CLAIM NO. 112868
Date: 20020417

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as Boyne Clarke v. Steel, 2002 NSSM 1

BETWEEN:

Name	BOYNE CLARKE	Claimant
Name	DAVID STEEL	Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 3, 2006. This decision replaces the previously distributed decision

D E C I S I O N

Appearances:

Kenneth A. MacLean, on behalf of the Claimant law firm;
Brian Hebert, on behalf of the Defendant client.

[1] This taxation of a solicitor's account, and claim and counterclaim thereon, came on before me on April 3, 2002. I heard the evidence of Ms. Sherree L. Conlon, the Defendant's former solicitor at the Claimant law firm; and the evidence of the former client, the Defendant David Steel.

[2] The Claimant seeks certification of its accounts, and an Order for Judgment thereon.

[3] The total of all accounts submitted in the period October 1999 through to September 2000 was $15,587.26, inclusive of HST and disbursements, of which, by my calculation,

a. $11,616.00 was in respect of fees; and

b. $2,570.53 was in respect of disbursements (both figures being exclusive of HST)

[4] The Defendant had paid $6,875.50 in respect of the various accounts. The last payment appears to have been in June 2000. The balance of $9,711.76 plus interest at 15% per annum forms the claim.

[5] The Defendant client counterclaimed:

a. for certification that the total of all accounts should be no more than $2,000.00 (from which would flow an Order that the Claimant law firm re-pay the difference already paid to the Defendant); and

b. for $4,436.36 "to reimburse costs of subsequent counsel".

JURISDICTION

[6] At the commencement of the hearing I raised a question with respect to the attendance by the parties before Taxing Officer Hare that occurred in February 2001. Apparently the Claimant law firm had originally applied for taxation of its account before Taxing Officer Hare. At the hearing the client (represented by Mr. Hebert) raised various objections, some of which appear to have involved allegations that the client had suffered damages arising out of the negligence of the law firm in its representation of him. Since these matters would have been outside Taxing Officer Hare's jurisdiction, he adjourned the matter, or at least refused to proceed with it.

[7] Counsel for the Claimant law firm before me wanted to advise me of Mr. Hare's comments concerning the actual accounts, but I refused to hear this evidence, both because it was hearsay; and because it appears that no actual decision was made by Taxing Officer Hare with respect to the account.

[8] Accordingly, I was of the view that there was nothing arising out of the appearance before Taxing Officer Hare to bind me or restrict my jurisdiction in any way on this application.

[9] There was also an issue with respect to the counterclaim "to reimburse costs of subsequent counsel".

[10] Counsel for the Claimant law firm argued that this Court had no power to make an award with respect to legal costs. He pointed to s. 29(1)(b) and s. 29(2), of the *Small Claims Court Act*, and to s. 15(2) of the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 58/2000, which provides that "no agent or barrister fees of any kind shall be awarded to either party."

[11] The solicitor for the client submitted, however, that the claim included fees that arose as a result of the Claimant's negligence, or breach of contract (i.e. retainer), and so were properly damages that could be claimed.

[12] I was of the view that while I could not award any part of the counterclaim that would include "agent or barrister fees", I might have jurisdiction to hear a claim for additional legal fees that were incurred as a result of any breach of contract on the part of the Claimant. I accordingly decided that I would hear the evidence, and deal with the issue at the conclusion of the matter.

MERITS OF THE APPLICATION

[13] This taxation arises out of a family law matter involving Mr. Steel and his former common law partner, Ms. Burke. Most if not all of the issues appear to have involved the division of assets between two common law partners, each of whom were employed, and each of which had maintained separate investment portfolios, credit cards, debts and so on. There were no children of the relationship. They owned a house jointly, but they had apparently paid unequal deposits on the original purchase. She had paid $8,000.00, he had paid $25,000.00, each by way of a down payment.

[14] Ms. Conlon was retained by Mr. Steel in August 1999 to represent him in respect of an interim support application arising out of his separation from Ms. Burke. The interim support application was eventually settled, although for some reason (and Ms. Conlon was unable to say why) the terms of the settlement were never reduced to a formal Order. There also appears to have been some concern at that time about a possible charge against him by the RCMP, but Ms. Conlon was able to quickly and easily resolve that matter.

[15] Accordingly, the only issues in September 1999 were those that concerned the division of assets between Mr. Steel and Ms. Burke, who is also represented by counsel.

[16] Both Ms. Conlon and Mr. Steel gave evidence to the effect that early on there was some discussion about the potential cost of legal representation. He was told that if the matter remained "simple", and if agreement could be reached on all of the issues surrounding the division of assets, then his total costs should be no more than $1,000.00.

[17] Negotiations between Ms. Conlon and Ms. Burke's solicitor commenced almost immediately after Ms. Conlon's retainer, and by the end of October 1999 it appears that there was a basic agreement with respect to how all of the assets were to be divided, with one exception. The exception involved the equity in the house that was held jointly.

[18] Mr. Steel's position was that each party should be able to recover the deposits that they had paid, and that any remaining equity in the house should then be split equally.

[19] Ms. Burke's position, on the other hand, was that all of the equity should be split equally without any consideration being given to the fact that unequal down payments had been made on the purchase of the house. Ms. Burke apparently adopted this position because she felt that she had made a greater contribution with respect to the subsequent maintenance and upkeep of the house than had Mr. Steel.

[20] In any event, both Ms. Conlon and Mr. Steel gave evidence to the effect that they both understood that on this issue (i.e. the division of the equity in the house) the parties were no more than $8,500.00 apart.

[21] It is important to understand this point because it is so crucial to the position of Mr. Steel.

[22] Had Mr. Steel been successful in his argument, he would have recovered his $25,000.00 down payment. On the other hand, had Ms. Burke's position been accepted, Mr. Steel would have recovered $16,500.00. This is because in the second case the two down payments ($25,000.00 and $8,000.00) would have been divided equally, resulting in a recovery to Mr. Steel (and Ms. Burke) of $16,500.00 each.

[23] Accordingly, the difference in what Mr. Steel could expect to recover if he was successful ($25,000.00) and if he was unsuccessful ($16,500.00) was only $8,500.00.

[24] On the evidence it also appears that by this time (or at least by the date of a November 11, 1999 email from Ms. Conlon to Mr. Steel), it was understood that if the matter did not settle, then:

a. there would be a discovery of both parties scheduled for December 1999; and

b. there would be a two day trial, scheduled for March 2000.

[25] Having heard the evidence of Mr. Steel and Ms. Conlon, I am also satisfied that at this time there was never any specific estimate of projected legal costs given by Ms. Conlon to Mr. Steel. Ms. Conlon gave evidence which was not really disputed by Mr. Steel that there was a "general discussion" of the fact that there would be certain costs involved in litigation, but such discussion never involved specific figures or estimates or budgets. I note by way of parenthetical comment that this lack of specificity is to be contrasted with correspondence that took place after the eventual trial decision, when Ms. Conlon stated (in a letter dated August 16, 2000):

> "You always have the option of appealing her [the trial judge's] decision. . . . The difficulty is that an appeal generally costs in the range of $4,000.00 to $5,000.00, and it simply does not seem cost effective at this point, considering we were seeking a total payment of about $48,000.00, the difference of what you will actually obtain of only $8,000.00": Exhibit D5, p. 122.

[26] It is also clear that Ms. Conlon did not canvass with Mr. Steel the possibility of splitting the difference, given that the parties were only $8,500.00 apart at the beginning of the litigation in October 1999; and given that if the matter did not settle there would be costs of discovery, pre-trial preparation and trial itself.

[27] It is difficult for me to determine why it was that this was not canvassed with Mr. Steel.

[28] It may have been because, at least on what Mr. Steel was telling Ms. Conlon, she thought he had a "good chance" on succeeding in his claim for an unequal division of the equity in the house, based on the fact that there had been an unequal contribution towards the down payment. Alternatively, it may have been because Mr. Steel appears to have been quite adamant that his position should be pushed, as evidenced by an email from him to Ms. Conlon dated October 31, 1999, wherein he stated that:

> "if they [his spouse and her lawyer] mean half the equity without taking into account the $25,000.00 and her $8,000.00 then dividing the rest be half; sure but if not and they don't accept our deal then

> you can tell them to go to &#$% and since you can't say that tell them we will see them in court": Exhibit C4, p. 11.

[29] Whatever the reason, it is clear (and I so find) that Ms. Conlon did not at this point give Mr. Steel any specific estimate, budget or projection as to what the costs of taking the matter forward would actually be, notwithstanding that she knew at this point that there would be at least a day of discovery (with attendant preparation time) as well as two days of trial (with attendant pre-trial preparation time).

[30] Based on Ms. Conlon's then hourly rate ($110.00, subsequently, $125.00), this information would have warranted at least an estimate in the range of $5,000.00 to $10,000.00.

[31] In any event, with the failure of settlement negotiations Ms. Conlon said that all issues came back onto the table and became part of the litigation.

[32] Discoveries of both Mr. Steel and Ms. Burke were held January 2000.

[33] The trial, originally scheduled for early March, had to be adjourned, because of the illness of Ms. Burke's counsel. It was adjourned to April 3 and 4. Prior to trial there was a pre-trial conference as well.

[34] Justice Hood, who heard the trial, rendered an oral decision on August 8, 2000. All issues save the question of the equity of the house had been settled just before trial, leaving the question of the division of the equity in the house the only issue. She accepted Ms. Burke's position.

[35] Mr. Steel had become dissatisfied with the services of Ms. Conlon, and discharged her on or about October 1, 2000.

[36] The issue of party and party costs was at that time still outstanding, and it was eventually dealt with by way of an application before Madam Justice Hood sometime later. Justice Hood released decisions on costs on January 18, 2001, and at that time she found that the "amount involved" was $8,500.00. As Her Ladyship noted, that was "the amount that was in dispute, that is, whether Ms. Burke should be entitled to one half of the difference between her down payment and that of Mr. Steel or whether each would receive his or her down payment and then split the remaining equity equally": see decision of Justice Hood, in Exhibit D5, p. 124 (p. 2 of the decision).

[37] Justice Hood eventually made an Order of no costs to either party.

[38] The Claimant law firm then moved to tax the account of Mr. Steel before Taxing Officer Hare in February 2001. As noted above, this application was aborted.

[39] The within Small Claims Court action was started in June 2001, and after a number of adjournments on consent, was set for hearing on April 3, 2002.

ISSUES

[40] The Defendant client argued that the Claimant's accounts should be reduced for a number of reasons.

[41] First, he says that Ms. Conlon failed to provide a specific estimate or budget of legal fees in October 1999 (or indeed at any time prior to trial).

[42] Second, he submits that Ms. Conlon failed to research or rely upon the doctrine of resulting trust, as opposed to the doctrine of constructive trust (or unjust enrichment). As a result, she ended up with a too sanguine view of Mr. Steel's chances at trial. Mr. Hebert submits on behalf of Mr. Steel that had Ms. Conlon researched the law of resulting trust, she would have realized that Mr. Steel's chances were "less than good".

[43] Finally, it is submitted that the total account is just too high, given that the matter was relatively simple; given that it involved an amount involved of only $8,500.00; and given the fact that there was never any projection with respect to potential legal fees other than the initial discussion that a "simple" matter would be in the range of $1,000.00.

PRINCIPLES OF ASSESSMENT

[44] The taxation of a solicitor's bill involves the application of a number of principles, including the following:

a. the provisions of Civil Procedure Rule 63.16(1) and s. 42 and s. 43 of the *Barristers and Solicitors Act* are "primarily for the protection of the client and must be enforced";

b. such protection is not ensured by a "cursory examination" of the solicitor's bill;

c. the "ultimate test" in all cases is whether the account is "reasonable"; and

d. any suggestion that a lawyer "may charge what the traffic will bear is contrary" to that principle: *Lindsay v. Stewart, McKeen & Covert* [1988] N.S.J. No. 9 (C.A.).

[45] CPR 63.16(1) provides that a solicitor "is entitled to such compensation from a client, who is a party, as is reasonable for the services provided, having regard to:

(a) the nature, importance and urgency of the matters involved,

(b) the circumstances and interests of the person by whom the costs are payable,

(c) the fund out of which they are payable,

(d) the general conduct and costs of the proceeding,

(e) the skill, labour and responsibility involved, and

(f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved."

[46] The fact that Mr. Steel paid some of the initial accounts that were rendered to him does not prevent me from being able to consider and tax those accounts: *Lindsey v. Stewart, McKeen & Covert, supra*.

FAILURE TO PROVIDE A SPECIFIC ESTIMATE OF PROJECTED LEGAL FEES

[47] As I have found, Ms. Conlon never gave to Mr. Steel a specific estimate of the fees, even though she had a reasonably good idea as early as October 1999 of the steps that would be necessary in order to take the matter through to trial.

[48] Commentary 12.1 of the Nova Scotia Barristers' Society "Legal Ethics and Professional Conduct Handbook" provides that "the lawyer has a duty to give the client an early and fair estimate of fees and disbursements, pointing out any uncertainties involved, *so that the client may be able to make an informed decision*." (emphasis added) This mirrors Commentary 3 under Chapter 11 (Fees) of the Canadian Bar Association's Code of Professional Conduct, which provides that the lawyer "should give the client an early and fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision."

[49] In *MacLean v. Van Duinen* (1994) 131 N.S.R.(2d) 60 (T.D.), Justice Grant cited the Nova Scotia Commentary, and observed (at para. 56) that:

> "Lawyers services are based on contract. Surely, a client has the right to know the down side of the contract, what she/he is expected to pay. The lawyer who avoids this seemingly unpleasant discussion, does so, in my opinion, at his/her peril."

[50] Failure to have specific discussions creates a vagueness which, as His Lordship observes at para. 60, almost forces the lawyer "into a quantum meruit situation to show the charges as fair and reasonable under the circumstances;" see also *Richard & MacDonald v. Shafie* (1991) 104 N.S.R.(2d) 356 (County Court) at para. 14.

[51] I note as well that "it is incumbent upon the solicitor to ensure that, so far as competence will allow, the client is told what legal costs lie ahead for the work required": *Gardner, Roberts v. MacLean* [1988] O.J. No. 1402 (Assessment Officer Clarke) at p. 3; see also *Vanek v. Baughen* [2001] O.J. No. 4766 (Ont. Superior Court of Justice). A solicitor should be reasonably explicit in advising the client as to the costs of litigation as against the ultimate value of the claim: *Gray v. Ford* (1993) 40 A.C.W.S.(3d) 1044 (Ont. Assessment Officer).

[52] All of this amounts in my view to a duty on the part of a solicitor, in anything save perhaps the simplest of cases, to provide at least a minimum specific estimate of fees on the projected work: see, for example, *Torkin, Manes, Cohen & Arbus v. Stendel* (1991) 28 A.C.W.S. (3d) 720 (Ont. Assessment Officer).

[53] There are good reasons for this "duty".

[54] First, few if any "ordinary" clients have any concept of just how expensive litigation can be. The difficulty is compounded because litigation costs often do not begin to mount rapidly until much later in the conduct of the file, with the commencement and completion of discoveries and, in particular, with trial itself. The difficulty is exacerbated in family law matters, where many of the issues are clouded by emotion rather than reason; and are conducted by people of reasonably limited means who are being expected to pay legal fees out of after tax dollars without being able to write such expenses off.

[55] The existence of such factors can easily lead clients to have unreasonable (or no) expectations or understanding as to just what exactly they are exposing themselves to by way of legal fees when they decide to litigate rather than settle a case.

[56] Second, and flowing from the above, I think it is fair to say that a client who retains a lawyer is relying on more than his or her legal knowledge or expertise as a litigator. They are also relying on them for their experience and knowledge of the practical realities of litigation and, in particular, the cost of such litigation. Without such knowledge a client has nothing against which to judge the value or reasonableness of proceeding with litigation as opposed to attempting seriously to settle the claim.

[57] As well, fulfilling the duty of providing such estimates is not only a good service to the client; it is also good practice. A client who is provided with such information, but who nevertheless instructs his or her counsel to proceed with litigation, can then hardly complain when the estimate comes true and he or she discovers to their chagrin that they will have to pay dearly for following such an uneconomic course of action: see, for example, *Magee v. Trustees RCSS Ottawa* (1962) 32 D.L.R.(2d) 162 (Ont. H.C.) at pp. 165-66.

[58] In the case at bar, Mr. Steel may very well have adopted a different approach than he did had he been told in October 1999 that if the matter continued to trial:

a. he could expect to pay something in the range of $10,000.00 for his solicitor and client costs;

b. he might lose the case, and thereby expose himself to possible liability to pay some part of the other side's costs; and

c. this course did not make "economic sense" when the amount at issue was only $8,500.00.

[59] Accordingly, in my view Ms. Conlon's failure to give Mr. Steel any specific estimate as to the projected costs of litigation, other than the original estimate that a simple settlement would cost in the range of $1,000.00, is an important factor to be taken into account in assessing the overall total account of $15,587.00.

CONDUCT OF THE TRIAL OR DEFENCE STRATEGY

[60] I am not, however, persuaded by Mr. Hebert's submissions that Ms. Conlon was negligent, or alternatively less than competent, in failing to argue the doctrine of resulting trust as opposed to constructive trust or unjust enrichment.

[61] First, having looked at the decision of Madam Justice Hood, and the written pre-trial submissions that were made by Ms. Conlon, it seems to me that the doctrine was in fact part of the overall issues that were canvassed before the trial judge.

[62] Second, and in any event, Ms. Conlon's evidence (which I accept) was that she had always made it clear to Mr. Steel that the prospect of success depended upon being able to prove what he had continually asserted to her, which was that he had put more into the house (in addition to the down payment) than had Ms. Burke; or that, at the very least, Ms. Burke's contributions were not as high as she made them out to be. I am also satisfied that all three doctrines (that is, resulting and constructive trusts, and unjust enrichment) are affected and to some degree determined by the factual issue of the respective contributions of two persons to a particular piece of property. Accordingly, even if Ms. Conlon had mounted her argument solely on the issue of resulting trust, I am not satisfied that there would have been any difference in the eventual outcome.

[63] For the same reason I am not persuaded by Mr. Hebert's argument that if Ms. Conlon had focussed on resulting trust, she would have been less positive about the chances of Mr. Steel's success at trial. As I have already noted, the principle underlying feature to Ms. Conlon's evaluation of Mr. Steel's prospects at trial was what Mr. Steel was telling her about the respective contributions of he and Ms. Burke to the house.

[64] Finally, and in any event, it is my view that what Mr. Hebert, in criticizing the conduct and strategy and analysis of Ms. Conlon, is doing what Justice Grant in *MacLean v. Van Duinen, supra,* said was inappropriate. As His Lordship observed at para. 32,

> "Three years later [in that case] 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."

[65] Having heard the evidence, and having reviewed the file, I am satisfied that all the steps taken by Ms. Conlon (save her failure to give an estimate), including her approach to the

claim, and her analysis of the prospects of success (based on what Mr. Steel was telling her) were reasonable at the time.

AMOUNT INVOLVED AND RESULTS

[66] The taxation of a solicitor's account involves more than simply a line by line analysis of entries for time and services; and more than simply a determination that such individual entries were reasonable. I am also required to look at the overall account in relation to the overall recovery: *Re Solicitor* [1973] 1 O.R. 107 (C.A.); *Tannous v. Halifax (City)* [1995] N.S.J. No. 422 (T.D.) at paras. 22 - 23.

[67] Accordingly, in assessing the reasonableness of the overall account of $15, 587.00 I have to consider whether such an account was "reasonable" given that the amount involved was only $8,500.00.

ASSESSMENT OF ACCOUNT

[68] How then do I assess such an account?

[69] In my view, for the reasons set out above, I have to take into account the following:

a. as of the end of October 1999 the only issue that divided the parties was one that was worth no more than $8,500.00;

b. as of this point Mr. Steel had incurred legal fees (up until the end of October 1999) of approximately $2,300.00;

c. the fees up to that point were not so far beyond the initial estimate of $1,000.00, given the circumstances of the case, as to be unreasonable in the circumstances; but

d. Mr. Steel was not advised at that point that if the matter did not settle (whether for $8,500.00, or some lesser amount) he could expect to incur additional legal fees of up to $10,000.00 (plus disbursements).

[70] Faced with such information there was a very real chance that Mr. Steel would have decided to make another attempt to settle the matter by splitting the difference, or perhaps even going further. Had he done so, and had the matter settled, he would not have faced much more in the way of costs than what he had already incurred.

[71] Taking all these factors into account, I assess the "reasonable" account in respect of fees at $3,500.00 (plus HST). I arrive at this figure for a number of reasons.

[72] First, had the solicitor provided a reasonable estimate of the projected legal fees at this time (when Mr. Steel had already spent approximately $2,300.00 in fees), there is a good chance

that the matter may have settled. Such negotiations would have involved some further expenditure in addition to the $2,300.00, but not substantially more.

[73] Second, when the solicitor knew that the amount involved was only $8,500.00 it would be inappropriate in my opinion to assess the account at an amount any higher than $3,500.00, at least in a case where the solicitor has failed to provide the client with specific projections as to legal expenses.

[74] In this regard I note the decision in *Re Mahar, Shaw and Kirsch* (1981) 12 A.C.W.S.(2d) 288 (Ont. Taxing Officer), where a law firm's account of $4,040.00 (in respect of a matter estimated to cost $500.00) was reduced to $1,600.00; and *Atlantic Nurseries Ltd. v. McInnes Cooper & Robertson* [1991] N.S.J. No. 190 (T.D.), where a solicitor's account of $25,000.00, in respect of an appeal that had been estimated to cost $10,000.00 was reduced to $15,000.00.

DISBURSEMENTS

[75] I questioned Ms. Conlon about the following categories of disbursements:

a. photocopying;

b. administration fee;

c. facsimile charges; and

d. computerized legal research (Quicklaw).

Facsimile

[76] On reviewing all of the accounts there was a total charge of, by my calculation, $83.50 for facsimiles. Ms. Conlon stated that the Claimant firm had a policy of charging $1.00 per page for a fax; and that if the fax was sent via long distance there was an additional surcharge. She could not recall what the long distance surcharge was, although to her recollection it was not tied to any actual long distance charge.

[77] In any event, in reviewing the accounts there were a total of 37 faxes, for a total disbursement charge of $82.50.

[78] Most of the faxes were $1.00 charges, but a number were for $5.50, or $6.50, and there was even one for $16.00.

[79] Ms. Conlon advised that correspondence to be faxed is routed to a central clerical person who is responsible for sending and receiving faxes.

[80] In my view such charges are not reasonable. They are not connected with any actual expenditure. While I can appreciate that facsimiles may be reasonable or necessary, the cost associated with sending them appears to be more in the line of overhead than a specific out of pocket expense; and as a normal rule, overhead is not something that can be charged to the client as a disbursement.

[81] Accordingly, I have disallowed $82.50 by way of disbursements on the total accounts charged.

Photocopying

[82] There was a total of $334.10 for photocopying. Ms. Conlon advised that there was a standard charge of $0.25 a page for photocopying, which works out to 1,336 pages of photocopying. Such a charge again strikes me as unreasonable in the circumstances, and I reduce the total disbursement charge to $100.00.

Administration Fee

[83] The Claimant law firm has a policy of applying a $30.00 "administrative fee" to each new file that is opened.

[84] Ms. Conlon stated that this fee was intended to cover the "costs" associated with opening a file, but in my view such costs are more in the line of overhead and accordingly are not normally allowable. I do not allow the charge.

Computerized Legal Research

[85] There was a total charge of $265.16 in respect of computerized legal research. Ms. Conlon stated that this was a charge in respect of her use of Quicklaw to do legal research. She stated that she used Quicklaw because the Claimant's law library had discontinued a number of the family law reporter series.

[86] However, I note in this regard that, at least according to Ms. Conlon, some if not all of the research she was doing involved Supreme Court of Canada decisions in this area; and such decisions are available for free on the Supreme Court of Canada's website.

[87] In addition, I have some difficulty with the reasonableness of a solicitor charging a client for access to legal materials that many solicitors, at least in a firm the size of the Claimant's, would have in their library. A firm normally cannot charge the costs associated with maintaining a law library to the client, since such a cost is normally a part of overhead,

which is recovered if at all as part of the lawyer's hourly rate. That being the case, it strikes me as unreasonable to shift the burden of such overhead onto the client by relying on "for charge" legal resources rather than an in-house law library. This is not a case, in other words, where Ms. Conlon had to access information that would not normally be found in a law library. For this reason, with respect, I decided to follow the decision in *Elliott v. Nickerson* (1999) 179 N.S.R.(2d) 264 (T.D.) rather than that in *Keddy v. Western Regional Health Board* [1999] N.S.J. No. 464 (T.D.). I have disallowed the amount of $265.16 in respect of computerized legal research, at least in the absence of any evidence that the materials accessed were rare or would not normally be available in a law library except through a computerized service.

THE COUNTERCLAIM

[88] Having heard the evidence of Mr. Steel, and having reviewed the accounts of Mr. Hebert (which form part of Exhibit D) and part of his counterclaim, I am satisfied that the costs claimed are for the most part costs in respect of the taxation. I accordingly dismiss that part of the counterclaim.

[89] The balance of the claim is problematic for a number of reasons.

[90] First, Mr. Steel did not make any real attempt to distinguish between that part of the accounts of Mr. Hebert related to the steps that were taken to finalize the lawsuit (which arguably were steps that would have been unnecessary had the matter settled in October 1999) and those costs associated with this taxation. A brief review of the accounts of Mr. Hebert in Exhibit D5 makes clear that these two types of claims are intermingled.

[91] It is for Mr. Steel to prove his case, not for me to perform the steps that he ought to have performed.

[92] The second difficulty with the counterclaim is that even if Mr. Steel could separate out that portion of Mr. Hebert's account that arose out of the alleged breach of contract, he would in my view only be entitled to claim the "reasonable" costs. In other words, the Claimant law firm would have to tax the account of Mr. Hebert to determine what the "reasonable" amount was. That has not been done, and there was no evidence presented that would allow me to tax that amount.

[93] Accordingly, in the absence of any evidence concerning the actual "damage" that Mr. Steel was said to have sustained as a result of having to continue with what was otherwise an unnecessary lawsuit, he cannot establish any damages (since the claim has not been taxed). In the absence of any damages it is not necessary for me to determine whether or not the claim is made out. I accordingly dismiss that portion of the counterclaim.

ASSESSMENT AND ORDER

[94] I have assessed the reasonableness of the Claimant firm's accounts at $3,500.00, plus HST of $525.00, for a total of $4,025.00. The Defendant has already paid $6,875.50, resulting in an overpayment of $2,850.50. I will issue an Order that the Claimant firm pay to the Defendant the amount of the overpayment ($2,850.50), and dismiss the Defendant's Counterclaim.

Dated at Halifax)
this day of)
)
April, 2002.)

_____
ADJUDICATOR
W. Augustus Richardson

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