In the Court of Appeal of Alberta

Citation: Webb v. Birkett, 2011 ABCA 13

Date: 20110126
Docket: 0903-0286-AC
Registry: Edmonton

Between:

Marguerite Webb

Appellant
(Plaintiff)

- and -

Lucille R. Birkett and Birkett Ticoll

Respondents
(Defendants)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Richard Marceau

Reasons for Judgment Reserved of the Honourable Madam Justice Bielby
Concurred in by the Honourable Mr. Justice Ritter
Concurred in by the Honourable Mr. Justice Marceau

Appeal from the Judgment by
The Honourable Mr. Justice W.P. Sullivan
Dated the 5th day of May, 2009
Filed on the 30th day of September, 2009
(2009 ABQB 239, Docket: 0603-05667)

Reasons for Judgment Reserved
of the Honourable Madam Justice Bielby

INTRODUCTION

[1] Marguerite Webb appeals from a decision dismissing her negligence claim against her former lawyer, Lucille Birkett, and Ms. Birkett's firm for failing to provide her with proper and complete legal advice, with the result that she entered into an improvident matrimonial property settlement and waived her entitlement to spousal support. Ms. Webb argues that had she received proper legal advice, she would have settled for, or received at trial, a lump sum spousal support award in the range of $230,000 - $250,000 as well as a matrimonial property award of $1.5 million to $1.8 million over and above the $818,641 she received by way of settlement.

[2] Ms. Webb, aged 57, retained Ms. Birkett to act for her in September, 2002 in relation to her matrimonial issues; she and her husband of 20 years, Mr. Todd, had decided to separate. At that time, she was residing in the matrimonial home with her husband and child. She was not employed outside the home. The sole source of the income she and her husband received was from Todd Cleaners Inc., which was completely owned by Mr. Todd.

[3] Mr. Todd owned 50% of the shares of that company at the time of marriage; he acquired the other 50% of the shares during the marriage. Todd Cleaners owned 50% of the shares in Bedford Holdings Inc. Ms. Webb directly owned 25% of the shares in Bedford and her husband directly owned the other 25%. Bedford owned several commercial income-producing rental properties.

[4] Ms. Webb sought out Ms. Birkett because she had heard about and wanted to use the collaborative family law process to resolve her issues with Mr. Todd. Ms. Birkett is a lawyer and registered collaborative family law practitioner. Mr. Todd retained another registered collaborative family law practitioner to act for him. The parties each signed agreements in which they acknowledged that their respective counsel would not continue to act should they start to pursue matters through the courts rather than via negotiation.

[5] Ms. Birkett obtained some factual information from Ms. Webb and they discussed Ms. Webb's concerns and goals. However, Ms. Birkett did not obtain full financial disclosure from Mr. Todd's solicitor prior to the parties entering into a settlement agreement. Whether or not Ms. Birkett was obliged to serve a formal Notice to Disclose, as the matter was proceeding on a collaborative family law basis, she failed to otherwise obtain or even request many of the documents referred to within such a Notice. She did not obtain the financial statements for Todd Cleaners.

[6] Ms. Birkett therefore could not and did not provide Ms. Webb with advice as to her options in relation to settlement. Ms. Birkett did not tell Ms. Webb what she would likely receive for either spousal support or property division if the matter proceeded to trial. She did not advise Ms. Webb

that proceeding to settlement without the missing information exposed her to the risk of settling for less than that to which she was legally entitled to receive.

[7] Ms. Birkett's only information in relation to income was that Ms. Webb had earned $1,000 a month as a life skills coach in 1999, but nothing subsequently, and that her husband brought home about $3,000 a month to cover household expenses. Ms. Birkett was aware that Ms. Webb did not have any day-to-day involvement in the operation of Todd Cleaners or Bedford and would thus have limited information about these companies.

[8] Ms. Webb told Ms. Birkett she did not want to have to rely on monthly spousal support in the future because she believed Mr. Todd to be unreliable. She said she did not want to take an interest in Todd Cleaners because it was a family business developed by her father-in-law, who had advanced it $500,000 during the course of the marriage.

[9] The parties and their lawyers held a series of four-way meetings in the autumn of 2002 in an attempt to resolve matters. They retained an accountant, Barry Gardiner, to value the shares in Bedford.

[10] However, prior to that valuation being complete, Mr. Todd and Ms. Webb, still residing in the same home, met together on November 16, 2002 and reached a tentative oral settlement of all matters without their lawyers present. On the strength of that agreement, Ms. Webb made an offer to purchase another home, to close on January 31, 2003, so that she could move away from Mr. Todd.

[11] The parties then advised their counsel that they had settled. A meeting was held at the office of Mr. Todd's accountant on December 16, 2002 to work out the structure of the payout to Ms. Webb under that settlement. Ms. Birkett and Mr. Todd's lawyer each attended the meeting by telephone. Ms. Webb told Ms. Birkett that she was willing to settle as proposed because it would give her sufficient funds to live on without relying on Mr. Todd generating any income in the future.

[12] All of the information upon which the settlement was based had come from Mr. Todd; none of it was verified or confirmed by Ms. Birkett. Settlement proceeded, after consultation with Ms. Birkett, on the basis of a negotiated increase on the higher of two settlement options provided by Mr. Todd. Each of those settlement proposals was based on a valuation of the commercial property owned by Bedford alone, with no consideration being given to any additional value in that company or in Todd Cleaners.

[13] Mr. Todd had disclosed the 2001 financial statements for Bedford prior to the settlement being reached. Those statements disclose a net value of about $3.3 million. He also obtained and provided separate appraisals for the buildings Bedford owned and operated. On the basis of this information, he formulated the two settlement options for his wife. Each involved taking the net

value for Bedford and deducting from it the sum of $500,000 plus interest at a rate of 10% accumulated over a period of eight years. This amount was said to reflect $500,000 Mr. Todd's father had injected into Todd Cleaners. No documentation was provided evidencing that this injection was a loan or granting an entitlement to payment of interest at 10%, or at all. If it was a loan, it is not clear that the loan would any longer have been enforceable at the date the settlement was reached.

[14] The first settlement option was based on Ms. Webb apparently receiving 50% of the lower end of the range of the appraised value for the commercial buildings owned by Bedford, leaving her with $751,864, most of which was to be paid over time. The other offered her 25% of the higher end of the range of the appraised value, less a deduction for the tax consequences of sale, leaving her with $722,345, most of which was to be paid over time.

[15] The negotiations proceeded on the basis of these two offers, with the ultimate settlement reached providing Ms. Webb with $818,641, paid over time, with no additional child support or spousal support. Ms. Birkett told Ms. Webb that if that figure was more than half of the value of the net matrimonial property, the difference could be considered as compensatory lump sum spousal support.

[16] The agreement was ultimately formalized in a matrimonial property agreement, signed March 6, 2003. The settlement provided that the parties' child, then aged 14, would reside equally with each of them and that no child support would be paid at that time. It provided that each spouse waived entitlement to spousal support. It provided that Ms. Webb would transfer her interest in the matrimonial home and her shares in Bedford to her husband and otherwise surrender any other matrimonial claim she might have against him, including her claim to an interest in his shares in Todd Cleaners.

[17] The settlement agreement provided that Mr. Todd would pay Ms. Webb the $818,641 as follows: $500,000 was to be paid in equal monthly installments over 10 years; another $161,699 plus $100,609 was to be paid relatively expeditiously; a further $56,333 was to be paid in monthly installments over two years. It provided for no entitlement to interest on the periodic payments, nor did it provide any security for those payments. It did, however, allow Ms. Webb sufficient funds to complete the purchase of her home on January 31, 2003.

[18] Ms. Webb subsequently retained Dale Tumbach, a family law lawyer, when she believed that Mr. Todd was failing to comply with his ongoing obligations under the matrimonial property agreement. Mr. Tumbach sued on the settlement, an action which was ultimately settled. He also commenced this action against Ms. Birkett on May 8, 2006 for breach of her duty of care.

[19] The trial judge found that Ms. Birkett had not breached her duty of care to Ms. Webb, that Ms. Webb had not proven that she suffered damages even had a breach occurred, and that this action was limitation barred in any event.

[20] The following issues arise in this appeal:

a. Did the trial judge err in concluding the limitation period had passed?

b. Did the trial judge err in applying a lower standard of care to lawyers using the collaborative family law process than other lawyers in relation to their duty to advise their clients?

c. Did the trial judge err in concluding that Ms. Webb failed to establish damages arising from Ms. Birkett's breach of her duty of care?

[21] The trial judge erred in effectively finding that Ms. Birkett owed a lower standard of care to clients participating in the collaborative family law process than was otherwise owed. The duty of care a collaborative family law practitioner owes to his or her clients is the same duty of care as any family law practitioner owes to a client.

[22] However, the appeal is dismissed because Ms. Webb did not establish damages resulting from Ms. Birkett's breach of duty. She failed to establish that the $818,641 she agreed to receive was not a reasonable reflection of what she would have received at trial or pursuant to a settlement made on the basis of full disclosure.

STANDARD OF REVIEW

[23] The standard of review is correctness in relation to the question of whether a different standard of care applies to lawyers engaged in the collaborative family law process than to other lawyers. The standard of review in relation to when a particular limitation period expired, a question of mixed fact and law, is palpable and overriding error. The standard of review in relation to damages is also palpable and overriding error since it involves a question of an alleged fundamental mischaracterization or misapprehension of evidence.

ANALYSIS

a. Did the trial judge err in concluding the limitation period had passed?

[24] Yes. Mr. Tumbach, acting for Ms. Webb, neither knew nor should have known that Ms. Webb had a claim against Ms. Birkett for negligence until May 31, 2004, when he first received the

Todd Cleaners financial statements. This action was commenced on May 8, 2006, within two years of that date.

[25] The trial judge made a palpable and overriding error in concluding that this action was statute-barred because he found that no important or critical information surfaced after January of 2004, and that Ms. Webb should therefore have been aware of her cause of action at that time.

[26] In order to trigger the running of the limitation period, the claimant must know or have been reasonably able to discover that an injury has occurred: see s. 3(1)(a) of the *Limitations Act*, R.S.A. 2000, c. L-12.

[27] Mr. Tumbach testified that he was retained by Ms. Webb in January, 2004. At that time, Ms. Webb's immediate concern was Mr. Todd's failure to make the payments due under the matrimonial property agreement. Mr. Tumbach sued Mr. Todd on her behalf. In that context, he requested and received Ms. Birkett's file on May 17, 2004, though her notations and internal memoranda had been removed from it.

[28] Mr. Tumbach testified that while Ms. Birkett's file did not contain any information he did not already have, it was only when he reviewed its contents that "things kick started" in relation to becoming concerned about the quality of Ms. Birkett's representation. He then asked for and received the Todd Cleaners financial statements from Mr. Todd's lawyer on May 31, 2004. The two reviewed them together on June 7, 2004, after which Mr. Tumbach first raised with Ms. Webb the possibility of making a claim against Ms. Birkett. He then realized that Todd Cleaners had value, of which Ms. Webb had received none; Mr. Todd had kept it entirely, notwithstanding that Ms. Webb would have had a claim against it under s. 7(3) of the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 ("MPA").

[29] Mr. Tumbach commenced this action just under two years later, on May 8, 2006.

[30] While the Todd Cleaners financial statements did not show any significant value in the Todd Cleaners shares over and above its interest in Bedford, that fact was relevant. If those financial statements had shown that Todd Cleaners had significant liabilities offsetting some or all of the $3.3 million value of the Bedford shares, there would have been no reason to conclude that the settlement was improvident. However, once Mr. Tumbach saw that Todd Cleaners did not have any such liabilities, with the result that it had a prima facie value equal to the $3.3 million value of the Bedford shares it owned it was apparent that the amount Ms. Webb had received by way of settlement was far less than 50% of that sum.

[31] The trial judge did not address this fact. He gave no reasons for concluding that no important or critical information surfaced after January, 2004. He did not reject Mr. Tumbach's evidence that he only received the financial statements for Todd Cleaners on May 31, 2004. There is no

discernible reason for the trial judge's conclusion that the Todd Cleaners financial statements added no relevant information to that which Mr. Tumbach had been given in relation to the potential value of Ms. Webb's matrimonial property claim. While he rejected Mr. Tumbach's expert evidence because of personal interest, he made no such finding in relation to Mr. Tumbach's evidence as to his involvement in the file.

[32] The trial judge therefore made a palpable and overriding error in concluding that this action was limitation barred.

b. *Did the trial judge err in applying a lower standard of care to lawyers using the collaborative family law process than other lawyers in relation to their duty to advise their clients?*

[33] Yes. This issue lies at the heart of this appeal. The trial judge erred in law by effectively finding that a lower standard of care applied to lawyers engaged in the collaborative family law process than for other lawyers.

[34] The trial judge stated in his judgment at para. 51:

> In determining whether Ms. Birkett breached her duty of care, I must consider the context in which the alleged breach occurred. In this case, the parties chose to engage in the CFL process, a process where the parties commit to settlement rather than litigation. It is a process ... where the role of the lawyers is to develop the process and the role of the parties is to take ownership of the process, gather their own information, and actively and fully participate in assessing the quality of that information. The roles of the clients and lawyers are clearly defined at the beginning of the CFL process. In the CFL process, it is the clients who have the control over the process, the cost and the outcome of the dispute. Moreover, it is the clients who are responsible for making decisions affecting the outcome. The clients are educated and empowered by the lawyers to make decisions affecting the outcome. *However, the CFL lawyer still has the fundamental responsibility to provide professional legal advice to their client.* (emphasis added)

[35] Notwithstanding this last sentence, the effect of his decision was to relieve Ms. Birkett of her obligation to advise Ms. Webb that, at the time the settlement agreement was negotiated, she did not have sufficient information to determine what Ms. Webb was legally entitled to receive by way of spousal support and through a division of matrimonial property. Further, he relieved Ms. Birkett of her obligation to advise Ms. Webb that, by settling prior to receiving full disclosure and on the basis of information entirely provided by her husband without independent verification, she was at risk of accepting less than she was entitled to receive legally (i.e., what she would likely receive at trial, or through a further negotiation once full disclosure had been made).

[36] The trial judge found, in effect, that any advice, action or inaction engaged in by Ms. Birkett was unimpeachable in the interest of getting any collaborative family law settlement for Ms. Webb, even one which resulted in Ms. Webb unwittingly agreeing to accept less than what she was entitled to receive at law. He found that Ms. Webb's goals of maintaining a positive ongoing relationship with her child, her husband and her father-in-law, which lead to her desire to use the collaborative family law process, justified Ms. Birkett in proceeding to confirm the settlement although she had received inadequate information from Mr. Todd and his counsel.

[37] He found that because Ms. Webb had advised Ms. Birkett that she did not want to depend on receiving either monthly spousal support or a share of Todd Cleaners because it was a family business, Ms. Birkett was then justified in failing to pursue spousal support at all or compensation of any kind in exchange for Ms. Webb's potential matrimonial interest in that dry cleaning business.

[38] The trial judge found as a fact that Ms. Birkett told Ms. Webb she was entitled to disclosure and that Ms. Webb was aware she did not have her husband's income tax returns. He found that Ms. Birkett told Ms. Webb of the process that was available to verify the information provided to her by Mr. Todd. He concluded that at that point it was up to Ms. Webb on her own to decide if she wanted to proceed with that process. Her actions in participating in an unscheduled settlement negotiation meeting with her husband and his accountant was an indication, by conduct, that she chose not to do so.

[39] Ms. Birkett candidly admitted at the time settlement was reached that:

a. She had no documentary evidence of the income of either Ms. Webb or Mr. Todd, although Ms. Webb told her she had not worked outside the home since 1999. (The trial judge's observation that Ms. Webb had a taxable income of $80,000 as a justification for her not having been given spousal support resulted from his misapprehension of the evidence; that figure was simply the result of income splitting from Todd Cleaners while the couple cohabited. Ms. Webb had no source of income of her own at the time of separation);

b. She had no documents to support Mr. Todd's claim that Todd Cleaners owed his father $500,000 at an interest rate of 8% per annum, interest which had been accruing over the past eight years;

c. She had not seen the Todd Cleaners financial statements, nor had she obtained corporate searches of either company;

d. While she and Ms. Webb had broached the fact that they would have to discuss spousal support, they "didn't get" to that part before the parties arrived at the settlement, which made no provision for the payment of same;

e. The settlement was reached on the basis of figures and financial information provided solely by Mr. Todd and his accountant with no independent verification, notwithstanding the fact that Ms. Webb told Ms. Birkett she did not trust her husband and thought he might be hiding assets. (During the December 16, 2002 settlement meeting, Ms. Birkett made a note on her file of her concern about his possible undue influence on Ms. Webb, but she did not advise Ms. Webb of the risks of proceeding to settlement on the basis of information received from Mr. Todd without verification); and

f. She had not discussed with Ms. Webb the risk that Mr. Todd would not pay the money due to Ms. Webb under the settlement agreement, which left it unsecured.

[40] Ms. Birkett also admitted, in cross-examination, she knew that to formally assess the increase in the value of shares in a private corporation such as Todd Cleaners one needed the financial statements: one required the value of the shares at the date of marriage and then at the date of valuation of the matrimonial property. She testified that to have a formal valuation one would not only need the financial statements but likely the assistance of a chartered accountant or business evaluation. This settlement proceeded with neither.

[41] Ms. Birkett testified that she did not come to an opinion as to whether the settlement agreement would provide Ms. Webb with more than half of the value of the divisible matrimonial property, but did advise her that if such was the case, the difference between the $818,641 and the settlement figure offered by Mr. Todd of $751,864 or $66,777 would amount to compensation for lump sum compensatory spousal support. Ms. Birkett was ultimately satisfied with the settlement reached because it would give Ms. Webb sufficient funds to live on in the future without having to rely on the uncertainties of periodic spousal support.

[42] Ms. Birkett admitted the $3.3 million valuation for the Bedford assets was a figure provided to her at the December 16, 2002 settlement meeting. There is no evidence to show Ms. Birkett advised Ms. Webb she could receive an equalization payment that would allow her husband to continue operating the family dry cleaning business without her having to walk away from her share of the value in that business and which could be paid to her from other assets.

[43] Ms. Birkett admitted to not having advised Ms. Webb that she had insufficient information to give Ms. Webb proper advice on matrimonial property division or on her potential claim for spousal support at any time. No doubt because she lacked this information, Ms. Birkett did not ever

advise Ms. Webb as to what she was legally entitled to receive by way of spousal support or property division, such that her entitlement could be compared to what was being offered in the settlement negotiations.

[44] Each of the parties called experts who testified as to the standard of care required of family law lawyers practicing in Edmonton in 2002. There was relatively little difference between the opinions given by any of them. Mr. Tumbach and Gary Frohlich gave opinion evidence on behalf of Ms. Webb and Susan Zwaenepoel testified on behalf of Mr. Todd.

[45] The trial judge rejected Mr. Tumbach's expert testimony in its entirety upon concluding that Mr. Tumbach was not an impartial witness because he had an interest in the outcome of the proceedings.

[46] Lack of impartiality is no reason to reject a witness' testimony in and of itself, but rather a factor to be taken into account when assessing credibility and reliability; see *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 3. Simply because the expert once acted for one of the parties is no reason for an outright, unweighed rejection of his or her entire expert testimony.

[47] This error had scant impact on the ultimate result, however, as Mr. Tumbach gave little opinion evidence on the standard of care, testifying almost exclusively about his actual representation of Ms. Webb from 2004 onward.

[48] Mr. Frohlich and Ms. Zwaenepoel each testified that:

a. A client has a right to the same quality of advice and a lawyer has the obligation to give the same quality of advice in a collaborative family law process as in a regular process; the standard of practice does not differ with the process;

b. To meet that standard of practice, or standard of care, the lawyer must give the client a description of options to any proposed settlement, an opinion on whether the settlement is reasonable, and a discussion of the pros and cons of that settlement in comparison to the other options so that any decision to settle is an informed decision;

c. To provide proper advice on spousal support, a lawyer would need to have the parties' income tax returns, although Ms. Zwaenepoel noted that those returns are sometimes not all that is needed to determine actual income. She opined that a lawyer who gave advice without significant information concerning income would not be acting in accordance with the standard of a reasonably competent lawyer;

d. A lawyer should issue a Notice to Disclose to the other side if the required financial information is not forthcoming; and

e. If a client takes the position that he or she wants to settle without full information from the other side, the lawyer has an obligation to ensure that the client really understands what they may be giving up by not getting that full disclosure. Mr. Frohlich opined that the lawyer should provide a written opinion to the client to that effect in order to avoid misunderstanding, while Ms. Zwaenepoel was of the view that, although a written opinion might be wise to avoid future claims, an oral opinion would be adequate for the client.

[49] Mr. Frohlich also testified that:

a. Prior to negotiating settlement, the lawyer should determine the value of any exemptions claimed for property owned at the date of marriage;

b. The lawyer should provide the client with an estimate of what a court would award for spousal support, if called upon to do so; the lawyer should advise the client about the possibility of spousal support by way of lump sum;

c. Where there is a concern about undue influence, the lawyer should meet with the client in person prior to any settlement being reached to assess the client's emotional state, to assess their body language, and to discuss the settlement with the client so as to satisfy themselves that the client's judgment has not been affected by any undue influence; and

d. No lawyer could arrive at the conclusion that a proposed matrimonial property settlement is adequate through a simple determination that the future income generated by the assets offered in settlement would be enough for the recipient to live on.

[50] Ms. Zwaenepoel also testified that:

a. A lawyer who gave advice to waive spousal support because the matrimonial property division might be larger than a half share without significant information relating to income would not be acting in accordance with the standard expected of a reasonably competent lawyer; and

b. No lawyer could give advice in relation to a reasonable range for settlement without sufficient information.

[51] The trial judge made no mention of any of Mr. Frohlich's evidence in his decision, nor of the above points upon which these two experts agreed. Rather, the trial judge based his conclusions upon the views expressed by Pauline Tesler in her 2001 book *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (Chicago: American Bar Association, 2001), which he found to be supported by the opinions of Ms. Zwaenepoel. However, the portions of this text which he extracts in his decision do not address the standard of care issue and are instead limited to a review of the structure and goals of the collaborative family law process. His conclusion that Ms. Zwaenepoel was saying the same thing as Ms. Tesler is based on the following statement extracted from a paragraph at page 9 of Ms. Zwaenepoel's expert report:

> In this case, a competent matrimonial lawyer would have ensured that Ms. Webb understood that disclosure of information to her satisfaction was available and that she understood that, in order to prepare a complete matrimonial property statement of the parties' assets and liabilities further information was required. The lawyer must confirm that Ms. Webb was willing to resolve this matter without such disclosure and that she was aware of the risks of settlement without completing that process.

[52] The trial judge then interpreted this statement to mean that if the client decides she wants to proceed without sufficient information to make an informed decision, the lawyer has no obligation to tell the client that, in the absence of that information, proper advice as to property division or support cannot be given, and the client is risking receiving less than her proper share of assets by proceeding in this fashion.

[53] This conclusion cannot be drawn from Ms. Zwaenepoel's evidence, either in her report or in her testimony, but rather is directly contrary to it. The trial judge made an error of law in arriving at his conclusion that Ms. Birkett owed a lower duty of care to Ms. Webb because they were participating in a collaborative family law process rather than through litigation. He did so because he either failed to consider or misapplied the expert evidence before him that was largely in agreement on the existence and extent of that duty of care. He also failed to address the absence of any case law supporting his conclusion that a collaborative family law lawyer is exempted from the expectation that he or she meet the standard of the reasonably competent and diligent solicitor imposed on all lawyers practicing family law.

[54] The trial judge erred in failing to find that a lawyer engaged in a collaborative family law process remains obliged to take the following steps, none of which were pursued by Ms. Birkett in this case:

> (a) To obtain sufficient reliable information to be able to ascertain what the client would likely receive or be required to pay for spousal support, child

support and matrimonial property division should the matter be resolved at trial, and to so advise the client;

(b) To give the client a description of options to any proposed settlement, an opinion on whether any proposed settlement is reasonable, and a discussion of the pros and cons of that settlement in comparison to the other options so that any decision to settle is an informed decision; and

(c) To tell a client who takes the position that he or she wants to settle without having received full information from the other side that they may therefore be accepting less or paying more than what would be required according to law, and to provide to that client an assessment of the impact of the risk, including estimates of the value of what might be lost or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing to avoid later allegations of misunderstanding.

[55] Applying the same standard of care to collaborative family law lawyers as to other lawyers does not defeat the structure or goals of the collaborative family law process. There is no reason parties cannot attempt a civil resolution of their differences outside of court; indeed, they should be encouraged to do so. However, the use of the collaborative family law process is no justification for making uninformed decisions or the concept of resolution at any cost. That result would strip parties of their legal entitlements while ultimately risking the kind of expensive, lengthy litigation that the parties hoped to avoid through use of the collaborative family law process (as has occurred in this case), and would be unjust.

[56] While clients are entitled to forfeit legal entitlements through the collaborative family law to achieve benefits that may not be available through litigation, including the hope of maintaining civility among family members, the collaborative family law process does not excuse their lawyers from obtaining the information required to give the advice needed to support informed settlement decisions. Interest-based bargaining does not excuse a lawyer from first advising his or her client of their legally-based rights, or at least giving a comprehensive and even compelling description of the risks faced by proceeding without having received full disclosure. Without that information, the client cannot make an informed decision to forfeit anything in the hopes of achieving extra-legal goals such as ongoing parental harmony. The fact that a collaborative family law lawyer may leave control of the outcome with their client does not excuse that lawyer from giving the client the information needed to exercise that control in her own best interests. Family law clients are often particularly vulnerable, either emotionally, financially or both, and can fall victim to the “quick fix” offered by collaborative family law at a time when they are in a poor condition to exercise proper control over outcomes.

[57] Many, if not most, persons involved in the end of a marriage hope for a civilized, minimally-stressful resolution. That is, no doubt, the attraction of the collaborative family law process. However, these desires cannot be equated with a deemed willingness to give up entitlements to money, other property or spousal or child support in the absence of full disclosure of the value of same. When the dust settles, and each of the parties moves on to live with the results of the settlement negotiated, hindsight can foster the stress and dissatisfaction the collaborative family law process aims to avoid, just as it did here. The parties are required to live with that dissatisfaction only where they had full information available to them – either as to their legal entitlements when they made a decision to take less or different benefits than those to which they were entitled, or, if they decided to waive receipt of full information, a full explanation of the risks and losses attendant upon so doing.

[58] In summary, the trial judge made an error of law in concluding that Ms. Birkett did not breach the duty of care she owed to her client, Ms. Webb.

c. Did the trial judge err in concluding that Ms. Webb failed to establish damages arising from Ms. Birkett's breach of her duty of care?

[59] No. Ms. Webb has failed to establish, on a balance of probabilities, that the settlement proposal she accepted did not reflect a reasonable assessment of her legal entitlement, notwithstanding any deficiencies in the advice she received from Ms. Birkett: see ***Fellowes, McNeil v. Kansa General International Insurance Co.*** (2000), 138 O.A.C. 28 at para. 6 (Ont. C.A.); ***Workers' Compensation Board (Alta.) v. Riggins et al.*** (1993), 131 A.R. 205 at para. 16 (Alta. C.A.).

[60] This conclusion does not arise from the finding of the trial judge that Ms. Webb failed to give evidence to the effect that she would have declined to enter into the settlement had she had the opportunity to look at the financial statements of Todd Cleaners, the income tax returns and corporate searches, and known how important these documents were. A review of the trial transcript at page 67, lines 15-30 of the Appeal Record shows that she gave that evidence.

[61] Rather, Ms. Webb failed to establish damages by proving that had she had the missing information, she would have obtained a better settlement or would have proceeded to trial and obtained more that the settlement provided to her: see ***Rivait v. Monforton***, [2005] O.T.C. 951 at paras. 85-90 (Ont. S.C.J.), aff'd at 2007 ONCA 829 (Ont. C.A.); ***Newton v. Marzban***, 2008 BCSC 328 at paras. 749-759. The burden of proof is on a plaintiff to prove what was actually lost as a result of her lawyer's negligence: see ***Fellowes, McNeil v. Kansa General International Insurance Co.***, *supra*, para. 6 (Ont. C.A.); ***Spencer v. King*** (1992) 131 N.B.R. (2d) at para. 21 (N.B.C.A.); ***Bueckert v. Mattison*** [1997] 1 W.W.R. 430 at para. 66 (Sask. Q.B.); ***Davidson (Donald) v. Lee, Roche and Kelly***, 2008 ONCA 373.

[62] As stated by Lord Goddard, C.J. in ***Bonham-Carter v. Hyde Park Hotel*** (1948) 64 T.L.R. 177 at 178:

> Plaintiffs must understand if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.

[63] Ms. Webb did not prove at trial that there would have been any significant value in the Todd Cleaners shares which she would have been entitled to receive had the matrimonial property action gone to trial. While she proved that Todd Cleaners owned half of the Bedford shares (she and Mr. Todd each owned half of the remaining shares personally) and that the Bedford shares were worth more than twice what she received by way of settlement she did not lead evidence to show that she would have received anything on account of the Todd Cleaner's shares had the matter been tried. This is largely because the Todd Cleaners shares were not the type of property to which a presumption of equal division arises under s. 7(4) of the MPA but, rather, were made up of exempt property and property which would have been divided on the basis of what the Court considered to be just and equitable, under s. 7(3) of the MPA rather than on a 50-50 basis.

[64] Half of the Todd Cleaners shares at the date of marriage were exempt from distribution because those shares were owned by Mr. Todd at that date. The balance were acquired by him through gift or by some means other than purchase during the course of the marriage (which may also have exempted the value of those shares). Therefore it was only the increase in value of the Todd Cleaners shares since the date of marriage /acquisition which was subject to division, and that division would be on something other than a 50-50 basis.

[65] No evidence was led as to the amount by which those shares appreciated after the date of acquisition or marriage. It may well be that they did appreciate, given that the value was made up of the value in the Bedford shares, which reflected the value of the commercial real estate owned by Bedford . Commercial real estate did appreciate in value between the date of marriage and the date of trial and Todd Cleaners owned Bedford shares for at least part of that period.

[66] However, the evidence at trial simply did not address these issues, or the issue of the nature and effect of the $500,000 injection into Todd Cleaners by Mr. Todd's father during marriage.

[67] Further, any distribution of the assets owned by Bedford, either by sale or transfer to Ms. Webb , would have resulted in tax consequences that would have reduced the net value of the shares. Sale to third parties would have had Bedford incur the costs of sale, including realtor's commissions. These expenses would reduce the value of the equity in Bedford available for distribution.

[68] In addition, if the $500,000 admittedly advanced to Todd Cleaners by Mr. Todd's father during the marriage was an enforceable loan, the value of the Todd Cleaners shares would have been reduced by the amount of that loan plus any accrued interest prior to determining Ms. Webb's entitlement. At the settlement meeting held December 16, 2002, Mr. Todd claimed that the accrued interest plus the principal amount totaled $1,071,794.

[69] While the trial judge found the evidence did not establish that the $500,000 injection was a loan, it could have been an investment in the company or a gift to either Mr. Todd or to both Ms. Webb and Mr. Todd. If an investment in the company, Mr. Todd's shares in the company and accordingly Ms. Webb's claim would be reduced. If a gift to Mr. Todd alone, it would have been completely exempt. If a gift to both parties, each party's portion would have been exempt. One would expect that Ms. Webb would have testified that it was a gift to her and to Mr. Todd if that were the case.

[70] Each of these characterizations would have a different consequence in terms of Ms. Webb's claim to a matrimonial property division of any of the equity in Todd Cleaners. Without proving which characterization was correct, Ms. Webb was unable to discharge her burden of proof to establish that there was any value subject to matrimonial property division after accounting for that which was exempt in Mr. Todd's hands.

[71] In summary, Ms. Webb did not prove what was exempt, what remained and, most importantly, that she had an entitlement to any of the portion which remained, let alone the value of that entitlement which was something other than 50%. Therefore, she has not proven on a balance of probabilities that the $818,641 she received was not a reasonable reflection of her legal entitlement to a matrimonial property distribution, given the impact of Mr. Todd's exemptions and the fact that she was not automatically entitled to an equal division of the non-exempt value in Todd Cleaners in any event. Neither has she proven, on a balance of probabilities, that had Ms. Birkett given her proper advice in relation to her entitlement to spousal support, she would have received more than she did.

[72] The settlement figure was negotiated beyond the $751,864 initially offered by Mr. Todd to increase that sum by approximately $67,000; Ms. Birkett told Ms. Webb that this could be considered a reflection of her entitlement to spousal support.

[73] Mr. Frohlich testified that, in his opinion, Ms. Webb would have been entitled to receive compensatory spousal support on an ongoing basis because this was a long-term marriage, because her teaching qualifications were dated, and because she had not taught for a long time and in fact had a sporadic employment history. Based on the assumption she would earn $40,000 a year from investment income from her property settlement, he opined she would have been entitled to receive further spousal support in the range of $2,500 to $3,300 a month given that Mr. Todd was left with income of $8,045 a month after the settlement.

[74] The trial judge did not address this evidence, no doubt because he made no findings as to damages, having come to the conclusion that Ms. Birkett had not breached her duty of care.

[75] Mr. Frohlich's evidence does not drive the conclusion that Ms. Webb was legally entitled to any periodic spousal support over and above what she had received as an implicit part of the $818,641. Having failed to establish the value of her legal entitlement to a property settlement, it is not possible to conclude that it substantially equalled the $818,641. It is therefore not possible to conclude that her entitlement would not have amounted to a lower figure, with the resulting difference representing what Ms. Webb was entitled to receive by way of lump sum spousal support.

[76] Further, spousal support could have been reduced because Ms. Webb received a share of the only assets which produced the income needed to pay spousal support: see ***Boston v. Boston***, 2001 SCC 43, [2001] 2 S.C.R. 413 (S.C.C.); ***Newton***; ***Newson v. Newson*** (1993), 78 B.C.L.R. (2d) 35 (B.C.C.A.).

[77] Therefore, Ms. Webb has failed to discharge her burden of establishing that she suffered damages through entering into the settlement agreement after receiving inadequate advice from Ms. Birkett.

CONCLUSION

[78] The appeal is dismissed.

Appeal heard on November 3, 2010

Reasons filed at Edmonton, Alberta
this 26th day of January, 2011

Bielby J.A.

I concur: Ritter J.A.

I concur: Marceau J.

Appearances:

R.G. McLennan, Q.C. and L.K. Semenchuk
for the Appellant

P.A.L. Smith, Q.C.
for the Respondents