In the Court of Appeal of Alberta

Citation: Betser-Zilevitch v Prowse Chowne LLP, 2021 ABCA 129

Date: 20210412
Docket: 2003-0226-AC
Registry: Edmonton

Between:

Maoz "Moose" Betser-Zilevitch

Appellant
(Appellant)

- and -

Prowse Chowne LLP

Respondent
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.A. Fagnan
Dated the 20th day of November, 2020
Filed on the 18th day of January, 2021
(2020 ABQB 732, Docket: 1803 16987)

Memorandum of Judgment

The Court:

Introduction

[1] A review officer fixed legal fees payable by the appellant client to the respondent law firm, and a Queen's Bench justice upheld that decision on an appeal under Rule 10.44 of the *Alberta Rules of Court*, Alta Reg 124/2010: 2020 ABQB 732. The client now seeks to overturn the Queen's Bench decision in this Court.

Background

[2] The client retained the law firm to represent him in a patent infringement matter in the Federal Court, and in September 2011 the parties entered into a contingency fee agreement (CFA). Following questioning in the litigation, the law firm advised the client that it would continue to represent him under the CFA only if the client would agree to negotiate a settlement. If the client wished to continue the litigation, the parties would have to switch to a fee-for-service retainer.

[3] The law firm put forward a settlement proposal to settle the action, which was accepted by the opposing party. In a letter to the Federal Court, the law firm advised the court that a settlement had been achieved subject to formalization. Subsequently, the client took the position that no settlement had been reached. The law firm, which took the position that there was a binding settlement agreement, advised the client that they were not in a position to continue to act for him.

[4] The client retained new counsel to challenge the settlement agreement in Federal Court. On July 25, 2018, the Federal Court held that a binding settlement agreement had been reached by virtue of letters between the parties dated January 25, 2017 and February 23, 2017: *Betser-Zilevitch v Nexen Inc.*, 2018 FC 735. That decision was upheld by the Federal Court of Appeal: *Betser-Zilevitch v Nexen Inc.*, 2019 FCA 230.

[5] After the Federal Court trial decision was released, the law firm issued an account to the client for $92,460.64, including $88,000 in fees. Following the discovery of a posting error, a subsequent invoice reduced the total amount to $80,915.80, of which $77,000 related to fees. Time billed by the law firm equated to $138,000 in fees. The $77,000 in fees ultimately invoiced was a significant reduction from the time billed, but represented 35% of the $220,000 settlement amount received by the client. Clause 4(b) of the CFA provided that the client would pay 35 percent of "claim proceeds", net of disbursements, after the commencement of examination for discovery.

Decision of the review officer

[6] Before the review officer, the client took the position that the CFA had been terminated by the law firm and, in accordance with Clause 13 of the CFA, no fees were payable. Clause 13

provided that if the law firm "conclude[s] at any time that there is not sufficient likelihood of recovery to justify further time and effort, [the law firm has] the right to stop acting…, which will end [the law firm's] right to compensation for professional services, except for outstanding disbursements".

[7] The review officer found the CFA was defective, as it did not contain the necessary particulars to conform with the requirements of Rule (2). As a result, the review officer applied Rule 10.8, which provides:

> 10.8 If a lawyer does not comply with rule 10.7(1) to (4), (6) and (7), the lawyer is, on successful accomplishment or disposition of the subject-matter of the contingency fee agreement, entitled only to lawyer's charges determined in accordance with rule 10.2 as if no contingency fee agreement had been entered into.

[8] Rule 10.2 provides that "a lawyer is entitled to be paid a reasonable amount for the services the lawyer performs for a client", considering several listed factors. The review officer reviewed the law firm's billing documents, including the time entries and fees and disbursements, and concluded they were reasonable in the circumstances. He accordingly allowed the final invoice in full.

Decision of the chambers judge on appeal

[9] The client appealed to a justice of the Court of Queen's Bench, who dismissed the appeal and upheld the decision of the review officer. The chambers judge found that the client, although caught by surprise by the finding that the CFA was defective, had the opportunity to put his position before the review officer. With respect to the review officer's consideration of the CFA, she found it "did not require interpretation of the CFA, but rather required a factual determination as to whether it contained the requisite particulars in precise and understandable terms", a determination that she found to be within the jurisdiction of the review officer.

[10] The chambers judge also considered the argument that the client is entitled to rely on the CFA, and particularly on Clause 13, despite the defects in the agreement. She concluded that, in determining a reasonable fee amount under Rule 10.2(1), a client's reasonable expectation that fees will be limited in some way, based on a written agreement drafted by the lawyer, is an appropriate factor to consider. The review officer did not interpret Clause 13 of the CFA, but was alive to the client's position that the law firm was not entitled to any fees because it terminated the retainer. He also considered the results achieved and the legal work performed, as well as the fact that the Federal Court had concluded the settlement was binding. He concluded that the issue of who terminated the retainer was irrelevant because the CFA was defective, but considered the existence of the CFA and the fact that the fees charged represented 35% of the settlement amount.

The chambers judge concluded that the review officer "did not err in law, principle or fact" in addressing the client's reasonable expectations based on the CFA in his analysis under Rule 10.2.

Issues on appeal

[11] In his further appeal to this court, the client raises several grounds of appeal. He submits the chambers judge erred in her interpretation of the review officer's jurisdiction and in upholding errors in that decision, including errors in principle and in fact. He also submits that the procedure before the review officer was unfair.

[12] For the reasons that follow, we dismiss the client's appeal.

Standard of review

A review officer's decision is entitled to deference on appeal, given the specialized knowledge and experience of review officers in assessing the reasonableness of lawyers' accounts: *Rocks v Ian Savage Professional Corporation*, 2015 ABCA 77 at para 15. The standard of review is otherwise governed by the framework established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235: Extricable errors of law and errors in principle are subject to review on a correctness standard. To the extent that the decision requires an interpretation of the rules of court and such interpretation is an extricable error of law, it is subject to review on a correctness standard. Where the question is one of fact, or mixed fact and law, the standard of review is "palpable and overriding error": see *Tallcree First Nation v Rath & Company*, 2020 ABQB 592.

Analysis

[13] The appellant submits that some of the review officer's decisions were outside his jurisdiction. Specifically, he argues that the review officer was called upon to interpret the CFA and determine its validity, not just the reasonableness of the fee charged. This exercise, he submits, required the review officer to refer the matter to the Court of Queen's Bench under Rule 10.18. Because of the failure of the review officer to refer the matter, any findings regarding the CFA were without jurisdiction.

[14] The chambers judge concluded otherwise. Rule 10.7(2) provides that, to be enforceable, a contingency fee agreement must contain a list of specified particulars. The review officer concluded that the parties' CFA did not include all the requisite particulars. As was noted by the chambers judge, the consideration of the CFA under Rule 10.7(2) did not require interpretation of the agreement, but rather involved a factual determination as to whether it contained the requisite particulars in precise and understandable terms. This exercise did not call for interpreting the document but examining it to determine whether the statutory requirements had been met. The

chambers judge correctly found this was a fact-finding exercise, not an exercise in contractual interpretation, and was within the review officer's jurisdiction.

[15] The client also submits that, despite the finding that the CFA was defective, the review officer ought to have allowed him, as client, to rely on the agreement. He submits that only the law firm, and not the client, is deprived of the benefit of a contingency fee agreement found to be defective under Rule 10.7(2). The client should, therefore, have been able to rely on Clause 13 of the CFA, which he argues precludes the collection of any fees in these circumstances. It was incorrect for the review officer to proceed to assess the reasonableness of the fees charged under Rule 10.8.

[16] As noted previously, Rule 10.7(2) provides that "to be enforceable", a contingency fee agreement must contain certain specified particulars "in precise and understandable terms". The review officer found the CFA did not contain the requisite particulars and was, therefore, unenforceable by virtue of Rule 10.7(2). This finding was upheld by the chambers judge. Rule 10.8 provides that, if a lawyer does not comply with the requirements of Rule 10.7(2), then the lawyer is "on successful accomplishment of the subject-matter of the contingency fee agreement, entitled only to lawyer's charges determined in accordance with rule 10.2", the usual manner of fee determination.

[17] The client's primary argument rests on the interpretation of Rule 10.7(2), and specifically whether the provision that renders the CFA unenforceable means it is unenforceable against both parties, or only that the law firm cannot rely on the agreement to assert entitlement to payment pursuant to its terms.

[18] The review officer appears to have concluded that the rule, on its face, means that neither party can rely on the terms of an unenforceable contingency fee agreement. The chambers judge came to the same conclusion. She held that the cases relied upon by the client, specifically *Molstad Gilbert v Douglas Rentals Ltd*, [1983] AJ No 664 and *Crawford v Morrow*, 2004 ABCA 150, stand for the proposition that a law firm cannot rely on the invalidity of its poorly drafted fee agreement to seek a greater benefit than that to which it would have been entitled under the agreement. However, there is no legitimate reason to go beyond the clear wording of Rule 10.7 or the usual rules of contract law to achieve a fair result. We agree. To the extent that previous case law suggests enforceability of contingency fee agreements only operates in one direction, to the detriment of the lawyer but not the client, such a result is not sustainable on a pure statutory interpretation basis.

[19] A contingency fee agreement is unenforceable if it does not comply with the clear provisions of the Rules. That does not end the matter, however. To ensure fairness in the assessment of fees, including consideration of the client's reasonable expectations in the

circumstances, the review officer is instructed to turn to the provisions of Rule 10.2. Those provisions give the review officer wide latitude to determine the reasonableness of a particular account having regard to several factors, including any retainer agreement, and all the surrounding circumstances, such as the number of hours worked, the settlement achieved, the time recorded, the result, and "any other factor that is appropriate to consider in the circumstances": Rule 10.2(1)(f). The review officer is charged with looking at what the lawyer did for the client and its value, having regard to all the circumstances.

[20] Here, the review officer and the chambers judge were aware of the CFA and its provisions and both had sufficient evidence as to the circumstances of the subject litigation to appreciate what had transpired, regardless of who "technically" may have terminated the unenforceable CFA. While the client submits that the CFA was terminated by the law firm, the review officer and the chambers judge were entitled to consider the nature of the work performed by the firm, the circumstances under which the relationship between the parties ended, and the result of the subject litigation. In this case, the Federal Court determined there was a binding settlement agreement, the decision was upheld by the Federal Court of Appeal, and the settlement proceeds were paid to the appellant. All of these circumstances were considered by the review officer and by the chambers judge on appeal.

[21] Determining the enforceability of the CFA under Rule 10.7 falls within the jurisdiction of the review officer. Once it is determined that the CFA is unenforceable, its existence does not become irrelevant, although its terms are no longer in force. As the chambers judge noted, "a client's reasonable expectation that fees will be limited in some way, based on a written agreement drafted by the lawyer", is an appropriate factor to consider under Rule 10.2(1) and will inform the reasonableness of the amount to be awarded. It is, however, only one of the considerations under Rule 10.2(1), and it was one of the factors considered in the decisions below.

[22] The chambers judge was correct in finding that the review officer did not err in his determination that the CFA was unenforceable and in his application of Rule 10.2. The chambers judge noted the review officer was alive to the client's argument that the law firm had terminated the retainer and was therefore not entitled to any fees whatsoever. Given the circumstances before the review officer, including that a valid settlement agreement had been entered into, the client had taken a legally unsustainable position against the law firm's advice, and the client had received proceeds from the settlement, he viewed the account rendered to be fair in the circumstances. All of those conclusions are sustainable on the record and all are within the review officer's jurisdiction.

[23] We see no error warranting our intervention in the chambers judge's decision to uphold the decision of the review officer.

[24] We have also considered the issue of procedural fairness, and are in total agreement with the reasons of the chambers judge on that issue. There was no procedural unfairness in the process before the review officer that prevented the client from making his case.

Conclusion

[25] The appeal is dismissed.

Appeal heard on March 29, 2021

Memorandum filed at Edmonton, Alberta
this 12th day of April, 2021

Paperny J.A.

Watson J.A.

Schutz J.A.

Appearances:

I.M. Carruthers
for the Appellant

V.A. Jones
for the Respondent