1999 S.H. No. 123511

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Evans v. Richey, 2000 NSSC 111

Between:

Marcella Evans

Plaintiff

- and -

David Richey

Defendant

DECISION

Heard: in Chambers at Halifax before the Honourable Justice Gerald R.P. Moir on February 29, 2000

Date: April 10, 2000

Counsel: Cathy L. Dalziel, for the Plaintiff

David W. Richey, representing self

MOIR, J.:

Ms. Marcella Evans was injured in a motor vehicle accident early in 1994. She retained Mr. David Richey over a year and a half later to pursue a settlement or to bring action on her behalf, and prosecute it to trial. After four years, Ms. Evans was dissatisfied with Mr. Richey's services, so she discharged him and retained new counsel to pursue her case, which had by then been reduced to suit. She wants to know what she owes to Mr. Richey for his services, but he is unwilling to render an account and submit it to taxation until Ms. Evans' case is determined by settlement or judgment. He says amount involved is a significant factor for determination of his just fee, and the amount involved will not be known until the case is settled or tried. Ms. Evans applied for "a determination under Rule 63.22 as to the amount, if any, due in respect of the services rendered by David Richey ...." and the application came to me in chambers. I cannot make that determination because I do not have required information. However, Mr. Richey is obligated to produce a fair and reasonable bill of costs now.

Through his affidavit, Mr. Richey provided a great volume of documents generated on account of, or produced in reference to, a complaint to the Nova Scotia Barristers' Society made by Ms. Evans against Mr. Richey. When the application came on for hearing, I told Mr. Richey I had not studied these materials. I could not see their relevance. Shortly after the hearing, at which I reserved decision, Mr. Richey wrote to me stating that this material "contains a lot of information which is important for the Court in assessing the significance of the seriousness of the subject matter and the urgency of the matter, to

understand how the final outcome of the litigation by Marcella Evans ... is related to the numerous factors which must be considered ... in establishing the value of the service provided by the solicitor." For Mr. Richey's benefit, I record that I have now studied the materials in detail. However, I remain frustrated in my attempts to relate all this information to the issues I have to decide.

Some of the terms of the contract between Ms. Evans and Mr. Richey were reduced to writing and executed in the form of a contingency fee agreement. It provides for Mr. Richey to receive a portion of any settlement or judgment as his fee. As to termination before settlement or judgment, the agreement provides

> ... in the event that the Solicitor's retainer is terminated by the Intended Plaintiff, application may be made by or on behalf of either party hereto to the Taxing Officer to determine the amount if any due in respect to the services rendered under the retainer.

In my opinion, this provides the client a contracted right to the production of a bill of costs upon early termination. The right expressly provided, to proceed immediately to taxation, is meaningless without production of a bill of costs to be taxed. Therefore, it is an implied term of the contract that the discharged solicitor will produce his bill of costs upon the demand of the former client. I conceive that such an obligation would be upon a discharged solicitor in most like circumstances, whether or not it was contracted. I conceive that, where the client desires to order her affairs in light of whatever she will owe to a former lawyer, it is an incident of the fiduciary relationship that the lawyer will "promptly render an account for outstanding fees and disbursements", to use words applied in a context different from but possibly informative of fiduciary obligation: Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct* (Nova Scotia, 1990) p.46. As will be seen, I believe the same

obligation also is implicit in *Rule* 63.22. In one of his briefs, Mr. Richey points out that his contingency agreement does not provide for payment upon discharge, as did some contingency agreements evident in the authorities. I agree with Mr. Richey that putting such provisions in contingency agreements is contrary to *Rules* 63.22(2) and 63.22(6). However, I distinguish between time for production of accounts, time for taxation, and time for payment. The fact that the rules postpone payment of a discharged lawyer's fees where there is a contingency agreement does not necessarily mean that the obligation to render accounts is postponed.

Mr. Richey drew my attention to three decisions of taxing masters which he thought to support his position that a discharged lawyer could resist the former clients's demand for a bill of costs until new lawyers completed the litigation for which the former lawyer had been retained. These decisions are unreported, and names have been obscured on the copies provided to me. Mr. Arthur Hare, Q.C. released two decisions in January 1994 where lawyers had sought taxation. In the first decision Mr. Hare said,

> The Taxation proceeded on the basis that I could tax the matter now. I presently reject that approach and think it is better to deal with the costs after the case is completed. A factor in Taxation is the amount involved in the case and at this time we do not know what amount will be awarded.

Taxing Master Carole Beaton followed her colleague's approach in a decision released in February, 1997. That case did not involve a contingency fee agreement. However, Ms. Beaton said "the same principles would apply as to the determining factors to be considered in arriving at an appropriate decision as to taxation." and she found

> This is an appropriate case for adjourning the matter until such time as all of the factors which must properly be taken into account are known to the parties and the Taxing Master.

Note that in those cases the solicitors had produced bills of costs. Note the solicitors, not the clients, were seeking taxation. I accept that the Taxing Master has a discretion to adjourn taxation until relevant facts become ascertained, but that does not relieve solicitors of a contracted obligation, and, I conceive, a fiduciary obligation, to produce accounts upon demand after discharge.

Ms. Evans' application is under *Civil Procedure Rule* 63.22. *Rule* 63.22(1) applies "[w]here a solicitor dies or becomes incapable of acting", and, by *Rule* 63.22(3), this includes the situation "[w]here a client changes or discharges his solicitor". In any of those events, *Rule* 63.22(1) provides

> ... an application may be made by ... either party to the taxing officer to determine the amount, if any, due in respect of the services rendered under the retainer ...

A "taxing officer" means a taxing master, or a judge of this court: *Rule* 1.05(z). *Rule* 63.22(2) makes it clear that *Rule* 63.22(1) applies in cases involving contingency agreements, and that the taxation may proceed even though the outcome of the litigation for which the agreement was made is unknown. However, *Rules* 63.22(2) and 63.22(6) postpone liability for payment. *Rule* 63.22(2) provides that where there was an early discharge and there was an agreement for fees contingent upon successful disposition "no monies in respect of the agreement are payable until the disposition has been made", and *Rule* 63.22(6) provides "payment may not be enforced prior to the successful disposition, and then only with the leave of the court." I was referred to *Haynes* v. *Regan* (1998), 169 N.S.R. (2d) 397 (C.A.), but that decision concerned the exercise of discretion provided by *Rule* 63.20(3)(b) to vary, modify or disallow terms of a contingency agreement, and I propose to dispose of the issues on this application without resort to that discretion. I see

no reason to modify the contingency agreement.

Let me sum up the effects of *Rule* 63.22 relevant to this application. It gives the former client and the discharged lawyer a procedural right to taxation when the lawyer has been discharged before retainer. By implication, it imposes upon the lawyer an obligation to produce a bill of costs and all justifying information where the application for taxation is made by the client. Where the retainer involved a contingency fee agreement, the *Rule* calls for taxation even though the subject of the contingency has not yet been determined, but it provides that the fees and disbursements do not become payable until successful disposition. Even after successful disposition of the case, the former solicitor cannot enforce payment without leave of the court.

I do not read these provisions as negating the discretion asserted by Taxing Masters Hare and Beaton in the decisions to which I have referred. However, *Rule* 63.22 distinguishes between the time for taxation and the time for payment where there was a contingency agreement, and it favours early determination of the amount that may come due. The client's procedural right to taxation before disposition ought not to be taken away by adjournment pending disposition unless the taxing officer is satisfied that knowing the outcome is necessary for finding a just fee. Put another way, *Rule* 63.22 presumes taxation before disposition, and taxing officers ought to give effect to that presumption unless the just fee cannot be determined without knowing the outcome. I suggest that, in many cases, if amount and risk are prominent factors they can be approximated by looking at the settlement positions of the parties and taking the opinions of the former and the new solicitor.

In summary, Mr. Richey is obligated both by contract and by *Rule* 63.22 to produce

his bill of costs. His ethics require that the bill shall be fair and reasonable: Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct* (Nova Scotia, 1990), p.51, and the rules require the same of him: *Rule* 63.16. Ms. Evans is entitled to taxation presently, both under her contract with Mr. Richey and under *Rule* 63.22. However, Mr. Richey is not entitled to payment until the case for which he was retained is successfully disposed, and even after successful disposition he cannot enforce payment without leave.

Ms. Evans' application was for a determination under *Rule* 63.22 of the amount due for the services rendered by Mr. Richey. I cannot provide that determination. Among the many documents appended to Mr. Richey's affidavit, I found a narrative of his daily activities logged to his file, but I am unaware of the amount of time involved. If value of the claim and risk are relevant, I have not been provided with sufficient information to assess either. I think it best to dismiss the application, but I am prepared to order Mr. Richey to produce his bill of costs with all supporting information. Ms. Evans may have the bill taxed if she is not satisfied with it. She may do that in the ordinary way, or by making another application under *Rule* 63.22. Although a judge has authority under that rule, so does the taxing master, and I would encourage parties to avail themselves of the taxing master's specialized knowledge.

Mr. Richey brought some applications of his own. He sought an order postponing taxation until determination of the suit for which he was retained, and some consequential relief. That application is dismissed. He also applied for a charging order. I believe that where a new lawyer takes over from a discharged lawyer, the new lawyer has an ethical obligation to urge the client to pay the just accounts of the discharged lawyer when those accounts come due or to make appropriate arrangements with the discharged lawyer. I

believe a charging order is premature when the possibility of consensual arrangements has not been fully explored. I will dismiss the application for a charging order, but I will stipulate that Mr. Richey may bring another application if his request for reasonable arrangements does not bear fruit.

The materials include sensitive information concerning Ms. Evans' suit, and the complaint. Pursuant to the inherent jurisdiction, I will order the affidavits sealed, and, in fact, I have already placed them in a sealed envelope endorsed with my order. I have removed all briefs and correspondence from the prothonotary's file. Some of the documents were captioned in the style of the action brought by Ms. Evans on account of her injuries. If necessary, I am prepared to authorize Ms. Dalziel to remove any documents from file S.H. 123511 that have to do with S.H. 160308. I invite counsel to settle costs, but I note that I am open to costs becoming payable only when Mr. Richey's accounts become payable. If counsel are unable to settle costs, they may arrange an appearance or, if both agree, make submissions in writing.

J.