

[4] The parties agree that the assessment officer does not have jurisdiction to determine whether there was a retainer and that this issue must be decided by this court.

[5] Although the moving parties had initially asked that the assessment itself be heard by a judge, they now agree that once the retainer issue has been decided, the assessment may proceed before the assessment officer.

[6] In their notice of motion, the moving parties requested production of dockets. The parties agree that these dockets have now been produced.

The position of the moving parties

[7] In their notice of motion, the moving parties plead that KMH and Ms. Vale Peters represented only Mr. Kasanda's company, L3 Prime Inc. The moving parties maintain that the lawyers represented L3 Prime Inc. in relation to court proceedings involving a dispute over the estate of Alfonso Sartarelli, who was Elke Kasanda's father. The moving parties argue that the lawyers' written retainer was with L3 Prime Inc. only and that Mr. Kasanda (hereinafter "Paul") was not a party to the court proceedings.

[8] In oral argument and in their factum, the moving parties agree that Elke Kasanda (hereinafter "Elke") was a party to the applications involving her father's estate and that KMH represented Elke in the applications. The moving parties also agree that L3 Prime Inc. was not a party to the applications.

[9] In his affidavit, Paul concedes that his name appears on the law firm's litigation intake form along with that of his wife. Paul offers two explanations for this. He says that he and Elke put both of their names on the form because there were two spaces to complete on the form. He also says that to the best of his recollection, Ms. Vale Peters asked him to include his name on the form so that she would be authorized to include him in correspondence pertaining to Elke's legal matters.

[10] In his affidavit, Paul says that Elke consults with him generally in respect of legal matters and frequently relies on him to communicate with lawyers on her behalf. Paul says that in this

case, Elke found the litigation to be distressing and unsettling. He says he saw his role as being Elke's advisor and supporter and to insulate Elke from emotional distress.

[11] Paul says he does not recall Ms. Vale Peters telling him that he was a party to the action or that he was assuming any personal liability in respect of the litigation or her fees.

[12] Paul says Ms. Vale Peters agreed to accept cheques from his company to pay for her fees, but only if the company agreed to sign her firm's retainer agreement.

[13] Paul says that Ms. Vale Peters never asked him or Elke to sign a separate retainer agreement.

[14] Paul says that whenever he communicated with KMH, it was on behalf of Elke, at Elke's direction, with Elke's knowledge and approval and always for Elke's benefit, not his own.

[15] Elke swore an affidavit in which she states that it was always clear that she was the client, and that Paul was her intermediary and advisor. In her affidavit, Elke confirms that the litigation was difficult for her. Elke says she met with Ms. Vale Peters "on a few occasions" to discuss the applications.

[16] In her affidavit, Elke also says the litigation did not end in her favour, and a cost award of \$74,287.59 was made against her personally.

Analysis

[17] *In Capital Sports Management Inc. v. Trinity Development Group Inc.*, 2022 ONSC 2657, Ryan Bell J. identified and considered the indicia of a lawyer-client relationship:

[33] Whether a solicitor-client relationship exists is a question of fact. The overarching question is whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party: *Trillium Motor World Ltd. v. General Motors of Canada Limited*, at para. 461.

[34] The court will look to a number of factors to ascertain whether a solicitor-client relationship exists. The relevant *indicia* include the following:

- (i) a contract or retainer;
 - (ii) a file opened by the lawyer;
 - (iii) meetings between the lawyer and the party;
 - (iv) correspondence between the lawyer and the party;
 - (v) a bill rendered by the lawyer to the party;
 - (vi) a bill paid by the party;
 - (vii) instructions given by the party to the lawyer;
 - (viii) the lawyer acting on instructions given;
 - (ix) statements made by the lawyer that the lawyer is acting for the party;
 - (x) a reasonable expectation by the party about the lawyer's role;
 - (xi) legal advice given;
 - (xii) any legal documents created for the party;
 - (xiii) the party's vested interest in the outcome of the proceeding;
- and
- (xiv) the belief of other parties to the litigation that the party was represented by the lawyer.

[35] Not all *indicia* need be present for the court to find that a solicitor-client relationship exists. In addition, depending on the facts of the case, other *indicia* may be relevant and will be factored into the analysis.

[18] I agree with and adopt Ryan Bell J.'s summary and take from it that, in this case, I must ask whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyers were acting for Paul, even though Paul did not sign the law firm's retainer agreement and was not a party to the applications involving the estate of Elke's father.

[19] Having considered the evidence and arguments of the parties, I make the following observations I believe to be relevant to where the indicia of a lawyer-client relationship listed in para. 34 of Ryan Bell J.'s decision are present in this case.

1. It was Paul and not Elke who was referred to the lawyers. In an email dated January 25, 2021, lawyer Mitchell Leitman told Ms. Vale Peters that he had just referred Paul to her. Mr. Leitman said the matter involved a dispute between siblings who were co-executors, and that Paul was the spouse of the sister. In his email, Mr. Leitman said, referring to Paul, that "he" was already working with a lawyer at a different law firm, so the referral could be for a second opinion or a new retainer. In my view, Ms. Vale Peters' initial impression would have been that Paul was the potential client and that he already had a lawyer but might be looking for a new one.
2. Paul, or Paul and Elke, put Paul's name on KMH's litigation intake form as well as Elke's. Paul's name appears before Elke's on the form.
3. Although the KMH retainer agreement was with L3 Prime Inc., the law firm initially prepared its retainer agreement in Paul's name. The version of the agreement that was in Paul's name stated that the law firm agreed to act for Paul in respect of the estate of Alfonso Sartarelli. The retainer agreement that Paul ultimately signed in the name of L3 Prime Inc. did not refer to the estate matter; it stated that it was in respect of general legal services.
4. I accept the evidence of legal assistant Brenda Desjardins that Paul asked for the retainer agreement to be in the name of his company. I also accept Ms. Desjardins's evidence that Paul asked the firm not to send him detailed invoices. Paul's counsel argued that I should place little weight on Ms. Desjardins's affidavit because it included hearsay and argument. I agree that some portions of Ms. Desjardins's affidavit offend Rule 39.01(4). However, the evidence I have referred to in this paragraph is based on Ms. Desjardins's observations and direct knowledge, is supported by emails to and from Paul and is properly admissible.

5. I do not accept Paul's evidence that Ms. Vale Peters had insisted that the retainer agreement be in the name of his company before she would accept cheques from the company. The retainer agreement did not need to be in the name of the company for the law firm to accept the company's cheques. Further, absent a request from Paul or Elke, there would have been no reason for the lawyers to change the wording of the retainer agreement they had prepared so that it referred to "general legal services" instead of the estate of Elke's father. There also would have been no reason for the law firm to deviate from its usual practice of sending its clients detailed dockets, absent a request from the client. I am satisfied that Paul wanted his company to pay the legal fees for this estate dispute and did not want it to be obvious on paper that the legal fees related to an estate dispute. Whether the law firm should have acceded to Paul's requests is not before me. Having done so obviously exposed the law firm to an argument that the company, and not Paul, was the law firm's client.

6. The law firm's dockets show that there were multiple communications, including emails, telephone calls and meetings between Paul and the law firm. It appears that Paul provided at least some instructions to the lawyers. Dockets include the following: "Draft letter and documents for PK review"; "E-mail to PK re [redacted]; Revise Offer as per client comments"; "E-mail to PK re [redacted]; Review and revise Paul's comments to the factum"; and "Review and revise responding factum as per Paul's comments".

7. It is evident from the law firm's dockets and the many communications between Ms. Vale Peters and Paul that the law firm provided advice to Paul. In his affidavit, Paul specifically referred to advice given to him by Ms. Vale Peters, when he said that Ms. Vale Peters told him not to submit affidavits so as not to appear to be a party to the litigation.

8. The law firm also prepared a legal document for Paul. Paul swore an affidavit in the estate proceedings responding to an affidavit of Elke's brother. (I will refer to this affidavit again in the next paragraph.)

9. Although Paul was not a party to the applications involving Elke's father's estate, he was not disinterested. For example: (a) In her decision of July 28, 2023, in which she found against Elke, Gomery J., as she then was, noted that Elke "felt that she and her husband Paul Kasanda did not receive the same financial support that her parents gave to [Elke's brother] Helmut and [Helmut's wife] Caroline." (b) Gomery J. also noted that Elke and Paul had both visited Elke's father's lawyer to review the terms of the father's will. (c) In the affidavit he swore in support of Elke's position in the estate proceedings, Paul referred to a meeting with Elke's father's lawyer where he, Paul, asked "if *we* (emphasis added) should be investigating what had happened to [Elke's father's] assets such that his estate was left destitute." Paul said he then challenged the lawyer about what the role of an executor was.

10. In an email exchange with Ms. Vale Peters in May 2023, Paul agreed to pay KMH \$30,000 in fees by September 30, 2023. He also acknowledged that this arrangement did not apply to future work and that he would be required to pay for any future work. Paul did not state in this email exchange that his company would pay these fees or that his company agreed to pay for future work.

[20] Where a lawyer fails to reduce to writing the terms of their retainer and a dispute arises, there is a heavy onus on the lawyer to establish the retainer: *Rye and Partners v. 1041977 Ontario Inc.*, [2004] O.J. No. 2480, at para. 2.

[21] KMH and Ms. Vale Peters have met the heavy onus on them in this case. I find there are sufficient indicia of a lawyer-client relationship present in this case to allow me to conclude that a reasonable person in the position of a party with knowledge of all the facts would reasonably conclude that the lawyers were acting for Paul.

Disposition

[22] The motion is dismissed.

Date: July 29, 2024

Williams J.

CITATION: KMH Lawyers et al. v. Kasanda et al., 2024 ONSC 4068
COURT FILE NO.: CV-23-000093571-0000
DATE: 2024/07/29

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KMH Lawyers and Miriam Vale Peters

Applicants

– and –

Paul Kasanda, Elke Kasanda and L3 Prime INC.

Respondents

REASONS FOR DECISION

Williams J.

Released: July 29, 2024