

Court of Queen's Bench of Alberta

Citation: Khan v Paul A Kazakoff Professional Corporation, 2019 ABQB 168

Date: 20190308

Docket: 1801 00721

Registry: Calgary

Between:

Ila Khan

Applicant

- and -

Paul A. Kazakoff Professional Corporation

Respondent

**Reasons for Judgment
of the
Honourable Madam Justice A. Woolley**

[1] The Applicant Ms. Ila Khan brought an application for a review of the charges of her lawyer Paul A Kazakoff, to a Review Officer who, on May 14 2018, referred the issue to this Court for determination pursuant to Rule 10.18(1).

[2] In August 2017 Ms. Khan agreed to sell 80 acres of land in Rocky View Alberta ("Rocky View property") to Dr. Beth Barrett for \$2,050,000. The property sale was completed in early December 2017. Mr. Kazakoff claims that he provided legal services to Ms. Khan in relation to the purchase and sale of the property. He further claims that he and Ms. Khan agreed that she would pay him 5% of the purchase price as a fee for those services – that is \$102,500 plus GST of \$5125.00, for a total of \$107,625. He held back that amount, along with other legal fees and a promissory note on which he said he was owed payment, when he distributed the proceeds of sale of the Rocky View property to Ms. Khan.

[3] Ms. Khan and Mr. Kazakoff do not have a written agreement in relation to the provision of legal services for the purchase and sale of the Rocky View property. There is no written agreement as to the nature and extent of services to be provided. There is no written agreement as to the amount to be paid for those services. Nonetheless, Mr. Kazakoff asks this Court to find that an agreement exists and that it ought to be enforced pursuant to Rule 10.2 of the Rules of Court. He says that it was a percentage fee or commission agreement as contemplated by Rule 10.5 which ought to be enforced on the basis that it meets the standard of reasonableness imposed by Rule 10.2. Before me Mr. Kazakoff abandoned his argument that this was an enforceable contingency agreement under Rule 10.7 or one that could be rendered enforceable by virtue of Rule 10.7(8).

[4] For the reasons below, I grant Ms. Khan's application and order that Mr. Kazakoff repay the entirety of the \$107,625 with interest payable in accordance with the *Judgment Interest Act* RSA 2000 c J-1.

I. Facts

a. Findings on Credibility

[5] Five witnesses testified at the hearing. Ms. Khan called four witnesses, including herself. Mr. Kazakoff called two witnesses, including himself. The non-party witnesses provided evidence that was independent, straightforward and consistent with other testimony and the record. They were credible.

[6] Ms. Khan was a credible witness. Ms. Khan's recollection of some events was uncertain and at times inconsistent, but that is unsurprising given she is 85 years old and that some of the events occurred several years ago. It is clear she feels upset by her dealings with Mr. Kazakoff, but she also gave Mr. Kazakoff credit for the work he had done for her over the years. On key points her evidence was corroborated by other witnesses and was consistent with the evidentiary record.

[7] Mr. Kazakoff was less credible. On matters that were secondary to the issue before me his evidence was supported by the record, transparent and appears to reflect his honest recollection of events. On the actual matters at issue, however – the work he did for the sale of the Rocky View property, and the existence and nature of the fee agreement with Ms. Khan – his evidence was occasionally self-serving and either inconsistent with or unsupported by the evidentiary record, as discussed further below. Where the evidence of Mr. Kazakoff and Ms. Khan conflict, I prefer the evidence of Ms. Khan.

b. Background

[8] Ms. Khan was born in 1933. She is 85 years old. Until she retired, she was a farmer and was involved in horse racing. In 2017 she was living in her house on the Rocky View property, where she had lived for at least 40 years. She had llamas, horses and dogs. She had a number of friends with whom she spent time, including Connie Sundquist who testified at this hearing, as well as acquaintances like Dr. Beth Barrett, who ultimately purchased the Rocky View property.

[9] Mr. Kazakoff is a lawyer in Calgary. He graduated from the University of Alberta in 1978 and was called to the bar following his completion of articles in 1980-81. He is a sole practitioner working primarily in the area of civil litigation.

[10] Ms. Khan and Mr. Kazakoff have known each other since the early 1980s. They were friends. They also worked for each other from time to time. From 2008-2014 Ms. Khan boarded the racehorse that Mr. Kazakoff owned with Dave Welke for a monthly fee of \$1000-1500. From 2014-2017, after the horse retired due to injury, she boarded the horse for Mr. Kazakoff at no charge.

[11] Mr. Kazakoff provided legal services for Ms. Khan on numerous occasions over the years. His work appears to have advanced Ms. Khan's legal interests. In 1990 he assisted her with documentation for a land sale. In 1996-2000 he represented her in a civil action related to injuries sustained by her thoroughbred Jan Alta. He recovered \$165,000 in that action, including taxable costs, and earned a 25% contingency fee. The contingency fee agreement was in writing. In 2005-2007 Mr. Kazakoff represented Ms. Khan in civil litigation arising from a dispute between Ms. Khan, a realtor, and a prospective purchaser of some of her land. The civil litigation was settled in 2007. The conduct of the litigation was complicated as Mr. Kazakoff became a witness and had to find replacement counsel for Ms. Khan on two occasions. Ms. Khan paid Mr. Kazakoff \$117,000 for his services in relation to that retainer. Mr. Kazakoff provided other legal

services to Ms. Khan on various matters which were itemized on bills for \$3675.00 and \$17,325.00 that he issued in November 2017.

[12] Other than the matter before me, Mr. Kazakoff and Ms. Khan have not had any dispute over the services provided by Mr. Kazakoff, or with respect to the payment or amount of fees for those services.

[13] Mr. Kazakoff loaned Ms. Khan money on three occasions. The loans were interest free but were put into writing in the form of promissory notes signed by Ms. Khan and witnessed. Two loans were in the amount of \$50,000 and one was in the amount of \$9000. All of the loans were repaid; the \$9000 in the form of a deduction from the purchase price for the Rocky View property.

[14] In 2002 Ms. Khan named Mr. Kazakoff as a beneficiary in her will. In 2008 she also named him as her agent in a personal directive and gave him power of attorney in the event she became infirm or mentally incapable. In 2015 she named Mr. Kazakoff as the sole beneficiary of her will. Until he returned the documents to her in November 2017, Mr. Kazakoff had possession of Ms. Khan's will, personal directive and power of attorney.

[15] Mr. Kazakoff testified that when Ms. Khan told him she was making him her sole beneficiary, he insisted she get a capacity assessment. His Affidavit included a copy of a signed physician's note dated July 29, 2015 stating that Ms. Khan was "of sound mind and able to make informed decisions re her health and affairs".

[16] I was provided with no other evidence about the legal advice received by Ms. Khan regarding her will, or the circumstances surrounding the drafting of the will and the naming of Mr. Kazakoff as a beneficiary. I do not know how the will or the capacity assessment came to be in Mr. Kazakoff's possession. Ms. Khan testified that she did not consent to Mr. Kazakoff including them in his Affidavit. It is clear, however, that Mr. Kazakoff knew that he was the sole beneficiary of Ms. Khan's will at the time he says that he was representing her in relation to the sale of the Rocky View property. It is also clear that the Rocky View property was the only significant asset owned by Ms. Khan.

II. The Rocky View Property Sale

[17] The Rocky View property is located at 224210 Range Rd 284 in Rocky View County. It consists of 80 acres of land, a house, a barn and some other structures.

[18] At the time the Property was sold in November 2017, Ms. Khan had two home equity loans, one of \$494,966.18 and another of \$103,401.70.

[19] In 2013 Ms. Khan began the process of selling the Rocky View property. She signed a brokerage agreement with two realtors, Anibal Rodrigues and Rui Tomeiro, dated November 18, 2013. The list price for the land was \$2,999,900. As a result of the economic circumstances in Calgary in 2014, an "Amendment to the Brokerage Agreement" dated May 23, 2014 lowered the list price to \$1,999,900. Ms. Khan did not discuss the brokerage agreement with Mr. Kazakoff before entering into it.

[20] The property did not sell during the time of the Rodrigues' brokerage agreement. Ms. Khan testified that she showed the property once, and Mr. Rodrigues showed it twice. Another realtor, Margaret Shum, approached Mr. Rodrigues with respect to a potential purchaser from

China, Ai Lin Wang. Mr. Kazakoff provided legal services to Ms. Khan in relation to the prospective sale to Mr. Wang. Mr. Kazakoff testified that he viewed this offer as potentially very attractive to Ms. Khan because Mr. Wang did not propose to live on the property, such that it was possible to come up with an arrangement where Ms. Khan would be able to stay on the property which Mr. Kazakoff knew was important to her. Unfortunately, Mr. Wang's financing fell through and the sale did not proceed.

[21] In July 2014, during the Rodrigues' retainer, Mr. Kazakoff advertised the Rocky View property on Kijiji and also responded to advertisements on Kijiji posted by persons interested in purchasing a rural property or farm.

[22] By way of a letter dated December 16, 2014, Mr. Rodrigues terminated the brokerage agreement. Ms. Khan understood that to have occurred because Mr. Rodrigues was going to Europe. The termination letter was sent to Mr. Kazakoff in an e-mail which referred a prospective purchaser to Mr. Kazakoff along with that purchaser's agent, John Zatwarnitski. Offers were exchanged in relation to that prospective purchaser through Mr. Kazakoff and Mr. Zatwarnitski, but the property did not sell. At that time, Mr. Kazakoff testified that he insisted that any offer from Ms. Khan include the opportunity for Ms. Khan to remain on the property.

[23] Mr. Kazakoff testified that in December 2014 he and Ms. Khan had an oral discussion initiated by her, in which they agreed that he would advertise the property, negotiate with all interested parties and come out to the property to show it. She would pay him a 5% commission for this work, rather than paying a realtor to do it. Ms. Khan testified that she knew that Mr. Kazakoff was making some effort to help her sell the Rocky View property but said that he did not do so at her request and she did not offer to pay him. She denies the existence of an agreement of the type described by Mr. Kazakoff.

[24] Mr. Kazakoff provided no corroborating evidence in relation to the existence of this agreement. Not only was there no written agreement detailing the services he was to provide, and what Ms. Khan was to pay for those services, there is no record of any discussion between Ms. Khan and Mr. Kazakoff about the nature of the agreement between them, or any record referring to its existence. The only evidence before me that such an agreement existed is Mr. Kazakoff's testimony to that effect. This is the case even though: a) on the prior occasion when Mr. Kazakoff had acted on a contingency basis he obtained that agreement in writing; b) all Ms. Khan's loans from him were documented in writing, and were signed and witnessed; and c) even though Mr. Kazakoff's own testimony was that when he had last acted for Ms. Khan in litigation, Ms. Khan had been difficult.

[25] Mr. Kazakoff's explanation for the lack of documentation was that he trusted Ms. Khan, and that her word was as good as gold to him. He acknowledged in cross-examination that he did not recommend that she get independent legal advice. He testified that in his view the agreement was fair and equitable to both parties.

[26] Between January 2015 and March 2016, Mr. Kazakoff made efforts to sell the Rocky View property. He had an advertisement on Kijiji and showed the property to several people. Ms. Khan recollected him showing it to 4-5 people during that period. One of those people was Juan Correa, who testified before me. In 2015 Mr. Correa responded to one of Mr. Kazakoff's advertisements on Kijiji. Mr. Correa received and reviewed documents provided by Mr. Kazakoff. He visited the property with Mr. Kazakoff and worked with Mr. Kazakoff to see if it

was possible to come up with an acceptable offer to purchase the property. Mr. Correa did not purchase the Rocky View property.

[27] In March 2016, after the death of a friend and a scare from an incident at the farm involving a donkey and a light fixture, Ms. Khan decided to again list the property with a realtor. She signed a brokerage agreement with a realtor, Laura Kitchen. The brokerage agreement had a list price of \$2,100,000 and provided that Ms. Kitchen would be paid a 2% commission, and would split that commission in the event a cooperating brokerage was involved in the sale. The commission was lower because Ms. Kitchen was just starting out. Ms. Khan did not discuss this agreement with Mr. Kazakoff before signing it.

[28] Ms. Kitchen was unable to sell the Rocky View property and no offers for purchase were made during the time she worked with Ms. Khan. During the 3-4 months of the Kitchen brokerage agreement, Mr. Kazakoff removed his Kijiji ad and ceased all efforts to sell the Rocky view property.

[29] From January 2015 through to November 2017, Mr. Kazakoff testified that, apart from the 3-4 months of the Kitchen brokerage agreement, he spent 2-3 hours per week attempting to find a purchaser for the Rocky View property, for a total of 300-340 hours. He described some of his efforts specifically, particularly his dealings with one potential purchaser, Peter Kosiorowski. The documentation he provided in relation to the work he did to sell the property was, however, very sparse but also such as to suggest that he had maintained records from at least 2014. He provided about a dozen e-mails all dated July 11, 2014 where he responded to advertisements on Kijiji. He provided evidence of his dealings with three prospective purchasers, Juan Correa, Kelly Tunney and Peter Kosiorowski. Mr. Correa testified as noted. With respect to Mr. Kosiorowski, Mr. Kazakoff provided 4 brief e-mails from July-August 2017. With respect to Ms. Tunney he provided one e-mail dated May 1, 2017. In sum, he provided 17 short (some one-line) e-mails from a 2 ½ year period, and one witness who testified regarding Mr. Kazakoff showing him the property. Mr. Kazakoff testified that he had no diaries, paper or electronic, or other records in relation to the visits he said that he made with purchasers to the Rocky View property. None of the evidence provided by Mr. Kazakoff, beyond his own stated recollection, supported his claim to have worked so extensively on the sale of the Rocky View property. That claim was also inconsistent with the evidence of Ms. Khan, and Ms. Khan's witnesses Ms. Sundquist and Mr. Welke, and I do not believe it.

[30] Ms. Sundquist has been friends with Ms. Khan since 2001. Over the period of 2014-2017 she visited Ms. Khan every week or so, usually on the weekends. During that time, she saw Mr. Kazakoff once or twice when he came to visit his horse, but she never saw him visit the property with a third party. She had dinner with Mr. Kazakoff at Ms. Khan's house during this time, and he did not discuss selling the property. Ms. Khan told Ms. Sundquist that she wished to reside on the property after it was sold.

[31] Mr. Welke owned a racehorse with Mr. Kazakoff, and they were good friends until 2014 when they had a falling out. From 2008-2014 Mr. Welke and Mr. Kazakoff's horse was boarded with Ms. Khan, and they paid her \$1000-1500 per month, depending on vet bills. Mr. Welke said that Mr. Kazakoff never mentioned that he was selling Ms. Khan's property. Mr. Welke testified that Ms. Khan did not appear to have any health issues, and that she told him that she wanted to stay on the property after it sold.

[32] Throughout 2014-2017 (and earlier), Ms. Khan had occasional conversations with Dr. Elizabeth Barrett, a veterinarian whom Ms. Khan has known for 40 years, about the purchase of the Rocky View property. The conversations with Dr. Barrett became more serious in 2014-15, after Ms. Khan put a “for sale” sign on Highway 22x in relation to the Rocky View property. Ms. Khan took Dr. Barrett on an extensive tour of the Rocky View property. She wanted Dr. Barrett to purchase the property because she believed that Dr. Barrett wanted to purchase it, and because she thought that she would be able to stay living in the house after Dr. Barrett did so. She told Mr. Kazakoff about Dr. Barrett’s interest in the house by 2015.

[33] Dr. Barrett testified that she never saw any advertisements on Kijiji for the property. She also testified that it was her intention to work out an arrangement whereby Ms. Khan could continue to live on the land after she purchased it, that she wanted Ms. Khan to stay there. She also confirmed that she was interested in obtaining the property at the lowest price she could.

[34] In May 2017 Dr. Barrett began communicating with Mr. Kazakoff about the potential purchase of the property. In August 2017, Dr. Barrett proposed that the parties enter into a Right of First Refusal Agreement with respect to the Rocky View property. Ms. Khan rejected that proposal.

[35] In an e-mail dated August 9, 2017 Mr. Kazakoff told Dr. Barrett’s lawyer that Dr. Barrett was not to contact Ms. Khan to discuss the purchase of the property. In his e-mail he said “I have come to the conclusion that your client’s repeated attempts to communicate directly with my client are inappropriate and may constitute an attempt to exercise some undue influence over her in respect of the proposed purchase of her property. To that extent I request that your client cease attempting to contact my client directly to discuss the proposed purchase”. Ms. Khan testified that she was not concerned about Dr. Barrett influencing her and that while she was aware of Mr. Kazakoff’s concern about Dr. Barrett influencing her, she had not seen the e-mail he sent to Dr. Barrett’s lawyer.

[36] On August 11, 2017 Dr. Barrett’s lawyer sent an offer for the Rocky View property. The offer was to purchase “land and equipment”, although the equipment the offer was to cover was unclear. The proposed purchase price was \$1,750,000. Clause 3(b)(iii) of the offer noted that part of the purchase price was an arrangement “for the Vendor to be able to remain on that portion of the Lands previously indicated to Purchaser by way of separate cover, after the Closing Date, for the duration of the Vendor’s choosing.” In the e-mail attaching the offer, Dr. Barrett’s lawyer said:

At some point, we will have to work out the precise arrangement that allows Ila to live on the property and does not contravene the subdivision rules in the Land Titles Act. Until those details have been worked out, Beth will not sign the offer. This could certainly be a ‘win-win’ transaction if both parties are willing, especially since our client will accommodate Ila’s wishes regarding the residence.

[37] On August 12, 2017 Mr. Kazakoff sent an e-mail to Dr. Barrett with a counter-offer. The counter-offer noted that “no equipment was listed in your draft proposal” and set out Mr. Kazakoff’s assumptions as to what would be included. It proposed a purchase price of \$2,100,000. Further, it said:

Ms. Khan confirmed that though she was interested in possibly renting the residence and a few acres at the north end of the property when she initially put

the property up for sale, maintain same at her age does not make this proposal feasible anymore. To that extent, she is not interested in remaining on a portion of the property as proposed at subparagraph 3(b)(ii).

[38] Ms. Khan testified that at no point had her desire to reside on the property changed, and that at no point had she told Mr. Kazakoff that she did not want to reside on the property. Dr. Barrett, Mr. Welke and Ms. Sundquist confirmed Ms. Khan's desire to live on the property in their testimony (although Mr. Welke's evidence largely referred to an earlier time period).

[39] In his testimony Mr. Kazakoff took the position that he had sent the e-mail because in his view the e-mail from Dr. Barrett's lawyer made it clear that there was not in fact any offer for Ms. Khan to live on the property. He said that he told Ms. Khan that Dr. Barrett was only offering a future agreement to agree, which is not enforceable, and that there was no point in pressing them on it.

[40] This characterization of the agreement and e-mail is inconsistent with the plain terms of sub-paragraph 3(b)(iii) of Dr. Barrett's offer, which clearly provides for Ms. Khan to reside on the property after it is purchased. The e-mail from the lawyer simply sets out the reasonable concern of Dr. Barrett and her lawyer that the legal implications of the proposal be properly considered before it was finalized. There is nothing in the e-mail to diminish or remove the proposal contained in the offer, and I do not believe Mr. Kazakoff when he says that he understood it in that way.

[41] This is particularly so given that his e-mail does not raise any questions about this issue, but simply states that Ms. Khan has changed her mind; a claim which her evidence and that of the other witnesses contradicts. He said in cross-examination that he phrased the e-mail this way to be diplomatic, but I do not accept that evidence. It was no more diplomatic than making inquiries about Dr. Barrett's intentions and concerns in relation to Ms. Khan remaining on the property.

[42] Mr. Kazakoff said in cross-examination that the issue of Ms. Khan residing on the property was not raised again until after the purchase of the Rocky View property was concluded.

[43] On August 21, 2017, Dr. Barrett's lawyer sent a further offer to purchase the land (and not equipment) for \$1,900,000. The offer did not permit Ms. Khan to remain on the land. After some further discussions, the parties ultimately agreed on a purchase price of \$2,050,000. The land was transferred on November 2, 2017, and Ms. Khan vacated the property in early December 2017.

[44] Ms. Khan never sold the equipment on the property, but instead gave it away to friends.

[45] Ms. Khan testified that she was very upset that she was not able to stay on the Rocky View property. She said that she had built the house, built everything there, and that she was leaving the land and her barn and her way of life. Mr. Kazakoff confirmed that Ms. Khan was upset. He characterized her response as angry and threatening to him, and that it was a result of this that he had returned the will, personal directive and enduring power of attorney to her in November, 2017.

[46] Ms. Khan testified that she borrowed money from the Rocky View property to purchase equipment, but that she did not have financial difficulties. She had approximately \$40,000 in income from pensions and other sources. Mr. Kazakoff testified extensively regarding his

position that Ms. Khan was using her property as a “land bank” and that she needed cash. He explained that this was why he lent her money. The evidence suggests that Ms. Khan did use the Rocky View property to generate cash. The evidence does not suggest, however, that Ms. Khan had pressing financial difficulties, or that her financial difficulties were such that it was impossible for her to accept an offer for the property with a lower purchase price, but which would have allowed her to remain on the property.

[47] After the closing of the sale of the Rocky View property Mr. Kazakoff provided three invoices to Ms. Khan. The first was based on the alleged 5% commission agreement, and was for \$102,500 plus \$5125 GST, for a total of \$107,625. The second was for professional services rendered in relation to the “Sale of Property to Beth Barrett or Nominee”. It describes professional services related to the execution and completion of the Property Sale Agreement between Dr. Barrett and Ms. Khan. That invoice was for \$3500 plus \$175 GST for a total of \$3675. Third, Mr. Kazakoff issued an account for “Sundry Legal Matters from July 10/07 to November 30/17. Amongst other matters listed, the invoice listed explicitly:

All dealings with Rodrigues re: Purchase offers on property and Listing Agreement

All subsequent dealings with Shum, Slezinski and Zatwarnitski re: sale of property

Sundry showings of property and all incidental communication and correspondence.

The third invoice was for \$16,500 with GST of \$825, for a total of \$17,325.00. Mr. Kazakoff claimed that the invoice should not have made any reference to the dealings with Rodrigues and Shum, and that it should not have referenced the number of Ms. Khan’s file for the land sale. He provided no explanation for why this was a mistake or should be viewed as such. Mr. Kazakoff’s evidence on this point is inconsistent with the invoice he acknowledged was issued by him, and I do not accept it.

[48] Mr. Kazakoff deducted all of these amounts from the proceeds of sale. He also deducted the mortgages owing on the property, and the \$9000 debt of Ms. Khan to him. There was no evidence that Mr. Kazakoff made these deductions pursuant to a direction to pay. He said in cross-examination that one of his paralegals had misappropriated funds and taken some files, including this one. He said that he did not recall having received a direction to pay although it would have been standard practice.

[49] Mr. Kazakoff testified that his billable rate at the time was \$500/hour. He also testified that he could not recall or estimate how many hours he spent on the negotiations with Dr. Barrett and her lawyer. He said that he could estimate the time he had spent in relation to Kijiji (discussed above), but not the time he spent on the negotiation.

[50] Kazakoff acknowledged that his prior experience in selling real estate was limited. He also acknowledged that he did not complete a number of the tasks that are set out in the standard form brokerage agreements, such as listing the property on the MLS.

III. Issues

[51] Should Mr. Kazakoff be entitled to a fee of 5% of the purchase price of the Rocky View property pursuant to Rule 10.2 of the *Alberta Rules of Court* AR 124/2010.

a. Analysis

[52] Rule 10.2 provides:

10.2(1) Except to the extent that a retainer agreement otherwise provides, a lawyer is entitled to be paid a reasonable amount for the services the lawyer performs for a client considering

- (a) the nature, importance and urgency of the matter,
- (b) the client's circumstances,
- (c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,
- (d) the manner in which the services are performed,
- (e) the skill, work and responsibility involved, and
- (f) any other factor that is appropriate to consider in the circumstances.

[53] In assessing an application under Rule 10.2, a judge “must apply the criteria listed...and provide an explanation as to how they influenced the...decision” (*Steinke v Hajduk Gibbs LLP* 2014 ABQB 34 at para 53). The Court must ensure that “those who are obliged to pay for legal services are treated reasonably, taking into account all the circumstances” (*Alberta Treasury Branches v 1401057 Alberta Ltd.* 2013 ABQB 478 at para 43, cited in *Steinke* at para 66). The lawyer who charged the fee “bears the burden of persuading the review officer that the amount charged is appropriate” (*Steinke* at para 73).

[54] The position of Mr. Kazakoff is that he had an agreement to be paid in a percentage in accordance with Rule 10.5 and that, while Rule 10.2 governs the recovery of his fees, the amount recoverable under Rule 10.2 should be the 5% fee agreed to.

[55] Rule 10.5 of the Rules of Court provides:

10.5(1) A lawyer may make an agreement with a client about the amount and manner of payment of the whole or any part of past or future lawyer's charges for services performed by the lawyer.

(2) The amount a lawyer is to be paid may be determined in any appropriate way, including

- (a) a gross sum,
- (b) commission,
- (c) percentage,
- (d) salary, or
- (e) an hourly rate.

(3) The amount payable may be at the same or at a greater or lesser rate than the rate to which the lawyer would be entitled under rule 10.2 [Payment for lawyer's services and contents of lawyer's account] if no retainer agreement were entered into.

[56] As discussed below, Mr. Kazakoff has not discharged his onus of proving the existence of an agreement for Ms. Khan to pay him a 5% commission on the purchase price of the Rocky View property. Even had he done so, however, I reject his argument that he can rely on Rule 10.5 in seeking to collect that fee. Mr. Kazakoff properly conceded that a fee for services calculated as a percentage of an uncertain sale at an uncertain price is a contingent fee subject to Rule 10.7: it is a fee the payment of which is contingent on an uncertain event, and the amount of which depends on the nature of the event which occurs. Mr. Kazakoff conceded that it did not meet the requirements of Rule 10.7 and could not be enforced under that rule. Having done so, Mr. Kazakoff can obtain no assistance from Rule 10.5. The reference to a percentage or commission in Rule 10.5 cannot be used as a work-around for a lawyer's failure to comply with Rule 10.7. As provided for by Rule 10.8, "If a lawyer does not comply with Rule 10.7(1) to (4), (6) and (7), the lawyer is, on accomplishment or disposition of the subject-matter of the contingency fee agreement, entitled only to a lawyer's charges determined in accordance with Rule 10.2 as if no contingency fee agreement had been entered into". Rule 10.5 does not come into it.

[57] In relation to proving the 5% agreement, lawyers bear a special onus to prove the terms of a contract when they have not reduced that contract to writing. In *Andrew v Two-in-One Gold Mines Limited* [1937] OR 482 the Ontario Court of Appeal noted that "from the earliest times" solicitors have had a duty to put their retainer in writing. Where the lawyer does not do so then "[o]ther things being equal, weight is to be given to the denial of the client as against a solicitor". In the words of Lord Denning "On this question of a retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it... The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences" (*Griffith v Evans* [1953] 2 All ER 1364, per Lord Denning, dissenting on other grounds).

[58] In *Ross, Barrett and Scott v Simanic* (1997) 163 NSR (2d) 61 the Nova Scotia Supreme Court said:

This is sometimes called a "rule of practice". It is not a rule of contract or of fiduciary obligation by which one party's version of the contract always prevails. The first part of Lord Denning's formulation is wrong. He said "...the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it." On the contrary, the ordinary rules of contract apply to a contract for legal services. The terms are to be found in the ordinary ways: by finding the intention of the parties through their contracting expressions understood in context, or by finding terms through implication according to the law of implied terms. *The difference in this class of contract is that the lawyer asserting an unclear, parol retention is under an evidentiary disadvantage on*

account of his or her failure in duty. The lawyer bears a "special onus"
[emphasis added]

[59] Mr. Kazakoff has not discharged that special onus. As noted, not only is the alleged agreement that Ms. Khan would pay him 5% of the purchase price in return for his help in selling the Rocky View property not in writing, there is no written evidence that alludes to its existence. Ms. Khan denies it. No other witness had knowledge of it. Such an agreement is inconsistent with Ms. Khan's entering into agreements with realtors to sell the Rocky View property not once, but twice. Why would she have asked Ms. Kitchen to sell the Rocky View property if, as Mr. Kazakoff claims, she already had an agreement for Mr. Kazakoff to do so? As discussed below, Mr. Kazakoff did make some efforts to assist Ms. Khan with the sale of the Rocky View property. Those efforts are not, however, sufficient to establish an agreement of the kind asserted by Mr. Kazakoff, particularly in the context of the relationship between Mr. Kazakoff and Ms. Khan. Ms. Khan boarded Mr. Kazakoff's horse for three years at no cost, a service that Mr. Welke's evidence establishes was worth some \$12,000 per year. In that light, Mr. Kazakoff providing some modest assistance to Ms. Khan in her attempts to sell the property is as consistent with an exchange of favours between friends as it is with a formal agreement that Mr. Kazakoff would provide services in exchange for a large fee. As such, the fact that he provided such assistance cannot in and of itself discharge his onus to prove the existence of an agreement that Ms. Khan would pay him a 5% fee for providing those services to her. I find that there was no such agreement. At most there was an agreement that he would provide her with some assistance with selling the Rocky View property and would charge her a reasonable fee for doing so, consistent with the nature of their relationship and such services as he ended up providing.

[60] Mr. Kazakoff submits that a reasonable fee in such circumstances is nonetheless the 5% fee that he charged, when considered in light of the factors set out in Rule 10.2. Mr. Kazakoff's submission in this respect cannot be accepted. In my view, the proper application of Rule 10.2 results in Mr. Kazakoff receiving only the amounts he billed for his work on the Rocky View property in the other two invoices issued in November 2017, and none of the amounts he has claimed as a 5% fee.

IV. The Nature, Importance and Urgency of the Matter

[61] The "matter" for which Mr. Kazakoff has retained \$102,500 plus \$5125 GST, for a total of \$107,625, is his efforts to sell the Rocky View property, including his negotiation with Dr. Barrett. It does not include professional services related to the execution and completion of the Property Sale Agreement between Dr. Barrett and Ms. Khan, for which Mr. Kazakoff issued a separate invoice.

[62] The sale of the Rocky View property was important to Ms. Khan, but it was not urgent. She did not have pressing financial difficulties, and her health did not require her to leave the property; indeed, she wanted to remain on the property after selling it. Importantly, the matter did not require legal services but rather the services of a realtor who could advertise the property on the MLS, provide related services, work with other realtors, and have training and experience in the negotiation of a real estate purchase agreement. It did not require the training and skills of a lawyer, particularly one specializing in civil litigation.

[63] Mr. Kazakoff's submissions imply that he believes that this criterion supports his claim for a 5% fee: since the nature of the services provided were those of a realtor, he should be paid

as a realtor would be. The problem with Mr. Kazakoff's submissions in this respect are, however, that he did not provide services offered in the other brokerage agreements entered into by Ms. Khan. He did not list the property on the MLS, obtain information in relation to the property such as information respecting property taxes and utility information, arrange for open-house showings, or install a lock-box on the property. Moreover, 5% is a 3% higher fee than the 2% charged by Ms. Kitchen in her brokerage agreement with Ms. Khan.

[64] In short, the services required were those of a realtor. They did not require Mr. Kazakoff's legal expertise, which is in civil litigation. Mr. Kazakoff essentially provided realtor services at a lower standard than otherwise provided for in the brokerage agreements entered into by Ms. Khan, yet claims a higher fee than that charged by one of the realtors used by Ms. Khan. Notably, Mr. Kazakoff had no role in finding the ultimate purchaser of Ms. Khan's property.

V. The Client's Circumstances

[65] Ms. Khan is elderly and was so at the time in which these services were provided to her. She saw Mr. Kazakoff as her trusted legal advisor and friend. She had made him a beneficiary in her will and named him in her personal directive and enduring power of attorney. During the time of this transaction she named him the sole beneficiary of her will. Ms. Khan was clearly competent and able to make decisions as to her own best interests, but she was unquestionably vulnerable to Mr. Kazakoff and in a position where she could be exploited by his superior knowledge and expertise. The evidence suggests that she trusted him and viewed his actions uncritically.

[66] During this time Ms. Khan was also providing Mr. Kazakoff with free boarding for his horse, for which he would normally have expected to pay \$1000 per month, and which would create an expectation from Ms. Khan that if Mr. Kazakoff provided some assistance to her with the sale of her property, she would not be expected to pay for that.

[67] Further, and importantly, Mr. Kazakoff was in a conflict of interest in relation to his work on the sale of the Rocky View property which heightened Ms. Khan's vulnerability. A conflict of interest arises where the lawyer's own interests, or the lawyer's duties to another client, create a substantial risk of a material and adverse effect on a lawyer's representation of the client (*Strother v 3464920 Canada Inc* 2007 SCC 24 at para 56). In this case, Mr. Kazakoff's own interests created a substantial risk of a material and adverse effect on his assistance to Ms. Khan in relation to the sale of the Rocky View Property.

[68] Mr. Kazakoff became the sole beneficiary of Ms. Khan's will in 2015, during the time in which he says he was working to find a purchaser for the Rocky View property. The Rocky View property was Ms. Khan's only significant asset. As the sole beneficiary of her will, particularly in light of Ms. Khan's age and life expectancy, Mr. Kazakoff had an interest in maximizing the value of that asset. It was in his interest to ensure that Ms. Khan could not waste the asset through keeping it and borrowing funds against it as security, and that the property sold for the highest possible price. In this respect, his interest conflicted with Ms. Khan's stated and reasonable desire to continue to live on the property, a desire which meant she was less likely to be motivated to sell and would prefer a lower purchase price if it would allow her to remain on the property. As the sole beneficiary of her will, there was a substantial risk that Mr. Kazakoff would not advance Ms. Khan's interest in negotiating an agreement in which the property was sold for a somewhat lower price, but she could continue to live there.

[69] In the face of this conflict of interest, Mr. Kazakoff had a professional obligation to disclose it to Ms. Khan, to obtain her informed consent and, as well, to undertake an independent assessment of whether his representation of her was in her best interests (*Law Society of Alberta Code of Conduct*, Rule 3.4-1 and Rule 3.4-12). Nothing in the evidence before me suggests that Mr. Kazakoff disclosed the conflict to Ms. Khan or obtained her consent. He testified that he viewed his representation of her as beneficial because he tried to maximize the sale value of the land, which he suggested a traditional realtor would not have done. This assessment ignores, however, Ms. Khan's interest in staying on the property and in her home, even if doing so would result in her receiving a lower price for the property.

[70] In his submissions, Mr. Kazakoff suggested that disclosure of the conflict was not necessary because Ms. Khan knew that she had made him her beneficiary in her will. This suggests a failure by Mr. Kazakoff to understand what it is the client needs to be told and needs to consent to in the circumstances of a conflict. A client needs to give informed consent to the conflict, *not* to the facts which create that conflict. An elderly, trusting and unsophisticated client like Ms. Khan is most unlikely to appreciate that making her lawyer the beneficiary of her will puts his interests at odds with hers such that there is a substantial risk that he will not represent her interests as he ought. The lawyer's obligation is to disclose that risk to her and to ensure she understands and consents to it, not to leave her to figure it out for herself based on her knowledge of the underlying facts.

[71] The conflict of interest would have been exacerbated by an agreement that Mr. Kazakoff be paid on a percentage basis. The percentage fee heightens Mr. Kazakoff's interest in maximizing the purchase price of the property. On its own this would not be a material concern, given that a realtor would have had a similar motivation; however, it is significant here because it heightens the conflict between Mr. Kazakoff's interest in maximizing the purchase price for the Rocky View property and Ms. Khan's desire to stay living there even if it means the purchase price is lower.

[72] Under cross-examination Mr. Kazakoff said that he understood the alleged 5% commission agreement to be a transaction between him and Ms. Khan such that Rule 3.4-13 of the *Law Society of Alberta Code of Conduct* applied to it. He said that he did not suggest that Ms. Khan receive legal advice or representation on that agreement because the 5% fee agreement was fair and equitable to both parties. He also noted that the agreement was proposed by Ms. Khan, and that he trusted her word.

[73] Generally speaking, fee agreements do not fall within the scope of Rule 3.4-13 (See: Commentary 10). Commentary 11 to Rule 3.4-13 states, however, that "Where a client proposes to pay for legal services by transferring an interest in a corporation, property, investment or other enterprise, the lawyer must, at a minimum, recommend that the client receive independent legal advice." In this case, Mr. Kazakoff only claims an interest in the property on a contingent basis, in the event that it sold. It is a contingent interest on the proceeds of sale of property, rather than in interest in property *per se*. For that reason, I am not sure that it falls within the scope of Commentary 11 or Rule 3.4-13. Nonetheless, Mr. Kazakoff did see this as a transaction with a client. Even if not a distinct breach of his professional duties, his failure to recommend that Ms. Khan receive independent legal advice on the alleged agreement reflects his broader failure to ensure that Ms. Khan was making careful and fully informed decisions in relation to her dealings with him.

VI. The Trust, Estate or Fund, if any, Out of Which the Lawyer's Charges are to be Paid

[74] This is not a relevant factor in this case.

VII. The Manner in Which the Services Were Performed

[75] A conflict of interest creates a substantial risk of a material and adverse effect on a lawyer's representation of a client. A conflict of interest leads to a breach of fiduciary duty where the lawyer in fact fails to fulfill his duties to the client (*Strother* at para 70).

[76] The evidence before me suggests not just that Mr. Kazakoff acted in a conflict, where there was a risk of an adverse effect on his representation of Ms. Khan, but that he in fact failed to fulfill his duties to her. The evidence of Ms. Khan, Ms. Sundquist and Dr. Barrett was that Ms. Khan wanted to continue living on the property. Mr. Kazakoff has himself acknowledged that she wanted to do so and, prior to his being named her sole beneficiary, had sought to achieve that outcome for her in the Wang and Zatwarnitski transactions. Yet on August 12, 2017 he eliminated the possibility of Ms. Khan living on the property by wrongfully informing Dr. Barrett that Ms. Khan was no longer interested in doing so. He also cut off any potential contact between Dr. Barrett and Ms. Khan, isolating Ms. Khan and leaving her subject to only his advice and influence.

[77] Dr. Barrett had clearly left open the possibility of reaching an agreement in which Ms. Khan could stay on the Rocky View property, but Mr. Kazakoff did not pursue that possibility further and instead took it off the table. His claim that he did so because Dr. Barrett had not in fact opened that possibility is, as previously noted, inconsistent with the evidentiary record, including the language of his own e-mail, and I do not accept it. The evidence rather suggests that Mr. Kazakoff ignored the interests of his client, isolated her, and acted so as to further his own conflicting interest in maximizing the purchase price of the property.

[78] In reaching this conclusion I recognize that Mr. Kazakoff did significantly increase the price paid for the Rocky View property. I am also cognizant of the possibility that, given her age and circumstances, Ms. Khan may have been better off leaving the Rocky View property rather than staying there. A client is entitled, however, to pursue her own life and choices. A client has agency and can choose the goals she wishes to pursue within the bounds of legality. A competent lawyer can and should discuss with a client those goals and how best to pursue them. What a lawyer cannot do is ignore those choices altogether and, even worse, ignore those choices when in a conflict of interest so as to prefer his own interests to those of the client. That is what Mr. Kazakoff did.

[79] Courts have held that a breach of fiduciary duty can justify a reduction in a lawyer's fees. In *B & Y Holdings Ltd v Best* 2008 NLTD 78 a law firm acted in a conflict of interest which it did not disclose to its client. The court held this was a breach of fiduciary duty and awarded as a remedy a 60% reduction in the lawyer's fees (*B & Y Holdings Ltd* at paras 51-52).

VIII. The Skill, Work and Responsibility Involved

[80] Mr. Kazakoff did increase the purchase price for the Rocky View property through his negotiation on Ms. Khan's behalf. He did not, however, find the purchaser for the property. As noted, he did not provide many of the services that would have been provided by a traditional

realtor. His claim to have worked 300-340 hours on selling the property is self-serving, unsupported by the record and implausible, particularly in light of his later inability to estimate the hours spent in negotiating the agreement with Dr. Barrett. Mr. Kazakoff did make some efforts to sell the Rocky View property. He did negotiate with Dr. Barrett, even if he ignored Ms. Khan's interests in that negotiation. In general, however, I would describe Mr. Kazakoff's efforts in relation to selling the Rocky View property as modest.

IX. Any Other Factor That is Appropriate to Consider in the Circumstances

[81] Mr. Kazakoff billed three times for work related to the sale of the Rocky View property. The 5% fee is the bill at issue before me, but he also billed for the execution and completion of the sale agreement between Dr. Barrett and Ms. Khan (\$3675 including GST) and for his "dealings with Rodrigues", his dealings with "Shum, Slezinski and Zatwarnitski" and for showing the property (part of \$17,325, including GST). Those bills were deducted from the proceeds of sale on the Rocky View property, and Ms. Khan does not dispute them. As noted, I do not accept Mr. Kazakoff's claim that he included his work on the Rocky View property on the second bill in error. Rather, the bills suggest that Mr. Kazakoff has otherwise been compensated for much if not all of his work on the Rocky View property.

X. Conclusion

[82] Based on the foregoing I reject Mr. Kazakoff's claim to any of the \$107,625 (\$102,500 plus GST) as compensation for his efforts to sell the Rocky View property. Mr. Kazakoff did not have an agreement with Ms. Khan for the work that he was doing, or with respect to how much she should pay for it. He was receiving services for her without charge, such that she could have understood his efforts as being made as an exchange between friends. He did not provide the same level of services that would have been provided by a realtor. Mr. Kazakoff acted in a conflict of interest, and he breached his fiduciary duties to Ms. Khan. He was otherwise paid for his work on the Rocky View property. In the circumstances, any further payment to Mr. Kazakoff would be unfair and unreasonable.

[83] I grant Ms. Khan's application and order that Mr. Kazakoff repay the entirety of the \$107,625 with interest payable in accordance with the *Judgment Interest Act* RSA 2000 c J-1. I also award costs to Ms. Khan. Parties may make submissions as to the quantum of costs, within 30 days of the date of these reasons.

Heard on the 25th, 26th and 27th days of February, 2019.

Dated at the City of Calgary, Alberta this 8th day of March, 2019.

A. Woolley
J.C.Q.B.A.

Appearances:

Jordan M. Gruman
for the Applicant

Respondent appeared on his own behalf