

COURT OF APPEAL FOR ONTARIO

CITATION: Smilecorp Inc. v. Pesin, 2012 ONCA 853

DATE: 20121205

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O'Connor A.C.J.O., Cronk and Juriansz JJ.A.

BETWEEN

Smilecorp Inc.

Applicant (Respondent)

and

Daniel Pesin

Respondent (Appellant)

Julian Binavince and Michael Suria, for the appellant

Laurie L. Aitchison, for the respondent

Heard: November 9, 2012

On appeal from the judgment of Justice Hugh K. O'Connell of the Superior Court of Justice, dated March 27, 2012.

Cronk J.A.:

I. Introduction

[1] This appeal concerns the enforcement of a non-solicitation covenant given by a dentist to the manager of a dental centre in consideration for the right to assume an existing dental practice and to practise dentistry at premises owned and operated by the manager.

[2] The appellant, Daniel Pesin, is a dentist. In the summer of 2009, he agreed with the respondent, Smilecorp Inc. (“Smilecorp”), that he would carry on his dental practice at a dental centre owned and operated by Smilecorp in Whitby, Ontario (the “Centre”). Under the parties’ arrangements, Dr. Pesin assumed responsibility for the existing dental practice at the Centre (the dental care of patients who had previously been treated by other dentists at the Centre), and for the dental care of new patients attracted to the Centre through Smilecorp’s advertising efforts.

[3] In the fall of 2011, Smilecorp terminated its arrangements with Dr. Pesin at the Centre. Shortly before his receipt of Smilecorp’s notice of termination – and without Smilecorp’s prior knowledge or consent – Dr. Pesin made copies of all the patient lists at the Centre. When Dr. Pesin left the Centre to establish a dental practice at a new location situated approximately five kilometres from the Centre, he took the lists with him with the intention of informing the patients of the fact and location of his new dental practice.

[4] Upon Dr. Pesin’s departure from the Centre, the dental care of patients at the Centre was assumed by a new dentist who had previously worked at the Centre. No disruption of dental care for patients occurred and patients were notified by the new dentist of the change in dental care providers.

[5] Smilecorp took the position that Dr. Pesin's copying of the patient lists, his removal of the lists from the Centre, and his plan to thereafter contact patients violated the terms of the parties' contractual arrangements including, in particular, a non-solicitation covenant in favour of Smilecorp given by Dr. Pesin.

[6] In early November 2011, Smilecorp applied to the Superior Court for an interim and permanent injunction, until October 31, 2013, to restrain Dr. Pesin from: (1) "soliciting, contacting, inviting or encouraging" any current or past patients of the dental practice previously carried on at the Centre to seek dental treatment at any location other than the Centre; and (2) sending "any announcement, advertising flyer, notice or any communication ... to the patients of the dental practice carried on at the Centre or announcing the change in location" of Dr. Pesin's practice, among other declaratory and injunctive relief.

[7] By judgment dated March 27, 2012, the application judge granted the requested injunction and associated declaratory relief. He also ordered Dr. Pesin to return all confidential information removed by him from the Centre, including patient records and lists of patients and their contact information.

[8] Dr. Pesin appeals. He does not contend directly that Smilecorp failed to meet the applicable test for a permanent injunction. Rather, he argues that the application judge erred: (1) by finding that Smilecorp had a proprietary interest entitled to protection by way of injunctive relief; (2) by holding that the non-

solicitation covenant at issue was not unreasonable; and (3) by failing to find that the parties' financial arrangements involved impermissible fee-splitting, thereby rendering the parties' contractual arrangements, including the non-solicitation covenant, void and unenforceable.

[9] For the following reasons, I would dismiss the appeal.

II. The Parties' Contractual Arrangements

[10] Dr. Pesin entered into two written contracts with Smilecorp: a confidentiality agreement, dated August 3, 2009, and a management agreement, dated August 6, 2009, as amended on July 1, 2010.

(1) Confidentiality Agreement

[11] Under the confidentiality agreement, Dr. Pesin acknowledged that Smilecorp had "expended considerable time, expense and effort in locating and developing [the Centre] for use by dentists, denturists and other health practitioners and providing management services to its tenants" as part of Smilecorp's business. He further acknowledged that Smilecorp wished "to protect its investment" in the premises where the Centre was located, in Smilecorp's business and in "the opportunities arising therefrom".

[12] Dr. Pesin agreed under the confidentiality agreement that he would not use "any of the Information directly or indirectly, in any manner whatsoever for [his] own benefit without the written consent of [Smilecorp]" (clause 4). The term

“Information” was defined under the confidentiality agreement as “all of the information provided by [Smilecorp] relating to the premises [of the Centre] and [Smilecorp’s] business ..., including... trade secrets” (clause 3).

(2) Management Agreement

[13] The management agreement included numerous terms designed to protect Smilecorp’s asserted proprietary interest in its facilities, premises and business at the Centre. The preambles to the management agreement included the following acknowledgements and agreements:¹

C. The parties agree that the Manager has invested considerable time, money and effort in establishing a prime facility for the practice of self regulated health professionals including but not limited to dentistry and dental hygiene in the Premises and that the proprietary interest created by the Manager in the location, facility and Premises is worthy of protection by the Manager and further agree that because of the valuable goodwill associated with the location and Premises as created by the Manager and the absolute trust the Manager must place in the Dentist to maintain the value of the Manager’s said proprietary interest, the Dentist has agreed to the strict enforcement of the terms of this Agreement including, without limiting the generality of the foregoing, the transfer of records, the non-competition and non-solicitation provisions of this Agreement.

....

¹ The management agreement referred to Dr. Pesin as the “Dentist”, to Smilecorp as the “Manager”, to Dr. Pesin’s dental practice at the Centre as the “Dental Practice” or “Practice”, and to the location of the Centre as the “Premises”.

H. One of the fundamental reasons the parties have entered into this Agreement is the intention of the parties that the patients of the Dental Practice will remain as patients at the Premises following expiry or termination of this Agreement by being treated by another dentist at the Premises as set out in this Agreement. As such, the parties agree that compliance with the termination provisions as set out herein are integral components of this Agreement. The parties agree that the Manager is relying on the Dentist to enhance the value of the Manager's proprietary interest in the Premises and facilities and that fundamental conditions for entering into this Agreement are the strict enforcement of the transfer of records, non-solicitation and non-competition provisions contained in this Agreement.

...

J. The Dentist agrees that he shall only be entitled to transfer his interest in his Dental Practice to another dentist at the Premises upon the expiry or termination of this Agreement as set out in this Agreement.

K. The parties have entered into a Confidentiality Agreement dated August 3, 2009 and hereby agree such Confidentiality Agreement remains in force notwithstanding the entering into [of] this Agreement and shall remain in force upon the termination of this Agreement.

L. The parties agree and fully understand that the Manager does not and cannot represent or warrant that this Agreement and its provisions therein are not in any violation of any rules, regulations or by-laws that may govern the practice of dentistry in the Province of Ontario. Furthermore, the Dentist shall satisfy himself as to the applicability, compliance and enforceability of said rules, regulations or by-laws in relation to the Agreement herein to his practice of dentistry in the Province of Ontario.

[14] In addition, under clause 3 of the management agreement, the parties expressly agreed as follows:

3. (1) The parties hereto are not a partnership, are not in an agreement i) of employment or ii) to fee-split whatsoever, and nothing herein contained shall be deemed to constitute the parties hereto as partners or associates with one another or as being in an employer-employee relationship.

....

3. (4) The parties agree that the Dentist is the sole owner of the patient charts, records and lists subject to the patient's trust like beneficial interest in his or her own chart. The Dentist however shall not be permitted to assign his legal or beneficial interest in the patient charts, records and lists except as specified in this Agreement. ... The parties also agree that the patient's right to choose his or her health care provider is of paramount importance.

[15] Clause 17 of the management agreement contained the non-solicitation covenant at issue, applicable on expiry or termination of the agreement. In material part, this provision read:

17. Upon the expiry or termination of this Agreement or any renewal thereof, for a period of twenty-four (24) months thereafter, the Dentist covenants: (1) not to solicit, contact, invite or encourage either directly or indirectly, in any manner whatsoever, any patients of the Dental Practice to seek dental treatment ... at any location other than at the Premises (2) not to send any announcement, advertising flyer, notice or any communication directly or indirectly to his patients announcing the change in location of the Dental Practice to another location ...

[16] Clause 18 of the management agreement addressed the reasonableness of this non-solicitation covenant and Smilecorp's remedies if Dr. Pesin were to breach the covenant:

18. The parties hereto confirm that the foregoing provisions of sections 15, 16 and 17 herein are reasonable and valid and all defences to the strict enforcement thereof are waived by the Dentist. The Dentist agrees that the remedy at law for any breach by the Dentist of the above provisions will be inadequate and that the Manager will be entitled to injunctive relief and damages (including reasonable solicitor's fees on a solicitor and client basis) in the case of breach.

[17] The termination provisions of the management agreement included the following:

19. With respect to the termination of this Agreement:

....

(9) The parties agree that after notification has been given that this Agreement shall expire or shall be terminated as set out herein, the Dentist shall:

...

(b) prepare correspondence to be sent by the Manager to each and all patients of the Dental Practice at least seven (7) days prior to the expiry or termination of this Agreement where such time is available, or forthwith if this Agreement has been terminated without notice, which shall include the following:

(i) the date when the Dentist shall no longer be practising dentistry at the

Premises (herein called the "Termination Date");

(ii) a statement that he will no longer be working at the Premises and that the patients' records are being transferred to the dentist(s) who will be replacing the Dentist upon the expiry/termination of this Agreement (herein referred to as "Transfer Dentist(s)"), and a statement encouraging his patients to continue their general dental treatment with such Transfer Dentist(s) at the Premises. The Transfer Dentist shall be one of the Other Dentists working at the Premises or to another dentist who will be working at the Premises after the Termination Date; and

(iii) a statement that if the patient does not wish to continue receiving dental treatment at the Premises, the patient may authorize the Transfer Dentist in writing to forward a copy of the patient's records to the dentist of the patient's choice; and

(c) take all steps necessary to ensure all patients' records and charts are transferred or assigned to a Transfer Dentist immediately upon the termination of this Agreement and the Dentist shall not make any duplicate copies thereof.

[18] In addition, clause 20 stated:

20. For the purposes of this subsection, "Goodwill" means without limitation, all records, patient lists and information concerning or related to the patients of the Dental Practice in any manner whatsoever.

(1) Upon expiry or termination of this Agreement, the Dentist shall vacate the Premises and:

(a) shall transfer all the Goodwill of the Dental Practice to one or more Transfer

Dentists at the Premises at no charge or fee whatsoever, where the choice of Transfer Dentist will be at the discretion of the Dentist but with the written consent of the Manager, where such consent may be withheld unreasonably;

(b) shall not remove any information related to any patient of the Dental Practice including but not limited to, any records, patient lists or personal information such as phone or fax numbers, email or any other address of such patients from the Premises;

(c) shall comply with the Confidentiality Agreement dated August 3, 2009, entered into with the Manager and without limiting the generality of the foregoing, not divulge any confidential information concerning the Premises and business of the Manager without the consent of the Manager.

...

(2) The Manager shall:

...

(b) provide the address and telephone number of the location where the Dentist has relocated the Dentist's Dental Practice, if known to the Manager, to anyone requesting same.

III. Issues

[19] There are three issues on appeal:

(1) Did the application judge err by finding that Smilecorp had a proprietary interest entitled to protection by way of injunctive relief?

- (2) Did the application judge err by holding that Dr. Pesin's non-solicitation covenant was not unreasonable?
- (3) Did the application judge err by failing to find that the parties' financial arrangements involved impermissible fee-splitting, thereby rendering the management agreement, including the non-solicitation covenant, void and unenforceable?

IV. Discussion

(1) Smilecorp's Proprietary Interest

[20] Dr. Pesin argues that the application judge erred by finding that Smilecorp had a proprietary interest entitled to protection by way of injunctive relief. He submits that while the application judge found that the goodwill associated with the premises where the Centre was located was a proprietary interest worthy of protection, in fact the only "goodwill" of Smilecorp identified under the management agreement related to the protection of dental patients. Because Smilecorp and its principal are not dentists and cannot have any dental patients, Dr. Pesin submits that Smilecorp cannot claim any proprietary interest in any dental patient by operation of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "RHPA") and the *Dentistry Act, 1991*, S.O. 1991, c. 24 (the "Act").

[21] I would reject this argument. In my view, it misconceives the application judge's findings concerning the nature of Smilecorp's proprietary interest under, and the actual terms of, the confidentiality and management agreements.

[22] Although the application judge stated, at para. 68, that Smilecorp had a proprietary interest in “the goodwill that [Smilecorp] has vested in the premises”, he also held:

[70] Both parties conceded in [the management agreement] that considerable goodwill has been established. The parties fully recognized the proprietary interest described in the [management] agreement. Both parties fully understood and agreed that the patients would remain Centre patients following the termination of the [management agreement].

[71] The [management] agreement however does not purport, nor could it, to fetter the ability of a patient to vote with his or her feet. It does not vest in Smilecorp a proprietary interest in the patients of the clinic. ...

[72] I find therefore that Smilecorp is not asserting a proprietary interest in dental patients, but rather in the goodwill occasioned by its management of dental practices under its roof.

[23] Later in his reasons, the application judge elaborated:

[84] Smilecorp has established a very formidable business model. As already noted the parties contracted with respect to the presence of goodwill. It is otherwise manifestly evident. As noted it does not lie in the patients, but rather in the model of the clinic and the accoutrements provided to the dentist who simply need contract with Smilecorp to inherit a fully constituted dental practice inclusive of client lists, location and equipment.

[24] These findings are firmly anchored in the terms of the contractual bargain concluded by the parties. From the outset of his dealings with Smilecorp, when he entered into the confidentiality agreement, Dr. Pesin recognized Smilecorp’s

efforts in developing the Centre and its desire to protect its investment in the Centre and its business. In doing so, Dr. Pesin specifically acknowledged Smilecorp's goodwill in its "location, facility and Premises". As the application judge put it, this goodwill pertained to the "very formidable business model" developed and utilized by Smilecorp, that is, the "model of the [Centre] and the accoutrements provided to the dentist" at the Centre.

[25] Both Dr. Pesin's acknowledgement of Smilecorp's goodwill and his covenants under the confidentiality agreement formed an integral part of the management agreement later entered into by the parties. For this reason, preamble K of the management agreement bound Dr. Pesin to his commitments under the confidentiality agreement.

[26] Moreover, the management agreement itself provided for the protection of the goodwill associated with Smilecorp's premises and its business.

[27] Preamble C of the management agreement referred to both Smilecorp's proprietary interest in the "location, facility and Premises" and the goodwill associated with the location and the premises created by Smilecorp.

[28] Further, under preamble H of the management agreement, Dr. Pesin acknowledged one of the core features of the business model created by Smilecorp: that upon termination of the management agreement, the patients

treated by Dr. Pesin in his dental practice at the Centre (the “patients of the Dental Practice”) would continue to be treated at the Centre by another dentist.

[29] In addition, under clause 20 of the management agreement, Dr. Pesin agreed that on termination of the agreement, he would transfer all the goodwill of his dental practice to a successor dentist at the Centre. The term “goodwill” was defined for this purpose as including all records, patient lists and information concerning or related to the patients of Dr. Pesin’s dental practice at the Centre.

[30] In essence, therefore, Dr. Pesin contracted to obtain the benefits of a ‘turn key’ dental practice built by others. By executing the management agreement, he gained an existing patient base, attracted and developed by Smilecorp and other dentists at the Centre, in exchange for his non-solicitation covenant, his professional services and his commitment that, when he left the Centre, those patients treated by him would remain at the Centre as patients of another dentist unless the patients elected otherwise. As the application judge held, at para. 76, the enticement to sign the management agreement with Smilecorp was the existence of “a built in client base and goodwill associated with the Centre”.

[31] Importantly, the management agreement also established a scheme to preserve the continuity of patient care and patient choice regarding patients’ selection of their dentist in the event of termination of the agreement. The management agreement provided that a patient’s records would be transferred,

on request, to a dentist of the patient's choice (clause 19(9)(b)(iii)) and that "the patient's right to choose his or her health care provider is of paramount importance" (clause 3(4)). The management agreement also contained provisions that were designed to ensure that, upon Dr. Pesin's departure, the dental care of patients at the Centre would continue with a successor dentist at the Centre.

[32] In my view, having embarked on his dental practice at the Centre on this basis, and having expressly acknowledged Smilecorp's right to protect its investment at the Centre, it was not open to Dr. Pesin, on termination of the management agreement, to deny either Smilecorp's proprietary interest in the business conducted and the premises at the Centre or its right to protect that interest by means of injunctive relief.²

[33] Accordingly, I would reject Dr. Pesin's attack on the application judge's finding that Smilecorp had a proprietary interest in its premises and business at the Centre. This attack is defeated by the express terms of the contracts that Dr. Pesin voluntarily entered into with Smilecorp, and of which he was the beneficiary.

² See for example, clause 18 of the management agreement, quoted above, regarding Smilecorp's remedies on Dr. Pesin's breach of the management agreement.

(2) Reasonableness of Non-Solicitation Covenant

[34] I reach a similar conclusion regarding Dr. Pesin's challenge to the reasonableness of his non-solicitation covenant.

[35] The provisions of the management agreement, read as a whole, undercut the claim that clause 17 is unreasonable as between the parties. The pertinent terms of the management agreement included:

- (1) a specific acknowledgement by Dr. Pesin that the non-solicitation covenant was "reasonable and valid" and that Smilecorp was entitled to injunctive relief, as well as damages, for any breach of the covenant (clause 18);
- (2) preservation of patient choice regarding a patient's selection of dental provider, by reason of the patient-notice provisions of the agreement (clause 19(9)(b));
- (3) a commitment by Smilecorp to inform patients, at their request, of Dr. Pesin's co-ordinates upon the relocation of his practice (clause 20(2)(b));
- (4) preservation of continuous dental care for patients treated by Dr. Pesin in his dental practice at the Centre (clauses 19(9)(c) and 20(1)(a)); and
- (5) a commitment by Dr. Pesin that, upon termination of the management agreement, he would not remove any information related to his practice from the Centre, including any patient lists, records or personal patient information (clause 20(1)(b)).

[36] Moreover, the ambit of the non-solicitation covenant is itself constrained.

As Smilecorp emphasized during oral argument, nothing under the management

agreement prevents Dr. Pesin from advertising generally concerning the relocation of his practice. Put another way, the non-solicitation covenant does not prohibit Dr. Pesin from soliciting patients generally. Instead, the covenant merely prevents Dr. Pesin from communicating with those patients treated by him at the Centre, except in the manner agreed to and described in clauses 19 and 20 of the management agreement.

[37] Further, the non-solicitation covenant places no restriction on the location of any new dental practice to be established by Dr. Pesin. As the application judge stated, at para. 64, nothing in the parties' arrangements "fetters trade or is otherwise detrimental to the business interests of Dr. Pesin. ... [T]here is nothing to stop Dr. Pesin from opening a business right next door to Smilecorp. He simply has to comply with the terms of the contract that he and Smilecorp expressly and clearly methodically, bargained for".

[38] I therefore agree with the application judge's finding, at para. 78, that the scope of the proscription on solicitation is "very limited" and "only germane to clients who utilize the dentists who occupy premises provided by Smilecorp".

[39] I would also reject Dr. Pesin's argument that the parties' contractual arrangements offend the regulatory scheme for dentists established by the RHPA and the Act so as to render Dr. Pesin's non-solicitation covenant unenforceable "as a matter of law".

[40] Dr. Pesin relies especially on the provisions of a February 2007 Practice Advisory on Change of Practice Ownership and an August 2007 Practice Advisory on the Release and Transfer of Patient Records (the “Advisories”) issued by the Royal College of Dental Surgeons of Ontario (the “College”), as well as ss. 2(17) and 6(c) of *Professional Misconduct* O. Reg. 853/03 (the “Regulation”) under the Act.

[41] I do not think that the Advisories or the Regulation compel the conclusion that the non-solicitation covenant is unreasonable or unenforceable.

[42] The Advisory on the Release and Transfer of Patient Records addresses a dental patient’s right to receive a copy of his or her dental records and contains provisions designed to ensure compliance by dentists with their professional obligations regarding patient records. The Advisory warns:

Disputes between practitioners or contractual arrangements should not prejudice the future treatment of patients, restrict patients’ rights to choose the dentist of their choice, or limit the access of patients to their dental charts or records.

[43] For the reasons set out above, nothing in the management agreement violates these principles. The agreement preserves, indeed emphasizes, a patient’s ability to choose his or her dental provider. The agreement also confirms that the patients at the Centre are entitled to access their dental charts and records, to obtain information concerning their previous dentist at the Centre, and to require transfer of their patient files, if they so elect. Further, and

importantly, no endangerment of future patient dental care was occasioned on Dr. Pesin's departure from the Centre because of the scheme for immediate file transfer contemplated, and agreed to by Dr. Pesin, under the management agreement.

[44] The Advisory on Change of Practice Ownership advises that a dentist leaving a dental practice should notify the patients of a change in ownership of the dental practice or in dental care providers. The provision of such notice – and, hence, compliance with the patient-centred objectives of the Advisory – is what clause 19(9) of the management agreement was designed to achieve.

[45] On the facts of this case, Smilecorp, as the owner of the Centre, provided for the immediate and orderly transfer of patient charts to a new dentist or dentists at the Centre on termination of successive management agreements, including the agreement entered into with Dr. Pesin. Under the latter management agreement, any patient wishing to leave the Centre or to transfer his or her dental care to Dr. Pesin or another dentist was free to do so.

[46] Further, the management agreement expressly provided for notice to patients of the change in dental providers at the Centre and in the location of Dr. Pesin's practice. And, the management agreement does not prevent Dr. Pesin from himself announcing the new location of his practice, so long as he does not breach the terms of the management agreement in so doing.

[47] Similarly, in my opinion, ss. 2(17) and 6(c) of the Regulation do not assist Dr. Pesin. Section 2(17) states that, absent consent, it is an act of professional misconduct for a dentist to give information about a patient to a person other than the patient or his or her authorized representative unless the provision of such information is required or allowed by law. Dr. Pesin pointed to no evidence in this case that patient information was provided to anyone at the Centre without the requisite consent of the patient or his or her authorized representative.

[48] In my view, s. 6(c) of the Regulation also does not support the assertion that the non-solicitation covenant is unreasonable or unenforceable. Section 6(c) is concerned with the solicitation of dental patients when a dentist ceases to practise with another dentist or where a partnership of dentists dissolves. Neither scenario is engaged here. Clause 3(1) of the management agreement specifically provided that the parties were not entering into a partnership, professional association or employer-employee relationship. Other provisions of the management agreement stressed the independence of Dr. Pesin's practice. In light of these provisions, s. 6(c) of the Regulation and the cases relied on by Dr. Pesin involving disputes between dentists are inapplicable.

[49] Finally, I agree with the application judge that any conflict between Dr. Pesin's obligations under the Advisories and the Regulation, on the one hand, and under the management agreement, on the other hand, is an issue for Dr. Pesin and his regulator. Under preamble L of the management agreement, Dr.

Pesin accepted that Smilecorp made no representation or warranty that the terms of the management agreement conformed with the regulatory regime that governs Dr. Pesin's dentistry practice. Indeed, under that preamble, Dr. Pesin was obliged to satisfy himself as to such conformity. General principles of contract law, therefore, govern the issues in contention as between Smilecorp and Dr. Pesin.

(3) Alleged Impermissible Fee-Splitting Arrangement

[50] Dr. Pesin's final ground of appeal concerns the financial arrangements between the parties. He argues that those arrangements constituted an impermissible fee-splitting arrangement as contemplated by the Regulation and the Conflict of Interest Guidelines published by the College in August 2002 (the "Guidelines"), thus rendering the entire management agreement void and unenforceable. The relevant provisions of the Regulation and the Guidelines prohibit dentists from entering into contractual arrangements that provide for fee or income splitting, save in specified circumstances, to avoid a conflict of interest.

[51] The application judge was alive to this issue. He expressly rejected the proposition that the existence of a fee-splitting arrangement between Dr. Pesin and Smilecorp, even if proven, would prevent Smilecorp from obtaining equitable relief to enforce the non-solicitation covenant in the management agreement. Having noted Smilecorp's evidence that no fee-splitting arrangement existed, the

application judge later held, at para. 82: “[E]ven in the face of fee-splitting, which [Smilecorp] argues is not present, ... any forbiddance of that activity is a problem for Dr. Pesin, not for Smilecorp.”

[52] In my opinion, it is unnecessary for the disposition of this appeal, as it was unnecessary for the application judge, to determine whether the financial arrangements between the parties constituted fee or income splitting within the meaning of the Regulation or the Guidelines.

[53] What is relevant to this appeal is that Dr. Pesin voluntarily entered into his arrangements with Smilecorp without complaint and derived the benefit of them during his tenure at the Centre. As I have already said, he also contractually agreed that it was his responsibility to determine the “applicability, compliance and enforceability” of the rules, regulations or by-laws governing the practice of dentistry in Ontario in relation to the management agreement (preamble L of the management agreement). Importantly, in clause 3(1) of the management agreement, Dr. Pesin also expressly agreed that his relationship with Smilecorp did not include fee-splitting.

[54] Dr. Pesin now seeks to challenge the validity of the entire management agreement, by impugning the propriety of his financial arrangements with Smilecorp, after the fact. Dr. Pesin’s challenge is simply another attempt by him to resile from his commitments under the management agreement. The

professional responsibility implications of Dr. Pesin's financial arrangements with Smilecorp, if any, are a matter for Dr. Pesin and his regulator. They do not insulate Dr. Pesin from the consequences of his breach of the management agreement.

V. Disposition

[55] For the reasons given, I would dismiss the appeal. I would award Smilecorp its costs of the appeal fixed, as agreed by the parties, in the amount of \$5000, inclusive of disbursements and applicable taxes.

Released:

"DEC -5 2012"
"DOC"

"E.A. Cronk J.A."
"I agree D. O'Connor A.C.J.O."
"I agree R. Juriansz J.A."