CITATION: CRA International v. Jamp Pharma Corporation, 2023 ONSC 3932
COURT FILE NO.: CV-21-00671881-0000
DATE: 20230707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CRA INTERNATIONAL LIMITED, Plaintiff

AND:

JAMP PHARMA CORPORATION, Defendant

BEFORE: Justice A.P. Ramsay

COUNSEL: *Shawn Irving* and *Clare Barrowman*, for the Plaintiff

Aaron Rousseau, for the Defendant

HEARD: November 17 and December 7, 2022

ENDORSEMENT

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I. Overview

[1] CRA International Limited ("CRA") and Jamp Pharma Corporation ("Jamp Pharma") had a contract whereby CRA was engaged to perform expert litigation services. The underlying action is based on a breach of contract.

II. Nature of the Motion

[2] CRA seeks summary judgment in an underlying contractual dispute, pursuant to r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the *Rules*).

III. The Parties

[3] The plaintiff, CRA, is a company incorporated under the laws of the Province of Ontario. CRA is a global consulting firm that provides economic, financial, and strategic expertise to law firms, corporations, accounting firms, and governments around the world.

[4] The defendant, Jamp Pharma, is a privately-owned company incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Jamp Pharma is active in all sectors of the pharmaceutical industry, including the generic pharmaceutical industry in Canada.

IV. Background

[5] In November 2019, Jamp Pharma commenced litigation against Unichem Laboratories Limited ("Unichem") in the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (the "UK Litigation").

[6] Jamp Pharma retained the UK based law firm, Macfarlanes LLP ("Macfarlanes"), to represent its interest in the UK Litigation. One of the issues in that litigation was whether Jamp Pharma had entered into a legally binding agreement with Unichem to supply the generic muscle relaxant drug, Tizanidine, for sale in the Canadian market, and if a contract existed, the quantum of damages because of any breach of the supply agreement.

[7] On August 6, 2020, Macfarlanes entered into a retainer agreement with CRA on behalf of Jamp Pharma. The retainer is not disputed by Jamp Pharma. The retainer was reduced to writing

in an engagement letter dated August 6, 2020, from by CRA's Group Vice President, Gregory Bell, to Jamp Pharma's counsel, Isabel Gilbert (the "Agreement"). The Agreement indicated that Jamp Pharma was the ultimate client, although invoices would be submitted to MacFarlanes. Jamp Pharma admits in its amended statement of defence that pursuant to the Agreement made in Ontario, CRA was retained by Macfarlanes, on behalf of Jamp Pharma, to provide certain litigation support and expert consulting services to Jamp Pharma in relation to the UK Litigation.

[8] CRA indicates that the effective date of the Agreement was August 6, 2020, and conversely Jamp Pharma refuses to admit the date in its pleading. While nothing turns on the date, on the evidence before me, the effective date of the Agreement, as evidenced by the retainer letter from CRA's Group Vice President, Gregory Bell to Macfarlanes, is in fact August 6, 2020. Jamp Pharma does not dispute the authenticity of the Agreement filed before me. The letter indicates: "I am pleased that effective August 6, 2020, Macfarlanes LLP (Macfarlanes"), acting on behalf of its client, JAMP Pharma Corporation (JAMP Pharma" or the "client") has retained Charles River Associates ("CRA") to provide services in connection with the above referenced matter." The Agreement indicates that CRA's "Terms and Conditions, which are incorporated herein by reference, and which are intended to safeguard our client information, establish reasonable fees for our services, and provide for the billing and collection of those fees in a timely manner."

[9] Under the "Relationship" heading of the Agreement, it states, in part: "Macfarlanes confirms that JAMP Pharma has been notified of the terms of this agreement, and that JAMP Pharma has authorized Macfarlanes to enter into this agreement with CRA on JAMP Pharma's behalf." Jamp Pharma has admitted in its statement of defence. Further, on the cross examination of Kang Lee, Vice President, Global Legal Affairs and Intellectual Property, for Jamp Pharma, Mr. Lee admitted that MacFarlanes retained CRA, on behalf of Jamp Pharma, to act as Jamp Pharma's damages expert in the UK litigation. Mr. Lee admitted on cross examination that MacFarlanes had the authority to do so. During the course of the motion, counsel for Jamp Pharma conceded that there was no dispute that CRA was properly retained, and that the retainer was proper and "in a general sense was binding".

[10] The relief sought in the statement of claim is the same relief being sought on this motion, that is:

a) damages in the amount of $506,198.70 (or such other additional amount as may be particularized at trial) for breach of contract, representing the amounts owed to the plaintiff by the defendant pursuant to the Invoices (as defined below) rendered in connection with the Services (as defined below) performed by the plaintiff;

b) the plaintiff's legal costs incurred to undertake collection efforts for the unpaid Invoices, pursuant to the Agreement (as defined below);

c) pre-judgment interest accrued at a rate equal to the lower of 1.5% per month or the maximum rate permitted under applicable law, pursuant to the Agreement;

d) post-judgment interest in accordance with s. 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

e) the costs of this proceeding, on a substantial indemnity basis, plus any and all applicable taxes; and

[11] Jamp Pharma admits in both the Agreement and its amended statement of defence that while CRA was being retained by Macfarlanes, Jamp Pharma had been notified of the terms of the Agreement, and that Jamp Pharma had authorized Macfarlanes to enter into the Agreement with CRA on Jamp Pharma's behalf.

[12] In its amended statement of defence, Jamp Pharma admits that the material terms of the Agreement were set out in paragraph 7 of CRA's statement of claim. Those terms are as follows:

> 7. The following materials terms are contained in the Agreement:
>
> (a) The Services will be delivered on a time and materials basis, and CRA will invoice for actual hours worked and expenses incurred.
>
> (b) All invoices will be submitted to Macfarlanes for prompt delivery to Jamp Pharma for payment.
>
> (c) CRA shall perform the Services at the direction of Macfarlanes without further confirmation from Jamp Pharma; and
>
> (d) Macfarlanes shall bear the responsibility of keeping Jamp Pharma apprised of CRA's efforts.

[13] Jamp Pharma also admits paragraph 8 of CRA's statement of claim which sets out the Billings and Payments under the Agreement. Paragraph 8 of the statement of claim pleads, as follows:

> 8. In respect of Billing and Payments, the Agreement provides as follows:
>
> (a) All invoices are due and payable upon receipt;
>
> (b) CRA reserves the option to charge interest on invoices that are outstanding more than thirty (30) days, at a rate equal to the lower of 1.5 percent per month or the maximum rate permitted under applicable law;
>
> (c) The obligation to pay CRA's fees and expenses is not contingent upon the results of the Services or any suit or matter in connection with which the Services are provided;
>
> (d) Any objection with respect to CRA's invoices must be made by the client in writing within five (5) business days following receipt of the invoice to which objection is made;
>
> (e) CRA reserves the right to suspend and/or terminate Services, withhold any report or deliverable, and to prohibit the client from using or permitting the use of any report or deliverable, and to prohibit the client from using or permitting

> the use of any report or any portion thereof until all of CRA's fees and expenses incurred to date have been paid in full; and
>
> (f) In the event that CRA is required to undertake collection efforts for unpaid invoices, Jamp Pharma shall be responsible for payment of CRA's reasonable attorneys' fees and costs associated therewith.

[14] On or about November 11, 2020, MacFarlanes provided a letter with instructions to CRA ('the instruction letter"). The instruction letter set out the scope of the work to be performed at that stage, the court-imposed timetable for the delivery of expert reports, a deadline for the meeting of the experts, and the trial date. Clause 2.2 of the instruction letter set out the scope of the matters upon which Jamp Pharma was being asked to provide an opinion.

[15] Dr. Andrew Tepperman, a Vice President of Life Sciences at CRA, testified as an expert on May 5, 2021.

[16] The parties agree that Dr. Tepperman authored three reports, and co-authored a report with the opposing expert, and he gave expert opinion evidence at trial.

[17] CRA delivered four invoices to Jamp Pharma totaling $506,198.07, plus interest for those services.

[18] Jamp Pharma admits paragraph 12 of the statement of claim, which sets out the invoices delivered and the amounts as follows:

> 12. The following invoices (together, the "Invoices") were rendered in connection with the Services on the dates set out below:
>
> (a) CRA Invoice No. 6501439 dated February 16, 2021 in the amount of $334,307.13;
>
> (b) CRA Invoice No. 6501445 dated March 26, 2021 in the amount of $26,575.50;
>
> (c) CRA Invoice No. 6501472 dated April 30, 2021 in the amount of $63,939.75;
>
> (d) CRA Invoice No. 6501510 dated July 19, 2021 in the amount of $81,376.32.

[19] Jamp Pharma does not deny or otherwise address paragraph 13 of the statement of claim and is therefore deemed to admit that paragraph. CRA pleads at paragraph 13 as follows:

> 13. CRA initially addressed the Invoices to Macfarlanes for prompt delivery to Jamp Pharma for payment, all in accordance with the terms of the Agreement outlined above. CRA was later asked by Macfarlanes to address the invoices directly to Jamp Pharma for payment which CRA proceeded to do.

[20] Jamp Pharma has not paid any of the invoices. CRA commenced this action to recover the amounts said to be due under the invoices.

V. **Position of Parties**

A. *CRA's position*

[21] CRA argues that this is a straightforward contractual dispute that should be resolved in favour of the plaintiff as efficiently as possible. Further, they submit this matter is appropriate for summary judgment because the material facts are either not in dispute or can be resolved on the evidentiary record before the court. CRA submits that the court should grant summary judgment in favour of CRA.

[22] CRA argues that there is no genuine issues requiring a trial with respect to the retainer and the amounts involved. CRA submits that it fulfilled its obligations under the Agreement and provided the services and, in turn, Jamp Pharma has failed to fulfill its obligation under the Agreement to compensate CRA for the services. CRA points to the following services rendered under the Agreement:

- CRA drafted and finalized an expert report dated December 22, 2020;
- CRA reviewed and provided comments on opposing expert reports dated February 23, 2021;
- CRA prepared a joint expert memorandum dated March 9, 2021;
- CRA prepared two supplemental expert reports dated March 23, 2021, and April 25, 2021;
- CRA assessed supplemental opposing expert reports dated March 23, 2021; and
- Dr. Andrew Tepperman, a Vice President of Life Sciences at CRA, prepared for
- trial and testified as an expert on May 5, 2021.

[23] CRA argues that Jamp Pharma should be held to its obligations and bound by the clear terms of the Agreement. It maintains that Jamp Pharma's allegations about the quality of CRA's services are baseless and were not raised within the time provided in the Agreement.

B. *Jamp Pharma's position*

[24] Jamp Pharma does not dispute the existence of an Agreement but disputes the amount of the invoices. It argues that CRA understood that its invoices needed to be reasonable, but disregarded Jamp Pharma's budget, reasonable expectations, and the scope of work that was requested. Jamp Pharma submits that determining the reasonableness of CRA's invoices requires a trial and a detailed inquiry into contested facts. Jamp Pharma argues that CRA deployed five billing professionals on the file and the time spent was duplicative and excessive. Jamp Pharma argues that CRA's work was deficient as it failed to appreciate salient facts which led to the court

in the UK litigation rejecting CRA's evidence. It points to the length of the report and the amount of damages involved in the UK litigation as factors to be considered by the court in determining to what extent CRA's invoices should be reduced.

[25] Jamp Pharma submits that it complied with the requirement for written objections within five days. In any event, CRA accepted Jamp Pharma's objections notwithstanding the provision and is estopped from relying upon it.

[26] As for the damages claimed by CRA for legal fees for its collection efforts and interest on damages, with respect to the former, Jamp Pharma argues it amounts to double recovery and there is no evidence of the claim before the court, and with respect to the latter. Jamp Pharma relies on the *Interest Act*, R.S.C., 1985, c. I-15.

VI. **Issues raised on the motion**

[27] The following issues are raised on this motion:

i. Is this an appropriate matter for summary judgment?
ii. Is there a genuine issue requiring a trial with respect to Jamp Pharma's budgets?
iii. Is there a genuine issue requiring a trial regarding the five-day notice of objection?
iv. Is CRA estopped from relying on the five-day notice provision?
v. Can the court consider Jamp Pharma's expectation relative to another retainer?
vi. Are the miscellaneous issues raised by the defendant genuine issues requiring a trial?
vii. Is CRA entitled to legal fees for collection?
viii. What is the annual rate of interest chargeable under the Agreement?

VII. **Disposition**

[28] Summary judgment is granted to the plaintiff on the following basis, for the reasons set out below:

i. The plaintiff is entitled to damages in the amount of $506,198.70 for breach of contract.

ii. The plaintiff is entitled to damages for legal costs incurred to undertake the collection efforts for the unpaid invoices.

iii. The plaintiff is entitled to pre-judgment interest on the outstanding invoices pursuant to the relevant provisions of the *Interest Act*.

iv. The plaintiff is entitled to post judgment interest in accordance with s. 129 of the *Courts of Justice Act*, as amended.

VIII. **Analysis**

A. Is this an appropriate matter for summary judgment?

[29] Pursuant to r. 20.01 (1) of the *Rules*, a plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

[30] The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: r. 20.04(2)(a) of the *Rules*; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 34.

[31] At para. 66, Karakatsanis J., writing for the Supreme Court, stated in *Hryniak*:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).

[32] In *Hryniak*, the Supreme Court of Canada provided a guideline for motion judges to determine whether a proceeding is appropriate for summary judgment as follows:

i. The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;

ii. On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;

iii. If the court cannot grant judgment on the motion, the court should:

a) Decide those issues that can be decided in accordance with the principles described in paragraph (ii), above; and

b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues.

[33] This is essentially a breach of contract case. There is an extensive evidentiary record including cross examination of the deponents on their affidavits. The amount involved is a little over half a million dollars. In my view, there are no genuine factual issues relating to the contract requiring a trial. There are a number of admissions made in the statement of defence and in the affidavits before me. At the heart of the motion is an interpretation of an agreement between the parties.

[34] The parties agree on the following:

i. The parties agree that Jamp Pharma's UK legal counsel Macfarlanes retained CRA on behalf of Jamp Pharma.

ii. The parties agree that Macfarlanes had authority to bind Jamp Pharma.

iii. The parties agree that Jamp Pharma and CRA entered into an Agreement whereby CRA would provide certain litigation support and expert consulting services.

iv. The parties agree the Agreement before me is the Agreement entered into by them.

v. The parties agree on the material terms of the Agreement. Those terms are set out in paragraph 7 of the statement of claim, which is admitted by Jamp Pharma.

vi. The parties agree on the Billings and Payments provision terms of the Agreement. Those terms are set out in paragraph 8 of the statement of claim, which is admitted by Jamp Pharma.

vii. The parties agree on the four invoices rendered in connection with services and the dates. Those invoices are set out in paragraph 12 of the statement of claim, which has been admitted by Jamp Pharma.

viii. Jamp Pharma is deemed to admit paragraph 13 of the statement of claim, that is, that CRA addressed the invoices to Macfarlanes in accordance with the Agreement but was later asked by Macfarlanes to address the invoices directly to Jamp Pharma for payment, which it did.

ix. The parties agree that Jamp Pharma has not paid any of the invoices.

x. The parties agree that Jamp Pharma never provided any notice of objection to any of the invoices within five days of receiving the invoice(s).

[35] Based only on the evidence before me, and without resort to the court's fact-finding powers under r. 20, and as mandated by *Hryniak*, at para. 66, I am satisfied that there is no genuine issue requiring trial. In my view, the court is able to reach a fair and just determination on the merits. Given the admissions made in the pleadings and the affidavit, the court is able to make the necessary findings of fact material to the breach of contract claim and apply the law to the facts. Given the amounts involved, the motion for summary judgment is a proportionate, more expeditious, less expensive, fair and just means to achieve a just result as mandated by *Hryniak*, at para. 49.

B. Is there a genuine issue for trial with respect to Jamp Pharma's budgets?

[36] One of the factual issues which Jamp Pharma urges the court to consider in determining whether the invoices were reasonable is whether Macfarlanes communicated any of the costs budgets to CRA, and when it did so. Jamp Pharma submits that this is a genuine factual issue requiring a trial. The court disagrees for the reasons expanded on below.

[37] Jamp Pharma submits that a requirement of the UK litigation is that each party must prepare a budget detailing how much each party will spend on each stage of the litigation, and once prepared, the budgets are filed with the court. Jamp Pharma argues that CRA disregarded its budget, it's reasonable expectations, and the scope of work that Jamp Pharma requested.

[38] Jamp Pharma submits that CRA was retained to opine on the Canadian pharmaceutical market, with a limited opinion on accounting. CRA was the only expert retained and no expert was ultimately retained to address the forensic accounting issues. Jamp Pharma argues that the first budget contemplated two experts would be engaged, one to address the Canadian pharmaceutical market, and the other, a forensic accountant. On March 4, 2020, Macfarlanes had budgeted approximately $300,600 for experts to the conclusion of trial. Jamp Pharma argues that as only one expert report was required, the original budget was presumed to be halved to $150,300.

[39] The evidence of Jamp Pharma is that on February 12, 2021, Macfarlanes provided Jamp Pharma with a new budget for the remaining steps in the litigation ("the second budget") of approximately $100,200. In its defence, Jamp Pharma pleads that Macfarlanes communicated the relevant limitations to CRA.

[40] I find that there is no genuine issue of fact requiring a trial with respect to this defence.

[41] CRA was a stranger to any budget related discussions that Jamp Pharma had with its counsel at Macfarlanes. Macfarlanes' first budget (dated March 2020) was prepared five months before CRA was retained. There is no evidence before me that CRA had any knowledge of the budgets. Further, there is no evidence before me that CRA agreed to be bound by any of the litigation budgets prepared by MacFarlanes. The Agreement, which sets out the obligations of both CRA and Jamp Pharma, is silent on any budgets.

[42] How is the court to interpret the Agreement between the parties? The authors in *Chitty on Contracts*, 30th ed., vol. 1 (London, Sweet & Maxwell, 2008), at p.8-39; 12-043 note that:

> The cardinal presumption is that parties have intended what they have in fact said, so that their words must be constructed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself [emphasis in original text]: [o]ne must consider the meaning of the words used, not what one may guess to be the intention of the parties"…..In the modern law, the court will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.

[43] The jurisprudence establishes that the object of contractual interpretation is to identify the true intent of the parties as expressed in the contract: *Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée.*, 2008 NBCA 12, 328 N.B.R. (2d) 205, paras. 18-19. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at paras. 57-58; G.H.L. Fridman, *The Law of Contract in Canada* (Toronto, Carswell, 2011), p. 434.

[44] A party to a contract can expect that the other side will fulfil its obligations under the contract. A failure by one party to carry out its contractual obligation may amount to a breach. There may be a minor breach justifying termination of the contract (see for example: *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*., [1962] 2 Q.B. 26 (C.A.)), or a "fundamental breach" going to the root of the contract, see for example: *Pigott Construction Co. Ltd. v. W.J. Crowe Ltd.* (1961), 27 D.L.R. (2d) 258 (Ont. C.A.).

[45] Whether minor or fundamental, the parties must be able to point to the terms of the contract – that is to say, what was agreed to by the parties. Terms are contractual and the failure to fulfil the promise contained in a term gives rise to an action for breach of contract: G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Carswell, 2011) at p. 434.

[46] The Agreement before the court was negotiated between the parties. The Agreement contains an entire agreement clause, specifying that it "constitutes the complete and exclusive statement of the parties in relation to the subject matter" of the Agreement. The Agreement does not include a budget. There is no evidence before me of any budget provided to CRA or any agreement or amendment to the retainer by CRA to be bound by a budget. Given the evidentiary obligation on the responding party as well, the court can assume that if such evidence existed, it would be before the court.

[47] I therefore agree with CRA that the budgets prepared by Jamp Pharma with Macfarlanes outside of the Agreement cannot be relied upon to vary the terms of the Agreement. Surrounding circumstances may be relied upon by the court in the interpretive process, but the court cannot use them to deviate from the text such that the court effectively creates a new agreement: *Sattva*, at para. 57; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62 (C.A.). I note in passing Jamp Pharma's reference to "several key witnesses at Macfarlanes" but note that none of their evidence is before the court.

[48] The jurisprudence has established that on a motion for summary judgment, each party must "'put its best foot forward' with respect to the existence or non-existence of material facts that have to be tried": *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 SCR 372, at para. 11; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, at para. 32.

[49] The evidence need not be equivalent to that to be advanced at trial but must be such that the judge is confident that he or she can fairly resolve the dispute: *Hryniak*, at para. 57.

[50] The bar on a motion for summary judgment is high. It is essential to justice that claims disclosing real issues that may be successful proceed to trial: *Lameman*, at paras. 10-11.

[51] A plaintiff who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para. 27.

[52] The plaintiff must prove that there are no genuine issue of material fact requiring a trial and may not rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.).

[53] The defendant/responding party must "lead trump or risk losing": r. 20.02(2); *Pizza Pizza Ltd. v. Gillespie et. al*. (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1994), 4 O.R. (3d) 545 at p. 552 (C.A.); *High-tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.).

[54] The principles governing the admissibility of evidence are the same on a summary judgment motion as at trial, with the limited exception of an affidavit made on information and belief: *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at para. 15.

[55] Parties must "put their best foot forward". They are prohibited from saying "more and better evidence will (or may) be available at trial." The court is entitled to assume the record contains all of the evidence the parties would present at trial. See: *Pizza Pizza Ltd*.; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); and *Simcoe Muskoka Child, Youth and Family Service v. L.V.*, 2019 ONSC 1208 (Div. Court).

[56] In the material before the court, Jamp Pharma concedes that in any event, much of Mr. Lee's communications around scope and budgets were with Matt McCahearty of Macfarlanes, who also authored the letter of instruction to CRA. Not only is there no evidence from Mr. McCahearty about what discussions he had with Dr. Tepperman, the instructing letter to CRA is silent on any budget.

[57] The Agreement also contemplated that the client may request estimates for a particular phase of work. There is no evidence before me that any request was made, at any point during the currency of the litigation, after CRA was retained, for an estimate or, for that matter, for a budget. Additionally, although the Agreement provides that an estimate may be requested from CRA for a particular phase of work, the Agreement clearly indicates that the estimate would not constitute a "cap" or fixed amount to be paid to CRA, but rather Jamp Pharma remains responsible for CRA's fees on a reasonable time and materials basis. The relevant section reads:

> From time to time, you may ask CRA to provide estimates of the likely costs of the engagement or of a particular phase or period of work. You agree that (1) these estimates are provided for JAMP Pharma's own internal budgeting processes, (2) JAMP Pharma will remain responsible for CRA's fees on a reasonable time and materials basis in the event that they exceed any estimate that we have given; and (3) these estimates are not caps or fixed amounts to be paid to CRA.

[58] Jamp Pharma therefore agreed that it would remain responsible for the fees, even if a requested estimate was exceeded by CRA.

[59] The court is left with Dr. Tepperman's uncontested evidence that the first and only time that CRA received a copy of the budget was on April 29, 2021, in a six-volume trial bundle, which included the first litigation budget. Dr. Tepperman's uncontradicted evidence is that neither Macfarlanes nor Jamp Pharma drew CRA's attention to the budget or took the position it was intended to limit CRA's fees.

[60] In my view, CRA cannot be said to be bound to the litigation budget prepared by Jamp Pharma and its counsel for the purposes of filing the budget with the court in the UK, as they did not participate in the process, were not aware of it (until shortly before the trial) and did not agree to be bound by Jamp Pharma's litigation budget filed in the UK court. In fact, there is no evidence before me that CRA was ever aware of or agreed to a budget before or during its negotiation of the terms of the Agreement. Mr. Tepperman's evidence on when the first budget came to his attention is uncontradicted.

C. Is there a genuine issue for trial regarding the five-day notice of objection**?**

[61] The Agreement stipulates that any objection to CRA's invoices must be made in writing within five (5) business days following receipt of the invoice to which objection is made. CRA's uncontradicted evidence is that Jamp Pharma did not do so, and therefore has no contractual right to object in its statement of defence. On the other hand, while counsel for Jamp Pharma conceded during oral submissions that no written objection was made, Jamp Pharma nonetheless argues that after seeing CRA's fees in the January invoice, Mr. Lee wrote to MacFarlanes on January 26, 2021, the same day he received the invoice, to request further justification and details. Mr. Lee deposes that on February 4, 2021, he "spoke to Macfarlanes" and again expressed his concerns about CRA's fees. There is, however, no evidence before me that whatever concerns Mr. Lee had were ever conveyed by Macfarlanes to Jamp Pharma. CRA's January 4, 2021, invoice was sent to Macfarlanes. The amount was $31,387.73, without taxes. It was later reissued. It indicates that it covered activities up to December 25, 2020. The invoice set out the names of five professionals, the hours, rate and amount related to work of each professional. There is a detailed breakdown of the date, task, and professional involved, and hours spent. There is communication from Mr. Lee to Macfarlanes in January 2021 asking for "further details for the budget received previously and further justification for the costs outlined below", and a response from Macfarlanes to Mr. Lee on January 26, 2021, with an explanation. Moreover, in a subsequent email from Mr. McCahearty (Maclarenes) to Mr. Lee (Jamp Pharma), he noted that:

> "There are various features of the work which CRA undertook which brought them, in our view, beyond the initial brief and which increased the costs of producing the final product. We have noted some of these factors below and hope that this will be helpful in explaining the costings position. We feel in general that CRA have been very flexible in responding to our requirements for the report."

[62] There is, however, nothing before me to indicate that after the explanation provided by Macfarlanes, Jamp Pharma or Macfarlanes communicated any concerns with the invoices directly to CRA. Indeed, not only did CRA reissue its first invoice on February 16, 2021 (adding taxes), but it went on to issue two more invoices thereafter. Again, there is no evidence of any complaints or objections by Jamp Pharma or its legal counsel, Macfarlanes, to those invoices either. I presume that Jamp Pharma was aware by January 2021, from its counsel, Macfarlanes, that CRA "went beyond the initial brief which increased the costs of producing the final product", however, no objection was made, or dispute process initiated. Instead, Macfarlanes provided an updated litigation budget to Jamp Pharma. CRA was a stranger to the discussions between solicitor and client.

[63] I note that strictly speaking, after the first invoice of in excess of three hundred thousand dollars, Jamp Pharma did not raise any objections even with MacFarlanes but rather requested justification for the amount of fees. Mr. Lee indicates that he had discussions with Macfarlanes on February 4, 2021. Jamp Pharma claims that Macfarlanes communicated its point to CRA, however, there is no evidence of this before me.

[64] In fact, there is no evidence, before the court of any written communication by either Jamp Pharma or its lawyers, Macfarlanes, to CRA during this time frame indicating any objection to the invoice. Jamp Pharma relies on a discussion that Mr. Lee had on May 19, 2021, with Mr. Tepperman, wherein Mr. Lee indicated that he believed the invoices were too high, and Mr. Tepperman indicated that "he would-as he always did- review the invoices to make sure they were fair and reasonable". At its highest, both men had a conversation about the invoices. However, there is no indication that anything said in the conversation amounted to an objection by Jamp Pharma, and the upshot is that Mr. Tepperman indicated that he would review the invoices to ensure that they were fair and reasonable. Most notably, the conversation occurred weeks and months after the February 26, 2021, invoice, the March 26, 2021 invoice and the April 20, 2021 invoice. There is nothing in writing or any indication of any communication by Jamp Pharma or Macfarlanes about CRA's account. CRA's last invoice is dated July 19, 2021, and again, there is no evidence before the court that any written objection was made about the last-mentioned account either. Indeed, as indicated above, Jamp Pharma has admitted that these four accounts were rendered in connection with services.

[65] Mr. Tepperman's evidence is that he would likely have availed himself of the provision within the Agreement which permitted CRA to terminate the services, withhold the report and to prohibit the client from using any report, until CRA's incurred fees had been paid. This evidence is speculative, but what is clear, on the evidence before me, is that neither Macfarlanes or Jamp Pharma raised any concerns about the amount of the invoices until May 2021, after the reports had been delivered, three of the four invoices had been delivered, and Mr. Tepperman had testified at trial. CRA continued to be assured that the invoices would be paid.

[66] As there is no evidence of Jamp Pharma providing the written notice to CRA objecting to any of the invoices within five business days of receiving the invoice, this is not a genuine factual issue for trial.

D. Is CRA estopped from relying on the five-day notice provision?

[67] Jamp Pharma acknowledges, at paragraph 20 of its factum, that: "The Agreement states that the client must make any objection concerning CRA's invoices in writing within five business days following receipt of the invoice to which objection is made". However, Jamp Pharma argues that CRA should be estopped from relying on the five-day provision as Mr. Tepperman did not raise it with Mr. Lee, and "And, indeed, while Mr. Tepperman was aware of the provision, he was prepared to consider objections to CRA's invoices in good faith irrespective of the five-day provision, including JAMP's objections in May 2021." Jamp Pharma argues that Mr. Tepperman listened to Mr. Lee's verbal objections to CRA's invoices and confirmed that he would review the invoices to ensure they were reasonable, without raising the five-day provision as an issue. Jamp

Pharma submits that Mr. Tepperman was aware at that time of the five-day provision and that it was past.

[68] I start with the pleadings. Jamp Pharma has not pleaded the doctrine of estoppel.

[69] Mr. Lee's call with Mr. Tepperman took place in May 2021. By that time, CRA had delivered all three expert reports, a Joint Statement of Expert Witnesses, and had testified at trial in the UK Litigation. The only evidence before me is that Mr. Lee raised a concern with the amount of the invoices. Beyond that, there is no evidence before me as to what specific objections, even to date, Jamp Pharma had with the invoices, aside from what is stated in its pleadings and Mr. Lee's affidavit, which is that it was not in line with the litigation budgets filed in the UK action and Jamp Pharma's expectation. On the evidence before me, I agree with CRA that Jamp Pharma's first written objection to the invoices was in their Statement of Defence, delivered on January 31, 2022. And, despite Jamp Pharma's dissatisfaction with the amount of the invoices, it did nothing, even after Mr. Lee's call with Mr. Tepperman, to stop working on the matter. CRA's evidence, which is uncontradicted, is that it continued to provide services after each invoice was issued and based on assurances that the invoices would be paid and, in the result, did not exercise its right under the Agreement to suspend or terminate the services.

[70] Jamp Pharma maintains that Mr. Tepperman, through his words and conduct, conveyed that CRA would permit objections without regard to the five-day rule. He intended to affect the legal relationship between CRA and Jamp Pharma. Jamp Pharma then did not deliver a prompt written objection to CRA's final invoice.

[71] The party relying on the doctrine of estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position.

[72] In my view, as for evidence relied upon by Jamp Pharma to ground a defence of estoppel, the summary distorts what the actual evidence is. Moreover, there is no evidence before me, unambiguous, or otherwise, by word or conduct, which indicates that CRA intended to waive or forgo the five-day notice provision. It is well established that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *John Burrows Ltd. v. Subsurface Surveys Ltd*., [1968] S.C.R. 607. The promise must be unambiguous but could be inferred from circumstances: *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647.

[73] The Supreme Court recently restated this test in *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, 163 O.R. (3d) 398 (note), at para. 15, stating:

> Promissory estoppel is an equitable defence and the elements were stated by Sopinka J. for this Court in *Maracle*, at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position.

[74] At most, the evidence of Mr. Tepperman on cross examination suggests that he was open to discussing the accounts with Mr. Lee so that they could be paid, but there is no indication that he or CRA made a promise, by word or deed, not to rely on the five-day notice provision, or that he intended to affect the legal relationship between the parties and to be acted upon.

[75] Indeed, Mr. Tepperman indicated that he believed it was a standard term. He testified that it is a legal agreement, and the lawyers and as the clients' lawyers deal with the agreement, so he was aware of the terms "generally". There is no evidence before me that Mr. Tepperman was in a position to waive the condition on behalf of CRA and in the result, it difficult to accept that his discussion with Mr. Lee in May 2021 had the effect of leaving Mr. Lee with the impression that CRA did not intend to enforce their strict rights under the Agreement. Indeed, Mr. Lee's own materials support this conclusion.

[76] CRA issued its final invoice on July 19, 2021. Jamp Pharma did not make an objection to the July 19, 2021 invoice within five business days. Mr. Lee, however, had been clear with Dr. Tepperman that he objected to the overall costs, which would only grow with the July 19, 2021 invoice.

[77] In fact, the summary distorts his evidence on cross examination. At its highest, Dr. Tepperman may have been prepared to find a way to move matters along and get paid and "be done with it", in his words. He was asked: "You weren't going to make any decisions, though, until you had more details and a chance to consider whether you thought there was any validity to concerns that JAMP might have about the past invoices – and we're talking here of the point in time of May 2021?" He responded: "I that that is partly correct, yes." But the response was never clarified. I do not agree that this exchange amounting to Dr. Tepperman promising not to rely on the five-day notice provision. Moreover, it cannot be said that Jamp Pharma relied on any such promise, to its detriment, since by the time Mr. Lee and Dr. Tepperman spoke in May 2021, three of the notice periods had already expired.

E. Can the court consider Jamp Pharma's expectation relative to another retainer?

[78] Jamp Pharma retained MNP LLP ("MNP") to prepare a valuation report regarding the calculation of value of intellectual property relating to a product to be transferred from Jamp Pharma to an affiliate. The costs of the MNP report were typical of the amounts Jamp Pharma charged for expert reports dealing with valuation/damages exercises.

[79] The retainer Agreement with MNP and the services provided under that agreement are not relevant to the Agreement before the court. There is no evidence that the MNP agreement was discussed with or brought to CRA's attention. On cross examination, Mr. Lee himself acknowledged the differences between the two agreements, the most cogent being that the MNP

agreement was not for expert services in litigation, but for internal financial planning and, that there was an explicit fee estimate. Beyond that, the subjective expectations of the parties have no bearing in interpreting the contract: *Sattva*, at para. 59.

F. Is the reasonableness of the invoices a genuine issue requiring a trial?

[80] In the materials before the court, Jamp Pharma raised a host of issues and sub-issues. All can be disposed of on the basis that they are not part of the Agreement between the parties, even if true. Jamp Pharma raised, for example, the fact that Dr. Tepperman did not deal with Comparative Studies/Chemistry and Manufacturing. There are personal attacks made of Dr. Tepperman including that he did not understand the issue, did not avail himself of Jamp Pharma's help to learn the issue, persisted in a mistake for reasons that appeared to be driven a personal agenda independent of duties to the court and the purpose for which he was hired by Jamp Pharma and delivered no value on this point, which entitles Jamp Pharma to a reduction as a consequence. First, the Agreement is not contingent upon results. Second, it is clear from the UK court decision that he may not have had the expertise to provide the opinion complained of. Third, there is no objection before me, even on this motion, of the aspects of the invoices that Jamp Pharma believes relates to Mr. Tepperman's alleged error on Comparative Studies versus Chemistry and Manufacturing. In my view, the Agreement speaks for itself.

[81] The Agreement also specifies, under the same "Relationship" heading that CRA should direct all communications to MacFarlanes, shall perform its services at the direction of MacFarlanes, without further consultation from Jamp Pharma and shall submit invoices to MacFarlanes for delivery to Jamp Pharma. The relevant portion of the Agreement states that: "CRA shall perform services at the direction of Macfarlanes without further confirmation from JAMP Pharma. Macfarlanes shall bear the responsibility of keeping JAMP Pharma apprised of CRA's efforts." Moreover, Jamp Pharma admits paragraph 8 of the of statement of claim that states: "CRA shall perform the Services at the direction of Macfarlanes without further confirmation from Jamp Pharma". Based on the provision, which Jamp Pharma was aware of, and agreed to, and the admission in the defence, CRA performed services at the direction of Macfarlanes, as contemplated by the Agreement, and had no obligation to avail itself of Jamp Pharma's help. It is difficult to conceive how CRA would bear any responsibility for any communication or lack of communication between Jamp Pharma and its legal counsel. Presumably, any further instructions that Jamp Pharma had with respect to concerns regarding the report would have been communicated by its legal counsel, Macfarlanes, to CRA. There is no evidence before me that that was done.

[82] The Agreement provided that all invoices are due and payable on receipt. The language of the Agreement puts CRA's fees on a "reasonable time and materials basis". The Agreement also states as follows: "JAMP Pharma will remain responsible for CRA's fees on a reasonable time and materials basis in the event that they exceed any estimate that we have given". The Agreement does not indicate that CRA fees are contingent upon the results of the suit, or the services provided. In fact, the Agreement states the exact opposite. The relevant portion of the Agreement states that: "The obligation to pay CRA's fees are not contingent upon the results of the services or any suit or matter in connection with the services provided."

[83] Jamp Pharma has argued that CRA made "errors" in its expert reports. The parties argue about whether the errors relate to factual errors and whose responsibility it was to provide the underlying facts. In my view, this is not a genuine issue requiring a trial. First, as stated previously, CRA's legal fees were not contingent upon the outcome. Second, Dr. Tepperman's uncontradicted evidence is that he sought Jamp Pharma's and Macfarlanes' confirmation of the underlying facts on these issues, which would be relevant to CRA's analyses. The law in Ontario is well established that lawyers are agents of their clients and have general authority to bind them in contract: *Scherer v. Paletta*, [1966] 2 O.R. 524 (C.A.), at para. 9; *Dick v. McKinnon*, 2014 ONCA 784, at para. 4.

[84] Third, Dr. Tepperman's report, based on assumed facts, as instructed by Macfarlanes, was available to Jamp Pharma through Macfarlanes by virtue of their review of the draft reports and any factual error in the report could have been identified and remedied. There is no evidence that it was. Finally, in the UK Litigation, the UK High Court indicated that it preferred Dr. Tepperman's evidence on market share and the relevant level of rebates, which were issues in dispute in that litigation.

[85] Jamp Pharma is essentially seeking an assessment of the invoices after the fact. It was well aware of the use of the five billing professionals to provide the services. It now argues that the services were duplicative. There is no genuine factual issue for trial with respect to this issue. Jamp Pharma has not placed any evidence before me as to which professional and which specific tasks or services rendered constituted duplicative work. In addition, there is no evidence before me of any complaint or objection by Jamp Pharma, before its pleadings, that it disputed the use of the number of professionals assigned. The Agreement required any objection to be raised within five days of receiving the invoices complained of. I would make the same point with respect to all other items raised by Jamp Pharma as factual issues requiring a trial, that is to say the same with regard to alleged errors in the report, the length of the report, and whether Dr. Tepperman's opinion was accepted by the UK Court.

G. Legal fees incurred for collection

[86] The Agreement provides that if CRA is required to undertake collection efforts for unpaid invoices, Jamp Pharma shall be responsible for payment of CRA's reasonable attorneys' fees and associated costs.

[87] Jamp Pharma submits that there is no evidence before the court of CRA's legal costs for the purposes of damages.

[88] In my view, this is not a genuine issue requiring a trial. If successful, CRA may submit a Costs Outline and Bill of Costs and Jamp Pharma will have an opportunity to respond to the claim for legal fees related to the collection effort.

H. What is the annual rate of interest chargeable under the Agreement?

[89] Jamp Pharma requested that pre-judgment (and post-judgment) interest should be awarded at a rate equal to the lower of one and a half per cent per month, on the basis that it was the rate

set out in the Agreement. Jamp Pharma argues that in the absence of an enforceable term regarding interest in the Agreement, the court should award interest at the *Court of Justice Act* rate.

[90] CRA only seeks pre-judgment interest at a rate of one and a half per cent per month, or alternatively, in accordance with the *Court of Justice Act*.

[91] The Agreement states that CRA reserves the option to charge interest on invoices that are outstanding more than thirty (30) days, at a rate equal to the lower of one and a half per cent per month or the maximum rate permitted under applicable law. Section 4 of the *Interest Act* provides that an interest rate in a written agreement in excess of five per cent per year must be expressly stated as a yearly rate. The Agreement does not contain an express statement of an annual rate, only a monthly rate of one and a half per cent per month, which is in excess of five per cent. Accordingly, CRA cannot recover the interest rate of one and a half per cent per month or 18 per cent per year.

[92] Since no maximum annual amount is set out in the Agreement, the maximum amount permitted by law is governed by s. 4 of the of the *Interest Act*, *Elcano Acceptance Ltd.* v. *Richmond, Richmond, Stambler & Mills* (1991), 3 O.R. (3d) 123 (C.A.). Section 4 of the *Interest Act* provides that (except for mortgages) whenever interest is made payable by the terms of a written contract, and no statement of the equivalent yearly rate is stated in the contract, no greater rate is payable than five per cent per year: *Wu v. Chen*, 2022 ONCA 664.

IX. Costs

[93] If the parties are not able to agree on costs, the plaintiff may deliver costs submissions within 20 days of the date of this endorsement, and the defendant may deliver responding submissions within 15 days thereafter.

A.P. Ramsay J.

Date: July 7, 2023