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HULL & HULL LLP
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A Cautionary Tale for Estate Solicitors?

by David M. Smith

In his decision in *Bott v. Macaulay* (“*Bott*”), released on August 15, 2005 and reported in the December 16, 2005 issue of the Ontario Reports (17 O.R. (3d) 422), the Honourable Justice Cullity has once again pronounced on an issue of importance to estate practitioners.

In this instance, the issue is the charging of fees by the estate solicitor. More specifically, *Bott* provides valuable guidance on: (i) the nature of the retainer between the estate solicitor and the estate trustee, (ii) the delineation between “executor’s work” and “solicitor’s work”, and (ii) the jurisdiction of the Court to order an assessment of a solicitor’s account rendered for “executor’s work.”

In *Bott*, the estate appears to have been a simple one, the Will of the deceased providing that the estate was to be administered by the son of the deceased, Gerhard Bott (“*Bott*”) as executor, with the estate to be equally distributed between Bott and his sister (being the only children of the deceased), the deceased apparently having been predeceased by her husband.)

Bott retained the solicitor Mr. Macaulay (“*Macaulay*”) to assist him, having had no previous experience in administering estates.

The administration of the estate proceeded effortlessly such that the estate was fully administered within the executor’s year.

The dispute between Bott and Macaulay related to the second of two invoices rendered by Macaulay two months after the receipt of Probate. The first invoice in the amount of \$7, 204.49 was rendered for services on behalf of the estate trustee for solicitor’s work. The second invoice in the amount of \$34,828.50 briefly detailed the preparation of real estate documentation to transfer the estate residence and the nature of various communications to and from the estate accountant “and all other matters incident thereto”. The account description concluded with the following statement: “My fee herein rendered at five per cent of the correct value of the estate = 5 per cent of \$651,000.00.”

Macaulay, at the outset of his retainer, had provided a letter to Bott which stated in part:

“If we are requested to assist you on your work as personal representative (as separate from our work as solicitors for the estate), then at the conclusion of our work, two bills will be submitted. One is to the estate for specific legal work required by the estate and one to you for estate trustee’s work done for you. This latter will have to be paid out of the estate’s compensation that you either agreed to or had been allowed by the Superior Court of Justice.”

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REMINDER

The next Breakfast Series meeting, Wednesday, January 18, 2006, will be a presentation of *Preparing Estate Accounts - A “Hands-On” Overview - Part II*.

Please see “Breakfast Series” on reverse for details on how to register.



A Cautionary Tale for Estate Solicitors? (continued from front)

Bott (and subsequently, his surviving spouse pursuant to an Order to Continue) commenced an application within a year of the accounts having been rendered for an assessment of the second account under the *Solicitor's Act*. Macaulay, in response, submitted that a solicitor's account could only be assessed in the context of an application to pass accounts.

Justice Cullity made the following findings:

1. Bott, as estate trustee, and not the estate of the deceased was Macaulay's client. As such, the estate trustee (and not the estate) is personally liable to the solicitor for payment of the solicitor's accounts. Accordingly, if the estate trustee has a quarrel with "his" lawyer's fee, an assessment under the *Solicitor's Act* is the appropriate procedure to follow. The most obvious exception to this would be a situation in which the beneficiaries of an estate compel a passing of accounts and object to the reasonableness of such fees incurred by the estate trustee;
2. The fact that Macaulay's second account was, as submitted to Bott, payable as "executor's compensation" did not take it out of the jurisdiction of the *Solicitor's Act*. In Justice Cullity's words: "The possibility that the reasonableness of a solicitor's fees may be in issue

on a passing of accounts, does not affect the rights of the estate trustee as the solicitor's client";

3. The retainer between Macaulay and Bott, and specifically that portion of the retainer set out above, did not justify an entitlement on the part of Macaulay to charge a fee based on a percentage of the estate. Justice Cullity notes that the tariff contained within Appendix B to the surrogate court rules has now been abolished; rather, the normal *quantum meruit* approach to evaluating appropriate solicitor's fees governs, subject to any agreement between the solicitor and the client. His Honour determined that the referenced excerpt from Macaulay's retainer letter did not constitute an agreement entitling the solicitor to five per cent of the estate.

In summary, the decision in *Bott* highlights the need for carefully communicating in detail the work required to be performed by an estate trustee and the extent to which the solicitor may legitimately be paid for doing "executor's work" on behalf of the estate trustee. Justice Cullity is careful not to comment on whether the estate trustee or the estate solicitor is entitled to the compensation: this will be a matter for the assessment. *Bott* should also be contrasted with a situation in which the beneficiaries are persons other than the estate trustee.

Breakfast Series

The Hull & Hull Estate, Trust and Capacity Law Breakfast Series provides members of the bar with presentations by one of Canada's leading Estate firms on topics of importance to estate practitioners.

The next Breakfast Series meeting, Wednesday, January 18, 2006, will be a presentation of *Preparing Estate Accounts - A "Hands-On" Overview - Part II* by Ian M. Hull, Jordan M. Atin and Anne M. Werker.

The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd Floor, 20 Toronto Street, Salon 1 & 2, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the Presentation to follow at 8:30 a.m. A fee of \$30.00 (28.03 + 1.97 GST) is payable to Hull & Hull upon registration by cheque, VISA or MasterCard. Materials included.

A CD or Cassette Tape recording of the Breakfast Seminar will be available at a fee of \$20.00 (\$18.69 + \$1.31 G.S.T.).

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