

CANADA / JUDGMENT

## Quaggin v. Berg Hart Cassels LLP

2018 BCSC 1130

COURT

Supreme Court of British Columbia

DECIDED

9 July 2018

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2018 BCSC 1130 Quaggin v. Berg Hart Cassels LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quaggin v. Berg Hart Cassels LLP,

2018 BCSC 1130

Date: 20180709

Docket: S151321

Registry: Vancouver

Between:

Jennifer Anne Quaggin also known as Jennifer Anne Gordon

Client

And

Berg Hart Cassels LLP also known as Hart Legal and Darren Hart

Solicitors

Before: Registrar Cameron

Reasons for Decision

Counsel for the Client:

L. Mackoff

J. Lord

Counsel for the Solicitors:

R. Margetts Q.C. (on October 23)

J. Vilvang Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 23, 24, 25, 2017

November 17, 2017

May 7, 8, 9, 10, 11, 2018

May 14, 15, 16, 17, 2018

June 11, 12, 13, 14, 15, 2018

June 21 and 22, 2018

Place and Date of Decision:

Vancouver, B.C.

July 9, 2018

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## INTRODUCTION

- [1] This proceeding was commenced by an Appointment filed by Jennifer Anne Quaggin (the "client") for the examination of the June 12, 2013 contingency fee agreement (the "CFA") made with Berg Hart Cassels LLP also known as Hart Legal and Darren Hart (the "solicitors"). The Appointment also sought a review of the bill delivered by the solicitors pursuant to the CFA.

- [2] I begin by observing that the majority of contingent fee agreements that are entered into between clients and their solicitors in B.C. are with respect to a civil cause of action for damages and, most often for claims arising from personal injury. In this instance, the CFA related to a matrimonial action involving the client and her husband for a division of their family property and for spousal support sought by the client. Such an agreement is not common in matrimonial litigation and there are statutory limitations on such agreements.
- [3] By design, contingency fee agreements are intended to increase access to justice and to allow litigants with limited means to retain counsel and bring claims for damage and loss they might otherwise not be able to pursue if they were faced with paying their lawyer on a more conventional and common hourly rate retainer.
- [4] A contingent fee agreement operates most effectively to improve access to justice when the claims being advanced are fraught with risk and will be expensive to pursue. The client only pays his lawyer if some recovery is made either by settlement or after trial. The lawyer will recover an agreed upon percentage of the settlement or judgment that will vary depending on the amount recovered and the stage of the proceeding when that recovery is made.
- [5] There remains some controversy about whether contingent fee agreements should be allowed at all. By its nature, the agreement gives the solicitor a "stake in the outcome" and it is thought by some that this may blur the objectivity of the solicitor in providing dispassionate and objective advice to the client.
- [6] Contingent fee agreements in matrimonial actions are not permitted in Ontario.
- [7] Gavin McKenzie in his text *Lawyers and Ethics: Professional Responsibility and Discipline*, (Toronto: Carswell, 1993) provides a policy reason for prohibiting contingent fee agreements in matrimonial matters being that the almost ever-present anxiety and emotion that accompanies these disputes will cloud the judgment of a client in fully understanding the meaning, consequences, and possible better alternatives to the contingent agreement.
- [8] In British Columbia, contingent fee agreements are permissible in matrimonial actions in limited circumstances. Contingent fee agreements generally are governed by the Legal Profession Act, S.B.C. 1998, c. 9 ("LPA") and also by the Law Society Rules (the "Rules").
- [9] The pertinent provisions in ss. 64-68 of the LPA and 8-1 of the Rules read as follows:

#### Part 8 -- Lawyers' Fees

##### Definitions and interpretation

##### 64 (1) In this Part:

"agreement" means a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement;

"bill" means a lawyer's written statement of fees, charges and disbursements;

"charges" includes taxes on fees and disbursements and interest on fees and disbursements;

"contingent fee agreement" means an agreement that provides that payment to the lawyer or law firm for services provided depends, at least in part, on the happening of an event;

"court" means the Supreme Court;

"person charged" includes a person who has agreed to pay for legal services, whether or not the services were provided on the person's behalf;

"registrar" means the registrar of the court.

- (2) Unless otherwise ordered by the court, this Part, except sections 65, 66 (1), 68, 77, 78 and 79 (1), (2), (3), (6) and (7), does not apply to a class proceeding within the meaning of the Class Proceedings Act.
- (3) This Part applies to a lawyer's bill or agreement even though the lawyer has ceased to be a member of the society, if the lawyer was a member when the legal services were provided.

### **Agreement for legal services**

65 (1) A lawyer or law firm may enter into an agreement with any other person, requiring payment for services provided or to be provided by the lawyer or law firm.

- (2) Subsection (1) applies despite any law or usage to the contrary.
- (3) A provision in an agreement that the lawyer is not liable for negligence, or that the lawyer is relieved from responsibility to which the lawyer would otherwise be subject as a lawyer, is void.
- (4) An agreement under this section may be signed on behalf of a lawyer or law firm by an authorized agent who is a practising lawyer.

### **Contingent fee agreement**

66 (1) Section 65 applies to contingent fee agreements.

- (2) The benchers may make rules respecting contingent fee agreements, including, but not limited to, rules that do any of the following:
  - (a) limit the amount that lawyers or law firms may charge for services provided under contingent fee agreements;
  - (b) regulate the form and content of contingent fee agreements;
  - (c) set conditions to be met by lawyers and law firms making contingent fee agreements.

- (3) Rules under subsection (2) apply only to contingent fee agreements made after the rules come into force and, if those rules are amended, the amendments apply only to contingent fee agreements made after the amendments come into force.
- (4) A contingent fee agreement that exceeds the limits established by the rules is void unless approved by the court under subsection (6).
- (5) If a contingent fee agreement is void under subsection (4), the lawyer may charge the fees that could have been charged had there been no contingent fee agreement, but only if the event that would have allowed payment under the void agreement occurs.
- (6) A lawyer may apply to the court for approval of a fee higher than the rule permits, only
  - (a) before entering into a contingent fee agreement, and
  - (b) after serving the client with at least 5 days' written notice.
- (7) The court may approve an application under subsection (6) if
  - (a) the lawyer and the client agree on the amount of the lawyer's proposed fee, and
  - (b) the court is satisfied that the proposed fee is reasonable.
- (8) The following rules apply to an application under subsection (6) to preserve solicitor client privilege:
  - (a) the hearing must be held in private;
  - (b) the style of proceeding must not disclose the identity of the lawyer or the client;
  - (c) if the lawyer or the client requests that the court records relating to the application be kept confidential,
    - (i) the records must be kept confidential, and
    - (ii) no person other than the lawyer or the client or a person authorized by either of them may search the records unless the court otherwise orders.
- (9) Despite subsection (8), reasons for judgment relating to an application under subsection (6) may be published if the names of the lawyer and client are not disclosed and any information that may identify the lawyer or the client is not disclosed.

#### Restrictions on contingent fee agreements

- 67 (1) This section does not apply to contingent fee agreements entered into before June 1, 1988.
- (2) A contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any portion of an amount awarded as costs in a proceeding or paid as costs in the settlement of a proceeding or an anticipated proceeding.

- (3) A contingent fee agreement for services relating to a child guardianship or custody matter, or a matter respecting parenting time of, contact with or access to a child, is void.
- (4) A contingent fee agreement for services relating to a matrimonial dispute is void unless approved by the court.
- (5) A lawyer may apply to the court for approval of a contingent fee agreement for services relating to a matrimonial dispute and section 66 (7) to (9) applies.

#### Examination of an agreement

68 (1) This section does not apply to agreements entered into before June 1, 1988.

- (2) A person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined.
- (3) An application under subsection (2) may only be made within 3 months after
  - (a) the agreement was made, or
  - (b) the termination of the solicitor client relationship.
- (4) Subject to subsection (3), a person may make an application under subsection (2) even if the person has made payment under the agreement.
- (5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.
- (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.
- (7) If an agreement is cancelled under subsection (6), a registrar
  - (a) may require the lawyer to prepare a bill for review, and
  - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
- (8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.
- (9) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the examination of an agreement.

#### Reasonable remuneration

8-1 (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,

- (a) the agreement is fair, and

- (b) the lawyer's remuneration provided for in the agreement is reasonable.
- (2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client
  - (a) does not exceed the remuneration provided for in the agreement, and
  - (b) is reasonable under the circumstances existing at the time the bill is prepared.
- [10] Sections 67(4) and 67(5) of the LPA require that the court first approve a proposed contingent fee agreement relating to a matrimonial dispute. That approval was obtained in this case by the solicitors and I will have more to say about the disclosure made by the solicitors in seeking that approval later in these reasons.
- [11] Section 68 provides the statutory framework for the examination of the agreement and subsection (6) allows for either cancellation or modification of the agreement if the registrar considers that the agreement is unfair or unreasonable at the time the agreement was entered into by the client and the solicitor.
- [12] This hearing was time consuming and the solicitors called the evidence of the three lawyers in the firm who, together, provided legal advice to the client during the retainer. A legal assistant also gave evidence. The client testified viva voce and she called the evidence of a chartered accountant as to the value of the settlement that was ultimately reached of her matrimonial claims. The client also relied upon the affidavit evidence of an Ontario solicitor who provided advice to her prior to the retainer of the solicitors, and her then treating psychiatrist as to her mental health. Neither the Ontario solicitor nor the treating psychiatrist was required for cross examination.
- [13] An expert opinion was also filed on behalf of the client from Lawrence Kahn, Q.C. an experienced family law practitioner. Mr. Kahn was not required for cross examination.
- [14] Almost all of the solicitor's file material was put into evidence and the witnesses gave extensive evidence as to the course of the retainer from its inception in March 2013 through to the settlement of the matrimonial litigation in early October 2013. At the time of the settlement, the solicitors valued the settlement as being worth \$5.1 million to the client. The solicitors sent an account to the client, in keeping with the CFA, for legal fees of \$1,005,000, net of the retainers paid by the client and not inclusive of taxes or disbursements.

## THE BACKGROUND AND THE INITIAL RETAINER

- [15] On March 1, 2013, the client contacted Krystle Gill, a junior associate with the solicitors. She had been referred to the solicitors by her Ontario counsel, Katie Skinner. The client provided Ms. Gill with some of the particulars of her marriage and the reasons for the separation from her husband.

- [16] The solicitors proposed, and the client agreed to a conventional hourly rate retainer. There was no discussion of any alternate billing arrangement or a contingent fee agreement. The retainer agreement and the accompanying general terms of service sent to the client on March 1, 2013 confirmed that the solicitors would take all steps necessary to advance her family law matter and, if a negotiated settlement was not possible, would prepare for and attend the trial of the action. The fees were to be "calculated using our hourly rates and depend on the actual time spent." The solicitors also committed to "keeping you fully informed of developments at our end. We will send you copies of all letters, court papers, and other documents."
- [17] One week later, the client sent the solicitors a detailed written account of her personal history and a description of the mental health challenges with which she had struggled for many years. Particulars were provided respecting the psychiatric treatment she had received and the impact her mental instability had upon the disintegration of her marriage.
- [18] What follows is a brief summary of the client's circumstances that I find were well known by the solicitors soon after their retainer commenced.
- [19] The client had excelled at university and had established a very successful career in the human resources field after moving to Vancouver in 2001 to marry her husband. Just prior to entering into the marriage, the parties executed a marriage agreement that provided that the assets and liabilities that each brought into the marriage were to be excluded property and that assets accumulated during the marriage were to be divided equally between them upon a marriage breakdown. They did not have any children together although her husband had two adult children from a prior marriage. This was the client's first marriage.
- [20] The client was a high income earner and held responsible positions in the companies for which she worked. Her husband was also very successful in his own right and, as disclosed by him in the matrimonial action, accumulated assets of more than \$12 million including what he brought into the marriage.
- [21] Within a short time after moving to Vancouver, the client began to suffer from depression and, over the next ten years, her symptoms became much worse. By 2005, she had become too mentally ill to continue working. Her mental health problems deepened over the next five years. She saw ghosts, felt that she was on a mission from God, and that she was able to fly. She was convinced that there was a curse over her and her husband that she had to break. This led to her purchasing potions, spells and amulets from charlatans. She began engaging in compulsive and irrational spending. After spending all of her own funds she began taking funds from her husband's investment accounts and line of credit. She created a fictional investment advisor from her husband's financial institution that provided cover for the substantial funds she diverted. She also purchased large amounts of food that she hoarded in the family home and purchased a tremendous volume of clothing that was largely unused and stored in lockers in the original packaging.

- [22] Her spending and cover-up were eventually discovered by her husband who had hired investigators to locate the missing funds. A report was generated which detailed the spending that was estimated to be in the range of \$4 million and found that there was no doubt she had been exploited and that she genuinely believed that she was cursed.
- [23] Following the discovery of these facts by her husband, the client attempted suicide and was involuntarily committed to the VGH psychiatric unit in August of 2011. A short time after her release, she returned to live with her parents in Toronto, at first temporarily and then, in early 2012, permanently. Her marriage was over.
- [24] During 2012, she resided in Toronto with her parents, pawning or selling the few items of value she had in her possession, and otherwise relying on her parents to house her and to provide her with funds.
- [25] After residing in Ontario long enough to commence a divorce action in that province, in 2012 she retained Ms. Skinner to bring a claim for support and division of family property.
- [26] She discussed with and then instructed Ms. Skinner to bring an immediate application for interim spousal support to provide her with some financial stability which she believed would have a salutary effect on her still fragile mental health.
- [27] Shortly after commencing the Ontario action, she learned that her husband had already filed a prior in-time action in B.C. As a result, Ms. Skinner referred her to her former classmate, Ms. Gill, at the solicitor's firm.

### THE FIRST THREE MONTHS OF THE RETAINER

- [28] From the outset of the retainer, and as a continuing theme the client's primary need for immediate spousal support was made known to the solicitors. The client had no source of income and was under the care of her psychiatrist who had determined she was unable to work and he could not say when that might change.
- [29] On March 22, 2013, the solicitors filed a Response to the Notice of Family Claim together with a Counterclaim that sought "permanent periodic, or lump sum, support, including retroactive spousal support."
- [30] In an email to the client dated April 8, 2013, Ms. Gill advised her that it was possible to apply to waive the requirement of a Judicial Case Conference ("JCC") and proceed directly to a support application. The client expressed some relief when she learned of this and encouraged the solicitors to press ahead to obtain support for her.
- [31] The client's parents had assisted her in paying a \$5,000 retainer to the solicitors. The solicitors requested a second retainer of \$10,000 for the purpose of obtaining interim spousal support. This retainer was also provided by the client's parents. It was Ms. Gill's stated goal to have interim spousal support in place by May 15, 2013.

- [32] By April 26, 2013, the client was reviewing her draft affidavit in support of the spousal support application and her psychiatrist had been contacted to obtain his evidence.
- [33] On April 29, 2013, Ms. Gill wrote to opposing counsel to inquire about her availability to hear an application to waive the JCC and proceed directly to a support application.
- [34] On April 30, 2013 before departing on vacation, Ms. Gill sent an email to the senior member of the law firm, Darren Hart, outlining what needed to be done in order to have the application for interim spousal support (and waiver of JCC) ready to be heard.
- [35] By this time, Mr. Hart was becoming more actively involved and he advised the client that he would take the lead counsel role on her matter thereafter.
- [36] In early May 2013, opposing counsel offered a without prejudice payment of \$8,000 to the client as an advance on support and Mr. Hart accepted that sum in exchange for providing a report from the client's psychiatrist as to her current mental health. As a result, the application for support was not immediately set for hearing.
- [37] The JCC was set for June 27, 2013 and Mr. Hart advised the client that if, thereafter, interim spousal support was not in place by agreement then the application would be brought immediately for support.
- [38] The research and analysis carried out by the solicitors confirmed that an award of \$13,000 to \$20,000 was the likely outcome if the support application went forward. Opposing counsel only intended to argue quantum and not entitlement at any contested application.
- [39] By mid May 2013, the F8 financial statement from the client's husband had been delivered confirming his net worth to be \$12.2 million and Ms. Gill had prepared a draft F8 for the client confirming that she had no immediate source of income and her assets amounted to approximately \$2.195 million made up primarily of her interest in the matrimonial home.
- [40] The course of this retainer took a dramatic shift beginning on May 24, 2013. On that date, Ms. Gill provided an email to Mr. Hart advising that the LPA allowed for contingency fee agreements in some matrimonial matters subject to prior court approval.
- [41] The evidence was not entirely clear why the solicitors turned their minds to a contingent fee retainer on this case at this time. Both Ms. Gill and Mr. Hart gave evidence that for some time the law firm was looking for creative solutions for family law clients to manage their litigation fees and expenses and they wished to "evolve away from hourly rate billing."
- [42] Another rationale for this rather sudden turn of events suggests itself. In a June 4, 2013 email sent by Mr. Hart to his legal assistant, and copied to the other lawyers in the firm active on the client's behalf, following the client's provisional agreement to a CFA, he said in part:

Please get the original Contingency agreement back from the client signed ASAP (she has it). And work with Krystle and Eric to put an application together with supporting affidavit that you can swear to have the agreement approved by the court-again, ASAP.

Thank you. This is a big one. Krystle did a great job to land this client!!!"

[43] The evidence is clear that it was at the sole initiative of the solicitors and not in response to any request from the client that a contingent fee agreement was proposed. It is also clear that at this time there was no immediate need for a much larger retainer to be provided by the client at least prior to a determination of the amount of support she would recover by way of agreement or court order.

[44] In my view this proposed change in the retainer arrangements should be seen more to be of benefit to the law firm than the client.

## THE CONTINGENCY AGREEMENT

[45] On May 27, 2013, Mr. Hart and Ms. Gill called the client to discuss the prospect of converting her retainer from hourly rate billing to a contingent fee arrangement.

[46] Both of the lawyers and the client testified about this phone call and they were all carefully cross examined. The documentary record of this phone call is inexplicably sparse for a matter of such significance. There was no letter or email sent to the client to confirm the advice and analysis the solicitors gave about the merits of her claim for support and a division of family property or the anticipated outcome whether by settlement or after a trial. Nor was there any record of the explanation given to the client to consider this significant change being made to the retainer arrangements before her entitlement for spousal support had been determined either by agreement at the JCC or after the court application that was by then set for July 26, 2013.

[47] The solicitor's file notes reflect the client was advised that her case had areas of risk and complexity and that her husband would argue that her share of the family property accumulated during the marriage should be reduced to reflect her spending as a result of her mental illness, and to account for the value of the growth in assets he brought into the marriage. She was also advised that the litigation could become very acrimonious and take a long time and considerable expense to resolve.

[48] On the other hand, the notes confirm that the client was advised that she had a "solid claim for between \$1 million and \$4 million." In his evidence, Mr. Hart was consistent that, once the husband provided his financial disclosure, he considered the client had claim to property worth between \$3 million and \$6 million and that "her worst day in court would be a recovery of \$3 million."

[49] The client testified that she understood from the conversation that she might have to spend large sums of money over a number of years and, as a result, could be left with little or nothing to show for it. She was very anxious and worried about her future and felt she could

not look to her parents to continue to fund the litigation. She was still desperate for interim spousal support to stabilize herself and be able to live independently again. In this context, she said she felt she should agree to a CFA to ensure that her case would go forward as she was resolved not to settle for less than what was fair.

- [50] In an exchange of emails following this call, the client asked about the method by which the fees would be calculated, and the solicitors confirmed that that the percentage that would apply would be 20% of the recovery if the matter settled eleven days before trial or earlier and 25% of the recovery if the matter settled within eleven days of trial or the matter went through trial. She also said she planned to discuss the proposed arrangement with her parents as they may wish to continue with the existing hourly rate retainer and she was clear that it was her wish to do so. She had expected, based upon the advice from the solicitors from the outset, that her interim support would have been successfully negotiated or obtained by court order by this time and, if so, she would have continued to fund the litigation from her monthly support payments. As that had not come to pass, she felt she had to look at the proposed alternative of a CFA.
- [51] On June 4, 2013, Mr. Hart confirmed that the solicitors would continue with the hourly rate retainer but, with the current work in progress, they would require a further \$25,000 retainer by the end of the week. Mr. Hart also advised that he would be seeking \$10,000-\$20,000 in interim spousal support at the upcoming JCC and, if support was unresolved after the JCC, an application would be brought promptly.
- [52] In my view, the request for another \$25,000 retainer does not reflect well on the solicitors when they had not met their own stated plan and the client's expectations to have spousal support in place by this time.
- [53] As matters transpired, the client did not speak to her parents about providing the further retainer of \$25,000 out of concern for their own needs and so as not to worry them further. With her support not yet in place she instead chose to accept the terms of the CFA.
- [54] The CFA sent to the client on May 28, 2013 and signed by her on June 12, 2013 reads as follows:

AGREEMENT made this 12th day of May June 2013.

BETWEEN:

Jennifer Gordon of

162 Inglewood Drive

Toronto, Ontario M4T 1H7

(hereinafter called the "Client")

OF THE FIRST PART

AND:

Darren Hart of

HART LEGAL

300- 1001 Wharf Street

Victoria, BC V8W 1T6

(hereinafter called "Darren")

OF THE SECOND PART

WHEREAS:

A. The Client has a right of action arising from a family matter;

B. The parties wish to agree on the terms upon which fees and disbursements incurred in prosecuting the action to judgment or settlement will be billed and paid;

IN CONSIDERATION of the premises and the following conditions, the parties agree as follows:

1. Darren agrees to commence an action in accordance with the instructions of the Client in the Supreme Court of British Columbia.
2. The Client agrees that Darren may incur reasonable disbursements on the Client's behalf in Darren's discretion. The Client acknowledges that disbursements include expenses relating to obtaining transcripts, filing fees, photocopies, long distance charges, and other related expenses.
3. The parties hereto agree that the amount of fees shall be:
  - a. If the action is settled 11 days before trial or earlier, the fees will be 20% of the total settlement; and
  - b. If the action is settled within 10 days of the trial, or judgment is obtained at trial, the fees will be 25% of the total judgment or settlement.
4. This does not include fees for commencing or responding to any appeal from the trial judgment, which will be separately negotiated.
5. This Agreement is conditional upon court approval.
6. The Client previously retained Hart Legal in relation to her family law matter and paid fees on an hourly rate basis. The fees that the Client paid to Hart Legal prior to the signing of this Agreement will be deducted from fees paid to Darren from the total settlement or judgment under this Agreement.

7. The Client agrees that the fees, disbursements, and applicable taxes will be deducted from the proceeds of any settlement on damages, breach of contract, costs; or judgment. In the event that interim payments against final settlement or judgment are received, the Client agrees that interim fees will be deducted from such payments.
8. Any court costs recovered will be paid to the Client upon receipt by Darren. The Client agrees that any fees for services related to attendances necessary to collect court costs after a trial or settlement will be based on the hourly rate then charged by Darren.
9. The Client understands and agrees that the fee payable to Darren, and taxable disbursements, will be subject to applicable taxes and the Client authorizes Darren to withhold the amount of taxes from the funds recovered in respect of the Client's claim.
10. If at any time, prior to the trial, it is Darren's opinion that there is insufficient evidence to justify pursuing the action further, Darren has the right to cease to represent the client, and to apply to be removed as counsel of record, in such event, the Client will only be liable to pay actual disbursements incurred.
11. If, for any reason, the Client instructs Darren to discontinue or not proceed with the action or refuses to follow Darren's advice, or requests a change of solicitor, then the Client will pay fees at the hourly rate then charged by Darren for services rendered up to the date of discontinuance or change of solicitors.
12. If a settlement proposal is made by the other side and is recommended by Darren, but is rejected by the Client, then the Client will pay to Darren the percentage fees based on that proposal, as provided in paragraph 3 herein, and thereafter will pay fees at the rate then charged by Darren.
13. Attached to this fee agreement is a copy of our General Terms of Service which outlines our firm's policies and general procedures. Please note part 2 of the General Terms of Service may not apply as you have retained our firm on a contingency basis as noted above in paragraph 3.
14. The Client acknowledges that she may have the terms of this contract reviewed by another solicitor for the purpose of obtaining the independent legal advice as to the provisions thereof.
15. The Client acknowledges and understands that Darren has made no guarantee regarding the successful determination of the claim, and all representations relative to the claim are matters of professional opinion only, based on the Client's instructions.
16. The Client further acknowledges and understands that if the claim is unsuccessful in court, taxable court costs and disbursements may be awarded to the other side and against the Client, and that these are separate from any and all obligations under this agreement.

17. The Client acknowledges that she may apply to have the reasonableness of this contract reviewed by a Judge of the Supreme Court of British Columbia pursuant to sections 66, 67, 68 of the Legal Profession Act which read as follows:

Contingent fee agreement

66 (1) Section 65 applies to contingent fee agreements.

- (2) The benchers may make rules respecting contingent fee agreements, including, but not limited to, rules that do any of the following:
- (a) limit the amount that lawyers may charge for services provided under contingent fee agreements;
  - (b) regulate the form and content of contingent fee agreements;
  - (c) set conditions to be met by lawyers and law firms making contingent fee agreements.
- (3) Rules under subsection (2) apply only to contingent fee agreements made after the rules come into force and, if those rules are amended, the amendments apply only to contingent fee agreements made after the amendments come into force.
- (4) A contingent fee agreement that exceeds the limits established by the rules is void unless approved by the court under subsection (6).
- (5) If a contingent fee agreement is void under subsection (4), the lawyer may charge the fees that could have been charged had there been no contingent fee agreement, but only if the event that would have allowed payment under the void agreement occurs.
- (6) A lawyer may apply to the court for approval of a fee higher than the rule permits, only
- (a) before entering into a contingent fee agreement, and
  - (b) after serving the client with at least 5 days' written notice.
- (7) The court may approve an application under subsection (6) if
- (a) the lawyer and the client agree on the amount of the lawyer's proposed fee, and
  - (b) the court is satisfied that the proposed fee is reasonable.
- (8) The following rules apply to an application under subsection (6) to preserve solicitor client privilege:
- (a) the hearing must be held in private;
  - (b) the style of cause must not disclose the identity of the lawyer or the client;
  - (c) if the lawyer or the client requests that the court records relating to the application be kept confidential,
  - (i) the records must be kept confidential, and

(ii) no person other than the lawyer or the client or a person authorized by either of them may search the records unless the court otherwise orders.

- (9) Despite subsection (8), reasons for judgment relating to an application under subsection (6) may be published if the names of the lawyer and client are not disclosed and any information that may identify the lawyer or the client is not disclosed.

#### Restrictions on contingent fee agreements

67 (1) This section does not apply to contingent fee agreements entered into before June 1, 1988.

- (2) A contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any portion of an amount awarded as costs in a proceeding or paid as costs in the settlement of a proceeding or an anticipated proceeding.
- (3) A contingent fee agreement for services relating to a child custody or access matter is void.
- (4) A contingent fee agreement for services relating to a matrimonial dispute is void unless approved by the court.
- (5) A lawyer may apply to the court for approval of a contingent fee agreement for services relating to a matrimonial dispute and section 66 (7) to (9) applies.

#### Examination of an agreement

68 (1) This section does not apply to agreements entered into before June 1, 1988.

- (2) A person who has entered into an agreement with a lawyer may apply to the registrar to have the agreement examined.
- (3) An application under subsection (2) may only be made within 3 months after
- (a) the agreement was made, or
- (b) the termination of the solicitor client relationship.
- (4) Subject to subsection (3), a person may make an application under subsection (2) even if the person has made payment under the agreement.
- (5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.
- (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement

- (7) If an agreement is cancelled under subsection (6), a registrar
  - (a) may require the lawyer to prepare a bill for review, and
  - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
- (8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.
- (9) The procedure under the Rules of Court for the assessment of costs, review of bills and examination of agreements applies to the examination of an agreement."

The Client acknowledges that she has read and understood the following notices set out below:

The Rules of the Law Society of British Columbia provide that, subject to the Supreme Court approving a higher fee, the maximum compensation that a lawyer is entitled to charge under a contingency fee agreement in respect of a claim of this nature 40% of the total recovered. Fees charged by different lawyers vary.

I have the right, within 90 days of the date of this agreement, or of the date this agreement is terminated by me or the law firm, to apply to a district registrar of the Supreme Court of British Columbia to have this agreement reviewed, whether or not I have paid the law firm's fees.

When the law firm delivers its account for fees, I have the right under Section 70 of the Legal Profession Act to have the account reviewed by a registrar of the Supreme Court of British Columbia.

AGREED between the parties the day and year first above written.

[signatures of the parties omitted].

[55] The client met with Ms. Skinner to sign the CFA and Ms. Skinner did not provide any advice about its terms. In her affidavit, Ms. Skinner confirmed that a CFA is not permissible in family law matters in Ontario and she did not give any advice about the law in B.C. either as it related to the client's case or at all about the terms of the CFA.

[56] The client also provided her own Affidavit in support of the application for approval of the CFA.

## COURT APPROVAL OF THE CFA

[57] On June 25, 2013, the court heard a without notice petition brought on behalf of the client for approval of the CFA pursuant to s. 67(4) of the LPA. Approval was granted.

[58] While it is not strictly necessary for my examination of the CFA pursuant to s. 68 of the LPA, having heard all of the evidence respecting the formulation of the CFA, and having reviewed the evidence that was put before the court for approval of the CFA, I must make observations about the sufficiency of that evidence.

- [59] The law is well settled that, in any application made without notice and seeking the court's exercise of discretion, an applicant must show the utmost good faith and make full and complete disclosure of all material facts. A failure to do so will, in itself, be grounds for setting aside the order.
- [60] The disclosure requirement in without notice applications is premised on the solicitor's duty of "utmost good faith" to the Court and the legal obligation to provide full and frank disclosure of all material facts. It is only on the basis of full and frank disclosure that the Court is able to make a proper assessment.
- [61] In this case, the application for approval of the CFA was spoken to by a junior lawyer from the solicitors' firm. There is no suggestion that the lawyer was anything but forthright in his submissions to the court nor is there any criticism to be made of his submissions. However, his lack of command of the material facts and circumstances leading to the CFA was such that he was unable to accurately answer the court's crucial question.
- [62] The chambers judge asked if the client had received independent legal advice as to the terms of the CFA and counsel answered in the affirmative, assuming that Ms. Skinner had provided that advice. That assumption was incorrect. From the transcript of the proceedings, it is apparent that this assurance was of importance to the judge in approving the CFA.
- [63] Additionally, the client's affidavit in support of the CFA included her evidence that a contingent fee agreement was the only way she would be able to afford a lawyer to assist her. In my view, in ensuring that full and frank disclosure was being made, the solicitors ought to have ensured the client made reference to the prospect of the existing hourly rate retainer being continued, as was the client's wish, if she obtained the expected result with her pending application for interim spousal support.
- [64] The client also testified that despite her long standing mental health issues, she felt emotionally capable of understanding the meaning and consequences of a contingent fee agreement.
- [65] Importantly, however, the court was not provided with any evidence from the client's treating psychiatrist regarding his the current diagnosis. The client's psychiatrist had diagnosed her as suffering with bipolar disorder with the possibility of drug-induced mania. He also believed that her increased stress and anxiety, which could be due to revisiting past events during the litigation, had resulted in her condition becoming increasingly unstable. It is beyond question that the solicitors were aware of this evidence and considered it to be probative as this affidavit formed part of the client's brief for the JCC.
- [66] One of the considerations that the court must undertake in assessing whether or not the CFA is reasonable, and should be approved, is the risk associated with the litigation. In her affidavit, the client testified that her lawyer explained that the action against her husband involved considerable risk and that she had been advised of her potential range of recovery. The court was not specifically apprised of Mr. Hart's strongly held view that the expected

outcome for the client was the recovery of at least \$3 million inclusive of support based upon the marriage agreement.

- [67] Whether or not this additional disclosure would have caused the chambers judge to decline to approve the proposed CFA is impossible to discern. However, the surrounding circumstances that were not disclosed to the court but that became apparent in this hearing must bear upon my decision as to the fairness and reasonableness of the CFA.

WAS THE CFA FAIR AND REASONABLE AT THE TIME IT WAS ENTERED INTO?

- [68] Counsel for the solicitors submitted that the client made a free and fully informed decision to convert their retainer from an hourly rate basis to a contingent fee arrangement and that, based upon her business experience and acumen, and her recovering mental health she was equipped to make a sound decision without requiring any more advice than the solicitors provided to her. Counsel also submitted that the client received what she needed from the CFA being the financial peace of mind to know she could see the matrimonial action through to completion without the worry of ongoing interim legal accounts over a potentially long period of time.
- [69] Counsel for the client submitted that the CFA was both unfair and unreasonable and that the solicitors took advantage of a vulnerable and needy client and orchestrated the circumstances that made the CFA look attractive to the client when it was anything but that.
- [70] Counsel agreed on the legal principles to be applied to the analysis of the CFA pursuant to s. 68 of the LPA which were most recently restated by the Court of Appeal in *Mide-Wilson v. Hungerford Tomy Lawrenson and Nichols*, 2013 BCCA 559, as follows:
- [21] The Registrar began her analysis of the issues before her with a brief reference to *Anderson v. Elliott* (1998) 60 B.C.L.R. (3d) 131 (S.C.), in which Sigurdson J. had described a contingent fee agreement as a "type of joint venture", albeit not one between equals. The Registrar noted that such agreements have been permitted in this province only since 1969, in order to "allow persons who might not otherwise have the financial means to hire counsel to have access to justice." (Paras. 85-6.)
- [22] The Registrar observed that clients in Ms. Mide-Wilson's position are protected not only by the common law but also by what is now s. 68 of the Act, and quoted from *Commonwealth Investors Syndicate Ltd. v. Laxton* (1990) 50 B.C.L.R. (2d) 186 (C.A.), known as "Commonwealth No. 1", in which this court had described the considerations relevant to "fairness" and "reasonableness" respectively, under what was then s. 99(2) of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26:

The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents. The inquiry would include whether, at the time the contract was entered into, there was any lack of capacity on the part of the client, whether there was any undue influence exercised or unfair advantage taken by the solicitor, whether any mistake was made, or whether any other flaw arose in the formation of the contract which would indicate that

the client did not understand and appreciate its content. The onus would be upon the solicitor to satisfy the foregoing requirements of the inquiry. Should any of those be found, the contract would not be "fair" in the sense of the statute and *Re Stuart*. The court would declare the contract cancelled, or would modify it, or the bill could be remitted for taxation.

The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered, and each factor may be the subject of professional evidence to assist the judge in determining the reasonableness of the fee in the particular circumstances. [At 198-99.]

[23] In *Randall & Co. v. Hope* (1996) 13 E.T.R. (2d) 257 (B.C.S.C.), Levine J. (as she then was) confirmed that the "two-step inquiry" approved in *Commonwealth No. 1* continued to apply under s. 68(5) of the present Act and that as a result of statutory changes (about which more will be said below) since *Commonwealth No. 1* was decided, both steps of the inquiry are concerned with the circumstances existing at the time the contract in question was entered into. In her words:

...The only change in the legislation from the Barristers and Solicitors Act [R.S.B.C. 1979, c. 26] to the Legal Profession Act [S.B.C. 1987, c. 25] is with respect to the time at which the reasonableness of the agreement is to be determined. Both fairness and reasonableness are to be determined under the circumstances existing at the time the contract was entered into. This may change some of the questions asked, but not the matters to be determined: fairness still involves the mode of obtaining the contract and whether the client understood and appreciated its content, and reasonableness still involves the amount of the fee. [At para. 36.]

Counsel in the case at bar did not challenge the assumption that the parameters confirmed in *Commonwealth No. 1* and *Randall* remain good law.

[24] The Registrar also noted Rule 8-1 of the Law Society of British Columbia Rules, which provides:

- (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,
  - a) the agreement is fair, and
  - b) the lawyer's remuneration provided for in the agreement is reasonable.
- (2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client
  - a) does not exceed the remuneration provided for in the agreement, and
  - b) is reasonable under the circumstances existing at the time the bill is prepared.

**FAIRNESS**

- [71] Considering first the fairness of the CFA, I conclude that if the solicitors had carried out their clear instructions to apply in a timely way for interim spousal support the likely outcome would have been an award to the client sufficient to allow her to fund the litigation on the existing retainer arrangement. The client was not shaken in her evidence that she would have continued the hourly rate retainer if she had a steady stream of income that would have allowed her to do so. By delaying the bringing of the application, the solicitors needlessly exacerbated the client's financial strain and worry. If the outcome of the application for support had not been as favourable as the solicitors' forecast, that would perhaps have been the proper time to consider the CFA.
- [72] For a proposed CFA to be properly understood and considered by a client he or she must be clearly advised by the solicitor of all of the information necessary to make a considered decision. That includes the merits of the case, the likely range of recovery, the risks of an adverse result, the prospects for a negotiated settlement, and some estimate of the legal expense to see the case through to its conclusion. In this case, the solicitors failed to deliver all of this requisite information at the time the CFA was proposed to the client.
- [73] To effectively impart all of this information to a client it would be expected that there would be one or more meetings face to face between lawyer and client. For reasons that were not satisfactorily explained, in this case the solicitors never took steps to arrange to meet with the client at any time up to obtaining court approval of the CFA. In fact, the solicitors never met with the client before negotiating a settlement of her claims in October 2013.
- [74] If the solicitor does not meet with the client then on all important matters, of which the CFA is certainly one, comprehensive written advice must take its place. Unfortunately, in this case, the client only had a telephone consultation with the solicitors about the CFA and while I find she understood its terms, I also find she was left confused about the likely outcome of her case. She testified she understood she might be left with very little if her case went through a trial and, while that was not what the solicitors expected the outcome to be by virtue of their failure to clearly record their advice, they bear responsibility for this confusion.
- [75] There is no absolute requirement, as a matter of law, that for a contingent fee agreement to be upheld the client must have taken independent legal advice. Nonetheless, a prudent solicitor will recommend that the client obtain independent legal advice.
- [76] However, in this case, given the client's continuing mental health struggle and her impecuniosity, both of which were well known to the solicitors, and the fact that the solicitors were proposing a very significant change to the existing retainer arrangements, I conclude it was essential that the client be advised to seek independent advice. She may not have appreciated what was objectively in her own best interests and the advice of an independent solicitor would ensure that she was not making an ill-considered choice.

- [77] In his submissions, counsel for the solicitors conceded that, while the solicitors did not make that recommendation, they nonetheless had a reasonable expectation that Ms. Skinner would provide that independent advice to the client.
- [78] In my view, that expectation was not well founded for two reasons. First, Ms. Skinner was not practising in a jurisdiction where a CFA could be entered into on a family law matter. She therefore did not have the necessary experience or perspective to evaluate the CFA and fully answer questions that might be posed by a client. Second, the solicitors did not provide the necessary analysis of the merits of the client's case in writing to allow any solicitor who might be consulted to provide meaningful independent advice.
- [79] It is also to be remembered that the chambers judge who approved the CFA thought that the provision of independent legal advice was an important factor to be considered in the approval process.
- [80] For all of these reasons and in all the circumstances existing when the CFA was agreed to, I am satisfied that the CFA was not fair to the client.

## REASONABLENESS

- [81] This inquiry focuses on the amount of the fee provided for in the CFA taking into account the risks of no or a very limited recovery thereby making the litigation perilous for both the client and the lawyer.
- [82] In this case, the solicitors had all the necessary information to provide an opinion to the client on the merits of her claims in advance of her signing the CFA. They did not do so in writing.
- [83] The solicitors understood that the parties would be dividing as much as \$12 million in assets they accumulated during their marriage, less an adjustment for assets brought into the marriage and any reapportionment that might be made for the client's spending. Working through these variables as they did, the solicitors concluded that the client should expect to receive no less than \$3 million if the case went to trial.
- [84] While this of course could not form the basis of any promise or guarantee to the client it would be a very important consideration for her in deciding whether or not to enter into a CFA that provided for 20% of a settlement amount to be paid to the solicitors.
- [85] Because the client was unclear about what her prospects were, she could not make a fully informed decision about her fee arrangement with the solicitors.

- [86] What was also missing was an objective estimate from the solicitors of the legal fees and disbursements they expected to incur to take the case forward up to and including a trial. All that was provided to the client was a recounting of a recent hotly contested family case that the solicitors took to trial that cost \$650,000 in fees and disbursements. Mentioning that case, without putting it into the context of the likely course of the client's litigation, would not provide the information that the client needed as part of her evaluation.
- [87] On all of the evidence, I conclude that this litigation did not carry with it any measurable risk to the client not making a substantial recovery in the range of \$3 to \$6 million and, as such, the CFA cannot be viewed objectively as being reasonable from her perspective.

## THE OUTCOME

- [88] I conclude that the CFA should be cancelled as not being fair or reasonable when it was entered into, given the then existing circumstances.
- [89] Having reached this conclusion, it is not necessary for me to consider whether the total fee charged to the client under the CFA was reasonable under the circumstances existing at the time the bill was prepared although there was considerable evidence led about the course the litigation took after the CFA was entered into in June 2013 and until the matter settled some three plus months later in October 2013.
- [90] On the basis of my conclusion, I invoke s. 68(7) of the LPA which provides:
- 68 (7) If an agreement is cancelled under subsection (6), a registrar
- (a) may require the lawyer to prepare a bill for review, and
  - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
- [91] If the parties are unable to agree on the amount of the solicitor's new bill, they proposed, and I accepted, that, rather than attending for further oral argument, they would provide written submissions for my review of the bill applying s. 71 of the LPA.
- [92] The parties have committed to a timely exchange of written submissions.
- [93] For the proceeding to date, the client is awarded her costs and disbursements at Scale B.
- "Registrar Cameron"

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