CLAIM NO. 113900
Date: 20020228

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Campbell v. Smith's Field Manor Development Ltd., 2002 NSSM 9

BETWEEN:

Name WESLEY G. CAMPBELL Applicant

Name SMITH'S FIELD MANOR DEVELOPMENT LIMITED
AND KAREN L. TURNER-LIENAUX Respondents

D E C I S I O N (No. 2)

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on August 23,2007.

Appearances:

Allan Parish, Q.C.
Gavin Giles for the Applicant, Wesley G. Campbell

No one appearing on behalf of the Respondent Smith's Field Manor Development Limited and Karen L. Turner-Lienaux

[1] This matter came on before me initially on November 30, 2001. It involves the taxation of the legal account of the plaintiff in this action, Mr Wesley Campbell. By a decision released June 18, 2001 Justice Hood awarded the plaintiff's costs "on a solicitor-client basis" against the defendants Smith's Field Manor Development Limited ("SFMD") and Mrs Karen Turner-Lienaux: *Campbell v. Lienaux et al* (2001) 195 NSR (2d) 220 (TD) at para.509.

[2] I pause here to note that the Notice of Taxation was filed on November 9, 2001. It is my understanding that the plaintiff's solicitors filed at the same time the three volumes of accounts which formed the basis of their claim. Mr Lienaux, on behalf of the defendants, filed a response on November 22, 2001, listing 27 specific objections to the accounts.

[3] Certain procedural matters were raised by Mr Lienaux, who appeared on November 30, 2001 on behalf of the Respondents Smith's Field Manor Development Limited and Karen L. Turner-Lienaux. Following submissions by both parties, I made a ruling respecting certain categories of services in the original solicitor and client accounts which were not properly part of the account to be taxed. That decision is reported as *Smith's Field Manor Development Ltd v. Campbell* [2001] NSJ No. 531, and I will not repeat all of the rulings here.

[4] However, it is necessary to outline one of the areas of my ruling, in order to provide a backdrop for what followed.

[5] One of the objections of Mr Lienaux was that the accounts to be taxed included fees incurred in respect of various interlocutory applications (and appeals therefrom) which had taken place during the course of the proceedings; and which had resulted in specific cost orders. Mr Lienaux's position was that the trial judge lacked the jurisdiction to change these orders; and that according her award of solicitor and client costs could not apply to fees incurred in respect of those applications, since they were already the subject of cost orders.

[6] I ruled, without the benefit of any authority being cited to me, that while I lacked the jurisdiction to determine the defendants' *liability* to pay solicitor and client costs in respect of such costs, I did have the jurisdiction to address the issue of whether such costs were *reasonable*. The question of whether any such costs, once found by me to be reasonable, were to be paid was left to a justice of the Supreme Court: see paras.51-53, *Smith's Fields Manor v. Campbell* [2001] NSJ No. 531.

[7] I also made certain procedural rulings, in an attempt to rationalize the taxation of the account. The ruling was made necessary by two things.

[8] First, there was the shere size of the account to be taxed. The account totalled $805,118.70. The solicitors filed copies of all their accounts, and their time dockets in respect of these accounts. There were more than 55 accounts over the period October 1993 through to April 2001. These accounts, when taken together with the time dockets, totalled almost 1,000 pages, and were contained in three bound volumes of material.

[9] Second, there was the fact that at the original hearing it appeared that Mr Lienaux, as agent for both defendants, appeared to intend to go through each account on a line by line basis. Such an approach, given the number of pages involved, would not have been a productive use of time. Nor would it have been fair to the Plaintiff, since his solicitors would not have time to prepare for every objection if made for the first time at the hearing itself.

[10] Accordingly, I ordered the parties to do the following:

a. The solicitors for the plaintiff were to provide Mr Lienaux with an amended Bill of Costs (that is, an amended version of Exhibits 1-3). They were to indicate on the accounts which charges for time and disbursements:

   i. they had already removed before serving their Notice; and

   ii. which they removed as a result of the reasons set out in my ruling regarding the various items of objection which had been filed by Mr Lienaux;

b. This amended list was to be delivered to Mr Lienaux on or before December 14, 2001.

c. Mr Lienaux was then to identify to the solicitors for Mr Campbell:

i. what other items fell within the items that should be excluded (as noted above) and why; and

ii. what time and disbursements were unreasonable and why.

d. Mr Lienaux was to deliver this reply on or before January 11, 2002.

[11] I then ordered that the taxation continue before me on February 1, 2002, or such other time as counsel may arrange. The date of February 1st was chosen on November 30th, 2001 with the agreement of counsel.

Subsequent Events

[12] My ruling was filed on or about December 3, 2001 with the Small Claims Court office.

[13] The plaintiff's solicitors filed their revised Bill of Costs, pursuant to my direction, on December 12, 2001. Mr Lienaux acknowledged receipt of the same in a letter dated December 14th, 2001. He objected to the form of the revision; and also advised that he was preparing an application for an order of prohibition to prohibit me, as a taxing officer, from:

a. "disregarding prior orders of other judges of the Supreme Court and/or the Court of Appeal which fixed party and party costs in respect of parts of the subject litigation;" and

b. "taxing solicitor and client costs in respect of those matters in contravention of orders of the Supreme Court and Court of Appeal which are binding on him."

[14] For these reasons he requested that I adjourn the hearing scheduled for February 1, 2002.

[15] On December 17, 2001 I indicated to counsel that in the absence of an actual application being filed I did not see any reason to consider an adjournment of the scheduled re-attendance on February 1, 2002. I also indicated that I was not in a position to determine whether or not the revised Bill of Costs complied with my ruling; and that his objections would have to be dealt with at the next hearing.

[16] Mr Lienaux then sent another letter, dated December 24, 2002. He cited caselaw suggesting that my ruling, at least insofar as the taxation of costs in respect of interlocutory applications, was incorrect. He asked me to revise my ruling "to conform with the case authorities and direct Mr Parish that the bill submitted ... for taxation must not contain charges for" various interlocutory matters listed by him.

[17] Mr Parish responded on Janaury 3, 2002. He took the position that my I was now functus in respect of the ruling; and that the matter should be addressed in the appeal he expected Mr Lienaux to launch. He also submitted that Mr Lienaux should file his

response, listing the items he thought were included in the interlocutory applications so that such information could be dealt with before an appeal court.

[18] Mr Lienaux replied on the same date. He disagreed with Mr Parish. He stated that if I proceeded he would have no alternative “but to apply for prohibition.”

[19] On January 3, 2002 I suggested to counsel that Mr Parish prepare a Bill of Costs “in the traditional form,” setting out the fees in respect of such items as discoveries, applications, and the like; and that following such submission the parties attend to make submissions on the Bill of Costs. I indicated that this was not a ruling, but merely a proposal to counsel.

[20] In written submissions dated January 8, 2002 Mr Parish objected to the proposal, in a five-page letter. Mr Lienaux then sent a five-page letter with equally detailed submissions, partly in support of the proposal; and partly in opposition to the proposed taxation of interlocutory costs.

[21] On January 21, 2002 Mr Parish noted that Mr Lienaux had not filed any response to the revised Bill of Costs.

[22] On January 22, 2002 I advised counsel that having considered their various correspondence, I had concluded that the best approach was “simply to proceed with the assessment, as currently scheduled, for February 1, 2002.” On January 24, 2002 I indicated in correspondence to counsel that it was my expectation that Mr Lienaux would be filing his response.

[23] On January 24, 2002 Mr Lienaux wrote to indicate that he had not received my correspondence of January 22, suggesting that this was “the second time Mr Richardson has communicated with Mr Parish without communicating with me.”

[24] I was of course concerned by Mr Lienaux’s suggestion that he had not received my earlier correspondence. I checked with my records, and learned that my office did have fax confirmations indicating that faxes had been sent to the fax number provided to me by Mr Lienaux. I faxed Mr Lienaux on January 25, 2002 copies of the correspondence he said that he had not received, together with copies of the fax confirmation forms. This letter was copied to Mr Parish.

[25] On January 28th Mr Lienaux repeated his statement that he had not received the original correspondence (though he did acknowledge receipt of my letter of January 25th with attachments), notwithstanding the noted fax record confirming the sending of the fax.

[26] Mr Lienaux also attached a letter he had sent to Justice Hood. The letter, dated January 28, 2002, requested the issuance of a Supplemental Order After Trial. He repeated the submissions he had made respecting my jurisdiction to tax costs in respect of the interlocutory applications; and requested an adjournment of the February 1, 2002 hearing pending Her Ladyship’s decision.

[27] On the same day I indicated in correspondence to Justice Hood that I intended to adjourn the hearing on the assumption that she could not deal with the matter before

February 1st. As I indicated in correspondence to counsel, also dated January 28th, I did not think it appropriate to proceed with an assessment given that a matter concerning the nature and scope of the trial judge's order had been put before the trial judge.

[28] Justice Hood then advised on January 29th that she had "no jurisdiction to deal any further with this matter." Her Ladyship accordingly refused to deal with Mr Lienaux's correspondence of January 28th.

[29] On January 29th I advised counsel that the taxation would proceed on February 1, 2002.

[30] On January 31, 2002 Mr Lienaux served me with a copy of an Interlocutory Notice seeking an order "to correct the omissions in Justice Hood's order," and sought an adjournment of the assessment.

[31] On the same day I indicated that, in the absence of an agreement to adjourn by both counsel, I intended to proceed with the taxation.

[32] On Janaury 31, 2002 Mr Lienaux faxed a letter to Mr Parish and me, stating that he did not agree that the taxation should continue because:

a. he had not had time to prepare his submissions;

b. by attending the taxation he would be consenting to my jurisdiction; and

c. there was a "reasonable apprehension that the bill of costs will not be objectively taxed," requesting that I recuse myself because "there is a reasonable apprehension of bias."

[33] Mr Lienaux also submitted that in proceeding with the taxation I would be proceeding "in contempt of orders of" the court.

[34] By a fax dated January 31, 2002 I indicated that I still intended to proceed.

[35] By a fax dated February 1, 2002 (received at my office at 7:22 am) Mr Lienaux stated that he would not be in attendance "for the reasons stated in my earlier correspondence."

[36] On February 1, 2002 Mr Parish and Mr Giles, together with Mr Campbell, appeared at 9:30 am. Mr Lienaux did not. I proceeded with the taxation, as I am entitled to do: *Small Claims Court Taxation of Costs Regulations*, as amended by OIC 2001-484, NS Reg. 124/2001, s.7(2).

[37] I will address the objections raised by Mr Lienaux before proceeding with the assessment.

Issue 1: He Had Not Had Time to Prepare His Submissions

[38] On November 30, 2001 I issued the order that was subsequently recorded in my decision released December 3, 2001.

[39] Mr Parish complied with the order, filing his revised Bill of Costs on December 12, 2001. The deletions that had originally been made were highlighted in yellow; those which were made pursuant to my ruling were highlighted in green: Mr Giles to Mr Lienaux, December 12, 2001. Mr Lienaux acknowledged receipt of the revised bill. As noted above, rather than proceed with his own response (as ordered), he objected to the revised Bill and submitted that Mr Parish fill a new and further revised Bill of Costs.

[40] On December 17, 2002 Mr Lienaux wrote to Mr Parish (but did not copy me). He stated that the information provided in Mr Parish's letter of December 17, 2001 "should enable us to break out the costs which should not be charged." However, he went on to say that "it would be redundant to go through the bill at this time and then have to revisit it if the Court directs that you cannot recover costs which have already been fixed by previous orders."

[41] On December 19, 2001 Mr Parish wrote to Mr Lienaux (but did not copy me). He did not agree with Mr Lienaux's position. He advised Mr Lienaux that "if you do not challenge any of the time entries which we have submitted to you as properly a portion of our accounts, then we will take the position that you have waived any such right and accept our accounts as tendered."

[42] Mr Parish repeated this position on January 28, 2002, indicating that Mr Lienaux's failure to respond was at his peril.

[43] In my view, Mr Lienaux had ample time to prepare a response to the plaintiff's revised Bill of Costs. I note in this regard that:

a. he had the revised Bill on December 12, 2002;

b. he had (at the original hearing on November 30, 2002) known that he was expected to reply on or before January 11, 2002; and

c. he appears to have decided on his own that it would be "redundant" to comply with the ruling, given that he disagreed with it.

[44] In my view Mr Lienaux was not entitled to disregard the order requiring the filing of his response to the revised Bill of Costs. He was entitled to disagree with the ruling, and to appeal it, but he still had to comply with it.

Objection 2: That by Attending He Would be Accepting My Jurisdiction

[45] With respect, I do not understand this submission. It is clear that Mr Lienaux did not agree with my earlier ruling, at least insofar as it dealt with interlocutory costs. It is equally clear that he had and has a right of appeal; and that I had made it clear in my original ruling that the issue of liability to pay was to be left to a judge of the Supreme Court.

[46] I do not see how his attendance on a long-scheduled date could be taken as affecting in any way his right of appeal.

Objection 3: That There was an Apprehension of Bias

[47] In my view, Mr Lienaux was and is labouring under a misapprehension as to the intent and scope of my ruling, and my jurisdiction. My original ruling was to the effect that I had jurisdiction to determine whether the fees claimed in respect of interlocutory applications were *reasonable*. It did not mean that I could determine whether his client was *liable* to pay those fees.

[48] As well, saying that I had the jurisdiction to tax the *reasonableness* of the fees does not mean that I would simply allow *whatever* fees were charged. The fact that fees were charged to and paid by a client does not oust my jurisdiction – or my duty – to assess the reasonableness of those fees. “An award of solicitor and client costs is not a determination that the responsible party pays **whatever** the solicitor and client costs bill happens to be:” *Halifax Regional Municipality v. Joudrey* (Goodfellow, J; released December 10, 2001; 2001 NSSC 185) at para.14. emphasis in original.

[49] Accordingly, if I determine that the solicitor and client fees were reasonable, then I must allow them. But if I determine that the fees were not reasonable, then I must disallow such fees.

[50] It is and was accordingly incorrect for Mr Lienaux to suggest, as he did in his letter of January 31, 2002, that if I proceeded with the taxation I “would be biased in favour of allowing costs on a solicitor and client basis in respect of matters covered by the application” merely because I had decided to assess the accounts. He still had the option of objecting to their reasonableness; and I was still under a duty to consider his submissions on that point.

Mr Lienaux’s Application

[51] I mentioned earlier that on January 31, 2002 Mr Lienaux delivered to my office a copy of an application made by him. The application, returnable February 12, 2002, seeks an Order “correcting an omission from the order after trial” of Justice Hood; and directing Mr Campbell “to abstain from taxing on the solicitor and client scale any such costs which have been previously disposed of by orders of the said Courts.”

[52] In my view there was nothing in the application which mandated an adjournment by me of the hearing on February 1, 2002. I was and am of the view that the application is in any event misconceived; and that the proper procedure would have been for Mr Lienaux appeal Justice Hood’s order (which he may in any event have already done), or mine, or both.

[53] Mr Parish was prepared to proceed on February 1, 2002, and I accordingly did proceed.

Assessment

[54] I proceeded with the taxation on February 1, 2002. Since the respondents had notice of the taxation, I was entitled to proceed in their absence: *Small Claims Court Taxation of Costs Regulations*, as amended by OIC 2001-484, NS Reg. 124/2001, s.7(2).

[55] Mr Parish commenced with the following analysis of his claim:

a. total fees claimed $657,781.18

b. total disbursements claimed $39,085.45

c. GST/HST $94,258.12

[56] These amounts were less that the total amounts which had been charged to Mr Campbell. The reductions were made, as discussed in my earlier ruling, by Mr Giles to take into account the fact that some of the charges had related to other matters not properly part of the within action. These reductions, as calculated by Mr Giles, totalled $57,068.97, and had been highlighted in yellow in the copy of the accounts that had been provided to Mr Lienaux.

[57] Mr Parish then added a claim for $3,870.51, being the amount of the account submitted by independent counsel who had been retained on Mr Lienaux's application to remove Mr Parish as solicitor of record. I my view, this was reasonably claimed as a disbursement.

[58] Mr Parish then deducted $48,816.73, being the total of the entries Mr Giles had removed pursuant to my ruling. These were highlighted in green in the copy provided to Mr Lienaux.

[59] Mr Parish then deducted $29,457.41, being the costs that the respondents had already paid under the various interlocutory orders; and also deducted $10,000, being the costs awarded against another party (Byrne).

[60] The total then claimed under this solicitor and client taxation thus became $706,721.12. I must determine whether it is "reasonable."

[61] On balance, and subject to a deduction of $50,000 which is discussed below, I have concluded that in the peculiar circumstances of this case the amount is reasonable.

[62] I say this for a number of reasons.

[63] First, this was clearly an expensive piece of litigation. The trial alone 39 days stretching over 3 months. The reported trial decision covers 98 pages. The proceedings took roughly seven years to get to trial. There were numerous interlocutory applications and appeals therefrom. There were substantial discoveries, some of which were conducted at the eve of trial. All of this would add to what might otherwise have been expected by way of solicitor and client fees.

[64] Second, I note that the action did not involve simply a monetary judgment. It also involved allegations of financial and professional impropriety against Mr Campbell. His reputation was at stake throughout the proceedings. The respondents chose to attack the integrity and character of Mr Campbell, and in so doing forced him to expend more than might otherwise have been expected in defending his reputation.

[65] Third, I note the comments of Justice Hood in her trial decision. Having heard all the evidence, she concluded that the following passage was "as accurate a summary of this matter as any I could make:"

> "[The respondents'] tactic throughout has been to raise any issue, regardless of its merit, for the sole purpose of wearing Mr Campbell down and exposing him to legal expenses in the hundreds of thousands of dollars. The various Statements of Claim and the various positions taken in their reports from the ... [respondents'] accounting expert show they have been continually searching for some argument to support their claims. All such attempts have been utterly without success:" *Campbell v. Lienaux* (2001) 195 NSR (2d) 220 (TD) at para.471, p.297.

[66] Such tactics would obviously have the effect of escalating Mr Campbell's legal fees; and the existence of such tactics must be taken into account by me in assessing the reasonableness of the resulting fees.

[67] Fourth, I note that Mr Lienaux refused to provide me with any specific objections to the charges listed in the revised accounts. Since he acted throughout the proceedings as counsel for the respondents, he would have been in the best position to determine whether any particular charge or group of charges was reasonable. This he refused to do, even though Mr Parish advised him that he would take the position that his failure to do so would be taken by him as a waiver of his right to object. His refusal also supports an inference that he did not think that the fees themselves were unreasonable. (I acknowledge, in saying this, that Mr Lienaux clearly did not agree that the respondents were liable to pay the fees – but that is a different issue from whether they are reasonable in amount.)

[68] Finally, I note that Mr Lienaux refused to make *any* attempt to comply with my ruling, apparently on the basis that he did not have to because he thought my decision was wrong. His refusal to provide his reply, as well as his refusal to attend at the taxation on February 1, 2002, also creates an inference that he was seeking to frustrate and delay the taxation process by manufacturing a failure of due process if I proceeded without him being present.

[69] Mr Lienaux had a right to challenge the reasonableness of the account that was being taxed. Nothing in my ruling prevented him from exercising that right. He wilfully chose to refrain from exercising that right for, I believe, a tactical reason. His decision deprived me of his assistance in evaluating a enormous account. His decision was also taken in full knowledge that Mr Parish would argue that he had in fact *waived* any objection based on reasonableness.

[70] I my view Mr Lienaux must be taken to have waived his right to challenge the reasonableness of the account; or to have conceded their reasonableness; or both. I am accordingly satisfied that, subject to a reduction of $50,000 discussed below, the amount is reasonable because:

a. the lawsuit was conducted in such a way as to inflate the amounts that would otherwise have been charged had it been conducted in a more reasonable fashion;

b. Mr Campbell's reputation and character had been put into issue, which also warranted higher amounts than what might otherwise have been incurred;

c. Mr Lienaux intentionally chose not to exercise his right to question the reasonableness of the accounts, giving rise to an inference that he accepted that the charges *were* reasonable; and,

d. as discussed below, my own review of the accounts, as limited as it was by Mr Lienaux's failure to provide any assistance or guidance, supports a conclusion that the accounts were reasonable.

[71] With respect to the last point, I note that I reviewed the three volumes of accounts and time dockets. I did not review each and every time entry (in the sense of comparing those entries with the contents of the actual files).

[72] I did note, however, that the actual accounts which were sent to Mr Campbell were always less than the total time incurred. When I questioned Mr Parish about this, he indicated that he had been concerned about the size of the accounts which were sent out, and that for that reason he had made a practice of reducing his accounts by 10%-15% on each occasion.

[73] I also reviewed the time dockets and accounts and located a number that appeared, by their description, to fall within the category of items that should be excluded because they fell outside the scope of the within action (as discussed at paras. 15-22, 43, 45, 59, 62-66 of my original ruling).

[74] I should note that in doing this I did not have the benefit of the yellow- and green-highlighted copy of the Bill of Costs. I was looking at the original copy, which lacked any highlighting. I did this to provide a form of independent check of the efforts of Mr Giles to remove those items from the account that were not properly part of the assessment.

[75] The first entries I questioned Mr Giles about were found at p.545, and pertained to entries on July 7, 1998 relating to the mortgage proceedings. These were matters that were not properly before me. Mr Giles confirmed, on review of his highlighted copy, that these amounts had been deducted from the account which had been submitted for taxation.

[76] The second set of entries were found at p.597, and pertained to entries on November 26, 1998. Mr Giles checked his copy and advised that they *had not* been highlighted. He confirmed that they ought to have been deducted, but he could not advise as to whether

or not they had been deducted. I was of the view that I would have to proceed on the basis that they had not been deducted from the account, but should have been.

[77] I then questioned Mr Parish as to how he wanted to proceed, given that my enquiry had determined that there were at least some entries in the account that should have been deducted.

[78] After consultation with his client, Mr Parish submitted that I should address this problem by:

a. deducting approximately 25% of the total of the “yellow highlighted” entries, or $15,000; and

b. deducting approximately 25% of the “green highlighted” entries, or $12,000,

from the accounts to be assessed. He also submitted that I should round the total of these two figures up (in favour of the respondent) to $50,000, and deduct that amount from the total claim.

[79] In the peculiar circumstances of this case I am satisfied that this was a reasonable way to deal with the problem, and I decided to accept his submissions.

Conclusion

[80] I hereby certify the solicitor and client costs of Mr Campbell, chargeable against Smith’s Field Manor Development Limited and Karen L. Turner-Lienaux, at $656,721.12, being the amount claimed ($706,721.12) minus the further reduction of $50,000 discussed above.

Dated at Halifax)
this day of)
_____)
) ADJUDICATOR
February, 2002) W. Augustus Richardson

Original Court File
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