Claim No: SCCH No. 329962

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
AND IN THE MATTER OF A TAXATION
Cite as: J.T. v. Planetta, 2010 NSSM 52

BETWEEN:

J.T.

Applicant (Client)

- and -

PETER PLANETTA and NEWTON & ASSOCIATES

Respondents (Solicitors)

TAXATION DECISION AND ORDER

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Dartmouth, Nova Scotia on July 20, 2010

Decision rendered on July 26, 2010

APPEARANCES

For the Applicant	self-represented
For the Respondents	Peter Planetta Solicitor

BY THE COURT:

Introduction

1. This is a taxation initiated by the Client to recover some of the $3,865.68 in fees and disbursements that he paid the Solicitor for representing him on some criminal charges.

2. The essential complaint of the Client is that he alleges that he was not properly informed of the seriousness of one of the charges, and that he was not given the opportunity to take advantage of a time-limited offer by the Crown Attorney to plead guilty and receive a 90-day sentence. In the end, the matter was taken to trial where the Client was found guilty and sentenced to a 2-year term in a federal penitentiary. He was eventually paroled after having served approximately 14 months.

3. The criminal charges arose from an altercation that the Client had with a former girlfriend. He was charged with assault, threatening and extortion. In conversations with the Solicitor the Client conceded that he was guilty of the assault and threatening, but vehemently denied any extortion. I believe it is fair to say that the Solicitor had a standing instruction to propose to the Crown that the extortion charge be dropped, in exchange for a guilty plea on the two lesser charges.

4. The Solicitor also testified that the Client had been very clear in his instructions that he did not want to go to jail, as he had had a very bad experience in lockup awaiting his bail hearing. Although the Client denied saying to the Solicitor that he had said “I am not going to jail under any

circumstances," the Solicitor's evidence had the ring of truth. It is a bit unclear what the Client may have meant by this. It could have meant that he would fight the charges in the hope of an acquittal or at least a non-custodial sentence, or that he would do something drastic before allowing himself to be incarcerated. In any event, it is clear that the Solicitor's prevailing understanding was that this Client was not eager to agree to a custodial sentence any time soon.

5. Against this background, the Solicitor attended Provincial Court on July 19, 2008 to enter a plea on behalf of the Client. As is common, the Client was not required to be present because he had appointed counsel. Representing the Crown was a Crown Attorney from Sydney who was (it appears) only filling in for the day. The Solicitor had a discussion with this Crown Attorney and asked her whether the Crown would be open to dropping the extortion charge, and further asked what kind of sentence the Crown might be looking for.

6. The Crown Attorney stated that she would accept a guilty plea on all three charges, and that she would be looking for a 90-day sentence. She made it known to the Solicitor that this offer was only good for that day, as she would be back in Sydney the next day and the matter would be assigned to another Crown Attorney who would have his or her own views.

7. The Solicitor was in no position to accept this offer. He had no instructions. The Client was not present, although perhaps he could have been reached by telephone. The Solicitor's understanding was that the Client would never agree to plead guilty to extortion. He also felt that he could not ethically advise the client to plead guilty to a charge that he adamantly insisted was

not based in fact. In the end, the Solicitor made no effort to contact the client that day. A few days later he confirmed the offer in a letter to the Crown, which was copied to the Client.

8. The Client claims that he continued to believe that this offer was open for acceptance at any time. He says that the Solicitor did not make it clear to him that the offer was for one-day only and that it had expired before he even knew anything about it.

9. As the trial approached, the Solicitor and the Client came to learn that the Crown was taking a very hard-line approach and would be asking for a 3-year term in penitentiary. It was somewhere in this time period that the Client says he first learned that the 90-day offer had been a one-day offer only, and that he learned that extortion was a Criminal Code offence potentially punishable by life imprisonment. He says that the Solicitor never explained that to him.

10. The Solicitor stated that he had explained to the Client from the outset that extortion is a very serious criminal offence similar to robbery. He says that he would not typically mention the theoretical maximum sentence because it is far more relevant in the real world to talk about the kind of sentences that are typically imposed by the Courts, and that no one gets life imprisonment for extortion offences.

11. By then, with no acceptable offer on the table the Client felt compelled to go to trial where he entirely denied having extorted anything from the complainant. The judge found otherwise and convicted the Client on all three counts. As mentioned, the eventual sentence was two years.

12. The Client was obviously very unhappy with the result, and clearly regretted that he had not taken up the 90-day offer. He blamed the Solicitor for getting him into the predicament that he was in. He wrote to the Solicitor at least twice from prison, making his views known and seeking (it appears) an acknowledgment by the Solicitor that he had done something wrong and seeking, as well, a partial refund of legal fees. He followed this up with a complaint to the Nova Scotia Barristers Society, alleging unprofessional conduct on the part of the Solicitor. He also eventually launched this Taxation in an attempt to recover back some of the fees that he paid for the Solicitor's services.

13. There is no issue about the time spent by the Solicitor, or his hourly rate of $120.00. The Solicitor also testified that his bills did not reflect many of the phone conversations that he has with the Client, and he considered the bill to be extremely reasonable for supplying a full defence including two half days of trial and a sentencing hearing. Despite the result, he feels that he launched a credible and vigorous defence and that the reason it ended poorly was because the judge made findings of credibility that were extremely damaging to the Client.

14. The ultimate issue on a Taxation is always whether the charges are reasonable, in all of the circumstances. The circumstances often revolve around issues of hours and hourly rates, but sometimes (as here) they centre on issues of competence or the Solicitor's judgment or conduct, leading to an undesirable result.

15. Solicitors are not expected to be perfect. Especially in the case of counsel engaging in litigation, they are expected to make judgment calls “on the fly” and these calls may prove to have been less than ideal when viewed in the full light afforded by the “retroscope.” I believe that this is one of those cases where the Solicitor acted consistent with his understanding of the Client’s wishes and that he had no reason to believe, at the time, that a failure to pursue the offer of a guilty plea on all charges would prove to be so unfortunate for the client.

16. Viewed in its own time, the Solicitor believed:

    a. The Client was maintaining his innocence of the extortion charge;
    b. The Client was angling for a result that did not involve incarceration;
    c. The offer, while explicitly “one-day only” was not so far below what could likely be negotiated later on that it had to be seized, at all costs.

17. I believe that the Solicitor was caught off-guard by the abrupt change in the Crown’s position. Obviously there is a huge difference between 90 days and three (or two) years, but most lawyers having been offered 90 days would reasonably conclude that this was in the general ballpark of what the Crown would eventually be looking for.

18. The Client’s current position is that had he known of the 90-day offer on July 19, 2008, he would have accepted it “in a heartbeat.” I simply do not accept this. In order to plead guilty to extortion, he would have had to admit to a set of facts in open court, that he had steadfastly denied to the Solicitor, and which he insisted up to and including at his trial had been fabricated by the complainant.

19. I believe it is more likely than not that the Client would have brushed off this offer, in the expectation that something at least close to this might still be available down the road.

20. As to the complaint that the Solicitor failed to advise the Client of the maximum sentence for extortion, I do not accept that this had any bearing on the decisions that were made. Any lawyer with even minimal experience in criminal law understands that the Criminal Code is full of harsh maximum sentences for many offences that have probably never, in the history of Canadian criminal justice, been imposed. The job of a criminal lawyer is to have a good working knowledge of the likely range of sentences that can be expected for an offence, and to advise his client accordingly. While some lawyers may advise their clients of the maximum sentences under the Criminal Code, others may reasonably conclude that this would only unnecessarily frighten or even mislead the client and that the better advice is to tell the client what type of a sentence he might actually receive if found guilty.

21. I find nothing actionably wrong about the way the Solicitor advised this client or in the way he represented him. As already stated, the standard is not perfection but reasonableness. I note that the Solicitor was at the relevant times a relatively new lawyer with approximately two years of experience, but there is no indication that the Solicitor's relative inexperience was a factor.

22. I am aware of the findings of the Nova Scotia Barristers Society in its response to the Client's complaint. Those findings were based on written

submissions, most of which I did not see. They held no hearings. The Society also has a mandate that is very different from that of this Court and, if I take anything from that process, it was critical of the Solicitor for not having committed to writing some of the advice that he says he delivered verbally to the Client. While committing advice to writing may be best practice, the failure to have done so does not mean that the advice was not delivered.

23. In the result, having heard the evidence of the parties, tested by cross-examination and having reviewed relevant aspects of the Solicitor's file, I do not believe that the bills rendered to the Client ought to be reduced as I have concluded that they were quite reasonable for the services rendered to the Client. I recognize that the result was far worse than either had hoped for, but this was not a risk that the Solicitor undertook in the sense that his fees were in any way contingent on the result.

24. The Solicitor's fees are accordingly taxed as presented. In light of the result the Client is not entitled to the costs of initiating this Taxation.

Eric K. Slone, Adjudicator