BINDING BARGAINS

When is a Deal a Deal? Solicitor Agreements in Matrimonial Matters

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Perhaps as early as "legal memory," which Sir William Holdsworth defined[1] as the arbitrarily-adopted date – 03 September 1189 – before which the memory of law does not reach, solicitors have, both orally and in writing, made settlement bargains on behalf of clients. Solicitors are in fact ethically obliged to explore, fully, prospects of reasonable settlement, under chapter III, paragraph 6 of The Canadian Bar Association's *Code Of Professional Conduct*,[2] as counsel were reminded in *King v. King*,[3] and are legally required to do so by certain legislation – notably, the *Divorce Act*,[4] subsection 9(2).

The extent to which solicitors' agreements (their existence, content, and meaning having been established) bind clients is described by Evans J.A. in *Scherer v. Paletta*:[5]

> A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and subject also to the disability of the client.

In other words, at common law, solicitors' agreements bind clients, subject to the exceptions identified by Evans J.A., if such agreements are made during pendency of and pertain to the subject of litigation. (What amounted to a solicitors' bargain, purporting to settle marital property (as well as parenting and support) issues, made when the only litigation commenced and pending between the clients was under the *Divorce Act* – a marital property proceeding under the *Family Law Act*[6] not having been instituted as of the date of the solicitors' bargain – failed to bind the clients in *Tucker v. Tucker*.[7])

To what extent, therefore, were these common law principles governing solicitors' agreements abrogated, varied or supplanted by domestic contract statutory enactments such as subsection 55(1) of Ontario's *Family Law Act*,[8] which states:

> A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed

and comparable legislation in the other Canadian jurisdictions?[9]

Not at all, concluded Russell J. in *Picco v. Picco*,[10] a decision interpreting section 35 of The *Matrimonial Property Act* (Newfoundland), ancestor of the similarly-worded present subsection 65(1) of the *Family Law Act* (Newfoundland). He held:

> If the Legislature intended to change the common law with respect to the effect of settlements of litigation by parties' solicitors, I presume it would have done so, to use the expression of Fauteux, J., in *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Company*,

[1] *Some Makers Of English Law* (The Tagore Lectures 1937-38) (William S. Hein & Co., Buffalo, 1983) 8.
[2] (Ottawa, 1988) 10. (Parenthetically, Rule 8.02 of *The Law Society Rules* (Newfoundland) continues to adhere to the "Code of Professional Conduct as adopted by the Canadian Bar Association on August 25, 1974.")
[3] 1992 Nfld CA No. 147, 24 February 1994, Cameron J.A. (Gushue and Marshall, JJ.A.), unreported; noted at: [1994] W.D.F.L. No. 625.
[4] RSC, 1985, c. 3 (2nd Supp.).
[5] [1966] 2 OR 524 (CA) at 527.
[6] RSN, 1990, c. F-2.
[7] (1993), 48 RFL (3d) 5 (Nfld CA).
[8] RSO 1990, c. F.3.
[9] See: *Matrimonial Property Act*, RSA 1980, c. M-9, section 38; *Family Relations Act*, RSBC 1979, c. 121, subsection 48(3); *Marital Property Act*, RSM 1987, c. M45, subsection 1(1); *Marital Property Act*, SNB 1980, c. M-1.1, section 37; *Matrimonial Property Act*, RSNS 1989, c. 275, section 24; *Family Law Reform Act*, RSPEI 1988, c. F-3, section 48; *Civil Code of Québec*, SQ 1991, c. 64, art. 440; *The Matrimonial Property Act*, SS 1979, c. M-6.1, section 38.
[10] (1987), 12 RFL (3d) 345 (Nfld UFC).

[1956] S.C.R. 610, at p. 614, with "irresistible clearness" leaving no doubts as to its intention.

In my opinion the common law position that solicitors can bind their clients is still good law and if this is to be abrogated or altered by statute the language of the statute must be clear leaving no doubt what was intended.[11]

He was, accordingly, satisfied that non- compliance with the adjectival statutory requirements for making a domestic contract, in the context of commenced litigation either pending or during trial, did not vitiate an agreement reached by exchange of correspondence between solicitors on instructions of their respective clients. To same affect is *Geropoulous v. Geropoulous*,[12] a decision of Ontario Court of Appeal, interpreting subsection 54(1) of Ontario's former *Family Law Reform Act*,[13] worded similarly to its present equivalent, subsection 55(1) of Ontario's Family Law Act (which is identical to subsection 65(1) of Newfoundland's *Family Law Act*[14]).

Absent the "pendency of court proceedings,"[15] the Newfoundland Court of Appeal reached an opposite conclusion in *Tucker v. Tucker*. There, the husband's solicitor sent a letter proposal to settle parenting, support and property issues between separated spouses. The wife's solicitor responded with a draft written agreement incorporating the letter's settlement proposals (and drafts of collateral agreements required to perform the settlement). A *Divorce Act* proceeding was then pending between the spouses. A marital property action under the Newfoundland *Family Law Act* had not been instituted. The husband balked at signing the draft written settlement agreement. In reversing the trial judge on the issue, Cameron J.A. for the Newfoundland Court of Appeal accepted but did not decide that the exchange between solicitors constituted a solicitors' agreement, and continued:

[...] The trial judge held that as a practical matter solicitors who are dealing with issues under the *Divorce Act* [under which a proceeding had been commenced] can be expected to deal with other matrimonial issues [such as involving marital property *apropos* which a proceeding had not been taken] to attempt to arrive at a global settlement. Certainly courts have often noted the desirability of resolving property issues so that support can be determined with a clearer picture of the means of the parties. The trial judge held the existence of the divorce petition was sufficient to take the "agreement" outside the operation of s. 65(1) [of Newfoundland's *Family Law Act*].

[...]

In Ontario, it has been held that where the agreement pre-dates the litigation the statute must be complied with (*Tanaszczuk v. Tanaszczuk* (1988), 15 R.F.L. (3d) 441 (U.F.C.); *Davis v. Gregory* (1990), 29 R.F.L. (3d) 62 (Gen. Div.)). [...][16]

After referring to the 1981 trial decision of Eberle J. of Ontario High Court in *Geropoulos v. Geropoulos* (affirmed on appeal),[17] Cameron J.A. similarly concluded:

The policy argument in favour of the position taken by the trial judge is that it avoids the unnecessary institution of litigation (see the commentary of James G. McLeod in *Campbell v. Campbell* (1985), 47 R.F.L. (2d) 392 (Ont. H.C.), at p. 393). However, it could likewise be said that all negotiations of separation agreements are made in the shadow of possible litigation, and to find all such agreements outside s. 65(1) [of Newfoundland's *Family Law Act*] would nullify the section, as it relates to separation agreements.

To accomplish the objective of encouraging settlement of litigation, maintaining the integrity of the system which enables solicitors to compromise litigation, and preserving the legislation, s. 65(1) must apply to all domestic contracts except those that may be characterized as settlement of issues in litigation commenced before the agreement was reached. The exchange of correspondence between the parties' solicitors in this case is therefore subject to s. 65(1) and cannot be enforced.[18]

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[11] Ibid. at 351.
[12] (1982), 26 RFL (2d) 225 (Ont CA).
[13] RSO 1980, c. 152.
[14] SN 1979, c. 32, section 35; rep./sub. SN 1988, c. 60, subsection 65(1); rep./sub. RSN, 1990, c. F-2, subsection 65(1).
[15] *Geropoulos v. Geropoulos* (1982), 26 RFL (2d) 225 (Ont CA), per Robins J.A. at 232.
[16] See *Tucker v. Tucker*, supra note 7 at 10, 11.
[17] (1981), 23 RFL (2d) 206, at 212; aff'd (1982), 26 RFL (2d) 225 (Ont CA).
[18] *Tucker v. Tucker*, supra note 7 at 11-12.

In *Bennett v. Hulan*,[19] in which the issue involved validity of an oral solicitors' bargain designed to amend, rather than to constitute, a settlement agreement, the husband appellant took the inning in Newfoundland Court of Appeal with questionable prospect, perhaps, of ultimately winning the match. Husband and wife had made a written separation agreement that complied with the adjectival requirements of Newfoundland domestic contract law. Subsequently, their solicitors made an oral agreement purporting to alter an aspect of the martial property provisions of the written separation agreement. To this juncture, no litigation had been commenced between the spouses. The wife declined to honor the purported alteration of the separation agreement. Her husband sued, apparently for specific performance of the separation agreement as amended. The trial judge declined reception of evidence of the solicitors' oral amending agreement; ruling that to do so would offend the parol evidence rule. From this decision the husband appealed to Newfoundland Court of Appeal which, per Goodridge C.J.N. (orally), held:[20]

> The trial judge misconstrued the parol evidence rule in this matter and, in so doing, rejected evidence that was otherwise admissible. The parol evidence rule provides that evidence may not be introduced to show that the provisions of a written document that is not ambiguous do not reflect what was agreed between the parties in respect thereof. The rule, however, does not operate to exclude evidence of a subsequent oral agreement which purports to vary or rescind an earlier written document.

The proceeding was remitted to the trial judge for re-hearing. If, as appears, litigation in relation to marital property was not pending when the solicitors' oral amending agreement was made, that amending agreement is, likely, invalid; failing required compliance, in the circumstances, with present subsection 65(1) of the Newfoundland *Family Law Act*.

Consonant with decisions earlier considered in this commentary, courts have held[21] that oral undertakings by solicitors to a court, on behalf of clients, during trial of litigation, in relation to the subject matter of the litigation (such as a solicitor's undertaking to the court during trial of a divorce proceeding that his client will, without order, financially support the other party until final determination of spousal support), bind their clients.

[19] (1993), 50 RFL (3d) 233 (Nfld CA).
[20] Ibid. at 234.

[21] *Butler v. Butler*, noted at: [1989] WDFL No. 543 (Nfld UFC), per Noonan J.; *Wedgwood v. Wedgwood* (1988), 69 Nfld & PEIR 134 (Nfld UFC).