Suit No. CI 98-01-07769
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

KEITH JOHNSON and NORMAN JOHNSON,	)	
applicants,	)	Gene G. Zazelenchuk (for the applicants)
- and -	)	
W.R. (DICK) VAN WALLEGHEM,	)	
respondent.	)	Michael G. Finlayson (for the respondent)
	)	Decision delivered: **July 16, 1998**

MASTER SHARP

The respondent seeks to set aside the order of a registrar referring the respondent's bill to a master for assessment, on the basis that the application for the order was not filed within the six month period provided for in Rule 71. The respondent, in the event this motion is not granted, also seeks an order for security for costs against the applicants.

Background

The applicants, who reside in British Columbia, retained the respondent to act for them in a sale of property in Winnipeg, Manitoba. A statement of account was mailed to the applicants by the respondent on October 22, 1996, and on October 29, 1996, the applicants requested an itemized statement of account.

An itemized statement, dated January, 1997, was eventually mailed to the applicants with a letter from the respondent dated May 26, 1997. There was thereafter a series of communications between the applicants and the respondent, and, commencing in or about November, 1997, between the applicants' counsel and the respondent, including some settlement proposals, which culminated in January, 1998, with the respondent advising that he would oppose an application for an assessment on the basis that such an application was out of time. The applicants subsequently filed their application, and the reference order was dated May 13, 1998.

Moving Party's Position

The respondent says the issue is a simple one of applying Rule 71, noting that the six month period within which an application is to be filed has long since passed, and that the applicants sought no extension of time. There is no evidence to show the applicants ever applied their minds to the six month limitation period, so that an argument based on estoppel cannot succeed.

Responding Parties' Position

The applicants argue that Rule 1.04(i) provides that the rules are to be "liberally construed" to secure "the just, most expeditious and least expensive determination of every civil proceeding on its merits". An application to tax a lawyer's bill constitutes an allegation of breach of contract for which the limitation period provided by the *Statute of Limitations* is six years, but to proceed here with a statement of claim, which would likely result in a reference to a master anyway, would not be consistent with Rule 1.04(i).

The applicants say that if Rule 71 imposes a limitation at all, it is a peculiar one couched in language which is not mandatory, but rather, permissive. Furthermore, it is not clear from the wording of the rule as to when the limitation period, if any, is supposed to run; substantive law says the bill must be suitable for taxation, and in the circumstances of the case at bar, the applicants did not receive an itemized bill until May, 1997. Furthermore, the bill was not paid until January, 1998 when the respondent transferred trust funds to cover it.

The applicants rely on decisions of the British Columbia Supreme Court in *Ladner Downs v Thauberger* (1983), 47 B.C.L.R. 121 and *Steintron International Electronics (Trustee of) v Gardner & Co.* (1991), 60 B.C.L.R.(2d) 367 as authorities for the proposition that the court is entitled to exercise its inherent jurisdiction to order a review, and that delay is no barrier to such an order where the respondent has known of the applicant's intention to review.

Conclusion

I am not persuaded there is merit to the applicants' argument, and my reasons for this conclusion follow.

There is no dispute as to the facts and, notably, that the first "final" version of the statement of account was mailed to the applicant on October 27, 1996, and that the final itemized version of the account was mailed to the applicants by letter dated May 26, 1997.

The questions to be determined therefore are:

(a) the effect of the stipulation in Rule 71.01(1) that ". . . . .client may, at any time within six months from the date a lawyer's bill is received by

the client, apply to the court for an assessment of the bill, ..." (emphasis added).

(b) jurisdiction of a master to undertake an assessment of a client's bill where the client has failed to comply with the time provisions of Rule 71.01(1).

(a) The Time Provision in Rule 71.01(1)

The objective of Rule 71 is to provide an expeditious, in keeping with the spirt of Rule 1.04(1), method for the consideration of lawyer's accounts, so as to avoid the potentially lengthier and more costly litigation route. In order to avail him or herself of this method, however, the client must make the application within the specified time frame

The use of the word "may" in Rule 71.01(1) is, in my view, relative to the client's option to file an application to assess the bill, not the time therefor: the client might have other options, and to utilize the mandatory "shall" in place of the permissive "may" here would result in a restriction of the client's rights in this regard.

It is also important to consider that the language of Rule 71.01(1) echoes that of section 47(9) of *The Law Society of Manitoba Act*, and that Rule 71.02 stipulates:

> "71.02 Where the time for filing referred to in subrule 71.01(1) is inconsistent or conflicts with section 47 of The Law Society Act, The Law Society Act prevails."

In that case, I am of the view that even had the applicants moved

before a Master pursuant to Rule 3.02(1) to extend the time prescribed by Rule 71.01(1), it would not have been open for them to do so, and this issue will be further explored below.

Considering the effect of section 47 further, the applicants argue that if they are not afforded the opportunity of availing themselves at this point of Rule 71, they will likely end up with a reference for an assessment before a master any way, but only after having been put to the time and expense of filing a statement of claim, an avenue which may still be open to them, and that this is contrary to the spirit of the rules now enshrined in Rule 1.04(1). This is, in my view, an argument which would at least render Rule 71.01(1) obsolete and ignore the paramountcy of section 47(9) of *The Law Society Act.*

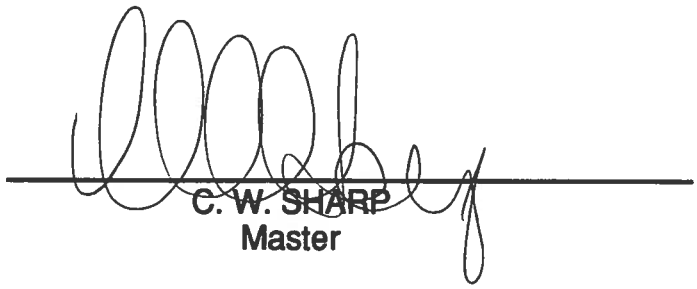
(b) Whether a Master has inherent jurisdiction to undertake any assessment in a situation of a client's failure to comply with the time limitation of Rule 71.01(1).

The master's jurisdiction is derived from statute and/or the rules: the general jurisdiction of a master is set forth in Rule 37.02(2) and, specifically for Lawyer's Fee Assessments, in Rule 71.03. The jurisdiction of a master to extend any prescriptions of time is contained in Rule 3.02(1), but is there limited to "time prescribed by the rules or an order". It is arguable that, given the paramountcy of s. 47(9) of *The Law Society Act*, any extension of time for filing a lawyer's fee assessment would be governed by section 14 of *The Limitation of Action Act* and would require an application for that purpose. Applications lie only within the jurisdiction of a judge, per Rule 38.03, and a master would not therefore have jurisdiction to entertain such an application.

I do not find the authorities relied upon by the applicants, noted at p. 3, to be helpful, as I am of the view that they are distinguishable from the situation here for a number of reasons, not least being their relating to other jurisdictions, different statutory provisions, and being decisions relating to a judge's jurisdiction.

For all the above reasons, I conclude that the applicants' application pursuant to Rule 71 was filed out of time, and that the order directing a reference was wrongly issued The respondent's motion to set aside the reference order is therefore granted.

The respondent will have his costs, which are fixed at $250.00, given that the respondent filed no brief.



C. W. SHARP
Master