

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Newton v. Rice*, 2024 NSSM 28

Date: 20240426

Docket: 529080

Registry: Annapolis Royal

Between:

Waterbury Newton

v.

Valerie Rice

Adjudicator: Sarah Shiels

Heard: March 6, 8, 19, 2024

Decision April 26, 2024

Counsel: Trinda L. Ernst, K.C., for the Applicant
Valerie Rice, Respondent, for herself

By the Court:

Background

[1] This claim was brought by the law firm Waterbury Newton to recover legal fees incurred in its representation of the Respondent, Ms. Valerie Rice, over a period of several years. The law firm acted for Ms. Rice in her capacity as an intervenor in an application filed by Ms. Rice's father, Oakley Peck, against respondents Lois Driscoll, Gregory Garth Peck, The Estate of Carol Beverly Peck, and Lois Driscoll and Basil Gillie in their capacity as Trustee of Funds for Carol Beverley Peck (Dig No. 483535).

[2] Waterbury Newton is presently holding funds in trust in the amount of \$21,842.69, which is the amount that was payable to the Respondent upon settlement of the application. The settlement was reached around March, 2021, but there were certain pre-conditions to be met prior to the disbursement of funds.

[3] The legal fees incurred ultimately exceeded the amount payable to the Respondent. The law firm reduced its account to a flat fee of \$20,000 inclusive of disbursements and HST, effectively discounting its pure legal fees of \$22,166.00 by \$5,238.83 (approximately 24%). This discount would have enabled the

Respondent to receive \$1,842.69, but this difference has since been subsumed by the law firm's claim for interest and costs in relation to the present taxation.

Evidence

[4] Ms. Ernst, K.C. appeared on behalf of the Applicant and called no other witnesses. She submitted a detailed report of her work for Ms. Rice along with a copy of the retainer agreement, the law firm's invoice, minutes of settlement, and correspondence.

[5] Ms. Rice testified on her own behalf and called her daughter, Erika Rice, and her neighbour, Sharon Resky, to testify as well. E-mail correspondence and a statement prepared by Ms. Rice was also tendered into evidence.

Retainer agreement

[6] A fee and retainer agreement was signed by the parties around May 22, 2019. Clause 1 of this agreement provided that the Respondent retained Trinda L. Ernst, Q.C. and the law firm of Waterbury Newton to represent her with respect to:

Adding Valerie Rice as an Intervenor to the current court proceeding involving an application made by Oakley Peck regarding the Estate of Carol Peck.

[7] Legal fees were billable based on a special arrangement articulated at clause 5(c) as follows:

Waterbury Newton's account for services rendered on Valerie Rice's behalf will be paid out of Valerie's share of the estate funds upon settlement of the current Court proceeding (Digby No. 483535).

[8] The agreement also specified the following at clause 17:

We keep you informed about the status of your account via interim bills and discussions with you. We try to estimate your total costs but actual costs may vary depending on the number of court appearances, the cooperation of the opposing party and Counsel, the amount of "legwork" you do on your file, and court or client imposed deadlines. [...]

[9] Although Ms. Ernst, K.C. openly discussed her concerns regarding mounting legal fees with Ms. Rice, the law firm did not provide the client with interim bills or accounts of services rendered until the final bill was issued on June 20, 2023. Consequently, the client was not in a position to monitor the firm's accounts and expenditures over the course of the firm's engagement.

[10] This arrangement is different from a contingency agreement where the amount may be based on a gross sum, a percentage of the amount recovered, or any other reasonable means of calculation. In such cases, the agreement is to articulate a gross sum or a stated formula and the responsibilities of the parties on termination as provided by Rule 77.14.

[11] It was clear from the evidence that Ms. Rice believed the scope of the retainer was broader than the plain language of the retainer agreement. However, with respect to the failure to pursue a claim against IG Wealth (aka “Investors Group”) the Court accepts the evidence of Ms. Ernst, K.C. that as of January 8, 2021, she advised Ms. Rice that it was unlikely Ms. Rice would have standing to pursue a claim in relation to Investors Group and Lois’ handling of the trust due to a lack of standing.

Discussions regarding costs

[12] According to the status report prepared by the law firm, litigation costs were discussed with Ms. Rice at a meeting on May 22, 2019. The details of this discussion were not presented to the court.

[13] As of late December 2020, Ms. Ernst, K.C. reported she communicated the following to Ms. Rice with respect to the conduct of one of the other parties and related costs:

I expressed my concern that Greg’s persistent lack of cooperation was certainly making the settlement and resolution take much longer than necessary and that costs continued to go up, that we had not received any money, and that, if we could not resolve the issues reasonably, there would not be any money left for you.

[14] Around February 1, 2021, Ms. Ernst, K.C. informed the Respondent that she was afraid that the amount of the law firm's fees would outstrip Ms. Rice's share of the estate and trust.

Law

[15] As provided by Adjudicator Darrell Pink in *Washington, Mahody v. MacLennan*, 2024 NSSM 1 at paragraph 39:

Taxation or assessment of fees is done in accordance with the *Legal Profession Act* and the Code of Professional Conduct of the Nova Scotia Barristers' Society and in certain matters, under Rule 77.13 of the Civil Procedure Rules.

[16] Rule 77.13(1) of the Civil Procedure Rules provides that counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

[17] Rule 77.13(2) lists six criteria that may be relevant to the assessment of the reasonableness of counsel's compensation, including but not limited to: the circumstances of the person who is to pay counsel; the general conduct and expense of the proceeding; and the skill, labour, and responsibility involved. The terms of retention may also be relevant.

[18] Rule 3.6 of the Code of Professional Conduct provides that 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. Factors relevant to the present matter include the following:

- the time and effort required and spent;
- the difficulty of the matter and the importance of the matter to the client;
- the results obtained;
- special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
- any relevant agreement between the lawyer and the client;
- the experience and ability of the lawyer;
- any estimate or range of fees given by the lawyer; and
- the client's prior consent to the fee.

[19] The issue of timely disclosure is addressed in the commentary to the Rules as follows:

A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

Analysis

[20] The Oakley Peck application (SCD 483535) required counsel with skill and experience in the areas of litigation, property, and estate law. The matter was of significant personal importance to the client.

[21] Ms. Ernst, K.C. is an experienced lawyer. She endeavoured to help her client meaningfully participate in a court proceeding that was largely steered and controlled by other parties with adverse or competing interests to those of Ms. Rice. Ms. Ernst's persistent efforts to reach a settlement agreement that would protect Ms. Rice's interests stretched over a time span of several years and were at times stymied by the conduct of an opposing party. Certain settlement discussions were held without Ms. Rice being present and one of the respondents, Gregory Peck, was represented by three different lawyers before the matter was finally concluded.

[22] The settlement was an elusive outcome in a contested proceeding involving multiple parties and diverse subject matter. The court finds that this result has significant value from a legal perspective.

[23] The final settlement served to reduce the risks and expense associated with litigation that was contentious, protracted, and deeply personal. In addition to a share in the Gillie trust, the settlement also entitled Ms. Rice to a share of her parents' personal effects and their ashes. The settlement indirectly increased the value of Ms. Rice's share in her father's estate. This was a reasonable and valuable outcome based on the terms of the retainer, which simply contemplated representation of Ms. Rice as an intervenor in the court proceeding; although the

court acknowledges there was a presumption that a settlement would be reached based on the terms of payment.

[24] Ms. Rice's frustration with the relatively high cost of legal fees in relation to her monetary share of the settlement award is understandable. There was no evidence of a clear estimate or range of fees in relation to the services rendered. The signed retainer agreement did not specify the overall cost of legal services.

Interim reports

[25] It is regrettable that interim accounting summaries were not provided to Ms. Rice during the course of the retainer. Where a retainer agreement does not provide a specific formula for compensation, it is reasonable for a client to expect to receive periodic updates with respect to billing. Periodic billing facilitates a client's ability to review legal services being provided and to guide and direct the lawyer retained.

[26] The above notwithstanding, the absence of interim reporting does not render the account unreasonable given: (a) the terms of the retainer agreement, (b) Ms. Ernst's ongoing discussions with Ms. Rice regarding the general costs of litigation, and (c) the fact that legal services generally fell within the scope of the stated retainer or were otherwise captured by the significant discount on legal fees.

Fee disclosure

[27] In light of Rule 3.6, the question of whether fees were adequately disclosed is pertinent to the determination of this matter. Although an estimate or quote would have been helpful, the court finds that the signed retainer agreement did provide sufficient detail by including the hourly rates for its lawyers as well as the cost of disbursements. The court accepts that the litigation was unpredictable and that costs were exacerbated by at least one other party's conduct during the proceeding.

Conclusion

[28] The court finds that the overall cost of Ms. Ernst's fees is fair and reasonable based on her effort to assist Ms. Rice pursuant to the law firm's agreement with Ms. Rice, subject to the reduction set out below. The court further notes that the retainer agreement allowed for interest at a rate of two percent (2%) per month to be charged on unpaid account balances and accepts the Applicant's calculation of interest as provided in the Notice of Taxation.

[29] Acknowledging, pursuant to Rule 77.13, that consideration may be given to the circumstances of the person who is to pay counsel; the court allows the Applicant's claim in the amount of \$20,000 plus interest accrued in the amount of

\$1,749.04, service and courier disbursements of \$231.70, and the taxation filing fee of \$99.70 except that the pure legal fees payable by the Respondent shall be reduced by \$206.74 from \$16,927.17 to \$16,720.43, with HST adjusted accordingly, for a sum total of \$21,842.69 with no additional interest (prejudgment or otherwise) prior to the date of this decision.

[30] An order shall issue accordingly.

Sarah A. Shiels, Small Claims Court Adjudicator