2018 SCTH72904

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Stewart v. Yuill (Yuill Law Firm)*, 2018 NSSM 60

BETWEEN:

ROBERT STEWART

Claimant

- and -

BRADFORD YUILL (the Yuill Law Firm)

Defendant

Hearing Dates: April 16 & May 14, 2018
Final Written Submission: June 1, 2018

Appearances:

Claimant:	Kristy J. MacKinnon, Barrister & Solicitor
Defendant:	Matthew J.D. Moir, Barrister & Solicitor
Kim Brine-Stewart:	Daniel Roper, Barrister & Solicitor

DECISION and ORDER

[1] This is a claim based on alleged solicitor's negligence arising in a matrimonial matter between the Claimant and his former wife, Kim Brine-Stewart. The Defendant was the former lawyer for the Claimant in the divorce proceedings including, particularly, a settlement agreement dated February 26, 2016.

[2] The Claimant gave evidence. As well, Ms. Brine-Stewart testified, as did the Defendant, Bradford Yuill.

[3] As I noted at the hearing, there were really two issues in play. First, was there a breach of the standard of care; and, secondly, has the Claimant shown that there was causation in

the sense that the breach of the duty caused the damage or loss claimed by the client/Claimant.

[4] In my view, there was a breach of the duty of care. In so saying, I am mindful of and refer to the comments of Adjudicator Barnette in the case of *Kabir v. Lawson*, 2015, N.S.S.N. 31, where he refers to the various requirements that will be considered in a claim in negligence against a litigation lawyer and which were referred to in the Alberta Queen's Bench decision of *Malton v. Attia*, 2015 A.B.Q.B.

[5] At paragraph 53, Adjudicator Barnett states as follows:

> *[53] At paragraph 80 of the decision in Malton v. Attia, Justice Moen itemizes a number of the basic requirements that, if observed, provide an answer as to whether or not the standard of the reasonably careful, skillful and knowledgeable lawyer has been met including the requirements:*
>
> *a. to be skillful and careful;*
> *b. to advise a client in all matters relevant to his or her retainer, so far as may be reasonably necessary;*
> *c. to protect the interests of the client;*
> *d. to carry out the client's instructions by all proper means;*
> *e. to consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer;*
> *f. to keep the client informed to such an extent as may be reasonably necessary on issues which do not fall within the express or implied discretion left to the lawyer;*
> *g. to warn the client of possible risks of action or inaction;*
> *h. to call appropriate witnesses, and, in particular, calling an expert if the circumstances so require;*
> *i. to explain the nature, effect, and significance of documents;*
> *j. to investigate potential issues and uncertain points of law;*
> *k. to proceed to advise only on complete instructions adequate to achieve the desired result;*
> *l. to act expeditiously where there is time sensitivity; and*
> *m. to protect the confidentiality of the clients' files.*

[6] Here the primary issue on which the claim of solicitor's negligence rests relates to the so-called "collateral agreements." Mr. Yuill testified that the issue of the excluded items, the father's lot and work in lieu of maintenance were matters that he wanted to discuss with the lawyer for Ms. Brine-Stewart. However, he testified that his client, the Claimant herein, wanted to get the signed agreement out. So, he decided to at least put it in the cover letter. He stated that he felt there was no big issue since he was told it had been agreed to.

[7] With respect, in any matrimonial case, or any other contentious matter, if there was any uncertainty about items not being included in a separation agreement, that the lawyer has a duty to follow up on those items. It seems to me to be fundamental that the reason that parties in a marriage breakdown situation do a separation agreement is to put all potential items of dispute on the table and agree, or attempt to agrree to them. This is even more so in a case which the lawyer himself referred to as a "high conflict," type of case.

[8] And, if the client is insistent that an unsatisfactory or incomplete document go out, then in my view the lawyer still has a duty to, adopting the comments of *Kabir*, above:

> (e) consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer;
>
> (g) to warn the client of possible risks of action or in action;
>
> (i) to explain the nature, effect and significance of documents.

[9] Had Mr. Yuill met these requirements, it is certainly conceivable, if not probable, that Mr. Stewart would have relaxed and re-thought any insistence he had that the document go out at that time. Alternatively, if he continued to insist that it go out, then the lawyer would or should advise the client that it is against his recommendation and make that very clear to the client. Often, a letter will be done in such circumstances to confirm that the client wishes to proceed in a certain manner or course of action which is contrary to the lawyer's advice.

[10] In this context and timeframe of February 2016, what was made very clear by the evidence of Ms. Brine-Stewart is that there was no agreement with respect to these collateral items, and in particular, the question of which equipment was Mr. Stewart's father's and was to be excluded. It was overwhelmingly clear to me that this was a very contentious issue at the time and continued to be.

[11] While I consider that the lawyer did fail in his duty to act appropriately with respect to confirming the precise terms of agreement, the result had he properly proceeded, is that it

would have become very apparent that there was no agreement on those items. This then leads to the next issue of causation.

[12] In Ms. MacKinnon's very helpful submission of May 28th, she refers to a recent Nova Scotia decision of *Gilbert v. Marynowski* 2017 N.S.S.C. 227, where Justice Stewart states as follows:

> *[54] A finding of breach of duty is a separate issue from causation. Causation cannot be assumed from a breach of duty. There must be proof that the breach of duty by the professional caused damage or loss to the client. A client who proves the existence of a duty, a breach of the standard of care, and damages, will still be unsuccessful unless a causal link between the breach of the standard of care and the damages established. In keeping with the traditional "but for" test for causation, the assertion of causation of this case rests on the assertion that the Marynowskis would have behaved differently – and specifically that they would not have entered into the APS – if only Ms. Malone had reviewed the terms and Mr. Cassidy had confirmed the financing condition...*

[13] Here, that the parties were not *ad idem* in respect of the collateral agreements was made very clear. Therefore, it cannot be said that "but for" Mr. Yuill's failure to act, as I've noted above, that this led to damages suffered by the Claimant, Robert Stewart. To put that another way, the evidence is such that it can only lead to the conclusion that had Mr. Yuill contacted Tammy MacKenzie in an attempt to confirm the items of the collateral agreements and include them in the separation agreement itself, there would have been no agreement reached at that time. How matters might have evolved in that case is a matter of conjecture. For my purposes, it is enough to find that there was no agreement at that time.

[14] As stated by counsel for the Defendant in his submission of June 1st, the Claimant bears the burden of proof *on evidence* that the damages were caused by the alleged breach of the standard of care. The Claimant has not met that burden.

[15] Accordingly, the claim must be dismissed.

ORDER

[16] It is hereby ordered that the Claimant's claim is hereby dismissed without costs to either party.

DATED at Halifax, Nova Scotia, this 3rd day of July, 2018.

MICHAEL J. O'HARA
ADJUDICATOR