
CANADA / JUDGMENT

Slater Vecchio LLP v. Cashman

2013 BCSC 134

COURT

Supreme Court of British Columbia

DECIDED

31 January 2013

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2013 BCSC 134 Slater Vecchio LLP v. Cashman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Slater Vecchio LLP v. Cashman,

2013 BCSC 134

Date: 20130131

Docket: S110853

Registry: Vancouver

Between:

Slater Vecchio LLP

Solicitors

(Appellant)

And

Fred Cashman

Client

(Respondent)

Before: The Honourable Madam Justice Adair

On appeal from Slater Vecchio LLP v. Cashman, 2012 BCSC 830

(Master sitting as Registrar)

Reasons for Judgment

Counsel for the Solicitors (Appellant):

A. I. Nathanson

Counsel for the Client (Respondent):

G. T. Palm and D. Hunter

Place and Date of Hearing:

Vancouver, B.C.

January 10, 2013

Place and Date of Judgment:

Vancouver, B.C.

January 31, 2013

Introduction

- [1] In July 2005, the client, Mr. Cashman, was injured in a motor vehicle accident. In due course, he retained the law firm of Slater Vecchio LLP, the appellant, to represent him. The question on this appeal is whether Slater Vecchio must disgorge the fee paid to it by Mr. Cashman. The amount involved is approximately \$200,000.
- [2] The matter of Slater Vecchio's bill originally came on for hearing before Master Taylor (sitting as a Registrar) as a review under s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9, requested by Mr. Cashman. The central issue on the review was not the quantum of the bill, but whether the retainer agreement was an "entire contract," such that Slater Vecchio's refusal to continue with Mr. Cashman's action for Part 7 benefits required it to disgorge the fee billed and paid by agreement, based on the result in Mr. Cashman's tort action. The Master issued written Reasons for Judgment (the "Reasons"), indexed at 2012 BCSC 830, in which he concluded that Slater Vecchio was required to disgorge its entire fee.
- [3] Slater Vecchio appeals, pursuant to s. 75 of the Legal Profession Act. It says that the Master erred in three respects:
- (1) in construing Slater Vecchio's contingency fee agreement as an "entire contract";
 - (2) in failing to give effect to an agreement (described by the Master as the "Settlement Agreement") made in November 2010, when the fee was paid to Slater Vecchio; and
 - (3) in holding that Mr. Cashman was not estopped from recovering the fee paid to Slater Vecchio in November 2010.
- [4] For the reasons that follow, I would dismiss the appeal.

Summary of the facts and the Master's conclusions

- [5] The facts are set out in detail in the Reasons, and Slater Vecchio does not take issue with the Master's findings of fact. I will therefore set out a brief summary.
- [6] In July 2005, Mr. Cashman, then a practicing lawyer, was riding his bicycle when he was struck by a motor vehicle. Mr. Cashman suffered injuries, the most serious of which was a traumatic brain injury. As a result of his injuries, in particular, his head injuries, Mr. Cashman has not been able to practice law since the accident.
- [7] Mr. Cashman commenced two actions arising out of his accident: a tort action (the "Tort Action") against the owner and driver of the vehicle, and an action against I.C.B.C. 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").
- [8] Mr. Cashman initially acted for himself in connection with both Actions. After briefly being represented by another lawyer, he retained lawyers (Mr. Deering and Mr. Hutchinson) at the law firm of Brown Benson. However, Mr. Cashman became unhappy with the lawyers at Brown Benson, and he then retained Slater Vecchio, specifically Mr. Slater and Mr. Gordon.
- [9] At the time of the file transfer from Brown Benson to Slater Vecchio, a substantial amount of work had been done on the Tort Action, including setting a trial date. There had been an unsuccessful mediation. Mr. Cashman wanted the policy limits of \$1 million, and the highest the defendants were prepared to offer was \$400,000.
- [10] By contrast, little had been done on the Part 7 Action. Pleadings were not closed, and although discoveries had been scheduled, they had been adjourned. Mr. Hutchinson had spent time reviewing Mr. Cashman's Part 7 claim and made extensive notes on the file.
- [11] In December 2008, Mr. Cashman instructed Brown Benson to send its file on both Actions to Slater Vecchio. Mr. Hutchinson wrote to Slater Vecchio, enclosing both the Tort Action and the Part 7 Action file materials. The file was sent on the basis that on resolution of Mr. Cashman's claims, Slater Vecchio would "protect the funds, and then contact [Brown Benson] regarding a pro rata apportionment of legal fees, and payment of our disbursements." On December 10, 2008, Mr. Slater wrote to Mr. Cashman confirming receipt of the file materials from Brown Benson and 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." The Master found that there was no mention that the Tort Action and the Part 7 Action amounted to separate retainers.
- [12] On December 16, 2008, Slater Vecchio filed Notices of Change of Solicitor in the Tort Action and the Part 7 Action.
- [13] Against that background, on January 13, 2009, Mr. Cashman met with Mr. Gordon. Mr. Cashman executed a written contingency fee agreement (the "Retainer Agreement"), prepared by Slater Vecchio, which provided as follows:

I, Frederick George 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.

I agree to pay to the law firm of Slater Vecchio LLP the following:

- (a) legal fees of 33-1/3 % of the amount recovered by settlement or at trial;
- (b) all disbursements incurred in prosecuting my case. I also agree to pay interest on all disbursements paid on my behalf by Slater Vecchio LLP at the rate of 10 percent per annum;
- (c) the Social Services Tax and Goods and Services Tax applicable to the fee.

I confirm that I have been advised of the following:

A. This Agreement may be terminated within 90 days from the date of the Agreement or within 90 days of the termination of the retainer with Slater Vecchio LLP by application to the District Registrar of the Supreme Court of British Columbia to have the Agreement reviewed, notwithstanding that payment has been made to Slater Vecchio LLP under the Agreement;

B. The Rules of the Law Society of British Columbia provide that, subject to the Supreme Court approving higher remuneration, the maximum compensation to which a lawyer is entitled in a claim for personal injury arising out of the use or operation of a motor vehicle is 33-1/3% of the total amount recovered.

C. This percentage limit applies to all matters related to the trial of a lawsuit, but does not include any appeal. A lawyer and a client may make a separate agreement for legal fees for an appeal.

D. Fees charged by different lawyers vary.

[14] At the same time, Mr. Cashman and Mr. 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 Brown Benson's fee was once the matter was resolved, and Brown Benson's fee would be paid from the fee billed by Slater Vecchio to Mr. Cashman.

[15] Ultimately, in June 2010, Slater Vecchio was able to obtain the policy limits of \$1 million for Mr. Cashman, and this resulted in settlement of the Tort Action. The Part 7 Action did not form part of the settlement and was not released.

[16] However, there was a fee dispute between Brown Benson and Slater Vecchio concerning what their respective fees should be. Mr. Cashman retained Mr. Gordon Turriff, Q.C., to represent him in connection with Brown Benson's claim to fees. Mr. Cashman did not want Brown Benson to receive as large a fee as they wanted from a split of the fees based on a 33 1/3% contingency. He told Mr. Slater 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 Mr. Deering on

the basis of a 60/40 split of the 33 1/3% fee, he would then fight with Mr. Deering over Brown Benson's 40% share.

- [17] Mr. Turriff advised Slater Vecchio that he had been retained by Mr. Cashman in relation to Brown Benson's entitlement to a fee. Mr. Turriff made it clear to Mr. Slater that he was not acting for Mr. Cashman in respect of Slater Vecchio's fee.
- [18] Discussions concerning settlement of the fee dispute continued into the fall of 2010.
- [19] On November 4, 2010, Mr. Turriff wrote to both Mr. Gordon and Mr. Deering, summarising the situation from his perspective. Mr. Turriff said:

We know two things for sure at this time. First that Fred [Cashman] and Bob [Deering] are at odds and, second, that Bob can't bill SV [Slater Vecchio] 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).

- [20] 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. Mr. Turriff reiterated that he was not involved in any fee dispute between Slater Vecchio and Mr. Cashman. The meeting broke up without a resolution.

[21] However, on November 10, 2010, Slater Vecchio, Brown Benson and Mr. Cashman, through his counsel, Mr. Turriff, agreed on a resolution of the dispute. The Master referred to this as the "Settlement Agreement," and so I will do likewise. The terms of the Settlement Agreement are found in several places in the evidence before the Master, including e-mail messages exchanged between Mr. Turriff and Mr. Gordon.

[22] The Master described what happened in these terms (Reasons, para. 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.

[23] Mr. Nathanson, on behalf of Slater Vecchio, says that this paragraph is the nub of his client's appeal. He submits that, in this paragraph, the Master expressed his finding that a "fee dispute" between Mr. Cashman and Slater Vecchio existed, and also expressed his conclusions on the legal effect of the Settlement Agreement.

[24] However, the Master begins his Reasons by briefly summarizing the facts. There, he describes the fee dispute as being between Slater Vecchio and Brown Benson. In the context of the Reasons as a whole, I do not read para. 42 as a finding by the Master that a fee dispute existed between Mr. Cashman and Slater Vecchio.

[25] The Master found that, 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 Mr. Cashman, care of Mr. 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 Mr. Turriff in trust for Mr. Cashman in the amount of \$90,747.08, representing payment of the balance of settlement proceeds; and
- (e) Slater Vecchio also provided Mr. Cashman with copies of the accounts and a reconciliation of monies received and disbursed.

[26] The amount paid to Mr. Cashman was a combination of the reduction to Brown Benson's fee and \$20,000 that Slater Vecchio was prepared to give up, as a business decision, to get a deal done.

[27] In January 2011, Mr. Cashman left Mr. Gordon a voicemail inquiring about the status of the Part 7 Action. On January 19, 2011, Mr. 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.

[28] On January 20, 2011, Mr. Cashman responded by e-mail to Mr. Gordon, objecting to Slater Vecchio's actions and asserting it was breaching the Retainer Agreement.

[29] On the same day, Mr. Gordon responded, advising that Slater Vecchio was terminating the Retainer Agreement, and that the firm had received and sought no compensation for its work on the Part 7 Action.

[30] On February 1, 2011, Mr. Palm, counsel for Mr. Cashman, wrote to Mr. Gordon advising that in unilaterally withdrawing its services, Slater Vecchio had repudiated the Retainer Agreement, and Mr. Cashman accepted the repudiation. Mr. Palm demanded repayment of the sum of \$201,600, representing repayment of all the fees and taxes on fees paid to Slater Vecchio.

[31] On February 9, 2011, Mr. Cashman commenced this proceeding for a review of Slater Vecchio's bill dated November 12, 2010.

[32] Slater Vecchio acknowledges that it had no cause to terminate the Retainer Agreement.

[33] Before the Master, the parties agreed on the issues to be determined by the court, as follows:

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?

[34] The Master found in favour of Mr. Cashman on each of these issues.

[35] The Master determined that a certificate of fees issue, providing for the refund to Mr. Cashman of fees paid (including taxes) in the sum of \$201,600.

Grounds of Appeal

[36] Slater Vecchio says that the Master erred in law and in principle in holding that it was required to refund fees paid to it in respect of the Tort Action, and in particular, the Master:

- (a) erred in law in failing to give effect to the Settlement Agreement;
- (b) in the alternative, erred in law in holding that the Retainer Agreement was an "entire contract" that required Slater Vecchio to prosecute both the Tort Action and Part 7 Action to their respective conclusions in order to be entitled to any fee; and
- (c) in the further alternative, erred in law and in principle in holding that Mr. Cashman was not estopped from recovering the fee paid to Slater Vecchio pursuant to the Settlement Agreement.

Standard of Review

[37] An appeal under s. 75 of the Legal Profession Act is a true appeal, and the standard of review is that of an appeal court generally: see *Jiwan v. Davis & Company, A Partnership*, 2008 BCCA 494, at paras. 14-17. The court will not interfere with the findings of fact in the absence of palpable and overriding error. On questions of law, the standard is correctness. Matters of mixed fact and law are to be judged according to the standard of "palpable and overriding error" unless a question of law can be readily extracted: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 36-37; *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385 ("*Inmet Mining*"), at para. 74 (per Newbury J.A.); and *Copcan Contracting Ltd. v. Ashlaur Trading Inc.*, 2010 BCCA 597, at para. 6.

[38] Questions of contract interpretation can raise questions of fact, questions of mixed fact and law and questions of law: see *Greg Dowling Architects Inc. v. J. Raymond Griffin Architect Inc.*, 2012 BCCA 366 ("*Dowling BCCA*"), at paras. 24-25 and Madam Justice Russell's review of the case law in *Greg Dowling Architect Inc. v. Raymond Griffin Architect Inc.*, 2012 BCSC 1317 ("*Dowling BCSC*"), at paras. 18-42. The meaning of the words of a contract, when viewed objectively and in the context of the factual matrix in which the contract was made, is a question of mixed fact and law, while the legal effect of the words of a contract is a question of law. A failure to apply the proper principles of contractual interpretation would

be an error of law, attracting review on a standard of correctness: see Dowling BCCA, at para. 24.

Discussion

[39] I am going to deal with the second ground of appeal - the proper construction of the Retainer Agreement - first. It is the necessary context in which to consider what effect should be given to the Settlement Agreement, and whether the Master made any reversible error in that respect.

[40] Mr. Nathanson, on behalf of Slater Vecchio, acknowledges that the Retainer Agreement uses the word "claim" (singular). However, he submits that the language of the Agreement is not determinative of the question of whether Slater Vecchio's obligation is entire or divisible. He argues that the Master misapprehended and misapplied the law concerning "entire contracts," and that, properly construed, the Retainer Agreement included two obligations to prosecute two separate and distinct actions to completion.

[41] In the Reasons, the Master reviewed the background leading up to the signing of the Retainer Agreement, and reviewed the submissions made by each party. He noted case law and the learned text cited by Slater Vecchio's counsel in relation to "entire contracts" and "entire" and "divisible" obligations. The Master concluded, at para. 65:

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.

[42] Mr. Nathanson argues that this passage shows that, in interpreting the Retainer Agreement, the Master inappropriately took into account the parties' subjective intentions, which are inadmissible, and treated the question of the proper interpretation of the Agreement as one of form (i.e., there was only a single written agreement), thus failing to address the essential question of whether the obligation undertaken by Slater Vecchio pursuant to the Retainer Agreement is entire or divisible. The result, in Mr. Nathanson's submission, is that the Master failed to apply the proper principles of contractual interpretation, including those principles relating to "entire contracts." Mr. Nathanson submits that this is an error of law, and the Master's interpretation of the Retainer Agreement is, therefore, not entitled to deference.

- [43] The principles of contractual interpretation are well-settled. They are summarized in, for example: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 52 and following; *Dowling BCSC*, at para. 27; *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, 47 B.C.L.R. (4th) 278, at paras. 19 and following; and *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107, at paras. 42 and following.
- [44] The goal of contractual interpretation is to ascertain what the parties objectively intended when the contract was made. A contract is to be construed as a whole, with meaning given to all of its provisions. The most significant interpretive tool is the language of the contract itself, which is read in the context of the factual matrix (surrounding circumstances) prevalent at the time the contract was made. In interpreting a contract, a court must determine the intention of the parties from the words of the contract and not interpret the words of the contract based on the intentions of the parties. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract, since the court is not concerned with the parties' actual (subjective) intentions, but with their objective intentions as manifested in the document.
- [45] The doctrine of *contra proferentem* operates to protect one party to a contract from ambiguous or confusing drafting by the other party, by interpreting any ambiguity against the drafting party.
- [46] There are no separate or unique interpretive principles applicable to what are termed "entire contracts." Rather, it is a question of construction whether the contractual obligation is entire or divisible: see *Chitty on Contracts* (30th ed.), at para. 21-029.
- [47] Here, in my view, it is clear from the Reasons that the Master interpreted the word "claim" in the phrase "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" in the Retainer Agreement, to mean Mr. Cashman's whole or entire claim for compensation arising out of the accident. This meaning is implicit in the Master's conclusion in para. 65 of the Reasons that Slater Vecchio was obligated to prosecute both the Tort Action and the Part 7 Action to their respective conclusions in order to be entitled to any fee. The meaning ascribed to words in a contract is a question of mixed fact and law, on which the Master is entitled to deference.
- [48] Moreover, there is a reasonable basis for the Master to reach this conclusion, not the least of which is that the parties used the word "claim" (singular), rather than "claims," in the first paragraph of the Retainer Agreement. When Mr. Cashman retained Slater Vecchio, he in fact had commenced two separate actions in respect of the Accident. Slater Vecchio knew this (as the Master found), and it was part of the factual matrix for the Retainer Agreement. Yet, when Slater Vecchio drafted the Retainer Agreement (as the Master found they did), they described the scope of the retainer using the word "claim," not "claims."

- [49] There are also other aspects of the Retainer Agreement that support this conclusion, and these are mentioned by the Master in his discussion of Issue 1. The Retainer Agreement provides that Mr. Cashman would pay to Slater Vecchio all disbursements incurred in prosecuting his case (singular). The Retainer Agreement provides that Slater Vecchio would be entitled to fees of 33 1/3% of "the amount" (singular) recovered, and that Mr. Cashman would pay taxes applicable to "the fee" (singular). The Retainer Agreement identifies an appeal as a separate - divisible - obligation, that would be subject to a separate agreement.
- [50] The fact that, following the settlement of the Tort Action, fees were discussed does not assist Slater Vecchio. The Retainer Agreement is interpreted as of the time the contract was made. Where the language of an agreement is clear and unambiguous, evidence of conduct subsequent to the contract being made is not admissible to alter, vary or interpret the words used. If there are ambiguities in the Retainer Agreement, these would be construed against Slater Vecchio, the drafter.
- [51] Of course, Slater Vecchio was in fact going to be acting as Mr. Cashman's solicitors in two separate actions. But this does not answer the question concerning the proper legal effect to be given to the Retainer Agreement. No doubt the Retainer Agreement could have been drafted to express the objective intention that Slater Vecchio's obligations to act for Mr. Cashman in respect of the Tort Action and the Part 7 Action were separate and divisible and that the firm was entitled absolutely to be paid its fee in respect of one Action once that Action was concluded, whatever the status of the other. That, essentially, is the legal effect Mr. Nathanson argues should be given to the Retainer Agreement, despite the use of the word "claim" and other singular nouns in the document.
- [52] But is that the legal effect of what the parties actually said in the Retainer Agreement? This is a question of law. In my opinion, applying the legal principles I have summarized above, it is not. In my view, based on the Master's findings concerning the meaning of the words in the Retainer Agreement and the factual matrix, the legal effect of the Retainer Agreement is that Slater Vecchio undertook an entire obligation to Mr. Cashman - to represent him in relation to his claim - and had no entitlement to the fee payable under the Agreement until they had performed their part, all of it. In my opinion, this is the objective intention expressed by the words the parties used in the Retainer Agreement.
- [53] I would therefore reject this ground of appeal.
- [54] I turn then to the effect of the Settlement Agreement.
- [55] In the Reasons, the Master said in respect of Issue 2, at para. 71:
- [N]either of the parties turned their minds to whether or not they were about to either make a new Agreement or amend the [Retainer] Agreement. Accordingly, in the absence of some evidence of actual intent to alter or amend the [Retainer] Agreement rather than by implication, I find neither occurred.

- [56] Mr. Nathanson submits that the Settlement Agreement is a contract in its own right and must be given effect, even if it departed from the terms of the Retainer Agreement. In Mr. Nathanson's submission the Settlement Agreement, by its own undisputed terms, did amend the Agreement. He says that the Master found (in para. 42 of the Reasons) that it was an agreement by Cashman "to pay \$180,000 plus taxes to Slater Vecchio in settlement of Slater Vecchio's entitlement to a fee for the tort action" [emphasis added by Mr. Nathanson], instead of the 33 1/3% of the amount recovered, as provided for in the Retainer Agreement. Mr. Nathanson argues that the Master's references to the parties' "actual intent" and "turn[ing] their minds" to the effect of the Settlement Agreement can only refer to evidence of the parties' subjective intentions. Mr. Nathanson says that the Master erred by focussing on what he perceived to be the parties' subjective intentions, instead of having regard to the terms of the Settlement Agreement itself.
- [57] However, I do not read para. 71 of the Reasons in the same way as Mr. Nathanson.
- [58] The question concerning the Settlement Agreement is the same as with any other contract: at the time the Agreement was made, what were the parties' true intentions, considered objectively. Therefore, I read the adjective "actual" in para. 71 as synonymous with "true," thus showing that the Master was concerned to determine what, objectively, were the parties' true intentions at the time the Settlement Agreement was made. I do not read para. 71 as indicating that the Master either focussed on, or required, evidence of either party's subjective intent, which is inadmissible.
- [59] Moreover, in my opinion, the Master's statements in para. 71 constitute a finding that the terms of the Settlement Agreement did not include a term whereby the Retainer Agreement was either altered or amended. It was for the Master to make findings concerning the terms of the Settlement Agreement, and his findings are entitled to deference on appeal. The Master did not fail to give effect to the Settlement Agreement. Rather, he gave effect to the Settlement Agreement based on his findings concerning the terms, and with the goal of determining what, objectively, were the parties' true intentions at the time the Agreement was made.
- [60] However, did the Master make findings concerning the terms of the Settlement Agreement that are inconsistent with one another? Mr. Nathanson submits that, in para. 42 of the Reasons, the Master found that one of the terms of the Settlement Agreement provided that Mr. Cashman agreed to pay \$180,000 plus taxes in settlement of Slater Vecchio's entitlement to a fee for the Tort Action.
- [61] The parties themselves did not use the word "entitlement." The Master's use of the word "entitlement" in para. 42 of the Reasons has to be understood in its proper context. The Master described the "fee dispute" as one between Brown Benson and Slater Vecchio as to what their respective fees would be. The Master found (Reasons, para. 4) that the "fee dispute was finally settled when Slater Vecchio agreed to take \$20,000.00 less than Mr. Cashman had suggested," and the "agreement was to be final in that Mr. Cashman would not

tax the accounts of Brown Benson." In that context, the Master's use of the word "entitlement" in para. 42 is not inconsistent with his finding that the Settlement Agreement did not alter or amend the Retainer Agreement, or with his conclusion that the Retainer Agreement described an entire obligation.

- [62] The primary aim of the transaction that resulted in the Settlement Agreement was to settle Mr. Cashman's dispute with Mr. Deering concerning the fee to be paid to Brown Benson. This is highlighted by Mr. Turriff's November 4 message to Mr. Gordon and Mr. Deering. Since Mr. Cashman had terminated Mr. Deering's retainer, there were no issues concerning entire or divisible obligations in relation to Brown Benson. Even if (hypothetically) Slater Vecchio had the ability at the conclusion of the Tort Action to bill 33 1/3% of the recovery to Mr. Cashman, it did Slater Vecchio little good, for the reasons Mr. Turriff described.
- [63] The Settlement Agreement settled, finally, the dispute between Mr. Cashman and Mr. Deering concerning the fee to be paid to Brown Benson. It also settled, finally, the allocation between Brown Benson and Slater Vecchio. To put it another way, it settled Brown Benson's and Slater Vecchio's respective entitlements, as between one another.
- [64] Slater Vecchio's dealings with Mr. Cashman, its client, are part of the factual matrix in which the Settlement Agreement was made. However, these dealings are inconsistent with the interpretation Mr. Nathanson argues should be placed on that Agreement. Slater Vecchio, as Mr. Cashman's solicitors, had the obligation to ensure that Mr. Cashman was fully and fairly advised concerning his rights under the Retainer Agreement and whether the effect of the Settlement Agreement was to alter or amend the Retainer Agreement so as to deprive Mr. Cashman of a right or rights. There was no evidence that Slater Vecchio provided advice to Mr. Cashman that, for example, if Slater Vecchio agreed to bill a fee of \$180,000 to settle the dispute with Brown Benson, they would have the right to keep that amount absolutely, even if they later terminated the retainer without cause. Mr. Turriff's involvement did not relieve Slater Vecchio of its obligations to advise Mr. Cashman, particularly since Slater Vecchio was well aware of the limits on Mr. Turriff's retainer.
- [65] The mechanics of implementing the Settlement Agreement do not assist Slater Vecchio. Mr. Cashman received money (paid to Mr. Turriff in trust) as a result of the settlement, but a significant portion of that money resulted from the compromise of Brown Benson's fees. It is true that the cheque and copies of the statements of account were sent to Mr. Cashman c/o Mr. Turriff. However, Mr. Turriff was retained by Mr. Cashman, and was entitled to be paid for his services. Sending a trust cheque to Mr. Turriff's firm as part of the mechanics was a simple way to achieve this.
- [66] The fact that Mr. Cashman agreed, pursuant to the Settlement Agreement, to make a payment on account of Slater Vecchio's ultimate entitlement to payment would not be sufficient to alter or amend the Retainer Agreement, and it is not inconsistent with the obligation under the Retainer Agreement being entire, rather than divisible. The fact of payment before completion of performance does not relieve a solicitor obligated under an

entire contract of performance of the whole obligation: see *Ladner Downs v. Crowley* (1987), 14 B.C.L.R. (2d) 357 (S.C.), at p. 375 and *Maillot v. Murray Lott Law Corp.* 2002 BCSC 343, at para. 88.

- [67] I would therefore also reject this ground of appeal.
- [68] The final ground of appeal concerns the Master's conclusion that Mr. Cashman was not estopped from recovering the fee paid to Slater Vecchio.
- [69] I will deal with this ground relatively briefly. Mr. Nathanson acknowledged that the estoppel argument was essentially another way of saying that the Settlement Agreement must be given effect.
- [70] Mr. Nathanson argues that settlement of a fee dispute between a solicitor and client may give rise to an estoppel so as to prevent the client from later reviewing the accounts that were the subject of the settlement agreement. This is correct. However, the Master found (accepting Mr. Cashman's submission in that regard) that there was no dispute between Mr. Cashman and Slater Vecchio. This is a finding the Master was entitled to make, and it is supported by the undisputed facts.
- [71] Mr. Nathanson argues further that the Master erred in rejecting the estoppel argument on the basis that Slater Vecchio had a duty to advise Mr. Cashman about the potential implications of entering into the Settlement Agreement. Mr. Nathanson says that Mr. Cashman himself had been involved in fee disputes in his law practice, and that, in any event, Mr. Cashman was advised by Mr. Turriff, an expert in the area of lawyers' fees, throughout.
- [72] Neither argument can assist Slater Vecchio.
- [73] The fact that Mr. Cashman had practiced as a lawyer did not absolve Slater Vecchio from its obligation, as Mr. Cashman's solicitors, to ensure Mr. Cashman was fully advised concerning matters relating to Slater Vecchio's compensation: see *Inmet Mining*, at paras. 48-49, 59-60 and 71-72.
- [74] With respect to Mr. Turriff, the Master found as a fact that: Mr. Turriff's retainer was limited to advising Mr. Cashman in relation to Brown Benson's entitlement to a fee and he was not acting for Mr. Cashman in respect of Slater Vecchio's fee; these limits were communicated to Slater Vecchio; Mr. Turriff told Mr. Slater that he was not acting against Slater Vecchio in the settlement negotiations involving Brown Benson; and Mr. Slater thanked Mr. Turriff for not acting against his firm. The Master also found that, when Mr. Turriff was involved, no one knew that Slater Vecchio was going to repudiate the Retainer Agreement.
- [75] The Master concluded that it was Slater Vecchio who had the duty to advise Mr. Cashman, and to do so fairly. In rejecting Slater Vecchio's estoppel argument, he concluded that the equities did not favour Slater Vecchio. In my opinion, he made no reversible error in this regard.

[76] I therefore reject Slater Vecchio's third ground of appeal.

Summary and Disposition

[77] The appeal is, accordingly, dismissed, with costs.

"Adair, J."

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