
CANADA / JUDGMENT

Slater Vecchio LLP v. Cashman

2012 BCSC 830

COURT

Supreme Court of British Columbia

DECIDED

5 June 2012

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2012 BCSC 830 Slater Vecchio LLP v. Cashman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Slater Vecchio LLP v. Cashman,

2012 BCSC 830

Date: 20120605

Docket: S110853

Registry: Vancouver

Between:

Slater Vecchio LLP

Solicitors

And

Fred Cashman

Client

Before: Master Taylor

Reasons for Judgment

Counsel for Solicitors:

A.I. Nathanson.

Counsel for Client:

G. T. Palm

Place and Date of Hearing:

Vancouver, B.C.

March 8 & 9, May 3 & 4, 2012

Place and Date of Judgment:

Vancouver, B.C.

June 5, 2012

Brief Summary of Facts and Introduction

- [1] While riding his bike on July 26, 2005, Mr. Cashman ("Cashman") collided with a vehicle and suffered a head injury such that he was unable to practice law thereafter. After attempting to represent himself and then briefly being represented by another lawyer, Cashman sought the assistance of Mr. Deering ("Deering") at the law firm of Brown Benson. Somewhat later, Mr. Cashman became disenchanted with Mr. Deering and his colleagues for a number of reasons and then retained the services of Slater Vecchio, LLP. He signed a retainer agreement dated January 13, 2009 wherein he agreed to pay a 33.3% contingency fee "for damages incurred as a result of personal injuries and other losses arising out of a motor vehicle accident...." The file materials had been sent over to Slater Vecchio from Brown Benson on Mr. Cashman's instructions. He was told by Mr. Slater ("Slater") that but for the necessity of having to protect Mr. Deering's fees that the contingency fees would likely have been less.
- [2] Slater Vecchio filed a Notice of Appointment or Change of Solicitor in both the tort action against the defendants, Kim and Son, and the Part 7 action against the Insurance Corporation of British Columbia. Both notices were filed and date stamped December 18, 2008.
- [3] Ultimately, Messrs Slater Vecchio were able to obtain the policy limits of \$1m for Mr. Cashman. Unfortunately, there was a fee dispute between Brown Benson and Slater Vecchio as to what their respective fees should be. Cashman retained the services of Gordon Turriff, Q.C. ("Turriff") to represent him as against Brown Benson in the fee dispute. Cashman did not want Deering and Brown Benson to obtain as large a fee as they wanted from a split of fees from the 33.3% contingency and was prepared to tax their fee component at the end of the day.
- [4] The fee dispute was finally settled when Slater Vecchio agreed to take \$20,000.00 less than Mr. Cashman had suggested but they did so as a business decision. The agreement was to be final in that Mr. Cashman would not tax the accounts of Brown Benson.
- [5] On November 10, 2010 an agreement was reached between Slater Vecchio, Deering and Cashman who, at the time, was represented by Mr. Turriff.

- [6] Sometime later following the Settlement Agreement, Mr. Cashman contacted Messrs Slater Vecchio to find out what was happening with his Part 7 claim. Shortly thereafter he received an email from Patrick Gordon ("Gordon") of that firm which indicated the firm was not prepared to act further for Mr. Cashman regarding the Part 7 claim given a number of difficulties with it. The email finished by saying, "...we do not believe the case is worth pursuing".
- [7] Mr. Cashman sent a return email in which he said:
- "[i]t is not proper that you cherry pick the claim and when the easy part is done then decide to give up the claim without a fight. I object to your withdrawal and do not consent to this breach of contract. The fee agreement was to do everything and not just that which you believed was worth pursuing. The contract is a Whole contract and has yet to be completed".
- [8] On the same day, Gordon responded, advising that Slater Vecchio was terminating the agreement, and that the firm had received and sought no compensation for its work on the Part 7 action. Gordon wrote, "[i]f you believe that you have a good claim against ICBC under Part 7, you will have no difficulty obtaining counsel to pursue it on your behalf".
- [9] On February 1, 2011, counsel for Cashman, wrote to Gordon advising that in unilaterally withdrawing its services, Slater Vecchio had repudiated the agreement with Cashman, and Cashman accepted the repudiation. Counsel for Cashman demanded payment of the sum of \$201,600, representing repayment of all the fees and taxes on fees paid to Slater Vecchio.
- [10] This matter comes before the court pursuant to s. 70 of the Legal Profession Act to review the bill of the solicitors, Slater Vecchio LLP, dated November 12, 2010. The central issue in this review is not the quantum of the bill, but rather whether the retainer agreement to prosecute two actions was an "entire contract" such that the refusal of Slater Vecchio to continue with the second Part 7 action requires it to disgorge the fee billed and paid by agreement based on the result obtained in the first action. Counsel agree it is an all or nothing proposition - either the Solicitors disgorge the fee or they keep the fee. There is no intermediate position available.

Agreed Statement of Issues

- [11] The parties have agreed to the issues to be determined by the court. They are set out below:

Issue 1: Was the retainer agreement between the Solicitors and the Client (the "Agreement") an entire contract by which the solicitors were obligated to prosecute both the Client's tort action and his Part 7 action to their respective conclusions in order to be entitled to any fee?

Issue 2: If so, then did the Solicitors and the Client, in or about early November of 2010, either

- (a) make a new agreement and discharge the Agreement; or
- (b) amend the Agreement;

such that the Solicitors were no longer required to prosecute both the Client's tort action and his Part 7 action to their respective conclusions in order to be entitled to any fee?

Issue 3: If not, then by virtue of dealings in or about early November 2010 is the Client estopped from recovering the fee paid to the Solicitors?

Issue 4: if not, then did the Solicitors breach the Agreement by withdrawing their services without cause prior to prosecuting the Client's Part 7 action to its conclusion such that the Solicitors are not entitled to any fee?

Detailed Facts

- [12] The facts in this matter are not in dispute. Accordingly, I have borrowed extensively from counsels' submissions in setting out the detailed facts below.
- [13] On July 26, 2005, Mr. Cashman was riding his bicycle when he was struck by a motor vehicle owned and operated by Heen Jung Kim ("Kim") and Kwan Jin Son ("Son"). He suffered injuries, the most serious of which was a traumatic brain injury resulting in headaches, memory and concentration problems. Another symptom resulting from the head injury was that he would go off on tangents, get very angry due to the fact he had difficulty controlling and regulating his mood, all resulting from his head injury.
- [14] As a result of the injuries suffered in the accident of July 26, 2005, and, in particular, his head injuries, Mr. Cashman has not been able to practice law since.
- [15] Mr. Cashman commenced two actions arising out of his accident. He commenced an action in tort against Kim and Son (the "tort action") and an action for first party insurance benefits under Part 7 of the Regulation to the Insurance (Motor Vehicle) Act, B.C. Reg. 447/83 (the "Part 7 action"). The Part 7 action is against the Insurance Corporation of British Columbia ("ICBC").
- [16] In the actions, Cashman was represented by a succession of counsel. He initially acted for himself, followed by James Butler of Butler & Company; Bob Deering ("Deering") and John Hutchinson ("Hutchinson") of Brown Benson and then finally Michael Slater, Q.C. ("Slater") and Patrick Gordon ("Gordon") of Slater Vecchio LLP.
- [17] In late 2009, Mr. Cashman decided to retain Slater Vecchio in place of Brown Benson since ICBC had refused to offer the defendants' \$1 million policy limits in the tort action and Cashman wanted to proceed to trial, obtain a judgment in excess of that amount and pursue a bad faith claim against ICBC. Because the law firm of Brown Benson, and Mr. Deering in particular, also acted for ICBC on certain defence matters, their contract with ICBC precluded them from acting for a client in a bad faith claim against ICBC.
- [18] Mr. Cashman was also dissatisfied that Mr. Deering had not used his relationships with ICBC as promised to go above the head of the adjuster on his file to try and get the policy limits, which was the main reason why Cashman retained Deering in the first place.

- [19] At the time of the file transfer from Brown Benson to Slater Vecchio, LLP, a substantial amount of work had been done on the tort action by Mr. Deering; the pleadings were closed, the defendant had been examined for discovery, some expert reports had been obtained and a trial date had been set.
- [20] There had been an unsuccessful mediation. Mr. Cashman wanted the \$1 million policy limits and the highest the defendants were prepared to offer was \$400,000. By contrast, in the Part 7 action, apart from a statement of claim and an appearance and two notices of change of solicitor by ICBC, nothing had been done. There was no statement of defence and no examinations for discovery had been held, although discoveries had been scheduled and then adjourned. As well, internally, John Hutchinson of Brown Benson had spent time reviewing Cashman's Part 7 claim and made extensive notes on the file.

The Slater Vecchio agreement

- [21] In December 2008, Cashman instructed Brown Benson to send their file on the tort and Part 7 actions to Slater Vecchio. On December 5, 2008, Mr. Hutchinson of Brown Benson wrote to Slater Vecchio, enclosing the file on the basis that on resolution of Cashman's claims, Slater Vecchio would "protect the funds, and then contact us regarding a pro rata apportionment of legal fees, and payment of our disbursements". On December 10, 2008, Mr. Slater wrote to Mr. Cashman saying, "The agreement will be 33 1/3%. We will work out the allocation of fees with John [Hutchinson]'s firm at the conclusion of the litigation".
- [22] On December 16, 2008, Slater Vecchio filed Notices of Change of Solicitor in the tort and Part 7 actions.
- [23] On January 13, 2009, Mr. Cashman met with Mr. Gordon of Slater Vecchio. Mr. Cashman executed a written contingency fee agreement, which provided that Cashman authorised Slater Vecchio to act as his solicitors "...with respect to my claim for damages incurred as a result of personal injuries and other losses arising out of a motor vehicle accident on July 26, 2005". Cashman agreed to pay Slater Vecchio legal fees of 33-1/3 % of the amount recovered by settlement or at trial, as well as disbursements and taxes. At the same time, Cashman and Gordon made a collateral oral agreement that Slater Vecchio "would be taking care of Brown Benson's fee" with the result that the total fees payable by Mr. Cashman would be effectively capped at 33 1/3% of any recovery. Slater Vecchio reached an understanding with Brown Benson that they would "work out what their fee was once the matter was resolved and it would be paid from" the fee that was billed to Mr. Cashman".
- [24] The 33 1/3% contingency was higher than the fee normally charged by Slater Vecchio because the firm had to satisfy Brown Benson's fee from that amount. In fact, Mr. Cashman was told that were it not for the necessity of having to cover the fee account of Brown Benson, Slater Vecchio's account to Mr. Cashman would likely be in the range of 20% to 25%.

The settlement of the tort action

[25] In June 2010, after several proposals from October 2009 onward by Slater Vecchio on behalf of their client, Mr. Cashman, to settle the tort action in exchange for the \$1 million limits of the defendants' insurance policy, ICBC finally agreed to make the policy limits available. This resulted in a settlement of the tort action. The defendants agreed to pay Cashman \$1,003,638 (the "Settlement Funds") plus taxable costs and disbursements for a total of \$1,051,138.00. The Settlement Funds were paid to Slater Vecchio in trust. The Part 7 action did not form part of the settlement and was not released.

The fee dispute

- [26] In late June 2010, around the time the tort action was settled, Mr. Cashman spoke to Mr. Slater about his dissatisfaction with Mr. Deering's failure to follow his instructions. Mr. Cashman said he would be fine with paying a global fee to both firms of \$250,000 but not the \$333,333 due under the agreement he had with Slater Vecchio. Alternatively, he said that if Slater Vecchio could reach an agreement with Deering on the basis of a 60/40 split of the 33 1/3% fee, he would fight with Mr. Deering over Brown Benson's 40% share which amounted to \$133,333.00. Mr. Cashman also told Slater that he had received advice from Turriff that Deering was not entitled to any fee. Mr. Cashman told Mr. Slater that if there was going to be a resolution, he wanted the money by Friday, July 2, 2010 as he was going away. Unfortunately, this did not occur.
- [27] On July 5, 2010, Mr. Turriff advised Slater Vecchio that he had been retained by Mr. Cashman in relation to Brown Benson's entitlement to a fee. Turriff made it clear to Slater that he was not acting for Cashman in respect of Slater Vecchio's fee, although Mr. Turriff took the position that Cashman reserved the right to argue that Brown Benson should receive no fee at all.
- [28] In early September 2010, Mr. Gordon of Slater Vecchio spoke to Mr. Cashman, who was, at that time, vacationing on his boat. Mr. Cashman gave instructions that Slater Vecchio should propose a 60/40 split of the contingency fee in Slater Vecchio's favour and that Mr. Cashman reserved his right to challenge Deering's entitlement to fees and the reasonableness of his disbursements. In a letter dated September 3, 2010, Slater Vecchio proposed this to Mr. Deering.
- [29] On September 22, 2010, Mr. Deering, now practising at DuMoulin Boskovich LLP, responded, rejected the proposal "as it does not bring the matter to a conclusion". Deering continued:

Unless the matter can be resolved quickly we will require from you a complete breakdown of time spent and steps taken and rates charged by your firm in the handling of this matter.

I suspect that the entire matter will have to be dealt with either by way of Mediation, an agreed Arbitration or a hearing before a Master/Registrar.

- [30] Mr. Gordon understood that Deering's reference to a proceeding was to a proceeding involving not just Brown Benson and Slater Vecchio, but Cashman as well. While Mr. Turriff said he regarded the matters as separate, both Gordon and Deering referred to the subsequent discussions among the three parties as a "three way dispute", "three way discussion" or as "attempts to reach a three party agreement".
- [31] In his October 28, 2010 e-mail to Mr. Gordon, Mr. Deering summarised his position: "[a]t present we have a dispute with Slater Vecchio in the future we may have a dispute with Mr. Cashman". On the same day, Mr. Turriff told Mr. Slater, "Deering cannot avoid the fight with Cashman".
- [32] Throughout the discussions, it became apparent to Gordon that while Mr. Cashman expressed concerns about Brown Benson's work and therefore the amount they were entitled to, "it just came down to how much money was going to be put in Mr. Cashman's pocket". Cashman had said maximising his net position was "a motivation" but not the driving motivation, and that what he cared about was Mr. Deering not profiting from his breach of promise.
- [33] On November 4, 2010, Mr. Turriff wrote to both Mr. Gordon and Mr. Deering, summarising the circumstances from his perspective:

We know two things for sure at this time. First that Fred and Bob are at odds and, second, that Bob can't bill SV because SV was never his client.

In those circumstances, practically speaking the starting point has to be agreement on the split between SV and Bob. Unless the split is agreed, neither Bob nor SV can know what to bill Fred.

I suppose that SV could bill Fred the whole contingent fee but if it did it couldn't safely pay itself until it knew what fee Fred would owe Bob. Bob's fee would only be determinable as between Fred and Bob. The determination of Bob's fee could only be made after Bob billed Fred but Bob couldn't bill Fred because SV already had. Bob (I guess) would have to sue for a declaration that he is entitled to a share of the SV fee and for a reference to the registrar for a recommendation about what the share should be. That proceeding could only be between Bob and SV. There would be no lis with Fred on the split. Presumably the declaration and the reference would go by consent. Then there would be a hearing. Bob and SV would make their best cases for their respective contributions to the result. That seems like a lot of unnecessary effort. It would be better for Bob and SV just to agree.

If the starting point were thought to be an agreement on Bob's fee as between him and Fred, the matter would immediately bog down. Bob and Fred are not likely to agree and their difference could only be resolved if Bob billed Fred. But Bob couldn't bill Fred because Bob wouldn't know, as between himself and SV, what his share of the contingent fee would be. I suppose Bob could bill Fred what he thinks his share should be but if he did that he would be at odds with SV as well as Fred. That would make no sense. Bob (or, I suppose SV) would have to sue for a declaration (see above). Presumably the suit for the declaration would have to be joined with whatever

proceeding might have to be commenced as between Bob and Fred. That seems like a lot of unnecessary effort (see above).

- [34] Mr. Gordon's reaction to this was that Turriff "had overly complicated matters, and this was going to be hard to resolve through litigation. We were either going to all compromise and settle or we weren't going to get paid for months, or even years". Gordon wrote, saying that Slater Vecchio still wanted to meet the next day to "see if we can get this done all at once. We can go round in circles for months otherwise". Deering agreed to meet.
- [35] On November 5, 2010, Mr. Gordon, Mr. Deering and Mr. Turriff, on behalf of Mr. Cashman, met at the offices of Slater Vecchio in an attempt to reach an agreement to resolve the fee dispute. Mr. Gordon explained that the position of Slater Vecchio was that if the parties did not reach agreement, Slater Vecchio could bill the entire one-third contingency and that if Deering's fee was zero, as Cashman suggested, any reduction would be to Slater Vecchio's account and not Mr. Cashman's. Mr. Turriff reiterated that he was not involved in any fee dispute between Slater Vecchio and Cashman. Then, during the meeting, It appeared an agreement had been reached. Mr. Turriff left to speak to Mr. Cashman, but then returned saying he had misunderstood his instructions and that in fact they did not have an agreement. The meeting then broke up.
- [36] Turriff subsequently communicated with Deering about the instructions he had misapprehended: "I was supposed to have said this morning that Mr. Cashman's position is that Slater Vecchio should get \$200,000 and you \$50,000. Those were my instructions". Turriff told Gordon that his "only instructions this morning were to propose \$200,000 to Slater Vecchio and \$50,000 for Deering" . In respect of this proposal, Cashman was in agreement that the payment to Brown Benson was to be absolutely final with no review of their fee.
- [37] In addition to conveying a proposal in respect of a reduced Slater Vecchio fee, Mr. Turriff also obtained an agreement from Slater Vecchio to forestall the firm from delivering an account to Cashman. Mr. Turriff acknowledged that he did so to avoid crystallising Cashman's obligation to pay the maximum 33 1/3% fee and instead, to leave space for the parties to reach an agreement on a lower amount, without having to do a review of the Slater Vecchio bill.
- [38] Prior to November 5, 2010, the previous settlement offer had been \$271,500, with \$180,000 to Slater Vecchio and \$91,500 to Deering. Not surprisingly, this was unacceptable to Deering.
- [39] Matters finally came to a head on November 8 and 9, 2010. On behalf of Mr. Cashman, Mr. Turriff formally requested that Deering deliver a bill addressed to Cashman, failing which he would apply to court. Slater Vecchio took the position that they would simply deliver an account for their full entitlement under the contingency fee agreement . Slater and Gordon told Turriff that they had told Deering "we were back to Square One, which would mean what we can do under our [contingency agreement]". Slater said that Cashman's risk was that he had to pay the full \$333,333. Slater asked if there was any way of resolving the matter quickly. Turriff assured him that there was, and that Cashman "does know that you are

giving something up " [emphasis in the original]. [emphasis added]

[40] Later that day, Turriff e-mailed Slater and Gordon, stating in part:

Fred has asked me to assure you that he is not playing you. He wants you to receive your proper entitlement as soon as possible.

Fred has also asked me to remind you that he had told you before he signed your contingent fee agreement that he intended to call for a review of Bob's charges.

Would it not make sense for you and Bob to deliver bills in the amounts that reflect Friday's proposed split?

[41] Gordon's evidence was that the reference to Cashman's "assurance that he is not playing you" was to the suggestions of Slater Vecchio "that this was all an unjustified ploy by Mr. Cashman to reduce the fee he had contracted to pay" to Slater Vecchio.

[42] On November 10, 2010, Slater Vecchio, Brown Benson and Mr. Cashman, through his counsel, Mr. Turriff, reached an agreement to resolve the Fee dispute (the "Settlement Agreement"). The Settlement Agreement provided that Cashman agreed to pay \$71,800 plus taxes to Brown Benson in settlement of Brown Benson's entitlement to a fee and a further \$180,000 plus taxes to Slater Vecchio in settlement of Slater Vecchio's entitlement to a fee for the tort action. Turriff confirmed this in an e-mail of the same date.

[43] Gordon offered a suggestion as to the mechanics of billing and paying out Slater Vecchio and Brown Benson's respective fees pursuant to the Settlement Agreement. Turriff responded, with instructions as to the mechanics of payment and with a request for "an overall accounting". He calculated that when all fees and taxes were paid, the total cost to Cashman was \$282,016.00.

[44] Pursuant to the Settlement Agreement:

- (a) Brown Benson delivered an account to Slater Vecchio for a fee of \$71,800 plus taxes, described as "To all professional services rendered pursuant to settlement agreement between the parties";
- (b) Slater Vecchio delivered an account to Cashman, care of Turriff, for a fee of \$251,800 plus taxes. This amount included the Brown Benson fee;
- (c) Slater Vecchio paid Brown Benson's account and its own account from the Settlement Funds it held in trust;
- (d) Slater Vecchio delivered a cheque to Turriff in trust for Cashman in the amount of \$90,747.08, representing payment of the balance of settlement proceeds; and
- (e) Slater Vecchio also provided Cashman with copies of the accounts and a reconciliation of monies received and disbursed.

[45] Some two months after the settlement agreement, Cashman left Gordon a voicemail inquiring about the status of the Part 7 action. On January 19, 2011, Gordon responded by email saying:

Hi, Fred,

We received your message about the status of your Part 7 action. No steps have been taken since the settlement of the tort claim

Mike [Slater] and I have reviewed the Part 7 claim and we have decided that we are not prepared to act further for you on it. Our opinion is that the claim has little chance of success based on representations made by you, or on your behalf, that you were not advancing a claim for Part 7 and your subsequent refusal to co-operate with ICBC. I know that we have discussed this and you do not agree with that characterization of the evidence. However, considering the amount involved and ICBC's position that it will not pay you any money on the claim, we do not believe that the case is worth pursuing.

[46] On January 20, 2011, Cashman responded by e-mail to Gordon, saying,

Gentlemen: That is not how I read the contract. It does not say that you only get to do what you deem to be the easy stuff, but that you will act "with respect to my claim for damages incurred as a result of personal injuries and other losses arising out of a motor..." In short it is not proper that you cherry pick the claim and when the easy part is done then decide to give up on the claim without a fight. I object to your withdrawal and do not consent to this breach of contract. I did not say that I was not advancing a claim for Part 7 nor did I refuse to cooperate with ICBC. They offered help with rehab which I did not need as I was getting lots of help. They never asked for any cooperation nor did they complain that I was not cooperating. The fee agreement was to do everything and not just that which you believed was worth pursuing. The contract is Whole contract and has yet to be completed.

[47] On the same day, Gordon responded, advising that Slater Vecchio was terminating the agreement, and that the firm had received and sought no compensation for its work on the Part 7 action. Gordon wrote:

With respect, we disagree. We are under no compulsion to continue to act. Any party can terminate the contract and we are doing so at this time.

Our withdrawal at this time cause no harm or prejudice to you. There are no pending trial or discovery dates.

We have received no compensation and seek no compensation for legal work on the Part 7 claim.

If you believe that you have a good claim against ICBC under Part 7, you will have no difficulty obtaining counsel to pursue it on your behalf.

- [48] On February 1, 2011, Mr. Palm, counsel for Cashman, wrote to Gordon advising that in unilaterally withdrawing its services, Slater Vecchio had repudiated the agreement with Cashman, and Cashman accepted the repudiation. Palm demanded repayment of the sum of \$201,600, representing repayment of all the fees and taxes on fees paid to Slater Vecchio.
- [49] On February 9, 2011, Cashman commenced this proceeding for a review of Slater Vecchio's bill dated November 12, 2010.

Issue 1: Was the retainer agreement between the Solicitors and the Client (the "Agreement") an entire contract by which the solicitors were obligated to prosecute both the Client's tort action and his Part 7 action to their respective conclusions in order to be entitled to any fee?

- [50] Mr. Cashman submits that an objective reading of the retainer agreement he made with the Solicitors, and considering the circumstances at the time it was made, it is clear that the agreement was a single contract for the prosecution of two actions, not separate contracts. Alternatively, Mr. Cashman submits that the agreement is at least ambiguous in that regard and that any such ambiguity must be resolved against the Solicitors, especially since they drew the contract.
- [51] Mr. Cashman's evidence was that he spoke with Mr. Slater in December 2008 and that Mr. Slater agreed that Slater Vecchio would take on both matters and would charge a fee of 33-1/3% of the amount recovered (which percentage was higher than what Mr. Slater told Mr. Cashman the Solicitors would have charged because the fee would have to be split with the Solicitors' predecessors, Robert Deering and Brown Benson). No mention was made at the time that there should be two separate retainers.
- [52] The Solicitors then received a letter from Brown Benson dated December 5, 2008 indicating that Brown Benson had been "instructed to deliver Mr. Cashman's entire Tort and Part VII file materials" for the Solicitors' use. The Solicitors then prepared (on December 9, 2008) and filed (on December 16, 2008) Notices of Change of Solicitor in each of the Tort and the Part 7 Actions.
- [53] On December 10, 2008, Mr. Slater sent Mr. Cashman an email confirming receipt of the files from Brown Benson and that the agreement between them would be for 33 1/3%. Again, there was no mention that the Tort Action and the Part 7 Action amounted to separate retainers.
- [54] It was in those circumstances that the Solicitors and Mr. Cashman entered into a written agreement entitled Contingency Agreement dated January 13, 2009 (the "Agreement"). The Agreement was drafted by the Solicitors. It provides at its outset:

I, Frederick Cashman, authorize the law firm of Slater Vecchio LLP to act as my solicitors with respect to my claim for damages incurred as a result of personal injuries and other losses arising out of a motor vehicle accident on July 26, 2005.

and goes on to provide that Mr. Cashman would pay the Solicitors 33 1/3% of the amount recovered, all disbursements incurred in prosecuting his case, and taxes applicable to the fee.

- [55] Mr. Cashman submits the Agreement refers to a single claim consisting of both damages incurred as a result of personal injuries and other losses. The obviously stated intention is that this was a single matter. There is nothing in the Agreement that would indicate to a client that the "claim" might actually be treated by the Solicitors as multiple claims and that the Agreement might therefore be divisible into multiple separate contracts.
- [56] As well, the Agreement provides that Mr. Cashman would pay to the Solicitors all disbursements incurred in prosecuting his case. Again, the singular is used to describe what the Solicitors had undertaken, clearly indicating an intention that all of what the Solicitors had been hired to do was part and parcel of a single matter.
- [57] So, too, submits the client, the Agreement provides that the firm would be entitled to fees of 33 1/3% of the amount recovered. It does not provide that the fees would be on each amount recovered or even on the amounts recovered. The obvious intention from reading the Agreement, it is submitted, was that, even if received in tranches, the fee would be assessed on the one, overall amount recovered. That is further confirmation, submits the client, that the parties intended this to be a single claim, at the end of which there would be an amount that Mr. Cashman had recovered. The one amount contemplated would only be known when the Solicitors had completed the entirety of the work.
- [58] The Agreement also provides that Mr. Cashman would pay taxes applicable to the fee, not each fee or even the fees. That reference to a single fee is consistent, Cashman maintains, with an intention that the work for which the Solicitors had been retained was part and parcel of a single claim - for which there would be one overall fee. That is not to say that the fee might not be paid in installments as funds came in if the parties so agreed along the way, but only that the Agreement contemplates a single fee, and thus one single contract.
- [59] Finally, the Client submits, the Agreement expressly provides that it would not apply to any appeal and that a lawyer and client could make a separate fee agreement with respect to an appeal. The implication, therefore, is that matters that were to be the subject of separate retainers would be set out separately, and thus the Agreement was a single agreement consisting of the prosecution of the matters for which the Solicitors were being hired at the time it was made.
- [60] The Solicitors submit it is important to situate the lawyer's agreement within the principles that apply to all "entire contracts". They submit a contract is said to be "entire" when complete performance is required before any duty to pay, usually a lump sum, arises. For this reason, these agreements are also sometimes referred to as "lump sum contracts". So, for example, the estate of a seaman who agreed to perform services on a voyage in exchange for a lump sum on completion was not entitled to recover his wages pro tanto when he died part way through the journey because it was an "entire contract". Similarly, at common law, a builder who agreed to construct a house under a lump sum contract but who did not

complete it was not entitled to recover for the work actually completed. "The refusal of pro rata payment is based on the inability of the court, as a matter of construction, to add such a provision to the contract, and also upon the rule that the mere acceptance of acts of part performance under an express contract cannot, taken alone, justify the imposition of a restitutionary obligation to pay on a quantum meruit basis". Chitty on Contracts, 30th ed. (London: Thomson Reuters, 2008), pp. 1417-1420.

- [61] The Solicitors further submit that whether the obligation is entire or divisible is a matter of construction of the parties' agreement in light of all of the circumstances. If the obligation is divisible or severable, "there is an express or implied agreement that payment will be made in proportion to the extent of performance". Chitty, *supra*, p. 1423.
- [62] The application of these principles, say the Solicitors, leads to the conclusion that the agreement was not an "entire contract".
- [63] First, submit the Solicitors, *Nathanson Schachter and Thompson v. Inmet Mining Corp. and Ladner Downs v. Crowley* speak in terms of an action singular: what is "entire" is the lawyer's obligation to do everything necessary to prosecute a single action to completion. "A contract of retainer for a single action, e.g. a common law action, is an entire contract". *Ladner Downs v. Crowley*, *supra*. The authorities do not stand for the proposition that Cashman urges, say the Solicitors, which is that where a lawyer is engaged to prosecute more than one action, performance requires him to prosecute all to completion, failing which he is entitled to a fee for none, as stated in *Cordery's Law Relating to Solicitors* (8th ed., 1988):

[a] retainer may be said to be an 'entire contract' where the client cannot receive the benefit of the consideration until the contract is completed ,

then an agreement to prosecute multiple actions will not be "entire", because the client derives the benefit of the consideration on the completion of one of the actions, whether by judgment or settlement.

- [64] The Solicitors maintain that contracts are "entire" where the obligations are indivisible, the consideration is usually a lump sum and if only part of the agreement is performed, the court could not assign a partial right to compensation to the part performance without re-writing the parties' agreement. Here, they say, there are two lump sums, not one; they are the product of entirely independent contingencies (success in the two separate actions); and the obligations are divisible because the lawyer can prosecute one action to conclusion without doing so for the other.
- [65] In Mr. Cashman's submission, the only objective interpretation that can be put on the Agreement looking at its terms and the circumstances in which it was made

was one contract requiring the prosecution by the Solicitors of both actions, which would then entitle them to a fee for the case as a whole.

I am inclined to the view that in the circumstances of this case, the contract entered into by the Solicitors and the Client on January 13, 2009 was an entire contract and intended as such by which the Solicitors were obligated to prosecute both the Client's tort action and his Part 7 action to their respective conclusions in order to be entitled to any fee. There can be no other interpretation, in my opinion, as there was no discussion between solicitor and client about any other form of contract or that there was intended to be two separate contracts. As well, Slater Vecchio purported to terminate the contract on January 20, 2011 in its email to Cashman, which suggests that at that time the Solicitors were of the view there was only one contract.

Issue 2: If so, then did the Solicitors and the Client, in or about early November of 2010, either

- (a) make a new agreement and discharge the Agreement; or
- (b) amend the Agreement;

[66] On this point, the Solicitors submit that if the court finds that Slater Vecchio's agreement with Cashman was an "entire contract", Cashman still must account for the effect of the Settlement Agreement. Whether the Settlement Agreement is treated as conduct which is evidence of the proper interpretation of the original agreement between Slater Vecchio and Cashman, as amending the parties' original agreement; or as a new agreement, the result on this point is the same: Cashman agreed that Slater Vecchio could bill and be paid based for its work on the tort action prior to and independently of what occurred with the Part 7 action.

[67] Mr. Cashman says that there was no settlement of a dispute between himself and the Solicitors because there was no dispute. Mr. Cashman says that it was not a term of any agreement that he made that the Solicitors would be discharged of their obligation to conduct the Part 7 Action to its conclusion and still retain the amount, and that if that was the Solicitors' intention, that ought to have been clearly conveyed to him.

[68] In response the Solicitors ask whether the Settlement Agreement, properly construed, reflects a common intention to finally resolve the question of the entitlement to and amount of fees by Slater Vecchio and Brown Benson? They say that it did. The Settlement Agreement may be interpreted in light of its object and purpose. The fee dispute, say the Solicitors, supplies the factual matrix of the Settlement Agreement and explains why it was made. Its purpose was to avoid the complexities of the fee dispute and "months, if not longer, of litigation" that would have ensued, with the attendant legal fees and delay in payment to all parties.

[69] Finally, the Client says, in short, there was no dispute between the Solicitors and himself. The only dispute involving the Solicitors was with Brown Benson, who would not commit to a split of fees, which the Solicitors had undertaken to achieve at the outset of the relationship with Mr. Cashman. The only dispute involving Mr. Cashman was also with Brown Benson and was about what portion of the split that was worked out that firm was going to get to keep.

[70] Thus, in the absence of a dispute, it cannot be said that there was a settlement, nor therefore, a release of obligations.

[71] As well, in my view, neither of the parties turned their minds to whether or not they were about to either make a new Agreement or amend the Agreement. Accordingly, in the absence of some evidence of actual intent to alter or amend the Agreement rather than by implication, I find neither occurred.

Issue 3: If not, then by virtue of dealings in or about early November 2010 is the Client estopped from recovering the fee paid to the Solicitors?

[72] The Solicitors maintain that even though the court has reached these decisions at this point in the reasons, Cashman is nevertheless precluded from seeking to recover the fee paid to Slater Vecchio in connection with the tort action by reason of the doctrine of estoppel.

[73] Estoppel requires (a) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (b) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made (that is, reliance); and (c) detriment as a consequence of the act or omission. *Costco Wholesale Canada Inc. v. Cazalet* 2008 BCSC 952, (2008), 86 B.C.L.R. (4th) 159 (S.C.), (BOA, Tab 3) citing *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.* [1970] S.C.R. 932. The representor's intention is satisfied if his conduct, viewed through the eyes of the representee, was such as would reasonably lead that person to rely on it: "[t]he underlying concept is that of unfairness or injustice". *Costco*, supra at p. 169, citing *Williston v. Canada (Minister of Indian Affairs & Northern Development)* 2005 FC 829, affirmed 2006 FCCA 316, 354 N.R. 180 (F.C.A.).

[74] The Client submits that in order for the Solicitors' argument under this head to succeed it must, in effect, be that Mr. Cashman impliedly represented not only that he would not later challenge the fee, but also that he would condone and waive later, as-yet unknown and not contemplated breaches of the Agreement by the Solicitors, and it was on the strength of that representation that the Solicitors acted. That says the client, is entirely contrary to the nature of a solicitor-client relationship.

[75] Indeed, the client suggests that, in fact, he can make a more compelling argument in equity than can the Solicitors. He says that by not raising with him the fact that the Solicitors hoped he would just give up on the Part 7 Action, by not advising him that they would not act on their now alleged assertion of cause when that supposed cause allegedly arose, and by not advising him that the acceptance of a reduced fee would mean the Solicitors were under no compulsion to act further on the Part 7 Action, the Solicitors represented clearly to Mr. Cashman that they would continue to act in respect of that action. Mr. Cashman further submits that he relied on that representation to his detriment when agreeing to pay monies on account of fees to the Solicitors at a time when they were not technically entitled to them because they had not performed the whole of their obligations under the Agreement.

- [76] In fact, the client relies on his evidence that he would not have agreed to any payment to the Solicitors in November 2010 had he any reason to believe the Solicitors would withdraw their services on the Part 7 Action.
- [77] The solicitors suggest in the face of Cashman's assertion that he was unrepresented vis-a-vis the Solicitors when the settlement agreement was arrived at, that he was represented by Turriff, and even though Turriff said he wasn't representing Cashman against Slater Vecchio, it matters not what Turriff said but what he did. According to the Solicitors, if anyone ought to have explained to Cashman the effect of agreeing to pay both firms before the Part 7 action was completed, it was Turriff.
- [78] I find this a difficult submission to accept for three reasons. One, Turriff told Slater that he wasn't acting against them in the settlement negotiations; two, Slater thanked Turriff for not acting against them once the Settlement Agreement had been reached; and three, no one knew at that point that the Solicitors were going to repudiate the contract.
- [79] Rather, I find the submission of the Client more compelling in that it is submitted by the Client that the equities simply cannot favour the Solicitors here. They had the duty to advise, they had the duty to do so fairly, they were the fiduciaries, and they knew what steps might or might not be taken by them in the future in respect of their continuing to act. For them to allege that they are the victims of an alleged representation when that representation - if it was even made - was made in circumstances where they had not fully and fairly advised their own client who could not possibly know that they would later fundamentally breach their contract and never even considered that possibility, is the antithesis of an argument in equity. It appears to be an attempt to use their own failure to be frank with their client as the basis of an estoppel argument.
- [80] Accordingly, my answer to issue 3 is that the client is not estopped from recovering the fee paid to the Solicitors.

Issue 4: if not, then did the Solicitors breach the Agreement by withdrawing their services without cause prior to prosecuting the Client's Part 7 action to its conclusion such that the Solicitors are not entitled to any fee?

- [81] The main point made by the Solicitors in their submissions regarding the fourth issue is that they properly had regard to not only the merits but to the risk of costs and Cashman's psychological health, as demonstrated by his irrational anger toward ICBC. Slater Vecchio maintains they treated Cashman fairly. They did not seek any fee for the work they did on the Part 7 action. In his evidence, Gordon made the observation that if the case was meritorious, as Cashman believed, he would have no difficulty obtaining other counsel to pursue it.
- [82] In support of this position they point out that Cashman insisted on advancing a claim to all of the TTD benefits in the Part 7 action, however, part of the claim - that related to the first two years of benefits - was wholly without merit. This was not insignificant: it amounted to

approximately \$44,000, or 40% of Cashman's Part 7 claim. In support of this submission they rely on *Richard Buxton v. Mills-Owens* [2010] 1 WLR 1997, [2010] EWCA Civ. 122 (C.A.) at para. 41 per Dyson L.J. where it was held that "reasonable grounds" are not susceptible to a comprehensive definition, since "whether there is a good reason to terminate is a fact-sensitive question". The Court of Appeal held the law firm was entitled to terminate the retainer where the client insisted on advancing arguments that were "hopeless" in law, and "not properly arguable".

- [83] The same principles, the Solicitors submit, apply in Canada. "There is an affirmative duty to check useless litigation", and where a solicitor reasonably forms the view that proceedings are hopeless or unnecessary, then not only should he not continue but he will be deprived of his entitlement to remuneration if he does so. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons, 1957), pp. 78-80 (BOA, Tab 20).
- [84] Not surprisingly, the Client takes the opposite view and distinguishes *Richard Buxton v. Mills-Owens* (supra).
- [85] The suggestion that Mr. Cashman had insisted on the pursuit of part of his claim when the Solicitors viewed that part as not properly arguable, it is submitted by the Client, played absolutely no role in the Solicitors' decision to withdraw. It is alleged by them to be cause for withdrawal only in argument.
- [86] As well, another difference has to do with the complete lack of any advice from the lawyer to the client as to the existence of a part of a claim that was not properly arguable. In *Richard Buxton*, the client submits, the court found that the advice given by the lawyers to their client was that three of the four grounds that the client wished to advance were hopeless, but that the client had insisted that those points be taken anyway. Such is not a fact in the case at bar.
- [87] Another difference between this case and *Richard Buxton v. Mills-Owens* says the client, is the nature of the client's instructions in light of the advice given. In that case, the client specifically instructed the lawyers to take positions that he had been advised were not properly arguable. Here, not only was Mr. Cashman not given advice that a claim for TTDs in the first 104 weeks was doomed to fail, there was also no evidence that he specifically instructed the Solicitors to continue on in that claim notwithstanding its supposed futility.
- [88] What the evidence shows is that all Mr. Cashman did in January, 2011, was call Mr. Gordon to find out what was happening on the Part 7 Action. In response to that inquiry, the Solicitors simply quit. The taking of that step in response to a simple inquiry as to the status of the matter is, in my view, unfortunate.

- [89] In my view, the least the Solicitors could have done was to prepare an opinion for the Client setting out in some detail the weaknesses of his case and recommending that he not pursue the Part 7 action, and, as well, setting out the risks of pursuing the claim, thus discharging their duty not to unreasonably expose the client to costs. Thereafter, it might be that the client may or may not wish to proceed knowing all the facts and having had an opportunity to consider them.
- [90] Accordingly, I determine that the Solicitors in the case at bar did not have cause to withdraw.
- [91] I, therefore, determine that a Certificate of Fees issue that provides for the refund to the Client of \$180,000 in fees paid, and taxes thereon of \$21,600 for a total of \$201,600.00. As well, the Client is entitled to be paid interest pursuant to the Court Order Interest Act from November 12, 2010 to the present.
- [92] I am indebted to counsel for their very thorough written submissions and their consummate professionalism in dealing with this very difficult matter.

"Master Taylor"

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