2005 S.C.C. H. Number: 249054

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as Singleton & Associates v. Mathieson, 2005 NSSM 4

BETWEEN:

SINGLETON & ASSOCIATES,
Barristers & Solicitors

Claimant

- and -

IRIS MATHIESON

Defendant

D E C I S I O N

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[1] This taxation proceeded before the Small Claims Court of Nova Scotia, at Halifax, on the evening of Tuesday, August 16, 2005. The Claimant Solicitor was present and was represented by counsel. The Defendant Client was not present. The Defendant Client had been served with the Notice of Taxation.

[2] Singleton & Associates, Barristers & Solicitors, the Claimant Solicitor was represented by Thomas J. Singleton, Esq. The Defendant Client was not present and was not represented. More about the Defendant Client's failure to attend or be represented will be set out in an Addendum below.

[3] The facts of the Taxation are not long and are not complex. Mr. Singleton testified on behalf of the Claimant Solicitor. Mr. Singleton was not sworn. As an Officer of the Court, Mr. Singleton was deemed to be under oath. I did not require him to be sworn.

[4] Mr. Singleton testified that the Claimant Solicitor's retention by the Defendant Client commenced as a result of a relatively garden-variety slip-and-fall which was suffered by the Defendant Client at a Zellers Store in Truro, Nova Scotia. According to Mr. Singleton's testimony and to documents submitted in support of the Claimant Solicitor's taxation, the Defendant Client was injured on July 4, 2002. She retained the Claimant Solicitor almost immediately.

[5] According to Mr. Singleton's testimony, the Claimant Solicitor's retainer proceeded relatively uneventfully until the early part of 2005. In the interim, the Claimant Solicitor was awaiting the resolution of the Defendant Client's injuries, was marshaling medical evidence, was communicating with insurance adjusters and, later, with counsel appointed by the Zellers Store.

[6] It seems that in the early part of 2005, the Defendant Client became concerned with what she termed was the Claimant Solicitor's delay in advancing her claim. It may have been that the Defendant Client mis-perceived the nature of the civil litigation process. I make that comment as there was nothing in Mr. Singleton's testimony or in the numerous documents which he tendered in support of the Claimant Solicitor's taxation which indicated any undue delay on its part.

[7] Regardless of the reason for the delay, it resulted in a breakdown in the relationship between the Claimant Solicitor and the Defendant Client. The break-down was precipitated by the latter. Her correspondence to the Claimant Solicitor at the time indicated that she had lost confidence in it and in its ability to move her claim forward expeditiously. There was nothing in Mr. Singleton's testimony nor in the numerous documents tendered in support of the Claimant Solicitor's Taxation to indicate that such conclusions were reasonable.

[8] As a result of the break-down in the relationship between the Claimant Solicitor and the Defendant Client, the latter appears to have retained other counsel. The nature of that retainer was vague at best. Mr. Singleton testified to it. He also submitted documents which alluded to it. There were in fact notes exchanged between Mr. Singleton and the Defendant Client's succeeding counsel. There were questions with respect to the Claimant Solicitor's lien over its file materials. There were questions surrounding how its fees for services rendered to the Defendant Client would be secured upon the take-over of its retainer by the Defendant Client's succeeding counsel. These questions were not resolved.

[9] Many of the exchanges which the Defendant Client and her succeeding counsel had with the Claimant Solicitor were unduly aggressive and rancorous. Rather than attempting to understand the Claimant Solicitor's comments on the nature of the civil litigation process, the Defendant Client seemed more concerned with accusations of disinterest and incompetence on the part of the Claimant Solicitor. The allegations were at least not helpful and at worst not fair. They were not borne out by the file materials tendered as part of the taxation.

[10] The Claimant Solicitor's fee account commenced with an entry on June 5, 2002 and concluded with an entry on May 2, 2005. I have reviewed the account in detail. I have considered the nature of the services provided by the Claimant Solicitor to the Defendant Client, the time charged by the Claimant Solicitor for each one of the services and the hourly rates charged by the Claimant Solicitor to the Defendant Client for each one of the services. None of the Claimant Solicitor's services to the Defendant Client "jumped out at me" as being undue, unnecessary, tardy or excessive. Moreover, given the relative seniority of the Claimant Solicitor's members who worked on the Defendant Client's file, I could not detect anything unreasonable about the hourly rates charged to the Defendant Client. These assessments are obviously more difficult in circumstances wherein the client is not present and is not represented.

[11] While almost three years of professional activity on a relatively straightforward personal injury claim is appreciable, it is by no means excessive. There are many claims which require upwards of a half decade in which to resolve themselves. The Defendant Client's claim in that regard was nothing extraordinary.

[12] Tendered by Mr. Singleton on behalf of the Claimant Solicitor was a copy of his correspondence dated July 12, 2005 to Ms. Victoria Rees, the Director of Professional Responsibility at the Nova Scotia Barristers' Society. In that correspondence, Mr. Singleton was responding to a professional complaint laid with the Society by the Defendant Client over the Claimant Solicitor's handling of her retainer.

[13] In Mr. Singleton's correspondence to Ms. Rees, he sets out the complete range of services which were provided by the Claimant Solicitor to the Defendant Client. These services showed timely action on behalf of the Defendant Client to alert the Zellers Store in Truro of the possibility of a claim. At the same time, the Claimant Solicitor put the Zellers Store on notice that the security camera video of the Defendant Client's fall should be preserved. Such was a prudent step taken by the Claimant Solicitor which may have been missed by other counsel.

[14] In the course of his explanation to Ms. Rees, Mr. Singleton recounted certain medical complications which the Defendant Client experienced in the course of her recovery from her injuries. It appeared from the Claimant Solicitor's file materials that it was waiting for the Defendant Client's injuries to fully resolve prior to obtaining medical records and prior to drafting a detailed Settlement Demand. With obvious respect to the Defendant Client, the Claimant Solicitor cannot be faulted for

such caution.

[15] Despite what appeared to be a relatively comprehensive presentation of the Defendant Client's claim by the Claimant Solicitor, Zellers denied liability on October 8, 2004. Thereafter, the Claimant Solicitor moved on with the formalities of litigation, issuing and Originating Notice and Statement of Claim out of the Supreme Court of Nova Scotia. From then on, the progress of the Defendant Client's claim appears to have been compromised by her departure for Florida for the Fall, 2004 and Winter/Spring, 2005 months.

[16] Although pleadings in the Supreme Court of Nova Scotia closed prior to the end of 2004, the Claimant Solicitor's ability to put forward the Defendant Client's List of Documents was compromised by the fact that the latter was not available readily for consultations. In that regard, the Claimant Solicitor was primarily concerned about the release to Zellers counsel of the Defendant Client's diary.

[17] In his correspondence to Ms. Rees, Mr. Singleton highlighted that it is not the Claimant Solicitor's policy or practice to serve a List of Documents until all of its contents have been reviewed by the client. As stated by Mr. Singleton in his correspondence to Ms. Rees:

> [T]he logic is that the client will be confronted with materials written in a diary and with other materials so disclosed at discovery and at trial. Accordingly, we decided to wait for [the Defendant Client] to return from Florida to arrange a meeting and review our documents before the same were forwarded to [Zellers' counsel].

[18] It appears from Mr. Singleton's correspondence to Ms. Rees that the relationship between the Claimant Solicitor and the Defendant Client (and especially the Defendant Client's husband) had deteriorated seriously by the end of April, 2005. By that time, there appeared to be a series of angry confrontations between the Claimant Solicitor and the Defendant Client's husband. It appears from all of the evidence available to me that these angry outbursts stemmed from the Defendant Client's desire to have her claim resolved somewhat immediately. While perhaps gratuitous, it goes without saying that immediate settlements are not always prudent ones. In such circumstances, the Claimant Solicitor had a clear professional obligation to the Defendant Client to protect her rights and to provide her with prudent advice to that end.

[19] For its services to the Defendant Client to date, the Claimant Solicitor claims the sum

of $5,226.98. Of that sum, fees total $4,415.00, disbursements total $131.50 and H.S.T. on fees and disbursements totals $680.48. As noted above, in my careful review of the Claimant Solicitor's time records and hourly rates, I could find nothing untoward or unreasonable in the calculations of its account to the Defendant Client.

[20] The ethical duty on the Claimant Solicitor with respect to its fee account to the Defendant Client is clear. "*Legal Ethics and Professional Conduct*", a publication of the Nova Scotia Barristers' Society (Chapter 12) sets out the following:

> A lawyer has a duty to
> (a) stipulate, charge or accept only fees that are fully disclosed, fair and reasonable;
> ...
>
> For the purposes of this rule, in determining whether a fee is fair and reasonable, the following factors should be considered:
>
> (a) the time and effort required and spent;
>
> (b) the difficulty and importance of the matter;
>
> ©) whether special skill or service has been required and provided;
>
> (d) the customary charges of other lawyers of equal standing in the locality in like manners and circumstances;
>
> (e) in civil cases, the amount involved of the value of the subject matter;
>
> (g) there result obtained;
>
> ...
>
> (i) reasonable office overhead;
>
> (j) such special circumstances of laws, or adverse effect on other work, urgency and uncertainty of rewards;
>
> (k) any reasonable agreement between the lawyer and the client.

[21] Without exception, all of these factors apply to my calculation and allowance of a reasonable fee between the Claimant Solicitor and the Defendant Client in this obviously difficulty case. While some of the factors apply more readily — and with greater importance than some others — all

of them must be considered in my assessment of what is reasonable.

[22] In addition to the factors set out above, *Civil Procedure Rules* 63.33(1) and (2) also govern my assessment of the reasonableness of the Claimant Solicitor's fee charged to the Defendant Client. These *Rules* provide that:

> (1) Upon a taxation between a solicitor and his client in a proceeding the taxing officer shall not allow the costs of any proceedings,
>
> (a) unnecessarily taken;
>
> (b) not calculated to advance the interests of the party on whose behalf the proceedings were taken;
>
> ©) incurred through over caution, negligence or mistakes;
>
> (d) that do not appear to have been necessary or proper for the attainment of justice...
>
> (2) Upon a taxation between a solicitor and his client in a proceeding the taxing officer may allow the costs of any necessary proceedings, where he is of the opinion that,
>
> (a) the solicitor could consider that they were conducive to the interest of his clients;
>
> (b) the proceedings were taken on the instructions of the client after being informed by his solicitor that they were unnecessary and not calculated to advance his interests.

[23] The seminal authority in this jurisdiction on the reasonableness of a solicitor's fee is *Lindsay v. Stewart McKean & Covert* (as that firm was then known), [1998] N.S.J. No. 9. The facts of that case are not important to the understanding of the principles to be derived from it.

[24] In the initial appeal to the Supreme Court of Nova Scotia by the client from the taxation of his account by the law firm, Nathanson, J. held that:

> [a] The only requirement as to the lawyer's fees is that they must be 'reasonable and lawful';
>
> [b] In judging the reasonableness of a lawyer's compensation,

> one must have regard for the factors [set out in the *Rules*];
>
> [c] A lawyer is not required to charge on a time basis but, if a Court finds an express or implied agreement to charge on that basis, on contract principles the Court will hold the lawyer to the bargain with the client;
>
> ...

[25] With respect to item [c] above, one presumes that while unstated, the client's bargain with a lawyer is also to be upheld. That is a significant principle to be considered in this case given the outstanding Contingency Fee Agreement as between the Claimant Solicitor and the Defendant Client.

[26] More than anything, *Lindsay* underscored the notion that the taxation of a solicitor/client account is a fluid exercise. It is not dependant specifically on any one feature. It is not a science which is to be practiced empirically. It is instead an exercise which attempts to bring facets of order to an amalgam of circumstances which are not easily reconcilable with each other. That is how I approached my taxation of the Claimant Solicitor's claim in this case.

[27] Very often, the taxation of solicitor/client accounts dissolves into an exercise in which attempts are made to reconcile individual time charges while each individual service is assessed retrospectively from the perspective of whether or not it was necessary or unnecessary. As inviting as such an approach might be to some, especially to clients against whom claims are being made by former solicitors, the more accepted role of the taxing officer is to gauge what was reasonable, all things considered, at the time the Claimant Solicitor was undertaking its services to the Defendant Client. As was held by the Supreme Court of Nova Scotia (per: Grant, J., as he was, in *MacLean v. Van DuinenI* (1994), 131 N.S.R. (2d) 60 (starting at paragraph 31):

> No lawyer undertakes perfection, no client is entitled to that expectation.
>
> The applicants were presented with a factual situation not of their making. Their role was to use their training, expertise, and skill to protect and promote their client's best interests. In doing so, they adhered to a standard of reasonableness. They were to do so at a

> reasonable charge.
>
> Three years later with the benefit of hindsight we are examining and diagnosing each step taken as the file progressed. That is not the proper standard because we are then looking at perfection. The test is whether the acts were reasonable in the circumstances at the time they were done.

[28] As the Defendant Client did not file any response to the Claimant Solicitor's Notice of Taxation and did not appear at the taxation (subject to what I will say below), it is difficult to glean its dispute, complaint or difficulty with the Claimant Solicitor's account. It may be that the Defendant Client regards herself as having been overcharged. It may be that the Defendant Client regards herself as owing nothing at all to the Claimant Solicitor. It may be that the Defendant Client is of the view that her obligation (if any) to the Claimant Solicitor should be suspended until her claim is settled or resolved by way of trial.

[29] The Claimant Solicitor's services to the Defendant Client were governed by a Contingency Fee Agreement. The Agreement, which was in evidence before me, was in relatively standard form. It included provisions for the payment, by the Defendant Client, out of the Claimant Solicitor's out-of-pocket expenses notwithstanding the outcome of the case. It included the standard "no cure, no fee" contingency provisions. It also provided for termination in the circumstances which ultimately transpired between the Claimant Solicitor and the Defendant Client.

[30] With regard to termination, the Agreement provided that:

> 2(d) If the client dismisses the Solicitor before the Solicitor has settled or prosecuted the action, the Client shall pay the Solicitor One Hundred Percent (100%) of the disbursements, plus One Hundred Percent (100%) of the Solicitor's costs taxed as between a solicitor and his own client.

[31] It is clear from the documentary evidence tendered by Mr. Singleton before me that the Defendant Client clearly dismissed the Claimant Solicitor. One needs only look to the e-mail messages from Mr. Mark Gardiner dated May 26, 2005, May 31, 2005 and June 17, 2005 to arrive at that

conclusion.

[32] At the time of the execution of the Contingency Fee Agreement as between the Claimant Solicitor and the Defendant Client, there was little, if any, contemplation that the latter would eventually leave the former and obtain her required legal services elsewhere. As such, there may have been no real consideration on the part of the Defendant Client of the ramifications of her dismissal of the Claimant Solicitor. To be clear, that Agreement did not bind the Defendant Client to the Claimant Solicitor in perpetuity. It instead provided for a reasonable ordering of the affairs as between the two in the event of the termination which ultimately unfolded.

[33] In conclusion, I find that the Claimant Solicitor rendered a reasonable fee account to the Defendant Client for legal services which were reasonably required at the time they were rendered. The full amount of its account in the sum of $5,226.98 is therefore “taxed and allowed”.

[34] By way of addendum, I make the following comments.

[35] At the conclusion of the Small Claims Court sitting during which this taxation was heard, Mr. Dwayne Rhyno appeared, purportedly on behalf of the Defendant Client. He advised the Court that he was in attendance only for the purposes of securing an adjournment. He advised further that he had been sent by Mr. Mark Gardiner who, Mr. Rhyno said, was representing the Defendant Client. Mr. Gardiner could not attend himself.

[36] Upon being advised by the Court that the taxation had already been dealt with and that subject to the rendering of written reasons for decision, had been finalized, Mr. Rhyno became concerned. He argued that the appointed hour was 7:00 o’clock and that he was there in due time. When I pointed out to him that the appointed time was 6:00 o’clock and that he was almost an hour late, he deferred to Mr. Gardiner saying that it was Mr. Gardiner who had asked him to be present for 7:00 o’clock.

[37] Mr. Rhyno also went on to recount the fairness principles at stake and about how the

Defendant Client had a right to make full answer and defence. I did not disagree. I pointed out only that the Defendant Claimant did have an opportunity to make full answer and defence both by way of a response to the Notice of Taxation (which was not filed) and upon an appearance at the appointed time (which was not made). I also pointed out to Mr. Rhyno my concerns with the concept of *functus officio*.

[38] Mr. Rhyno next argued that the Claimant Solicitor was aware that Mr. Gardiner was going to appear at the appointed time to make an application for an adjournment. True though that may have been, I read into the record Mr. Singleton's correspondence to Mr. Gardiner dated July 5, 2005 wherein the former advised the latter that if an adjournment of the taxation was to be sought, it would have to be sought at the appointed time and would be opposed. Mr. Singleton testified to that exchange when I enquired about his communications with the Defendant Client or with someone representing her. Mr. Singleton testified that he had not heard from Mr. Gardiner nor from anyone else on behalf of the Defendant Client the correspondence of July 5, 2005. Mr. Gardiner did not appear to have responded to that correspondence.

[39] Although I deeply regret the circumstances in which the Defendant Client now finds herself, they cannot be attributed to either the Claimant Solicitor or to the Court. Mr. Rhyno's suggestion that the Claimant Solicitor took unfair advantage is not tenable. On the contrary, Mr. Singleton appears from the running correspondence record to have firmly advised Mr. Gardiner on July 5, 2005 of the intentions of the Claimant Solicitor to proceed with the Taxation as scheduled. Mr. Singleton very clearly invited Mr. Gardiner to appear at that time to move an adjournment if that was the Defendant Client's instruction. Mr. Singleton also made it clear that he would be opposing, on behalf of the Claimant Solicitor, any such motion for an adjournment. Moreover, there was no indication in the Court file of any communication from Mr. Gardiner or from Mr. Rhyno or from the Defendant Client that an adjournment was destined to be sought. Due notice of the taxation was served on the Defendant Client. It appears from Mr. Rhyno's representations that she retained counsel to respond to the matter for her. For whatever reason, counsel did not respond to the notice. Although the taxation proceeded *ex parte*, it did not proceed "by default". Every element of the proof required by the Claimant Solicitor was made.

[40] In making these comments, I am minded of the decision of the Supreme Court of Nova Scotia (per: Chief Justice Kennedy) in *Liberated Networks Inc. v. G.W.C. Online Systems Inc.* ([2002] N.S.S.C. 273). There, Chief Justice Kennedy admonished Adjudicators of the Small Claims Court of Nova Scotia not to attorn too slavishly to procedures and to concentrate, instead, on affording all parties before the Court as reasonable a chance as is possible to present their respective cases. I paraphrase.

[41] Although the issue in *Liberated Networks* is not germane to the resolution of this taxation, I have considered the general principles espoused by Chief Justice Kennedy. I have concluded, with respect, that they do not apply to this taxation. This taxation was scheduled upon due notice to the Defendant Client. The Defendant Client appears to have retained counsel. For whatever reason, counsel did not attend at the appointed time. The matter then proceeded as it was permitted to do pursuant to the provisions of Section 23(3) of the *Small Claims Court Act*. The Defendant Client still has her remedies pursuant to the provisions of Section 23(4) of the *Act.*

[42] A Certificate of Taxation in favour of the Claimant Solicitor shall issue in the normal format.

DATED at Halifax, Nova Scotia, this 17th day of August, 2005.

Gavin Giles, Q.C.
Chief Adjudicator,
Small Claims Court of Nova Scotia

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