Claim No: 435560

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: *Geffroy v. England*, 2015 NSSM 23

BETWEEN:

LINDA GEFFROY

Claimant

- and -

S. ADELE ENGLAND and PARKLAND LAW

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on March 10, 2015

Decision rendered on March 16, 2015

APPEARANCES

For the Claimant — self-represented with David Cunningham (her husband)

For the Defendant, S. Adele England — self-represented

For the Defendant, Parkland Law Russell Quinlan

BY THE COURT:

1[] The Claimant resides in Eastern Passage and is the mother of an adult son, Andrew Buchanan, who resides in Alberta.

2[] The Defendant, S. Adele England, is a practising lawyer who at the relevant time was working with the firm Parkland Law, which is also named as a Defendant. For convenience I will refer to S. Adele England as "Ms. England," and to Parkland Law as "Parkland." Andrew Buchanan will be referred to as "Andrew."

3[] There is no dispute that on or about October 31, 2014, the Claimant gave a legal retainer of $1,500.00 to Ms. England, as part of the process of retaining Ms. England to represent (her son) Andrew in a proposed Variation Application in the Family Division of the Supreme Court, concerning Andrew's access to his young son.

4[] The Claimant has sued for $1,299.50 for various complaints which she characterizes in her Notice of Claim, as generally "un-professionalism," and specifically cites an alleged failure to communicate, and a failure to account by issuing invoices or progress reports on the work that she was doing. The $1,299.50 claimed is the balance of the retainer, as $200.50 was already returned to her by the Defendants. Although the Claimant says she never received them, the Defendants produced three invoices made out to Andrew

which charge that same total of $1,299.50 for legal work detailed therein, plus HST.

5[] In essence, the Claimant wants all of her money back, or at least more of it than she has already had returned to her, on the basis that (she believes) Ms. England did not do a proper, or timely job.

6[] At the outset of the hearing, the Defendants raised a preliminary issue as to whether the Claimant had any legal standing to contest the amount of the legal bill. They contend that - notwithstanding the source of retainer funds - the true "client" was Andrew, and only he would have the legal standing to engage in what is, in substance, a taxation of the account. It is understood that Andrew lives in Alberta and it would hardly be practical for him to travel to Nova Scotia for a matter of this modest magnitude. However, the Claimant did not even produce any document, such as a letter, authorizing her to stand in his place. In fact, there was no evidence produced even to indicate that Andrew was aware of this proceeding, and what views he may hold.

7[] The Defendants further raised a concern that taxing the accounts, without the presence of Andrew, would potentially place them in an ethical dilemma as, in the course of demonstrating the work done, they might be forced to reveal confidential solicitor-client information (such as draft affidavits detailing personal facts, and personal financial information which was needed for other court filings) without his consent.

8[] The Defendants also contend that the procedure used was irregular, in that it was commenced as an ordinary Claim rather than as a Notice of Taxation.

9[] I chose not to rule immediately on the preliminary motion, without first hearing the Claimant's evidence, because I considered it possible that she might convince me that she had established a relationship with the Defendants that would have entitled her to tax the account. I further indicated that I would order the disclosure of confidential information, to the extent necessary for the Defendants to answer the claim. I also ordered that, as a further protection of Andrew's privacy, the hearing would be continued *in camera*, which would have precluded any member of the public from listening to the evidence (had anyone shown up to do so.)

10[] While I heard the evidence of the Claimant in its entirety, touching upon all issues, I will only refer to such evidence that might support her ability to tax the account or otherwise obtain the kind of accounting that she seeks. This is not the time to consider whether any of her complaints about Ms. England's handling of the file have any merit, as only her side of the story has been heard, so far.

The relevant facts

11[] It is uncontested that the Claimant came to meet with Ms. England, who was then practising law with Parkland, to discuss a possible court proceeding involving her son Andrew. Ms. England accepted the engagement and asked for a $1,500.00 retainer. She clearly understood that the issues concerned Andrew's access to his young son, who lived with the child's mother in Nova Scotia. The child's mother was allegedly denying access at that time.

12[] Ms. England appears to have accepted the arrangement whereby communications with Andrew would, at least some of the time, be filtered through the Claimant. The Claimant was the source of much of the preliminary information that Ms. England needed in order to move forward, including the identities of parties, addresses and phone numbers and such. However, there is no doubt that Ms. England intended to be in direct touch with Andrew, and that she needed him eventually to provide the sworn affidavit that would be filed in support of his court claim. There is no evidence, at this point, as to whether or not Ms. England would have allowed the Claimant to be privy to all of her communications with Andrew.

13[] The Claimant has experience with lawyers and legal proceedings, and must be taken to have understood the nature of a legal retainer. It is a deposit of money, which the lawyer must hold in trust, to secure legal fees. According to the Rules of the Barristers Society, the lawyer is permitted to draw from that fund to satisfy accounts, as rendered. The ultimate question as to whether or not an account is reasonable, or justified, rests with a judge or adjudicator exercising jurisdiction under the *Legal Profession Act*, which provides (in part):

> **LEGAL FEES**
>
> **Interpretation of Part**
>
> 65 In this Part,
>
> (a) "account" means the fees, costs, charges and disbursement to be paid by a client or a party to a matter as a result of an order of a court;
>
> (b) "adjudicator" means an adjudicator of the Small Claims Court of Nova Scotia;

(c) "lawyer" includes a law firm and a law corporation.

Account recoverable

66 A lawyer may sue to recover the lawyer's reasonable and lawful account.

Taxation

67 Notwithstanding any other enactment, a lawyer's account may be taxed by

(a) an adjudicator; or

(b) a judge.

Initiation of taxation

68 A taxation may be initiated by

(a) any person claiming the whole or a portion of an account; or

(b) any person from whom an account or any portion of it is claimed.

Where lawyer is party

69 Where a lawyer is a party in a proceeding in which the reasonableness of the lawyer's account is raised, the presiding judge or adjudicator may

(a) tax the account as part of the proceeding; or

(b) order the account to be taxed by another judge or adjudicator.

14[] In order to question the reasonableness of the accounts, the Claimant must bring herself within one or other of the sections above.

15[] Specifically, under s.68 (b) she must establish that she is *"a person from whom an account or any portion of it is claimed"* in order to *"initiate a taxation."* Alternately, under s.69 this must be a *"proceeding in which the reasonableness of the lawyer's account is raised,"* in which case it would be within my authority as an adjudicator either to tax the account, or order that someone else do so.

16[] In my view, the Claimant cannot satisfy either test.

17[] The Claimant is not someone from whom the account is claimed. Suppose, for sake of argument, that Ms. England had done more work than the retainer would have covered. It is difficult to imagine that Ms. England could have sued the Claimant for the additional amount. The person for whom the services were being provided was Andrew. It was he who stood to benefit from the court order that was to be sought. In order for a third party such as the Claimant to become responsible for an account for services rendered to someone else (such as Andrew) there would have to be a written guarantee to "answer for the debt of another." The law has always been unwilling to hold people responsible for the debts of others, without very clear proof that they have agreed to do so. The *Statute of Frauds*, which has been in place in similar form for several centuries, provides as such:

> **Action upon agreement**
>
> 7 No action shall be brought
>
> ..... (b) whereby to charge any person upon any special promise to answer for the debt, default or miscarriage of another person; .....

> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

18[] There was no retainer agreement or other document created in the situation here that would have rendered the Claimant responsible for Andrew's legal accounts. Obviously, Ms. England was in a position to rely on the $1,500.00 retainer as security, up to the amount provided. Had the retainer been exhausted, she could have asked for an additional retainer, but she would have had no basis to argue that the Claimant had legally obligated herself to provide further retainers or to answer for Ms. England's legal account.

19[] I take notice of the fact that, in the legal world, there are arrangements made whereby people guarantee, in writing, to pay the accounts of others. Had there been such a document here, it would have followed that the Claimant also had a right to question (via taxation) the reasonableness of the accounts.

20[] This disposes of her right under s.68 of the *Legal Profession Act*.

21[] The authority under s.69 might, at first blush, appear to support a right, because the matter before me is *"a proceeding in which the reasonableness of the lawyer's account is raised,"* and I therefore have the authority to tax the account or order that someone else do so. However, in my opinion, this section does not apply where the claim is, at its heart, nothing other than an attempt to tax the account.

22[] Section 69 recognizes that, from time to time, an issue arises within a case that brings up the reasonableness of a legal account, which then makes it convenient for the judge or adjudicator either to tax the account, or carve off the taxation of the account for another judge or adjudicator to deal with.

23[] Furthermore, in my view, the section gives a judge or adjudicator the discretion whether or not to tax the account. Assuming that the Claimant can place herself within this section, in the exercise of my discretion I would not allow the accounts to be taxed as there is nothing else in the claim to determine. To invoke this section as a basis for a non-client to tax a lawyer's account would be, in my respectful view, not respectful of the intent of the section, which is to provide a convenient way for taxations to occur that are ancillary to another, larger proceeding.

The proper way of initiating a taxation

24[] The Defendants raise the additional issue of how this attempted taxation was commenced, i.e. by way of a regular Notice of Claim rather than a Notice of Taxation. While the issue is moot, in light of my other findings, I offer a few thoughts.

25[] Under section 3 (1) of the Regulations made under Section 33 of the Small Claims Court Act (also known as the *Small Claims Court Taxation of Costs Regulations*) a taxation is initiated by an applicant filing:

(a) a Notice of Taxation in Form 1;
(b) a copy of each bill incurred in the proceeding; and
(c) a $96.80 taxation fee

26[] In my experience as an adjudicator, this procedure is not always followed. In particular, many lawyers use the ordinary procedure of a Notice of Claim when suing on their accounts. For better or worse, this has been treated as, at most, a procedural irregularity that is not fatal to the matter proceeding.

27[] In the case here, absent any demonstrated prejudice to the lawyers involved, I would not have refused to tax the accounts on this ground alone, but would have excused the procedural irregularity.

28[] In the result, the claim must be dismissed. This is without prejudice to any taxation that Andrew, as Ms. England's client, might pursue.

Eric K. Slone, Adjudicator