SUPREME COURT OF NOVA SCOTIA
Citation: *Baillie v. Power*, 2017 NSSC 86

Date: 20170328
Docket: Tru. No. 439649
Registry: Truro

Between:

Carl Baillie

Applicant

v.

James Power Jr., Kris McNeil, Robert Youden, George Jessen, Paul Yurchesyn and William MacLeod

Respondents

Decision on Costs

Judge:	The Honourable Justice Peter Rosinski
Heard:	January 9, 2017, in Truro, Nova Scotia
Final Written Submissions:	February 17, 2017
Counsel:	Dennis James, Q.C., for the Applicant Sheree Conlon, Q.C. and Michael J.E. MacIsaac, for the Respondents

By the Court:

Introduction

[1] By filing a notice of application in court, Mr. Bailey sought to have the respondents fulfil their contractual obligations and for the agreed-to sum of $190,594.64, purchase the remaining 25% of his shares in a closely held private corporation. After a one day scheduled hearing, which commenced at 10:00 a.m. and ended at 2:30 p.m., I dismissed his claim by written decision – 2017 NSSC 12.

[2] The parties were unable to agree upon costs. They submitted their written positions on February 17, 2017. I also had the benefit of solicitors' affidavits from each of Mr. James for the applicant, and Michael J.E. MacIsaac for the respondents.

Position of the parties

[3] Briefly stated, their positions were as follows:

The successful respondents

[4] The respondents argue pursuant to Rule 77.06(2) that they are presumptively entitled to Tariff A compensation, for an "amount involved" of $190,594.64 (excluding prejudgment interest at 5% per Rule 70.07 as they had indicated they would not be seeking that amount in this costs assessment). That amount entitles them to $16,750, plus $2,000 for the one day hearing plus disbursements of $454.97, or a total of $19,204.97.

The unsuccessful applicant

[5] The applicant argues that, because Tariff A would effect a more than substantial contribution to the actual fees and disbursements of the successful respondents, the court should depart from the presumptive Tariff A and assess a lump sum that would be a substantial contribution to the reasonable fees and disbursements of the successful respondents.

[6] While there is no evidence of what are the respondents' actual fees and disbursements, the applicant has provided his fees and disbursements ($14,703 fees, plus disbursements, and HST) and suggests that those of the respondents' would likely be not significantly different, and therefore the court is in a position to assess what would be a substantial contribution to the respondents fees and disbursements. Using a 60% indemnification rate of the fees, the applicant suggests $8,800 including disbursements is an appropriate costs award here.

Analysis and conclusion

[7] A Rule 5.07 application in court is fairly characterized as a trial by affidavits. The process is generally most effective when used for relatively short periods of hearing (involving days rather than weeks), during which cross-examination of the affiants take place. A motion for directions permits a customized plan to effectively manage such litigation to the point of hearing. In some cases, this process can become somewhat complicated involving disclosure, discoveries, a series of hearings, etc. Particularly, in more complex applications in court, counsel can spend as much time as if the matter were proceeding as a trial. This is not one of those cases.

[8] At the hearing, the evidence was limited to the affidavits and cross-examination of Carl Baillie and David MacKenna. Between 10:00 a.m. and 11:45 a.m., their evidence was completed. One and a half hours of legal argument followed in the afternoon. By 2:30 p.m., the hearing was completed. Because the hearing was intended to start at 9:30 a.m. and lasted until 2:30 p.m., it is fair to characterize this as a full day hearing for purposes of a costs assessment. The central issue in the dispute was the wording in one clause of the share purchase agreement. In all respects, counsel are to be congratulated for being very efficient in their marshalling of the evidence, and presentation of same and legal argument. I should note here as well, that the hearing was held in Truro and that the successful respondents' counsel did travel from Halifax. To the extent that travel occasioned any cost to the respondents, the court would ignore that cost as is usually done when choice of counsel are drawn from out of the area.

[9] Rule 77.06 dictates that presumptively, Tariff A should apply. I accept that the amount involved can fairly be said to be the $190,594.64. I say this because:

> (i) … The risk of being exposed to a costs award is meant to encourage reasonable behaviour in litigation-see for example *Landymore v. Hardy* [1992] NSJ No.79(QL)(CA)"-per Saunders JA, at para. 94 in *Ellph.com Solutions Inc. v. Aliant Inc*, 2012 NSCA 89; as the trial judge in *Landymore*, Saunders J (as he then was) stated: "… The court should assess the risk to which the successful party was exposed in deciding the 'amount involved'… It is simply to recognize that the trial judge – who has presided and is therefore in the best position to comment on the proceedings – may choose to consider the risk and consequences to the litigants because such factors almost always affect the importance of the issues and will often dictate the complexity of the proceeding. A case that involves damages exceeding $500,000 will obviously generate more activity than one seeking recovery of $12,000. The outcome, in terms of success or failure, will be much more important in the former than in the latter, and by virtue of that

> importance and(typically) complexity, will justify greater expenditures of time and fees"- *Leddicote v. Nova Scotia (Atty. Gen.)*, 2002 NSCA 47 at paragraph 85.
>
> (ii) Mr. Baillie sought the Court's assistance to compel the respondents to pay him $190,594.64 (plus prejudgment interest). Had he been successful, he would have had the money, and the respondents would have had the shares. Presently he still has the shares, and no money. Though in the Share Purchase Agreement all of the Baillie's shares were valued for sale to the respondents as a block, based on a 30% discount rate from their fair market value as assessed by independent auditors, now because he only retains 25% of his original holdings, and given a very limited market of potential buyers, the value of the remaining shares may be disproportionately reduced. However, I have no valuation of the remaining 25% of the shares, and I expect the valuation would fluctuate over time. Thus, there not having been any claim for damages here, but only specific performance, the court is left with no yardstick, but the amount of $190,594.64, which the parties contractually agreed to approximately 2.5 years earlier.
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> [My italicization]

[10] Given my conclusion that this was a one day hearing of a factually and legally simple dispute, the resources that would have to be marshalled by the successful respondents to answer the applicant's claim for specific performance, and the "risk", would not justify the imposition of costs according to Tariff A – i.e. $18,750 plus disbursements.

[11] As Justice Fichaud stated in *Armoyan v. Armoyan*, 2013 NSCA 136:

> Tariff or Lump Sum?
>
> 15 The tariffs are the norm, and there must be a reason to consider a lump sum.
>
> 16 *The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses.* In *Williamson*, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410:
>
> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
> >
> > - ... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.

Justice Freeman continued:

> o In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

17 *The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs*. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.

18 *But some cases bear no resemblance to the tariffs' assumptions*. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. *Sometimes the effort is substantially lessened by the efficiencies of capable counsel*, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, *a substantial sum may turn on a concisely presented issue*. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that *the reflexive use of the tariffs may inject a heavy dose of the very subjectivity* -- e.g. to define an artificial "amount involved" as Justice Freeman noted in *Williamson* -- that the tariffs aim to avoid. *When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum.* A principled calculation should turn on the objective criteria that are accepted by the Rules or case law.

…

37 As noted in *Williamson*, with which I agree, generally speaking the "substantial contribution" should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of

> the case. Considering Mr. Armoyan's conduct, as discussed, and the rejected settlement offer of October 2011, a substantial contribution here should represent: (a) 66% of the $100,000 base sum before the settlement offer of October 2011 for the forum conveniens proceeding in the Family Division (i.e. $66,000); plus (b) 80% of the $200,000 base sum after that settlement offer for the forum conveniens proceeding in the Family Division (i.e. $160,000); plus (c) 80% of the $100,000 base sum in the Court of Appeal for both appeals (i.e. $80,000). This totals $306,000, including disbursements.
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> [My italicization]

Summary

[12] To do justice as between the parties here, I must recognize that party and party costs follow the result, and they should strive to be a substantial contribution to the successful party's litigation costs. The one day hearing resembled more a motion than a trial. It is appropriate to depart from Tariff A and award a lump sum.

[13] While I have no express accounting of the respondents' litigation costs here, I could infer that the respondents' costs are not significantly (20%+) more than those of the applicant. I observe that the respondents only claim $454.97 in disbursements, (while the applicant would have claimed $1,080.26) and respondents' counsel stated that the Tariff A based $18,750 claim "would amount to substantial, but certainly not complete indemnity of the respondents' actual costs" (para. 27, brief). If the respondents' counsel's fees were objectively considered to be as high as $17,640 (20% more than $14,700), then at a 60% indemnification rate, this would result in a substantial contribution to their costs being assessed at: $10,584 plus $374 in disbursements ($454.97 less the disallowed 80.97 mileage) for a total of $10,958 (including HST).[1]

[14] However, I find it too speculative for present purposes, to attempt to infer those as the respondents' actual reasonable legal fees and disbursements.

[15] Costs in non-complex cases of similar length range from $4,000 to almost $7,000.

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[1] In cases where the "amount involved" has been difficult to determine, some courts have used a "rule of thumb" of $20,000/day of hearings to assess the total "amount involved" – e.g. *Mader v. Hatfield*, 2011 NSSC 121 per Bourgeois, J. (as she then was) an adverse possession case; *Harrington v. Coombs*, 2011 NSSC 141 per Dellapina, J. in a 1 day trial regarding the validity of a cohabitation agreement. Such analysis applied here would suggest $4,000 costs plus $2,000 for the hearing at the Scale 2 (Basic) level. For examples of a non-complicated one day application in court costs award, see: *Kerr v. 2463103 Nova Scotia Limited*, 2014 NSSC 111, per Warner, J. (but for misconduct would have awarded the successful party in a wrongful dismissal case, based on Scale 1: $6,688); and *Vienback v. Pook*, 2012 NSSC 113, per Wood J. (Scale 2 - $4,000 total) on a right of way declaration case.

[16] The applicant suggests $8,800 (including disbursements and HST).

[17] Having rejected the Tariff A framework, I am left with great discretion to determine a costs award suitable to these circumstances. I accept the applicant's inferential basis for estimating the respondents' reasonable fees and disbursements and award them $8,800 in costs payable within 30 days of the order herein.

Rosinski, J.