CLAIM NO. 113668
Date:20020131

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Boyne Clarke v. Gosbee, 2002 NSSM 4

BETWEEN:

Name	BOYNE CLARKE	Claimant
Name	EDWARD GOSBEE	Defendant

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers for the parties on August 17, 2006. This decision replaces the previously distributed decision.

D E C I S I O N

Appearances:

Rebecca Gasek, on behalf of the Claimant;
Mr. Edward Gosbee, on his own behalf.

[1] This is an action by the law firm Boyne Clarke against a client (the Defendant Mr Gosbee) for certain services it says were provided to him by one of its partners, Ms Kathryn A. Raymond. The client, who admits that the services were provided, says that some of these services were not requested by him; and that in any event he and the lawyer had already agreed that he would be liable to pay no more than $200, an amount which he has already been paid.

Background Facts

[2] Mr Gosbee used another lawyer in the firm of Boyne Clarke for a property transaction. He asked the lawyer whether there was anyone from whom he could seek advice concerning an employment problem he was having. He was told to try speaking to Ms Raymond.

[3] Mr Gosbee called Ms Raymond on March 26, 2001. His evidence was that he explained the nature of his problem, and asked her whether she was in a position to advise him. She said she was. He then made arrangements to come in to consult with her on the same day.

[4] Mr Gosbee arrived on the appointed day at the appointed hour. He was kept waiting half an hour. He was then ushered into his office.

[5] Mr Gosbee says that the first thing he did was ask Ms Raymond how much it would cost to consult with her. She told him that her hourly rate was about $185, and that with HST the charge for the meeting should be about $200 an hour. He said fine, and then proceeded to discuss his problem with her. She provided him with advice.

[6] At the end of the hour Mr Gosbee says that he told Ms Raymond specifically that "that's it, don't do anything more." He made out a cheque for $200, and asked her who he should pay. He was directed to the accounting office, and he handed over his cheque.

[7] After Mr Gosbee left, and notwithstanding his instructions, Ms Raymond sent him a 3 ½ page "confirming letter." The letter (which I did not see) apparently outlined the facts and problem about which Mr Gosbee had sought her advice; and the opinion that she had given him. It was drafted on March 27th and 28th, and sent to him sometime thereafter: see Exhibit "A" to the affidavit of Ms Raymond, filed with the court.

[8] Ms Raymond then sent Mr Gosbee an account for a total of $523.83. (Credit for the $200 already paid by Mr Gosbee was later given by the firm, leaving a balance of $323.83 to the claim.)

[9] (I should note that there is some ambiguity in the evidence as to when and how Mr Gosbee paid the $200. He says that he paid it at the conclusion of the meeting, by way of a cheque that he took to the firm's accounting office. Ms Raymond's affidavit is silent on the point. The firm's credit manager, Mr Ernest Manwell, filed an affidavit which mentions that Mr Gosbee *had* paid $200 "*as of* April 17th" (emphasis added), but does not say *when* the payment was made. Mr Gosbee says that he recalls that there was some confusion at the accounting office over his cheque, which may have been the result of his attempting to pay the account on the same day the service was rendered. Given the evidence, and having heard Mr Gosbee, I find that Mr Gosbee did in fact pay the $200 on the day of the meeting.)

[10] The account detailed charges for the following:

a. Phone conversation "to obtain description of the problem and to obtain partial background information;"

b. The meeting with him, which included "advice regarding legal rights" and "obtaining instructions not to proceed further until Mr Gosbee learns" certain information;

c. The letter to Mr Gosbee "confirming advice;"

d. administration fee (of $30.00) together with HST on the administration fee of $4.51; and

e. HST on the fees.

[11] Mr Gosbee objected strongly to this account. He thought it was unreasonable. He said that as far as he was concerned, he had paid all that he had agreed to pay when he handed over the cheque for $200. Ms Raymond had not objected at that time. Moreover, he did not understand why he should be expected to pay for the letter, when he had specifically told Ms Raymond to do nothing further at the conclusion of their meeting.

The Cause of Action and Taxation of the Account

[12] Boyne Clarke sues on its account. A solicitor's right to sue on his or her account is limited by s.41 of the ***Barristers and Solicitors Act***, RSNS 1989, c.30, as amended ("*BSA*""), which provides that a solicitor "may sue for and recover their *reasonable and lawful* fees, costs, charges and disbursements:" s.41 (emphasis added). This provision in my view triggers my jurisdiction as a taxing officer under s.42 of the *BSA*, as amended by s.3 of the ***Justice Administration Amendment (1999) Act***, SNS 1999 (2nd session), c.8; by s.11 of the ***Justice and Administration Reform (2000) Act***, SNS 2000, c.28; see also s.9A(1) of the ***Small Claims Court Act***, as enacted by s.92 of the ***Justice and Administration Reform (2000) Act***.; and, by reference, Civil Procedure Rule ("CPR") 63.27.

[13] I say this because in order to make a judgment on the merits of the claim I must, pursuant to s.41 of the BSA, consider whether the account is "reasonable and lawful" – which in turn requires that I assess or tax the account. Finally, in considering whether the account is "reasonable and lawful" I am required to consider CPR 63.16(1), and I must do so in more than a cursory fashion: *Lindsay v. Stewart, MacKeen & Covert* [1988] NSJ No. 9 (CA).

[14] I will accordingly consider each of the items set out in the account.

The Initial Phone Call to Describe the Problem and Set Up the Meeting

[15] In my view, whether it is "reasonable" to charge for the phone call depends (at least initially) upon whether any legal service was actually provided. If sufficient information had been acquired over the phone to permit the lawyer to provide an opinion, and such opinion was provided, it might then be reasonable to charge for it. This would certainly be the case in an ongoing solicitor-client relationship, where many of the solicitor's services are provided over the phone on a call by call basis.

[16] However, in this case no legal service was provided. The client only provided enough information to permit Ms Raymond to determine that it would be appropriate to meet with him. She decided that it was, and set up the meeting. Such calls and actions happen all the time. Since no legal service was provided to Mr Gosbee, I cannot find that it was reasonable to charge him for it.

The Meeting

[17] It is clear on the evidence that it was reasonable to charge Mr Gosbee for the meeting. A legal service was clearly provided. Mr Gosbee expected to pay for the time and, he thought, he had.

[18] However, the issue is whether it was reasonable, on the evidence before me, to charge more than what Mr Gosbee had thought that he had agreed to pay – that is, $200.

[19] Ms Gasek filed the affidavit of Ms Raymond, who stated that:

a. during the March 26th telephone conference "of approximately 12 minutes ... I explained my hourly rate to the Defendant during this telephone conversation."

b. that is was her practice to explain her rates; the billing practice of the firm (that the defendant would be billed monthly); and that the bill would include "fees, disbursements and applicable taxes;"

c. that during the following meeting she met with Mr Gosbee for 1 ½ hours; provided him with advice; and "obtained further instructions not to pursue the options, including legal action, until the Defendant" learned certain information; and

d. that on March 27th she wrote a letter confirming her advice to the Defendant, for which she charged only ½ hour of her time.

[20] I should note, however, that while Ms Raymond deposed (on January 21, 2002) that she told Mr Gosbee her hourly rate in the phone conversation, in an earlier letter from her to Mr Gosbee, dated April 18, 2001, she stated only that she "believed" she had communicated this information to him in the phone conversation: see letter dated April 18, 2001, being Exhibit "B" to her affidavit. Given the state of this evidence, and given Mr Gosbee's own evidence, I think it more likely that the discussion concerning her rate took place when he said it did – that is, at the beginning of the meeting.

[21] Mr Gosbee in his evidence was very clear about the terms under which he thought he was operating:

a. He obtained an estimate as to the cost of the meeting from Ms Raymond before the meeting commenced;

b. When the meeting ended he stated that he did not want any more work to be done; and

c. He paid for the service immediately thereafter.

[22] No mention is made by Ms Raymond of any estimate that was given to Mr Gosbee; nor is there any mention of any discussion at the end of the meeting as to him asking how much he owed; or of his giving the firm a cheque for $200. She does not deny the existence of

any such estimate; she is merely silent on the point.

[23] On balance, it strikes me as likely and reasonable that a client would ask at the beginning of a meeting how much such a meeting would cost. I accordingly find that such an estimate was discussed at the meeting. The issue then becomes whether it was reasonable for Boyne Clarke to send an account that was substantially in excess of that estimate. (The total account is more than twice what Mr Gosbee was told it would cost.)

[24] In my view, there is nothing in the evidence before me that would make it reasonable to depart from the estimate of $200.

[25] Mr Gosbee asked for and received from Ms Raymond an estimate of the cost of the meeting at its commencement. A lawyer is obliged to provide proper estimates, particularly when asked to do so by the client; and to advise him or her immediately if the estimate may be exceeded by the actual cost, so as to permit the client to determine whether he or she wishes to proceed: *Re Cogen and Irving Weisdorf & Co Ltd* (1984) 28 ACWS (2d) 153 (Ont SC, Taxing Officer); see also *Re Meagher, Shaw and* Kirsch (1981) 12 ACWS (2d) 288 (Ont SC, Taxing Officer), and *Atlantic Nurseries Ltd v. McInnes Cooper & Robertson* [1991] NSJ No. 190 (TD), per Roscoe, J (as she then was) at p.5.

[26] Mr Gosbee was entitled to have a reasonably accurate estimate of the service to be provided in the meeting. Mr Gosbee paid the $200 (inclusive of HST) that he was told the meeting would cost, and I cannot find that it was reasonable to charge him for more than he was told it would cost.

The "Confirming Letter"

[27] Ms Gasek, on behalf of Boyne Clarke, submitted that it was "good practice" for Ms Raymond to send a confirming letter. I agree. Such letters keep a record of what was discussed and the opinions given, and ensure that there is no misunderstanding as to these matters; or as to the lawyer's retainer, if one is agreed upon. Such letters may also be of service to the client, at least in the context of an ongoing relationship, because they provide a record of what was discussed and the opinions given. It keeps such information fresh and exact in his or her mind.

[28] However, the issue is not whether such letters are good practice. It is whether it is reasonable to charge the client for such good practice, at least in a case where the client has expressly said that he did not need or want any further work done.

[29] In my view it is not reasonable to charge a client for work that he or she has expressly and specifically said should not be done. Such work, even if it is "good practice," is work that was "unnecessarily taken" insofar as the client was concerned: see, for example, CPR 63.33(1)(a).

[30] Such a conclusion is in my view particularly the case when the solicitor herself

acknowledges that she received instructions at the end of the meeting "not to proceed further."

[31] I accordingly find that it was not reasonable to charge for this letter.

The Disbursements

[32] The disbursements break down into three items:

a. HST on the fees;

b. Administration fee (of $30.00); and

c. HST on the administration fee.

[33] Having found that it was not reasonable for Ms Raymond to charge more than the $200 (inclusive of taxes) for her services, which was discussed at the meeting, I conclude that the claimant cannot claim HST on the fees claimed.

[34] With respect to the administration fee, there was no evidence before me as to what the fee is actually for. I assume that it is intended to recover the normal overhead costs of a law firm associated with opening a file, preparing accounts, and the like. Overhead is not normally a charge that can be levied on the client by the solicitor. Overhead is intended to be reflected in the hourly rate; not as an extra disbursement; and it is not normally chargeable, at least in the absence of any express agreement to that effect: see Orkin, *The Law of Costs* (Toronto, 2nd ed., 2000), para.311.12; and see, for example, *Blaier & Albert v. Iuglio* (1992) 35 ACWS (3d) 772 (Ont Assessment Officer0; *Shrum Liddle & Hebenton v. Seagull Ventures Inc* (1999) 19 ACWS (3d) 132 (BCSC Master).

[35] There is no evidence that Mr Gosbee was ever told that he would be charged a fee for opening his file (or that he agreed to pay such a charge). While Ms Raymond does state in her affidavit that she believed that he was told that "disbursements" would be charged, she does not specify *what* charges would be included within the term "disbursements.". This evidence is not in my mind sufficiently specific to constitute an agreement to pay such a fee. This is particularly the case when the word "disbursement" was used. "Disbursement" carries with it the connotation of an actual expenditure of money, and would not in my mind be apt to cover internal office overhead.

[36] I accordingly disallow the claim for the administration fee, and the HST associated with it, as being unreasonable, particularly in the absence of any agreement to make such a payment: *Boyne Clarke v. Gray* [2001] NSJ No. 336

Conclusion

[37] For the above reasons I find that it was not in the circumstances reasonable for Boyne

Clarke to charge more than the $200 which has already been paid by Mr Gosbee.

[38] I accordingly dismiss the claim.

Dated at Halifax, Nova Scotia, this _____)
day of January, 2002)
)
)
)

_____
ADJUDICATOR
W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)