CITATION: Eve v. Brook, 2016 ONSC 1496
COURT FILE NO.: ES-756-11
DATE: 2016/03/01

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Roslynn Valera Eve	Jarvis K. Postnikoff and April Postnikoff, for the Plaintiff
Plaintiff	
- and -	
Heather Brook as Estate Trustee of the Estate of Lillian Wilhelm as Estate Trustee of the Estate of the late Russell Bernard Phillips and in her personal capacity, Gregory Phillips as Estate Trustee of the Estate of Arthur Earl Phillips, Gregory Phillips as Estate Trustee for the Estate of Earl Phillips in trust, 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited, Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Miller Thomson LLP, Clark, Pollard & Gagliardi	Heather Brook, Self-represented Randell K. Thomson, for the Defendants Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Arthur Earl Phillips, Earl Phillips in trust, and 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited David M. Lobl and Amer Pasalic, for the Defendant Miller Thomson LLP Ruth A. Henneberry and Reine E. Reynolds, for the Defendant Clark, Pollard & Gagliardi
Defendants	
	HEARD at Kitchener, Ontario: September 16, 17, 18, 21, 22, 24, 25, 28, 29 & 30, October 1, 2, 6, 7, 8, 9, 13, 14, 15, 16, 19, 20 & 21, 2015

The Honourable Justice P. R. Sweeny

Corrected decision: The text of the original judgment was corrected on March 29, 2016 and the description of the correction is appended.

REASONS FOR DECISION

INTRODUCTION

[1] On February 25, 2008 Russell Bernard Phillips ("Russ") died. In his Will, he named his older sister Lillian Wilhelm ("Lillian") as his Executrix. His adult children Roslynn Eve ("Roz") and Garry Phillips ("Garry") were the residual beneficiaries of his estate. One of the assets in the estate were shares that Russ held in 345023 Ontario Inc. ("345") which was a corporation that he owned 50% with his oldest brother Arthur Earl Phillips ("Earl"). The shares were sold by Lillian to Earl on November 30, 2009. Roz asserts that the sale was not authorized by the Will and was, in any event, improvident. Roz also asserts that Lillian did not act properly in the administration of the estate.

[2] Roz issued a claim against Lillian; Lillian's lawyers at the time, Miller Thomson LLP; the accountants who acted for Russ, Earl and their companies for over 25 years, Michael Pollard of Clark, Pollard & Gagliardi; her uncle Earl; 345, and Phillips Bros. Radiator Service Ltd., the company that carried on the radiator manufacturing, repair, service and installation business that Earl and Russ had operated for 30 years.

[3] In addition to these claims, Roz and Garry object to the estate accounts prepared by Lillian.

[4] In June 2011, Sloan J. ordered that the action be tried immediately before or at the same time as the application to pass accounts.

[5] These are my reasons for decision on the issues raised in the action and the passing of accounts.

PARTIES AND INTERESTED PERSONS

[6] The following is a list of parties and other interested persons who figure prominently in this proceeding:

> *Russell Bernard Phillips ("Russ")* – businessman, father of Roslynn and Garry, separated from his wife June in 1995, died February 25, 2008.
>
> *Arthur Earl Phillips ("Earl")* – brother of Russ, in business with Russ in the manufacture, repair and service of radiators for 30 years, died October 30, 2014.
>
> *Lillian Wilhelm ("Lillian")* - sister of Russ and Earl, Executrix of Russ' estate, died August 11, 2014.

Lorne Wilhelm - husband of Lillian

Heather Brook - daughter of Lillian and Lorne, estate trustee for Lillian's estate in this proceeding.

Roslynn Eve ("Roz") - the daughter of Russ and June, sister of Garry, residual beneficiary of Russ' Estate, and plaintiff in the action.

Dean Eve - husband of Roslynn Eve

Garry Phillips ("Garry") - son of Russ and June, brother of Roz, and residual beneficiary of Russ' Estate.

Phillips Bros. Radiator Services Limited ("Limited") - company incorporated in 1976, owned 50% each by Russ and Earl, carried on business as a radiator repair and service business until December 2005.

Phillips Bros. Radiator Service Ltd. ("Ltd") - corporation owned by Greg that purchased the operating assets of Limited in 2005, Ltd. went bankrupt in 2013.

345023 Ontario Inc. ("345") - corporation that held the remaining assets of Limited when the operating assets were sold to Ltd.

Gregory Phillips ("Greg") - son of Earl, cousin of Roz and Garry, worked in the radiator business for 25 years, estate trustee for the Estate of Arthur Earl Phillips in this proceeding.

Steven Finch ("Finch") - litigation lawyer at Miller Thomson LLP who acted on behalf of Lillian on the passing of accounts up to the date the claim was issued.

Jamie Martin ("Martin") - the lawyer at Miller Thomson who acted on behalf of Lillian with respect to estate matters from December 2008 to 2011.

Steven Lubzcuk ("Lubzcuk") - partner in Voisin, Lubzcuk who acted for Lillian after the death of George Voisin in July 2008, joined Miller Thomson LLP October 7, 2008.

Mike Pollard ("Pollard") - accountant who acted for Russ, Earl and their businesses for approximately 30 years.

Clark, Pollard & Gagliardi LLP ("CPG") – accounting firm in which Mike Pollard was a partner.

BACKGROUND

[7] Russ and Earl worked together for over 30 years in the radiator repair/service/manufacturing business. In 1976 they incorporated Limited. In 2005 they sold the operating assets of Limited to Greg's company, Ltd.

[8] On February 11, 2000, Russ made a Will naming Lillian as the Executrix. The residual beneficiaries were Roz and Garry. The Will had a clause relevant to the shares of 345 (the holding corporation owned 50% by Russ and Earl). The Will provides at paragraph 3:

> I give and appoint to my trustees all my property wherever located, including any property over which I may have a power of appointment, upon the following trusts:
>
> …
>
> (c) I direct my executors to consult with the other shareholders/owners of any business or property I own at the time of my death and to co-operate with such shareholders and partners to ensure that my executor can transfer, *in specie,* shares and interests to my beneficiaries in such a way as to restrict or exclude my beneficiaries' involvement in the business, including conversion of shares into nonvoting shares and having my estate execute agreements having the effect of binding my beneficiaries.
>
> …
>
> (g) To divide the residue of my estate equally among those of my children ROSLYNN EVE, and GARRY PHILLIPS, who are alive (10) clear days after my death, but if a child of mine is not then alive, and the deceased child leaves any lineal descendants then alive, those descendants are to receive in equal shares *per stirpes* the share that the deceased child would have received if then alive.

[9] The Will also contains certain specific powers given to the estate trustees. These are set out in paragraph 4, in part, as follows:

> To carry out the terms of my will, I give my trustees the following powers:
>
> (a) To sell or otherwise dispose of, at the time or times and in the manner that my trustees in their discretion decide upon, assets, investments, or money.
>
> (b) To retain assets or investments of my estate in whole or in part in the form in which they are at my death until they are distributed, sold or otherwise disposed of and even though they are not authorized for trustees, they are considered to be authorized for the purposes of my Will.

…

(e) To invest from time to time and reinvest assets of my estate and those securities and investments inside or outside of Canada, without being limited to those investments to which the trustees are otherwise restricted by law.

(f) To make a division of my estate or set aside or pay any share or interest in it either wholly or in part in the assets forming my estate at the date of my death or at the date of division, setting aside or payment and my trustees shall determine the value of my estate or any part of it for the purpose of making a division setting aside or payment and their determination is binding upon all persons concerned.

…

(h) To continue and renew any bills, notes, guarantees or other securities for contracts relating to them, but only for the purpose of facilitating an orderly liquidation of those obligations without undue embarrassment to members of my family.

[10] Lillian was appointed Estate Trustee with a Will on April 15, 2008.

[11] Lillian had spoken with Russ on occasion about his wishes. Lillian had a habit of tape recording phone and in-person conversations. There were tapes of Lillian's telephone conversations with Russ entered into evidence. Russ expressed concern about the running of the business. Lillian believed that he appointed her because she could mediate between the parties – that is, Earl and his family and Roz and Garry. In her evidence, Roz also said that it was so she might receive some money as Executrix.

[12] On February 25, 2008, after being hospitalized first in Arizona and then in Ontario, Russ died. There was extensive evidence surrounding his return home. Roz went to Arizona and brought him back. She alleged that Lillian did not move quickly enough in bringing Russ back. This set the stage for things to come.

[13] Immediately after Russ' death, Garry came back from China, where he had been living, for the funeral and visited the house. Roz and Garry divided up some of the assets. Roz and Dean gathered up some papers and took them to Lillian. They dropped off keys, but Lillian thought it took too long and she had trouble accessing the house. Lillian also complained that it was left a mess and that Roz was somehow responsible.

[14] The Estate consisted of an annuity, several bank accounts and GICs, Sun Life shares, a piece of machinery, the house and contents, a car, a motorhome, and Russ' shares in 345.

[15] Following Russ' death, Lillian consulted with George Voisin, the longtime lawyer for Russ and Earl and the business. George had acted for Russ, Earl and Greg on the sale of the operating assets of Limited to Ltd. in 2005. Unfortunately, George died on July 24, 2008. After George's death, his partner Steven Lubzcuk, mainly a family law lawyer, took over helping Lillian. He met with her on several occasions. He was told of the perceived problems Lillian was having with Roz. Lillian was also concerned because Russ' ex-wife June was involved as a representative of her son Garry. There was an issue with respect to the sale of the house. Ultimately, Roz and Garry agreed that the house should be transferred to Roz. In October 2008 Lubzcuk joined Miller Thomson's Waterloo office. The house was transferred to Roz on December 2, 2008. Martin became involved with the estate on December 7, 2008.

[16] The issue of the shares of 345 was important to Lillian. She believed that the best way to deal with the shares was to sell them to Earl. She believed this would fulfill the wishes expressed to her by Russ. Lillian sought advice from Pollard on this issue. She also sought advice from Martin. She was concerned that Roz and Garry would cause trouble or interfere with the business. Based on her discussions with Russ and the terms of the Will, she believed that to fulfill her duties as estate trustee she should negotiate the sale of the shares to Earl.

[17] She expressed this intention to Roz in a telephone call in December 2008. Roz responded by email and said Lillian should not negotiate on Roz and Garry's behalf. Lillian did not heed this warning. She continued to do what she believed was her duty; that is, to sell the shares for a fair price.

[18] Over the course of the next 11 months, Lillian negotiated and sold the shares of 345 to Earl. Roz says that she did not have authority under the Will to sell the shares and that, in any event, she sold them for too little. Aside from the issue of shares, Roz complains that Lillian breached her duty as Executrix in a number of ways. She failed to provide information requested by Roz. She failed to invest properly the estate funds. She paid lawyers and accountants for work that she was to do as estate trustee and she paid them too much. She sold some shares in Sun Life for too little.

[19] On June 29, 2010, Lillian brought an application to pass her accounts. It was originally returnable September 30, 2010. Roz served her first notice of objection to accounts on September 7, 2010. Further notices of objection were delivered on behalf of Roz and further estate accounts were delivered on behalf of Lillian. On June 9, 2011, a consent order of Kent J. provided for an interim distribution to Roz and Garry. On June 13, 2011, Sloan J. made an order (incorrectly dated June 9, 2011) allowing for the service of a statement of claim relating to some of the issues in the application, providing for a process for discovery and disclosure of documents and providing for the removal of Lillian as estate trustee after certain funds were paid into court. The balance of the funds remaining in the trust account of Miller Thomson was paid into court.

[20] Following the orders of Kent J. and Sloan J., additional documents were provided to Roz, the Statement of Claim in this action was issued, and examinations were held of various parties.

[21] In May 2013, Roz brought a motion to require the payment into court of the proceeds of the sale of real properties owned by 345. On May 13, 2013, Sloan J. issued an order requiring that the proceeds of the sale of the properties be held pending further order of the court.

[22] The trial commenced September 16, 2015 and was held over the course of 23 days.

ISSUES TO BE DETERMINED

[23] There are a number of issues which must be determined. The main issue surrounds the sale of the shares in 345. Roz asserts that the sale was not authorized under the Will and that the sale was improvident. Lillian responds that the sale was authorized; even if the sale was not authorized, the conduct of Roz precludes her from now complaining; and, in any event, the share price was not improvident.

[24] There are also allegations with respect to the failure to provide documentary disclosure, allegations about the mismanagement of 345, and an issue about the shares in Ahead Inc.

[25] I will address the following issues:

(1) Was the sale of the shares of 345 authorized under the Will?

(2) What is the effect of the communication between the parties surrounding the sale of the shares of 345?

(3) What is the fair market value of the shares of 345, which requires a determination of the fair market value of the properties owned by 345?

(4) Was there inadequate documentary disclosure which caused a loss to the plaintiff?

(5) Was there mismanagement of 345 which caused a loss to the plaintiff?

(6) Did the plaintiff suffer some loss as a result of the handling of the shares of Ahead Inc.?

(1) Was the Sale of the Shares of 345 Authorized under the Will?

[26] The clause in the Will with respect to the shares is unusual. Specifically, I set it out again:

> (c) I direct my executors to consult with the other shareholders/owners of any business or property I own at the time of my death and to co-operate with such shareholders and partners to ensure that my executor can transfer, *in specie,* shares and interests to my beneficiaries in such a way as to restrict or exclude my beneficiaries' involvement in the business, including conversion of shares into nonvoting shares and having my estate execute agreements having the effect of binding my beneficiaries.

[27] It directs the executors to "consult with other shareholders" and to "co-operate with such shareholders … to ensure that my executor can transfer, *in specie*, shares … in such a way as to restrict or exclude my beneficiaries' involvement in the business." This is a significant problem, given that a shareholder has rights under the *Ontario Business Corporations Act* even if a nonvoting shareholder. The oppression remedy is available to the shareholder. There is also a specific prohibition in the articles of incorporation of 345 against a transfer of shares without the consent of a majority of the directors.

[28] Martin's view of the clause 3(c) was that it created a requirement that the estate trustee first consult with other shareholders to ascertain their view in respect to a potential change in ownership. If the outcome of those consultations was positive, the estate trustee could transfer the shares to the beneficiary in the form of "nonvoting" shares which would have required an amendment to the articles of 345. If, however, the other shareholders were not agreeable to the transfer of the shares, then the estate trustee could proceed to sell the shares under clause 4 which gives the estate trustee power to sell shares. In contrast to the view of Miller Thomson, Roz asserts, in her supplementary notice of objection to the accounts, that the clause was too vague and ambiguous to be acted upon and the Will should be read as if the clause was not there. If the clause was not in the Will, then Lillian had the authority to sell the shares under clause 4 in the Will. Given that the articles of incorporation required the consent of the directors to the transfer, and given the family dynamics, there is no doubt Earl would not have agreed to the transfer. The shares would have had to be sold by the estate trustee.

[29] I find that the Executrix was authorized to sell the shares in 345 under the Will and did not breach any duty in selling the shares.

(2) Communication between the Parties Surrounding the Sale of the Shares

[30] Lillian formed the belief that she was required to sell the shares very early in her administration of the Estate. She discussed the issue with Pollard and Martin. In a December 2008 telephone call, Lillian told Roz that she was in the process of selling the shares. An email response was sent by Roz on December 8, 2008 at 12:54 a.m. The email reads as follows:

> Hi,
>
> IN RESPONSE TO YOUR LAST PHONE CALL WHERE YOU INFORMED US THAT YOU INTEND TO REPRESENT US IN THE PURCHASE OR SALE OF OUR INTERESTS OF PHILLIPS BROS. WE WILL REPRESENT OURSELVES OR USE A LAWYER OF OUR OWN. YES, YOU REPRESENT DAD AS FAR AS DISBURSING THE ESTATE GOES.
>
> THE OWNERSHIP OF PROPERTY/SHARES IS OURS AS INTENDED IN THE WILL. WE HAVE NOT ASKED YOU TO DO ANYTHING BUT GIVE THEM TO US. PLEASE DO NOT REPRESENT YOURSELF AS OUR REPRESENTATIVE WITHOUT OUR WRITTEN PERMISSION. UNCLE EARL AND HIS REPRESENTATIVES ARE ALWAYS WELCOME TO CONTACT US.
>
> RESPECTFULLY,
>
> ROZ.

[31] There is no response to this email found anywhere in the evidence.

[32] On March 16, 2009, lawyer Mr. Darrel Hawreliak ("Hawreliak") wrote to Martin. In that letter Hawreliak stated that he had been consulted by Roz and requested a list of the assets, summary of the activities completed to date, a summary of what was anticipated left to be done, and an estimated date for completion of the estate.

[33] On March 17, 2009, Martin responded advising that he would be away on vacation and he would be meeting with his client shortly after his return. He advised that they were waiting for completion of an environmental assessment on the property owned by 345. On May 28, 2009, Martin provided a more substantive response to Hawreliak. He advised that "a Phase II environmental site assessment" had been conducted and the estimated costs of the remediation were in the range of $120,000 to $240,000. The letter specifically states:

> "Mrs. Wilhelm is currently having discussions with her brother, Earl, regarding the possibility of the shareholding owned by the estate being purchased by Mr. Earl Phillips. At the time of sending this report, I am not aware of the details of those discussions nor any outcome."

[34] On June 8, 2009, Hawreliak responded advising that Roz believed she was also a shareholder of Ltd. and he inquired with respect to the share structure, the identity of all shareholders, and whether or not the shares owned by Roz were voting shares. He also advises that in the event that Roz does own shares she wants to participate through Hawreliak's office in the disposition of shares. On July 27, 2009, Hawreliak

provided a more detailed response to the letter of May 28, 2009. On the issue of the sale of shares he states:

> "5. With respect to the shares owned by the estate, we note that paragraph 3(c) of the Will provides that the Executor is not to sell the shares, but to 'transfer, *in specie,*' shares and interest to my beneficiaries in such a way as to restrict or exclude my beneficiaries involvement in the business including conversion of shares into non-voting shares and have my estate execute agreements of having the effect of binding my beneficiaries. According to our reading of the Will, the Estate Trustee cannot simply sell the shares to Mr. Earl Phillips."

[35] On August 13, 2009, Martin responded to the letter of July 27th. With respect to the sale of shares, the letter read as follows:

> "In the meantime, however, I want to confirm a voicemail message that I left in your voicemail on August 10 having to do with the shares and the holding company. With respect, we disagree that the Will requires our client to transfer *in specie* the shares. We do not interpret that paragraph in that method at all and our client has seriously questioned whether or not non-voting shares in the corporation would be of any benefit for your clients."

[36] The letter goes on to say that the trustee has determined that it is in the best interests of the estate of the beneficiaries that the shares be sold. The letter states:

> "Accordingly, in the event that your client feels that the provisions of the Will are mandatory, I would urge you to take immediate steps to have the matter clarified as our client clearly is moving towards selling the shares."

[37] On September 2, 2009 Martin wrote a further letter to Hawreliak. The letter specifically stated as follows:

> "As advised in our letter of August 13, 2008, our client's intention is to proceed to sell the shares. She has made this decision after careful consideration. We remind you that the Testator had great confidence in his sister and duly appointed her as his personal representative. He did not appoint his children. As indicated in our earlier correspondence, if your client insists that your interpretation is correct, we advise you to take appropriate steps."

[38] On October 27, 2009 Hawreliak wrote to Martin in response to the September 2nd letter. The letter states:

> "Our client does not propose to respond to each paragraph in your letter at this time. However, we wish to follow up on certain items contained in your letter."

[39] The letter makes no mention of paragraph 5 dealing with the sale of shares.

[40] On November 10, 2009, Martin writes:

> "I believe the parties are in agreement on those items upon which you are silent and I will be proceeding accordingly."

This would include the sale of the shares.

[41] On November 24, 2009, Martin writes:

> "As you know, the original value set out for estate purposes was $232,000 and my client has successfully negotiated a sale for $265,000."

[42] The letter also states:

> "I believe the sale of the corporate interest will be closing fairly shortly."

[43] The transaction closed on November 30, 2009. On December 8, 2009, Hawreliak responded to Martin's letter of November 24th. The letter states:

> "You indicate in your letter that your client has 'successfully negotiated a sale for $265,000'. Please provide immediate particulars as we are instructed to apply to the court, if necessary, for an order restraining the sale until such time as the proper valuation of the company and the shares can be obtained."

[44] This letter also addressed a number of issues with respect to the sale of shares and with respect to the valuation of the shares, the operation of Ltd., and the administration of the estate. At the time of this letter, the shares had been sold.

[45] Roz was cross-examined on the exchange of correspondence between Martin and Hawreliak. It appears that throughout the course of communications with respect to the sale of shares, Roz was seeking to "hedge her bets". She was being told explicitly that Lillian intended to sell the shares. Her lawyer stated the position that Lillian could not simply sell the shares. When Martin stated his position that it was authorized, he received no immediate challenge to that position. In fact, when he advised that a deal had been negotiated for the sale of the shares, the response was not that Lillian had no authority, but that she had sold the shares for undervalue. This is different than advising she had no authority to sell the shares. While Roz asserts that she set out her position in December 2008, the correspondence sent by Martin clearly requested an explicit position on the sale.

[46] An application to interpret the Will would have increased legal costs. If Roz agreed that the shares could be sold, that cost would be avoided. I accept that it is the trustee's obligation to administer the trust and the trustee's obligation to comply with the terms of the Will, and if there is uncertainty, the trustee ought to take steps to interpret the Will. However, in this case, if Hawreliak had responded to the letters of August 13 and September 2 that his client continued to disagree and that it was the trustee's obligation to act appropriately, Lillian may have taken different steps. However, that was not the communication received. In her evidence, Roz said that she was told that she would have to wait till the end to make a complaint. In the circumstances, in light of the communication made by Martin that Lillian planned to sell the shares, the failure to say something would lead Lillian to believe that Roz did not, in fact, oppose the sale of the shares. Therefore, I find Lillian acted reasonably in proceeding to sell the shares.

(3) What is the Value of the Shares?

[47] Although I have found that Lillian's conduct in selling the shares was reasonable, she is still obligated to sell the shares for fair market value. Roz complains that the shares were undervalued. Therefore, I must proceed to determine the fair market value of the shares of 345. In order to determine the fair market value of the shares of 345, it is necessary to determine the value of the properties which are the significant assets of 345.

Appraisals of the Properties

[48] Russ had the properties appraised in 1995 when dealing with the valuation of assets for the purposes his matrimonial proceeding with June. Otto & Kirwin were retained to provide the appraisal. Because of this prior experience, the successor to Otto & Kirwin, Otto & Company, was retained to appraise the properties in 2008. Otto appraised the properties all together as one, although they are separate parcels, for $600,000. Chung & Vander Dolen Engineering Ltd. ("Chung") provided an independent Phase II environmental site assessment on February 11, 2009 which concluded that the cost of remediation was in the range of $120,000 to $240,000. Otto & Company appraised the value of the property at $360,000 by deducting the maximum amount for remediation of the property.

[49] The Otto & Company appraisal was challenged by Roz. Roz retained James Griesbaum ("Griesbaum") of City Management & Appraisals (2006) Limited to appraise the properties. Mr. Griesbaum appraised the properties as if they were not contaminated and without the benefit of a site visit. He appraised the properties at an aggregate value of $1,175,000.

[50] The defendants retained David Atlin ("Atlin") of Integris Real Estate Counsellors ("Integris") to comment on the valuation of the property conducted by Griesbaum. Atlin and Griesbaum met on August 26, 2015 and prepared a Memorandum to identify areas

where they agree in principle, and was silent on areas where there remains differences. The Memorandum was attached to the Agreed Statement of Facts (Exhibit 1). The Memorandum set out a range of values for the property taking into consideration the proposed remediation necessary. This resulted in a range of value from $420,000 to $730,000. The low end valuation came as a result of the sale of a property which was across the street from the subject properties. It represented a value of $40 per square foot. In his evidence, Griesbaum agreed with this comparable. Atlin and Griesbaum agreed that the properties ultimately sold for $455,000 in May 2013. While the subsequent sale price of properties cannot be relied upon because the appraisals were done prior in time to the sale, the actual sale price of a property can be used as a method of testing the accuracy of appraisals (see *Jackson v. Jackson*, 2009 CanLII 43105 (ONSC)). The sale of the properties in May 2013 was to an arm's length purchaser after a significant exposure to the market. Therefore, it represents fair market value of the properties in May 2013. Given the sale price of the properties at that time, it lends credibility to the appraised value of $420,000 for the properties in 2009. Based on all the evidence, including the evidence of Griesbaum and Atlin, I find that $420,000 would represent the fair market value for the properties in 2008/2009.

Valuation of the Shares

[51] The property appraisal is then used by business valuators as one component for the valuation of the shares of 345. The plaintiff retained Tim Rickert of BDO to prepare a share valuation. Mr. Rickert is a certified business valuator ("CBV"). The defendants retained Nancy Rogers of NRogers & Associates, a CBV, to value the shares. Each gave evidence at the trial.

[52] On the issue of share valuation, there were really two areas of difference between the experts. These were: (1) the value of the property and (2) the value placed on the debt owed by Ltd. to 345. This debt represented the balance of the promissory note given by Ltd. on its purchase of the assets of Limited and the outstanding rental payments owed by Ltd. to 345.

[53] In closing submissions, the plaintiff agreed with Ms. Rogers' position with respect to the valuation. The plaintiff asserted that the $420,000 sale could not be used because it was the modified Otto appraisal value. However, the evidence is clear that the $420,000 was based on a comparable sale. In that case, the plaintiff then determined that she would rely on Ms. Rogers' evidence for her upper two values, but the Mr. Rickert's evidence of the $420,000 appraisal was found to be this value.

[54] Mr. Rickert, in analyzing the outstanding debt, assumed $.54 on each dollar would be recovered on the unsecured debt owed by Ltd. to 345. Ms. Rogers used a zero to 50% recovery. Mr. Rickert's recovery assumed 100% recovery without any deduction for the costs of realization. In my view, this is an unreasonable assumption and Ms. Rogers' analysis using the range of zero to 50% was more appropriate. Ms. Rogers' valuation of the shares held by the Estate, with an assumption of the real estate

value of $420,000, is a range of $225,000 to $301,500 as at February 25, 2008 and $157,500 to $238,500 as at November 30, 2009.

[55] As Mr. Rickert acknowledged, a sale at the top end of the range or at the bottom end of the range, would still be a fair market value.

[56] Based on the evidence, I find that the sale of the shares for $265,000 represented the fair market value for the shares of 345.

(4) Was there Inadequate Documentary Disclosure which caused a Loss to the Plaintiff?

[57] Roz asserts that Lillian failed to provide disclosure of documents to her in a timely fashion and, accordingly, Roz is entitled to damages for such failure. The evidence discloses constant, continual, relentless requests for documentary disclosure by Roz. The plaintiff's request for documentary disclosure commenced with the Hawreliak letter dated March 16, 2009. Although some disclosure was provided, Martin refused to provide the legal accounts in his letter of September 2, 2009.

[58] Martin had proposed an interim distribution. Martin indicated the trustee wished releases to be executed or they would move to pass the accounts. Before Roz could agree to sign off to get the distribution, she wanted to look at the file at Miller Thomson's office. Roz and Dean booked May 3, 2010 to go and look at the file. They brought a scanner with them and scanned documents for three and a half hours. They made copies of many receipts, for example receipts for cleaning supplies and a battery for the motorhome. Roz was not satisfied with the disclosure received. She wanted more time and more documents produced. On May 13, 2010, Martin wrote to Hawreliak and advised that Lillian would formally pass the accounts.

[59] Finch became involved in the file in May 2010 because the matter would be proceeding to a passing of accounts. The application record for the passing of accounts was served in June for a date for the application in September. Roz' retainer with Hawreliak was terminated at the first appearance for the application. Roz was upset that Hawreliak did not set up enough time for the application to be heard. Roz was then unrepresented for some time. On December 17, 2010 Finch provided a significant number of documents to Roz. Roz requested more documents.

[60] On February 15, 2011, Finch wrote to Roz and reviewed what he believed were the outstanding disclosure issues. He inquired as to whether there were any specific additional requests. Roz had requested documents necessary to review every single transaction. She sought to examine each receipt, no matter the size of the disbursement, and every piece of paper with respect to the estate, including all prior corporate documents with respect to 345 and the banking records of 345 from 2005 forward. The documents requested were far beyond what normally would need to be produced. The trustee was obligated to produce what she had, but not necessarily documents she did not have. The response to the request for information required a

detailed review and increased the time spent by Miller Thomson and the legal fees incurred.

[61] Lillian was obligated to provide the legal accounts of Miller Thomson, and it was unfortunate that those were not immediately provided. However, I find that the provision of those documents would have made no difference. The plaintiff ultimately received all the documents requested which consisted of in excess of 1,600 pages. The plaintiff's document brief consisted of 15 volumes. The defendant's document brief consisted of five volumes. It is evident that from the date of Finch's involvement in the file, significant efforts were made to comply with all disclosure requests. Finch requested documents from third parties including Pollard and Krakovsky, the lawyer who acted on behalf of Earl with respect to the 345 share sale in 2009. Significant time was spent in responding to the request for information and to collate, copy and provide the documents to Roz.

[62] Prior to May 22, 2011, Roz was receiving advice from lawyer Karen Scherl ("Scherl"). Scherl was appointed as Roz' lawyer on May 22, 2011. Scherl then brought an application for interpretation of the Will; the removal of Lillian as Estate Trustee; and, the production of documents.

(5) Was there Mismanagement of 345?

[63] A significant amount of trial time was spent reviewing issues of the management of 345. Roz says that it was not properly managed by Lillian and Earl after Russ' death. She raises several issues, including: (1) no effort was made to pursue Ltd. for repayment on the promissory note, (2) no effort was made to collect the rent from Ltd., and (3) if no rent was paid, no effort was made to evict Ltd.

[64] Russ was the owner of 50% of the shares and a director of 345. He and Earl sold the operating assets to Ltd. so that Greg could continue to run the business, which had been losing money. Greg inherited several long-term employees, with the concomitant obligations of severance. Greg had worked in the company for more than 20 years. He had no other income aside from his income from the radiator repair and service business. It is important to appreciate that decisions made in small closely-held family corporations take in consideration many values and interests. The owners of related corporations are family members. Any claims made by 345 with respect to rent arrears and the promissory note would have a significant impact on the operation of Ltd.

[65] The debt, as represented by the promissory note, consisted of the receivables and assets of the operating portion of 345. The financial statements of 345 for the year ended November 30, 2006 were approved by Russ and Earl as directors. They explicitly signed the financial statements. The financial statements for the year ended November 30, 2007 were approved by Russ and Earl in a meeting in January of 2008. These financial statements show the status of the debt owed by Ltd. to 345. There is no reason to go behind the financial statements and question the underlying transactions. While Roz reviewed the bank statements of 345 from 2005 to the date of the sale of the shares, that review was unnecessary. There was no obligation on the Estate Trustee to

make such inquiries and, in any event, the financial statements were approved to November 30, 2007.

[66] The evidence disclosed that the debt was increased from $161,294 to $194,366 on the basis that Ltd. directly received a dividend from Ahead Inc.

[67] The Executrix was not required to become involved in management of the corporation and, in particular, it would not have been appropriate for her to take any steps to seek to recover on the promissory note from Ltd. Given the relationship between 345 and Ltd., it would not be reasonable for the Executrix to expect that Earl would ever agree that 345 should evict Ltd. as a tenant for nonpayment of rent. This is precisely the interference in the operation of the business which Russ did not want. In my view, Lillian should not be criticized for failing to take more proactive steps with respect to the management and operation of the corporations.

(6) Did the Plaintiff Suffer some loss as a Result of the Handling of the Shares of Ahead Inc.?

[68] Ahead Inc. was a buying group consisting of nine shareholders. They would get discounts for bulk purchases and rebates for paying on time. The income was distributed to the participants by way of a dividend. The dividend was an inter-corporate dividend and, so, not taxable.

[69] Ahead Inc. was incorporated sometime prior to the sale of the assets of 345 to Ltd. There is no indication of the Ahead Inc. shares being sold as part of the deal. This is odd, given that the income earned was income generated by the operating company. That is, it was return of money that had been paid by Ltd.

[70] There was evidence of a dividend paid in 2008 in the amount of $33,043.00. This dividend was paid to Phillips Bro. Services. It was deposited by Greg into the account of Ltd. The T4 from Ahead Inc. was issued to 345. The income was received on paper by 345. Pollard determined that he would show the fact that it was deposited into Ltd.'s account by simply increasing the amount Ltd. owed to 345. There was also a dividend declared in 2009.

[71] What is the effect of all this? In the valuation of 345, each expert included an amount for the shares of Ahead Inc. BDO and Nancy Rogers valued the investment at $51,400.00. Pollard valued them at $50,000.00. There was no challenge to these numbers. The valuation of the shares was made based on the financial statements of Ahead Inc. for 2007. The Estate did receive value for the shares, which included the amounts that were ultimately dividend out. Therefore, there is no loss to the Estate as a result of the dividends paid on the Ahead Inc. shares.

CLAIMS AGAINST DEFENDANTS

[72] In the context of these factual findings, I will now consider the claims made against the various defendants.

[73] I shall review the claims made against the various defendants in the following order:

(1) Claims against Greg, Earl, 345 and Ltd;

(2) Claims against Lillian;

(3) Claims against Clark, Pollard & Gagliardi;

(4) Claims against Miller Thomson LLP;

Claims against Greg, Earl, 345 and Ltd

[74] Roz claims as against 345 and Earl for:

(1) Breach of fiduciary duty;

(2) Knowingly assisting in a breach of trust;

(3) Knowingly assisting in a breach of fiduciary duty;

(4) Knowingly receiving trust property in breach of trust;

(5) Knowingly receiving trust property in breach of fiduciary duty;

(6) Negligence;

(7) Oppression under the *Ontario Business Corporations Act;*

(8) Unjust enrichment;

(9) Collusion and inadequate consideration under s.18 of the *Trustee Act*. R.S.O. 1990, c T-23.

[75] The plaintiff claims as against Ltd and Greg:

(1) Knowingly assisting in a breach of trust;

(2) Knowingly assisting in a breach of fiduciary duty;

(3) Unjust enrichment;

(4) Collusion and inadequate consideration under s.18 of the *Trustee Act.*

[76] In addition, the plaintiff claims prejudgment interest, post-judgment interest and legal fees.

[77] The defendants 345 and Earl Phillips raise the defence that a full and final release was provided by Lillian to them on the sale of the shares. In the context of the sale transaction, Lillian provided a release which released Arthur Earl Phillips and 345023 Ontario Inc. In this case, Lillian was the trustee and had authority to provide a release on the sale of the shares. There is no evidence that Earl or Greg were aware of any limitations on Lillian's ability to sell the shares. Therefore, the executed release is a defence to a claim against them arising out of the sale of the shares or any action taken with respect to the corporation. Roz sought to set aside the release, but that is not appropriate. There was no evidence of fraud which could vitiate the release. The release is a valid defence to any claim made by Roz against these defendants.

Breach of Fiduciary Duty

[78] In *Louie v. Lastman* (2001), 54 O.R. 3(d) 286, [2001] O.J. No. 1888, Benotto J. (as she then was) described a fiduciary relationship as follows:

> The essence of fiduciary relationship is that one party exercises power on behalf of and either expressly or impliedly pledges to act in the other's best interest. The ability to exercise that power in a damaging way is what makes the imposition of a fiduciary duty necessary. While it may not always be necessary to unilaterally undertake the role of fiduciary, there still must exist a situation where the fiduciary looks after the interests of the beneficiary in order to establish a relationship.

[79] In this case, neither Earl nor 345 nor Greg owed a fiduciary duty to Roz. They never acted in a position of trust or control over the trust property. Therefore, as no fiduciary duty exists, there is no breach of fiduciary duty on behalf of 345, Ltd., Earl or Greg.

Knowing Receipt of Trust Property and Knowing Assistance in Breach of Trust

[80] In *Locking v. McCowan*, 2015 ONSC 4435, Belobaba J. set out the elements of knowing assistance as follows:

> The three elements that must be established for a claim of knowing assistance to succeed are:
>
> (i) An act of fraud or dishonesty on the part of the trustee;
>
> (ii) The defendant has knowledge of the trustee's dishonest conduct; and

(iii) The defendant assists the trustee in perpetrating the dishonest conduct.

[81] In this case, Lillian's conduct was not dishonest or fraudulent. She was explicit in saying she was selling the shares. If there is no fraud or dishonesty, then Greg, Earl and 345 cannot have knowledge of the dishonesty. They also cannot be liable for knowing receipt of trust property.

Negligence

[82] A successful claim in negligence requires the plaintiff to establish the following: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) damages, and (4) the damages must be causally linked to the breach of duty.

[83] In this case, 345, Earl and Greg owed no duty to Roz. For the purposes of the transaction with respect to the sale of shares, Earl was merely a party purchasing from another party, that is, Lillian on behalf of the estate. There is no duty owed in the circumstances of this case and, accordingly, the claim for negligence cannot succeed.

Unjust Enrichment

[84] A claim for unjust enrichment requires that the defendant receive a benefit and the plaintiff suffer a detriment and there be no juristic reason. This was a sale of shares for a consideration and there can be no claim for unjust enrichment.

Collusion and Inadequate Consideration under the Trustee Act, *s.18*

[85] Collusion is defined as "a secret or illegal cooperation in order to cheat or deceive others" (Concise Oxford English Dictionary, 12th Ed. (2011)).

[86] The *Trustee Act*, s. 18 reads:

> **18(1) Sales by trustees not impeachable on certain grounds**
>
> A sale made by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.
>
> **18(2) Collusion between purchaser and trustee**
>
> Such sale shall not, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

[87] In this case, the sale of the shares was done with knowledge of Roz that it was being done. There was no cooperation to cheat or deceive. In any event, given my finding on the value of the shares, the sale was not depreciatory. Therefore, Roz has no claim under s.18 of the *Trustee Act.*

Oppression under the Ontario Business Corporations Act

[88] The oppression remedy is available under s. 248 of *Ontario Business Corporations Act,* R.S.O. 1990, which reads as follows:

> 248.(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[89] A "complainant" is defined under s.245 as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[90] In this case, Roz cannot meet the definition of "complainant". She is not a registered holder or beneficial owner of the securities. The shares of the corporation were never transferred to her. They were owned by Russ and then Russ' estate. She has no standing to bring an application under the *Ontario Business Corporations Act*. In any event, there was no oppression in this case.

[91] The claims against the Phillips defendants are dismissed.

Claims against Lillian Wilhelm

[92] The plaintiff asserts the following claims against Lillian Wilhelm:

(1) Breach of trust;

(2) Breach of fiduciary duty;

(3) Gross negligence;

(4) Collusion and inadequate consideration under s.18 of the *Trustee Act;*

(5) An order setting aside the releases signed by Lillian as estate trustee;

(6) An order that she reimburse the Estate for all invoices which were paid to lawyers, accountants and other experts and advisor;

(7) Damages representing the foregone interest which the Estate would have earned had the Estate money been better invested;

(8) General damages for failing to properly manage the deceased's property prior to his death and failure to keep proper accounts;

(9) Interest on the sum of $650,300 which should have been disbursed without the request for a release.

(10) Reimbursement of $9,000.38 legal fees paid by the plaintiff in obtaining the order of Kent J.;

(11) Reimbursement to the plaintiff of $2,323.66 for legal costs of the motion which resulted in the order of Sloan J. dated June 9, 2011;

(12) Damages in the sum of $10,000 for the refusal to discharge the $50,000 mortgage against the plaintiff's residence;

(13) Damages of $10,100 representing the loss as a result of the failure to sell Sun Life Financial shares in a timely manner;

(14) Damages in the amount of $2,000 for not having provided the plaintiff with all the documentation, information within time limits set out in certain orders and depriving the plaintiff of the ability to incorporate same into the Statement of Claim.

[93] Lillian Wilhelm was Russ' personal caregiver, confidante, POA and his older sister. Lillian was named Executrix in Russ' Will. Lillian had many conversations with Russ and the tapes of some of those conversations were evidence in this proceeding.

[94] Following Russ' death, Lillian took steps to ascertain the assets of the Estate and any debts owed by Russ. She engaged professional advisors immediately upon Russ' death starting with George Voisin. She consistently relied upon professional advisors in her administration of the Estate.

[95] Lillian and Lorne were actively involved in the administration of the Estate. They took steps to clean Russell's house after his death. Lillian took seriously her duties as trustee. She wanted to fulfil her brother's wishes. Communication between Lillian and Roz became difficult. There appeared to be a distrust between them. The evidence discloses that Roz was consistently communicating with Lillian by email but there are few, if any, responses from Lillian in the evidence. Lillian repeatedly expressed to her professional advisor her concern for the beneficiaries in ensuring that each received their appropriate entitlement. She was concerned that Garry was not fully apprised of the position being taken by Roz. She was concerned that June was involved on behalf of Garry, which she thought could complicate the administration of the Estate.

Breach of Trust and Breach of Fiduciary Duty

[96] As the trustee of the Estate, Lillian owed a fiduciary duty to the beneficiaries.

[97] The estate trustee also has an obligation to properly administer the Estate. In administering the Estate, the trustee must act honestly and with a level of skill and prudence which would be expected of a reasonable man at business administering his own affairs. (See D.W.M. Waters*, The Law of Trusts in Canada,* 2nd Ed. (Toronto, Ont) Carswell, 1994 at pp. 690-695.)

[98] With respect to the sale of shares, as stated in *McKay Estate v. Love* (1991), 6 O.R. (3d) 511; affirmed 6 O.R. (3d) 519:

> "The duty of a trustee is to ensure that the sale is in the best interests of the beneficiaries. The performance of that duty requires the court to be satisfied that the sale price is the best which can be obtained.

[99] The standard of care of the trustee was set out in *McConnell v. LeBlanc*, 2008 NBQB 335, as follows:

> 14 In Widdifield, *On Executors and Trustees*, Carswell, 6th edition, the author comments at pages 8-2 and 8-3 as follows:
>
> **8.12 Standard of Care**
>
> Assuming that the trustee acts within the scope of the powers conferred upon him, the exercise of his discretion will be subject to the general standards and rules which the courts have developed to control the actions of trustees. While it is an intangible thing to describe, there is law relating to the mental processes of the trustee in coming to conclusions and decisions in his administration. The

trustee cannot be criticized for lack of training or experience but the court will try to enforce good faith, proper motives, and a minimum of good judgment. The law requires that the trustee turn his mind to his various tasks and exhibit the same degree of diligence in the exercise of his discretion as would be expected from a man of ordinary prudence in the management of his own affairs. The test is whether a reasonable and honest man might have come to the same conclusion rather than whether the judge would have handled the matter otherwise: see *Learoyd v. Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.); *Tabor v. Brooks* (1878), 10 Ch.D.273 (Eng. Ch. Div.); *Bell, Re* (1923), 23 O.W.N. 698 (Ont. H.C.).

Scott on Trusts, 3rd ed., p. 1501, analyses the circumstances which may be considered determining whether the trustee has acted reasonably:

> In determining whether the trustee is acting within the bounds of a reasonable judgment the following circumstances may be relevant: (1) the extent of discretion intended to be conferred upon the trustee by the terms of trust; (2) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; (5) the existence or non-existence of an interest in the trustee with that of the beneficiaries.

15 The author goes on to say at page 8-4:

The court retains an inherent jurisdiction over the actions of trustees and will normally require that a trustee discharge his duties with good faith and with the standard of care of a reasonable and prudent man of business. However, where a trustee is granted powers which are to be exercised at his discretion, the court traditionally will not interfere unless the trustee has not turned his mind to the exercise of his discretion or has acted unfairly or in bad faith: *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.); *Bell, Re* (1923), 23 O.W.N. 698 (Ont. H.C.); *Haasz, Re,* [1959] O.W.N. 395 (Ont. C.A.); *Floyd, Re* (1960), [1961] O.R. 50 (Ont. H.C.: *Edell v. Sitzer* (201), 55 O.R. (3d) 198 (Ont. S.C.J.), affirmed (2004), 9 E.T.R. (3d) 1 (Ont. C.A.). leave to appeal refused (2005), 2005 CarswellOnt 96 (S.C.C.)…

[100] Roz characterized the duty owed by Lillian set out in para. 30 of the Statement of Claim as follows:

> Pursuant to that fiduciary duty of care, Wilhelm was required to exercise the reasonable degree of care, skill, diligence, independent judgment and intelligence expected of a competent and prudent estate trustee and fiduciary including, but not limited to, the duty to:

(a) be unwaveringly loyal to the beneficiaries set out in the Deceased's Last Will in carrying out the provisions in it in a manner that would protect and promote only their interests ahead of everyone else's interests;

(b) ascertain the nature and value of all the Deceased's assets, collect or take possession of them, and safeguard them for the benefit of the beneficiaries of the Estate;

(c) ascertain the nature and value of all debts and money owed to the Deceased or his Estate either directly or indirectly;

(d) ascertain the nature and amount of all debts owed by the Deceased and his Estate;

(e) communicate openly, regularly, civilly, in good faith, and in a timely manner with the beneficiaries of the Estate about the assets and liabilities of the Estate and ascertain the beneficiaries' interests and wishes with respect to particular assets of the Estate;

(f) apply to the court for an interpretation of, or an order for directions with respect to, any ambiguous or troublesome provisions in the Deceased's Last Will;

(g) minimize, pay, and settle the Deceased's and the Estate's debts and liabilities including income taxes in a timely manner;

(h) collect money owed to the Deceased directly and indirectly or at least make reasonable attempts to collect as much as possible;

(i) sell assets of the Estate only after having obtained the express consent of the affected beneficiaries to the terms of such proposed sale, or in the absence of such agreement seek the prior direct and advice of the Court;

(j) fully account to the beneficiaries of the Estate for all actions taken by her and by anyone on her behalf in administering the assets and debts of the Estate;

(k) distribute to the beneficiaries of the Estate in accordance with the Deceased's Last Will the assets of the Estate net of reasonable estate administration expenses;

(l) not delegate her decisionmaking authority as a trustee to anyone else;.

[101] Roz asserts that Lillian breached her duty of care in a number of ways. These are set out in para. 31 of the Statement of Claim as follows:

Wilhelm breached that standard of care required of her as an executrix and Estate Trustee by, among other things,:

(a) failing to carry out to the provisions of the Deceased's Last Will in a manner that protected and promoted the interests of the beneficiaries set out in it.

(b) failing to exercise her shareholder rights as the Deceased's legal representative with respect to 345023 to the detriment of the residuary beneficiaries;

(c) failing to make other reasonable or timely or independent inquiries and investigations and failing to engage qualified experts in order to ascertain the fair market values of 345023's real estate holdings and the Deceased's shareholdings in 345023 for the benefit of the affected beneficiaries of the Estate before agreeing, without their prior express consent and contrary to their then express wishes of which she had knowledge, to sell such shares to Earl at an unreasonably low and undervalued price;

(d) failing to exercise her rights as a co-shareholder in 345023 with Earl to make other reasonable or timely or independent inquiries and investigations in order to ascertain the debts owed by Phillips Bros. and others to 345023 in which the Deceased held 50% of the voting shares, and failing to take any or any appropriate steps to try to collect any such money owed;

(e) failing to thoroughly and intelligently assess and analyze and independently confirm information made available to her from CPG about the true fair market values of 345023's real properties and the Deceased's shares in 345023 before agreeing to sell those shares to Earl for an unreasonably low price;

(f) failing to undertake additional or more extensive independent inquiries and investigations about the values of the Deceased's share in 345012;

(g) refusing or failing to fully account to the residuary beneficiaries of the Estate about all the assets and liabilities of the Deceased and for all actions taken by her and by others on her behalf in administering the assets and debts of the Estate until court orders for such accounting were obtained by the residuary beneficiaries;

(h) failing to communicate openly, regularly, civilly, in food faith, or in a timely manner with the beneficiaries of the Estate about the assets and liabilities of the Estate.

(i) failing to ascertain the beneficiaries' interests and wishes with respect to particular assets of the Estate before unilaterally disposing of them in total

disregard to what their interests or wishes or proposals with respect to such assets might have been;

(j) failing to apply to the court for an interpretation of, or an order for directions with respect to, ambiguous clauses in the Deceased's Last Will in order to obtain clarification as to what extent, if any, it obligated or entitled her to favour the interests of Earl, 345023, Phillips Bros., and Gregory over the interests of the residuary beneficiaries of the Estate;

[no (k) in original]

(l) failing or refusing in February 2010 to distribute Estate assets to the beneficiaries of the Estate in accordance with the Deceased's Last Will by requiring them to sign a release and indemnity of all claims against her as a condition to their receipt of that proposed interim distribution of assets when no such condition appears in the Deceased's Last Will, forcing the plaintiff to incur the unnecessary expense of obtaining a court order in June 2011 against her that such interim distribution be made;

(m) abdicating all her decisionmaking authority as a trustee to Miller Thomson LLP and to CPG; and

(n) such other breaches as may be proven at the trial of this action.

[102] The plaintiff became demanding and aggressive in her approach to Lillian. The communication was severely strained. Lillian was ultimately diagnosed with dementia and died before this matter was resolved. The portrait of Lillian painted in the tapes and through her written communication is of a woman who was considerate and always seeking to act in the best interests of the beneficiaries and also to fulfill the terms of the Will.

[103] On the whole, Lillian fulfilled her duties as trustee appropriately. She proceeded to collect, take possession, and value the assets of the Estate. She ascertained the nature and the amount of debts, and paid them. Lillian interpreted the Will with respect to the shares that they could be sold. She understood that this was the Testator's intention. She sought advice from lawyers about the administration of the Estate. She sought advice from Mr. Pollard with respect to the appropriate price for the shares. She was concerned about the beneficiaries. She negotiated the sale price for the shares with a view to obtaining fair market value for the shares.

Collusion and Inadequate Consideration under the Trustee Act, s.18

[104] As I indicated above at paragraph 81, the sale of the shares was done with Roz' knowledge. I have found that the shares were sold for fair market value and, therefore, the sale was not depreciatory. Roz has no claim against Lillian under s.18 of the *Trustee Act*.

Setting Aside Releases

[105] The releases were signed by Lillian on behalf of the Estate as part of the sale of the shares. There was no fraud or any other basis to set aside the releases signed by Lillian.

Reimbursement Professional Fees

[106] The claim with respect to the fees paid to advisors is properly addressed in the context of the passing of accounts. Lillian appropriately retained advisors and experts to assist her in her duties as trustee. The extent to which there was some overlap in the legal work with trustee work, and questions with respect to the quantum of the fees, those are addressed in the passing of accounts below.

Failure to Properly Manage the Deceased's Property Prior to his Death

[107] There is no evidence that Russ was incapable of managing his affairs at any time prior to his death. Lillian acknowledged that she used the power of attorney for the purpose of payment of certain funds necessary for transporting Russ back to Ontario. Aside from payment of modest amounts of money, which Roz acknowledged, she did not manage his property prior to his death and so had no obligation to keep accounts. This claim is dismissed.

No Interim Distribution without Release

[108] Lillian proposed to make a further interim distribution to Roz and Garry, but requested that a release be executed before the distribution was made. In the absence of a release, Lillian would proceed to pass her accounts.

[109] The plaintiff alleges that Lillian refused to make the proposed interim distribution without requiring her to sign "overly broad releases and indemnities" first.

[110] There is no entitlement for a beneficiary to receive an interim distribution. An estate trustee is entitled to request a release and waiver before making a distribution, provided that the beneficiaries are advised. If the beneficiary does not agree, the estate trustee will be required to formally pass their accounts and the beneficiary will have an opportunity to make the objections.

[111] In proposing the interim distribution, Martin was explicit that if the release indemnity was not be signed, they pass their accounts. The requirement for release is a prudent step to be taken by an estate trustee and, accordingly, the plaintiff is not entitled to any damages for the failure to make the distribution.

Reimbursement of Legal Fees on Motions

[112] The claim for legal fees with respect to the orders of Kent J. and Sloan J. are dismissed. These costs are properly recoverable either in the context of the motion or the passing of accounts. It is not appropriate to seek damages for those costs incurred in the context of this action.

Discharge of $50,000 Mortgage

[113] A mortgage of $50,000 was placed on Roz' home to secure a debt to Russ. The mortgage was discharged when a request was made by Roz. The plaintiff has established no loss as a result of any alleged delay in discharging the mortgage.

Failure to Invest

[114] Roz asserts that the Estate Trustee failed to prudently invest and re-invest the cash annuities and GICs. The Estate Trustee responds that at all times she reasonably believed that there would be a distribution of the Estate and accordingly was not appropriated to utilize any long term investments. In any event, the appropriate investments would be modest and I find that there is no want of due care and attention on the part of the Estate Trustee in failing to invest the estate assets in the more lucrative investments.

The Sale of the Sun Life Shares

[115] The Sun Life shares were sold within the executor's year. Unfortunately, there was a significant drop in the market in 2008. However, the conduct of the trustee in selling the shares to realize their value was not negligent. The sale of the shares in all the circumstances was reasonable and I find no want of due care and attention on the trustee with respect to the sale of the Sun Life Shares.

Documentary Disclosure

[116] Roz requested disclosure of documents repeatedly. Some of the material requested went far beyond what might be considered reasonable. This includes copies of all bank records for 345 and going back to 2005. There was disclosure provided and there was no loss suffered as a result of the failure to provide more timely disclosure. The plaintiff acknowledged that no amendments were made to the Statement of Claim even after full disclosure of all documents was provided. While it would have been better if the disclosure occurred earlier, it would have made no difference.

Claim against Clark, Pollard and Gagliardi

[117] The plaintiff claims against CPG for:

(1) Knowing assistance in breach of trust or breach of fiduciary duty;

(2) Negligence;

(3) Collusion and inadequate consideration under s.18 of the *Trustee Act*.

[118] Pollard had worked more than 20 years as the chartered accountant for Russ, Earl, and their companies. From 2005, onward he acted as accountant for Greg. Pollard was retained by Lillian to assist her as estate trustee. Pollard prepared income tax returns, provided advice to Lillian with respect to the value of the estate including the value of the shares of 345. Lillian's decision to sell the shares for the price that she determined was based, in a large measure, on Pollard's valuation of the shares. There is no doubt that Pollard owed a duty to Lillian.

[119] Pollard was in a conflict of interest. He had a longstanding relationship with Earl, Russ and Greg. Earl was the driving force behind the business. Pollard did not provide the best advice to Lillian. She asked if she should talk to the beneficiaries. He encouraged her to talk to Earl and Greg. There is no doubt that Lillian relied upon Pollard for an opinion on the value of the shares for the purposes of the sale. Pollard ultimately acknowledged that in his evidence. His analysis was not detailed. He assumed that there would be no recovery on the debt owed by Greg owed to 345. He did not advise Lillian to get an independent valuation, which may have clarified issues. Pollard provided advice on the Will and the sale of the shares of the company. He raised the issue of selling early in his conversation with Lillian on April 4, 2008. She relied on that advice. She met with Greg. She tried to make sure the price was fair. In the context of the negotiations, Pollard explained the number of $250,000.00 given by Greg to Lillian. He advised her on the negotiation with Greg in tape recorded conversation. When she specifically asked if she should speak to the beneficiaries, he said she did not have to speak to them legally, but morally was another issue. He did not encourage her communication with them.

[120] Pollard provided an estimated value for the shares. He initially valued the shares at $405,000. He then did a further analysis and found the shares to have a value of $232,000. Pollard's analysis assumed that none of the debt owed by Ltd. would be recovered and accepted the $360,000 value of the Otto appraisal for the properties. The plaintiff criticized Pollard for his analysis. The plaintiff also pointed to Pollard's conflict of interest.

[121] In acting for the Phillips defendants and Lillian, Pollard was in a conflict of interest. However, Pollard asserts that Lillian consented to the conflict. Lillian was aware that he was the accountant for all the different parties. In my view, while there may be some issue as to whether she truly appreciated the potential problems arising out of the conflict, Lillian was aware of Pollard's interest and accepted advice from him. In the circumstances, while Pollard's share valuation methodology may have been flawed, Lillian ultimately sold the shares for fair market value. The plaintiff suffered no loss as a result of the conduct of Pollard.

Knowing Assistance in Breach of Fiduciary Duty

[122] I have set out above at paragraph 80 the elements of knowing assistance. As I have found Lillian's conduct was not dishonest or fraudulent, the claim for knowing assistance cannot succeed against CPG.

Negligence

[123] A successful claim in negligence requires that the plaintiff establish the following: (1) A duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) damages, and (4) the damages must be causally linked to the breach of duty.

[124] Roz asserts that Pollard owed a duty of care to her. Given that I find that Pollard's conduct did not give rise to any loss, it is not necessary to analyze whether or not he, in law, owed a duty of care to the beneficiaries. However, I will say that in my view Pollard did not owe a duty of care to Roz in the circumstances of this case. He owed a duty to Lillian, and if that duty was breached and a loss was suffered, Lillian would have a claim over against him. CPG was not retained by Roz so there is no specific accountant/client relationship which is in existence upon which to base a duty of care.

[125] As the Supreme Court of Canada stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165:

> A duty of care will only be owed to those persons who the accountant could reasonably foresee would rely on the accountant's work and where such reliance was reasonable.

[126] In this case, there is no evidence that Roz relied on Pollard. If she did, that reliance was not reasonable. Roz had counsel acting on her behalf. Pollard was providing advice to Lillian and also to the Phillips defendants. He was provided no advice to Roz. In the circumstances, there is no duty owed by Pollard or CPG to the Roz.

[127] Even if a duty was owed, Roz provided no evidence with respect to the standard of care or the elements of the duty that would be required by an accountant. Given my finding with respect to the value of the shares, the plaintiff Roz suffered no loss as a result of any alleged breach of duty on behalf of CPG.

Collusion and Inadequate Consideration under the Trustee Act, *s.18*

[128] I have set out in paragraphs 85 and 86 above the definition of collusion and s.18 of the *Trustee Act*. In this case, there was no collusion and, give my finding on the sale of the shares, the sale was not depreciatory. CPG is not liable under the *Trustee Act*.

[129] The claim against Pollard and CPG is dismissed.

Claims Against Miller Thomson

[130] The plaintiff claims against Miller Thomson as follows:

(1) Miller Thomson was a constructive trustee;

(2) Miller Thomson knowingly assisted the trustee in breach of trust;

(3) Negligence;

(4) Breach of trust;

(5) Breach of fiduciary duty;

(6) Gross negligence;

(7) Collusion and inadequate consideration under s.18 of the *Trustee Act;*

(8) An order setting aside the releases signed by Lillian as estate trustee;

(9) An order that she reimburse the Estate for all invoices which were paid to lawyers, accountants and other experts and advisor;

(10) Damages representing the foregone interest which the Estate would have earned had the Estate money been better invested;.

(11) General damages for failing to properly manage the deceased's property prior to his death and failure to keep proper accounts;

(12) Interest on the sum of $650,300 which should have been disbursed without the request for a release.

(13) Reimbursement of $9,000.38 legal fees paid by the plaintiff in obtaining the order of Kent J.;

(14) Reimbursement to the plaintiff of $2,323.66 for legal costs of the motion which resulted in the order of Sloan J. dated June 9, 2011;

(15) Damages in the sum of $10,000 for the refusal to discharge the $50,000 mortgage against the plaintiff's residence;

(16) Damages of $10,100 representing the loss as a result of the failure to sell Sun Life Financial shares in a timely manner;

(17) Damages in the amount of $2,000 for not having provided the plaintiff will all the documentation, information within time limits set out in certain orders and depriving the plaintiff of the ability to incorporate same into the Statement of Claim.

[131] The majority of the claims outlined above were addressed in the context of the claim against Lillian and will not be reviewed with respect to the claim against Miller Thomson. I shall address the claim of negligence, trustee *de son tort,* knowing assistance, and the claim for legal fees.

Negligence

[132] Dealing first with the claim of negligence against Miller Thomson, I note the Statement of Claim does not plead negligence against Miller Thomson. The allegations are that Miller Thomson acted as *de facto* trustee or that Miller Thomson knowingly assisted in the breach of trust by Lillian.

[133] In this case, Miller Thomson was retained by Lillian. The solicitor for the trustee owes a duty to his client, the trustee. A duty of care has been found owed by a solicitor who prepares a will to a disappointed beneficiary in very limited circumstances. The potential conflict between the duty owed to the client and the duty owed to the beneficiaries would preclude the finding of a duty of care in the circumstances of this case. In any event, the plaintiff has established no loss as a result of the conduct of Miller Thomson.

Trustee de Son Tort

[134] In this case, there is no evidence that Lillian abdicated her decision-making authority to Miller Thomson. In fact, the opposite appears from all the communications. Lillian was always acting as the trustee. She sought advice from Miller Thomson but did not abdicate her responsibilities and her duties to Miller Thomson. Accordingly, Miller Thomson has no liability as trustee *de son tort*.

Knowing Assistance

[135] The law with respect to knowing assistance is set out in paragraph 80 above. In this case, the trustee committed no act of fraud or dishonesty and, accordingly, Miller Thomson cannot be liable for knowing assistance in breach of trust.

Legal Fees

[136] The plaintiff also claimed reimbursement of legal fees from Miller Thomson. The legal fees represent work done by Miller Thomson in fulfilling its duty to Lillian. Roz' complaint with the legal fees rests with Lillian and will be addressed in the context of the passing of accounts.

THE PASSING OF ACCOUNTS

[137] This battle was initially waged in the context of an application by Lillian to pass her accounts as Estate Trustee. The initial application to pass accounts was issued on June 9, 2010 and scheduled for September 30, 2010. It was adjourned on consent by Hawreliak and Finch. Hawreliak's retainer was then terminated and the application was adjourned again to January 2011 and then to June 2011.

[138] Lillian prepared Estate accounts for the following periods: February 25, 2008 to December 31, 2009; January 1, 2010 to January 31, 2011; and February 1, 2011 to August 25, 2011.

[139] Roz prepared six sets of objections to the accounts. Many of the issues raised in the action are also raised in the objections. Therefore, many of the issues have already been addressed earlier in these reasons. The combination of Roz' focus on detail, Lillian's issues, and Miller Thomson's involvement led to an inordinate amount of time and expense associated addressing relatively minor issues.

[140] For example, Roz raised an issue with respect to the failure to include the value of the Lincoln Town car in the capital assets. However, the plaintiff had agreed that the Lincoln Town car would be transferred to her father's friend, Kelly. Roz objected to the value of 24 Anthony Place as being expressed as $229,000.00 as that is more than the appraised value from one appraiser. $229,000.00 was the amount the plaintiff agreed to value the principal residence. It was the amount set out in an email sent by her. Although the plaintiff sought to correct that amount, it was the amount that was used consistently by Lillian and is appropriate. This focus on formality and detail significantly increased the time spent in the administration of the Estate. A trustee is not held to a standard of perfection. In the context of administering an estate, mistakes will be made.

[141] In the context of the passing of the accounts, I shall address the following issues: (1) Estate Trustee Compensation, (2) Legal Fees, (3) Accounting Fees, and (4) Alleged Failure to Invest Properly.

[142] I have already addressed the issue of the sale of the shares. The sale of the shares was authorized by the Will, and the estate trustee received fair market value for the shares. I will not revisit the issue of the shares in the context of the passing of the accounts.

Estate Trustee Compensation

[143] The estate trustee's entitlement to compensation is found in s.61 of the *Trustee Act*, R.S.O. 1990, c T.23, which states that: "A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and

trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."

[144] The *Trustee Act* confers the right to receive compensation but it does not provide a formula or rates for calculation of that compensation. Percentage guidelines have been developed by the court to assist in quantifying compensation in order to bring more predictability to the assessment of the trustee's compensation. The Ontario "tariff guidelines" are as follows: fees charged against capital at 2-1/2% on capital receipts and on capital disbursements; fees charged against revenue at 2-1/2% on revenue receipts and revenue disbursements; and a care and management fee of 2/5 of 1% per annum on the gross value of the assets under administration (see *Laing Estate v. Hines* (1998), 41 O.R. (3d) 571 (CA) at p. 573 citing *Re Jeffrey Estate* (1990), 39 E.T.R. 173 at p.178).

[145] In *Laing Estate*, the Court of Appeal approved the approach taken by Killeen J. in *Re Jeffery Estate* as follows:

> To me, the case law and common sense dictate that the audit judge should first test the compensation claims using the "percentages" approach and then, as it were, cross-check or confirm the mathematical result against the "five-factors" approach set out in *Re Toronto General Trusts and Central Ontario Railway*, supra. Usually, counsel will, in argument, set out a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required. The process is not scientific but is not intended to be: in the estate context, it is a search for an award which reflects fairness to the executor; in a real sense, the search is for an appropriate quantum meruit award in a unique setting.

[146] The five factors set out in the case of *Toronto General Trusts Corp. v. Central Ontario Railway* (1905), 6 O.W.R. 350 (H.C.) are : (1) the size of the trust; (2) the care and responsibility involved; (3) time occupied in performing the duties; (4) the skill and ability displayed; and (5) the success of the administration.

[147] In the initial application to pass accounts, the Estate Trustee claimed compensation of $49,709.73. The compensation was claimed on capital receipts of $1,377,412.60, capital disbursements of $528,150.11, revenue receipts of $67,664.40 and revenue disbursements of $14,921.88. Although the trustee prepared two more sets of accounts, no further compensation was claimed. There was no care and management fee claimed over the course of the administration of the Estate. Given that the Estate was essentially distributed August 25, 2011, the trustee could have claimed

an additional approximately $22,500 under the tariff on the capital and revenue disbursements made during the course of her administration. This is aside from any care and management fee.

[148] The $49,709.73 claimed should be examined against the five factors.

Size of the Trust

[149] The trust was about $1.4 million. The trust was not enormous; however, the Estate would yield a fee in the range of $80,000 on a straight tariff basis The amount claimed is not at the high range.

Care and Responsibility Involved

[150] Lillian took her job seriously. She spent significant time cleaning the house. She made an effort to deal with the shares of the corporation. It was not a simple, straightforward estate because of the existence of the shares in the corporation. Lillian retained experts to assist her in the administration of the Estate. Roz was critical of Lillian for not taking active steps with respect to the operation of the corporation. In my view, it would be inappropriate for the trustee to seek to take any steps with respect to the operation of 345. Any interference by her was unjustified and would be inappropriate. She was not required to engage in management decisions with respect to the corporation simply by being the Estate Trustee. In her efforts to sell the shares, she spent considerable time negotiating to ensure she was getting the fair market value for the shares.

Time Occupied in Performing the Duties

[151] Lillian recorded some of the time that she had spent in performing her duties. The time claimed appears to be significantly underreported when one considers the number of meetings that she attended. It appears she was very involved in her duties. There was time spent in performing some duties of the Estate Trustee by the lawyers and the accountant which should be considered in looking at this factor.

Skill and Ability Displayed

[152] In all the circumstances, Lillian met the standard expectation of an estate trustee in her conduct. She retained experts to assist in her administration. She relied on the experts. She received fair market value for the shares. She transferred the house.

Success of the Administration

[153] Essentially the Estate was completely distributed and notwithstanding the protestations of Roz, it was handled well.

[154] In all the circumstances, I find that compensation of $40,000.00 is appropriate compensation for the Estate Trustee.

Legal Fees

[155] The Estate paid legal fees of $89,293.70 to Miller Thomson. In addition, Miller Thomson did not pursue legal fees in the amount of $44,505.00, plus disbursements in excess of $6,000.00. These fees were for services rendered from December 31, 2010 to August 18, 2011 (the date of service of the Statement of Claim on Miller Thomson). Throughout this period, Finch and others at Miller Thomson provided legal advice to Lillian, responded to correspondence from Roz and her lawyers, and prepared and attended at court for proceedings. In the normal course, these services would be the responsibility of the Estate. The Estate has received a benefit by Miller Thomson not pursuing these fees.

[156] Roz raises several objections to the legal fees. These are that the fees: (1) include executor's work; (2) include fees for the sale of shares; (3) are not properly paid to the extent that the fees are incurred in the context of the passing of accounts; and (4) are excessive. I shall address each of these objections.

Executor's Work

[157] Roz and her husband went through each account for the approximately $50,000.00 in legal fees and commented on each individual entry. In some instances, the entry was disputed because too much time was spent or they did not feel there was an adequate explanation. In other cases, it was determined to be trustee's work. There was one entry in an account which was not related to this file. The entry was .6 @ 485.00 for Martin. The fees will be reduced by $291.00. This will be recovered as a deduction from the Estate Trustee's compensation.

[158] An estate trustee is entitled to receive legal advice with respect to the administration of the estate and her duties and responsibilities. But a professional who undertakes estate trustee's work should be reimbursed from the executor's compensation for such tasks.

[159] I have reviewed all the accounts and, in my view, $10,000.00 of fees in the accounts are matters related to trustee work. Therefore, the Executor's compensation will be reduced by $10,000.00, plus HST, for that work done. I note that much of the work in preparing the Estate accounts was done by Lynn Brohman at $130 per hour.

[160] In the context of administering the Estate, Lillian intended to make an interim distribution of $10,000.00 to each of Roz and Garry. She went to Western Union to determine the cost and misunderstood the information she received. The quote from Western Union included exchanging funds from Canadian to American, which resulted in an approximately $2,000.00 difference. Lillian thought this was the costs associated with the wire transfer. She thought it was excessive. She advised Miller Thomson and

steps were undertaken to seek to pay the $10,000.00 other than by Western Union. This was an error on Lillian's part. It was compounded when Miller Thomson failed to appropriately follow up with Lillian. I find that the legal fees which were unnecessarily incurred related to the transfer of that to be $1,325.00 inclusive of HST. This amount shall be paid by Lillian as a reduction of her executor's compensation.

Sale of Shares

[161] The sale of the shares of 345 was completed by Lillian. The Will authorized the sale of shares and, accordingly, the legal fees associated with the sale of shares are properly paid by the Estate. There will be no reduction to the legal fees on account of the fees incurred for the sale of shares. Roz' objection to the sale of the shares focuses mainly on the "failure to obtain fair market value". Had her claim been successful, Roz would have been entitled to the difference between the fair market value and the actual amount received on the sale of the shares. Legal fees would have been incurred in any event to realize that sale and so would be appropriately paid.

Passing of Accounts Related Legal Fees

[162] This claim essentially relates to the account rendered on December 24, 2010 in the amount of $32,902.64. This account was from May 2010 and much of it was related to the passing of accounts.

[163] Legal fees incurred on a contested passing of accounts are true administration expenses. An estate trustee is entitled to be indemnified for them unless the expenses are excessive (see *Re Kane Estate* 1991 41 E.T.R. 263, [1991] B.C.J. No. 3018 (B.C.S.C.)). Roz says that they should not have been paid without court approval. I accept the cogent analysis of Professor Oosterhoff in his article, Indemnity of Estate Trustee on Applied in Recent Cases, (2013) *The Advocates' Quarterly*, Volume 41, that the trustee is entitled to be reimbursed for the legal expenses for contested passing of accounts from the Estate. It is not improper to pay those without court approval. However, on the passing of accounts, the court will determine whether the fees were reasonable.

Excessive Fees

[164] The total legal fees, inclusive of HST and disbursements, paid to Miller Thomson are significant. After deducting for the Executor's work, the wrong entry, and the time spent on the Western Union issues, the balance is approximately $75,000.00, inclusive of disbursements and HST. The net legal fees only are in the range of $65,000.00.

[165] In reviewing the accounts, there are instances of interoffice consultations and research being conducted. The hourly rates charged are generous. In all the circumstances, a 20% or $13,000.00 ($14,690.00 with HST) reduction is warranted.

[166] In summary, the total legal fees, inclusive of HST and disbursements, in the amount of $89,293.70 shall be reduced by $291.00 for the wrong docket entry, $11,300.00 for the executor's work done, $1,325.00 for the Western Union issue, and $14,690.00 on the basis that the total time spent was excessive. Accordingly, the total legal fees are reduced by $27,606.00, and the legal fees allowed are $61,687.70. The difference of $ 27,607.00 will be deducted from the executor's compensation granted to Lillian.

Accounting Fees

[167] The accounts for CPG consists of two accounts; one dated June 26, 2009 for $8,400 and one dated May 31, 2010 for $1,575. For these accounts, Roz and her husband once again reviewed each item indicating the amount sought and "reason disbuted"(sic). Of these accounts, some time was spent doing work which could be considered estate trustee work. Roz objects to the work done as estate trustee and any time spent on the sale of the shares. Given my decision with respect to the sale of the shares, in my view the time for sale of shares is appropriately paid by the Estate. Roz was also critical of the time spent on the preparation of the T-3 returns. The time spent was reasonable in the preparation of the tax returns. Accordingly, of the total claimed for accountants' work, I reduce the amount by $1,710.00 ($1,932.30 with HST) as representing time spent on estate accounting. Accordingly, Lillian's trustee compensation will be reduced by $1,932.30.

Judgment on the Passing of Accounts

[168] I have reviewed the accounts and the objections raised to the accounts. While there is some issue with respect to the presentation of certain capital receipts not included, and Roz' claim for a reduction in the amount of compensation based on the inclusion of amounts paid, in all the circumstances, the compensation to which Lillian would have been entitled on the tariff is in excess of $70,000.00. I have fixed the compensation at $40,000.00. That $40,000.00 is to be reduced by $29,538.30, for a balance of $10,461.70.

[169] The trustee is entitled to payment of $10,461.70 from the amount paid into court. The balance shall be held pending my decision on costs.

DISPOSITION

[170] The claim of the plaintiff is dismissed against all the defendants.

[171] The Estate accounts are passed, with the executor's compensation fixed in the amount of $40,000.00 and a reduction of the executor's compensation for the legal fees and accounting fees as set out above.

[172] The Order of Sloan J. dated August 8, 2013 is hereby set aside. The costs of the motion may be addressed in the costs submissions.

[173] If there are any additional orders necessary to give effect to these reasons, counsel should consult each other and, if necessary, I will receive correspondence on behalf of all counsel at my chambers in Welland.

COSTS

[174] Costs submissions with respect to this matter shall be made in writing addressed to me at my chambers in Welland. The costs submissions of the defendants, limited to 10 pages, together with Bills of Costs and any offers to settle, shall be delivered within 20 days of the release of this decision. The plaintiff shall have 20 days to respond, with a Bill of Costs. The defendants will have a further right of reply within 10 days.

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Sweeny J.

Released: March 1, 2016

CITATION: Eve v. Brook, 2016 ONSC 1496
COURT FILE NO.: ES-756-11
DATE: 2016/03/01

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Roslynn Valera Eve

Plaintiff

- and –

Heather Brook as Estate Trustee of the Estate of Lillian Wilhelm as Estate Trustee of the Estate of the late Russell Bernard Phillips and in her personal capacity, Gregory Phillips as Estate Trustee of the Estate of Arthur Earl Phillips, Gregory Phillips as Estate Trustee for the Estate of Earl Phillips in trust, 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited, Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Miller Thomson LLP, Clark, Pollard & Gagliardi

Defendants

REASONS FOR DECISION

Sweeny J.

Released: March 1, 2016

CITATION: Eve v. Brook, 2016 ONSC 1496
COURT FILE NO.: ES-756-11

Description of Correction

March 29, 2016: In paragraph 50 “a non-arm’s length purchaser” has been replaced with “an arm’s length purchaser”.