms. D'Abreau. I advised her that I would take them over time so as not to create any cash flow issues for her. She was in agreement. To date I have paid myself the sum of $6,250 for fees and GST. As the costs increased, I decided that I would not take any further fees unless Ms. D'Abreau received an award of costs or now, unless the court authorizes it.

[19] Mr. Markowitz concluded his affidavit by stating:

> As I said at the outset, I am pulled in different directions. On the one hand, I am fond of Ms. D'Abreau and will be happy for her when this proceeding comes to an end. I put in considerable time and effort, but am not seeking any additional compensation.
>
> On the other hand, Ms. D'Abreau is competent. She did not want to pay Mr. Woolner. Her instructions were to oppose, and she understood that additional fees to oppose would be involved.

[20] Mr. Marcovitch did not include a copy of his post-March 30, 2008, dockets with his affidavit.

B. Mr. Koven

[21] Mr. Koven filed an affidavit sworn by his law clerk describing his involvement, and he made submissions before me. I will treat the law clerk's affidavit as essentially that of Mr. Koven.

[22] According to that affidavit, a conference call took place on April 9, 2008, shortly after the appearance before Strathy J., amongst Mr. Marcovitch, Mr. Koven and Ms. D'Abreau to discuss Mr. Koven's retainer and how to respond to the application. According to Mr. Koven, during that conversation Ms. D'Abreau ultimately agreed to a limited capacity assessment. The law clerk's affidavit does not contain any information about what, if any, discussion took place about the amount of Mr. Koven's fees or the potential cost of the litigation.

[23] Mr. Koven paid for the assessment of Ms. D'Abreau by the capacity assessor.

[24] On July 8, 2008, Mr. Koven wrote a letter to Ms. D'Abreau and Mr. Marcovitch enclosing his account in the amount of $3,184.65. The letter was addressed to Ms. D'Abreau "c/o Mr. Marcovitch". In his letter Mr. Koven wrote:

> As you may know, Mr. Woolner is seeking his costs of the proceeding before the court in the amount of $16,735.50, which he is suggesting that you ought to pay in light of his position that he was acting at all times in your best interests. Mr. Woolner's solicitor has now requested that we contact him and advise him of our intention with respect to payment of the outstanding account and to that end we would like to arrange a mutually convenient date and time to discuss the matter by way of telephone conference so that we can obtain the necessary instructions from you and advised Mr. Eisner accordingly.

[25] The affidavit of Mr. Koven's law clerk's then continues:

> Between May 20, 2008 and August 2008, Mr. Koven had a number of discussions with Nora D'Abreau and with David Marcovitch regarding the applicants Bill of Costs and settlement of this matter. Ms. D'Abreau was insistent that she would "not pay a penny" to Mr. Woolner in this matter as a result of the way he had treated her. She felt humiliated that her capacity was even being questioned and felt that Mr. Woolner had kidnapped her property and held her financially hostage.

Mr. Koven's letter of July 8, 2008 attached his account which itemized his docket entries. For the period May 20, 2008 to July 8, 2008, Mr. Koven's dockets do not show any discussion or contact with Ms. D'Abreau. Mr. Koven did not file his dockets for the period after July 8, 2008.

[26] The law clerk's affidavit recounts that in August, 2008, Mr. Koven received instructions to attempt to settle the matter by requesting Mr. Woolner pay Ms. D'Abreau $5,000 in costs. From Mr. Marcovitch's affidavit it appears that he so instructed Mr. Koven. However, Mr. Koven's law clerk's affidavit went on to state that Ms. D'Abreau understood that further settlement discussions would likely take place and that a counteroffer might be made, although no details were provided about how that information was communicated to Ms. D'Abreau.

[27] In September, 2008, Mr. Koven prepared a Retainer Agreement addressed to Ms. D'Abreau for her to sign – her name was typed under the signature line. The Retainer Agreement listed the hourly rates for Mr. Koven, his law clerks and students-at-law. The Retainer Agreement did not specify a budget for the litigation, nor provide any estimate of the expected costs. Although the signature line contemplated that Ms. D'Abreau would sign the Retainer Agreement, in fact Mr. Marcovitch signed it on September 26, 2008, as her attorney for property. Mr. Marcovitch does not refer to the Retainer Agreement in his affidavit; I have no evidence before me that the Retainer Agreement was ever given to Ms. D'Abreau.

[28] Responding materials on behalf of Ms. D'Abreau (which did not contain an affidavit from her) were prepared on October 24, 2008. On October 28, 2008, Mr. Koven wrote Ms. D'Abreau, again care of Mr. Marcovitch, advising that the matter would be proceeding in court on December 12, 2008. Mr. Koven reported on the inability to settle the matter with Mr. Woolner and advised that court materials had been sent to him. The letter concluded:

> Although we believe that your case is strong, please keep in mind that it is at least a possibility that the judge could agree that the court application was brought with your best interests in mind and order that you pay the costs of Mr. Woolner in the proceeding. We will continue to make every effort to bring this matter to a resolution before the December 12, 2008 and will keep you apprised of our efforts.

The letter made no reference to the costs incurred to date on behalf of Ms. D'Abreau nor the amount of her potential costs exposure. From the letter it appears that Mr. Koven did not provide Ms. D'Abreau with a copy of the respondent's record filed on her behalf.

C. Ms. D'Abreau

[29] In my earlier endorsement I noted the absence of Ms. D'Abreau's voice in the materials before me at the December hearing. For this hearing independent counsel arranged for Ms. D'Abreau to file an affidavit. She deposed:

> Although I have problems with my memory, I do not recall ever refusing to have my mental capacity assessed nor do I recall ever instructing my lawyer, Mr. Marcovitch, to refuse to have my capacity assessed.
>
> When I was asked to have my capacity assessed, I did not refuse. I did not consider the request for the assessment an insult.

[30] Ms. D'Abreau described her understanding of the issue of potential legal fees in the application initiated by Mr. Woolner:

> In relation to my legal fees, I was aware that I would incur legal fees in fighting the claim against me, however, I was not aware that the fees would be as high as the sum of $23,000.

> To me it does not make sense that I would have a legal bill for more than the initial amount of the claim against me and I feel foolish that this has happened.
>
> I do not recall Mr. Marcovitch, my lawyer, advising me how much it would cost to oppose the claim against me, however, it is possible that he may have. I do not recall receiving any legal bills from Mr. Marcovitch.
>
> If Mr. Marcovitch had told me that there was a risk that I would have to pay more in legal costs than the amount of the initial claim against me, I would not have allowed him to act for me. I definitely would not have allowed him to act for me if there was a risk that I would end up paying everyone's legal costs.

[31] Turning to Ms. D'Abreau's recollection of her dealings with Mr. Koven, she deposed:

> I am advised by Mr. D'Arcy J. Hiltz that a lawyer by the name of Mr. Paul Koven also acted as my lawyer.
>
> I do not recall ever meeting or speaking to a lawyer by the name of Paul Koven.
>
> I understand from Mr. Hiltz that Mr. Koven acknowledges that he has never met me. I also understand that Mr. Koven maintains he had telephone conversations with me. It is possible that this occurred and that I do not remember. At all times, it was my understanding that my lawyer was Mr. Marcovitch.
>
> I do not recall anyone advising me how much Mr. Koven's legal bill would be in opposing the claim against me, however it is possible that this may have occurred. I do not recall receiving any bills or letters from Mr. Koven.

[32] As to the June 20, 2008 letter which Mr. Marcovitch deposed he sent to Ms. D'Abreau, she deposed that she did not recall receiving such a letter. Nor did she recall receiving Mr. Koven's letter of October 28, 2008. Ms. D'Abreau concludes her affidavit by stating: "I believe that Mr. Marcovitch was attempting to help me and I am agreeable to pay the amount the Court feels I should pay for my legal fees."

V. Positions of the parties

A. Ms. D'Abreau

[33] Independent counsel submitted that Messrs. Marcovitch and Koven incurred costs on behalf of Ms. D'Abreau without reasonable cause and without her instructions and, as a result, a substantial reduction should be made to the costs claimed by the lawyers against Ms. D'Abreau..

B. Mr. Koven

[34] Mr. Koven expressed concerns about the accuracy of Ms. D'Abreau's evidence regarding the capacity assessment. He stated that in his conversations with her, Ms. D'Abreau opposed

undergoing an assessment and only reluctantly agreed in the end. In his view, Ms. D'Abreau at all times was competent to instruct counsel and was aware of the risks of litigation, and the work he performed was done pursuant to, and in accordance with, her instructions.

C. Mr. Marcovitch

[35] Mr. Marcovitch stated that he was torn in this proceeding. He followed what he thought were Ms. D'Abreau's instructions and what he did was for Ms. D'Abreau's benefit. Although he put in considerable time and effort on her behalf, Mr. Marcovitch was not seeking any additional compensation over that already billed.

VI. Analysis

[36] Rule 57.07(1) of the *Rules of Civil Procedure* provides that "where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs."

[37] In my December endorsement I identified four stages in this litigation: (i) events prior to the issuance of the Notice of Application on February 19, 2008; (ii) the period from February 19 to the attendance before Strathy J. on March 31, 2008; (iii) arranging a capacity assessment of Ms. D'Abreau and the applicant's May 14, 2008 letter advising that his concerns had been allayed; and, (iv) the period of the costs dispute which ran from May 15 until December 12, 2008.

A. The first three stages of the litigation

[38] As I indicated in paragraphs 38 and 41 of my December endorsement, my concerns about the reasonableness and proportionality of the costs focused on what took place during the fourth stage of the litigation. As to the first three stages, Ms. D'Abreau was named as a respondent to a proceeding by Mr. Woolner and steps necessarily had to be taken on her behalf to respond to his application. Although the evidence about Ms. D'Abreau's willingness to submit to a capacity assessment conflicts, Mr. Koven's introduction into the dispute appeared to result in a decision to undergo a capacity settlement and, shortly thereafter, a resolution of the *lis* between the parties. From my review of the evidence, the legal services provided by Mr. Marcovitch and Mr. Koven to Ms. D'Abreau during these first three stages contained value for her, and they are entitled to compensation for such services.

B. The fourth stage of the litigation

[39] The same cannot be said for the work they performed after May 14, 2008. In my December endorsement I concluded that no proportionality existed between the parties' conduct during the fourth stage of litigation and what was at stake. I pointed out in paragraph 43 of my endorsement that a simple re-attendance before Strathy J. could have settled the costs dispute with little extra expense to the parties. The costs which Mr. Marcovitch and Mr. Koven incurred on behalf of Ms. D'Abreau during the fourth stage were done without reasonable cause. The

litigation strategy which they executed on her behalf was not reasonable in the circumstances nor was it proportional to what was at stake.

[40] Let me deal separately with the obligations of Mr. Marcovitch and Mr. Koven.

(i) Mr. Marcovitch

[41] During the fourth stage of the litigation Mr. Marcovitch assumed two roles in his dealings with and on behalf of Ms. D'Abreau. First, he was her solicitor. At the same time he was her attorney for property and, as such, her agent. As her lawyer Mr. Marcovitch owed Ms. D'Abreau fiduciary obligations, including a duty to provide her with full disclosure of all relevant and material information relating to her interests: Lysyk, Dodek and Hoskins, *Barristers and Solicitors in Practice*, §5.36. As an attorney of property exercising powers given by a grantor who remained capable, Mr. Marcovitch also owed Ms. D'Abreau fiduciary duties: Kimberly A. Whaley and Helena Likwornik, *Powers of Attorney and Financial Abuse* (2008), 27 Estates, Trusts & Pensions Journal 378, at 387.

[42] The evidence shows that Mr. Marcovitch was primarily responsible for the decisions made regarding what legal costs Ms. D'Abreau should incur. He deposed that he spoke and met frequently with Ms. D'Abreau; by contrast Mr. Koven never met her and stated that he only talked once with her.

[43] While a lawyer may not operate under a legal obligation to commit to a specific figure for work to be incurred on behalf of a client, he certainly owes a professional duty to ensure that his client's eyes are opened to the likely range of costs: Lysyk, *supra.*, §13.23. As put by the Commentary to Rule 2.08 of the *Rules of Professional Conduct of the Law Society of Upper Canada*:

> Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should forestall misunderstandings or disputes by giving the client an immediate explanation.

[44] Although Mr. Marcovitch deposed that on several occasions he talked with Ms. D'Abreau about the possible costs of the litigation, his evidence does not reveal that he discussed with her specific numbers or ranges of costs. The extract from his June 20, 2008, letter (which Ms. D'Abreau does not recall receiving) only indicated that "the fees to date are substantial" and "I have not yet tallied my account nor has Mr. Koven provided his bill, but much time has been spent." Such a communication did not satisfy his fiduciary obligation as a lawyer to make full disclosure of all relevant and material information about the costs of the litigation, nor did it satisfy his reporting obligations as Ms. D'Abreau's attorney agent.

[45] Mr. Marcovitch retained Mr. Koven to act on behalf of Ms. D'Abreau. As her attorney he executed Mr. Koven's Retainer Agreement of September 26, 2008. That Agreement did not contain any estimate of fees. Mr. Marcovitch did not depose that he provided Ms. D'Abreau with a copy of the Retainer Agreement, nor is there any evidence he discussed the agreement with her. Such a course of action by Mr. Marcovitch was not acceptable. He knew his client was compentent; she had undergone a capacity assessment in April. Mr. Koven was about to incur significant expenses on behalf of Ms. D'Abreau by preparing a lengthy responding record on the costs issue in which Mr. Marcovitch's affidavit would figure prominently. As her lawyer and attorney Mr. Marcovitch was under an obligation to discuss with Ms. D'Abreau the range of costs that would be incurred by undertaking that course of action and to ensure that any decision which she made was a fully informed one. Unfortunately, I have no evidence before me from which I can conclude that Mr. Marcovitch satisfied either obligation.

[46] The context of this case is of paramount importance. Ms. D'Abreau was not a large, commercial client who instructed her lawyer to take whatever steps were necessary to respond to the application regardless of the costs involved. She was an elderly person who resided in a retirement home and lacked any immediate family with whom she could consult. The evidence shows that she depended heavily upon Mr. Marcovitch for his advice and stood in a classic vulnerable position in relation to him.

[47] As Canada's population ages over the next few decades, elderly people will turn increasingly to lawyers for assistance in managing their affairs and providing advice on problems or disputes which arise, either as lawyers, attornies, or both. In discharging their duties to elderly clients or grantors of powers of attorney, lawyers must act with scrupulous care to ensure not only that what they do is for the benefit of their client or grantor, but also that they can account for what they have done. As Whaley and Likwornik point out in their article, an attorney should keep written documentation of his instructions. In my view, a lawyer/attorney should be able to demonstrate by a written record that he has fully informed his client or grantor of the risks and potential costs of future steps, especially where litigation is involved.

[48] In the present case Mr. Marcovitch cannot document the advice which he gave Ms. D'Abreau about the potential costs of the litigation or the instructions he received from her. Ms. D'Abreau's evidence shows that her memory is frail and she cannot recall with certainty what she may or may not have discussed with Mr. Marcovitch. As fiduciaries, lawyers and attornies must be able to account for what they did and why, particularly when their clients or grantors are elderly. On the evidence before me, I cannot conclude, on a balance of probabilities, that Mr. Marcovitch clearly informed Ms. D'Abreau about the risks and potential costs of the litigation strategy that he and Mr. Koven undertook, or that he received from her informed instructions to proceed with that strategy.

[49] Turning to the approximately $3,893.00 of work performed by Mr. Marcovitch for which he has not yet billed, the onus lies on the lawyer to prove the appropriateness of his work: Lysyk, *supra.*, §13.77. In assessing the appropriateness of work performed by a lawyer, a court should take into account all factors essential to justice and fairplay, including what the lawyer accomplished: Lysyk, §13.93. In my December endorsement I concluded that the approach and

work undertaken on behalf of Ms. D'Abreau during the fourth stage of this litigation were unreasonable and completely disproportionate to what was at stake. As matters now stand, she faces claims for unpaid costs by her lawyers that come close to equaling her maximum exposure on Mr. Woolner's demand for his full costs of $16,735.50.

[50] Ms. D'Abreau put the matter aptly in her affidavit: "To me it does not make sense that I would have a legal bill for more than the initial amount of the claim against me…" I agree; it certainly does not. I conclude that the legal work performed by Mr. Marcovitch on behalf of Ms. D'Abreau in this litigation after May 14, 2008 provided no value to her and resulted in costs being incurred without reasonable cause. He is not entitled to any further compensation from Ms. D'Abreau for work performed on this litigation other than the $6,250.00 for which he has already been paid.

(ii) Mr. Koven

[51] Most of what I have said regarding the services performed by Mr. Marcovitch applies equally to Mr. Koven, although he acted only as Ms. D'Abreau's lawyer, and not as her attorney for property. Mr. Koven never met Ms. D'Abreau; he talked with her once, but she cannot recall the conversation. Neither his letter of July 8, 2009 nor that of October 28, 2009 clearly recorded instructions that she gave him, and certainly neither contained any estimate of potential costs. His September Retainer Agreement gave no estimate of costs.

[52] Most significantly, notwithstanding that he knew Ms. D'Abreau was competent, the evidence reveals that he took no steps to ensure that his letters or Retainer Agreement actually were received by Ms. D'Abreau notwithstanding that they were addressed to her. As well, he permitted Mr. Koven to sign the Retainer Agreement on behalf of Ms. D'Abreau, instead of discussing it directly with her.

[53] The Retainer Agreement indicates that Mr. Koven regarded Ms. D'Abreau as his client, not Mr. Marcovitch. Under those circumstances, Mr. Koven's fiduciary obligation to Ms. D'Abreau required that he ensure she understood the nature and risks of the litigation for which she was retaining him and, as well, its potential costs. Mr. Koven has not produced any documentation – dockets, memos to file, or correspondence – that indicates he did so. To have relied for instructions on his client's agent, rather than the client herself, was not an appropriate course of action to take in the circumstances of this case when he knew his client was elderly, but competent, and he was proposing a litigation strategy which I have characterized as completely disproportionate to what was at stake. If a lawyer intends to launch his client on a high risk, high cost litigation strategy, he must ensure that he can demonstrate that his client clearly understood the risks involved, yet nonetheless approved the proposed course of action. On the evidence before me, Mr. Koven has not done so.

[54] I conclude that the legal work performed by Mr. Koven on behalf of Ms. D'Abreau in this litigation after May 14, 2008 provided no value to her and resulted in costs being incurred without reasonable cause. Although a portion of the work covered by his July 8, 2008, account related to time spent after May 14, 2008, it is small in amount and I see no need to adjust that account. However, I find that Mr. Koven is not entitled to recover from Ms. D'Abreau any costs that he incurred after July 8, 2008, in respect of this litigation.

VII. Summary

[55] By way of summary, pursuant to Rule 57.07(1)(a) of the *Rules of Civil Procedure*, I disallow any costs in relation to this litigation as between Mr. Marcovitch and Ms. D'Abreau apart from the $6,250.00 which he previously billed her, and I disallow any costs in relation to this litigation as between Mr. Koven and Ms. D'Abreau beyond those costs billed in his account of July 8, 2008, which has been paid.

[56] Independent counsel advised that Ms. D'Abreau, and not the PGT, would be responsible for his costs, and he wished an opportunity to make submissions on costs. Accordingly, Mr. Hiltz may serve and file with my office written cost submissions, including a Bill of Costs, no later than Tuesday, February 17, 2009. Messrs. Marcovitch and Koven may serve and file responding written cost submission no later than Wednesday, February 25, 2009. The written submissions shall not exceed three pages in length, excluding any Bill of Costs.

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D. M. Brown J.

DATE: February 10, 2009