CLAIM NO. 202776
DATE: 20030909

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Zollinger v. Leahey, 2003 NSSM 2

BETWEEN:

Name	M.A. Zollinger	Applicant
Name	W.M. Leahey	Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 3, 2007. This decision replaces the previously distributed decision.

D E C I S I O N

Appearances:

M.A. Zollinger and Mel Price, on behalf of the Client;
William M. Leahey, solicitor, on his own behalf.

Preliminary Matters

1. This taxation of three accounts of Mr Leahey rendered to Ms Zollinger came on before me on the evening of September 2nd, 2003. It was not completed by 11 p.m., and was accordingly adjourned to September 4th, at which time it consumed more than four hours.

2. I heard the evidence of the client, Ms Zollinger, who was sworn. Her friend, Mel Price, also sworn, gave some evidence, since he had had some contact with Mr Leahey. Mr Leahey gave extensive evidence himself. I also heard lengthy submissions from both Ms Zollinger and Mr Leahey throughout the two hearings.

3. The taxation concerns three accounts rendered by the solicitor to Ms Zollinger , as follows:
   a. 2 January 2003 . . . . . $1,837.13

b. 29 January 2003 . . . . . $1,792.86

c. 3 March 2003 . . . . . $1,837.13

4. The accounts were inclusive of fees, disbursements and HST, and total $5,467.12. So far as I can tell from the solicitor's ledger account, the total fees (exclusive of taxes and disbursements) for the period in question were $4,747.50: Ex D2.

5. On June 10, 2003 the client provided the solicitor with a memo containing her detailed analysis of his three accounts, based on his ledger (Ex D2). The analysis was Ex C1 at the taxation. It contained her comments as to what charges she would accept (and why); what charges she disputed outright (and why); and what charges she would accept but at a lesser rate (and why).

6. At the end, by her calculations, she determined that she only owed the solicitor $3,233.22 (inclusive of HST). She had already provided him with retainers totalling $2,700. She paid him an additional $533.22 to bring the account up to $3,233.22.

7. The solicitor did not at any time respond to this analysis. The client accordingly filed her Notice of Taxation on June 20, 2003.

Preliminary Observations

8. I must say at the outset of these reasons that as the taxation progressed it became apparent to me that the solicitor was both unprepared for the taxation and disorganized in his presentation. The solicitor was surprised to see the client (who lives in Switzerland). He said several times that he had not expected to see her there, and his surprise may explain in part his lack of preparation and organization during both taxations.

9. However, the extent of that lack of preparation and disorganization (which is detailed below) was so great that it leant support in my mind to many of the client's complaints about the way in which a relatively simply matter had been handled over a relatively short period of time.

10. For example, the client's objections totalled no more than roughly twenty items out of a total of roughly 56 ledger entries. The objections had been spelled out to the solicitor in clear and careful detail memo from her on June 10, 2003: Ex C1. Yet notwithstanding the relatively small amounts in issue, and the small number of disputed items, the taxation stretched over two days and roughly 8 hours.

11. In the end, I was lead to the conclusion that notwithstanding that the client had been prepared to accept and pay for an account of $3,233.22, that amount was in fact not a “reasonable” amount to charge in the circumstances. For reasons set out below, I certify the total fees at $2,500 plus HST, which requires a repayment of the client by the solicitor.

The Retainer

12. The client’s retainer of the solicitor arose out an interest in land at Kelly’s Point, near Prospect Bay in Nova Scotia, which the client said she had acquired in the early 1980s. It appears that there was a written agreement of some kind which created the interest, and which had been registered on title. However, there had been a subsequent quieting of titles application which may or may not have extinguished her interest.

13. The client and her friend Mr Price had had some contact with the solicitor over the years. In 2001 they had some preliminary discussions with him about the client’s interest in the land; and in particular, whether it still existed; and, if not, whether she had a cause of action against anyone as a result of any such extinction.

14. On December 2, 2002 the client retained the solicitor to investigate the issues; and then send a demand letter to the people whose conduct may have damaged or extinguished whatever right she had in the land: see memo re telecon dated December 2, 2002, part of Ex C13. The solicitor told Ms Zollinger that he “will write [a demand] letter to” the lawyer acting for the people against whom Ms Zollinger believed she had a cause of action. He also told her that the projected legal costs for this work would be roughly $2,500 to $3,000, but that a trial would cost between $25,000 and $30,000: *ibid*. Ms Zollinger agreed to send the solicitor $1,200 against his expected costs: *ibid*; and see Ex D3.

15. The solicitor then proceeded with his retainer. Unfortunately, problems in the solicitor and client relationship began to develop almost immediately. The sources of these problems were various, and included the following:

    a. the difference between the Swiss legal practice (with which Ms Zollinger was familiar) and that of Canada;

    b. basic technical incompatibilities between Ms Zollinger’s European email and fax systems, and those of the Canadian solicitor;

c. a feeling on Ms Zollinger 's part that the solicitor was either not doing what he said he would do; or was not following instructions; or both; and

d. a concern that much of correspondence from him to her consisted of repetitious "regurgitations" (to use her word) of what the law was; what options existed; why things were or were not progressing properly; and so on; that is, a concern that she was being charged not for what the solicitor was actually doing, but for his explanations of why it hadn't been done.

16. Not surprisingly, the relationship between them appears to have soured between them within weeks of the formal retainer. Indeed, the solicitor's position at the taxation was that by Feb 13, 2002 his client's questioning of his conduct of the matter "had a fatal impact on the solicitor and client relationship."

17. I pause here to note that the solicitor's statement is important. It supports the client's complaint that much of the work for which she was being billed by mid to late February 2003 was not performed with the view of advancing the client's interests (i.e. was not legal work as such), but were rather attempts to justify what had happened (or as often not happened) to date.

18. It also calls into question the reasonableness of charging the client for work done after that time, at least where some part of that work appears to be taken up with attempts to justify or explain the solicitor's conduct. Defence of a client's interests may be charged to a client if reasonable; defence of a lawyer's interests is not generally so billable.

The Issues

19. The issues raised by the parties on the taxation were these:

a. whether it was "reasonable" in the circumstances to charge the client for time spent by the solicitor trying to resolve problems with the technical compatibilities of their respective email and fax systems;

b. whether it was "reasonable" to charge the client for time spent responding to communications from the client inquiring as to why things promised to be done had not been done;

c. whether the solicitor could support the reasonableness of his accounts through reference to correspondence, or work and services, or

disbursements, that had been performed or incurred but for which he had not docketed, or had not charged, in his original three accounts;

d. whether certain bank charges should be borne by the client or the solicitor; and, in general,

e. Whether the solicitor's accounts were "reasonable."

20. By way of summary, I indicate here that while I agree in principle with some of the solicitor's submissions on some of these issues, I find that in general the accounts as rendered were not reasonable; and that what the client had already paid was in fact more than was reasonable compensation for what was actually done by the solicitor.

A and B: Time Spent Resolving Technical Incompatibilities

21. In my view the law is reasonably clear that overhead is not normally an item that can be charged as a separate item on a solicitor's account: Orkin, *The Law of Costs* (Toronto, 2nd ed., 2000), para.311.12. While it may be a factor in setting the lawyer's hourly rate, it is not something that can be charged separately.

22. Information technology ("IT") is, in my view, part of normal office overhead, and as such should not be charged to the client. Mr Leahey himself conceded that in ordinary course one would not expect to bill a client for problems caused by a law firm's IT problems. However, he submitted that he should be able to charge for his time in dealing with problems associated with Ms Zollinger's system (and in particular the European division of AOL) because they represented an extraordinary expense not normally encountered by a solicitor in North America; and because Ms Zollinger had demanded immediate response to her emails.

23. Ms Zollinger's position was that she used such systems extensively in her own work in Europe and Africa; and that she "rarely" had the difficulties in internet and fax communication that she had experienced with the solicitor. As a result, she tended at the taxation to be dismissive of the problems, suggesting that it was a function of lack of competence rather than technical incompatibilities in the two systems.

24. In my view, based on the evidence of both parties, Ms Zollinger was too quick in her dismissal of these problems. She herself acknowledged that problems of this sort

did crop up in her own work. I also accept the solicitor's evidence that AOL in Europe employs various types of firewalls and anti-virus programs that make difficult communication (and in particular email attachments) between AOL and non-AOL customers.

25. Looking at the course of the communications, it does seem to me that some part of the correspondence from Ms Zollinger represented a lack of appreciation for the interconnect problems between Europe and North American internet and email systems.

26. Both parties looked a little askance when I asked why, once the technical problems became evident, they did not simply use the regular mail Ms Zollinger stated that her work was such that she relied on email and faxes to keep her up to date because she travelled a lot.

27. In such a case, when a client requires a lawyer to adopt a particular communication strategy, he or she cannot expect the lawyer to shoulder the entire cost of dealing with problems associated with that particular system, particularly where, as here, it is an open question as to whose system (Ms Zollinger 's European system or the solicitor's NA system) was to blame (if indeed it is possible to allocate blame).

28. For example, if, as in this case, a client instructs a lawyer to email attachments, which the lawyer does; but the client's email system then refused to accept the attachment; then the client's repeated requests for that attachment by email (which perforce necessitate someone's dealing with the technical issues) create a cost that would not ordinarily be there.

29. By the same token, however, a lawyer who uses electronic systems and email (as the solicitor here prides himself on) must then take steps to ensure his electronic email boxes are cleared out, so they do not (as was the case on occasion here) become so full as to cause rejections of new email.

30. In this case, while I do not think it reasonable to put the entire burden of these costs associated with the use of technology on the client, I also do not think it is appropriate to put the entire burden on the lawyer. Accordingly, were it not for what transpired during the rest of the taxation, and, as a consequence, my overall assessment of the reasonableness of the solicitor's fees, I would have split the costs associated with technical communication difficulties 50/50 between them.

C: Looking at Time Not Charged

31. At the conclusion of the taxation the solicitor introduced several lists of work performed by him or his staff, and disbursements, which he had not charged to the file. This extra time and these disbursements amounted to almost an additional $2,000 over and above what he had already charged. He introduced this information not to charge for them; but to support his argument that his actual accounts that were more than reasonable, since they in fact represented something of a discount.

32. I cannot accept this submission in the circumstances of this case.

33. First, as a general rule, it strikes me that the failure to record time, at least in a file based on time charges (as opposed to a contingency file), can be taken as some indication that the billing lawyer did not at the time think it was reasonable to bill for the work in question.

34. This point is supported in this case by the fact that almost all of the additional unrecorded charges are those of staff or of the solicitor dealing with technical problems. Such time (particularly staff time) is generally considered to be overhead, which is not in normal course recoverable in a solicitor's account.

35. Second, and more importantly, the test on a taxation is whether the fee charged is "reasonable." Whether one looks at all the time spent on a file, or only at the time actually billed on the file, one is left with the same question: is what was actually charged reasonable in all the circumstances. If the amount, standing on its own, is unreasonable, then it does not become reasonable because the lawyer actually spent more time than was recorded doing the work. To accept such reasoning would be to reward the less efficient at the expense of the more efficient.

D: Credit Certain Bank Charges

36. In January 2002 Ms Zollinger sent a retainer of $1,200 by electronic bank draft to the solicitor.

37. The solicitor's bank levied a transaction charge on the electronic transfer of $30.00, which meant that only $1,170.00 was credited to the solicitor's account. A dispute then arose between Ms Zollinger and the solicitor as to whether he should credit her account with $1,200 (the amount she sent him in Europe) or $1,170 (the amount that actually ended up in his account).

38. Ms Zollinger takes the position that she should be credited with $1,200, because that is what she sent. When asked why she did not send a cheque, she stated that that was the way it was done in Europe. The solicitor took the position that he should have to credit her only $1,170, because that is what he received.

39. As a general rule, a creditor is entitled to receive what is owed to him without deduction for costs associated with getting the funds to him.

40. The case would be different if the creditor required the debtor to employ a particular method of payment which carried a surcharge. Then, subject to an agreement to the contrary, the charge must be born by the creditor.

41. Here, however, in this case it was the debtor client who decided to employ the method that she did. While she is entitled to choose whatever system of payment she wishes, she is not entitled to force the cost of that choice on the solicitor.

42. Accordingly, in determining what the client has already paid the solicitor I am going to credit her for only $1,170.

E: Reasonableness of the Account That Was Rendered

43. A solicitor is entitled only to his or her “reasonable” fees, and what is reasonable depends on various factors, many of which are listed in CPR 63.16(1); and see *Lindsay v. Stewart, MacKeen & Covert* [1988] NSJ No. 9 (CA); and *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD) at paras.23-24.

44. Having heard from both the client and the solicitor, and upon reviewing the various exhibits filed, I am satisfied that the essence of the solicitor’s retainer was to:

    a. investigate the state of title to the land to which his client claimed an interest;

    b. provide the client with a preliminary opinion as to the strength of her claim; and

    c. send a demand letter to the owners or former owners of the property to assert that interest and seek a remedy.

45. It is also clear that the solicitor was not given *carte blanche* to proceed to litigation; or to proceed after he had received a response to his demand letter; without further instruction from his client. It is also clear from the evidence and the documents that

by the time the solicitor sent the demand, and certainly thereafter, more of his time with his client was spent justifying his actions (or, as she put it, his inaction) and critiquing her instructions, than in advancing her claim.

46. In my opinion, the legal work that was accomplished could reasonably be expected to include such things as:

a. preliminary discussions and interviews with the client of a fairly lengthy nature to obtain the background context to the case;

b. preliminary opinions as to the options for proceeding;

c. in this case, some investigation of court files to look at old registered documents and court proceedings (such as the quieting of title applications); and

d. the actual demand letter.

47. All of these were done by the solicitor, and in my opinion, given the nature of the issues and the work needed to be done, such work should not have taken more than 10 hours of the lawyer's time, which, at the hourly rate of $225, would have resulted in an account of $2,250. I am prepared to allow some extra time, to allow for some necessary work of paralegals, and because of the importance of the matter to the client, and the technical problems noted above, and for that reason I assess the reasonable fees for what was actually accomplished at $2,500 plus HST.

48. I reach this conclusion based on my assessment of what was required to be done; what was in fact done; and a review of the various email and faxes between the client and the solicitor. My conclusion was strengthened in my view by what actually transpired at the taxation.

49. The taxation, which essentially concerned approximately 20 time entries, took the better part of 8 hours over two days. In my opinion the extraordinary amount of time taken to tax these accounts was caused primarily by the solicitor's lack of preparation; lack of apparent knowledge of his file; disorganization (both in presentation and in his file materials); and, most importantly, by a tendency to focus on issues that were extraneous to the issues before me.

50. The solicitor repeatedly sought to introduce evidence concerning events, communications and correspondence that either predated the charges set out in his

various invoices; or which, while they took place during the relevant time period, were not recorded in his dockets; or which had been accepted by his client.

51. I permitted the solicitor some latitude in this evidence. However, most if not all of this evidence was in my mind not relevant to the issues before me. For example, at one point the solicitor objected that I was not permitting him to "disprove" Ms Zollinger 's statement that she had always paid her retainers "on time." He stated that these documents would prove that she had not sent the retainers "on time." However, since it was not disputed that she had in fact sent retainers (for which credit had been given) I failed to see how any such delays (even assuming they had taken place) were relevant.

52. On another occasion, he sought to read "into the record" a "new" document he said was important to "prove his case" that his client had refused to give him appropriate instructions. As he read it in it became apparent that the correspondence in question had already been discussed and entered into evidence minutes before.

53. My review of the file indicates that these same problems were evident in the solicitor's file and work for which he had billed his client. For example, the account of March 3, 2003 contains several entries for February 11, 2003. Two of them are as follows:

    a. voice mail to Mr McGavney (docketed at .1 of the solicitor's time); and

    b. lengthy teleconference with Mr McGavney (docketed at .6 of the solicitor's time).

54. The client challenged these entries, and in particular the second, because her information was that Mr McGavney was away on vacation on February 11th.

55. The solicitor's initial position was that he would not have made the entry that he did had the conversation not taken place on February 11th. He stated that he "would not have recorded a call on February 11th if it did not take place on that date." He suggested that an explanation for the second entry might be found in the possibility that Mr McGavney, though on vacation, may have checked his voice mail message and then called the solicitor on that day. The solicitor accordingly insisted that the conversation had to have taken place on Feb 11th.

56. Ms Zollinger then drew the solicitor's attention to an email from the solicitor to her dated Feb 17th, 2003, in which the solicitor said that "I have not heard on any call back from Mr McGaveney." The solicitor at that point conceded "then my entry is not correct."

57. To take another example, Ms Zollinger questioned two entries, both for drafting lengthy emails, dated Feb 24th and Feb 25th. She agreed that she had received an email on Feb 25 that appears to have been sent Feb 24th, but questioned the second entry, because she had not received a separate and distinct email. The solicitor's position was that if his records showed two drafts, then two separate and different drafts were done. He did not accept the suggestion that Feb 25th was a continuation of the Feb 24th draft. However, when asked to produce the second, different email of Feb 25th he was unable to do so. After taking considerable time to sort through his various files, he finally stated that his computer, on which all his email and correspondence was contained, had been corrupted and was not accessible at this time. He was not, in other words, able to produce the second email that he said had been sent on Feb 25th.

58. The final example concerns the entry for Feb 11th (entry 114912). The solicitor recorded this conversation as a .8 teleconference, while the client in her own records had recorded it as taking only 12 (or .2) minutes. The solicitor's initial position was that the conference was taken up with Ms Zollinger trying to get him to agree to interview two potential witnesses. The solicitor suggested that Ms Zollinger, who had some legal training of some sort (alluded to but not explored at the taxation), was telling him to do things that in his opinion as a solicitor should not be done. He explained that he told her that it would not be right for him to call these witnesses because:

    a. he did not have the necessary documents on which to question them; and

    b. he might by speaking to them become a potential witness.

59. Ms Zollinger rejected this account. She stated that the solicitor was the one who had initially suggested some time before this conversation that he would speak to the witnesses; and that on Feb 11th she had merely questioned him as to why this had not been done by this time.

60. The solicitor, having heard this evidence (evidence which in fact was supported by a review of some of his earlier email correspondence), then altered his position. He conceded that he had in fact told Ms Zollinger that his interviewing the witnesses was an option; but that by Feb 11th he had changed his mind as to the advisability of this course of action.

61. These examples strengthened my conclusion that much of the time recorded by the solicitor was caused by:

a. his disorganization;

b. the need to explain why he had not done things he had said he would do;

c. his tendency to explore matters that were irrelevant to the matters in issue; and

d. his tendency to repeat information.

62. This is not time that can reasonably be charged to the client: see, for example, CPR 63.33(1); and *Roebuck, Garbig v. Albert* (1992) 33 ACWS (2nd) 1021; and *Tannous v. Halifax (City)* NSJ No. 422 at para.22. For that reason I concluded that what was actually accomplished by the solicitor did not in this case reasonably cost more than $2,500 plus HST (leaving disbursements to one side).

63. The fact that the client had paid more than this amount is not a bar to any overpayment being recovered: *Lindsay v. Stewart, MacKeen & Covert*, *supra*, per Jones, JA at p.6. As well, as has been noted elsewhere before, docketed time is not in and of itself conclusive proof of reasonableness; and it would be an error for me to accept such time merely because the client had accepted it without also considering whether or not it was in fact reasonable in all of the circumstances of the case: see, for e.g., *Re Solicitor* [1973] 1 OR 107 (CA); *Keel Cottrelle v. Stoneburgh* (1997) 75 ACWS (3d) 555 (Ont Ct(GD)). Nor is the fact that she had been prepared to accept what she had paid as a reasonable assessment of the lawyer's account: the court, not the client, is ultimately responsible for that assessment, and cannot be bound by a client's agreement to the contrary: see CPR 63.16(2).

Additional Documents

64. At the conclusion of the second hearing shortly after 5:00 pm the solicitor asked for the opportunity to provide additional documentation (or the missing documents that he had not been able to locate at the hearing) after the hearing was over. Ms Zollinger objected, on the grounds that:

a. the solicitor had had ample notice of her concerns as set out in the June 10, 2003 memo and yet had done nothing to reply to them;

b. he had appeared at the Tuesday hearing and knew that she was present and prepared to contest the matter, and that she had to return to Switzerland Thursday evening, and so had had ample time to prepare and assemble

whatever documents he needed to advance his case; and

c. she was returning to Switzerland, and would not have a chance to respond.

65. I accepted Ms Zollinger ’s submissions, agreeing as I did with Ms Zollinger ’s submissions. Taxations cannot be prolonged indefinitely; clients are entitled to know what they are being charged for and to be provided with that information on a timely basis.

Conclusion

66. Accordingly, for all of the above reasons, I tax and certify the solicitor’s account as follows:

a. $2,500 fees

b. $375 HST;

c. $14.96 disbursements and HST thereon;

d. $2,889.96 total

67. From this must be deducted the four payments of the client of $1,170 (arrived at as detailed above), $667.13, $812.87 and $533.22. These total $3,183.22.

68. This calculation results in an overpayment of $293.26, which I order the solicitor to repay to the client Ms Zollinger.

Dated at Halifax, Nova Scotia this 9th day of September 2003

ADJUDICATOR
W. Augustus Richardson

Original Court File
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