IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Mitchell v. BH*, 2022 NSSM 35

Claim No: SCCH 21-508843

BETWEEN:

Jeff T. Mitchell

Applicant

-and –

BH

Respondent

Decision

This matter came before me for hearing by way of a video conference call on August 3, 2022.

The dispute is in relation to payment of Mr. Mitchell's account for legal services rendered. It is a taxation, with Notice of Taxation filed August 31, 2021.

Taxations in Small Claims Court:

Section 9A(1) of the *Small Claims Court Act* says that "an adjudicator has all the powers that were exercised by taxing masters, and section 9(A)(2)states "[t]he monetary limits on the jurisdiction of the Court over claims made pursuant to Section 9 and on orders made pursuant to Section 29 do not apply to taxations."

In *Patterson Law v Sarson*, 2020 NSSM 16 (CANLII), Adjudicator Richardson provides a comprehensive summary of the powers and duties of a small claims court adjudicator in taxations, specifically in the context of quick judgements, but pointing out that it is not a "rubber stamp process", but rather:

> [39] The onus of proof of a particular fact lies—as it does in every action—on the party asserting that fact to be true. Hence a solicitor suing on his or her account has the onus of establishing that it is reasonable and lawful: *Mor-Town Developments Ltd v. MacDonald* 2012 NSCA 35 at para.49.

The chronology of the litigation leading to the taxation:

Both Mr. Mitchell and Ms. BH testified in the proceeding before me. Mr. Mitchell provided an exhibit book containing his retainer agreement with Ms. BH, itemized records of costs and fees accrued by his firm, and his correspondence with Ms. BH and with successor counsel, Mr. McKeough. Ms. BH did not provide any documentation at the hearing, but some days after that texted me and attached two text messages she had with Mr. Mitchell on July 29, 2020. My decision not having been made, I contacted Mr. Mitchell to advise him of the contact and to ask if he objected to their admission, and for any comments, and as he had none, I have added them to the record

The injury that is the reason for Ms. BH's filing a lawsuit happened in January of 2015. I do not have exact dates as to when the litigation in question began. Ms. BH thinks it was "several years" before the transfer of the file to Mr. Mitchell. The cause of action (I did not see the statement of claim or defence), she says, was a "slip and fall" at the Mayflower Mall in Sydney.

Ms. BH says that she initially retained Nash Brogan, a lawyer in Sydney, to represent her in this matter. She says that while Mr. Brogan was her solicitor of record, it was Mr. McKeough, who was at the same firm, who was managing her file. There is no documentation filed to show that there was ever a change of solicitor.

Mr. Brogan's representation ended after when Ms. BH entered into a Contingency fee agreement with Mr. Mitchell and his firm, signed on November 18, 2018, and I will review that Agreement in more detail below.

It appears that when the file was transferred from the firm that was by 2018 Brogan McKeough. I have no evidence that there had been discoveries or other initiatives to move the matter to trial up to that point.

And so, the invoices from Mr. Mitchell's firm (attached to Mr. Mitchell's affidavit in support of his Notice of Taxation) show their work on the litigation beginning in the fall of 2018. These invoices are detailed, showing dates, a brief description of the service provided, the service provider within the firm, their rate, time spent, and amount owing for that entry. The Defence was amended. There were contacts with prior counsel (including apparently Mr. McKeough), the initiation of medical requests to support the claim, and days of discovery October 16 and 17th, 2019, leading to various undertakings to be fulfilled. Offers to settle and counters ensued, and in January of 2020, the parties agreed to a mediation with Chris Correia, Q.C., whom Mr. Mitchell described in his evidence as an experienced litigator from New Brunswick, and that process was set down for July 28, 2020. Drafting of the mediation brief commenced, which Mr. Mitchell described in his evidence as comprehensive, and including multiple attachments, and reports aimed at proving Ms. BH's losses.

In the January to March 2020 time period, settlement discussions continued, more medical reports were being sought, discovery undertakings continued to be followed upon. The mediation occurred as scheduled, and it appears that then is when the relationship between the parties fractured. There was a text exchange between Ms.

Hutt and Mr. McKeough, in which Mr. McKeough informed Ms. BH that she required new representation. A week later, August 5th, 2020, a Notice of New Counsel was filed, naming Mr. McKeough.

At the hearing before me, Ms. BH testified that Mr. McKeough did not become her new solicitor, a confusing position given that Notice of New Counsel referenced above, and the fact (to be canvassed below), that Mr. McKeough apparently settled her claim with the Defendant.

The background of the end of the relationship between the parties can be found in a letter which Mr. Mitchell wrote to Ms. BH on August 11, 2020, in which he states his concern that Ms. BH walked out of the mediation while stating that she needed to consider other legal representation, and that in a call following the mediation in which Mr. Mitchell sought instructions on a new offer, Ms. BH hung up on him and had twice since, while "questioning [my] motivations".

He concluded by stating:

> Our contingency fee agreement allows me to end our retention for cause, which would include where a client refuses to accept the lawyer's advice or where the lawyer cannot obtain satisfactory instructions. In this circumstance, we are permitted to charge for our time on an hourly rate basis. I appreciate that you dispute this position and believe that if you are "fired" by your lawyer, rather than being the party that initiates termination of the agreement, no payment is owed, be it for time incurred or disbursements and expenses incurred by the law firm. The circumstances are everything, and in our view, the situation was such that we had no choice but to discontinue progressing your file.
>
> In this circumstance, your new counsel and I would reach an agreement regarding the payment of legal fees and disbursements. I have proposed that Mr.McKeough's firm pay that disbursements we have incurred thus far and reach an agreement with my firm that we are paid a portion of the legal fees based on the work each firm has done. To be clear, if Mr. McKeough's firm incurs the vast majority of the time on the case, his firm should receive a corresponding percentage of the legal fee based on your agreement with that firm. This arrangement should require [no] payment from you whatsoever, assuming you enter into a standard contingency fee agreement with Manley Law. I look forward to continuing this conversation with you or Mr.McKeough.

He concludes his letter by stating: "Our goal is to transition your file to Mr. McKeough as soon as possible so that your case can proceed without any delay and without collection efforts being initiated", and he attaches the invoice for disbursements and expenses.

An e-mail correspondence followed between Mr. Mitchell and Mr. McKeough, which can be most conservatively described as unproductive. The crux of the correspondence was Mr.Mitchell's (relatively patient) attempts to have Mr. McKeough engage on the issue of

file transfer and arrangements between counsel, along the lines of what he explained to Ms. BH in his letter of August 11, 2020: that being, payment of disbursements and an agreement to assess amounts owing based upon work done by each lawyer in reaching a resolution of the matter. It should be noted that that invoice had been provided to Mr. McKeough as well on that date.

Mr. Mitchell followed up with Mr. McKeough on August 20, 2020, and Mr. McKeough responded saying he had "serious issues with [Mr. Mitchell's] representation", and stating "If I was in your position I would not be worried about taxation but worried about notifying my insurer but that is your choice".

At Mr. McKeough's request, Mr. Mitchell provided him with a copy of his contingency agreement on August 21, 2020. Various exchanges followed with no further productive result, culminating in Mr. McKeough again questioning Mr. Mitchell's competence and recommending he seek a mentor as "I think perhaps you went out in [sic] your own too early and tried to chase the easy money of person [sic] injury and did so without having enough experience".

On October 30, 2020 Mr. Mitchell made a final attempt to engage on the matter, saying in part:

> Thank you for the quick reply. When did you advise Ms. BH to pay the disbursements. I did not have any discussions with her regarding disbursements following a call immediately after she retained you. She was under the impression that I was requesting immediate payment. I confirmed to her that I would seek payment at the conclusion of the file, which is the usual practice when another when another lawyer takes on the file.

Mr. McKeough's response in part states:

> I think I have made it clear to you that I want you to file for taxation, so your statement that I am trying to discourage you from filing a taxation simply does not hold water. I look forward to cross examining you on your billing practices.
>
> If you wish to attempt to resolve the matter for disbursements, I will recommend that to Ms. BH but otherwise please file your taxation.
>
> I also note that I am reluctant to recommend the disbursement amount given that you somehow agreed to half the mediation fee if it failed.

And so, the evidence supports that Mr. McKeough was refusing to entertain payment of any portion of Mr. Mitchell's fees, or to enter into any agreement regarding division of retainer upon conclusion of the litigation, his offer being that she would pay for (some) disbursements only.

In the course of Ms. BH's evidence, I found it very difficult to ascertain exactly what occurred in the fall of 2020 regarding settlement. I was able to determine that according to her, the matter settled sometime in that time period for the amount of $62,000,

making the settlement amount perhaps $5000 over what Mr. Mitchell testified that he had been able to get a commitment from the defendant for in July of 2020.

The evidence of the exact settlement amount is entirely from the verbal evidence of Ms. BH. She says that she received that amount, and that Mr. McKeough did not receive any money for his representation (bearing in mind her evidence that he did not represent her as counsel at all).

The notice of taxation was filed August 31st, 2021, and initially Mr. Mitchell named both Ms. BH and Mr. McKeough as respondents to the taxation, the cause of adding Mr. McKeough being largely on the grounds of intentional interference with economic relations. At a pretrial held on March 1, 2022, Mr. McKeough appeared and objected to being made a respondent. I treated this as a preliminary motion on his part, and directed to parties to file submissions for my review. My preliminary ruling on that issue, in which I found Mr. McKeough was not a proper party to this taxation, is attached to this decision.

Mr. McKeough did not testify in the proceeding before me on August 3, 2022, and the materials filed by Mr. Mitchell in support of the preliminary matter confirm that a Hearing Panel of the Nova Scotia Barrister's Society suspended him from practice for 10 months by a decision dated February 15, 2022. Mr. Mitchell was one of many complainants in that process, and the documentation regarding it and filed with me states that Mr. McKeough had the funds of settlement disbursed directly to Ms. BH.

At the hearing, I was advised that Ms. BH has now (as of April 2022) filed a complaint with the Nova Scotia Barrister's Society regarding Mr. Mitchell's representation in this case. In her evidence before me, her very significant anger and dislike of Mr. Mitchell seems to be largely based upon Mr. Mitchell having participated in the Bar Society process regarding Mr. McKeough, and of course, because he has filed for taxation of his account.

The Merits:

Assessment of the Amounts charged by Mr. Mitchell's firm

Based upon my review of the materials and evidence before me, I do not find anything to suggest that Mr. Mitchell's representation of Ms. BH was either unprofessional or inadequate. I hasten to add that that, in and of itself, is not determinative in the case of a taxation. A client may have absolutely unassailable representation, but if it is found that the amounts for that representation are excessive to the extent that they are not reasonable and lawful, they are subject to being reduced, or even refused payment.

A useful overview of the factors to be considered in assessing a taxation can be found in section 3.6.1 of the *Nova Scotia Barrister's Society Code of Professional Conduct*, which states:

Reasonable Fees and Disbursements

3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

1. What is a fair and reasonable fee depends on such factors as:

a. the time and effort required and spent;

b. the difficulty of the matter and the importance of the matter to the client;

c. whether special skill or service has been required and provided;

d. the results obtained;

e. fees authorized by statute or regulation;

f. special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

g. the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

h. any relevant agreement between the lawyer and the client;

i. the experience and ability of the lawyer;

j. any estimate or range of fees given by the lawyer; and

k. the client's prior consent to the fee.

I propose to review those factors which are relevant to this case in assessing the reasonableness of the fees charged.

1. **Time and effort required and spent:**

The evidence before me indicates that when the matter was referred to Mr. Mitchell in 2018, there was much work to be done to advance the claim. I hasten to add I have no evidence that anything had been done other than (one has to assume) filing the claim and possibly disclosure (although I have no evidence of that taking place).

Once the file was referred to Mr. Mitchell, his invoices reflect the necessity of acquiring a number of doctors reports intended to show, if possible, degree of injury and income loss, and also that during the time of his retention as counsel, he dealt with an amended defence, two days of discovery with accompanying disclosure obligations and undertakings, and preparation for a full day of mediation including the preparation of a mediation brief. It should be noted that the text message documentation filed later also confirms that Mr. Mitchell contacted the Court so that a scheduled date assignment

conference could be rescheduled with Ms. BH's new counsel, so as not to compromise Ms. BH's place in the scheduling queue.

2. The difficulty of the matter and the importance of the matter to the client;

From Ms. BH's evidence before me, I have no doubt that she considered the matter to be of great importance. The difficulty for Mr. Mitchell, was in coming to the file several years after the event, and gathering documentation sufficient to support a significant amount being claimed as a result of injuries sustained in her slip and fall.

3. The results obtained:

The results obtained must have been almost entirely based upon the work done by Mr. Mitchell and his firm. I base that on the fact that the difference between the settlement amount in August of 2021, and the actual settlement about 2 months later, was marginal, and the timeline very quick, leading me to conclude that little or no new evidence or factors were brought forward.

4. Any relevant agreement between the lawyer and the client:

Of central importance is the Contingency Fee Agreement existing between Mr. Mitchell and Ms. BH (the "Agreement"):

The Agreement provided the following:

Mr. Mitchell was given authorization to act on behalf of Ms. BH;

Mr. Mitchell was given authority to retain physicians or therapists for the purposes of getting medical information to support the claim;

That the claim would not be settled without the client's approval;

That there would be payment of legal fees on a contingency basis (roughly speaking, 25% plus HST plus disbursements pre discovery, 30% plus HST and disbursements post discovery, and 35% should the matter go to trial and be appealed). The Agreement further indicated stipulated that the client understood their liability for costs in the event that they were unsuccessful at trial.

Clause 9 of the Agreement is key to the dispute between the parties in this case, and I reproduce it here:

> *In the event that the client chooses for whatever reason to discontinue the claim, or seek alternative at representation, the client agrees to pay the actual total time spent on the file billed at the lawyer's hourly rate as agreed plus disbursements, or the total determined by a taxing officer. This hourly rate incorporates all office overhead as long as well as non lawyer labour*.

At Clause 11 the Agreement states:

> *If the lawyer chooses to withdraw for cause the lawyer reserves the option to charge the client for services on a time basis plus disbursements as agreed or as determined by the taxing officer. Cause includes, but is not limited to, abuse or harassing conduct by the client toward the lawyer or firm stuff, intentionally misleading the lawyer or providing false information to the lawyer, failure to cooperate with the lawyer in the advancement of the clients case.*

The end of the retainer which is now subject to taxation:

On the evidence before me, I find that the retainer ended, first of all, because Ms. BH ceased to have confidence in Mr. Mitchell, and sought new representation, and secondly because Mr. Mitchell determined that he could no longer continue to represent Ms. BH because she had lost confidence in his representation.

I should add that Mr. Mitchell's contingency agreement echos the provisions of the *Nova Scotia Barrister's Society Code of Professional Conduct*, regarding options withdrawal, which states:

> If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Mr. Mitchell, in his evidence, testified that the mediation had been very stressful for Ms. BH, and that such processes often are. However, it was the breakdown in communication, he says, that caused him to realize that the relationship could not continue productively.

Taking all the evidence together, the conclusion that Ms. BH had lost confidence in Mr. Mitchell is supported by the dating of the Notice of New Counsel at August 5th, 2020, and a File Transfer Authorization signed by Ms. BH asking Mr. Mitchell's firm to release her file to Mr. McKeough's firm. This occurred less than a week after the mediation. It happened so fast, that it is difficult to see how it was not in contemplation even before the events of July 28, 2020. By the time Mr. Mitchell sent his letter on August 11, 2020, formally advising her (and Mr. McKeough) of the transfer requirements regarding his retainer, the relationship had ended, and it had ended in writing.

This fact was supported by Ms. BH's evidence before me, which dealt largely with her belief that Mr. Mitchell did not support her in her aspirations for compensation in her claim, and only wanted her to "settle". Her perception in that regard is not supported by the fact that Mr. Mitchell had been monitoring settlement proposals, and had so far guided her litigation through discovery and mediation.

Much of her testimony was directed at being extremely critical of Mr. Mitchell in every aspect of his representation including his demeanour and dress, to the point of anger, with some of that anger seemed to relate to Mr. Mitchell having been involved in the complaints made regarding Mr. McKeough's practice, to the Nova Scotia Bar Society.

The ”reasonable and lawful” result in this case:

I note that Ms. BH in her evidence spoke of her significant health issues, and states that the money that she received as a settlement is all gone.

While I can accept that that is true, what is also true is that Ms. BH entered into a contingency agreement with Mr. Mitchell’s firm. There should not have been an expectation that representation would be free, only that fees would be reasonable and lawful.

Apparently, the entire settlement amount was released to Ms. BH. The possibility at least of a decision in favour of Mr. Mitchell should he file for taxation should have been known to both Ms. BH and to her then counsel Mr. McKeough, and yet no funds were retained against the possibility that all the legal work performed had, in the end, to be paid for. Releasing the funds to Ms. BH had left her in the situation in which she now finds herself.

Mr. Mitchell filed with his Notice, an invoice dated September 19, 2021 which outlined the amounts owing as follows:

Legal fees: $40,493.90

Disbursements and Expenses: $6,670.51

HST: $7,017.58

At filing, Mr. Mitchell relied upon Clause 9 of the Agreement to set the amount owing at the total hourly rate accrued, plus disbursements and HST.

I find that fees and disbursements totalling $54,181.99 on a total amount achieved for Ms. BH of $62,000, would not be fair and reasonable, although I agree that it is arguably allowed under the Agreement.

However, that Agreement is subject to the review of this Court. It was always his intention during the course of the retainer to act on a contingency basis, and given the amount involved, I find that that approach is what is appropriate in this case.

I find that the amount allowed for under the Agreement, that is, 30% of the amount achieved ($18,600), would be a fair and reasonable result in this matter.

However, I will include a slight reduction in acknowledgement of the fact that the claim was started before and settled after Mr. Mitchell’s involvement (although the details of how the claim was settled or started are not before me), and reduce the amount awarded to $15,000.

I further find that the disbursements being sought are awarded, with the exception of the amount of $380.56 claimed as disbursement interest, which I disallow for reasons I will

explain below. They relate entirely to two requirements – acquisition of medical evidence to support the claim (files and reports), and payment for copying and hotel bookings associated with discovery and mediation. I have no issue with Mr. Mitchell agreeing to pay for half the costs of mediation, as division of such fees is commonplace.

In the circumstances, I believe this is an appropriate case to decline to award interest.

Therefore, I find that in total the reasonable and lawful amount owing to Mr. Mitchell and his firm is as follows:

Fees: $15,000 (plus HST @ 15% - $2,250.00)

Disbursements: $6,289.95 (HST included)

The account is thereby taxed and allowed in the amount of $23,539.95.

A Certificate of Taxation will issue accordingly.

Dated at Halifax, on the 17th day of August, 2022

Dale Darling, QC

Small Claims Court Adjudicator