

NOVA SCOTIA COURT OF APPEAL

Cite as: Colchester Young Men's Christian Association v. MCR Holdings Ltd.,
1998 NSCA 216

Chipman, Roscoe and Bateman, JJ.A.

BETWEEN:

THE COLCHESTER YOUNG MEN'S
CHRISTIAN ASSOCIATION

Appellant

)
)
) Vincent Roberts
) for the Appellant
)
)

- and -

MCR HOLDINGS LIMITED,
a body corporate

Respondent

)
) Hugh Wright
) for the Respondent
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) Appeal Heard:
) November 10, 1998
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) Judgment Delivered:
) November 18, 1998
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THE COURT:

The appeal is allowed with costs and the decision and order of Hamilton, J. are set aside as per reasons for judgment of Chipman, J.A.; Roscoe and Bateman, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision and order of Hamilton, J. giving summary judgment to the respondent, the assignee of a law firm, for a taxed bill of solicitor/client costs.

The appellant is a society incorporated under the **Societies Act**.

The law firm taxed its bill for services in the amount of \$22,297.16 before Arthur E. Hare, Q.C., taxing master in Halifax. The appellant did not appeal from this taxation. The account was assigned to the respondent which then commenced action against the appellant on May 29, 1998. The appellant filed a defence, denying that it retained the law firm and specifically alleging that the procedures required by law to bind it in contract were not followed.

The application for summary judgment was granted by Hamilton, J. by written decision dated August 6, 1998. Hamilton, J. recognized that the onus was first upon the respondent to establish the claim and once that was done, then rested upon the appellant to show that it had some reasonable ground of defence. She found that the claim was established but that the ground of defence was not. In her view the appellant, not having appealed from the taxing master's decision, was then precluded from raising the issue of retainer. She said:

I make no comment on the validity of the allegations in the many affidavits filed by the defendant because they should have been raised previously in order to be considered. It is too late after the certificate of the Taxing Master has been issued and the appeal period expired to deal with these. Accordingly, I find given the process of taxation that was followed, the plaintiff has proved its entitlement as set out in the Statement

of Claim and the Defendant has not raised a fairly arguable point and therefore it is appropriate that the summary judgment be granted.

At the taxation, the appellant raised the defence of no contractual relationship between the parties. In his decision, the taxing master said:

It is asserted by the present officers that the engagement of the solicitors herein was not in accordance with the **Societies Act** Province of Nova Scotia, which are applicable to the YMCA. Many assertions were made concerning the conduct of the then president and the claim was made that the legal account was a personal matter between the President and the law firm.

These arguments are rejected as there is sufficient evidence on file that the law firm was asked to act for it. This would entitle it to payment.

This appeal raises the question whether the taxing master's jurisdiction goes beyond merely fixing the amount of the bill for services, and includes as well the power to adjudicate the issue of retainer. If it does not, we must resolve the question whether there is a fair issue to be tried, based upon a reasonable ground of defence.

JURISDICTION:

Provisions for taxation of a solicitor/client account are found in the **Barristers and Solicitors Act**, R.S., c. 30 and in the **Civil Procedure Rules**. Section 42 of the **Act** provides that a bill may be taxed by a taxing master or a judge. Section 44 provides for notice. There is no requirement that an action to recover the costs must be commenced first. **Civil Procedure Rule** 63.16(1) provides that a solicitor is entitled to such compensation as is reasonable, having regard to a number of listed factors. The charges of a solicitor are subject to taxation as provided in **Rule** 63. **Rule** 63.28 provides the mechanics for proceeding to taxation. **Rule** 63.32 sets out the powers of the taxing officer

which include taking evidence either by affidavit or viva voce upon oath and directing the production of books, papers and documents.

Specific powers of the taxing officer are set out in **Rule 63.33**:

63.33(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;
- (c) incurred through overcaution, negligence or mistake;
- (d) that do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party.

Sections 47 and 48 of the **Act** provide:

47 Where in any action or proceeding in which a barrister is a party any question arises as to the amount of the fees, costs, charges or disbursements of such barrister, the judge at any time, on the application of such barrister or of any person against whom such claim is made, may order the fees, costs, charges or disbursements to be taxed before a judge of the Supreme Court, the taxing master or a judge of the county court for the district in which any of the charges were incurred.

48 Subject to the right of appeal, the certificate of the taxing master or judge, upon any taxation as to the amount of the bill, shall be binding upon the parties.

(emphasis added)

Civil Procedure Rule 63.35 provides:

63.35 (1) On a taxation, the taxing officer shall certify the amount of the costs taxed by him for and against each party or person.

(2) Subject to appeal and the terms contained in the certificate or in the order under which the taxation has been made, any certificate given upon any taxation is final and conclusive as to the amounts therein mentioned against any person who received notice of the taxation.

(emphasis added)

Thus, under the statutory scheme, solicitor/client costs may be taxed by the solicitor before bringing action or may be taxed on direction of the court after action has been brought. The former course was taken here, but in determining the scope of the taxing officer's powers, the scheme should be considered in its entirety.

Our attention has not been drawn to authority in this Province where the question has been addressed whether the taxing officer has power to decide the issue of retainer as opposed to that of the amount of costs. Decisions in other jurisdictions dealing with differently worded legislation are not particularly helpful. See for example **Knott Pollard and Morgan v. Offers** (1984), 56 B.C.L.R. 166.

In **MCR Holdings Limited v. Elbthal Realty Trust** (1981), 47 N.S.R. (2d) 179, Hallett, J. (as he then was) granted an application for summary judgment of a claim for payment of a taxed bill of costs for legal services. The defendant made representations to the taxing officer but did not appeal his decision. Hallett, J. said at p. 180:

The defendant did not appeal the taxation within the time period required by **Civil Procedure Rule** 63.38 but filed defence in this action brought on the account as taxed. I find the taxation is final and conclusive as to the amounts owing by the defendant as there was no appeal from the taxation. I am satisfied that the plaintiff's documents clearly prove its claim and the defendant has not raised an arguable point. The plaintiff is therefore entitled to summary judgment pursuant to **Civil Procedure Rule 13 (Carl B. Potter Ltd. v. Anil Canada Ltd. and Mercantile Bank of Canada** (1976), 15 N.S.R. (2d)

408; 14 A.P.R. 408). As stated in my oral decision, it is too late now to raise the issue as to the quality of the legal services. The plaintiff shall have pre-judgment interest at 12% for one year of the amount of the judgment and shall have party and party costs to be taxed.

There is no question in my mind that the statutory scheme for taxation of a solicitor's bill of costs confers upon the taxing officer's power to resolve the issue of the amount of the bill and, to the extent outlined in **Civil Procedure Rule 63**, the quality and value of the services. It does not, however, expressly or by implication confer upon the taxing officer the power to resolve such questions as the identity of the person liable to pay the amount so determined. What is determined conclusively and binding upon the parties is the amount fixed (**Act**, s. 48, **Civil Procedure Rule 63.35**). It is that to which the taxing officer's jurisdiction is confined.

In my opinion, the Chambers judge therefore erred in law in deciding that the taxing master's decision - not appealed - precluded the appellant from challenging its liability to pay the respondent the amount of the taxed bill.

It is therefore necessary to proceed with the second issue.

FAIR ISSUE:

In support of its position on the motion before Hamilton, J., the appellant filed affidavits in which a challenge is raised to the respondent's claim that the law firm was properly retained by the appellant. While it is neither necessary nor possible to say whether such a challenge will succeed at trial, the material clearly raises a triable issue based on a reasonable ground of defence. Thus, summary judgment should not have been granted.

The appeal should be allowed and the decision and order of Hamilton, J. should be set aside. The appellant should recover the costs of the application before Hamilton, J. and on this appeal in the total amount of \$1,000.00, plus disbursements.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.