

CANADA / JUDGMENT

Della Penna v. Cobb

2020 BCSC 635

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 635 Della Penna v. Cobb

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Della Penna v. Cobb,

2020 BCSC 635

Date: 20200424

Docket: S1611940

Registry: Vancouver

Between:

Robert Della Penna

Plaintiff

And

Neil L. Cobb, Neil Cobb Law Corporation

and Cobb St. Pierre Lewis

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

J. Shewfelt

Counsel for the Defendants:

R. Cooper, Q.C.

H. Doi

Place and Date of Trial:

Vancouver, B.C.

February 26-27, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2020

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Introduction

- [1] In this summary trial application, Robert Della Penna seeks an order that Neil Cobb, Neil Cobb Law Corporation, and Cobb St. Pierre Lewis pay him the sum of \$224,000 plus prejudgment interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79, and his costs of this action. He says that the sum of \$224,000 was billed and paid from funds belonging to him in breach of contract and in breach of fiduciary duty. In these reasons, I refer to the defendants collectively as "CSPL".
- [2] The \$224,000 Mr. Della Penna seeks in the action is the amount CSPL received in settlement of fees it says were outstanding to it from Mr. Della Penna, arising from the firm's representation of him on criminal charges.

Preliminary Issue: Suitability for Summary Trial

- [3] Mr. Della Penna seeks to have the matters in this action determined by way of a summary trial pursuant to Rule 9-7(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Although, in his submissions, Mr. Della Penna did not specifically address the suitability of this matter for summary determination, CSPL did not oppose a summary determination.

The Law

- [4] The parties' agreement that a matter is suitable for summary determination does not bind the court, which must reach its own conclusion with respect to suitability under Rule 9-7(15). This Rule provides:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.
- [5] Therefore, in brief, I may determine this case summarily if, taking into account all of the evidence, I am satisfied that I can find the necessary facts and that it would not be unjust to do so.
- [6] In a number of cases, this Court has set out various factors to be considered when determining whether it would be unjust to proceed summarily. They include:
- (a) the amount involved;
 - (b) the complexity and urgency of the matter;
 - (c) any prejudice likely to arise from delay;
 - (d) the cost of taking the matter forward to a conventional trial in relation to the amount involved;
 - (e) the course of the proceedings;
 - (f) the time required for summary trial;
 - (g) whether credibility is critical in determining the issues;
 - (h) whether the summary trial application would result in litigating in slices; and
 - (i) whether the determination of some issues would assist in resolving others.

(Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 215; Gichuru v. Pallai, 2013 BCCA 60 at paras. 30-31.)

- [7] The list is not exhaustive, and not all of these factors apply in every case. For example, in this case, there is no urgency and no concern about litigating in slices.

Is this case suitable for summary determination?

- [8] The factors that are important to my decision include that the key parties, Mr. Cobb and Mr. Della Penna, have filed affidavits, have responded to each other's affidavits, and have been examined for discovery.
- [9] The other key members of the CSPL law firm, who were involved in representing Mr. Della Penna or in managing the administration of the firm's trust account, have also provided affidavit evidence.
- [10] In addition to the affidavit evidence filed in support of this summary trial, there is a written record of some relevant communications between the parties, other written documents about the parties' relationship, sworn affidavits filed in court proceedings that predated this dispute, and court orders.
- [11] The progress of Mr. Della Penna's criminal proceedings, and of a number of civil forfeiture proceedings involving him, are not seriously in dispute.
- [12] The cost of determining this dispute at a conventional trial is not warranted by the amount in dispute. This summary trial was heard in two days, representing a significant saving of time and costs.
- [13] For these reasons, I have concluded that this matter is suitable for summary determination. The evidentiary record before me will permit me to find the necessary facts and decide the key issues in this matter without any injustice to either party. Where there are two different versions of events, I am able to make the necessary credibility findings without having the affiants testify.

Factual Background

The Parties' Relationship

- [14] From October 2004 until early 2012, CSPL represented Mr. Della Penna with respect to serious drug charges. CSPL's representation included appearances in the Provincial Court, the Supreme Court, and the Court of Appeal. After the Crown stayed the criminal charges against Mr. Della Penna, CSPL continued to perform services for him, including with respect to two civil forfeiture actions brought against him by the Director of Civil Forfeiture.

- [15] To understand the issues in this summary trial application, it is necessary to set out, in some detail, the history of the criminal proceedings against Mr. Della Penna. In this history, I will identify the factual disputes between the parties. Later in these reasons, I will determine which version of the facts is most credible and/or reliable.

The Criminal Charges and the Initial Retainer Agreement

- [16] On October 14, 2004, Mr. Della Penna was arrested by the RCMP as part of a "reverse sting" operation conducted by undercover officers. Mr. Della Penna had been the main target of an international drug investigation. During the course of the investigation, and pursuant to a series of wiretap authorizations, the RCMP recorded Mr. Della Penna's communications with others involved.
- [17] Based on the information from the wiretaps, the RCMP set up the reverse sting operation and arrested Mr. Della Penna while he was in a hotel room for the purpose of buying cocaine from undercover officers. The RCMP captured the interaction between Mr. Della Penna and its undercover officers on tape pursuant to a one-party consent authorization.
- [18] At the time of his arrest, for the purpose of buying the drugs, Mr. Della Penna was carrying a suitcase containing \$575,920 in cash. The suitcase of cash was seized by the RCMP (the "Seized Funds").
- [19] In October 2004, the Crown charged Mr. Della Penna with two counts of conspiracy to traffic cocaine and one count of conspiracy to traffic marihuana. Several other accused were also charged. In February 2006, the Crown added a further count of conspiracy to import cocaine (together, the "Charges"). In October 2004, while in custody, Mr. Della Penna was arrested on similar charges in Alberta. In October 2005, the Crown stayed the Alberta charges, at CSPL's request, due to the ongoing prosecution in BC.
- [20] During his discovery, Mr. Della Penna acknowledged that the Charges were very serious and the stakes were incredibly high. He also agreed that, if convicted, he was facing a sentence upward of 20 years, and that it was incredibly important for him to win the trial, which would be difficult.
- [21] In discovery, Mr. Della Penna also acknowledged that the source of the Seized Funds was the sale of drugs, an illegal activity. In particular, he was asked the following series of questions:

Q: You knew that you had taken two suitcases full of money to the Sandman Hotel in Richmond. You knew that.

A: [Another accused] delivered them to the hotel and then I grabbed them from him and brought them up to the room.

Q: I see, so you took them from the parking lot to the room.

A: Yes.

Q: And they were full of cash?

A: Yes.

Q: Where did you get that money from?

A: Just had it.

Q: How did you earn it?

A: With illegal activity.

Q: You earned it selling drugs; right?

A: If you say so.

Q: Well, did you or didn't you?

A: I just said I earned it in illegal activity.

Q: You earned them selling drugs.

A: Yeah, I guess.

[Extract from Questions 197-208.]

[22] In October 2004, following his arrest and while in custody, Mr. Della Penna met with two senior lawyers from CSPL: David St. Pierre, now a judge of the BC Provincial Court, and Mr. Cobb. Mr. Della Penna was a high school classmate of CSPL's office manager, and Mr. Cobb had successfully represented him on earlier criminal charges. During his cross-examination, Mr. Della Penna acknowledged that he had confidence in Mr. Cobb and CSPL.

[23] In their affidavits, Mr. Cobb and Mr. St. Pierre said that, at the October meeting with Mr. Della Penna, they explained that the Crown had strong evidence of his guilt and the case against him involved complex legal issues. As a result, they told him that his case would typically require two lawyers to be in court on all sitting days.

[24] Both Mr. Cobb and Mr. St. Pierre said that Mr. Della Penna was interested in the best deal they could give him for representing him. The lawyers say that they quoted Mr. Della Penna an initial fee of \$300,000-\$350,000 for the first 50 days of court time (the "Initial Retainer"). The 50 days of court time, on which they based their quote, relied on the Crown's initial estimate of the length of the trial. The Initial Retainer discounted the lawyers' normal daily hearing rates, which at the time and for this kind of major file, were \$5,000 per lawyer per day. Based on two senior lawyers attending 50 days of trial, CSPL's usual fee would have been \$500,000. Mr. Cobb said in his second affidavit that the \$300,000-\$350,000 Initial Retainer was the best deal possible.

[25] Mr. Della Penna says that Mr. Cobb told him that his firm was going to give him a "deal" on legal fees and that he would not be charged CSPL's normal rates. He says that he did not ask about, or discuss, specific hourly rates, but he understood that he would be getting a

substantial discount on how CSPL's fees were calculated. Mr. Della Penna says that Mr. Cobb explained his reasons for discounting CSPL's fees, one of which was their previous relationship. He could not recall the others. Mr. Della Penna says that he acknowledged and accepted Mr. Cobb's offer.

- [26] Mr. Della Penna said that, while he was still in custody, Mr. Cobb asked him to pay CSPL \$250,000, the amount he told Mr. Della Penna the trial was going to cost. Mr. Della Penna said that even though Mr. Cobb stated the figure in absolute terms as the fixed amount he had to pay, he understood that the actual fees could be higher or lower depending upon the amount of the work that was done.
- [27] There is a subtle difference in Mr. Cobb's and Mr. Della Penna's evidence about the Initial Retainer. According to Mr. Cobb, Mr. Della Penna sought the discount. According to Mr. Della Penna, Mr. Cobb offered the discount. It accords with common sense that Mr. Della Penna sought the discount.
- [28] There is no dispute that Mr. Della Penna retained CSPL and that there was no written retainer agreement.
- [29] From October 2004 until his appointment to the bench in March 2009, Mr. St. Pierre was senior and lead counsel on Mr. Della Penna's file. At different times, Mr. Cobb and Ms. Lewis were also senior and lead counsel on the file, assisted as necessary by various associates. In their affidavits, all three of these senior lawyers said that, during their involvement in Mr. Della Penna's file, they discussed the issue of fees with him.
- [30] In particular, Mr. St. Pierre deposed that on April 20, 2005, he met with Mr. Della Penna at CSPL's offices. The meeting was arranged so that Mr. Della Penna could be personally served with a restraining order respecting a property he was alleged to own in Mission, BC.
- [31] Mr. St. Pierre took the opportunity to discuss Mr. Della Penna's failure to pay the Initial Retainer. He says that he confirmed the amount of the Initial Retainer with Mr. Della Penna, advising him that based on the \$90,000 he had paid into trust at that point, CSPL was still owed an additional \$200,000-\$250,000. Mr. St. Pierre took contemporaneous notes of this meeting.
- [32] During his examination for discovery, Mr. Della Penna said that he did not recall a discussion with Mr. St. Pierre about fees. He said that Mr. Cobb charged him \$250,000 for the trial, and that is what he paid. For reasons set out in my credibility assessment below, I do not accept that Mr. Cobb quoted a fee of \$250,000 for the trial or that Mr. Della Penna paid that amount into trust. I find that the quoted Initial Retainer was between \$300,000 and \$350,000, as set out in Mr. Cobb's and Mr. St. Pierre's affidavits, and that Mr. Della Penna only paid \$175,000 towards the Initial Retainer.

- [33] I also find that a fee of \$300,000 to \$350,000 was a significant discount on CSPL's daily fee of \$5,000 per senior lawyer per court day, which, based on a 50-day trial, would have been \$500,000.
- [34] Ms. Lewis joined what was then Cobb St. Pierre in July 2005. She became the managing partner and assumed management of the firm's finances, including ensuring that clients met their retainer obligations. As a result, she had various discussions with Mr. Della Penna regarding fees over the history of his file. She was aware that a flat fee estimate of \$300,000-\$350,000, inclusive of taxes and disbursements, had been given to Mr. Della Penna at the outset of the retainer and that it represented a "very significant discount" on the rates usually charged by the senior partners.

The Proceedings in the Provincial Court

- [35] The first step in CSPL's representation of Mr. Della Penna was a complex bail hearing in the fall of 2004. The firm was successful in obtaining his release pending trial. The firm also represented him at all of the pre-trial hearings in the Provincial Court.
- [36] The Crown's case in Provincial Court began before Judge Warren on April 10, 2006. There were six accused, including Mr. Della Penna.
- [37] The Crown had strong evidence of Mr. Della Penna's guilt stemming from the intercepted wiretap communications and the reverse sting operation. The defence strategy was to challenge the lawfulness of the wiretap authorizations, and CSPL filed a number of applications regarding the admissibility of the wiretap evidence.
- [38] Judge Warren dealt with those applications in a number of pretrial voir dres, during which evidence was called. The voir dres were contested, complex, and took far longer than the Crown's initial estimate of 50 days. Between April 2006 and July 2008, there were approximately 84 hearing days before Judge Warren, and she issued 18 written evidentiary rulings, 16 of which were published.
- [39] In her rulings, Judge Warren determined the validity of the wiretap authorizations that she was asked to review. Pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms, she ruled that some, but not all, of the evidence the Crown wished to adduce at trial was inadmissible.
- [40] After July 2008, Judge Warren was unable to continue with the hearings. Judge Howard was assigned to the file. She determined that the trial would need to start again: *R. v. Della Penna et al*, 2008 BCPC 326. As a result, all previously determined admissibility issues would need to be reargued.

The Proceedings in the Supreme Court

- [41] Rather than relitigate in the Provincial Court, in November 2008, the Crown preferred a direct indictment against Mr. Della Penna and three other accused. The trial began in May 2009 before Justice Leask. Nineteen days were set aside for voir dres.
- [42] In a June 29, 2009 oral ruling, Justice Leask granted Mr. Della Penna's application to quash the initial one-party consent authorization, for failure to meet the statutory requirements of s. 184.2 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] and for unlawful infringement of Mr. Della Penna's s. 8 Charter rights. The authorization permitted the RCMP to record Mr. Della Penna's communications with a cooperating witness, an individual facing serious drug charges in Washington state, USA.
- [43] Following Justice Leask's ruling, the Crown conceded that the subsequent wiretap and one-party consent authorizations, including the authorization recording Mr. Della Penna's interactions with the undercover officers during the reverse sting operation, were similarly flawed as the foundation for them was the initial one-party authorization.
- [44] Mr. Della Penna and the other accused then sought to exclude the evidence obtained from the various authorizations under s. 24(2) of the Charter.
- [45] In a second oral ruling on July 14, 2009, Justice Leask granted Mr. Della Penna's application and excluded the evidence obtained from the subsequent wiretap and one-party consent authorizations. Without that evidence, Mr. Della Penna was acquitted on all counts.

Fee Arrangements and Payment of Fees Within the Provincial Court and Supreme Court Proceedings

- [46] Between about December 2004 and July 2007, CSPL issued invoices to Mr. Della Penna in respect of the proceedings in the Provincial Court, drawing on the \$175,000 it had in its trust account. Mr. Cobb deposed that CSPL rendered its bills, taking into account the nature of the work done, estimates of the time spent, and the amount remaining in trust. The amount remaining in trust was relevant because it was CSPL's practice not to bill large fees on files without having funds in trust. By doing so, CSPL avoided later categorizing the unpaid accounts as bad debts and applying for tax refunds.
- [47] CSPL rendered the following invoices for the work that was done by the partners in Provincial Court:
1. Invoice 3717, dated December 7, 2004, in the total amount of \$45,600. The invoice referred to the criminal charges filed against Mr. Della Penna in Vancouver and Calgary. It indicates that \$22,000 was for work done by Mr. Cobb, \$18,000 was for work done by Mr. St. Pierre, and the balance of \$5,600 was for tax.

2. Invoice 3877, dated March 4, 2005, in the total amount of \$2,280. The invoice also refers to the criminal charges in Vancouver and Calgary. The work done was not attributed to a specific CSPL lawyer, although in Mr. Cobb's examination for discovery, this invoice was referred to as Ms. Redmond's bill.
 3. Invoice 5239, dated September 7, 2006, in the total amount of \$67,800. The fee was \$60,000, and the balance relates to applicable taxes. The invoice refers only to the Vancouver charges. The work done was not attributed to specific CSPL lawyers, although the text referred to various court attendances by Mr. Cobb and Ms. Lewis through to the conclusion of the first voir dire. The invoice also refers to legal research, the preparation of briefs of authorities, the preparation of written submissions, and all other services.
 4. Invoice 5503, dated December 18, 2006, in the total amount of \$35,000. The fee was \$30,973.46, and the balance relates to applicable taxes. The work done was not attributed to specific CSPL lawyers, although the text refers to 13 days of court attendance by Mr. Cobb and Ms. Lewis. The invoice also refers to reviewing additional Crown disclosure, legal research, preparing further written submissions, and preparation for the court appearances.
 5. Invoice 5895, dated July 4, 2007, in the total amount of 17,147.76. The fee was \$15,175.01, and the balance related to applicable taxes. The work done was not attributed to specific CSPL lawyers, although the text refers to 11 days of court attendance by Mr. Cobb and Ms. Lewis. The invoice also refers to meeting with Mr. Della Penna, reviewing additional Crown disclosure, legal research, preparing further written submissions, and preparation for the court appearances.
- [48] All of these invoices were paid out of the money CSPL held in trust for Mr. Della Penna. I note that the total of these invoices comes to \$167,697.76, which is less than the \$175,000 that Mr. Della Penna paid to CSPL. On reviewing CSPL's trust ledger, it is not clear to me where the discrepancy arises. In any event, the parties appear to agree that, as of the July 4, 2007 invoice, all of the money Mr. Della Penna had paid towards the Initial Retainer was exhausted, so it is unnecessary for me to resolve the reason for the discrepancy.
- [49] As discussed below, CSPL later rendered an invoice on April 5, 2009 - Invoice 6946 - for the remaining work done in the Provincial Court.
- [50] I accept that CSPL was not billing Mr. Della Penna at an hourly rate for a specified number of hours worked. Mr. Cobb explained in his second affidavit that the invoices were based on estimates of the amount of time spent by the partners, associates, and articulated students on the tasks described in the invoices. Although Mr. Cobb said in his discovery that Invoices 3717 and 5239 were prepared based on an estimation of the number of hours worked, multiplied by an unspecified hourly rate, this statement was inconsistent with the evidence from the other partners, with the evidence of Mr. Della Penna that no hourly fee was agreed to, and with what can be inferred from the invoices themselves. Mr. Cobb also said the invoices were notionally to inform Mr. Della Penna of the work that was being done, but the

fee was still a flat fee, and CSPL did not know at the time that Mr. Della Penna was never going to pay the \$300,000-\$350,000 Initial Retainer. While Mr. Della Penna argues that Mr. Cobb's evidence in this regard was false, I do not reach that conclusion. I conclude that Mr. Cobb was mistaken in his evidence.

- [51] I find that the invoices were approximations that were intended to inform Mr. Della Penna of the work done, but that the fee arrangement was based on a global fee of \$300,000-\$350,000.
- [52] Mr. Della Penna argues that, on the preponderance of the evidence, I could draw an inference that the fee agreement between him and CSPL was for senior lawyer hourly rates of \$250 per hour. He submits that, because Invoices 3717 and 5239 were for work carried out by Mr. Cobb, Mr. St. Pierre, and Ms. Lewis and were in round figure amounts that were divisible by an hourly rate of \$250, I could infer that the reduction in fees they had agreed to was from their normal rate of \$350 to a reduced rate of \$250 an hour.
- [53] There are a number of flaws in this argument. First, Mr. Della Penna refers to only two of the five bills, only one of which broke down the total amount between two partners of the firm. Those bills do not specify the number of hours spent on each of the tasks outlined. The remaining bills which referred to the work of the senior partners were not in amounts divisible by \$250 per hour. Second, with respect to Invoice 5503, the amount billed is significantly less than would be expected for two senior lawyers attending 13 days in court, even if the rate were \$250 an hour. Third, Mr. Della Penna never testified that he had been quoted a discounted rate of \$250. In fact, he said he never knew of or discussed an hourly rate with Mr. Cobb.
- [54] I accept that these invoices were billed in global amounts until Mr. Della Penna's retainer was exhausted. It is not at all clear how the amounts were arrived at. This was particularly clear from Invoice 5895 in the amount of \$15,175.01 plus tax. It involved either Mr. Cobb, Ms. Lewis, or others reviewing Crown disclosure, researching applicable cases, and preparing further written submissions; and Mr. Cobb and Ms. Lewis both attending in court for 11 days. Clearly, the invoice was not based on an hourly rate of \$250 an hour. In any event, I need not reach any conclusion in this regard as Mr. Della Penna does not question the invoices rendered by CSPL up to July 2007. However, on the evidence, I am unable to draw the inference Mr. Della Penna asks me to.
- [55] After the retainer funds provided by Mr. Della Penna were exhausted, and between August 2007 and April 2009, CSPL worked on his defence without payment. In his second affidavit, Mr. Cobb says that hundreds of hours of work were put in by the partners and associates on Mr. Della Penna's complex defence, without payment, and that they worked longer than usual hours on other paying files to keep the firm solvent and operational.
- [56] Mr. Cobb says that he and Mr. Della Penna then agreed that, for the remaining trial work done after July 2007, CSPL lawyers would bill their time at their normal hourly rates. The billable rate for each of Mr. Cobb, Mr. St. Pierre, and Ms. Lewis was \$350 an hour.

- [57] Both Ms. Lewis and Mr. St. Pierre confirmed this agreement with Mr. Della Penna.
- [58] Mr. Della Penna disputes that there was a change in the billing arrangement between him and the firm after the Initial Retainer was exhausted.
- [59] In the fall of 2007, Mr. Cobb discussed with Mr. Della Penna options for paying his mounting legal bills. They discussed the possibility of having some of his legal fees paid out of the Seized Funds pursuant to court-authorized payments under certain provisions of the Code. He explained that Mr. Della Penna would require independent legal advice about the process. Mr. Cobb arranged for Mr. Della Penna to receive independent legal advice from J. Douglas Jevning.

Section 462.34(4)(c)(ii) of the Criminal Code and Related Applications

- [60] This section is part of the proceeds of crime regime set out in Part XII.2 of the Code. It permits the state to seize property from an accused, who is presumed innocent and has not been found guilty of a crime, if there are reasonable and probable grounds to believe the property is the proceeds of crime. For some accused, the seizure of property deprives them of assets that could, otherwise, have been used by them to hire counsel to defend them.
- [61] Section 462.34(4)(c)(ii) of the Code permits an accused, who has no other assets or means available, to seek return of some or all of the seized property for the purpose of paying reasonable legal expenses.
- [62] If the property is subsequently determined to be the "proceeds of crime", either at sentencing or at a forfeiture hearing, it is subject to forfeiture or a fine in lieu. For property that is no longer available for forfeiture, such as funds provided to the accused to pay reasonable legal fees, a sentencing judge may order a fine instead of forfeiture. Offenders who fail to pay the fine are liable to an additional term of imprisonment. Under this regime, there is a link between the cost to an accused who accesses seized property for the purpose of retaining counsel and his liberty interests.
- [63] On October 25, 2007, Mr. Jevning filed an application under the Code for access to the Seized Funds to fund Mr. Della Penna's legal fees (the "Funding Application"). In support of the Funding Application, Mr. Della Penna filed an affidavit on October 24, 2007, in which he swore that:
- (a) the retainer for Mr. Cobb and Ms. Lewis was extinguished as of June 29, 2007 and since then, Mr. Cobb and Ms. Lewis had been attending in court without fee or retainer;
 - (b) Ms. Lewis had since expended 164 hours and Mr. Cobb 185 hours of research, preparation, and trial time. Thirteen days of trial time had been expended from the expiry of the retainer up to and including October 16, 2007;
 - (c) there were currently a further 23 trial days scheduled. However, on October 5, 2007, the Crown advised that it wished to set aside a further 90 days;

- (d) he had provided financial disclosure to the Legal Services Society ("LSS") and applied for legal aid under their tariff. He was advised on October 5, 2007 that he was ineligible for legal aid because his assets, including the Seized Funds, exceeded LSS financial eligibility guidelines; and
 - (e) he had received independent legal advice about the potential consequences of the Funding Application.
- [64] For reasons not explained to me, the October 2007 Funding Application was adjourned. It may have been adjourned because Mr. Della Penna had not completed an internal review process with respect to his legal aid application. Mr. Della Penna's failure to complete the review process was addressed in Mr. Cobb's November 26, 2008 letter to him. As discussed below, the Funding Application was argued in the spring of 2009.
- [65] Mr. Cobb wrote to Mr. Della Penna on November 26, 2008, regarding his continued non-payment to CSPL and advised that the firm would not be able to continue with his defence in the Supreme Court without a guarantee of payment and was withdrawing as Mr. Della Penna's counsel. His letter said, in part:

We have just spoken with LSS and they advise us that you have not provided the documents they require with respect to proof of income which are essential for them to consider your application for Legal Aid. The items have not been received and so they are unable to make a decision with respect to your application. As such we have not received a referral and do not consider ourselves retained with respect to this matter any longer.

We have had several meetings with you where we have attempted to explain that we can no longer represent you without a guarantee of payment. You are well aware that your retainer was exhausted long ago and that we have continued to work (for free) on your case, spending hundreds and hundreds of hours, working evenings and weekends, and continuing to expend the limited resources of our small office on your case. As we told you we can afford to do so no longer.

No application can be made to court until you complete your legal aid application process.

We appreciate that you are in a difficult position and this case has taken far longer to complete than anyone ever anticipated. However, we have done far more than could reasonably be expected of us within the confines of your initial retainer. We will simply not represent you any longer without payment. Accordingly, we will not appear in Court for you unless and until you deal with this issue. Please take this letter as notice that we are now withdrawn as your counsel. This means that we will no longer be your lawyers.

- [66] Despite Mr. Cobb's letter, CSPL did not withdraw. On December 9, 2008, Ms. Lewis wrote to LSS, asking it to review its decision to refuse Mr. Della Penna legal aid on the basis that he had provided insufficient financial information.

- [67] In January 2009, about a year and a half after Mr. Della Penna's retainer funds had been exhausted, CSPL brought the Funding Application on his behalf in the Supreme Court. CSPL also brought a related Rowbotham application, referring to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), for a judicial stay of proceedings pending funding. Mr. St. Pierre and an associate, Nicholas Reithmeier, argued these applications. The Rowbotham application filed by Mr. St. Pierre set out the complexity of the case against Mr. Della Penna, the aborted proceedings in the Provincial Court, and the scheduled dates set in the Supreme Court. He set out that the \$175,000 in retainer funds provided by Mr. Della Penna had been exhausted as of July 2007.
- [68] Mr. Della Penna filed an additional affidavit in support of the Funding Application on January 27, 2009. In it, he set out his educational and employment background, his limited income as reported in his income tax returns, and said that he had no other assets or means for offsetting his legal fees. He said he had exhausted his family members' resources and they were unwilling or unable to assist him further. Of particular importance to this summary trial application, he said:
- (a) Since his arrest, he had retained CSPL. The firm had served him exceptionally well and he wished them to continue to represent him. He was aware of the serious potential consequences of the case;
 - (b) Mr. Cobb previously advised him of the fees required for him and Ms. Lewis to act for him until the scheduled completion of his matters. Although he had grave concerns about his ability to pay the fees, he had managed to provide an initial retainer.
 - (c) Proceedings in the Provincial Court had taken considerably longer than contemplated. Between April 10, 2006 and July 25, 2008, no less than 84 days had been devoted to his hearing, 37 days of which were after the retainer he had provided to CSPL had run out on July 5, 2007.
 - (d) Since August of 2007, Ms. Lewis had expended 419 hours, and Mr. Cobb 355 hours, of research, preparation, and trial time.
 - (e) He had twice unsuccessfully applied for legal aid. He was denied coverage because LSS considered the Seized Funds to be his asset.
 - (f) He had received independent legal advice about the Funding Application.
- [69] Mr. St. Pierre said that he explained to Mr. Della Penna the nature of the Funding Application, including that based on the Code provisions, it could result in the possibility of additional jail time if he were convicted. He also explained that, on such applications, the Crown often took the position that, if a funding order was made, it should be at an hourly rate at or near the Legal Aid tariff rates. Finally, he also explained that a successful application might result in an order covering fees below the \$350 hourly rate at which the partners billed.

- [70] As previously noted, CSPL had also arranged for Mr. Della Penna to receive independent legal advice from senior criminal counsel, J. Douglas Jevning. Mr. St. Pierre said that he confirmed with Mr. Della Penna that he understood the potential outcomes of the Funding Application and would pay any shortfall in the hourly rate that would be set by the court if CSPL successfully secured a return of the Seized Funds. Mr. Della Penna told Mr. St. Pierre that he had recently agreed to that arrangement with Mr. Cobb.
- [71] As mentioned above, in his affidavit, Mr. Cobb said that in the fall of 2007, he discussed with Mr. Della Penna about his mounting legal bills. This was when Mr. Cobb first explained the possibility of bringing the Funding Application. Mr. Cobb says that he told Mr. Della Penna that the partners billed their time at \$350 per hour and that the firm had kept track of the hours since the \$175,000 retainer funds had run out. Mr. Della Penna said that he understood and was extremely grateful that CSPL had stood by him when he could not pay the agreed-upon fees, and that the firm could "keep it all" if they could obtain the return of the funds he had delivered to the undercover police officers.
- [72] Mr. Cobb says that while the Funding Application was going on, he told Mr. Della Penna that if the Funding Application was successful, but at a rate less than CSPL's normal hourly rate, the firm would charge him the difference from the money they hoped to have returned if and when they won his case. Mr. Della Penna agreed with this and reiterated his offer that the firm could keep it all if he was acquitted.
- [73] Justice Leask heard the Funding Application on March 2, 2009. He determined that Mr. Della Penna had no other assets or means available to meet his reasonable legal expenses and that no other person appeared to be lawfully entitled to possession of the Seized Funds. He ordered that Mr. Della Penna was entitled to access the Seized Funds for the purposes of his defence.
- [74] In such applications, the court takes into account the nature of the case, the work being done, and the circumstances unique to an application to allow counsel to use seized property for the purposes of an accused's defence. On the applications before Justice Leask, the Crown asked him to consider the legal aid tariff, the risk of jail time in lieu of a fine that might be imposed on conviction, and the need to protect Mr. Della Penna's interests.
- [75] At a series of subsequent in camera hearings, counsel made submissions regarding the quantum of legal fees permitted to be paid from the Seized Funds. After considering the relevant factors, Justice Leask allowed:
- (a) CSPL to bill lump sum fees of \$125,000 plus taxes for the work it did in the Provincial Court from August 2007 to November 2008; and
 - (b) CSPL to bill at hourly rates of \$250 for the partners, and varying rates for the associates depending on their year of call, for its work in the Supreme Court.

- [76] On April 15, 2009, in accordance with Justice Leask's order, CSPL rendered Invoice 6946, in the total amount of \$140,000 (\$125,000 in fees and \$15,000 in taxes) for the work it did in the Provincial Court between August 2007 and November 2008. At subsequent in camera hearings, and in four orders, Justice Leask approved CSPL's invoices for the work done in the Supreme Court up to July 2009. In total, Justice Leask approved payments to CSPL from the Seized Funds totalling \$351,174.39.
- [77] In doing so, Justice Leask determined what was "reasonable" to be paid out of the Seized Funds. He was not determining the reasonableness of the fee agreement between Mr. Della Penna and CSPL. The Payment Approval Orders for CSPL's interim accounts are not a determination that Mr. Della Penna had satisfied his obligation to pay his solicitors under their fee agreement.

The Appeal

- [78] In July 2009, the Crown filed a notice of appeal from Justice Leask's decisions leading to Mr. Della Penna's acquittal. The Crown filed eight volumes of transcripts and nine volumes of appeal books. Ms. Lewis reviewed the Crown's materials and concluded that they were incomplete. CSPL filed a supplementary transcript of materials and supplementary appeal books.
- [79] The appeal required extensive preparation, in part, given the long underlying procedural history. It was originally estimated by senior appellate counsel to require three full days. The hearing concluded in two days on October 24-25, 2011.
- [80] On November 21, 2011, Mr. Cobb wrote to Mr. Della Penna, advising him that, based on the questions from the Court of Appeal, it was likely that he would lose the appeal and explained his right to apply for leave to appeal to the Supreme Court of Canada. In the letter, Mr. Cobb said:

The final matters which we need to address at this time are financial and personal ones. You still have quite an outstanding balance in respect of the very hard work you know we did on your appeal. Appeals to the Supreme Court of Canada also cost money and while you should expect us to continue to give you the best bargain rates that any accused person has ever received, there are real limits to what a modest firm like ours can do. Please get cracking on that.

- [81] The letter went on to explain that CSPL would be prepared to argue the leave application in the Supreme Court of Canada but, if there was to be a retrial, CSPL was not in a position to represent Mr. Della Penna because of the toll the case had taken on Mr. Cobb's professional and personal life.
- [82] The Court of Appeal rendered its decision on January 10, 2012: *R. v. Della Penna*, 2012 BCCA 3. It overturned Justice Leask's decisions and ordered a new trial.
- [83] Unusually, at para. 56 of its reasons, the Court said:

- [56] Before leaving this case, I must observe that it seems to have been beset by an unusual and multifarious series of vicissitudes. Given that this was a fairly ordinary drug case, the duration of the proceedings approaches the interminable. While it is of course ultimately a decision for the prosecutorial authorities, I venture to respectfully suggest that it would be appropriate for them to review the course of proceedings to date to determine whether the interests of justice would be well served by a continuation of the process.
- [84] The Crown advised in January 2012 that it would be staying the charges against Mr. Della Penna and, on February 17, 2012, the Crown wrote to this Court, directing a stay of proceedings on the indictment. The criminal charges facing Mr. Della Penna were brought to an end.

Fee Arrangements for the Appeal

- [85] After Mr. Della Penna was served with the Crown's notice of appeal, Mr. Cobb says that he advised Mr. Della Penna, in a meeting at the Vancouver Law Courts, that CSPL's fee for the appeal would be a flat fee of \$100,000, including disbursements but not taxes, for a total of \$112,000.
- [86] Mr. Della Penna says in his affidavit that the fee Mr. Cobb quoted him for the appeal was \$50,000.
- [87] Again, there was no written retainer agreement.
- [88] There is no dispute that Mr. Della Penna only paid \$30,000 towards the appeal costs.
- [89] CSPL issued two invoices for the appeal work drawing on the \$30,000 in trust. As with the invoices previously rendered by CSPL to Mr. Della Penna, these invoices were rendered based on CSPL's practice of not billing large fees on files without having the funds in trust. By doing so, CSPL avoided categorizing the unpaid accounts as bad debts and having to apply for tax refunds.
- [90] Therefore, CSPL says that although \$100,000 including disbursements was the amount agreed on for legal fees on the appeal, the invoices in October 2011 totaled \$29,108.54 (excluding taxes). At the end of October 2011, \$82,000 was still owed on the appeal.

Events Following the Stay of Charges

The Australian Criminal Charges

- [91] Shortly after the Court of Appeal rendered its decision and the Crown indicated that it would stay the proceedings against Mr. Della Penna, he was arrested in Australia on drug-related charges. He arrived in Sydney on November 19, 2011, and, according to a Statement of Facts prepared by the Australian Federal Police, between late November 2011 and January 25, 2012:

was observed by [Australian Federal Police] physical and electronic surveillance meeting with and arranging narcotic-related activities with a number of persons. [Mr. Della Penna] was also in contact with other persons interstate and overseas pertaining to the delivery of border controlled drugs and the dealing in proceeds of crime.

[92] Drugs were seized pursuant to a search warrant of premises rented by Mr. Della Penna, and he was arrested and charged. Mr. Della Penna was convicted of drug-related charges and incarcerated in Australia.

The Civil Forfeiture Proceedings

[93] While the criminal prosecution of Mr. Della Penna in British Columbia was ongoing, the Director of Civil Forfeiture (the "Director") targeted money and property allegedly owned by Mr. Della Penna through seizure and forfeiture proceedings.

[94] On April 5, 2005, a property located at 9439 Barrett Street in Mission, BC (the "Barrett Property") was made subject to a restraint and management order after a search of it uncovered 3000 marihuana plants and 49 individuals in the process of harvesting and processing the plants. This order was served on Mr. Della Penna in CSPL's office, in the presence of Mr. St. Pierre, on April 20, 2005. In evidence in support of the restraint and management order, police described the commercial marihuana grow operation that was discovered at the Barrett Property.

[95] Title to the Barrett Property was registered in the name of Bernie Walton, but, during his examination for discovery, Mr. Della Penna acknowledged that he was the beneficial owner. The Barrett Property was eventually ordered sold on February 11, 2007, and the surplus from the sale, totalling \$487,400, was paid to the Seized Property Management Directorate (the "Surplus Funds").

[96] On December 19, 2006, the Director brought an action against Mr. Della Penna and others, seeking forfeiture of two properties located at 3766 Cambridge Street in Burnaby, BC (the "Cambridge Property") and 13740 114A Avenue in Surrey, BC (the "Surrey Property"). The claims also sought forfeiture of the furnishings at the Cambridge Property and a BMW vehicle. Although Mr. Della Penna was not listed as a registered owner of either property, the Director alleged that Mr. Della Penna was the beneficial owner of both properties and that he used nominee owners, and bank accounts belonging to family members, to hide his true ownership. The Director alleged that Mr. Della Penna used drug profits to purchase all or part of the properties.

[97] Following a settlement with the Director, on August 29, 2007, Justice Bracken made an order for the forfeiture of the Cambridge Property and its furnishings, and dismissed the action against the Surrey Property and the BMW.

- [98] After the Court of Appeal decision and the Crown's decision to stay the proceedings, on March 20, 2012, the Director commenced a civil forfeiture action against Mr. Della Penna and Mr. Walton with respect to the Surplus Funds from the Barrett Property (Victoria Registry, Action 121026). On the same day, the Director obtained an Interim Preservation Order over the Surplus Funds.
- [99] On March 21, 2012, Mr. Reithmeier appeared before Justice Fisher and obtained an order that, due to the final conclusion of the criminal proceedings, the Surplus Funds were to be paid into the Supreme Court of British Columbia to the credit of Action 121026.
- [100] On April 3, 2012, Mr. Reithmeier appeared on behalf of Mr. Della Penna before Judge Wingham in the Provincial Court and obtained an order that the remaining \$224,745.61 (after payments towards Mr. Della Penna's legal fees) from the Seized Funds be returned to CSPL in trust for Mr. Della Penna. However, before the funds were received by CSPL, on April 11, 2012, the Director commenced a civil forfeiture action in the Supreme Court against the remainder of the Seized Funds (Victoria Registry, Action 121275). On the same day, the Director obtained an order from Justice Dorgan that the Seized Property Management Directorate possess and keep the balance of the Seized Funds for 30 days.
- [101] When Actions 121026 and 121275 were commenced, Mr. Della Penna was in prison in Australia. He was served with the notices of civil claim while in custody. CSPL communicated with him by telephone and in writing to obtain his instructions with respect to the continuing conduct of his file, particularly given the developments on the civil forfeiture proceedings.
- [102] At discovery, Mr. Cobb said that, knowing that there was a possibility that the Director might proceed against the Surplus and Seized Funds, and in the hope of realizing a solicitor's lien for the amounts Mr. Della Penna owed CSPL, on March 23, 2012, CSPL prepared Invoice 8083 in the amount of \$313,647.04. Both Mr. Cobb and Ms. Lewis said Invoice 8083 was prepared pursuant to their fee agreement with Mr. Della Penna. The amount represented: (a) the fees still outstanding for the senior lawyers' work in Provincial Court and Supreme Court calculated at \$350 per hour as opposed to the \$250 per hour permitted under the Funding Application; and (b) the remainder of the appeal fee.
- [103] At his discovery, Mr. Cobb said that he discussed Invoice 8083 with Mr. Della Penna on the first phone call that Mr. Della Penna made to him after preparing Invoice 8083. Mr. Cobb explained to Mr. Della Penna the prospect of a solicitor's lien to pay the more than \$300,000 that he owed CSPL. He said he took Mr. Della Penna through each subheading of Invoice 8083 to explain to him how they arrived at the total on the invoice. Mr. Cobb also said that he discussed Invoice 8083 in the May 4, 2012 conversation with Mr. Della Penna discussed below.
- [104] On May 2, 2012, CSPL filed a notice of application for a solicitor's lien pursuant to section 79 of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA], in the amount of Invoice 8083 (the "Lien Proceeding"). Mr. Solomon, now Judge Solomon of the BC Provincial Court, who CSPL had

retained to represent Mr. Della Penna's interests in the civil forfeiture proceedings, was provided with a copy of CSPL's Lien Proceeding on May 3, 2012. Mr. Solomon discussed possible resolutions of Actions 121026 and 121275 with Mr. Ryneveld, counsel for the Director.

[105] On May 4, 2012, Mr. Ryneveld sent a without prejudice email to Ms. Lewis and Mr. Solomon, confirming his discussions with Ms. Lewis earlier that morning. He reiterated his instructions to oppose CSPL's solicitor's lien claim, which was scheduled before Justice Leask on May 8, and Ms. Lewis's agreement that the application would be adjourned. His email went on:

After a brief discussion of the merits of your claim, the applicable law, and the issue of whether or not the funds were in fact Mr. Della Penna's at all, or whether they were proceeds of crime; and the issue of priority of claims etc. we agreed that if this matter could be resolved between the parties on consent, it would be in everyone's best interest.

I indicated to you that provided that Mr. Solomon, on behalf of Della Penna in our civil action was also in agreement, I may be able to persuade my client to agree to a resolution as follows:

1. By my calculation there is a total of \$712,145.61 in Court from both the Barrett St matter and the "cocaine in the suitcase" matter.
2. If you agree to reduce your claim for legal fees in relation to the cash in court to \$200,000 plus \$24,000 HST; that would leave \$488,145.61; AND IF
3. Jay Solomon agreed to an 80-20 split in favour of the Director of the balance of \$488,146.61 that would mean that Della Penna would receive \$97,629.12.
4. The Director would settle for the balance of \$390,516.48.

I have since spoken to Jay Solomon about this suggestion for resolution and he seemed to think that would be a reasonable settlement as well. I encouraged him to phone you and to get instructions from his client. If you and Jay are both amenable to my suggestion for settlement, I will do my utmost to persuade my client to agree.

[106] Mr. Ryneveld summarized some of the arguments he would make in opposition to CSPL's Lien Proceeding and his view that the Director's case against Della Penna for full forfeiture of the Seized and Surplus Funds was very strong and that the Director would do considerably better than an 80-20 split if the matter went to trial.

[107] On the same day, Mr. Cobb contacted Mr. Della Penna in prison in Australia. He made contemporaneous notes about the call. He told Mr. Della Penna of the ongoing attempts to settle the civil forfeiture actions against him. Mr. Cobb recorded that they discussed the negotiations between counsel for the Director and Mr. Solomon for a division of the Surplus Funds and the remaining Seized Funds.

[108] Mr. Cobb said that he advised Mr. Della Penna about CSPL's Invoice 8083 and the Lien Proceeding. At his discovery, Mr. Cobb said that he told Mr. Della Penna that he still owed CSPL in excess of \$300,000, that Mr. Della Penna said that he was fine with that, and that the firm could keep all of the money that it got back from the police. Mr. Cobb also sought and received Mr. Della Penna's instructions to retain Jay Solomon to act as his legal counsel with respect to the resolution of Actions 121026 and 121275 and the Lien Proceeding. Mr. Cobb recorded in his notes of his conversation with Mr. Della Penna that:

[Mr. Solomon] is going to request 25/75 in lieu of standard 10/90. [Mr. Ryneveld] is trying to get Director to pay some of our fees - poss[ibly] to \$200K & split [indecipherable] balance of 80/20 - [Mr. Della Penna] could net 100K - over the moon - thought it was all gone would've been happy [with] Rolex! Explained we need written instructions & how to get to him with time sensitive negotiations - [Mr. Della Penna] said Suzie Sandrussi is best conduit - got her email address. Will send her letter of instructions today for his signature when she visits.

[109] At his discovery, Mr. Cobb said that the phrase "over the moon" that he recorded in his notes was his phrase. He said that Mr. Della Penna was yelling, hooting, and hollering and said that he thought the money was all gone. Mr. Cobb said that he never expected Mr. Della Penna to receive a return of any of the Surplus or Seized Funds and that, from the outset, he advised Mr. Della Penna of that.

[110] On May 4, 2012, Mr. Cobb emailed Ms. Sandrussi about Mr. Della Penna's suggestion that she might facilitate Mr. Della Penna signing an instruction letter. The instruction letter was then sent to Ms. Sandrussi, and she arranged for Mr. Della Penna to sign it. She faxed the signed copy to Mr. Cobb on May 9, 2012, and mailed the original. The instruction letter provided:

Further to our telephone conversations yesterday afternoon, we write to confirm your instructions and to update you, in writing, on the status of the [Actions 121026 and 121275]. By way of background, we confirm that both the R.C.M. Police, and counsel for the Director of Civil Forfeiture in Victoria have made it abundantly clear in recent weeks that seeing you walk "scott-free" from the epic, 8-year war that they waged to seek your incarceration here in Canada for the next twenty-years, they are determined to hurt you financially just as much as they can. [Actions 121026 and 121275] were filed within days of our victory.

Your instructions to us from the outset have been to do everything that we can to preserve anything possible from the property seized from you almost eight years ago. We have done that all on our own until it became obvious that you required counsel with specialized skills and a track record of success with the Director, at which point (about a month ago) we hired Jay Solomon, Esq., as counsel on the [Actions 121026 and 121275]. Somehow, he has manoeuvred the matter to the point where the senior lawyer acting for the director MAY well agree to pay some of your outstanding legal fees to us AND return a percentage of the property to us in trust for yourself (in the approximate amount I mentioned yesterday). As I told you yesterday, Mr. Solomon would feel more comfortable having your written instructions to bolster those that you

have given to us from the outset. Please sign this letter in the space provided so that Ms. Sandrussi can fax it back to us immediately and we can get on with the process. The shelf-life of this offer is in the range of days, according to Mr. Solomon. Please call if you have any questions.

[111] On May 7, 2012, Ms. Lewis emailed Mr. Ryneveld, advising that CSPL agreed to the proposed settlement and would reduce the claim for legal fees to \$200,000 plus HST. Ms. Lewis indicated that she expected that he would hear from Mr. Solomon that Mr. Della Penna had agreed, but she was not speaking for him.

[112] Later on May 7, Mr. Ryneveld confirmed that he had instructions from his client to settle on the basis of his May 4 proposal. After receiving Mr. Della Penna's instructions, Mr. Solomon entered into a final settlement of Actions 121026 and 121275. The terms of this final settlement included that:

- (a) CSPL and Mr. Della Penna agreed there would be no further claims by either of them against the Surplus or the Seized Funds;
- (b) the settlement was a final and complete settlement of Actions 121026 and 121275, the Lien Proceeding, and all of the matters between these settling parties;
- (c) CSPL would reduce its legal fees claim in relation the Surplus and Seized Funds from \$313,647.04 inclusive of taxes to \$224,000 inclusive of taxes;
- (d) Mr. Della Penna would receive \$97,629.12, representing 20% of the remaining Surplus and Seized Funds; and
- (e) the Director would receive 80% of the remaining Surplus and Seized Funds.

I will refer to this arrangement as the "Settlement Agreement".

[113] On May 8, 2012, Ms. Lewis appeared before Justice Leask on the Lien Proceeding and obtained a consent order to which Mr. Della Penna, the Director, and CSPL are parties (the "Consent Order"). Pursuant to the Consent Order, Justice Leask determined that CSPL was entitled to a solicitor's lien in the amount of \$224,000 including taxes on account of its legal fees and taxes.

[114] CSPL received the sum of \$224,000 in settlement of its outstanding fees. It also received a cheque for \$97,866.40 from Mr. Solomon representing Mr. Della Penna's share of the Seized and Surplus Funds. CSPL held that money in trust. Pursuant to Mr. Della Penna's instructions, on August 1 and November 14, 2012, CSPL paid out a total of \$15,000 to Bryer Gaslard, Mr. Della Penna's former girlfriend.

- [115] After his release from prison in Australia, Mr. Della Penna returned to Canada. On February 11, 2015, he attended at CSPL's offices to obtain his personal items, which CSPL had retrieved from the RCMP after the conclusion of the criminal proceedings, and kept for him. These included his gold Rolex watch, other valuable watches, some cash and other belongings seized from his apartment, and the remaining funds from the Settlement Agreement. Mr. Della Penna was provided with a copy of the March 23, 2012 invoice.
- [116] On June 4, 2015, Mr. Della Penna returned to CSPL's office and took issue with the fees he had been charged and alleged the appeal fee was supposed to be \$50,000. He commenced this action thereafter.

Issues

- [117] The following issues are raised in this summary trial:
- Is the plaintiff's claim barred by issue estoppel?
 - If not, whose evidence on the retainer agreements should be believed?
 - Has the plaintiff established a breach of contract?
 - Has the plaintiff established a breach of fiduciary duty?
 - Is the plaintiff's claim an abuse of the court's process?
 - Is CSPL entitled to fees on a quantum meruit basis?

Is Mr. Della Penna's claim barred by issue estoppel?

Positions of the Parties

- [118] CSPL argues that Mr. Della Penna's claim is barred by issue estoppel. For the following reasons, I disagree that the doctrine of issue estoppel applies to this matter.
- [119] CSPL submits that Justice Leask's Consent Order of May 8, 2012, is a final judicial decision giving rise to issue estoppel. It submits that the Consent Order determined the question of its entitlement to \$224,000 on account of its legal fees and taxes, which is the same question Mr. Della Penna now asks this Court to determine. It argues that an examination of the underlying settlement correspondence and the Settlement Agreement discloses that the parties intended the Consent Order to conclusively and finally determine CSPL's entitlement to the funds as partial payment for their legal fees.
- [120] The parties to the Consent Order included Mr. Della Penna and CSPL. Mr. Solomon signed the final order on Mr. Della Penna's behalf. The defendants submit that Mr. Cobb and Neil Cobb Law Corporation share a sufficient degree of common interest with CSPL to render them privies of CSPL in the solicitor's lien proceeding.

[121] Mr. Della Penna submits that issue estoppel is not invoked here because a solicitor's lien under s. 79 of the LPA is not the same thing as an assessment of fees. Determining the validity of a solicitor's s. 79 charge does not resolve or adjudicate upon the validity of the solicitor's fees, which is the issue in this lawsuit.

Analysis

[122] The doctrine of issue estoppel precludes the relitigation of issues previously decided in another court proceeding: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 23 [CUPE]. There are three requirements for issue estoppel to be invoked:

- a) the issue must be the same as the one decided in the prior decision;
- b) the prior judicial decision must have been final; and
- c) the parties to both proceedings must be the same, or their privies.

(CUPE at para. 23; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25.)

[123] If these criteria are met, the court must then determine whether, as a matter of discretion, issue estoppel ought to be applied: *Danyluk* at para. 33.

[124] *Danyluk* confirms that the estoppel "extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that 'issue' in the prior proceeding": para. 54.

[125] I agree with the plaintiff that Justice Leask's May 8, 2012 Consent Order did not decide the same issue that is raised in this litigation, and, accordingly, the preconditions for issue estoppel are not met.

[126] Section 79(1) of the LPA provides:

79 (1) A lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.

[127] In order to obtain a charge under this provision, the lawyer must demonstrate that he or she was retained by the client for a proceeding, that property was recovered or preserved as a result of the proceeding, and that the lawyer will not be paid unless the charge is granted: *Chouinard v. I.C.B.C.*, 2002 BCSC 655 at para. 10, *aff'd* (sub nom. *Hosseini-Nejad v. Insurance Corp. of British Columbia*) 2004 BCCA 255, leave to appeal *ref'd* [2004] S.C.C.A. No. 309; *625536 B.C. Ltd. v. Fulton & Company LLP*, 2019 BCCA 397 at paras. 15-19.

[128] These questions, which were before Justice Leask on the s. 79 proceeding, are not the same questions to be determined in this matter. The primary issue in this case, being the actual fee agreement reached between the parties, was not decided by Justice Leask. For this reason, I find that the preconditions for issue estoppel are not met on the facts of this case.

Whose evidence should be believed?

Legal Principles

[129] Mr. Della Penna submits that where there is a conflict between his evidence and that of Mr. Cobb, Mr. St. Pierre, and/or Ms. Lewis with respect to the oral financial arrangements between them, the law requires that his word be accepted, or given more weight, unless there is evidence to corroborate their word or which tends to support their evidence.

[130] The interpretive principles applicable to an oral retainer agreement between a client and a solicitor, where they give conflicting evidence, were summarized in 380876 British Columbia Ltd. v. Ron Perrick Law Corp., 2009 BCSC 601 at para. 133 [Ron Perrick]:

[133] Master Halbert in *Coates v. Buchholz and Arbutus Bay Estates Ltd.* (9 September 1991), Victoria 903846 at 3 (B.C.S.C.) considered the onus on a solicitor to prove a retainer:

The law with respect to the determination of the retainer is well settled. The onus is always on the solicitor to prove his retainer: *MacGill & Grant v. Chin Yow You*, (1914) 19 B.C.R. 241 (C.A.); *In Re Dickie, De Beck et al* (1916) 23 B.C.R. 538 (C.A.); *Griffiths v. Evans*, [1953] 2 All E.R. 1364 (C.A.), per Lord Denning at p. 1369. Where there is a dispute as between the solicitor and his client on the terms of the retainer, the word of the client is to be accepted, or at least given more weight, unless there is some evidence to corroborate the word of the solicitor, or which tends to support the solicitor's evidence.

Any ambiguity in the fee contract will be resolved against the lawyer on the basis of the contra proferentem rule (*Prodor v. Newell* (1994), 93 B.C.L.R. (2d) 98 (C.A.); *Blaxland v. Clendenning*, 2000 BCCA 252; *Price v. Roberts & Muir* (1987), 25 C.P.C. (2d) 166 (B.C.C.A.)

[131] I accept that, absent circumstances in which a client's credibility is at issue or where the client seeks to prove a special arrangement limiting fees, the principles summarized in Ron Perrick apply. However, those principles are not absolute as explained in *Re Dickie, de Beck & McTaggart v. Sherman* (1916), 23 B.C.R. 538 (C.A.) [*Re Dickie*], cited in Ron Perrick.

[132] In *Re Dickie*, the Court of Appeal considered an appeal from a judge's order concerning a registrar's taxation decision. The dispute was over the charge for an appeal book. The client said his solicitor agreed to limit the charge to \$150. The solicitor said that the fee would be limited to \$150 only if he lost the case; otherwise, the regular tariff charge would apply. The registrar did not allow any charge for the appeal book. The judge allowed a fee of \$150, and the solicitor appealed.

[133] The majority in the Court of Appeal dismissed the appeal. Justice McPhillips set out, at 541-42, what has come to be known as the rule in *Re Dickie* regarding the onus of proving an oral retainer:

In the second place, the circumstances are such that it seems not unreasonable that the agreement, as deposed to be by the client, was the one that was come to. On the question of retainer, the onus is on the solicitor that there was a retainer, and not being in writing, it is not accepted against the client's statement. I am putting both parties upon an equal ground of credibility. There runs through all the cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with a client, then he must be able to shew what that agreement is, and if it is not in writing, then it seems to be that the client's statement must be accepted.

[134] The rule placing the onus on the solicitor, and accepting the word of the client against that of a solicitor, assumes that both parties are on "an equal ground of credibility".

[135] In concurring reasons in *Re Dickie*, Chief Justice MacDonald set out that while the solicitor had the onus of proving the retainer in the first instance, the retainer had been accepted before the alleged agreement regarding the disbursement arose. As it was the client who asserted the "special agreement" regarding the cost of the appeal book, he had the onus of proving it: at 539.

[136] In *Re Beck* (1925), 3 W.W.R. 64 at 65-66 (C.A.), Justice MacDonald in concurring reasons held that the onus of proving a retainer falls on the solicitor but, once the retainer is established, the onus of proving a special contract limiting fees is on the client.

[137] More recently, these interpretive principles were considered in *Barker v. Daum*, 2015 BCSC 1958. Justice Leask heard a client's appeal from a registrar's order partly on the basis that the registrar erred in interpreting the rule in *Re Dickie*. There was no dispute that the lawyer had been retained. The dispute was whether there was an agreement to a fixed fee of \$25,000. The registrar concluded that, once the retainer was proven, the onus shifted to the client to prove the fixed fee contract. The registrar questioned the credibility of the client's evidence, but found the lawyer to be credible and consistent.

[138] On appeal, Justice Leask upheld the registrar's interpretation. Justice Leask also considered the role that the assessment of credibility plays in preferring a client's evidence in interpreting an oral retainer as follows:

[12] The respondents' lawyer advanced a second argument in defence of Registrar Nielsen's decision on this ground of appeal. His counsel referred to *Morton v. Harper Grey Easton*, 1995 CanLII 1227 (BCSC) in which Wilson J. referred to another aspect of the decision in *Re Dickie* where McPhillips, J.A. said: "...I am putting both parties upon an equal ground of credibility." (at p. 541).

[13] Wilson J. also made reference to another decision of this Court:

I do not understand *Chang v. Lai*, unreported, 26 August 1988, Vancouver No. C851996, Lysyk, J. (B.C.S.C.), to deviate from this proposition. As I understand the reasons for judgment in *Chang*, *supra*, the client was not found to be a credible witness. The parties were not on "equal ground".

(at para. 35)

[14] Although in the *Morton* case Wilson J.'s reasoning was obiter dicta, I am satisfied that his interpretation of the *Re Dickie* rule is correct. Where there is no basis for finding any difference between the credibility of the lawyer and the client, the client's version must be preferred. However, if the court is comparing a credible lawyer with a client who lacks credibility, it would be an error to prefer the client's evidence. I am therefore satisfied that this forms a sound second basis for rejecting the appellant's first ground of appeal.

[139] In summary, the following interpretive principles apply to an oral retainer agreement between a solicitor and a client:

- (a) in the first instance, the solicitor bears the onus of proving an oral retainer to do work for the client;
- (b) once the retainer is proven, the onus shifts to the client to prove any "special agreement" limiting the fees;
- (c) if the parties are equally credible, then the client's evidence is to be accepted over that of the solicitor, or at least given more weight, unless there is some evidence to corroborate the solicitor's evidence, or which tends to support it;
- (d) if the parties are not equally credible, the client's evidence need not be preferred, and it would be an error to do so.

Analysis

[140] In this case, there is no dispute that Mr. Della Penna orally retained CSPL to defend him against the Charges. There is also no dispute that Mr. Della Penna orally retained CSPL to represent him on the appeal.

[141] Mr. Della Penna asserts that there was a special agreement that limited his fees to a discounted rate for the trial work to \$250,000 and for the appeal work to \$50,000. Mr. Della Penna bears the onus of proving the fee limiting agreements.

[142] I accept that, with respect to the Initial Retainer, the fee estimate that was given to Mr. Della Penna reflected a discount from normal rates. As Mr. Cobb said at his examination for discovery, the reason for the discount was CSPL's relationship with Mr. Della Penna, past cases on which they had represented him, the firm's experience with these types of files, and the firm's expectations as to how they hoped the file would go. However, for the reasons set out below, in the circumstances of this case, I conclude that Mr. Della Penna and CSPL are not on "an equal footing" with respect to credibility and that Mr. Della Penna's evidence should not be given more weight.

[143] I do not find Mr. Della Penna's evidence credible, and in each instance where it differed from the evidence filed on behalf of the defendants, I preferred their evidence. My reasons are as follows, and I provide some examples to support my conclusions.

Mr. Della Penna persistently could not recall events when they were potentially inconsistent with the basis for his claim

[144] On October 24, 2007 (the "October affidavit") and on January 28, 2009 (the "January affidavit"), Mr. Della Penna swore affidavits that were relied on in support of the Funding Application, which was argued in March 2009. At his examination for discovery, he acknowledged that they were his affidavits and that they were true. In both affidavits, he acknowledged that Mr. Cobb had advised him of the fees required for Mr. Cobb and Ms. Lewis to represent him to the scheduled completion of his trial.

[145] Mr. Della Penna acknowledged that the April 4, 2005 Provincial Court scheduling memo, which was attached as an exhibit to his October affidavit, showed that the matter was set for 50 days in the Provincial Court, and that he was aware of that. He acknowledged, in his October affidavit at para. 16, that as of October 18, 2007, there were 23 days scheduled for the remainder of the trial and the Crown was seeking to set aside a further 90 days. He was then asked the following questions with respect to para. 16 of his October affidavit:

Q: So do you recollect that your trial was taking way longer than it was supposed to?

A: I don't know.

Q: This was true at the time; you believed this to be true?

A: Like I said. I don't recall. I left it in Neil's hands.

Q: Well, you wouldn't have sworn falsely to something in an affidavit, would you?

A: No.

Q: So you believed this at the time you swore it?

A: Like I said, it was a long time ago. I don't remember. I don't recall.

[Questions 255-258]

[146] Mr. Della Penna was then taken to para. 14 of his October affidavit where he said the trial commenced on April 10, 2006, and that as of October 18, 2007, there had been 60 days of applications, evidence, and argument. His counsel had also attended two pretrial conferences, numerous fix-dates, and two additional days to hear decisions of the court. He was asked:

Q: You swore that?

A: I don't recall. I don't recall. That was a long time ago; I don't recall.

Q: Is this your affidavit?

A: Yeah, I guess it is my affidavit.

Q: We've already established that's your signature at the end of it?

A: Yes, yes.

Q: And that it was true?

A: If you say so.

Q: It's not if I say so. If you --

A: It's a long time ago, I - I left it in Neil's hands and that was it. Like, you're telling me all these - you're trying to, you know, like get into all this stuff that I don't even remember. It was a long time ago. I left it in Neil's hands and I just sat back and whatever Neil said happened happened.

Q: Well, you knew at the time that you swore this affidavit that you had been in court 60 days, because you were there.

A: I don't remember it being 60, but it's a long time ago. I don't remember 60 days.

Q: Do you dispute that it was 60 days when you swore this affidavit?

A: I just don't remember. I don't recall it being 60 days.

[Questions 259-266]

[147] Mr. Della Penna's answers demonstrate his reluctance to agree to anything that he perceives might be against his interests in this case. Even when confronted with his sworn affidavits and the exhibited supporting documents, he would not agree that he knew that his trial in the Provincial Court took longer than expected. Assuming Mr. Della Penna's October affidavit is true, as he said it was, and it is clear that he filed and relied on it, the fact the proceedings were taking considerably longer than expected is beyond dispute. The Provincial Court scheduling memo, and the sworn evidence of Mr. Cobb, Mr. St. Pierre, and Ms. Lewis all support that fact.

[148] Mr. Della Penna answered a similar series of questions with respect to his January affidavit. Ms. Lewis read para. 17 to him at the discovery. In it, he swore that the Provincial Court case took considerably longer than originally contemplated. He swore that no less than 84 days of court time had been devoted to his hearing, of which 37 were after his retainer ran out in July 2007. He was asked:

Q: Do you see that there?

A: Yes.

Q: And that is a true statement?

A: I don't recall.

Q: You acknowledge that this statement exists in your affidavit?

A: Yes.

Q: And you acknowledge that when you swore this affidavit on January 27, 2009, you were sworn to tell the truth?

A: Yes.

Q: And you did tell the truth at that time, didn't you?

A: Yes.

Q: So the statement therefore is true?

A: If you say so.

[Questions 356-361]

[149] Mr. Della Penna's tendency to answer that he did not recall things which were potentially damaging to him was also evident when he was asked whether he understood that any quote he was given as part of the Initial Retainer was based on the 50 days of trial time that had then been set aside. It was put to him that he must have understood that; he responded that he did not recall.

[150] When Mr. Della Penna was asked about his April 20, 2005 meeting with Mr. St. Pierre, he agreed he attended at CSPL's offices to be served with the Crown's proceedings with respect to the Barrett Property. He could not recall the date of the meeting but agreed that a lawyer, who he recalled being Mr. Cobb, was present. He did not recall that it was Mr. St. Pierre. He was then asked:

Q: If I suggested to you that it was actually David St. Pierre that was with you on that day, would you agree or disagree with that?

A: I don't recall.

Q: Do you dispute that it was him?

A: I don't recall.

Q: After the police left, do you recall having a discussion about money with Mr. St. Pierre?

A: No.

Q: I'm going to suggest to you that on April 20th, 2005, he told you that it was going to be a further \$200-\$250,000 on top of what you paid already to finish your case.

A: Don't recall.

Q: Did you take notes at that meeting?

A: No.

Q: Did you see Mr. St. Pierre take notes?

A: Don't recall.

Q: Do you dispute that he took notes?

A: Don't recall.

[Questions 288-295]

[151] Mr. Della Penna was then taken to Mr. St. Pierre's notes of April 20, 2005, and was asked:

Q: Maybe this will help refresh your memory. At the bottom it says: "I told Robbie that he's looking at another 200-250K for fees on his matter." Does that refresh your memory?

A: No. I never discussed - I didn't discuss money with St. Pierre. I just discussed money with Neil.

[Question 296]

[152] Mr. St. Pierre's notes were made contemporaneously. He set out when Constable Gray and Corporal Armstrong came to CSPL's offices to serve Mr. Della Penna with a restraint order, which he recorded in his notes by file number, with respect to the Barrett Property. Mr. St. Pierre recorded the questions the officers asked of Mr. Della Penna and his responses. He then recorded his discussion with Mr. Della Penna about fees. The content of these notes, made ten years before this action was commenced, are a reliable record of what occurred that day. Mr. St. Pierre would have no reason to create an inaccurate record, and Mr. Della Penna did not challenge Mr. St. Pierre's notes in his responsive affidavit.

[153] Mr. Della Penna's lack of recall of details, even when confronted with his prior sworn evidence, affects the credibility of his evidence overall and is in direct contrast to his detailed recollection of certain things. For example, at his examination for discovery, when Ms. Lewis put to him that the suitcases that he carried into the Sandman Hotel contained \$575,000 in cash, he corrected her to say they contained \$576,000. He was also certain of the amount he says he was quoted for the appeal. Mr. Della Penna, who was unable to recall the meeting of April 20, or who attended, was able to recall, with certainty, that he never discussed money with Mr. St. Pierre. His evidence in that regard was not credible.

[154] Another example of Mr. Della Penna's convenient lack of memory was with respect to the whether CSPL continued to represent him, without being paid, after the money he paid towards the Initial Retainer ran out:

Q: Okay. And you also know that we worked for you for almost two years with no money?

A: If you say so.

Q: Well, fine. You couldn't pay us; we didn't quit. Fair?

A: True.

Q: No one left you abandoned facing these serious charges -

A: No.

Q: - in court?

A: No.

Q: Neil kept showing up?

A: Yes.

Q: I kept showing up?

A: Yes.

Q: And we kept winning. Right?

A: Yes.

Q: And you weren't paying us.

A: I don't recall.

Q: Well, you know you didn't pay us after the money ran out.

A: Yeah, but the money was from the 250 - the original 250 that Neil said was going to cost 250, said he was going to give me a deal on it, and that's what I was understanding - that was covering the first trial.

[Questions 399-407]

[155] Mr. Della Penna's evidence in that regard directly contradicts what he said in his October and January affidavits, in which he swore that Mr. Cobb and Ms. Lewis had worked hundreds of hours without being paid after the funds he provided towards the Initial Retainer ran out.

[156] Similarly, Mr. Della Penna said he could not recall receiving a November 26, 2008 letter from CSPL, signed by Mr. Cobb. He was asked:

Q: And when [we were in Supreme Court] you were given a letter by Neil that said we couldn't keep working for free. Do you remember that?

A: No, I don't remember.

[Mr. Della Penna was shown the letter.]

Q: Had you ever seen this letter before?

A: I don't recall seeing this letter.

Q: You just have no memory of it?

A: It's a long time ago. I don't recall.

Q: Well, you recall that back at this point in time you were now indicted in Supreme Court; you had no money; something had to happen; right?

A: Yeah.

Q: You tried to apply for legal aid; right?

A: I don't recall applying for legal aid.

Q: You don't recall applying for legal aid. Well, you did apply for legal aid.

A: I don't recall.

[Mr. Della Penna was taken to his October affidavit.]

Q: Please go to the last page.

A: Okay.

Q: "Legal aid application refused."

A: Okay.

Q: Do you see that?

A: Yeah, yeah.

Q: Does that help you? So you did apply for legal aid; right?

A: I guess I did.

Q: So your recollection is not very good about things that happened, is it?

A: Well, it was a long time ago.

Q: So you don't remember clearly; fair?

A: I don't remember clearly about his one.

[Questions 410-421]

[157] Mr. Cobb's letter to Mr. Della Penna indicates that CSPL could no longer continue to represent him without payment. It is just not credible that Mr. Della Penna did not recall receiving the letter, particularly as, shortly after Mr. Della Penna was given it, CSPL proceeded with the Funding Application and Mr. Della Penna swore his January affidavit setting out the fact that LSS had denied him legal aid funding.

[158] With respect to the Funding Application, Mr. Della Penna was asked:

Q: So you knew that we got a court order for \$125,000 for the Provincial Court fees that we were owed.

A: Like I said, I left it in Neil's hands.

Q: I'm going to suggest to you that you knew -

A: I knew you guys were getting money because you guys said that there was money owed from the first trial. I knew you guys were getting money, but I don't recall the exact amount of what was owed. I just left it in Neil's hands.

Q: But you were content with what was happening in the Supreme Court on the funding application. You were fine with that.

A: Yeah.

Q: Right? You participated in it fully.

A: Yeah.

Q: You went to court, you gave evidence?

A: Yes.

Q: So you consented to what was happening in Supreme Court; right?

A: I just left it in Neil's hands.

[Questions 530-535]

[159] In this series of questions and answers, Mr. Della Penna attempts to distance himself from the Funding Application. His evidence is inconsistent with: his filing of two applications with LSS, supported by financial information; the contents of his October and January affidavits; Mr. St. Pierre's evidence that he explained the Funding Application and its potential consequences to Mr. Della Penna; and the independent legal advice that CSPL arranged for him to have with respect to the applications.

[160] Finally, with respect to Mr. Della Penna's knowledge that CSPL needed to be paid after his case took longer than expected in the Provincial Court, Mr. Della Penna was asked:

Q: So you knew that the flat-rate deal was over and we were needing to be paid now because it took longer.

A: That's what you guys said. That's what - Neil was like, "We need to get more money." I'm, "Okay, if you need to get more money, get more money."

Q: And you were fine with that.

A: I was just present and I was just going by whatever Neil said.

Q: All right. You were aware that Mr. Justice Leask authorized us to bill at \$250 an hour in Supreme Court?

A: Yeah.

Q: And you knew that was not our hourly rate?

A: No. I knew that you guys were going to give me a deal and that's - that's about it.

Q: So do you dispute that we told the Court we wanted \$350 an hour?

A: I don't recall.

Q: You were perfectly aware that our hourly rate was 350 and that we were only getting 250.

A: Like I said, Neil said he was going to give me a deal that's probably why it was 250.

Q: It wasn't 250 because that's what the judge ordered?

A: I don't recall.

Q: I'm going to suggest to you that the deal was if we got the money back we were going to bill the difference.

A: If you say so. I don't know.

Q: That was the agreement that we had.

A: Do you have it in writing?

Q: No.

A: Well, then

Q: But we made that agreement, you and I.

A: I don't recall.

Q: And Neil?

A: I don't recall.

Q: You had that discussion with him?

A: I don't recall.

Q: In fact what you told me was just bill it all.

A: I don't recall.

[Questions 542-546 and 556-564]

[161] Once again, Mr. Della Penna said he could not recall whenever Mr. Cobb's or Ms. Lewis' evidence about fee discussions was put to him.

[162] Finally, with respect to Mr. Della Penna's signing and returning an instruction letter with respect to the Settlement Agreement, Mr. Della Penna agrees that Ms. Sandrussi came to visit him in jail in May 2012, and that he knew that she was coming to see him and it made sense to have her assist in getting documents signed. He was asked about the purpose of Ms. Sandrussi's visit:

Q: And do you remember the purpose of her visit at that time?

A: For me to - well, Neil wanted - we had to get a lawyer to sign my power of attorney over to Neil to represent the case that he was getting the money back.

Q: A power of attorney?

A: Well, whatever it was. I had to sign a form saying that Neil was going to take care of it.

[Questions 790-791]

[163] Mr. Della Penna was then shown the instruction letter he had signed and that Ms. Sandrussi returned to Mr. Cobb. He was asked:

Q: So you told Neil in a telephone conversation that he should get in touch with Suzy.

A: Yeah.

Q: And that she would be able to help facilitate -

A: Well, Neil needed me to sign a piece of paper for him to ... go after the money. So since I knew her and she was a lawyer, she came to the jail and did it.

Q: Right. But you told Neil, "Get in touch with Ms. Sandrussi; this is her email address; she can help." Correct?

A: Yes.

Q: Yes, okay. So it was no surprise to you when she came with a document for you to sign.

A: Yes.

Q: I'm going to suggest to you that in early May you were told that it might be possible for the civil forfeiture proceedings to be settled. Mr. Cobb told you that.

A: I don't recall

Q: You don't recall?

A: No.

Q: Mr. Cobb told you that the director of civil forfeiture might be prepared to pay some of the fees that you owed us. He told you that?

A: Yeah, I think so. I really don't recall too much about that. It was kind of a blur.

Q: Mr. Cobb told you that we were taking steps to protect our fees. He told you that?

A: No, I don't recall that.

Q: You don't recall. Okay. If you could turn - -

A: Neil kept - when I was trying to ask him questions about stuff, he just kept saying, "Well, I don't want to talk about these on overseas phones." So I really didn't get into any conversation about what exactly was happening because Neil wouldn't say anything over the phone.

[164] Mr. Della Penna was shown the instruction letter which he agreed that he signed and gave to Ms. Sandrussi to be returned to CSPL. He was asked:

Q: And you read that letter before you signed it?

A: Well, not really. I didn't really read it. I just kind of went by - you know, because Neil got me off on the charges and I just kind of went by what he said, and she just said, "Sign these papers," because he was going to take it over. So I don't think I actually read it at all.

Q: So Ms. Sandrussi, a lawyer who you trusted, presented you with this document and asked you to sign it without reading it. Is that your evidence, sir?

A: Yeah, kind of.

Q: This letter was pursuant to a telephone discussion that you'd had with Neil earlier?

A: Yeah.

[The letter was read to Mr. Della Penna]

Q: Have I read that correctly?

A: Yes.

Q: And you signed that letter?

A: Yes.

Q: And you caused it to be returned to us?

A: Yes.

Q: And there was a telephone conversation where Neil told you that the director was going to give us \$200,000?

A: No, he didn't specifically say anything about money because he didn't want to talk about this over these overseas phones.

Q: All right. You didn't call with any questions with respect to this letter? You just signed it and returned it to us?

A: Yeah, I basically didn't - I don't think I even I read it. I just signed it and gave it back to Suzy.

Q: Well, it's clear in here that Jay Solomon is the lawyer -

A: But I didn't know Solomon was the lawyer, because I had to hire a lawyer to find out who the lawyer was.

Q: This letter says that Jay Solomon is the lawyer that we hired -

A: Yes, I understand that -

Q: And it says it not once but twice.

A: I was in jail. She said, "Sign this paper" and that was it, so Neil could -- I didn't really look at it. I was stressed out, I was in jail.

Q: So you didn't read it. Is that your evidence today?

A: I just signed it.

Q: You knew that it was -

A: Neil's like, "I'm going to get -- you need to sign this form so I can get the money back for you." So I -- she came in, I signed the form, and that was it.

Q: Did she cover it up so you couldn't read it?

A: I was just happy to see her and get a visit, so I signed the bottom of it, and we talked about other stuff.

Q: You had every opportunity to read that document, didn't you?

A: I was in jail and I was stressed out and I was just happy to get a visit from -

Q: You had every opportunity to read that document.

A: Well, I didn't know that Jay Solomon was a lawyer until after --

Q: Well, this letter informs you of that, sir.

A: Well, I was in jail and I just - - I signed the bottom because I trust Neil.

[Questions 811-828]

[165] Later in the discovery, Mr. Della Penna acknowledges that he did not dispute that Mr. Solomon represented his interests with the Director and signed documents on his behalf as his lawyer. He also agrees that Mr. Solomon did what he was supposed to do.

[166] Finally, Mr. Della Penna says he understood that by signing the instruction letter and returning it to CPSL, he was acknowledging his agreement to the settlement.

[167] There are a number of aspect of this part of Mr. Della Penna's evidence which are concerning. First, he does not dispute that Mr. Cobb called him to discuss the instruction letter in advance of sending it to him. He denies some of the content of the telephone call,

but those parts that he did recall are consistent with Mr. Cobb's contemporaneous notes about it. The reliability of Mr. Cobb's notes is confirmed by the fact that Mr. Della Penna agreed that he provided Ms. Sandrussi's name and contact information to Mr. Cobb, and suggested that she could facilitate his signing the instruction letter. Further, the content of Mr. Cobb's initial contact with Ms. Sandrussi is consistent with him contacting her as suggested by Mr. Della Penna.

- [168] At the time the notes were made, Mr. Cobb would not have known that there was likely to be a dispute about the Settlement Agreement. His description of Mr. Della Penna being "over the moon" about the possible settlement, as he did not think he was going to get anything back except his gold Rolex watch, is credible.
- [169] Mr. Della Penna's evidence that he did not read the instruction letter before signing it is not credible. During the course of his answers, his evidence that he had not read the instruction letter became more certain. While it is possible that Mr. Della Penna was experiencing stress because he was in jail, he suggested Ms. Sandrussi as the conduit for obtaining his signature on the instruction letter. She had visited him in jail on other occasions. His evidence that, after he signed the instruction letter, he and Ms. Sandrussi went on to discuss other things, does not suggest that he was under stress.
- [170] If Mr. Della Penna did not read the instruction letter, or had questions about it, there was nothing preventing him from calling Mr. Cobb to get clarification or to seek to speak to Mr. Solomon.
- [171] Mr. Solomon was comfortable acting on Mr. Della Penna's instructions as he signed the Settlement Agreement on his behalf.

Has Mr. Della Penna established that CSPL obtained fees in breach of contract?

- [172] In his notice of application, Mr. Della Penna alleges that, despite their agreement to bill him at reduced fees, CSPL breached the retainer agreement by "rebilling the same work at 'normal' hourly rates in March of 2012."
- [173] Mr. Della Penna asserts that, pursuant to the Funding Application, this work was paid at a rate of \$250 per hour, the rate that Justice Leask approved as reasonable, and, on that basis, CSPL cannot issue a second bill for the same work. He relies on his evidence that he would be "billed at discounted rather than normal rates" as support for his position.
- [174] Mr. Della Penna relies on Justice Leask's Funding and Payment Approval Orders as evidence that CSPL's Invoice 8083 was a "rebilling" of the work done in the Provincial and Supreme Courts. As I found earlier in these reasons, the Funding Order of March 2, 2009, determined what reasonable legal fees could be paid from the Seized Funds in accordance with the Code regime under ss. 462.34(4)(c)(ii). It did not determine the reasonableness of the fee agreement between Mr. Della Penna and CSPL. Therefore, the Funding and Payment Approval Orders did not prevent CSPL from billing Mr. Della Penna the difference between their usual hourly rates and the rates approved by Justice Leask under their retainer

agreement.

How much did Mr. Della Penna pay towards the Initial Retainer?

- [175] In his second affidavit filed on this application, Mr. Della Penna suggests that he paid "at least" \$175,000 to CSPL. His evidence is inconsistent with what he said at his examination for discovery. There, under oath, Mr. Della Penna said that Mr. Cobb charged him \$250,000 for the trial and that is what he got. Mr. Della Penna has provided no objective evidence to support that he paid anything over \$175,000 to CSPL for the trial in Provincial Court.
- [176] In contrast, there is objective evidence from CSPL that it only received \$175,000 towards the Initial Retainer.
- [177] In her affidavit sworn November 20, 2019, Olga Batista Alves, CSPL's former legal assistant and office manager, sets out the dates and amounts of the retainer funds that were received from Mr. Della Penna, or from others on his behalf. She attaches copies of the receipts she issued for the funds. The funds received total \$175,000.
- [178] Further, Mr. Cobb has been consistent in his affidavit evidence. In both of his affidavits filed for the purposes of this application, Mr. Cobb swore that Mr. Della Penna only paid \$175,000 towards the Initial Retainer. In addition, in his second affidavit, Mr. Cobb explained that CSPL's practice was not to bill large legal fees on files when they did not have the funds in trust. He explained that, as they had learned over the years, criminal clients often do not pay their full agreed-upon fees and that paying taxes on the bills, only to later categorize them as bad debts and apply for tax refunds, was expensive and time consuming. CSPL tried to avoid that. The fact that CSPL only billed Mr. Della Penna up to the amount which exhausted the funds received towards the Initial Retainer was consistent with the firm's practice.
- [179] In his affidavit, Mr. St. Pierre swore that when he met with Mr. Della Penna on April 15, 2005, Mr. Della Penna had only paid \$90,000 into trust and had executed an assignment of his \$20,000 Alberta bail deposit. Mr. Della Penna assured Mr. St. Pierre that he would get CSPL the outstanding fees soon. Mr. St. Pierre said that the firm received the assignment of the bail deposit on October 25, 2005, and that Mr. Dell Penna paid a further \$65,000 into trust, thereby bringing the amount in trust towards the Initial Retainer to \$175,000. Mr. St. Pierre's evidence is consistent with Mr. Cobb's and Ms. Batista's and with CSPL's trust ledger.
- [180] Assessing the evidence as a whole, I find that CSPL only received \$175,000 from Mr. Della Penna, or from others on his behalf, towards the Initial Retainer.
- [181] I note that despite Mr. Della Penna's affidavit and discovery evidence, his counsel concedes that for the purpose of this summary trial, he did not dispute, and the documentary evidence showed, that the money Mr. Della Penna provided to CSPL was \$175,000.

Was there a change in the fee arrangement between CSPL and Mr. Della Penna?

- [182] In his third affidavit filed on this application, Mr. Della Penna swore that he never agreed that CSPL could charge him their normal hourly rates. He denies the evidence set out in Mr. Cobb's second affidavit, and in Ms. Lewis', Mr. St. Pierre's, and Ms. Batista's affidavits. Mr. Della Penna says that he reached an agreement with CSPL that he would not be charged at normal rates, and that he never agreed to abandon that agreement and replace it with an agreement that obliged him to pay the firm's normal rates.
- [183] There are a number of difficulties with Mr. Della Penna's position. First, as I have found, Mr. Della Penna never provided CSPL with the Initial Retainer that he had agreed to; he only provided \$175,000. Second, in his October and January affidavits, filed in support of the Funding Application, he swore that the retainer he had provided was extinguished as of June 29, 2007, and since then, Mr. Cobb and Ms. Lewis had been attending without fee or retainer. In his October affidavit, he set out the number of unpaid hours they had worked and the remaining scheduled trial dates. A similar paragraph appears in Mr. Della Penna's January affidavit, but the number of unpaid hours had increased. He also swore that Mr. Cobb advised him of the fees required for Mr. Cobb and Ms. Lewis to represent him to the completion of the trial.
- [184] As set out above, when Mr. Della Penna was examined for discovery, his lack of recall about the issues dealt with in these paragraphs of his October and January affidavits affected his overall credibility.
- [185] Further, as I have said, I prefer the evidence of Mr. Cobb, Mr. St. Pierre, and Ms. Lewis over Mr. Della Penna's evidence. In that regard, I accept Mr. Cobb's evidence that in the fall of 2007, he discussed with Mr. Della Penna about his mounting legal bills. Mr. Cobb explained the possibility of bringing the Funding Application. Mr. Cobb says that he told Mr. Della Penna that the partners billed their time at \$350 per hour and that the firm had kept track of the hours worked on his file since his \$175,000 retainer had run out. Mr. Della Penna said that he understood, and was extremely grateful that CSPL had stood by him when he could not pay the agreed-upon fees, and that the firm could "keep it all" if they could obtain the return of the funds he had delivered to the undercover officers.
- [186] Mr. Cobb also said that while the Funding Application was ongoing, he explained to Mr. Della Penna that even if CSPL was successful on the application, the presiding judge might only allow the firm to bill at less than their normal hourly rates to minimize Mr. Della Penna's risk of additional jail time. Mr. Cobb told Mr. Della Penna that CSPL would charge him the difference from the money they hoped to have returned if, and when, they won his case. Mr. Cobb says that Mr. Della Penna agreed and reiterated that the firm could "keep it all" if they could get him acquitted.

- [187] Mr. St. Pierre had a similar conversation with Mr. Della Penna. In his affidavit, Mr. St. Pierre said that while he was preparing the Funding Application, he confirmed with Mr. Della Penna that he understood Mr. Jevning's advice about the nature of the Funding Application and the consequences of it, including the possibility of additional jail time if Mr. Della Penna were convicted.
- [188] Mr. St. Pierre also said he explained to Mr. Della Penna that a successful Funding Application might result in an order covering fees below the \$350 hourly rate at which the partners billed. Mr. St. Pierre said that he informed Mr. Della Penna that the Crown often took the position that any funding order should be at or near the legal aid tariff rates which were considerably lower than the firm's rates of \$350 per hour. Mr. St. Pierre said that Mr. Della Penna was aware of these potential outcomes and assured him that he would pay any shortfall in the hourly rate should CSPL succeed in securing return of the seized funds. Mr. Della Penna told Mr. St. Pierre that he had recently agreed to this with Mr. Cobb.
- [189] In her affidavit, Ms. Lewis said that the \$175,000 retainer that Mr. Della Penna had provided to CSPL was exhausted well before the conclusion of the voir dire portion of the trial. When it became apparent that the matter could not complete in anywhere close to the estimated 50 days of trial time, Ms. Lewis says that she told Mr. Della Penna that additional fees would be required for the firm to continue on his matter. She says it was the firm's standard practice to require additional fees based on an hourly rate when matters did not complete within the original time estimate and Mr. Della Penna's case was no different.
- [190] Ms. Lewis met with Mr. Della Penna for the purpose of taking his October affidavit in support of the Funding Application that was to be argued in the fall of 2007 but was adjourned until March 2, 2009. Ms. Lewis said that she discussed the content of Mr. Della Penna's affidavit with him, including the additional hours that she and Mr. Cobb had spent since his initial retainer had run out. She also said that she told Mr. Della Penna that CSPL would be seeking to have the firm's fees paid from the seized funds at the rate of \$350 per hour. She said that Mr. Della Penna responded that he did not care what the firm charged, "just get me off and you can have it all".
- [191] I find that the firm was not paid for about a year and a half while it continued to represent Mr. Della Penna and that the purpose of the Funding Application was to access the Seized Funds to pay for Mr. Della Penna's ongoing defence. I also find that Mr. Della Penna understood that the rate approved by Justice Leask for his representation was less than the firm's hourly rate and he agreed that they could bill him the difference if they were able to obtain a return of the Seized and Surplus Funds.
- [192] I also accept Ms. Batista Alves' evidence that she knew Mr. Della Penna personally and had previously introduced him to Mr. Cobb. She says that she was concerned, from the outset of Mr. Della Penna's retainer of CSPL on the Charges, that Mr. Della Penna was not keeping up to date with his payments and personally reminded him to pay the fees. She told Mr. Della Penna the hourly rates for the partners and the associates.

- [193] It is unfortunate that CSPL did not record their fee discussions with Mr. Della Penna in writing. Nonetheless, considering all the evidence and assessing its credibility, I accept Mr. Cobb's, Mr. St. Pierre's, and Ms. Lewis' recollections of their discussions with Mr. Della Penna and that they established that the firm's fee agreement with Mr. Della Penna changed over the course of the retainer.
- [194] I find that the basis for the Initial Retainer quote given to Mr. Della Penna, which represented a significant discount on CSPL's normal billing rates, turned out to be optimistic. The trial in the Provincial Court took considerably longer than the originally scheduled 50 days. I find that Mr. Della Penna was aware of the basis for the Initial Retainer.
- [195] I conclude that after Mr. Della Penna did not pay the Initial Retainer in full, and after the firm had worked for him for more than a year and a half without being paid, they entered into a new fee arrangement in conjunction with the Funding Application. Mr. Della Penna's October and January affidavits, filed in support of the Funding Application, make it clear that he understood the need to access funds for CSPL's continued representation of him.
- [196] Pursuant to the new fee arrangement, Mr. Della Penna agreed that if the presider on the Funding Application allowed CSPL's reasonable fees at an hourly rate below the hourly rate of the partners, Mr. Della Penna would make up the difference from the Seized Funds if CSPL recovered them. Mr. Della Penna's flat denial that he reached such an agreement is not credible and is inconsistent with the evidence of Mr. Cobb, Mr. St. Pierre, Ms. Lewis and, to a lesser extent, Ms. Batista Alves, all of whom gave evidence that, in context, was consistent and credible.

What fee was quoted to Mr. Della Penna for the appeal?

- [197] There is a dispute between Mr. Cobb and Mr. Della Penna about the fee that CSPL quoted for the work on his appeal. As set out, Mr. Cobb says that he quoted \$100,000 inclusive of disbursements but not tax. Mr. Della Penna says the quote was \$50,000. He does not say whether he understood that to include disbursement or tax.
- [198] I prefer the evidence of Mr. Cobb, Ms. Batista, and Ms. Lewis about the fee that was quoted for the appeal. Mr. Cobb had a detailed and specific recollection of his conversation with Mr. Della Penna. He was able to pinpoint the specific location and approximate timeframe. In contrast, Mr. Della Penna's evidence was vague. At his examination for discovery, he was asked:

Q: So, Mr. Della Penna, this \$50,000 deal, tell me what you remember about that for the appeal.

A: Neil's like, "It's \$50,000 for the appeal."

Q: When did he say that?

A: Before the appeal. They need \$50,000 for the appeal.

Q: Where? Where did this occur?

A: I don't recall where but - I don't recall where.

Q: And in relation to when the appeal took place, when do you recall this happening?

A: When he told me -

Q: You said before the appeal. When before the appeal?

A: I guess when they sent me the appeal papers, he told me it's going to be \$50,000 for the appeal.

Q: Was anybody else there for that?

A: I don't recall. I don't think so. I think it was me and Neil.

Q: Where were you?

A: I don't remember.

Q: Was it on the telephone?

A: I don't remember.

Q: Was it in the office?

A: I don't remember.

[Questions 642-650]

[199] In addition, in her affidavit, Ms. Lewis swore that she was aware that Mr. Della Penna was quoted \$100,000 plus taxes for the conduct of the appeal. She was also aware that Mr. Della Penna paid a total of \$30,000 towards the quote, and she attaches a copy of a CSPL invoice on which she had handwritten "\$70 more on appeal". She explained that her note was a shorthand reminder to herself that Mr. Della Penna owed \$70,000 on account of his appeal.

[200] Finally, in her affidavit, Ms. Batista Alves swore that she was aware that Mr. Della Penna was provided a flat fee quote for the appeal of \$100,000. She was responsible for receiving and monitoring payments toward his appeal fee. Mr. Della Penna paid a total of \$30,000 in three installments, for which she issued receipts.

[201] Ms. Lewis and Ms. Alves have no direct knowledge of the agreement reached between Mr. Cobb and Mr. Della Penna about the appeal fee. Nonetheless, their understanding is consisted with Mr. Cobb's evidence which I prefer over Mr. Della Penna's.

[202] I also have before me an opinion filed by Ian Donaldson, Q.C., a senior member of the criminal defence bar who was retained by CSPL to give an opinion on the complexity of the appeal and the reasonableness of the fee. He says:

the transcripts and appeal books were voluminous. The number of rulings and proceedings preceding the Crown appeal were significant and substantial. ... Given the size of the record, and the legal issues involved, in my opinion \$100,000 was a reasonable fee.

[203] Considering all of the evidence, I find that Mr. Della Penna was quoted an appeal fee of \$100,000.

[204] For these reasons, I would dismiss Mr. Della Penna's action on the basis that he has failed to establish a breach of contract.

Did CSPL act in breach of a fiduciary duty to Mr Della Penna?

Positions of the Parties

[205] Mr. Della Penna alleges that in addition to being in breach of contract, CSPL's billing of the \$224,000 including tax was in breach of their fiduciary duty to him. He cites s. 69 of the LPA in support of his argument, alleging that the failure to deliver a bill to him before taking additional fees breached statutory and fiduciary duties.

[206] In particular, Mr. Della Penna points out that the March 23, 2012 bill was not delivered to him until sometime in early 2015, either February or June. He says that this was two-and-a-half to three years after CPSL had paid itself pursuant to that bill.

[207] Mr. Della Penna relies on 380876 British Columbia Ltd. v. Ron Perrick Law Corp. et al, 2007 BCSC 507 at para. 28 for authority that it is sufficient for a lawyer to have taken money from a trust account before a bill was issued in order to make a finding of liability. Although the funds used to pay CPSL did not pass through its trust account, Mr. Della Penna argues that the funds received by CPSL from the civil forfeiture settlement were his funds and they could not have been dealt with by CSPL on any basis other than as trustees. Therefore, taking the funds without delivering a bill was a breach of trust and was contrary to CSPL's duty of utmost good faith to him.

[208] CSPL submits that it complied with its duty of loyalty to Mr. Della Penna at all times. It submits that Invoice 8083 was rendered based on the fee agreements reached, and point to the fact that Mr. Della Penna was independently represented by counsel in the settlement negotiations.

Analysis

[209] I find that Mr. Della Penna has not made out his claim for breach of fiduciary duty. As I have explained above, I find that Invoice 8083 was issued in accordance with the agreement made between CSPL and Mr. Della Penna. It was delivered to Mr. Della Penna, through his counsel Mr. Solomon on May 3, 2012, when he was provided with the materials for the solicitor's lien proceedings.

[210] While Mr. Della Penna was incarcerated in Australia, CSPL arranged for independent representation for him. He consented to Mr. Solomon representing him in the civil forfeiture proceedings. He does not suggest that Mr. Solomon acted inappropriately.

[211] I also accept that Mr. Cobb discussed Invoice 8083 with Mr. Della Penna by phone on May 4, 2012. Mr. Cobb's notes reflect the discussion.

[212] For these reasons, I also dismiss Mr. Della Penna's action on the basis that he has failed to establish a breach of fiduciary duty.

Is this action an abuse of process?

Positions of the Parties

[213] CSPL submits that Mr. Della Penna's claim is an abuse of process by relitigation and that it violates the principles of judicial economy, consistency, finality, and integrity of the administration of justice. Mr. Della Penna was a party to the settlement negotiations, where he was represented by independent counsel. On his behalf, his counsel agreed to the Settlement Agreement. His claim is an attack on the final Settlement Agreement and Consent Order, and it constitutes a misuse of the court's process.

[214] CSPL cites *McGregor v. Holyrood Manor*, 2014 BCSC 679 at paras. 150-152, for authority that where a binding settlement determines the issues between the parties and a subsequent proceeding makes the same claims encompassed by the terms of the settlement, such a proceeding may constitute an abuse of process by relitigation. They submit that Mr. Della Penna's claim is contrary to the explicit terms of the Settlement Agreement and the Consent Order. In particular, Mr. Della Penna's action invites the court to reconsider a prior judicial determination and to reach a different result, which risks diminishing the credibility of the judicial process.

[215] Finally, CSPL points to the fact that Mr. Della Penna has admitted under oath that the Seized Funds were the proceeds of crime, which is critical to assessing the balance of fairness in this case.

[216] Mr. Della Penna submits that the abuse of process argument should fail for the same reason as the issue estoppel argument. He submits that the Settlement Agreement did not deal with an assessment of fees, this issue has not previously been decided, and Mr. Della Penna did not give up his right to review CSPL's fees. The Settlement Agreement determines how to split the Seized Funds between the parties; it does not determine the fee arrangement between Mr. Della Penna and CSPL.

Analysis

[217] The abuse of process doctrine was also discussed in *CUPE*. Justice Arbour explained that the doctrine stems from the inherent and residual discretion of judges to prevent an abuse of the court's process, which may be established where the proceedings are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency: para. 35.

[218] Justice Arbour endorsed the following paragraphs from *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56, per Goudge J.A. dissenting, in *CUPE* at para. 37:

37

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[Emphasis added by Arbour J.]

[219] Justice Arbour confirmed that the doctrine of abuse of process may apply where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

[220] Justice Arbour explained at para. 46 that the concern underlying the abuse of process doctrine does not have to do with a party's motive for relitigation, but the impropriety of attempting to "impeach a judicial finding by the impermissible route of relitigation in a different forum". She outlined three reasons for the focus on the integrity of the adjudicative process, rather than the motive of the parties, at para. 51:

51 First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[221] That being said, in certain instances, relitigation may enhance the integrity of the judicial system in cases where the first proceeding was tainted by fraud or dishonesty, where new evidence becomes available that impeaches the original results, or when fairness dictates that the original result should not be binding in a new context: para. 52. There are circumstances in which a bar to relitigation would create unfairness, for example:

53 If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision

[citations omitted.]

[222] I am satisfied that Mr. Della Penna's action constitutes an abuse of the court's process in that it attempts to indirectly attack the terms of the Settlement Agreement and Consent Order, which is a valid and binding order of this Court.

[223] During the settlement discussions, Mr. Della Penna was represented by independent counsel, Mr. Solomon. Mr. Della Penna does not make any allegations that his counsel acted improperly, that he was not properly informed of the terms of the Settlement Agreement, or that he did not give his valid consent to the Settlement Agreement forming the basis of the Consent Order.

[224] Mr. Della Penna authorized the settlement negotiations through his counsel, and he knew and understood the terms of the Settlement Agreement. Some of the key terms of the Settlement Agreement were that CSPL would receive \$224,000 including tax for its legal fees from the Seized Funds, that there would be no further claims to the Seized or Surplus Funds by the settling parties, and that it was intended as a final settlement "of all the matters as between the parties". CSPL agreed to reduce its claim for legal fees against the Seized Funds to \$224,000, and Mr. Della Penna received 20% of the remaining funds, which amounted to just under \$98,000.

[225] I agree with CSPL that it is an abuse of the court's process to commence a proceeding making claims encompassed by the terms of the binding Settlement Agreement and Consent Order that continues to be in effect, and to invite the court to make a finding that contradicts the terms of the Consent Order. Mr. Della's claim for the \$224,000 that was paid to CSPL under the Settlement Agreement and Consent Order is such a claim.

[226] In any event, it is not clear that it would be open to the court to order that the \$224,000 paid to CSPL from the Seized Funds be paid to Mr. Della Penna. He did not pay these funds; they were paid to the firm by the Director from the Seized Funds which were the subject of civil forfeiture proceedings. In light of Mr. Della Penna's admissions in these proceedings that the Seized Funds were obtained by illegal drug dealing, and the Surplus Funds were the net proceeds of sale of the Barrett Property which had been used for the purposes of an illegal marihuana grow operation, it is far from clear that Mr. Della Penna was entitled to the Seized and Surplus Funds.

- [227] Although not addressed by counsel, it is arguable that the Director should have been a party to, or had notice of, these proceedings so that he could argue that, if CSPL was not entitled to the \$224,000, or any part thereof, the funds should be returned to the Director and be subject to any claims it might make against them. The way Mr. Della Penna framed his action, he seeks to retain the benefit of the settlement in the form of the funds he obtained pursuant to it, without taking the risk of the Director making a successful claim against either the funds he received or those received by CSPL.
- [228] As these issues were not addressed, and in light of my findings on the credibility of Mr. Della Penna and the lawyers from CSPL and on the abuse of process argument, it is not necessary for me to decide these issues.

Conclusion

- [229] For the reasons given, I conclude that Mr. Della Penna's action should be dismissed in its entirety.
- [230] In light of my findings of fact with respect to the retainer agreements, it is unnecessary for me to consider whether CSPL is entitled to fees on a quantum meruit basis.
- [231] Finally, I think it worth noting that despite Mr. Della Penna never providing CSPL with the agreed-upon retainers, the successfully represented him for almost eight years at all three levels of court in our province, including for over 1.5 years without payment.

Costs

- [232] If, in light of the result of this decision, the parties are unable to agree on costs, they may contact Supreme Court Scheduling and seek to appear before me to speak to costs.

"MacNaughton J."

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