COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *FitzGibbon v. Piters,*
2012 BCCA 269

Date: 20120620
Dockets: CA039523 & CA039529

Docket: CA039523

Between:

Olga Terri FitzGibbon and
Hammberberg Altman Beaton & Maglio LLP

Respondents
(Plaintiffs)

And

Ronald E. Piters

Appellant
(Other)

- and -

Docket: CA039529

Between:

Olga Terri FitzGibbon

Appellant
(Plaintiff)

And

Ronald Piters, David M. Maglio, John Bourgoyne, Dave Young LLP,
Hammberberg Altman Beaton & Maglio LLP, and Macaulay McColl

Respondents
(Other)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, November 2, 2011
(*FitzGibbon v. Ma*, Vancouver Registry M084574)

Counsel for the Appellant R. Piters (CA039523): C.J. Bolan

The Appellant O. FitzGibbon appeared in person (CA039529)

Counsel for the Respondent D. Maglio (CA39529):	M. Chandler
The Respondent O. FitzGibbon appeared in person (CA39523)	
Place and Date of Hearing:	Vancouver, British Columbia April 23, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 20, 2012

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

[1] Hammerberg Altman Beaton & Maglio LLP (the "Law Firm"), and in particular David Maglio, acted for the appellant, Olga FitzGibbon, under a contingency fee contract on her claim for damages arising from a motor vehicle accident which occurred on 14 March 2007. Settlement negotiations with ICBC did not result in an agreement.

[2] Mr. Maglio withdrew as Ms. FitzGibbon's solicitor, after which the latter retained the appellant, Ronald Piters. A settlement was eventually concluded, and funds were paid by ICBC to Mr. Piters in trust. Mr. Piters subsequently transferred the settlement funds to Ms. FitzGibbon.

[3] The Law Firm applied for a charge against the settlement funds recovered by the plaintiff, pursuant to the *Legal Profession Act*, S.B.C. 1998, c. 9, and for an order that Ms. FitzGibbon and Mr. Piters be held jointly and severally liable for an amount to be assessed, and for an order remitting the matter to the Registrar for taxation.

[4] The chambers judge granted all of these orders. Mr. Piters appeals in Court of Appeal file number CA039523. Ms. FitzGibbon appeals in Court of Appeal file number CA039529.

[5] For the reasons that follow, I would dismiss both appeals.

II.

[6] Ms. FitzGibbon was involved in a motor vehicle accident on 14 March 2007, and alleged injuries as a result. She retained the Law Firm to represent her in respect of that claim. She entered into a contingency fee contract with the Law Firm in which she agreed to pay all disbursements incurred in pursuit of her claim, with interest at a rate of 1.5 percent per month, and a fee of 33 1/3 percent on any amount recovered. The contingency fee contract included this provision:

> 7. The Client agrees that if an offer of settlement or payment into Court is made, acceptance of which is recommended by the Law Firm, but is rejected by him or her, then the Law Firm shall be entitled to render an account and to be paid for services rendered to that date on the appropriate percentage fee stipulated for in Paragraph 3 ...

[7] On 11 January 2009, Ms. FitzGibbon was involved in a second motor vehicle accident. The Law Firm declined to be retained in respect of this matter.

[8] The Law Firm developed the evidence relating to Ms. FitzGibbon's claim from the first accident, requested medical records and reports, commenced an action on her behalf, closed the pleadings, and set dates for examinations for discovery and for trial.

[9] The Law Firm engaged in negotiations with ICBC with respect to the first accident, and on 14 March 2009 ICBC made an offer to settle based on two options:

1. an offer to settle the first accident for $27,500, all inclusive; or

2. an offer to settle both accidents for $30,500, all inclusive.

[10] The chambers judge described the events that followed:

> [5] The law firm sent Ms. FitzGibbon a letter dated March 17, 2009, reviewing her position. They suggested that she give serious consideration to the offer and, if necessary, seek a second opinion. The law firm did not make a recommendation that she take either offer.
>
> [6] Ms. FitzGibbon sent an e-mail to Mr. Maglio on March 22, 2009, and a letter April 6, 2009, outlining some concerns she had regarding the manner in which her file was being handled. She expressed that there had been some critical errors made and questioned legal fees given her lack of "satisfaction" with the law firm's services. She advised that she would be protesting the fees and disbursements on the basis of not accounting for time spent on the file and that she would be contacting another lawyer.
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> [7] On April 14, 2009, the law firm advised Ms. FitzGibbon by letter that due to her lack of confidence in it, Mr. Maglio would be withdrawing as her solicitor and enclosed a notice of intention to withdraw. Ms. FitzGibbon objected to the notice. The law firm confirmed that it would not change its position.
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> [8] On April 28, 2009, Mr. Maglio sent a notice of withdrawal to Ms. FitzGibbon and the other participants on the file.

[11] On 21 May 2009, the defendants made a formal offer to settle, addressed personally to Ms. FitzGibbon, for the sum of $24,500 plus disbursements.

[12] In June 2009, Mr. Piters began acting for Ms. FitzGibbon, and, in the spring of 2010, the plaintiff settled with ICBC by accepting ICBC's formal offer of 21 May 2009.

[13] On 12 August 2010, Mr. Piters wrote to the Law Firm advising that he and his client were attempting to negotiate with ICBC on the disbursements. He asked for a copy of the invoice for a certain medical report.

[14] On 13 August 2010, the Law Firm wrote to Mr. Piters with a copy of the invoice and advised him, for the first time, that it was maintaining a solicitor's lien in relation to its legal fees and disbursements. The same day, the Law Firm also wrote to ICBC reiterating its previous advice to ICBC that it was maintaining a solicitor's lien.

[15] On 1 September 2010, counsel for ICBC advised the Law Firm that the plaintiff's claim had been settled in the amount of $24,500 plus disbursements, which were said to be between $3,000 and $3,800. The Law Firm made further attempts to contact Mr. Piters, without success.

[16] On 29 December 2010, Mr. Piters sent an email to the Law Firm indicating that he was not involved in any dispute between the Law Firm and Ms. FitzGibbon about the payment of their fees.

[17] On 4 January 2011, the Law Firm learned that the settlement funds had been paid out to Ms. FitzGibbon by Mr. Piters.

III. The Parties' Positions Before the Chambers Judge

[18] The Law Firm applied for an order pursuant to the *Legal Profession Act* for a charge against the settlement proceeds recovered by Ms. FitzGibbon from ICBC. The Law Firm argued that its circumstances satisfied the three-part test outlined in *Chouinard v. I.C.B.C.*, 2002 BCSC 655, 40 C.C.L.I. (3d) 303: namely, that it was retained; that it would not be paid if a lien were not granted; and that the property was recovered as a result of its work in the proceedings. The Law Firm pointed out

that the amount of the eventual settlement was less than the offer Mr. Maglio had elicited from ICBC in March 2009.

[19] The Law Firm asserted that Mr. Piters was aware of its claims for unpaid fees and disbursements, and that his conduct in settling Ms. FitzGibbon's claims deprived the Law Firm of its charge on the settlement proceeds and rendered it unable to collect its fees and disbursements. It argued that, in the circumstances, Mr. Piters was jointly and severally liable for its fees and disbursements.

[20] Mr. Piters advanced a number of arguments against the Law Firm's claim for a charge. He contended that the Law Firm had no good reason to terminate the solicitor/client relationship with Ms. FitzGibbon; that by withdrawing without a good reason, the Law Firm terminated the contingency fee agreement and was therefore entitled to no fees; that the charging order sought was not available under s. 79 of the *Legal Profession Act;* and that he should not be held jointly and severally liable with Ms. FitzGibbon because he gave no undertaking to protect the Law Firm's account, although Mr. Maglio had asked him to do so.

[21] Ms. FitzGibbon supported the position taken by Mr. Piters. She said she did not wish to terminate the agreement with the Law Firm for legal services, and that Mr. Maglio lost any right to claim fees when he terminated the agreement.

IV. The Chambers Judge's Reasons for Judgment

[22] The judge held that the Law Firm met the three-part test set out in *Chouinard* (para. 36). She determined that settlement monies were "property" within the meaning of s. 79(1) of the *Legal Profession Act*. In the course of her reasons, she reviewed case law which discussed the distinction between a solicitor's possessory lien and the rights created by s. 79. She concluded that the question of whether the Law Firm terminated its retainer without good cause, and hence whether it had forfeited its right to fees, was an issue to be addressed before the Registrar on a taxation.

[23] The judge held that Mr. Piters' conduct in paying out to Ms. FitzGibbon the proceeds of the ICBC offer "operated to defeat the Law Firm's charge" and that

Mr. Piters was therefore jointly and severally liable under s. 79(6) of the *Legal Profession Act* (para. 45).

V. Errors Alleged

[24] Mr. Piters contends that s. 79(1) of the *Legal Profession Act* does not authorize the granting of a "retroactive" charging order over monies that had already been paid out. He argues that even if such an order were authorized, the Law Firm did not meet the criteria for granting such an order. He further submits that the Law Firm did not establish that it would be "just and proper" for the Court to grant an order in the circumstances. Finally, he asserts that a lawyer cannot be in breach of s. 79(6) of the *Legal Profession Act* if it would require the lawyer to act against his client's instructions without the protection of a court order.

[25] For her part, Ms. FitzGibbon contends that the charging order should not have been made against her because she is not a lawyer, and not governed by the *Legal Profession Act*. She also argues that the judge failed to consider the issue of the Law Firm's "negligence" and "misconduct", and that she erred in finding that it was just and proper to grant a charging order.

VI. Discussion

[26] The order appealed from was made under the provisions of s. 79 of the *Legal Profession Act.* For the purposes of this appeal, the relevant portions of that section are:

> 79 (1) A lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.
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> (2) Subsection (1) applies whether or not the lawyer acted as counsel.
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> (3) The court that heard the proceeding or in which the proceeding is pending may order the review and payment of the fees, charges and disbursements out of the property as that court considers appropriate.
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> ...

> (6) All acts done and conveyances made to defeat, or that operate or tend to defeat, the charge are void against the charge, unless made to a bona fide purchaser for value without notice.
>
> (7) A proceeding for the purpose of realizing or enforcing a charge arising under this section may not be taken until after application has been made to the appropriate court for directions.

[27] The first argument advanced on Mr. Piters' behalf is that the Law Firm had no charge against the settlement funds recovered by the plaintiff until the charging order was pronounced by the Court. By the time this order was pronounced on 2 November 2011, Mr. Piters had already paid those settlement funds from his trust account to Ms. FitzGibbon. The argument advanced is that an order pronounced under s. 79(1) of the *Act* cannot have a retrospective effect.

[28] This argument is based upon cases decided under the United Kingdom's *Solicitors Act*, 1860 (UK), 23 & 24 Vict, c. 127, s 28, or analogous provisions such as Rule 625 of the *Alberta Rules of Court*, 390/68, as applied in *Merchant Law Group v. McLeod & Co.*, 2005 ABQB 875, 55 Alta. L.R. (4th) 301. Under both regimes, the court has discretion to "declare" the lawyer "... to be entitled to a Charge ...".

[29] However, the provisions of the *Solicitors Act* have been replaced in British Columbia by s. 79 of the *Legal Profession Act*. By its express terms, the lawyer who is retained to prosecute a proceeding in a court "has a charge against any property that is recovered". The charge arises upon the lawyer having done the work on behalf of the client in pursuit of her claim that resulted in some recovery.

[30] The nature of the charge arising may be described an "inchoate right", the crystallization of which requires only the pronouncement of the court [see *Re Tots and Teens Sault Ste. Marie Ltd., et al* (1975), 65 D.L.R. (3d) 53 (Ont. H.C.J.)]. While the charge exists, by statute, upon the recovery of property as a result of the retained lawyer's efforts, the charge only becomes enforceable upon declaration by the Court under s. 79(3).

[31] This analysis is consistent with the decision of the Supreme Court of British Columbia in *Jenik v. Fearn*, (1995) 130 D.L.R. (4th) 695 (B.C.S.C.), and in *Chouinard.*

[32] The decision of whether to make a declaration upon application is a discretionary one. The judge must be satisfied that it would be "just and proper" to grant the order (see *Wilson, King & Co. v. Lyall (Trustees of)* (1987), 12 B.C.L.R. (2d) 353 (C.A.), and *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 346, 21 B.C.L.R. (5th) 297).

[33] It is not an answer to the inchoate nature of the charge to say that the property it applies to has not been identified. In *Doyle v. Keats*, (1990) 46 B.C.L.R. (2d) 54 (S.C.), the Court said:

> It is my opinion that the words "any property" used in s. 79 of the Legal Profession Act are as well of the widest possible character, and include a chose in action. Further, I am of the view that the specific property need not be immediately ascertained. It is generally, but not exclusively, the client's interest in the property which is subject to the charge: *Walker v. Saunders,* supra. The ascertaining of the extent of that interest may occur subsequent in time to the creation of the charge.

[34] In my respectful opinion, the argument that a charging order under s. 79 cannot have retrospective effect is not supported either by the language of the statute or by the relevant caselaw.

[35] The second argument advanced on Mr. Piters' behalf is that the Law Firm did not meet the requirements for the granting of the charging order, as set out in *Chouinard*. The chambers judge held (para. 36) that the criteria were met. She said:

> [37] It [the Law Firm] was clearly retained on the file on February 18, 2008.
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> [38] It has shown that it will not be paid unless the charge is granted. Ms. FitzGibbon was aware that there would be fees and disbursements owing. Her letters of March and April 2009 specifically raised and challenged the amounts. She did not pay anything until October 24, 2011, a week in advance of this hearing, and then only disbursements with no interest.
>
> [39] The law firm has also demonstrated that the settlement was recovered or preserved as a result of its work. Mr. Maglio's conduct of the file resulted in ICBC making the alternative offers which it did in 2009. The offer which Ms. FitzGibbon accepted was lower than either alternative.

[36] I can see no basis for interfering with those conclusions, and would not give effect to this submission.

[37] The judge also found that it would be “just and proper” to grant a charging order in the circumstances. The only issue before the judge was whether the Law Firm was entitled to enforce a charge against the settlement proceeds. Whether the Law Firm terminated the solicitor/client relationship for good reason was not an issue for her to decide. That is an issue that may be addressed before the Registrar, in deciding whether in fact the Law Firm is entitled to be paid fees, taxes and disbursements from the settlement proceeds over which the charge exists.

[38] Similarly, the question raised by Ms. FitzGibbon as to the Law Firm’s “negligence” or “misconduct” as a basis for defeating the charge, are matters for the Registrar in deciding what amount, if any, the Law Firm is entitled to be paid.

[39] Mr. Piters contends that the judge should not have made an order for joint and several liability against him and Ms. FitzGibbon under s. 79(6). The judge found that Mr. Piters’ conduct in paying the settlement proceeds from his trust account to Ms. FitzGibbon amounted to “... acts done ... to defeat or that operate or tend to defeat the charge” (para. 46).

[40] This conclusion was based on the judge’s findings that Mr. Piters was aware of the Law Firm’s claim, that he ignored the claim, and that he took the position that it was a matter solely between the Law Firm and Ms. FitzGibbon.

[41] The effect of s. 79(6) is to render void Mr. Piters’ conduct that operated or tended to defeat the charge. As against the Law Firm’s claim to enforce the charge against him, it is as though Mr. Piters’ transfer of the funds did not occur.

[42] Mr. Piters asserts, finally, that the chambers judge’s interpretation of the law would have the effect of requiring current lawyers to act against their clients’ instructions or interests. In his submission, this would contravene public policy. He calls the Court’s attention to provisions from Chapters 1 and 6 of the *Professional Conduct Handbook*, which set out the requirement that a lawyer give undivided loyalty to every client, and that he or she “should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law.”

[43] While it is true that lawyers have a duty zealously to pursue their clients' interests, this obligation is not without limit, as the *Professional Conduct Handbook* specifically acknowledges. Lawyers also have duties to the state, to the judiciary, to the bar, and to other lawyers, which must be balanced against their responsibilities toward their clients. With respect to the present case, it would not advance the public interest to allow new counsel in a matter to act so as to frustrate a lawful charge imposed for the benefit of former counsel. I would accordingly not give effect to this ground of appeal.

[44] For the foregoing reasons, I see no error in the chambers judge's conclusions that Mr. Piters was jointly and severally liable with Ms. FitzGibbon.

[45] Ms. FitzGibbon's submission that the charging order should not have effect against her because she is not a lawyer, and not subject to the *Legal Profession Act,* cannot be sustained. The *Legal Profession Act* is a law of general application in the Province of British Columbia. It governs all persons as it may apply in the particular circumstances of any case.

[46] I would dismiss both appeals.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Frankel"