Claim No: 315192
Date: 20091106

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Smith v. Ward, 2009 NSSM 65

BETWEEN:

W. BRIAN SMITH

CLAIMANT

- and -

SHANE CLAUDE WARD and DARRYL WARD

DEFENDANTS

DECISION

DATE OF HEARING:	October 6, 2009
DATE OF DECISION:	November 6, 2009
PLACE OF HEARING:	Dartmouth, Nova Scotia
HEARD BEFORE:	Patrick L. Casey, Q.C. Small Claims Court Adjudicator
COUNSEL:	W. Brian Smith, Q.C., Claimant, appeared on his own behalf
	Shane Claude Ward and Darryl Ward, Defendants, appeared on their own behalf

BACKGROUND

(1) This is a claim by W. Brian Smith (Smith) against Shane Ward and Darryl Ward. The amount claimed against both Defendants is $21,123.53 plus costs.

(2) Shane Ward did not file a Defence, however, at the hearing, he admitted that he owed the full amount being claimed by Smith. Judgment will be entered against him in that amount plus costs.

(3) Darryl Ward disputes that he is responsible for the account.

(4) Shane Ward was charged with a serious criminal offence. He wished to retain Smith's services. He did not have the funds to do so. Darryl Ward, who is Shane Ward's father, met with Smith. Smith explained to Darryl Ward how retainers worked. Darryl Ward was advised that the charges were very serious and that legal fees could be substantial.

(5) Darryl Ward indicated that he wished to retain Smith's services on behalf of Shane Ward, and Smith commenced work immediately.

(6) Billings were set up under Smith's accounting system. Shane Ward was shown as the client and bills were forwarded directly to Shane Ward.

(7) Darryl Ward provided an initial retainer of $5,000.00 on January 17, 2007.

(8) On February 15, 2007, Smith wrote to Darryl Ward enclosing his first Statement of Account dated January 31, 2007, and indicated that the retainer had been depleted.

(9) Smith states in part in the letter to Darryl Ward as follows:

> *"Initially I advised you that a case of attempted murder would cost in the range of $20,000.00 or more."*

(10) And further:

> *"In addition I have just received the tape of the Bail Hearing as Shane Ward has requested that I examine the possibility of having the denial of bail reversed. Accordingly I require that my retainer be increased by a significant amount. If you wish to speak to me in <u>the</u> regard please do not hesitate to do so." (sic)*

(11) A further $5,000.00 retainer was provided by Darryl Ward on February 21, 2007.

(12) On May 8, 2007, Smith forwarded a second letter to Darryl Ward. In that letter, he enclosed his second invoice for services rendered and requested a further retainer. A further retainer of $5,000.00 was paid by Darryl Ward on May 15, 2007.

(13) The early practice of forwarding accounts directly to Darryl Ward was not followed as the file progressed. I find, however, that there were many discussions between Smith and Darryl Ward concerning Shane Ward's representation, including the issue of billings. As a result of these discussions, Darryl Ward paid a further retainer of $5,000.00 on June 27, 2007, and a final retainer of $5,000.00 on December 18, 2007. As of the date of the payment of the final retainer, there was a surplus in the trust account of $8,016.08.

(14) The next invoice was not sent out until August 31, 2008. It covered services rendered during the period from September 17, 2007, to August 30, 2008. Once the trust balance was applied, there was a further amount owing of $2,868.22 at that time.

(15) A further invoice was sent out on October 14, 2008, covering services from September 5, 2008, to September 25, 2008, at which point, the balance outstanding was $13,713.40. A further invoice concerning a separate but related matter was sent out on November 6, 2008, covering services from September 24, 2008, to September 29, 2008, and was in the amount of $3,254.00 and, finally, there were two more invoices concerning the matter for which Smith was originally retained, the first dated January 28, 2009, for services incurred on November 13, 2008, in the amount of $1,707.45 and an invoice dated July 22, 2009, covering services between February 9, 2009, and June 12, 2009, in the amount of $542.40.

(16) At this point, the account was seriously in arrears. Application was made by Smith to be removed as solicitor of record and the application was granted August 20, 2009. Shane Ward sought replacement counsel. Smith approached Darryl Ward to pay the amount outstanding and Darryl Ward denied liability.

(17) Smith commenced this action by way of Notice of Claim filed on August 7, 2009.

LEGAL BASIS OF CLAIM

(18) Darryl Ward is not a client of Smith's. Nevertheless, it is the responsibility of the Court to tax the account as it is a legal account for services rendered (see Johnson v. Tyerman, 1998 CarswellSask 593 (Saskatchewan Court of Queen's Bench)).

(19) The purpose of taxation is to assess the account in order to determine whether it is reasonable and lawful. The legal basis for taxation is set out in Section 66 of the Legal Profession Act, 2004, c. 28, s. 1 and, also, Rule 77.13 of the Civil Procedure Rules applies. Rule 77.13 provides as follows:

> *"77.13 Counsel's fees and disbursements: entitlement and assessment*
>
> *(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.*
>
> *(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:*
>
> *(a) counsel's efforts to secure speed and avoid expense for the client;*
>
> *(b) the nature, importance, and urgency of the case;*
>
> *(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;*
>
> *(d) the general conduct and expense of the proceeding;*
>
> *(e) the skill, labour, and responsibility involved;*
>
> *(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing."*

(20) In Lindsay v. Stewart, MacKeen & Covert (1988) N.S.J. No. 9, the Nova Scotia Court of Appeal held that the taxation provisions are "primarily for the protection of the client" and must be enforced. Such protection is not ensured by a "cursory examination of the solicitor's bill." Even where there is an agreement between the lawyer and the client, the court has an obligation to tax the bill as to its reasonableness.

(21) In this case, both Shane Ward and Darryl Ward agree that the accounts are reasonable and having reviewed the accounts, I concur with their assessment. All of the work was performed by Smith in a highly professional and effective manner. The account is based on time docketed and recorded by Smith and applies a standard and appropriate rate for legal fees.

CONTRACT BETWEEN DARRYL WARD AND THE CLAIMANT

(22) There is no written Retainer Agreement with either Shane Ward or Darryl Ward.

(23) The absence of a Retainer Agreement was commented upon by The Honourable Justice Gerald R.P. Moir of the Nova Scotia Supreme Court in Ross, Barrett & Scott v. Simanic, 1997 CarswellNS 347.

(24) Justice Moir held that in cases where there is no written Retainer Agreement between the lawyer and the client, the lawyer bears a "special onus" to prove the contractual terms. The rationale for this is explained in paragraphs 24 to 26 of Ross, Barrett & Scott as follows:

> *"24 The controlling law on this issue is the basic law of contract and a special rule. Lawyers have a duty to establish their retainers with clarity and to reduce the contract to writing. A rule has developed because of that duty: where there is no written retainer, and there is a conflict in the evidence of the lawyer and the client as to a term of the retention, weight must be given to the version advanced by the client rather than that of the lawyer. Our Appeal Court has said that this is an accurate summary of the authorities on disputes arising from parol contracts for legal services.[FN5]*
>
> *25 This is sometimes called a "rule of practice".[FN6] It is not a rule of contract or of fiduciary obligation by which one party's version of the contract always prevails. The first part of Lord Denning's formulation is wrong. He said "... the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it."[FN7] On the contrary, the ordinary rules of contract apply to a contract for legal services.[FN8] The terms are to be found in the ordinary ways: by finding the intention of the parties through their contracting expressions understood in context, or by finding terms through implication according to the law of implied terms. The difference in this class of contract is that the lawyer asserting an unclear, parol retention is under an evidentiary disadvantage on account of his or her failure in duty. The lawyer bears a "special onus". [FN9]*
>
> *26 The "rule of practice" preferring a client's version of an unclear, parol retention was referred to by the Ontario Court of Appeal in these words:*
>
> > *Other things being equal, weight is to be given to the denial of the client as against a solicitor. I do not think the rule goes any further than that.[FN10]*
>
> *There it was said, as I would here, "... the very case of the client tells strongly in favour of the solicitors' understanding of the bargain."[FN11] The rule is not that the lawyer's version never prevails over the client's version. Rather, the lawyer is under a special onus but it remains open for the lawyer to demonstrate that the testimony of the former client is, for whatever reason, at variance with the understanding reached when the relationship was formed."*

(25) Justice Moir also found that the same special onus applies to the question of who is liable to pay the account, and I quote from paragraph 29 of the decision as follows:

> *"29 Mr. Ross is under the same special onus as analysed above when it comes to the question of who is liable to pay his account. In fact, the onus applies in respect of all disputes respecting any term of retention, and one would expect careful attention where a lawyer is asked to act for more than one person."*

(26) The guiding principle where there is no written Retainer Agreement, therefore, is that where there is a difference in the evidence of the lawyer and the client, the lawyer has a special onus to prove his or her version of the retainer terms. If the lawyer cannot meet the special onus, then the client's explanation should be accepted. The same special onus applies in determining the issue of who is liable to pay the bill in the event that it is alleged that someone other than the client is responsible.

(27) In order to determine whether Smith has met the special onus in this case, it is necessary to consider all of the circumstances.

(28) Smith believed that he could rely upon the initial arrangements entered into with Darryl Ward and that it formed the basis of binding retainer arrangements.

(29) Darryl Ward's position is that his contribution should be capped at $20,000.00.

(30) There is evidence in this case that Smith did discuss with Darryl Ward certain things at the beginning of the retainer, including how a retainer worked, that his fees were estimated "in the range of $20,000.00 or more" and that his fee estimate was based on the original charge. Circumstances arose requiring that Smith's retainer be "increased by a significant amount" as the charges had been upgraded. In addition to the defence on the main charge, Smith represented Shane Ward in regards to bail-related issues.

(31) I find, as well, that Darryl Ward was aware of all of the facts and circumstances surrounding the charges against Shane Ward as he attended Court with Shane Ward and spoke to Smith at various times concerning these issues as the case progressed.

(32) While Shane Ward did receive an inheritance from his grandmother (Darryl Ward's mother) in the amount during his retainer of Smith, I find that it was not known to the parties at the time that Smith was retained at what point Shane Ward would be receiving this inheritance, and it did not therefore constitute part of the agreement between Smith and the Defendants.

(33) Also, although Darryl Ward testified that he was loaning the money to Shane Ward and there was an agreement between him and Shane Ward that Shane Ward would repay the money at some point and I accept that this is the case, Smith was not made aware of these arrangements.

(34) I am unable to conclude from all of the circumstances that there was an agreement between Darryl Ward and Smith that his liability would be limited to $20,000.00.

(35) The solicitor's obligation, however, goes even further. In Atlantic Nurseries Ltd. v. McInnes Cooper & Robertson, 1991 CarswellNS 360, The Honourable Justice Elizabeth Roscoe of the Nova Scotia Supreme Court (as she then was) held in regards to a quote or estimate provided by a lawyer, that the lawyer has an ongoing obligation to keep the client advised throughout the proceeding regarding the issue of how costs are proceeding in relation to the original estimate of fees provided to the client.

(36) Justice Roscoe held that the Court may exercise its discretion to tax the lawyer's account at some amount lower than the actual amount of fees and disbursements in the event that the client is not kept up to date should the actual costs of services exceed the original amount quoted.

(37) Although Smith kept Shane Ward informed of the increased fees necessitated by the upgrading of the charges and the additional services required, Darryl Ward was not provided with a revised estimate of fees or with copies of the accounts on an ongoing basis.

(38) In Boyne Clarke v. Steel, 2002 CarswellNS 650, Adjudicator Richardson of the Small Claims Court of Nova Scotia cited the case of Richard & MacDonald v. Shafie (1991) 104 N.S.R. (2d) 356 (Nova Scotia County Court) (a decision referred to and relied upon by Justice Roscoe in the Atlantic Nurseries case) as authority for the proposition that if there is a lack of specific discussion around revision of an original estimate quoted for legal fees, then this creates a "quantum meruit" situation.

(39) While there were no specific discussions with Daryl Ward about the scope of the increased retainer as a result of the upgrading of the charges and the extra services required by Smith, I find nevertheless that Darryl Ward was aware in a general way that the scope of the fees required was going to exceed what was originally quoted. In fact, he was advised in the February 15, 2007, letter that the retainer was to be increased "by a significant amount".

(40) This was also apparent from the nature and degree of the services rendered both prior to and after December 2007.

(41) From a review of the invoices, I conclude that substantial charges were incurred with respect to Court attendances in the summer and fall of 2008, including a Pre-Trial Conference on June 11, an adjournment on June 27, a preliminary hearing on September 18, a continuation of the preliminary hearing on September 19, September 24, and September 25, an adjournment on September 28, a show cause hearing on September 29, and an application to set down the charges for hearing on November 13, 2008. Each of these Court related matters required preparation time. This flurry of matters pertaining to Shane Ward's legal representation caused the remaining retainer to be expended in its entirety and significant additional charges to be incurred placing the account in a serious deficit position. I find that Darryl Ward was aware of these circumstances due to his personal involvement in the case.

(42) After the flurry of legal activity in the fall of 2008, one would expect if Daryl Ward had an expectation that his overall liability should be limited to $20,000.00, that he would have communicated this to Smith around that time, however, there is no record that this was done. One would also expect that he would have discharged Smith's services at some point, however, as indicated, additional services were incurred all the way up to June 2009 and Smith reasonably assumed that he remained retained by Daryl Ward on the same basis as before.

(43) While I accept that at some point Darryl Ward may have wanted to limit his personal liability for Shane Ward's legal fees, this fact was never communicated to Smith. Darryl Ward testified that he was upset when his father indicated that he wasn't going to pay the bills and stated that he wished that his father had told him that months ago. This is consistent with Smith's recollection of events, and I accept Smith's version and find that he has met the special onus imposed on him.

(44) Daryl Ward's actions are not consistent with his position in this case.

(45) While the lack of a written Retainer Agreement and the lack of discussion of the scope of the revised retainer permits an exercise of discretion, I can see no reason in this case therefore to exercise that discretion to reduce the account. Daryl Ward readily agreed that the account was reasonable. While Daryl Ward was not provided with a copy of the accounts on an ongoing basis and was not provided with a revised quote for fees, I find that he was fully aware of the fact that Smith was rendering the services to Shane Ward throughout the summer and fall of 2008 and even subsequent to that, that he was aware of the nature of the services being rendered, and that he had a very good idea of the amount of time being invested by Smith on behalf of Shane Ward. For all of these reasons, his attempts to limit his liability in this case should not succeed.

JURISDICTION TO DECIDE RESPONSIBILITY FOR THE ACCOUNT

(46) In MCR Holdings Ltd. v. Colchester Young Men's Christian Association, 1998 CarswellNS 481, Chipman J.A. of the Nova Scotia Court of Appeal held that the Taxing Officer in that case did not have jurisdiction to determine the person responsible to pay the taxed account.

(47) In Jovcic v. Garson, Knox & MacDonald, 2006 CarswellNS 406, Adjudicator Richardson of the Small Claims Court of Nova Scotia decided, however, based upon amendments to the Small Claims Court Act subsequent to the MCR Holdings Ltd. case that a Small Claims Court Adjudicator does in fact have jurisdiction to determine the "identity of the person liable to pay the amount so determined" and, further, that Section 9A(2) of the Act specifically provides that the monetary limits of the Court do not apply to cases of taxation of accounts heard by the Court.

(48) Adjudicator Richardson stated as follows in that case:

> *"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."*

COSTS

(49) In Gorin v. Flinn Merrick, 1994 CarswellNS 95, Justice Stewart of the Nova Scotia Supreme Court stated as follows at paragraph 26:

> *"26 I dismiss the appeal of the grounds raised and award no costs. In so doing, I would, however, reiterate the strong desirability of a written retainer between the lawyer and the client with specific reference to the case law set out in Lindsay v. Stewart, MacKeen & Covert, supra."*

(50) Similarly in this case, I exercise my discretion not to award costs against Darryl Ward.

SUMMARY

(51) In summary, Shane Ward and Darryl Ward are jointly liable to the Claimant, W. Brian Smith, for $21,123.52 and Shane Ward is solely responsible for the additional amount of $360.15 for costs of this action.

Dated at Dartmouth, Nova Scotia,
on November 6, 2009.

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Patrick L. Casey, Q.C., Adjudicator