IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Wickwire Holm v. Moore*, 2014 NSSM 48

Claim: SCCH 425483
Registry: Halifax

Between:

Wickwire Holm

Applicant

v.

Donal Moore

Respondent

Adjudicator: Augustus Richardson, QC

Heard: June 3, 2014

Appearances: Selina Bath, for the Applicant
James Boudreau, QC

Donal Moore, Respondent

Decision: October 16, 2014

By the Court:

[1] This is a taxation, or assessment, of legal accounts rendered by the Applicant Wickwire Holm (the "Firm") to the Respondent Donal Moore ("Mr Moore"). Mr James P. Boudreau ("Mr Boudreau"), a partner with the Firm, supplied–or supervised the provision of–the legal services for which the accounts were rendered.

[2] Three accounts are in issue:

a. June 5, 2012. . . . . $8,685.81

b. September 30, 2012. . . . . $20,636.27

c. May 6, 2013. . . . . $26,924.51

d. Total. $56,246.59

[3] The first account was in fact paid in full. Mr Moore made a partial payment of $1,314.19 in respect of the second, and paid nothing with respect to the third. The resulting balance outstanding as of February 28, 2014 was $46,246.59. The Firm also claims interest on the outstanding amounts under the second and third accounts of $9,021.91 as of March 6, 2014, together with interest from that date to the date of payment or the issuance of the Certificate of Taxation at 18% per annum ($27.26 per diem).

[4] The matter came on before me on June 3, 2014. I heard the evidence of Mr Boudreau and of Mr Moore. I also heard the submissions of counsel for the Firm, and of Mr Moore. A large volume of documents–mostly emails–was filed by Mr Moore.

Background

[5] Mr Moore divorced his wife in Germany. The divorce proceedings in Germany were apparently acrimonious and bitter. They were carried over seven years. They resulted in a German consent judgment against Mrs Moore in favour of Mr Moore for approximately $453,000.00 CDN. It was not clear when exactly the judgment was obtained.

[6] By the time Mr Moore obtained the judgment in Germany his now ex-wife was living in Nova Scotia. She had some property registered in her name. The value of the property was apparently sufficient to satisfy Mr Moore's judgment. He came to Nova Scotia to enforce his judgment against her.

[7] He first retained another law firm (which I shall refer to as "the AB Firm"). It appears that the AB Firm did not follow the appropriate procedures necessary to register a foreign

judgment–and hence to levy execution on Mr Moore's ex-wife's property–under the law of Nova Scotia. As a result of this apparent negligence on the part of the AB Firm–and the resulting delay–Mr Moore lost his chance to execute against his ex-wife's property prior to its sale by her.

[8] Mr Moore then came to the Firm and retained Mr Boudreau. This was in March 2012. He was still looking to enforce his judgment against his ex-wife. He retained the Firm–and in particular Mr Boudreau–to commence proceedings to enforce the German judgment under the reciprocal enforcement of judgments legislation.

[9] Mr Boudreau does not and has not practiced family law. He advised Mr Moore that he was not interested in pursuing vindictive litigation simply to punish Mr Moore's ex-wife. He preferred a dispassionate, logical approach to the issues before him.

[10] Mr Boudreau provided Mr Moore with a retainer letter dated March 14, 2012. Of note are the following items:

a. the Firm was retained "to represent your legal interests with respect to, primarily, the appeal of an order by Justice K. Coady of 2011, making your divorce settlement in Germany, an order of the Supreme Court of Nova Scotia;"

b. time was recorded in tenths of an hour, with the minimum time entry being .2 of an hour;

c. the amount of time recorded "is used as a guideline in determining the final fee, along with the factors set out earlier in this letter;"

d. the final fee "is determined in consultation with other lawyers in the Firm;"

e. Mr Boudreau's regular rate was $375.00 an hour, which rate could change over time;

f. where appropriate, other lawyers or paralegals would work on the file which would ensure "the right person for each aspect of the task at hand" as well as "keep[ing] costs down for you;" Mr Boudreau would supervise such work;

g. photocopying was charged at .25 cents a page; local faxing at .75 cents a page; long distance faxing at $1.50 a page;

h. a $5,000.00 retainer was required, which would require replenishment each time it was depleted to $1,500.00;

i. bills would be rendered monthly (or in any event whenever time or disbursements were more than $50.00); and

j. interest on overdue accounts was charged; at that date the rate was 1.5% per month.

[11] With respect to estimates of fees and disbursements, the letter stated as follows:

> "We are happy to provide estimates on request at any time, but the nature of the practice of law does not permit us to give definite figures for fees or disbursements until final completion of the matter in hand. Consequently, it is important to understand that any estimate given is not a quotation, nor does it constitute a statement of what the minimum or maximum fees or disbursements will be."

[12] Mr Moore received a copy of the retainer letter. In an email dated March 15th, 2012 he commented on the retainer letter. In particular he asked that time be recorded and billed to the tenth of an hour, rather than to the twentieth. He wanted detailed listings of the charges. With regard to an estimate, he noted as follows:

> "I am a person with very little money and I will do my utmost to prepare background information so that you or your associates will have only to convert the factual information provided into an appropriate legal format required in Nova Scotia. The fees necessary to register the divorce settlement from Germany as an order of the Supreme Court of Nova Scotia to be in a range of $3,000.00 to $7,000.00 Canadian dollars maximum."

[13] He also wanted to initiate a discussion about moving from an hourly fee to a contingency once "we both have reviewed the choices available and the likely work ahead."

[14] When Mr Moore retained Mr Boudreau there was a motion for reciprocal enforcement pending in the Nova Scotia Supreme Court. The motion, scheduled for March 21st, had been launched by the AB Firm, but, as already noted, by March 2012 Mr Moore's ex-wife had sold her property. In his email of March 15th Mr Moore asked that the motion be adjourned "to provide necessary time for you and I to review the case file and formulate a practical strategy and step outline."

[15] Mr Moore's ex-wife was represented by Mr Douglas Tupper, QC of McInnes Cooper. She had apparently provided him with some funds out of the sale of her property with instructions to negotiate a settlement with Mr Moore. Mr Tupper had approached Mr Boudreau about this time to initiate settlement discussions. The offer was apparently for $200,000.00.

[16] Mr Boudreau did not think the offer was adequate. However, he was uncertain as to how firm the figure was. But even if that was all that had been set aside by Mr Moore's ex-wife to secure a settlement, Mr Boudreau also had the potential claim against the AB Firm for its negligence in failing to get the German judgment registered prior to the sale of Mr Moore's ex-wife's property. In his opinion the claim against the AB Firm could address any shortfall by reason of a settlement with Mr Moore's ex-wife.

[17] Mr Boudreau came to the conclusion that the best approach was to deal with both "claims"–the settlement negotiations with Mr Tupper, and those with LIANS, the insurer of the AB Firm–"in lockstep." The difficulty with that approach as it developed was that he was to some extent also whipsawed between the two of them. The solicitor acting for LIANS pressed him (or rather Mr Moore, who handled much of the negotiation with LIANS himself) to secure as much as he could from Mr Moore's ex-wife in mitigation of the claim against the AB Firm. Mr Moore then pressed Mr Boudreau to press Mr Tupper to produce evidence to substantiate that Mr Moore's ex-wife had no assets–and no ability to pay–beyond the proceeds she had set aside from the sale of her property.

[18] Mr Boudreau also had to deal with Mr Moore. From my review of the documentation it is clear that from the start Mr Moore was still operating in full matrimonial-litigation mode. In an email dated March 19th he provided a detailed list of conditions for settlement, including the statement that he would "only agree to a settlement which ... [his ex-wife] pays in full the $451,945.00 plus interest." That condition was repeated in an email dated April 23rd, 2012, and again on June 4th. As of June 14th his ex-wife's offer of $200,000.00 was still on the table. He

also sent Mr Boudreau detailed email correspondence requiring him to take certain steps; review certain (and apparently voluminous) documents; and explain many things. There is a sense, at least in the beginning, that Mr Moore was still litigating his divorce and the proceedings leading up to it.

[19] It is clear from the documentation filed by Mr Moore that relations between him and Mr Boudreau became less than harmonious. Mr Moore had not paid his second account of September 30th (and indeed had indicated as early as May 25th that his "financial resources are exhausted"). The year dragged on. LIANS's solicitor continued to press Mr Moore to establish his ex-wife's impecuniosity beyond the $200,000.00. At some point that winter she apparently threatened to instruct Mr Tupper to start deducting his fees from the monies he was holding against the possibility of settlement: see, for e.g., email dated February 25, 2013 from Mr Boudreau to Mr Moore. Mr Moore continued to remonstrate with Mr Boudreau over what should or should not be done, and why. Mr Moore continued his discussions with the solicitor for LIANS, and then asked Mr Boudreau to take steps based on those discussions.

[20] By March 2013 the relationship between Mr Boudreau and Mr Moore had deteriorated so badly that it was severed by the former on March 6th, 2013: see email exchange dated March 6th, 2013. Even that was not enough to end the relationship, since Mr Moore continued to send long emails to Mr Boudreau into May 2013.

[21] Mr Moore continued his negotiations with the solicitor for LIANS. At some point he reached a settlement which according to him totalled approximately $290,000.00, comprised of

a. $55,000 from LIANS, and

b. $237,000.00 from his ex-wife through Mr Tupper.

Analysis and Decision

[22] The nub of Mr Moore's complaint is that, he says, Mr Boudreau never gave him a detailed plan of action; never followed his own instructions; and in essence did little of value. The Firm's accounts are accordingly not "reasonable" and so should be seriously discounted.

[23] I must say that in ordinary course I would have had some question about a total legal bill in the range of $56,000.00 in respect of services that consisted mostly of negotiation over the course of one year that resulted in an overall settlement of $290,000.00, especially given that some of those negotiations were conducted by the client himself. However, having reviewed the email correspondence between them–at least that part of it that was put into evidence by Mr Moore–I was not satisfied that he had established most of his complaint. A course of action was mapped out by Mr Boudreau; it was clear; and it was simple: obtain as much as possible from Mr Moore's ex-wife and from the insurer of the AB Firm. That is the approach Mr Boudreau attempted to follow. However, Mr Moore's email correspondence reveals insistent and repeated demands that Mr Boudreau pursue an aggressive and litigious approach; that he leave no stone unturned; and that he not accept without detailed proof his ex-wife's position that she lacked funds or the ability to pay more than she had offered to pay. While part of this pressure was no doubt the result of the position taken by the solicitor for LIANS, it also was clearly coloured by the deep-seated animosity Mr Moore bore towards his ex-wife. It is not surprising then that so much time should have been spent by Mr Boudreau and the Firm on Mr Moore's account. Much of the time on the file was the result of Mr Moore's demands that certain actions be taken; or that detailed explanations be given (and given again).

[24] There was some double-docketing (in the sense that both Mr Boudreau and associates or articling clerks might record time spent meeting with each other). There was also the issue of Mr Boudreau's use (though not frequent) of a minimum entry of .2, which Mr Moore had not agreed to. But in general I have no doubt that most of the time recorded by Mr Boudreau and the associates or articled clerks that appear (though not too frequently) on the accounts was incurred; and that much of it was incurred in direct response to Mr Moore's correspondence, requests and instructions.

[25] I do note however that the Firm did not follow the practice it outlined in its retainer letter. In particular, it did not provide monthly accounts. It is not surprising that it did so, given the early protestations of Mr Moore that his financial situation was dire. For the Firm to issue accounts would be for it to incur the liability to pay HST and, in the event of Mr Moore's failure to pay such accounts, to carry that HST until it recovered payment from Mr Moore or wrote off the account as a bad debt. Nevertheless, it is contrary to what the Firm said it would do.

[26] There are two difficulties with the Firm's failure, however understandable, to follow the billing practice that it said it would follow.

[27] First, Mr Moore was clearly a difficult and demanding client. Had monthly accounts been rendered he would have had to face up more quickly to the fact that his constant meddling with the file would generate substantial cost to him. The Firm for its part would–in the event that Mr Moore continued to be in arrears–come to an earlier realization that it could not carry on with the file. It could have ceased its retainer and hence cut off the accrual of time before it became too high. Alternatively, the existence of such outstanding accounts could have enabled the Firm to take Mr Moore more firmly in hand, and secure from him the agreement to let Mr Boudreau handle the file without constant supervision from Mr Moore–at least, if he wished to continue being represented.

[28] Second, the Firm's failure to provide monthly accounts compounded the problem caused by its initial failure to provide Mr Moore with an estimate of expected legal fees in respect of its retainer. Estimates are important because they help provide clients with the information necessary for them to make informed decisions about how to pursue litigation. In the event that an estimate is not given (or even when it is) monthly accounts can alert a client to the cost of adopting a particular course of action. Without an estimate, and without the distant early warning system provided by monthly accounts, a client can find him or herself deeply in legal debt before they have a chance to alter course: see, for e.g., *Boyne Clarke v. Steel* [2002] NSJ No. 186.

[29] These are somewhat theoretical points in the context of this case. I say this because Mr Moore continued in his course of action even after his receipt of the September 30th account. He continued to question Mr Boudreau about what was–or what should be–happening. Of course, by this late date Mr Moore was, as they say, "in for a penny, in for a pound" and so to some extent had no other option. The solicitor for LIANS was pressing him for financial and other information concerning his ex-wife's situation. LIANS by this time was at least willing to consider paying something in respect of the claim against the AB Firm, which payment would "top up" the offer from his ex-wife. In this context his requests that Mr Boudreau take certain steps–and respond to his questions–makes certain sense.

[30] What then is "reasonable" taking these points into account? Taking both Mr Moore's approach to the litigation as well as the Firm's failure to follow its billing practice into account, as well as all the other factors noted above, it is my opinion that a straight "time-docket" approach to valuing the account would not be reasonable. A better approach would be one that Mr Moore himself had suggested early on–a contingency percentage. Taking that approach in the circumstances of this case strikes me as producing a more reasonable assessment of the value of the services provided to Mr Moore. Given the range of contingency percentages used in this

province, I conclude that an account equal to 20% of the amount paid by Mr Moore's ex-wife inclusive of all disbursements would be a reasonable amount. Twenty percent of $237,000.00 is $47,400.00. HST adds $7,110.00 to that amount, for a total of $54,510.00. Mr Moore has already paid $10,000.00, thereby reducing the total to $44,510.00. I do not allow interest, inasmuch as there was no evidence that Mr Moore had actually agreed to pay interest, and because had monthly accounts been rendered as promised a lesser total (for reasons discussed above) might have resulted.

[31] I will make an order to that effect.

DATED at Halifax, NS this 16th day of
October, 2014

Augustus Richardson, QC
Adjudicator