Lisa Ritchie v. Royal Trust Corporation of Canada

C.A. No. 1223

Fiat issued June 20, 2008

Erratum October 15, 2008

Taxation of Solicitor's account
Before: L. M. Schwann, Q.C.
Registrar, Court of Appeal

Robert Thornton, Q.C., for Royal Trust
Richard Steponchev, for Lisa Ritchie

Please make the following modification to the above noted fiat:

On page 6, under the heading "Conclusion", the following is added to the third sentence [", PST"] so that the third sentence now reads: "The total allowed for solicitor-client costs payable out of the estate is therefore $18,117 plus, GST, PST and disbursements."

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In the matter *Lisa Ritchie v. Royal Trust Corporation of Canada* (2007 SKCA 64), the Court of Appeal (Cameron and Gerwing, J.J.A. for the majority; Richards, J.A. in dissent) dismissed the appeal of Lisa Ritchie along with the cross-appeal of Royal Trust (the "appeal"). The appellant, Lisa Ritchie, was awarded costs on a party and party basis, to be taxed and paid from the estate. Royal Trust, which had divided success on appeal, was awarded costs "*on a reasonable solicitor-client basis, to be taxed also and paid from the estate.*" [par. 23] I was asked to tax Mr. Thornton's solicitor-own client costs, and this is my decision.

Procedural History

The dispute giving rise to the appeal began with a chambers application in the Court of Queen's Bench. Lisa Ritchie challenged the Will made by her late father on the basis that he lacked testamentary capacity and was subject to undue influence. In fact it was her father's third will which triggered the onslaught of legal proceedings culminating with this appeal. Royal Trust was the Executor by default as the first named executor, Russell Ritchie, renounced being an executor. Lisa brought a motion to have the Will proven in solemn form and for a trial to be directed on issues of testamentary capacity and undue influence. Royal Trust brought a motion to vacate the caveat filed by Lisa and for a grant of letters probate.

The disposition of the applications by Wilson, J. is summarized succinctly by Richards, J.A in his dissent:

> She dismissed Lisa's application to have the Will proven in solemn form, vacated the caveat and ordered that letters probate were to issue. She also fixed Royal Trust's costs at $17,000 to be paid out of the estate. This was less than the full amount billed to Royal Trust by its counsel. [par. 33]

At this point it is worth noting how costs were dealt with in the court below. Both parties were allowed 'taxable court costs' payable out of the estate. (see: *Royal Trust Corporation of Canada v. Lisa Ritchie*, 2005 SKQB 420). Wilson, J. was subsequently invited to reconsider the cost issue and the parties succeeded in having legal fees paid from the estate on a solicitor-client rather than a party-party basis, as originally ordered. [see: *Corrigendum* dated September 4, 2005]. At the time of that application, each party

provided the Court with their draft solicitor and client bill. As regards the Royal Trust bill, which was $30,017.00, Wilson, J. found it to be unjustified pointing to the excessive hours devoted to the brief of law and argument and on some of the affidavits. She fixed their costs at $17,000.00.

Lisa Ritchie appealed the core decision of Wilson, J. to this Court. Royal Trust cross-appealed the reduction of costs set out in the *Corrigendum,* effectively seeking the full amount of its solicitor-client costs incurred in Queen's Bench. Royal Trust also sought costs on appeal on a solicitor and own client basis.

As noted above, the majority on appeal dismissed the cross appeal. Richards, J.A. did not disagree with the majority on this point and in so doing made the following observations:

> The reduction ordered by the Chambers judge was dramatic but I see no error on her part which is of the sort that would warrant this Court overturning her decision. The overall time spent on the file was very generous, particularly in relation to the preparation of a brief on points where the law is well settled and in relation to the drafting of Margaret's affidavits. [par. 85]

Position of the Parties

Speaking for the beneficiaries, Mr. Steponchev emphasized the need for Royal Trust's bill to be reasonable having regard to the fact that payment comes out of the estate and thereby affects amounts paid to beneficiaries. His argument for a reduction in fees is threefold:

1. If the Court of Queen's Bench saw fit to reduce the account from $30,000 to $17,000, similar logic and restraint should be applied. As the arguments on appeal and the case itself parallel the work done in Queen's Bench, the account should be rolled back by approximately $10,000.
2. Time spent overall on the appeal was excessive (approximately 93 hours) considering the matter had already been dealt with exhaustively at Queen's Bench.
3. Time spent on factum preparation was excessive.
4. Time spent to prepare for taxation was excessive.

Mr. Thornton responds as follows;

1. There were 6 grounds of appeal. Three related to the admissibility of evidence which had not been dealt with in the court below. Appendix A to the factum compared the evidence. In short, the factum required more work than simply dusting off the arguments used in Queen's Bench.
2. It made more sense for him to do the work on the file rather than assign it to a junior.

3. The issues raised on appeal were complex, requiring comprehensive review. As respondent, he was required to respond to all arguments raised. He points to the fact that the appellant's factum was 32 pages in length.
4. Because the challenge to the Will was only part and parcel of the larger estate administration, time was required to segregate estate administration from the appeal.
5. It would be inappropriate to simply reduce his fees by a global amount as was done by the Queen's Bench without critically reviewing the account on a line by line, item by item, basis.

A brief of law filed in support augments the above arguments as follows:

1. Considerable time was devoted to this appeal (approximately 93 hours).
2. Work was billed out at $275 per hour, which he suggests is reasonable given his seniority and expertise.
3. Royal Trust became executor following the renunciation of the primary executor. Royal Trust is not a beneficiary and is simply discharging its duties in the face of a challenge to the Will of the deceased. He argues that it is not, therefore, in the public interest to fail to fully compensate a trust company for its legal costs as to do so would deter trust companies from serving in this capacity.

Analysis

The case of *Re Kinar Estate* [1998] S.J. No. 616 stands for the following succinctly stated proposition:

> The executrix is clearly entitled to her costs out of the estate on a solicitor and client basis because she was the successful party at the end of the trial and the practice in this province has always awarded solicitor and client costs to the successful party out of the estate.

The Court of Appeal applied this principle by awarding Royal Trust its solicitor-own client costs. This does not mean, however, that any amount is appropriate or that some level of oversight for 'reasonableness' cannot or should not be applied. In *Frymer v. Brettschneider* (1992) A.C.W.S. (3d) 355, the court stated the principle this way:

> The general rule is that trustees are to be indemnified against all *reasonable* costs and expenses which they incur as trustees. [emphasis mine]

Indeed, inclusion of the modifier "*reasonable*" in the disposition as to costs by both the majority and dissenting judges of the Court of Appeal is strongly suggestive of a reasoned and balanced approach to legal fees, particularly so, as is the case here, the estate is not large.

The question to be answered is this: are Royal Trust's legal bills reasonable? Generally speaking, there are several factors applied on taxation of a solicitor-client bill to assess

'reasonableness' of account. Orkin on *The Law of Costs* offers the following list, set out in order of prominence:

1. time expended by the solicitor
2. legal complexity of matters dealt with
3. degree of responsibility assumed by solicitor
4. monetary value of the matter in issue
5. importance of matters to the client
6. degree of skill and competence demonstrated by the solicitor
7. results achieved
8. ability of client to pay
9. expectation of client as to amount of fee.

I don't intend to vet the account through each of the factors. Indeed, no issue has been raised concerning factors 5 through 8. I have no knowledge of factor number 9 and therefore offer no comment.

The first factor – time spent – is the main ground of concern and one to which I will respond. Two legal bills were submitted totaling (fees only) $27,117: one for $23,877 and a second, supplementary account relating to taxation matters of $3,240. From an hourly perspective, the two reflect 103.7 hours expended. Of those billable hours, I calculate approximately 60 hours were spent on research, factum writing, preparation for oral argument, and the appeal hearing.

Orkin makes the following observations on the 'time spent factor' at page 3-46.3:

> Other things being equal, a solicitor who bills at substantially less than the prevailing hourly rates for solicitors of like experience should be entitled to charge for substantially more hours than the norm. Conversely, a lawyer who charges a premium rate should be able to complete the work in less time than an average lawyer.....A lawyer has an obligation to protect a client from taking too much of the lawyer's expensive time.

Mr. Steponchev argues that too much time was devoted to the factum and preparation for oral argument. In view of the fact that a good portion of the argument tracked the same argument advanced in the court below for which a brief of law was already prepared (described by Wilson, J. as "excellent"), I tend to agree.

Furthermore, some of the billable hours were devoted to a cross appeal on costs. Unfortunately the statement of account does not break out time spent on the cross appeal; clearly though, some amount of time has to be allocated to this facet of the overall appeal. The cross appeal took square aim at the *Corrigendum* of Wilson J. and no doubt considerable efforts were expended to overturn that decision which had substantially reduced the executor's costs in the lower court. While the cases recognize a right to indemnity from the estate where there is a contested will – as was done in this case – the application of that principle to a discretionary decision on costs is quite another matter.

[see Richards, J.A., par. 85] That said, I recognize the Court of Appeal awarded costs to Royal Trust without differentiation between appeal and cross-appeal (on which it was unsuccessful); nevertheless, this part of the overall appeal, in my view, should be subjected to a brighter light of examination.

Legal complexity of the issues raised is advanced in support of this account. The fact the Court of Appeal devoted 39 pages and a dissenting opinion to the appeal gives some credence to Mr. Thornton's position that the matter was complex thereby justifying time spent on research and analysis. Orkin at page 3-48 says:

> The degree of complexity of a case is often considered in conjunction with other matters, for example the result achieved, or in weighing what might otherwise seem an excessive expenditure of time. A fee was reduced on assessment.....where, even though the case was complex, the solicitor expended too much time.....

Were the issues complex? Justice Wilson in her *Corrigendum* reduced the fee because, in her view, the matter involved settled law. [*Corrigendum*, par. 6; see also comments of Richards, J.A. at par. 85] Mr. Thornton argues that the appeal increased in complexity because of the many evidentiary arguments advanced for the first time by the appellant in his Notice of Appeal. No doubt those lines of argument resulted in additional time spent on factum preparation; however I can't say that the legal issues were overly complex, at least not to the point of justifying the many hours spent on research and preparation. Nonetheless, I accept that as respondent, the grounds necessitated a response.

The strength of the 'complexity' argument is, in my view, further diminished by two other facts. First, a great many of the issues were the same as those argued in Queen's Bench (which I assume were also thoroughly researched and presented at that level). Second, as noted above, some of the billable hours were devoted to a cross appeal on costs and this part of the appeal was not overly complex.

The third factor and argument advanced by counsel for the beneficiary concerns the degree of responsibility assumed by the solicitor. There is certainly an argument to be made that the file could have been more cost effective had larger portions of the work been assigned to a younger lawyer. While that may well be the case in theory, Mr. Thornton says his firm did not have an abundance of young associates, and I accept that. I also accept that given his expertise and knowledge, it was probably quicker for him to do the work than it was to explain and review the work of others. With the exception of preparation of his accounts and matters relating to taxation, it was more than appropriate for him to have done the work.

While Mr. Thornton's intimate knowledge of the file was no doubt helpful in preparing for this taxation, a lot of the work could have been done by more junior lawyers or possibly even support staff. Furthermore, the brief filed in support largely repeats portions of the factum dealing with the cross appeal, and thus the 5 plus hours spent reviewing the file and preparing a brief seem excessive. In sum, a bill of $3,240 for 10.8

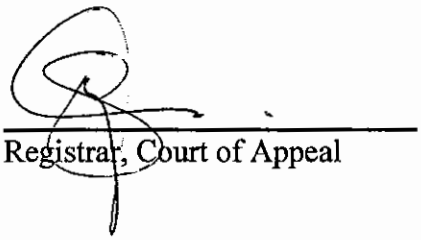
hours of his time on the narrow issue of taxation is in my view not reasonable. By way of comparison, Column 4 of the new Tariff for party-party costs nets costs of $250 for preparation of a bill of costs and $125 per hour for taxation. Tripling the total of these two items (assuming 2 hours for taxation) results in a substantially lower sum, accordingly I find this account to be excessive and thereby conclude that it should be substantially reduced.

The fourth factor in Orkin's list which comes into play here is 'monetary value of the matter in issue', in this case, size of the estate. As alluded to earlier, this is not a huge estate, a fact which should have been at the forefront through all stages of proceedings. In my view, this fact calls for even greater scrutiny on the 'reasonableness' assessment.

Conclusion

Based on the considerations set out above, I conclude that the solicitor client account of $27,117 is not reasonable and reduce the main account by $7,000 and the supplementary account by $2,000. I have determined that an appropriate amount of $18,117 compensation on a global basis is reasonable plus GST and disbursements. The total allowed for solicitor-client costs payable out of the estate is therefore $18,117 plus GST and disbursements. In reaching this conclusion, I wish to emphasize that it in no way reflects the excellent quality of legal work provided by Mr. Thornton.

Dated at Regina, Saskatchewan, this 1st day of August, 2008.



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