

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
CITE AS: Jovcic v. Garson, Knox & MacDonald, 2005 NSSM 1

BETWEEN:

Name SLOBODAN JOVCIC Appellant

Name GARSON, KNOX & MACDONALD Respondent

D E C I S I O N

APPEARANCES:

Slobodan Jovic, on his own behalf;
Mark Knox on behalf of the solicitor

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.

- [1] This taxation of a legal account, made by the client, came on before me on September 13, 2005.
- [2] I heard the evidence and submissions of the client, Slobodan Jovic. Mr Jovic called his business associate, Mr Joseph Mrkonjic, to give evidence as well. Mr Mark Knox, the solicitor, gave evidence and made submissions on his own behalf.
- [3] Three accounts are in issue:
 - a. one dated November 27, 2003, for a total of \$1,329.06;
 - b. another one dated November 27, 2003, for a total of \$5,000; and
 - c. one dated July 8, 2005, for a total of \$42,187.89.
- [4] All three amounts are inclusive of fees, disbursements and HST.
- [5] Mr Jovic admitted that he had retained Mr Knox. His basic position was threefold: either Mr Knox:
 - a. did nothing of value for him; or, if he did,
 - b. the accounts were far too high; and, in any event,

- c. Mr Knox had told him that he would accept, or agreed to accept, less than \$42,187.89.

The Background Facts

- [6] The solicitor's services grew out of a family matter. Mr Jovicic and his wife separated in 2003. The separation appears to have been somewhat acrimonious. It resulted in a charge of assault being laid against Mr Jovicic by his wife. It was this charge which led Mr Jovicic to retain Mr Knox. The retainer was on short notice. Mr Jovicic called Mr Knox on Friday, August 29, 2003 in respect of the trial on the assault charge, which was to commence Wednesday, September 3rd. (It appears that prior to this point Mr Jovicic had been represented by a different firm.) The trial proceeded on September 3rd and 9th, covering two days.
- [7] Mr Knox met with Mr Jovicic on September 2nd. In a letter dated September 4th, 2003 Mr Knox explained to Mr Jovicic that:
 - a. his hourly rate was \$250.00 plus tax and disbursements; and that
 - b. he anticipated that preparing for and attending at trial would "involve legal fees in the vicinity of \$5,000."
- [8] Mr Jovicic was convicted at the conclusion of the trial. While that concluded the assault matter, the underlying matrimonial issues remained. They included a number of issues, including:
 - a. spousal and child support, which Mr Jovicic did not want to pay on the grounds that he earned little or no money; and
 - b. access to—and eventual sale of—the matrimonial home (which was at the time being occupied by Mr Jovicic's wife and at least one of their children; Mrs Jovicic apparently wanted to delay the sale of the house).
- [9] Mr Jovicic retained Mr Knox to deal with the matrimonial matters.
- [10] On November 27, 2003 Mr Knox sent Mr Jovicic the first two of the three accounts in issue. He "cut back" the work on the assault charge to keep it within the estimate he had provided to Mr Jovicic in his letter of September 4th. This resulted in the account of \$5,000 for that work. The other account (for \$1,329.06) represented Mr Knox's involvement with the matrimonial issues up to that point.
- [11] These accounts were not paid at that time. Mr Knox explained that in matrimonial matters he had found that clients rarely had the resources to pay interim accounts; and that he would often wait for payment until the final resolution of the issues. However, as was also his practice, he would seek some form of security for his accounts from the client.
- [12] In this case, both in the November 27th letter and in a number of letters thereafter, Mr Knox asked Mr Jovicic for some form of security, primarily something he could register against the matrimonial home. The evidence is clear that while Mr Jovicic understood what was being

asked of him, he chose never to respond to Mr Knox's requests for security. He never provided it, and Mr Knox never pushed the issue beyond those requests.

- [13] Mr Jovcic initially took over handling the matrimonial matters. He did not return to Mr Knox for assistance with them until February 2004. At this point Mr Jovcic was facing an application for interim child support in the Family Division of the Supreme Court, slated for March 4th. He was resisting payment of support on the grounds that he made little or no income from his business as a restaurateur.
- [14] That application went ahead. In the year that followed, there were two more applications: one by Mr Jovcic to sell the house (which failed because Mrs Jovcic was still living in it with a school-age child); and one by Mrs Jovcic for exclusive possession of the home. Mr Knox worked on all these matters.
- [15] On December 1, 2004 Mr Knox wrote to Mr Jovcic. He recounted the history of the interim proceedings up to this point. He noted that the two invoices of November 2003 remained unpaid "for reasons that I completely understand." He pointed out that in the period February-December 2004 58 hours of time had been devoted to the file, "which equates roughly to the sum of slightly over \$14,000 plus tax and disbursements."
- [16] Mr Knox advised that he did not expect payment of the two outstanding accounts until the matrimonial matter had been resolved. (Trial had been scheduled for June 2005 at this point.) He repeated his request for security.
- [17] On May 5, 2005 Mr Knox wrote to Mr Jovcic. He provided a detailed review of the issues that had been raised by Mr Jovcic in the matrimonial litigation. He offered opinions as to their relative strengths and weaknesses. He asked once again for security for the outstanding and ongoing legal expenses and disbursements.
- [18] Mr Jovcic says that on May 27, 2005 he went to Mr Knox's office to find out how much he owed up to that point. He obtained a copy of Mr Knox's letter of December 1, 2004. Mr Knox was not in the office. Mr Jovcic says that Mr Knox's secretary called Mr Knox, and that as a result of that conversation told him that the total fees up to that point (May 2005) were roughly \$17,365.49. She wrote that number on the letter: see Exhibit C2. Mr Jovcic says that this figure represented the total fees as of May 27th, 2005, and that that should be taken into account in evaluating the total account.
- [19] I do not accept Mr Jovcic's evidence on this point. In my opinion all that Mr Jovcic was told in May was that the total account as of December 1st, 2004 was \$17,365.49. The time dockets reveal that the total fees on the account up to December 1, 2004 were \$14,725. Taxes and disbursements would have increased that amount and account, in my opinion, for the figure of \$17,365.49 which was placed upon Mr Jovcic's copy of the December 1st letter by Mr Knox's secretary. This conclusion is strengthened by the fact that the figure appears in the margin of the letter, with a line drawn towards the phrase "plus taxes and disbursements" in the letter.
- [20] I find that Mr Jovcic knew in May 2005 (shortly before going into trial) that his legal account for the matrimonial matters up to December 2004 was roughly \$17,400. I also find as a result that he knew in May 2005 that he would be incurring additional costs in the same range by going into trial.

The Law

- [21] This is a taxation of three legal accounts. A lawyer is entitled to recover only in respect of his or her “reasonable and lawful account:”s.66, *Legal Profession Act*, SNS 2004, c.8 (the “LPA”). While some of the services in question were performed under the LPA’s predecessor, in my opinion the test is the same. The “reasonableness” of any such account may be determined by an adjudicator: s.67(a), *LPA*. An adjudicator performing this function is to determine whether the amount charged “is reasonable for the services performed:” CPR 63.16(1), having regard to such factors as:
- a. the nature, importance and urgency of the matters involved;
 - b. the circumstances and interest of the person by whom the costs are payable;
 - c. the general conduct and costs of the proceeding; and
 - d. the skill, labour and responsibility involved.
- [22] As well, an adjudicator must not allow costs that were unnecessary; or not calculated to advance the interests of his or her client; or were incurred through overcaution, negligence or mistake: CPR 63.33(1).
- [23] I am also of the view that the “reasonableness” of a legal account may be affected in part by what understanding the clients had of the potential size of such accounts: see, for e.g., *Boyne Clarke v. Steel* [2002] NSJ No. 186 (SCCA). The cost of litigation can easily far exceed the value of its fruits. It is accordingly important that clients have some idea of those potential costs in order to be able to adequately instruct counsel. A client who is fully informed of the cost of litigation may chose to settle in order to avoid costly legal bills; a client who is not may find him- or herself deeply in legal debt over a trifle.

The Issues

- [24] In this taxation there are three principal issues as I see it:
- a. was the client adequately informed as to the potential costs of the litigation;
 - b. are the accounts “reasonable” in light of the services that were provided; and
 - c. was there an agreement that Mr Knox accept less than the amount of the final account.

Issue 1: Was the Client Adequately Informed?

- [25] Litigation is expensive. Contentious litigation, and in particular litigation involving matters of emotion or principle, can be unbelievably expensive. The expense is all the greater in the case of lay litigants, who have to pay in after-tax dollars. Yet it is precisely this type of litigant who usually has little or no idea of how much litigation can and will cost. Blinded by emotion and principle, they may demand and expect a course of conduct on the part of their solicitor that results in huge legal accounts with little in the end to show for such expenses.

If advised of the potential cost of such litigation, such clients may temper their instructions and their expectations, in order to avoid or limit the legal cost.

- [26] As I have already noted, it is my opinion that clients need to be informed of the cost of litigation in order to be able to provide fully informed instructions to their lawyers. In the absence of such information lawyers can expect to have unhappy clients complain that they would not have authorized a particular course of action (for example, trial) if they had known how much it would have cost; and lawyers in such cases can expect, sometimes, to have their accounts reduced as a result.
- [27] At issue, however, is the knowledge of the client. A lawyer's failure to adequately advise a client as to the projected cost of litigation may be remedied by the client's own knowledge of that cost. An astute business person who has engaged in litigation many times in the past is not in the same position as a first time lay litigant. The former may be expected to have some idea of what a particular course of action will cost; the latter may not.
- [28] Turning to the facts of this case, it would appear that the solicitor here did not ever provide the client with an estimate of what the legal expenses for the matrimonial dispute might be. He did do this in the context of the criminal matter, and in my opinion it would have been preferable to have attempted the same in the context of the matrimonial proceedings. It is of course true that it is often very difficult to provide a reasonable estimate, since the cost of litigation can depend on how reasonable (or unreasonable) the other side (or other counsel) are. Such difficulty should not, however, prevent the offering of at least a range of best-case/worst-case scenarios, if only to encourage reasonable conduct on the part of one's own client.
- [29] Having said that, I am also satisfied on the evidence that the client here did know that the litigation was going to be very expensive; and that he did have at least a rough idea of how much it was going to cost. Mr Jovicic was a businessman. He had used lawyers before. He had received two accounts already from Mr Knox. Mr Knox did tell him in December 2004, well before the pending trial, that the matrimonial expenses to date were \$14,000. As well, Mr Mrkonjic's evidence, which I accept, was that he had spoken to Mr Jovicic a number of times about the litigation; that he told him to get statements from Mr Knox precisely because Mr Jovicic was complaining about how much it was going to cost; that "he knew it was going to be expensive;" and that if he had the statements Mr Jovicic could best decide how to handle the matter.
- [30] I accordingly find not only that Mr Jovicic was well aware that the legal services of Mr Knox (and the positions in the litigation he was instructing Mr Knox to take) would be expensive; but that he had a reasonable idea of how much they would cost. He was not misled by Mr Knox's failure to provide an estimate or a budget, because he already had a reasonable idea of how much the litigation would cost. He chose not to request written confirmation of that knowledge. In doing so he cannot complain that Mr Knox did not give him information that was both unnecessary (because he already had it) and not wanted.
- [31] I should note perhaps parenthetically that both Mr Jovicic and Mr Mrkonjic asked rhetorically, "if Mr Knox had no security for the accounts, why did he proceed?" They both seemed to suggest that Mr Knox was somehow to blame for his own folly in continuing to act without immediate payment; and that he should accordingly expect to receive less than what he charged for such services. In this I think they were wrong. It is entirely proper—and indeed is within the best tradition of the legal profession—for a lawyer to forgo payment until the end

of a matter. Indeed, it is in some ways mandated by the *LPA* and the general law of taxation, since the “reasonableness” of an account can only really truly be determined at the end of a proceeding.

Issue 2: Were the Services Reasonable?

- [32] As noted at the beginning of these reasons, Mr Jovicic challenged all three accounts.
- [33] Mr Knox was called to the Bar of Nova Scotia in 1986. About 60% of his practice is in the field of family law. He has appeared at all levels of the provincial and Supreme Court in Nova Scotia. His hourly rate is \$250.
- [34] I have reviewed all three accounts and the underlying time dockets. The dockets provided by Mr Knox do not in my opinion reveal any unreasonable or unnecessary charges (such as, for example, a standard charge of .2 or .3 for reviewing simple correspondence).
- [35] Regarding the third account, I have also reviewed the decision of Justice Dellapinna in *Jovicic v. Jovicic* [2005] NSJ No. 280. Mr Knox was successful in a number of the important issues (particularly those involving whether or not Mr Jovicic should pay retroactive support or whether income should be imputed to him). The matrimonial matters in the third account include three interim applications (involving at least two court appearances); a discovery; and a four-day trial. Given the work involved, the issues involved and their importance to Mr Jovicic, the nature of the instructions given by Mr Jovicic to Mr Knox (as revealed in Mr Knox’s correspondence to him), and the degree of success on some if not all of these matters, I satisfied that the fees of \$36,062.50 are reasonable.
- [36] As far as the second account is concerned, I note that it involved preparation for and attendance at a two day trial. A total account of \$5,000 (which amount is inclusive of HST and disbursements) is in my view more than reasonable for such services. And I reach the same conclusion with respect to the first account.

Issue 3: Did Mr Knox Agree or Say that he would take—or charge—less than \$36,062.50 in respect of fees?

- [37] The matrimonial account totalled \$42,187.89. Of that, \$36,062.50 represented fees for services rendered.
- [38] Mr Jovicic stated in evidence at on July 5, 2005 he met with Mr Knox in his office to discuss the trial and the judgment (which had been released June 30, 2005). He discussed the state of his legal fees, and says that Mr Knox told him that the total charge would be \$32,000. Mr Jovicic was upset, asking him what he had accomplished for him other than legal charges; and that it “was too much for what you did.” He says Mr Knox agreed in response to reduce the charges by \$10,000.
- [39] Mr Knox agreed that there had been some discussion about reducing his account (though not in the manner stated by Mr Jovicic), but that any such offer was premised on Mr Jovicic agreeing to provide security by way of a direction to pay to be directed to the lawyer handling the sale of the matrimonial home. This offer was reduced to writing in a letter from Mr Knox to Mr Jovicic dated July 6, 2005: see Exhibit D3. Mr Knox’s position was that in the

absence of any agreement on Mr Jovicic's part to provide the security, there was no agreement to charge less than his actual account.

- [40] The evidence here requires me to decide whether or not Mr Knox agreed or promised to reduce his account by some amount. In other words, I am being asked to decide not whether the amount of \$42,187.89 is **reasonable**; but whether it (or some lesser amount) is **payable** (that is, whether the client is liable to pay it).
- [41] In an earlier decision I had expressed the view that an adjudicator did not have the jurisdiction to make a determination as to the **liability** of a client to pay an amount in excess of the financial jurisdiction of the Small Claims Court: see *Merrick Holm v. Wind Driven Inc* [2003] NSJ No. 417 (SCCA) at para.27. This decision in turn was based at least in part on the decision in *MCR Holdings Ltd. v. Colchester Young Men's Christian Association* [1998] NSJ No. 448 (CA) at para.14, where Chipman, JA stated that that a taxing master did not have the jurisdiction "to resolve such questions as the identity of the person liable to pay the amount so determined [as reasonable under taxation]."
- [42] Having reviewed the provisions of the *Small Claims Court Act*, RSNS 1989, c.430, as amended up to SNS 2002, c.10 (the "SCCA") I am now satisfied that an adjudicator does indeed have that jurisdiction.
- [43] Section 9(a) of the SCCA provides that "[a] person may make a claim under this Act seeking a monetary award in respect of a matter or thing arising under a contract ... where the claim does not exceed fifteen thousand dollars." Section 29(1)(a)(ii) of the SCCA authorizes an adjudicator to make an order "requiring a party to pay money ... in a total amount not exceeding fifteen thousand dollars."
- [44] These two provisions establish the financial limit of the jurisdiction of adjudicators in respect of general claims under the SCCA. However, s. 9A(2) of the SCCA then goes on to provide that "[t]he monetary limits on the jurisdiction of the Court over claims made pursuant to s.9 and on orders made pursuant to section 29 do not apply to taxations."
- [45] Accordingly, s.9A(2) has the effect of amending s.9(a) and s.29(1)(a)(ii) of the SCCA in such a way as to provide an adjudicator with the statutory power to determine claims in respect of the taxation of legal accounts, and to make orders to pay in respect of legal accounts, in excess of \$15,000. In other words, s.9A(2) of the SCCA enlarges the jurisdiction of a taxing masters (that is, adjudicators) beyond what it was when the Court of Appeal rendered its decision in *MCR Holdings Ltd, supra*. An adjudicator can determine a claim, and make an order requiring payment, in respect of a legal account regardless of its amount.
- [46] Having disposed of that issue I return to the question: did Mr Knox agree to reduce his account as stated by Mr Jovicic? I find that he did not. I find as a fact on the evidence that Mr Knox did offer to reduce his account **if** (or in consideration of) the grant by Mr Jovicic of security against the sale of the house. But it is equally the case that Mr Jovicic did not accept that offer. He did not provide that consideration required . That being the case, we are left with the actual account as rendered at the conclusion of the trial, an account which I have found to be reasonable.

Conclusion

[47] For the reasons set out above, I find and certify that the three accounts in question are reasonable. I will also make an order requiring Mr Jovicic to pay those amounts.

Dated at Halifax
this day of September, 2005

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ADJUDICATOR
W. Augustus Richardson

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Court File
Claimant(s)
Defendant(s)