Claim No: 332962

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
AND IN THE MATTER OF A TAXATION

Cite as: Brian Bailey and Associates v. D.M.C., 2010 NSSM 72

BETWEEN:

BRIAN BAILEY AND ASSOCIATES

Applicant (Solicitors)

- and -

D. M. C.

Respondent (Client)

TAXATION DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Dartmouth, Nova Scotia on September 7, 2010

Decision rendered on October 25, 2010

APPEARANCES

For the Applicant	Brian Bailey Solicitor
For the Respondent	self-represented

BY THE COURT:

[1] This is a taxation initiated by the solicitors to collect the balance of their account issued to the Respondent (hereafter referred to as "the Client"). The balance claimed to be owing is $5,636.88. The Client has already paid $10,000.00, and has counterclaimed for this money to be refunded.

[2] The Client required a lawyer to help with an urgent matter involving the Client's granddaughter's baby, who had been apprehended by the child welfare authorities. The source of the problem appeared to be a volatile relationship with the child's father, which had led to some police involvement and was thought to be placing the child at risk. The ultimate object of the legal exercise was to have mother and child reunited. Because the Client's granddaughter did not have the resources to retain her own lawyer, the Client stepped in with an offer to help.

[3] When initially approached by the Client, Mr. Bailey gave a ballpark estimate of between $8,000.00 and $10,000.00 and quoted an hourly rate of $350.00. He indicated that he required a $4,000.00 retainer. All of this was communicated to the Client in an email dated June 29, 2009. I believe it is fair to say that this estimate was given by Mr. Bailey with just a bare amount of information.

[4] The Client did not immediately retain Mr. Bailey. About a month later, the Client came in to Mr. Bailey's office for a meeting, and was presented with a Retainer Agreement to sign. The specific terms were that this was a time-based retainer and Mr. Bailey's hourly rate was now $400.00. He also now required a $5,000.00 retainer.

[5] There was nothing in the evidence to indicate that the Client questioned the fact that the terms on offer were different from the initial email. The agreement was signed and work commenced.

[6] The Client testified before me that she did not really read the retainer agreement and did not take note of the change in hourly rate. This she attributed to her state of mind at that time, being worried about her great-granddaughter and granddaughter. I can accept this as likely being true, but she must certainly have been aware of the fact that what had initially been a $4,000.00 retainer was now $5,000.00, and she could not reasonably have assumed that the terms of an email from weeks earlier was the true reflection of her agreement with Mr. Bailey. Any prudent person being presented with an agreement to sign would at least skim the agreement to see what it was they were agreeing to.

[7] In general terms, one is bound by what one signs whether one reads it or not. There are exceptions, but it is hard to see how any would apply here.

[8] As such, the retainer of the solicitor was in general terms to provide services at an hourly rate of $400.00. There was no estimate or upper limit written into the retainer.

[9] The court on a taxation has the discretion to determine whether a charge for legal services is reasonable. A charge may be unreasonable where more hours are spent than ought to have been necessary to achieve the result, or where the quality of the work is poor, the result is poor or the fees charged simply cannot be justified. There would also be a discretion to

reduce an account where the lawyer charged an hourly rate so out of the norm as to be unconscionable.

[10] The Client here raised several issues of a slightly different nature. She does not appear to question the hours billed *per se*, with one exception about which I will comment further below. The Client's core complaint is that Mr. Bailey failed to observe his part of the bargain by:

A. Not performing certain other services that he allegedly agreed to perform.

B. Failing to seek court costs from the authorities that had apprehended the child.

C. Failing to "get my family's files" from Community Services.

D. Failing to obtain general damages to compensate for the pain and suffering that she and her family had endured.

[11] She also complained that Mr. Bailey had not personally performed all of the work, having brought in one of his associates, Angela Walker, to attend in court when faced with a scheduling conflict.

[12] The Client articulated many of these grievances in a complaint to the Nova Scotia Barristers Society.

[13] The NSBS reviewed all of the Client's evidence and came to certain conclusions. While they are not binding on me, on my review of the available evidence there is nothing that I can find which would lead me to differ with the conclusions that the Society reached in its June 1, 2010 decision:

> "Based on the information we have before us, there is no reason to conclude that Mr. Bailey has breached any of the duties set out in the code of conduct for lawyers in Nova Scotia: Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia.
>
> You have provided no evidence to support your submission that you requested that Mr. Bailey pursue civil action against the Department of Community Services, to seek the return of your file from Children and Family Services or to seek costs at [the granddaughter's] placement hearing. In addition, there is no evidence to suggest Mr. Bailey accepted any additional retainer from you. The retainer agreement provided in support of Mr. Bailey's position clearly states that he was retained by you to represent [the granddaughter] in relation to the Children and Family Services matter only. With respect to the issue of costs, you have provided no evidence to support your position that you or [the granddaughter] instructed Mr. Bailey or Ms. Walker to seek such an award from the Court. The Society finds Mr. Bailey's response to this allegation probable and consistent with the consensual outcome of the placement hearing.
>
> Furthermore, Mr. Bailey's letter to you dated September 7, 2009, supports his position that you and [the granddaughter] agreed to have Ms. Walker attend court on his behalf. There is no evidence to suggest the firm acted inappropriately by proceeding in this fashion."

[14] In short, I conclude that Mr. Bailey was retained, in writing, for a specific task which was to use the court process to attempt to reunite mother and child at the earliest possible date. Mr. Bailey used his professional judgment and chose to represent the granddaughter directly, rather than to act for the Client in an intervenor capacity (as she had originally proposed). I find that Mr. Bailey or those working under him performed the necessary work, including preparation of the affidavits. I find the Client's contention that she drafted her own affidavit to be without any credibility, though I do not doubt that she supplied the raw material necessary. The affidavits used for the court proceeding are professionally drafted, and Mr. Bailey produced

copies of the handwritten statements from the Client that were drawn from and greatly expanded upon. This is normal practice.

[15] As such, I cannot give any credit to the Client's contention that Mr. Bailey or Ms. Walker charged excess hours for preparation of affidavits.

[16] As for the alleged failure to conduct other proceedings, while there may have been mention of other proceedings to be taken down the road, I find that there was no undertaking by Mr. Bailey to pursue such things, and furthermore that they were not part of the retainer for services which is the subject of this proceeding.

[17] The result achieved by Mr. Bailey and Ms. Walker was ideal, in the sense that the Department of Child and Family Services chose to return the child to its mother without the matter going to a hearing. Precious time was saved. As is often the case, however, most of the work had already been done by the lawyers.

[18] The result achieved is always a consideration in assessing the value of work. Sometimes lawyers will look for a premium for a particularly good result. That is not the case here. Mr. Bailey is only looking to recover the time spent.

[19] My assessment on the evidence is that the task required more effort than originally estimated by Mr. Bailey. It is hard to fault a lawyer for putting in all of the effort required, and for not shortchanging the effort in order to stick within an arbitrary budget. Where a firm estimate has been given, many

lawyers will simply absorb the extra time without charging for it. But there is no obligation to do so, particularly where there is no binding estimate.

[20] I appreciate the Client's situation and accept that this represents a lot of money to her. Most ordinary people cannot afford litigation, and even more so cannot afford to pay at the rates charged by experienced, senior lawyers. However, it is precisely such lawyers that people often look to when they are in difficult circumstances.

[21] While Mr. Bailey has to shoulder some responsibility for having issued too optimistic an estimate in the early communication, I cannot say that he was legally bound by such estimate. There is a very clear legal distinction between an estimate and a fixed quote. I cannot ignore the plain language and clear terms of the retainer agreement.

[22] In the result, the solicitors are entitled to the balance of their account and the Client's defence and counterclaim has no merit.

[23] The account is taxed at $15,636.88, with the balance outstanding of $5,636.88 confirmed.

Eric K. Slone, Adjudicator