
CANADA / JUDGMENT

MacAlpine v. Funk

2020 BCSC 1225

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1225 MacAlpine v. Funk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacAlpine v. Funk,

2020 BCSC 1225

Date: 20200819

Docket: M146495

Registry: Vancouver

Between:

Justin MacAlpine

Plaintiff

And

Marlene Funk

Defendant

Before: Registrar Nielsen

Reasons for Decision

Counsel for Plaintiff:

N. Hartney

Counsel for Defendant:

R. Marcoux

Place and Date of Hearing:

Vancouver, B.C.

September 11 & 12, 2019

November 8, 2019 and

August 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2020

- [1] This is a client-initiated review pursuant to the provisions of the Legal Profession Act, SBC 1998 c. 9 (LPA). The client wants fees calculated on an hourly basis pursuant to the retainer agreement. The client further takes the position that the fees billed on an hourly basis as calculated in the bill dated May 21, 2019, are excessive and not in accord with the actual time spent pursuing the client's case. The client has provided written instructions dated November 7, 2018, to his counsel to resolve the issue on his behalf.
- [2] The law firm characterizes the dispute as one between two law firms concerning how to split a contingency fee on a quantum meruit basis.
- [3] On August 22, 2014, Mr. MacAlpine, (the client) entered into a contingency fee agreement (CFA) with McComb Witten (the law firm) in relation to injuries sustained in a motor vehicle accident on November 10, 2012. The CFA provided at clause 6:

Either party can terminate this contract, and if I decide to terminate for whatever reason, I agree to pay McCOMB WITTEN \$350.00 per hour for services rendered to the date of termination plus all disbursements incurred to that date. This amount is to be paid upon termination of the contract.

- [4] The client was introduced to the law firm by his friend, Mr. Tyler Dennis, who had been an articulated student at the law firm since July 2014. A senior partner at the law firm was to have primary conduct of the file until Mr. Dennis reached competency. On July 24, 2015, shortly before Mr. Dennis's call to the bar on September 11, 2015, the file was internally transferred to Mr. Dennis and the opposing parties were notified that he had conduct of the matter. Mr. Dennis had conduct until June 18, 2018 when he advised the law firm he was leaving to take a position with another firm, Preszler Law Firm LLP (Preszler).

- [5] As often happens in these situations, two days later, on June 20, 2018, the employment relationship between Mr. Denis and the law firm was terminated, and he was escorted from the law firm. Coincidentally, on the same day, the client was involved in a second motor vehicle accident. The client retained Mr. Denis, through Preszler, in relation to the second accident.
- [6] By letter dated June 21, 2018, the law firm advised the client of his right to remain a client of the firm, or to continue to have Mr. Denis represent him. The client chose the latter, and Mr. Denis advised the client in an email dated June 21, 2018 that the terms of the contract with Preszler would mirror the previous fee contract.
- [7] On June 22, 2018, the law firm received a letter from Preszler advising the client had elected to continue to retain Mr. Dennis.
- [8] On October 1, 2018, the client's two motor vehicle accident's were settled for the global amount of 350,000 plus taxable costs and disbursements. The law firm was advised of the settlement October 2, 2018.
- [9] The trial had been set for ten days, commencing October 29, 2018.
- [10] Prior to Mr. Dennis leaving the law firm, the best offer advanced by ICBC had been 150,000 plus taxable costs and disbursements.
- [11] Following settlement, a 30% contingency fee in the amount of 103,789.09, plus applicable taxes, was payable. Both the law firm's CFA and Peszler's CFA provide for a 30% contingency. This amount is held in trust pending resolution of this dispute.
- [12] The law firm claims a quantum meruit share in the contingency fee, despite the express provision of clause 6 of the CFA quoted above. The client does not take issue with the amount paid as a contingency fee, but takes issue with the law firm being able to claim a quantum meruit share of the fee. The client also challenged 1,176.82 of the law firm's disbursements.
- [13] The law firm's bill dated May 21, 2019 lists a number of tasks performed and claims a fee of 87,500 plus applicable taxes. The bill does not provide a breakdown of the hours worked for the various tasks listed, nor does it indicate who performed the work. The law firm had not kept track of the hours performed because they did not anticipate the need to do so. Presumably, the 87,500 fee billed is based upon 250 hours of work at 350 per hour. During submissions, the law firm took the position that this would also be a fair fee on a quantum meruit assessment.
- [14] In preparation for this review, the law firm had a lawyer within the firm, Mr. Khazamipour, review the entire file and provide a summary of the work done together with his estimate of the time expended in completing the various tasks. The time estimates are attested to in an affidavit, and were supplemented by Mr. Kazamipour's viva voce evidence.

[15] Mr. Kazamipour estimates the law firm did between 220 to 250 hours of work on the file. These hours encompass lawyers, paralegals and secretaries. He qualifies this estimate stating at paragraph 25 of his affidavit:

"For the best approximation of the time spent on the documented and undocumented work done on the file, Mr. Dennis would be the best source of said approximates".

[16] On cross-examination, Mr. Khazamipour again testified Mr. Dennis was in the best position to estimate the time spent, and that Mr. Dennis was credible and he did not doubt him with respect to the work he did and his time estimates. Mr. Khazamipour also conceded he had never met the client nor acted on his behalf.

[17] Mr. Dennis provided an affidavit summarizing the work done on the client's file and estimating the time spent pursuing the client's case while at the law firm. The affidavit evidence was supplemented by Mr. Denis's viva voce testimony. Mr. Denis conceded he did not record his hours contemporaneous with the work performed, nor were there time records of any sort.

[18] Both Mr. Khazamipour and Mr. Dennis testified it was not the law firm's practise to record hours, given the time it took to do so, and the fact that the law firm's fee would be calculated on a 30% contingency, not hours spent.

[19] Mr. Dennis's affidavit and viva voce evidence estimates the total hours spent on the client's file, to the point of his departure, was 81.48. Of the 81.48 hours spent, Mr. Denis estimates he personally invested 31 hours of his time and paralegals and secretaries performed the balance of time.

[20] Mr. Dennis attributes the law firm's efficiency to their Amicus Attorney computer software, their excellent precedent system and support staff. At a rate of 350 per hour, 81.48 hours would generate a fee of 28,518 plus applicable taxes.

[21] The law firm's CFA is relatively short, having seven clauses and consisting of a single page. With the exception of clause 6 quoted above, it does not provide much guidance in regard to the dispute at hand.

[22] At paras. 6 through 9, Mr. Dennis attests in his affidavit:

[6] Mr. MacAlpine and I met on August 22, 2014 when we discussed the McComb Witten Fee Contract. Mr. Witten attended for approximately 5 minutes to meet Mr. MacAlpine and go over any questions he may have had regarding the McComb Witten Fee Contract.

[7] Paragraph 6 of Mr. MacAlpine's McComb Witten Fee Contract provides the following:

"Either party can terminate this contract, and if I decide to terminate for whatever reason, I agree to pay McComb Witten \$350.00 per hour for services rendered to date of termination plus all disbursements incurred to that date. This amount is to be paid upon termination of the contract."

Neither myself, nor Mr. Witten explained or included any additional terms to the McComb Witten Fee Contract articulating minimum billing times, or rounding to the nearest 1/10th, 2/10th, 3.10th, or 5/10th of an hour for services rendered.

- [8] There was no indication from Mr. Witten nor myself that services rendered by an experienced lawyer would carry a different hourly rate than the most inexperienced of junior legal assistants. There was no description of compounding fees dependent on how many lawyers or staff were in a room when discussing Mr. MacAlpine's file.
- [9] During my August 22, 2014 meeting with Mr. MacAlpine, there was also no discussion with Mr. MacAlpine as to additional fees McComb Witten may charge in relation to "overhead" or otherwise unrecoverable disbursements, or any description that the rate of photocopying, scanning, and facsimile would be greater than what the law supported as recoverable (Registrar's rates).
- [23] This evidence was not contradicted.
- [24] The CFA did not state whether the 350 per hour was for lawyers, articulated students, or support staff, nor did it indicate whether the client would be charged the hourly rate for the work of paralegals or secretaries. Absent a contractual provision to the contrary, the ordinary rule is that non-lawyer work cannot be billed at lawyer rates, and secretarial work is included in a lawyer's hourly rate and considered overhead, and cannot be billed to an individual client. See *C.D Wilson & Associates v. Walker*, 1996 CanLII 2858 (BCSC) at para [30]; *Campbell v. Cindrich*, 2014 BCSC 119 at para [101]; and, *Yu v. Perry*, 2014 BCSC 322 at para. 28.
- [25] Mr. Kazamipour attests at paras. 20 through 23 of his affidavit:
- [20] My Firm quantifies our billing rate based on the expertise and experience of the handling lawyers, as well as the firm support provided to each handling lawyer. My Firm has seven billing lawyers that are supported by a combination of junior lawyers, paralegals, senior legal assistants, junior legal assistants, filing assistants, and other staff.
- [21] The support given to our seven billing lawyers helps facilitate higher outcomes and service for our clients.
- [22] Our Agreement contemplates \$350.00 per hour for services rendered to a client. Time spent by a lawyer or legal support on a file is not tracked at the time the service is incurred. We track outcomes obtained on a our files as opposed to time spent by a lawyer, especially in light of the amount of support provided by other lawyers, assistants, paralegals, etc.
- [23] When required to provide an accounting of time spent on a file, we look at the file material and estimate the time involved with each task, based on our knowledge of the expected firm practices and the support provided to each lawyer.

- [26] Billed time must be reasonably necessary and proper to the conduct of the proceeding. Its purpose is to provide corresponding value to the client. The onus of demonstrating the necessity, propriety, and intended value rests on the shoulders of the billing law firm and lawyer. Further, pursuant to s.71 (4) (f) of the LPA, an hourly rate of 350 must be reasonable in all the circumstances. What is reasonable will depend on various factors including the lawyer's expertise, experience, and year of call. With the exception of Mr. Denis, there was limited evidence concerning the relative expertise, experience, and year of call of those involved in the client's file.
- [27] Both Mr. Denis and Mr. Kazamipour spoke highly of the paralegals and secretaries at the law firm, however, absent a provision in the CFA to the contrary, secretarial time is overhead, included in the lawyer's hourly rate, and cannot be billed to the client on an hourly basis.
- [28] Absent a specific provision in the CFA, paralegal time can be billed at a reasonable rate commensurate with their experience, but 350 per hour is not within a range of reasonableness. In the absence of a specific provision in the CFA, the evidence provided concerning the relative experience of the paralegals who worked on the client's file, and the work they performed, a rate of 100 per hour is allowed for the paralegal work performed.
- [29] There was evidence of the law firm's practise of over seeing junior lawyers and holding occasional team meetings concerning strategy and management of the client's file.
- [30] Both Mr. Kazamipour and Mr. Denis were credible and straightforward in their views. However, their viva voce and affidavit evidence boils down to their best estimates of the time spent. There were no contemporaneous time records of any sort.
- [31] Mr. Kazamipour's evidence suffers from the lack of direct involvement in the work performed on the file, or contact with the plaintiff. While Mr. Denis had direct contact with the plaintiff and performed the bulk of the legal work on the file to the point of his departure, his estimates of his own time, the time spent by the secretaries, paralegals, and the supervising lawyer are all estimates. I consider his time estimates concerning the work performed by others, to be somewhat lean. Even accepting the efficiency of the law firm's computer system, precedents and exceptional staff, I find a total of 81.48 hours to be at the lower end of the range.
- [32] I accept Mr. Denis's time estimate of 31 hours expended by him. The hours invested by the paralegals and senior counsel need to be added into the equation. Neither counsel provided a detailed breakdown of time estimates in this manner. Their estimates are task oriented. In my view, considering the time estimates provided by both Mr. Kazamipour and Mr. Denis in their affidavits and oral evidence, and the work performed, I allow 45 hours for the time invested by lawyers. I consider the hourly rate in the CFA at 350 to be reasonable pursuant to s.71(4)(f) of the LPA given that the time includes the oversight of senior counsel, secretarial time, and occasional team meetings.

- [33] It is not possible to mathematically extract the secretarial time from the time estimates of counsel with any precision. Considering the evidence of both Mr. Kazamipour and Mr. Denis concerning the details of the non-lawyer work performed, I allow 70 hours for paralegal time.
- [34] This is not the end of the matter. The law firm seeks a fair fee for its services measured on a quantum meruit basis. They take this position despite the provision of paragraph 6 of the CFA, which it drafted and executed. The law firm submits that to do otherwise allows Preszler to obtain a windfall of fees. The law firm submits that in order to "maintain the integrity of the profession" as provided by the BCCA in *Mide-Wilson v. Hungerford Tomy*, 2013 BCCA 559, the registrar ought to ignore the provision of clause 6 of the CFA in favor of a quantum meruit analysis.
- [35] The law firm submits that the registrar must consider the CFA in context, with the CFA itself being the mere starting point of the analysis, keeping in mind that pursuant to s. 71(5) of the LPA, the discretion of the registrar is not limited by an agreement between the lawyer and the lawyer's client. In support of this proposition, the law firm cites *Mide-Wilson supra*, at paras. 53, 54 and 98 which provide:
- [53] In undertaking the ss. 70-71 analysis, the chambers judge referred first to *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994) 94 B.C.L.R. (2d) 177 (C.A.) ("Commonwealth No. 2"). There, Chief Justice McEachern for the Court had described the Court's task under the statutory test that governed the agreement in that case, s. 99(2) of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26. It provided that a court could modify or cancel an agreement not found to be fair and reasonable. He reasoned as follows:

Instead of making such an assessment, I believe this Court, particularly, must remember its task. This is not to fix a fee either by a reconsideration of all the evidence and the application of judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context. All the circumstances must be considered, including the Yule factors, the risks and expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment.

[At para. 47; emphasis added.]

- [54] The chambers judge was of the view that the foregoing approach no longer applies to a review under the present legislation. In his words, "The registrar's task is to determine the proper fee. Section 71(5) specifically sets out that the registrar's discretion is not limited by the terms of any agreement between the lawyer and the lawyer's client." (Para. 158; my emphasis.) Elsewhere, at para. 172, he stated that the fee was to be determined "regardless of" the terms of the agreement.

- [98] The chambers judge found that the Registrar had given too much weight to the terms of the CFA and, at least implicitly, that she had failed to give sufficient weight to the integrity of the profession. Again, I am not persuaded he erred in so holding (and I would add that she overemphasized the importance of holding parties to their bargains in this context) or in finding that a fee of \$9,000,000 did not strike the right balance between an amount that handsomely rewarded the Firm and one that grossly over-rewarded it. The chambers judge's choice of \$5,000,000 does in my view strike a reasonable balance, and I would not disturb it.
- [36] The law firm further submits that a CFA is not a lottery ticket and there must be a relationship between the legal services actually provided and the ultimate fee charged. Regardless of the terms of a CFA, the law firm submits a lawyer is never entitled to more than a fair fee, and this approach maintains the integrity of the profession. Sanctity of contract is not determinative in fee agreements and there is a need for court supervision of lawyer's fee arrangements, which continues to be justified in today's society. In support of this submission, the law firm cites *Mide-Wilson supra*, at paras. 79, 80 and 88 which provide:
- [79] This brings us as well to what the Client described in her factum as the "central issue" in this case - whether a fee agreement (here, a contingent fee agreement) is as the Registrar appeared to find, essentially a contract like any other that should be enforced in all but exceptional cases, or whether there is an "overarching requirement, grounded in the solicitor's fiduciary duty to the client and the profession's duty to the public, to ensure that the solicitor's remuneration under the agreement and the final bill are reasonable in amount, reflecting the work put in and the actual risk assumed by the solicitors". These policy considerations are apparent in the following critical portions of the chambers judge's reasoning which I repeat here for convenience:

A client need only pay a proper fee. I agree with Registrar Cameron's comment in *Parpatt* that there is a point when the differential between the work done and the fees payable under the contingency agreement must be adjusted to maintain the integrity of the profession. In such circumstances the terms of the contract must be sacrificed to insure that the client pays no more than a proper fee.

An error in quantum can be so gross as to indicate an error in principle. I find that has occurred in this case. There must be a relationship between the legal services actually provided and the ultimate fee. In *Re Stuart*, which I note was decided in 1893, the court opined that "it is impossible to say that work which according to information given by the taxing master to the divisional court could be properly remunerated by the sum of 20£ can be reasonably charged at nearly 100£.

In order to maintain the integrity of the legal profession, a legal account must have some relationship to the actual work carried out. To allow the fees awarded in this case given the work the Solicitors actually did would call into question the integrity of the profession.

A contingency fee agreement is not a lottery ticket. Success in the action does not guarantee a fee in the amount set out in the agreement. Even if the agreement was neither unfair nor unreasonable at the time it was entered into, the final account must be reasonable and proper given the services provided and the risk undertaken.

In *Inmet, Bauman J.A.*, as he then was, for the majority on this issue, directed that in determining the proper fee the registrar should take a holistic approach rather than performing a mathematical calculation on the basis of time spent. While time spent may be an important factor, it cannot be overemphasized to the exclusion of other proper considerations. Recovery under a contingency agreement is not limited to some predetermined multiple of time spent.

While the terms of the contract set the maximum fee, the proper fee is ultimately determined by a consideration of the factors set out in s. 71(4) augmented as noted in *Commonwealth No. 2* by those further considerations that apply only to contingency fees including the risk of no recovery and the expectation of a larger fee based upon results than would be appropriate in non-contingency cases. Regardless of the terms of a contingency fee agreement, those factors and considerations cap the amount that lawyers can charge. A lawyer is never entitled to more than a proper fee.

In the circumstances of this case, I find that \$9 million is not a proper fee for the work actually done and does threaten the integrity of the profession. While the Solicitors took on a case in which there was great risk, the case and the risk ended within months of the commencement of the retainer.

[At paras. 173-74, 178, 180, 182-83 and 185; emphasis added.]

Integrity of the Profession

[80] This court's reference in *Commonwealth No. 2* to the integrity of the profession in the context of lawyers' fee agreements has very deep roots. It has informed the matter of lawyers' fees for centuries. In the dim mists of the common law, a barrister could not sue for payment of his fees and indeed could not make an express contract with a client for the payment of future fees. Thus *Blackstone's Commentaries* (19th ed., 1783) stated at 28 that "It is established that a counsel can maintain no action for his fees, which are given not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation." (See also *McDougall v. Campbell* [1877] O.J. No. 100 (Ont. Q.B.) at para. 86.)

[88] On a more general level, it also seems to me that the public cynicism resulting from recent events in the United States involving "professionals" who have manipulated or exploited, if not abused, regulatory systems in order to reap personal rewards in the millions of dollars, should give lawyers pause. One must question whether members of the Bar, who occupy positions of special trust and confidence, should chafe too strongly against rules designed to ensure that the line between lawyers and others trading on their own account does not become blurred. In saying this, I do not intend to criticize any conduct on the part of the

Firm in this case – only to suggest that there are profound reasons why the sanctity of contact cannot be determinative and why court supervision of lawyers' fee arrangements continues to be justified in today's society.

- [37] The law firm submits that the approach taken in *Holness Law Group v. Mann*, 2015 BCSC 2380 is appropriate in the case at bar, citing paras. 33 through 35, which state:
- [33] In the present case, both law firms participated in the outcome of the same matter, with the same client. Both firms were engaged on a contingency fee basis. Both firms agree their fee would be calculated on a 30% contingency fee basis, given the stage at which the case was settled.
- [34] This is a case where justice and fair play require a single fee to be apportioned between the two firms on a quantum meruit basis, taking into account all the circumstances and factors expressed by s. 71(4) of the LPA. That fee cannot exceed the 33 1/3% limit set by the benchers pursuant to s. 66(2) of the LPA.
- [35] In this case, the reasonable global fee before apportionment is \$75,600 plus tax, which represents a 30% contingency fee which is not disputed by the client.
- [38] The law firm cites *Green v. John M. Richter Law Corp.*, 2018 BCSC 1840 in support of taking the same approach as that taken in *Holness*, supra. Otherwise, the law firm submits its valuable work performed will be devalued and undermined. The law firm calculates that it had the client's file for 94% of the time involved, but if the hourly rate based upon the hours estimated by Mr. Dennis is applied, the subsequent law firm will reap the bulk of the total fee. A result, which the law firm submits was rejected by the court in *Green*, supra.
- [39] In my view *Green* supra, is distinguishable. It involved a situation where the client had retained multiple law firms to represent him, all of which he dismissed or justifiably withdrew due to a breakdown in the solicitor-client relationship. The client then sought to disentitle all the firms involved to any fee after he settled the case for an offer obtained by the last law firm. That is not the situation here.
- [40] The law firm further submits that the client did not pay the hourly fees owed immediately upon his departure, and therefore, the client is "cherry picking" only part of clause 6 of the CFA for enforcement.
- [41] The law firm also relies on the case of *Arletto v. Simpson Thomas and Associates* 2016 BCSC 136, appeal dismissed 2016 BCCA 470, wherein the court dismissed a subsequent law firm's attempts to enforce an hourly rate provided in the CFA of the previous firm, characterizing the dispute as one between law firms.
- [42] The client submits that *Arletto* supra, is distinguishable. *Arletto* supra, was not a review pursuant to the provisions of the LPA, and more importantly, there was no termination of the prior fee agreement in that case. Rather, the subsequent law firm continued to act under the terms of the prior agreement. At paras. 10 and 11 the court states:

- [10] In my view, the December letter advising Mr. Arletto of Mr. Hébert's decision to move to Whitelaw Twining and that if Mr. Arletto chose to have Mr. Hébert continue to represent him, it would be under the same terms as the Simpson Thomas fee arrangement was not a termination of the fee agreement.
- [11] If a termination of the fee agreement was intended, the letter would have said so. Rather, the letter provided that Mr. Hébert would continue to represent Mr. Arletto "under the same terms as the current fee agreement". Moreover, it is plain that Simpson Thomas was led by Whitelaw Twining to believe that Whitelaw Twining had the ostensible authority of Mr. Arletto to act on his behalf in accepting the undertakings set out in the December 28, 2014 letter from Simpson Thomas to Whitelaw Twining.
- [43] In the client's written submission he states that in Arletto supra, both the prior and subsequent law firms signed a joint letter which explicitly stated that if the client chose for his file to go with the leaving lawyer, then it would be "under the same terms as the current fee agreement". Mention of a jointly signed letter does not appear in either the decision of the BCSC or the BCCA, nor was any evidence in that regard directed to my attention.
- [44] The client submits in the case at bar the law firm's CFA was terminated and there is nothing which represents an agreement to maintain the existing CFA as was done in Arletto, supra. In support of this submission the client references: the email to him from Mr. Denis where it was said the terms of the contract with Preszler would mirror those of the prior law firm; the two subsequent CFA's between the client and Preszler concerning both motor vehicle accidents; and, Peszler's letter of July 17, 2018.
- [45] The client submits that in keeping with the doctrine of contra proferentum and the duty of utmost good faith, the CFA must be construed against the law firm in those instances where there is a dispute about its terms. The client submits this is especially so in circumstances where, as here, the law firm was the author of the CFA. See Laxton v. Morris, 2007 BCSC 1690.
- [46] The client submits that the law firm should have no resort to the s. 71 factors when seeking a "fair fee" where there is an agreement to the contrary. See Nathanson, Schachter & Thompson v. Inmet Mining Corp., 2009 BCCA 385.
- [47] In response to the law firm's allegation of cherry picking a portion of clause 6 of the CFA, the client submits that the law firm did not produce a bill in a timely manner after the client's departure. Rather, the law firm only did so once ordered to by the court following a pre-hearing conference within the LPA review process.
- [48] The client further submits that the case of Ayeras v. Oostlander, 1999 CanLII 4304 (BCSC) is directly on point with the case at bar. In that case, a CFA provided for an hourly fee in the event the client retained different counsel and the court enforced that agreement on the notion that "a deal was a deal".

- [49] In Ayeras *supra*, the lawyer had drafted a CFA which provided that the client was to pay the lawyer on an hourly basis if the client terminated the agreement, but later sought a fee on a quantum meruit basis instead. The court, during a petition hearing seeking an order directing the lawyer produce a bill, made the following comments:
- [1] The petition is for an order requiring the respondent, a solicitor, to render her account for legal services on an hourly basis pursuant to a term of a contingency fee agreement with the petitioner. The contingency fee agreement contains a clause wherein the petitioner agreed that if she changed lawyers she would pay a rate of \$150 an hour to the respondent for her legal services.
- [2] Counsel for the petitioner turns this into a simple matter. He says, quoting from Mr. Justice Boyle, "a deal is a deal". The respondent isn't so sure, especially in view of the \$875,000 settlement that was fashioned by her replacement. Ms. Oostlander wants her account to be based on quantum meruit.
- ...
- [18] She protected herself. First, she would not have to await the outcome of the litigation to collect her hourly rate. The contract provided that the client shall "promptly pay". (This provision is probably unenforceable). Second, should the client be unsuccessful the obligation to remunerate the original solicitor on an hourly basis remains.
- [19] Consequently, the "contingent" part of the contract, in the case at bar, no longer applies. The petitioner discharged the respondent and incurred a liability for paying, promptly, the hourly rate. The respondent, who was the author of the agreement, chose the predictable path over the uncertain. She now wants the best of both worlds.
- [20] In *Gaglardi v. Gaglardi* (1983), 1983 CanLII 352 (BC SC), 44 B.C.L.R. 271, [1983] 4 W.W.R. 752 (S.C.), Mr. Justice Boyle said that "solicitors must be held to their agreements. A deal, in other words, is a deal." That view was agreed with by Esson J.A. in *Fraser & Co. v. Holden* (1988), 1988 CanLII 2902 (BC CA), 29 B.C.L.R. 31 (C.A.).
- [21] Registrar Scarth also agreed in *Label v. Nobiss* (April 14, 1999), Vancouver Registry J990085 which is a case from the other side of the coin. The client, who had a contract similar to the one at bar, tried to reduce the first lawyers account based on the hourly rate clause by forcing her to rely on a sharing of the contingency fee with the new solicitor. Registrar Scarth found that the "deal" was in the hourly rate clause.
- [26] The respondent says that she is "ready and willing to deliver a bill to the petitioner on a quantum meruit basis." However, before doing so she requires full particulars of the settlement, particulars of the time expended by the new solicitor and particulars of the agreement as to the fee to be paid to the new solicitor.

- [27] While this point is now moot, it should be pointed out that the respondent was not "willing" to render any account. She demanded to know the financial relationship between the petitioner and her new solicitor. In that the respondent authored her way out of a contingency contract, the financial agreement between her former client and new lawyer is none of her business. There are not, in my opinion, "sound policy reasons", as submitted by counsel for the respondent, to order the production of such particulars.
- [50] In response to the law firm's submission that the client has no interest in this matter, the client further submits that he directed the review of the law firm's accounts, and did so in writing. The client also submits he has already achieved a direct financial benefit from the review by the reduction of the law firm's disbursement account of 1,176.82. He also points to the potential of a fee reduction depending on the outcome of the review.
- [51] The provision of clause 6 in the CFA expressly provides that in event the client leaves the law firm in favor of another, the client will immediately reimburse the law firm at the hourly rate of 350 for the work done by the firm to the date of the client's departure. However, the law firm did not keep time records. The evidence was that keeping time records was itself a time consuming task not justified given the existence of a CFA.
- [52] The law firm's difficulty is that the client's former and current counsel is in the better position to provide the most accurate estimate, as is possible, of the hours expended by him to the date of the client's departure. This is an untenable position from the law firm's perspective, as the result, in its view, is that it is under-remunerated for its work.
- [53] In my view, the contractual terms of clause 6 present problems in several ways. From the client's perspective, it limits the choice of counsel and tethers the client to the law firm. If there is a breakdown in the solicitor-client relationship for any reason, the effect of clause 6 is hamper the client from leaving the law firm as an immediate liability is created whereby the client must reimburse the law firm for its time expended at a rate of 350 an hour.
- [54] Paying an hourly rate is opposite of a contingency. Those clients' whose only access to justice is facilitated by a contingency fee agreement are unlikely to have funds for an immediate lump sum payment based upon an hourly rate in order to buy their way out of the CFA.
- [55] As noted by the court in *Ayeras*, supra, provisions for immediate payment of an hourly rate at the termination of a CFA are probably unenforceable. While there may be exceptions, the general rule is that the dismissed law firm must await the outcome of the litigation before receiving payment. The cases in this regard are summarized in *Kelly v. McMillan & Harbottle & Co.* 2000 BCSC 709 at paras. 13 through 19, after which the court concludes at para. 20:

[13] Dr. Kelly's agreement with Harbottle & Co. is a contingency agreement. In *McQuarrie, Hunter v. Foote et al.* (1982), 41 B.C.L.R. 123 (C.A.), the Court of Appeal considered the appropriate approach to fees when a client who is a party to such an agreement discharges his or her solicitor. The Court held that while an obligation to pay arises on discharge of a lawyer, the amount of that obligation must await the determination of the result of the action. The rationale for this approach was stated by Nemetz C.J.B.C. at page 128:

If, however, the client were to become liable to pay the reasonable fees of the solicitor at the time of discharging him, the client would be forced to choose between continuing the employment of a solicitor in whom he has lost faith or, in some cases, discontinuing his action. This would defeat the underlying rationale of contingency fees. ... It is more consistent with the special relationship between solicitor and client and the underlying rationale of a contingency agreement to have both parties await the happening of the contingency. The interests of both parties can then be balanced in light of the outcome of the litigation.

[14] In *Doyle v. Keats* (1990), 46 B.C.L.R. (2d) 54 (S.C.), Master Wilson (as he then was) considered an application by solicitors for a charge on future proceeds of a former client's personal injury action. The client had made a contingency agreement with the solicitors which contained a provision that if the solicitors were discharged before completion of the action they were entitled to compensation based at their option on either an hourly rate or a percentage of the ultimate proceeds of the action.

[15] Master Wilson held that the solicitors were entitled to a charge against the ultimate proceeds, but the extent of the charge must be the subject of future ascertainment. In referring to *McQuarrie, Hunter v. Foote*, Master Wilson stated at pp.60-61:

I am mindful of the fact that in the contingency fee agreement under consideration in *McQuarrie* there was not a provision addressing the consequences of a termination of the retainer before the end of the litigation.

In this matter there was a provision, as recited above, that, at the option of the solicitors, compensation could be based on an hourly rate formula.

Nevertheless, it is my opinion that these solicitors may not submit their bill for taxation unless or until the contingency has occurred.

[16] Counsel for Harbottle & Co. referred to *Ayeras v. Oostlander* (1999), 69 B.C.L.R. (3d) 379 (S.C.). Despite a contingency agreement which provided that on a change of lawyers the client would be required to pay the discharged lawyer at an hourly rate, the solicitor sought to render the account on a quantum meruit basis when the subsequent solicitor settled the claim for \$875,000. Thackray J. required the initial solicitor to render her account on an hourly rate basis as provided for in the contingency agreement.

- [17] In *Label v. Nobiss* (1999), 34 C.P.C. (4th) 86 (B.C.S.C.), District Registrar Scarth reviewed two bills of a solicitor arising out of two contingency fee agreements where the solicitor had been discharged before the completion of the cases. The new solicitor settled the two actions and two subsequent actions for a total of \$50,000. The first solicitor issued her bills based on a provision in her contingency fee agreements that on a change of solicitors the client would be required to pay fees at the rate of \$175 per hour.
- [18] The client objected to the accounts on the ground that the fee should be determined on a proportional basis to the time spent by each counsel. The client, however, did not dispute the reasonable value of the services provided by the first solicitor. It was held that the solicitor was entitled to her fees "calculated on an hourly rate basis, provided those hours were reasonably spent" because the agreements provided for it. The District Registrar found the hours claimed to be reasonable.
- [19] It is important to note that in both *Label v. Nobiss* and *Ayeras v. Oostlander* the final settlement amounts were known to the court at the time the decision was made. This was not the case in *McQuarrie*, *Hunter v. Foote*, *Doyle v. Keats* or the tort action that gives rise to this application.
- [20] In my view, although the relationship between Dr. Kelly and Harbottle & Co. is essentially a matter of contract, the contract must be interpreted in light of the case law relating to contingency fee agreements and the provisions of the Legal Profession Act. As a result, when Dr. Kelly discharged Harbottle & Co. he became obliged to pay them, but the amount of that obligation must await the determination of the result of the action. It is also my view that the relative priority of the claims of Mr. Prodor and Harbottle & Co. must await that determination.
- [56] Given this long-standing principle it is surprising that a term providing for immediate payment upon the client's departure still find their way into contemporary CFA's.
- [57] Clause 6 of the CFA may advance the law firm's financial interests in those cases where the client remains with the law firm due to the client's inability to finance a change of counsel, or the belief that immediate payment is due on termination of the CFA. However, it can also operate to the prejudice the law firm in certain circumstances.
- [58] It works to the law firm's detriment in circumstances where the law firm has invested minimal hours before the client leaves, and the client later obtains a significant settlement/judgement, and corresponding contingency fee, for the subsequent law firm retained by the client. This may not result in a fair fee if the prior law firm significantly advanced the client's interests with a minimal investment of time measured on an hourly basis. The difficulties are compounded in those circumstances where the client has kept the same lawyer who has switched law firms, particularly where time records have not been kept. Who better to estimate the hours expended for the benefit of the client at the previous law firm than the very lawyer who provided that service?

- [59] A provision in a CFA which allows for a quantum meruit assessment of fees at the conclusion of the case, where the client has moved onto another law firm, allows the client access to counsel of their choice, while ensuring the competing law firm's are compensated on the basis that reflects the relative value of their services. In my view, this is the preferable approach as it is fair to both the client and the law firms. The client gets unimpeded access to counsel of his choice, and the law firms get a fair fee at the conclusion of the case.
- [60] This was the approach taken in *Holness supra*; however, in that case there was no equivalent of clause 6 requiring the payment of an hourly rate upon the client choosing the services of another law firm. This is made clear at para. 30 where the court states:
- [30] In my view, *Label, supra*, is distinguishable as the contract of HLG did not provide for the payment of an hourly rate upon their dismissal. Indeed, the contingency fee agreement of HLG provided that in the event they were dismissed, the client was to pay "a percentage of the applicable professional fees which reflect the proportion of contribution in the work completed by HLG".

The CFA here is opposite that in *Holness, supra*.

- [61] In *Nathanson, supra*, the BCCA referred to the "fair fee" analysis as a default position where there was no agreement to the contrary. At para. 95 the court states:
- [95] A so-called "fair fee", or one calculated on a quantum meruit basis, is the default fees position in a solicitor/client relationship in this Province, in the absence of an agreement to the contrary; in particular, in the absence of an agreement between the parties "that sets a fee rate that is based on an amount per unit of time spent by the lawyer" under s. 71(4)(f) of the Act.
- [62] The Court's reasons in *Nathanson supra*, arose in the context of a law firm paying itself a bonus on top of the hourly billings provided by the retainer agreement, which had no provision allowing for a bonus. Despite achieving, what the BCCA characterized as an "extraordinarily good result", the law firm's attempt to claim a bonus, in addition to the hourly fees provided by the retainer agreement, was rejected as the retainer agreement did not so provide. In the case at bar, there is no provision for a quantum meruit assessment in the CFA, clause 6 provides the contrary.
- [63] The law firm submits that the registrar's discretion is not limited by an agreement between the lawyer and the lawyer's client pursuant to s. 71(5) of the LPA; therefore, the registrar can simply ignore the CFA in the present case and assess what would be a fair fee in all the circumstances. The law firm cites *Mide-Wilson supra*, in support of this approach.

- [64] In my view, *Mide-Wilson supra*, does not stand for this proposition. Rather, *Mide-Wilson supra*, allows for the calculation of a fair fee, despite the provisions of the CFA, in those rare situations where the integrity of the profession would be brought into disrepute if the provisions of the CFA were enforced. This relief typically occurs at the behest of an unsophisticated client, not the very law firm which drafted the CFA.
- [65] The role of the registrar is to decide whether the CFA operates reasonably in context, and whether the fee provided by the agreement is reasonable and maintains the integrity of the profession. Within that analysis, the starting place is the agreement itself.
- [66] There is no provision for a quantum meruit assessment of the fees owed to the law firm on the termination of the CFA by the client. Neither is the CFA silent in this regard. It expressly provides for the immediate payment of the law firm's fees calculated on an hourly rate of 350. This provision does not benefit the client.
- [67] Further, it was Preszler, not the law firm, which assumed all the risk in the litigation once the law firm was reimbursed the 31,686.59 in disbursements. If the action was subsequently dismissed, or took an unexpected turn, it would be Preszler who would be out the monies for disbursements and fees. The law firm would have been reimbursed its disbursements, and arguably still be entitled to its hourly rate pursuant to clause 6 of the CFA.
- [68] Finally, the fee generated by the CFA is not in dispute. Both the client and the law firm agree the overall fee is fair and does not bring the profession into disrepute. The fee generated by the CFA in this case was not the equivalent of "a winning lottery ticket" as was characterized in *Mide-Wilson, supra*.
- [69] The real dispute herein arises from the law firm's sense of injustice in not having received what it believes is its fair share of the contingency fee. By the terms of clause 6, which it drafted and inserted into the CFA, the larger share of the fee would otherwise go to Preszler.
- [70] The law firm submits that the client did not abide by paragraph 6 as he did not pay the hourly amount immediately upon termination of the agreement. While this is correct, the law firm did not generate a bill in a timely fashion. The client encountered difficulty in getting the law firm to produce a bill based on an hourly rate, despite the existence of paragraph 6 of the CFA. Eventually, following a pre-hearing conference within the LPA review process, the law firm was ordered to produce a bill based upon an hourly rate, without prejudice to its right to argue a quantum meruit assessment ought to be applied instead of the hourly rate. The law firm produced an hourly bill on May 21, 2019.
- [71] Regretfully, the hourly bill did not itemize the hours spent to complete the various tasks listed, nor did it identify who performed the work. The bill was neither timely nor did it provide sufficient detail for the client to adequately assess its reasonableness. If the law firm had not delivered the bill as ordered, the registrar would not have jurisdiction to embark on a review, as this is a prerequisite pursuant to s. 69 of the LPA. In *Kelly v. McMillan and Harbottle & Co.*, 2003 BCSC 307 the court states at para. 43:

- [43] In the first instance, it is for the solicitor to value his or her services. This is done by means of a bill. Lawyers are not entitled to come to the Registrar, explain the work they have done, and then ask the Registrar to set a fee. The client is entitled to know the value that the solicitor has placed on the services rendered. Only with that information can the client determine whether to contest the bill and seek its review. After the bill has been delivered, either the client or solicitor can take out an appointment to review the bill. As noted, this is a practise which has been followed for almost 300 years.
- [72] In the circumstances arising, I find the law firm's CFA was terminated by the client, and clause 6 is enforceable insofar as the hourly rate is concerned. In my view, this does not bring the integrity of the legal profession into question. The law firm drafted and inserted clause 6 into the CFA for its sole benefit. The effect of the clause was to tether the client to the law firm by making it difficult for the client to vacate the contract by demanding immediate payment on an hourly basis.
- [73] The law firm has become ensnared in its own tether. It would be inappropriate to cut that tether in the circumstances arising, to the law firm's sole benefit. It would condone continued use of outdated contractual terms calling for immediate payment on termination. It would transfer all risk of the litigation to the subsequent law firm, allowing the prior firm advance reimbursement its disbursements, and the option of hourly fees if the lawsuit went awry, and a quantum meruit analysis if it went well. Finally, the terms of the CFA limit a client's access to counsel of their choice by creating a financial hurdle through the false belief that immediate payment is due.

Disposition

- [74] The law firm is entitled to fees based upon 45 hours of lawyer's time calculated at the rate of 350 per hour, and a further 70 hours of paralegal's time based upon an hourly rate of 100, plus applicable taxes. I am advised there is no dispute concerning disbursements. The law firm is entitled to the disbursements billed, with the exception of the 1,176.82 in disbursements contested by the client, and conceded by the law firm.
- [75] As the client has been successful, he is entitled to the costs of this review.
- [76] A certificate may be submitted through the registry for signature if required.

Registrar Nielsen

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