
CANADA / JUDGMENT

Sagert v. Cascade Law Corporation

2020 BCSC 484

COURT

Supreme Court of British Columbia

DECIDED

31 March 2020

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2020 BCSC 484 Sagert v. Cascade Law Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sagert v. Cascade Law Corporation,

2020 BCSC 484

Date: 20200331

Docket: S1914318

Registry: Vancouver

Between:

Michelle Sagert

Petitioner

And

Cascade Law Corporation, Marco Cedrone

and Michelle Cedrone

Respondents

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Petitioner:

R.L. Wishart

Counsel for the Respondents:

B. Vickers

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 31, 2020

- [1] The petitioner used to practice law as an associate with the respondent, Cascade Law Corporation. The individual respondents are the principals of Cascade Law Corporation.
- [2] In November 2019, the petitioner's employment with the law firm ended. While in the law firm's employ, she worked on a large volume of personal injury files. Around the time of her departure, she sent letters to 120 of the law firm's personal injury clients advising of her departure from the law firm. The letters stated that she was opening up a new law firm, and that each client had the choice to "remain" with the petitioner or alternatively have the file "go to" the law firm.
- [3] Each letter provided a check box for the client to indicate a decision. Each letter was signed by the petitioner but not by the law firm. Some 58 clients have elected to be represented by the petitioner.
- [4] The law firm had previously incurred disbursements for the 58 clients who have elected to go with the petitioner. Some of these are in trifling amounts while others are more substantial. At issue on this application is whether the disbursements must be paid as a condition of the law firm releasing possession of the files.
- [5] Because there is other related litigation between these parties, and because it is not material to the issues on this application, I will make no comment about the propriety of the various communications and in particular the form of the letter.

The issue

- [6] The question to be decided on this petition is whether the law firm should be compelled to deliver copies of the 58 files for the clients who have chosen to retain the petitioner to prosecute their claims, and if so, on what terms.

Positions of the parties

- [7] The law firm says it has a possessory lien over the files and is entitled to maintain possession until the disbursement accounts are paid.

[8] The petitioner's arguments can be broken down into two categories:

- a) the wording of the retainer agreement is such that the disbursement account is not payable and as such, the law firm is not entitled to retain the files to secure payment of the disbursement accounts; and
- b) even if the disbursement accounts are payable, the court has the discretion to order security in lieu of payment and should do so.

The retainer agreement

[9] The petitioner argues that based upon the wording of the law firm's standard retainer letter, the law firm is not entitled to require payment of disbursements until the file concludes.

[10] The retainer letter provides as follows:

I/WE UNDERSTAND THAT either party may terminate this contract. If Cascade Law Corporation terminates the contract, no legal fees are payable. If I/we terminate the contract, I/we agree to pay Cascade Law Corporation's account rendered on the basis of services provided at the rate of \$400.00 per hour, plus disbursements incurred.

[11] The petitioner says the wording of the paragraph does not provide for payment forthwith, which can be contrasted with two other circumstances contemplated in the retainer letter that do so provide. These paragraphs are as follows:

IN THE EVENT THAT a settlement proposal is made to resolve my/our claim, which in Cascade Law Corporation's opinion should be accepted, but I/we reject it, Cascade Law Corporation may continue to represent me/us and I/we shall be liable to pay Cascade Law Corporation forthwith the legal fees calculated on the above schedule on the amount offered for settlement as if I/we had in fact accepted the settlement offer and recovered that sum and shall pay for Cascade Law Corporation's legal services rendered thereafter at the rate of \$400.00 per hour, plus disbursements incurred.

...

IF AT ANY TIME your firm advises me/us that in the opinion of the firm this action ought not to be continued further, I/we am/are at liberty to remove this file to the conduct of any solicitor of my/our choice, upon payment by me/us of disbursements incurred to date of removal and upon filing a Notice of Change of Solicitor or Notice of Intention to Act in Person.

[12] The petitioner says that the files should be delivered to her on the conditions she proposes and says the disbursements do not have to be paid now. She seeks an order requiring the law firm to provide her with a complete copy of each of the files, conditional upon the grant of appropriate security pursuant to ss. 78(1) and 78(2) of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA]. The statutory provisions provide as follows:

78 (1) If a client changes lawyers or begins acting on his or her own behalf, the client or the new lawyer may apply to the court for an order directing that the client's former lawyer deliver the client's records to another lawyer nominated by the client or to the client, as the case may be.

(2) If the court makes an order under subsection (1), the court may

(a) make the direction conditional on the client

(i) paying all amounts due to the client's former lawyer from the client, or

(ii) giving security for the payment of the lawyer's claim in an amount and manner satisfactory to the court, and

(b) order a review by the registrar.

[13] As for the security proposed by the petitioner, in her petition she proposes to acknowledge that the law firm has a charging lien in accordance with s. 79 of the LPA. Section 79(1) of the LPA provides as follows:

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

[14] More precisely, the petitioner proposes acknowledgement of a charging lien in favour of the law firm on the following terms:

As you know, you acted for [name of transferring client] in that proceeding in the [location of court] Registry of the [name of court] numbered [court registry number] while you were employed at Cascade. I claim a lien at common law (otherwise known as a charging lien), for the proper fees, charges and disbursements pertaining to your work done while you were employed at Cascade, including counsel work of or in relation to that proceeding, against any property, including any settlement or judgment fund, recovered or preserved as a result of the proceeding. As you may know, any person who, without regard for my lien claim, participates in the transfer of any recovered or preserved property, or in the disbursement of any recovered or preserved settlement or judgment fund, may be personally liable to satisfy my proper fees, charges and disbursements, including any expense I incur to recover the fees, charges and disbursements. Please confirm in writing that you acknowledge my lien in accordance with section 79 of the Legal Profession Act.

[15] In submissions, her counsel proposed an alternative, which was to provide an undertaking to confirm that "disbursements have first priority on any settlement or judgment obtained, and/or will be paid within five years of today's date".

[16] For the reasons that follow, the petition is dismissed.

Discussion

- [17] Contingency fee agreements play an important role in allowing plaintiffs to advance claims they otherwise might not be able to afford. From the lawyer's perspective, they involve a degree of risk. Although the disbursements are payable regardless of outcome, the lawyer nonetheless pays the disbursements upfront in expectation that ultimately these will be repaid. The lawyer hopes that these are paid as part of the payment received from the defendant, but if the claim is dismissed or is unsuccessful for whatever reason, the lawyer is left to try to recover the disbursements from the client directly.
- [18] The lawyer is prepared to fund the disbursements in the litigation and to defer receipt of any fees in the hope and expectation that the fees are higher than they would have been if retained on an hourly basis. However, this will not always prove to be the case. If a claim is dismissed at trial, the lawyer's time goes uncompensated. On other occasions, the lawyer will recover less than what might have been obtained on an hourly basis.
- [19] If the client terminates the services of the lawyer and chooses alternative representation, the lawyer no longer has any control over the client's claim even though he or she may have invested significant funds in advancing it. The lawyer will no longer have ongoing contact with the client; they may not be aware of the status of the claim or even know where the client lives and works given that several years sometimes pass between the commencement of the claim and final resolution. The fact that personal injury lawyers are prepared to invest funds the client does not have, especially if seriously injured, provides access to justice to those who might not be financially capable of advancing a claim.
- [20] It is against that backdrop that I will address the nature of the solicitor's lien asserted by the law firm.
- [21] There are, broadly speaking, two categories of solicitor's lien:
- a) a possessory lien over the client's documents and papers; and
 - b) a lien over property that is either recovered or preserved as a result of the solicitor's work, or the "fruits of the action", which is the discretionary lien contemplated in s. 79 of the LPA (a "charging lien").
- [22] The law firm in this case asserts possessory liens. The law firm claims possessory liens only because there are no proceeds that could be the subject of a s. 79 charging lien. The alternative relief sought by the petitioner is ostensibly to replace the possessory liens with charging liens.

- [23] The petitioner points out, correctly, that I cannot order that she pay disbursements because she is not liable to pay them under the contract. This is so; it may equally be said that she is not in a position to dispute whether the contract requires the various clients to pay their disbursement bills because she is not a party to the contract and therefore not in a position to argue its interpretation. That said, I can nonetheless consider it as a factor in determining whether it is appropriate to order substitute security.
- [24] Regardless of the issue of the petitioner's standing, I will consider the arguments about the wording of the retainer agreements.
- [25] The only evidence regarding the retainer agreements in this case is a precedent copy that is not signed by anyone. The petitioner's argument under the retainer agreement, if she were in a position to advance it, is that it does not provide for payment forthwith. The paragraph of the retainer agreement that contemplates the situation of the client choosing to move the file to another firm is as follows:

I/WE UNDERSTAND THAT either party may terminate this contract. If Cascade Law Corporation terminates the contract, no legal fees are payable. If I/we terminate the contract, I/we agree to pay Cascade Law Corporation's account rendered on the basis of services provided at the rate of \$400.00 per hour, plus disbursements incurred. [emphasis added]

- [26] The law firm concedes that legal fees are not payable forthwith and does not seek to collect them. Rather, it says fees are to be apportioned between lawyers at the conclusion of the claim, or by the registrar if the lawyers cannot agree.
- [27] The retainer agreement is silent about the timing of payment; however, it does not automatically follow that payment would not be due until the end of the client's claim. The retainer agreement does not provide that payment is due at the end of the claim. Such a term would therefore need to be inferred.
- [28] If a contract does not provide for time for payment, the court may look to the surrounding circumstances to determine when payment would be due. In some cases, the court has concluded that payment is due within a reasonable time, with what constitutes a reasonable time depending on all of the circumstances.
- [29] The effect of the order sought by the petitioner in this case would have the law firm continue to fund the disbursements on an indefinite basis but without any potential to recover more than repayment of the disbursements and compensation for time spent calculated on an hourly basis. There would be no chance of any 'success factor' for the law firm. The law firm would continue to bear the risk of the file without any control over its conduct and outcome. I cannot accept that a reasonable interpretation of the retainer agreement would have the law firm continue to fund the litigation and bear the risk of failure with neither control nor any potential for any success factor. By contrast, the order sought by the petitioner would allow her to enjoy the benefits of the potential success but with none of the associated risks.

- [30] The retainer agreement provides that the client agrees to pay the law firm's invoice if the client chooses to terminate the retainer. I do not agree that it is reasonable to infer that the law firm would be entitled to issue an invoice but the client would have no obligation to pay it for what amounts to an indefinite period.
- [31] I conclude that clients are obligated to pay the account for disbursements within a reasonable time. What constitutes a reasonable time is not something I need to determine here as none of the clients are before the court. The LPA provides that a lawyer cannot apply to review an account until 30 days has elapsed. Presumably a reasonable time is no less than 30 days. However, the law firm has a possessory lien over the file and is entitled to retain possession until the account has been paid.
- [32] Even if a solicitor has a valid possessory lien, the court still has the discretion under s. 78 of the LPA to order that the file be delivered to new counsel. The court has the discretion to impose terms on the delivery of the file under s. 78(2): the court can order the delivery be subject to the client paying the amounts due to the former solicitor, or may require the providing of security, and can order a review of the accounts by the registrar.
- [33] The petitioner argues that the contingent event is unknown and that it would not be appropriate to require the clients to pay the disbursements at this time. She refers to *McQuarrie Hunter v. Foote* (1982), 41 B.C.L.R. 123 (B.C.C.A.) at paras. 16 and 17 in support of her proposition:
- [16] After anxious reflection, I prefer the reasoning as it has developed to the present time in the federal courts. The approach taken by the American federal decisions (Shattuck) appears to me to balance the interests of both the solicitor and the client. While an obligation to pay arises on discharge, the client and solicitor await the completion of the lawsuit, and the result obtained becomes a factor in determining the value of the services of the original solicitor. On this approach, no money is due until the value of the services has been determined.
- [17] I prefer this approach because of the historic recognition of the solicitor-client relationship as a very special one. It is a relationship based on confidence and trust. The dignity and integrity of the legal profession demand that the interests of the client be fully protected. The relationship is such that the client is justified in seeking to dissolve it whenever he ceases to have absolute confidence in his solicitor. The fact that the solicitor has rendered valuable services under his employment, or that the client is indebted to him for these services does not deprive the client of this right. 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. In addition, if responsibility to pay reasonable fees were to accrue immediately upon discharge and the subsequent damage award to the client were substantially less than that anticipated, a financial disaster for the client might occur. The

risk of success or failure would have been shifted entirely to the shoulders of the client. It is more consistent with the special relationship between solicitor and client and the underlying rationale of a contingency fee 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.

- [34] McQuarrie Hunter does not assist the petitioner here. In *McQuarrie Hunter*, at issue was compensation for time expended by the solicitor. The court concluded that the lawyer was entitled under the retainer agreement to compensation contingent on the recovery, but because the recovery was unknown, it was more consistent with the underlying intention of the contract to await the contingency. By contrast, disbursements are not contingent. They are ascertainable, and are payable by the client to the solicitor regardless of the outcome of the case. The respondent law firm does not dispute that any recovery of any fees cannot occur until files conclude.
- [35] The petitioner refers to two other authorities. In *Ashurst v. Wilson*, 2000 BCSC 901, Justice Boyle ordered delivery of the client's file without payment of the disbursements, referring to the fact that the retainer agreement was silent as to the timing of payment of disbursements. After referring to the practice that disbursements are paid prior to delivery of the file to a new solicitor, he held as follows:
- [19] There is nothing in the Act or in the retainer letter requiring payment of disbursements before a file is transferred.
- [20] The retainer letter is specific only as to hourly rate of fees on transfer. It fixes no time-table. Contingency practice is risky. Counsel can be protected only by full and clear terms in a retainer letter.
- [21] In this instance, there is an aged, ill and impecunious plaintiff (client) whose affidavit suggests a doubtful understanding of the legal and lawyer/client process and the retainer letter does not make clear the expectations of counsel. The plaintiff would have no knowledge of "practice".
- [22] An order will go directing transfer of the plaintiff's personal injury file to the petitioner without prepayment of disbursements.
- [23] The respondent's fees and claim to disbursement will be secured by undertaking from the petitioner subject to the right to review.
- [36] In *Kelly v. McMillan & Harbottle & Co.*, 2000 BCSC 709, the court concluded that neither the new solicitor nor the client could afford to pay disbursements prior to completion of the case. Justice Ralph ordered transfer of the file but nonetheless made an order that saw the law firm protected, including a partial payment of the outstanding disbursements.

- [37] The court came to a different conclusion in *Foisy v. Horne Marr Zak*, 2001 BCSC 1003. In that case, Justice Hunter reviewed both *Ashurst* and *Kelly* and concluded that unlike in either of those cases, there was no evidence that the client, Ms. Foisy, could not pay the disbursements. He drew a clear distinction between payment of fees and disbursements and concluded it was not reasonable to expect the solicitor to await payment of disbursements until the file completed:
- [10] The law firm must await resolution of Ms. Foisy's claim arising out of the motor vehicle accident with regard to the matter of fees and there is no dispute on that. However, determination of the amount of the disbursements is known at this time. I do not think that it was a reasonable expectation on the part of the client that in the event of the discharge of the law firm the client would not be obliged to pay the disbursements at the time of discharge. The inference I draw from this contract is that the parties expected that the law firm would be entitled to be paid their disbursements at the time of discharge subject to the discretion of the court set forth in s. 78(2) of the Legal Profession Act.
- [38] I am satisfied that the law in British Columbia is that absent a term to the contrary, disbursements must be paid if the client chooses to retain a new solicitor, although the solicitor must await the contingency in order to determine appropriate compensation for legal fees. The solicitor is entitled to assert a possessory lien to secure payment of the disbursement account. The court retains a discretion to override the solicitor's possessory lien and to impose other terms within the framework of s. 79(2) of the LPA if the circumstances warrant. However, those determinations are fact specific inquiries and are dependent on whether the client would be precluded from advancing the claim, which the court found was the case in both *Ashurst* and *Kelly*.
- [39] In this case, the petitioner is the solicitor. There is no evidence of the financial circumstances of the clients with one exception. The one client who has put specific information before the court is Ms. Cooper. However, even the evidence of her circumstances does not establish that she is unable to pay her account for disbursements, whether in whole or by way of instalments. The evidence is also insufficient to establish that she will be precluded from pursuing her claim if her disbursement account, which is relatively modest, must be paid at this time.
- [40] The petitioner is asking the court to exercise its discretion to displace the law firm's possessory liens. However, discretion requires an analysis of the particulars and the specifics of each individual circumstance. It would not be proper for me to conclude that any particular client would be prejudiced or not by the order sought because the clients are not parties to the application before me. As such, if any of the individual plaintiffs were in similar positions as the clients in *Kelly* and *Ashurst*, it would be unfair for me to make a decision in this case that would preclude them from advancing those arguments on proper evidence.

- [41] The petitioner argues that the law firm is better off with a charging lien. She says the law firm's only other option would be to sue in small claims court. This is not so, because the law firm would likely be better proceeding with a review under the LPA, a much simpler procedure. However, if the disbursements were not properly payable at this time as the petitioner asserts, any review or small claims action would presumably fail.
- [42] I do not accept that the law firm is better off with the petitioner's proposed acknowledgement of a charging lien. It is important to remember that the petitioner is a stranger to the arrangement between the law firm and each individual client. At best, the petitioner can acknowledge that the law firm asserts that it has a charging lien. But the fact that the petitioner says she is prepared to acknowledge a charging lien is of little or no value to the law firm. It is the clients who would be impacted by such an order. The petitioner may think that the law firm has a valid charging lien but her thoughts are not binding on the 58 clients.
- [43] On the facts here, it is far from clear that the law firm would have the ability to assert the charging lien in the circumstances of each of the various clients. In *Cliffs Over Maple Bay (Re)*, 2011 BCCA 346, the Court of Appeal discussed a solicitor's charging lien and concluded that the court must be satisfied that the prerequisites must be present before ordering a charging lien. At paras. 24 and 25, Newbury J.A., in dissent but not on the solicitor's lien issue, held the following:
- [24] Like its common law predecessor, the statutory lien or charging order is discretionary in the sense that it does not arise as a matter of right upon the satisfaction of the stated prerequisites. Rather, the court must be persuaded it would be "just and proper" to grant the privilege of a lien: *Henry v. Columbia Securities Ltd.*; *In Re Freeman & Freeman* (1942) 58 B.C.R. 193 (C.A.); and *Wilson, King & Co.*, *supra*, cited and confirmed in *Hosseini v. Oreck Chernoff* 1999 BCCA 386, 174 D.L.R. (4th) 685 (B.C.C.A.) at paras. 18-22.
- [25] Before exercising its discretion, the court must be satisfied that the solicitor recovered or preserved property as a result of the proceeding in which his or her fees and disbursements arise. The property against which the charge arises or attaches must be the property so recovered or preserved. Thus Donald J.A. stated for this court in *Hosseini*, *supra*:

A lawyer employed to prosecute a claim regarding property seeks to recover that property; a lawyer employed to defend the claim strives to preserve it. The relationship between the words connects the lien with the lawyer's employment. In other words, the lien must relate to what the lawyer was hired to do and what the lawyer accomplished; it can only go against the property that the lawyer recovered or preserved as the case may be. [At para. 26; emphasis added.]

- [44] In this case, the question of whether property was recovered or preserved on account of anything done by the law firm is not something the court can determine without any evidence. The property preserved or recovered in the context of a personal injury action would presumably be the settlement funds or trial judgment. Assuming that some of these files are in their infancy and may not even have actions started, it is not possible to conclude

by way of a general statement or assertion that the requisite findings for a charging lien can be satisfied.

- [45] The standard practice in British Columbia is that a law firm who wishes to assume conduct of an ongoing personal injury file pays the disbursements and agrees to protect the fees portion. The fees may be the subject of a review by the registrar in the event the two lawyers cannot agree. It may be that the fee at the conclusion of the file is sufficient for both firms to be paid their full hourly rates; however, in some cases this may not be the case.
- [46] In the circumstances, the petitioner has failed to establish that there is anything unique or unusual about these circumstances that would cause the court to conclude that some alternative method of securing the disbursements incurred by the law firm is either necessary or appropriate, either in the instance of a specific client or generally.
- [47] Finally, I do not consider the petitioner's suggestion raised during reply of an undertaking on the part of the petitioner to pay the disbursements as a first charge on any settlements and for all disbursements to be paid with an outside date of five years, to be an attractive alternative. Indeed, this proposal would appear to confirm that what the petitioner seeks is to compel the law firm to fund its former associate's new practice. The law firm is not prepared to do so willingly, and I am not prepared to order it to do so.
- [48] The petition is dismissed, with costs to the respondents.

"Wilson J."

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