IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: Boyne Clarke LLP v. Adema, 2016 NSSM 1

Claim: SCCH 443875
Registry: Halifax

Between:

Boyne Clarke LLP

Claimant

v.

Jennifer Lynn Adema

Defendant

Adjudicator: Augustus Richardson, QC
Heard: November 10, 2015
Appearances: Michael Levin, AC, for Claimant
Jennifer Lynn Adema, Defendant

Decision

[1] This matter, brought as a claim, is actually in effect a taxation (or assessment) of a series of legal account for services rendered. The issue it raises is what weight, if any, should be given to a client's ability to pay when a court assesses the reasonableness of such an account.

[2] Ms Chapman, the solicitor who had carriage of the file for Ms Adema, the client, was not present at the assessment hearing. As a consequence I was left with only the testimony of Ms Adema. The claimant law firm did, however, enter into evidence its retainer letter, its fee and payment policy (from its online website) and copies of four accounts, dated respectively April 17th, May 8th, June 6th, July 11th and August 7th, 2014.

The Accounts and the Claim

[3] As detailed below, Ms Adema provided an initial retainer of $2,500.00. That retainer was drawn down over the course of the file. The accounts rendered by the claimant over time are as follows:

Date	Amount (including HST and Disbursements)	Balance Outstanding
April 17, 2014	1,021.78	$0 (paid out of trust)
May 8, 2014	903.38	$0 (paid out of trust)
June 6, 2014	$2,879.20	$2,304.36 ($574.84 paid out of trust)
July 11, 2014	$553.50	$2,857.86
August 7, 2014	$181.41	$3,039.27

[4] The August 7th account represented the state of Ms Adema's account as of that date.

[5] Ms Adema made the following additional payments on that account thereafter:

Date	Payment
October 9, 2014	$90.00
November 10, 2014	$90.00
January 13, 2015	$80.00
February 24, 2015	$60.00
April 20, 2015	$160.00
August 28, 2015	$50.00
Total	$530.00

[6] However, during the same period the claimant was charging interest at 12% per annum on the outstanding account. Those interest charges amounted to $442.94, offsetting to a large extent the payments Ms Adema was making on account during that period.

[7] As a result the claimant now seeks $3,030.91 as due and owing, comprised of

a. $2,932.21 due and owing (inclusive of payments on account and interest), and

b. $99.70 in filing fees.

The Retainer

[8] Jessica Chapman ("Ms Chapman"), a solicitor with the claimant law firm, was retained on or about January 23, 2014 by the defendant Jennifer Lynn Adema ("Ms Adema"). She was retained for the purpose of a variation application in a family law matter. The variation related to Ms Ademan's desire to obtain full custody of her two children.

[9] Ms Adema provided a retainer of $2,500.00 on January 28th, 2014. No retainer letter was signed at that time. A formal retainer letter was eventually obtained by the claimant. It was dated April 10th, and was signed by Ms Adema on April 15th. Given that Ms Chapman did not provide evidence, and given that the actual retainer occurred earlier, in January 2014, I am left with only Ms Adema's testimony was to what was discussed during the initial retainer or thereafter.

[10] Ms Adema explained that when she first discussed the retainer with Ms Chapman on Januart 23rd she understood that the variation application would not be more than $2,500.00. She told Ms Chapman that she would have to borrow the money in order to provide the requested retainer. She subsequently borrowed the money and paid it to the claimant on January 28th. Ms Chapman commenced work on the file.

[11] A court application was eventually scheduled for May 29th. However, the retainer had run out a few weeks before that date (as appears from the above chart). Ms Adema was advised at that time that she would have to come up with $1,500.00 more. She said she could not pay and could not access any further money. She testified that Ms Chapman told her that she "would try her best to get it covered by a costs application." And it appears that something to that effect was added to the affidavit material used during the court hearing.

[12] The variation application was essentially successful, Ms Adema testifying that she "got just about full custody of my two children."

Assessment

[13] I should say at the outset that Ms Adema had absolutely no complaint with Ms Chapman's service. In fact, she said that Ms Chapman "was wonderful." Ms Adema's only issue was that she could not pay.

[14] A solicitor is only entitled to charge a "reasonable" amount for his or her services. Whether an account is reasonable depends on a large number of factors as well as the circumstances of each particular retainer. In this case, there was no issue as to the work that was done, or the skill or competency with which it was carried out. But was it reasonable to hold the client in this case, based on the facts of this case, to more than she could afford to pay? That is the question that has to be answered in this case.

1: The Claim for Interest

[15] Courts are reluctant to imply agreements to pay interest on overdue accounts. There must be either an express agreement to that effect, or an agreement that can be implied on the evidence: see generally *McInnes Cooper v. Canus Fisheries Ltd* 2006 NSSM 9 at para. 19.

[16] In this case the claimant relies upon the written retainer letter of April 10th, 2014 as representing an agreement on Ms Adema's part to pay interest. The letter does states that there is an interest charge of 12% per annum on overdue accounts. However, the letter was not issued or signed until well after the retainer had commenced (and at least two accounts had been paid). And while Ms Adema signed the letter, I note that it is seven pages long and covers a multitude of possible charges that might be incurred. It strikes me as unlikely that the three lines respecting interest would have jumped out at anyone reading the letter. Added to that is the fact that Ms Adema testified that there had never been any discussion between her and Ms Chapman as to interest on overdue accounts. None of this supports a finding on a balance of probabilities that Ms Adema knew of–or agreed to–paying interest on overdue accounts when the retainer commenced in January 2014.

[17] The other point is this. It is one thing to raise such potential charges with a client prior to the retainer's commencement. It is another to raise them after the retainer has commenced and the client has become dependent on the solicitor's services, particularly in a matter involving ongoing litigation. At that point in their relationship a client would be reluctant to object to terms or conditions that might threaten that relationship: *McInnis Cooper v. Canus, supra* at paras.40-

42. It strikes me then as unreasonable to place much weight on a client's signature, at least in the circumstances of this case.

[18] The onus is on the claimant to establish its claim for interest. I am not satisfied that the evidence before me established an agreement–either express or implied–to pay interest on overdue accounts. Nor does such a charge appear reasonable, especially given that Ms Adema had made clear from the very start that she could afford to pay more than $2,500.00. Hence the claimant's charge of $442.94 in interest is disallowed.

2: Claim in Excess of the $2,500.00 Initial Retainer

[19] A solicitor who accepts a retainer from a client who has expressly advised that his or her ability to pay is severely constrained must in my view take that into account when rendering a "reasonable" account. There are several reasons for this conclusion.

[20] First, the client has agreed to retain the lawyer on that basis. Had the lawyer, knowing of the client's financial constraints, refused to accept the retainer the client could have gone elsewhere to find a solicitor who would proceed on that understanding.

[21] Second, from a policy perspective, it forces the solicitor to be as efficient or as streamlined as possible. Steps that might be useful (at a cost) but not absolutely necessary can be avoided.

[22] Third, it has always been an obligation on solicitors when rendering their accounts to take discussions as to ability to pay and estimated costs into consideration. Under Rule 63.16(1) of the former Civil Procedure Rules the "circumstances and interest of the person by whom the costs are payable" was a factor to be considered on an assessment of the reasonableness of legal accounts: *Campbell v. Smith's Field Manor Development Ltd* 2001 NSSM 7 at para.36; see also *Cohen v. Kealey & Blaney* [1985] OJ No. 160 (CA). So too are any estimates that were given: see, for e.g., *Cohen v. Kealey & Blaney, ibid; Atlantic Nurseries Ltd. V. McInnes Cooper & Robertson* [1991] NSJ No. 190; *Boyne Clarke v.* Steel [2002] NSJ No. 186 at paras.47-59; *Mercer, Osborn, Benson, Myles v. Lundrigan* [1991] NJ No. 60.

[23] Fourth, I think it fair to say that it is in the finest tradition of the profession that lawyers will from time to time, in an appropriate case, take on a client's case notwithstanding the client's

financial constraints or ability to pay. In a case like this Ms Chapman's decision to proceed with Ms Adema's case after the original $2,500.00 retainer had been exhausted was both proper and admirable. It would be unfortunate if the merits of such a decision were lost by a refusal of the court after the fact to consider the client's financial constraints when assessing the reasonableness of the account.

[24] Taking all these factors into account I am not satisfied that it was reasonable in the circumstances of this case to charge the client more than the $2,500.00 (plus HST) that she had originally been able to scrape together. That would amount to a total liability of $2,875.00.

3: Claim for Disbursements

[25] The accounts included the following amounts by way of disbursements:

a. Courier. $69.00

b. Copy print/scan. $97.40

c. Fax. $1.00

d. Postage. $3.35

[26] I accept the courier and postage as reasonable disbursements. I do not accept a charge of $1.00 per page for faxes as reasonable.

[27] The charge for "copy print/scan" was listed in the April 10th letter as being $0.25 per page. It is distinct from the charge for photocopying, also set at $0.25 per page. My understanding is that when the claimant's photocopy machine is used to copy something it is charged as a photocopy. However, the machine can also produce original printed pages (as when documents are sent straight to the machine from a desktop for printing), and on that occasion it is classified as "copy print/scan."

[28] Copy costs of $0.25 a page are generally considered to be unreasonable, with charges in the range of $0.10 to $0.15 a page being more acceptable. In this case I have calculated that there

were 390 pages that were "copy printed." Using $0.15 a page results in a charge of $58.50 rather than $97.40.

Conclusion

[29] For the above reasons I have decided to assess the claimant's claim as follows:

a. Fees. $2,500.00

b. HST on fees. $375.00

c. Disbursements. $130.85

d. TOTAL.. . . . . $3,005.85

[30] Ms Adema has already paid a total of $3,030.00, resulting in an overpayment of $24.15. I will accordingly make an order to that effect. Since there has been an overpayment I do not allow the filing fee claimed.

DATED at Halifax, NS
this 5th day of January, 2016

_____
Augustus Richardson, QC
Adjudicator