SUPREME COURT OF NOVA SCOTIA
Citation: *MacAdam v. Cook (Dixon)*, 2018 NSSC 246

Date: 2018-10-04
Docket: *Syd.* No. 471211
Registry: Sydney

Between:

Colin A. MacAdam and Heather Burton

Applicants

v.

Maureena Cook (Dixon) and Terrence M. Dixon

Respondents

Decision on Costs

Judge:	The Honourable Justice Robin C. Gogan
Heard:	July 19, 2018, in Sydney, Nova Scotia
Final Written Submissions:	September 17, 2018
Counsel:	Donald L. MacDonald, for the Applicants Anna Manley, for the Respondents (on costs only)

By the Court:

Introduction

[1] This is a decision on costs flowing from the determination of an application in court. The proceeding involved a boundary dispute between adjacent properties in South Harbour, Nova Scotia. An oral decision was rendered on July 19, 2018. The successful applicants seek costs.

Background

[2] On December 11, 2017, Colin MacAdam and Heather Burton commenced an application in court to resolve a boundary dispute between themselves and respondents, Maureena Cook and Terrence Dixon. The application sought a declaration of the common boundary between the adjacent properties, and an Order enjoining Cook and Dixon from thereafter entering the property belonging to MacAdam and Burton.

[3] Cook and Dixon were served with the application on December 17, 2017. A Notice of Contest was filed on December 20, 2017 which admitted certain facts. Cook participated in the Motion for Directions. Deadlines were set for the filing of affidavit evidence and hearing dates were set for July 19 and 20, 2018.

[4] Cook and Dixon did not file any evidence in the proceeding and did not appear for the hearing of the application.

[5] The evidence filed by MacAdam and Burton established that their property had been used and occupied by predecessors in title for over 150 years without dispute. In 2016, a dispute arose over the common boundary between their property and the adjacent property owned by Cook. Subsequently, Cook and Dixon erected a fence in a location which reflected their view of the boundary line. This fence interfered with access to the dwelling on the applicants' property.

[6] Also in 2016, Cook and Dixon erected a structure on a large tree very close to the house on the applicants' property. In 2017, Cook and Dixon began to operate a zip line business using the structure they had erected. The erection of the structure and operation of the zip line business was viewed to be particularly egregious given the nature of the dispute between the parties and the proximity of the operation to the house on the applicants' property.

[7] The relief sought by MacAdam and Burton was granted on July 19, 2018. The boundary line was resolved, the respondents directed to remove the structure erected as part of the zip line business, and thereafter enjoined from entering onto the applicants' property.

[8] The successful applicants now seek costs.

Positions of the Parties

MacAdam and Burton

[9] The applicants seek lump sum costs in an amount equal to 80% of the their legal fees and reasonable disbursements. The evidence discloses legal fees and disbursements totalling $12,702.30. There were no offers to settle. It is submitted that the conduct of the respondents throughout the proceeding must be considered as a basis to increase the quantum of costs.

[10] The applicants rely upon the decisions in ***Hennebury v. Compton***, 2014 NSSC 412, ***Andrews et al., v. Keybase et al.***, 2014 NSSC 287, ***Shannon v. Frank George's Island Investments Ltd.***, 2015 NSSC 133, and ***Laamanen v. Cleary***, 2017 NSSC 153.

[11] The applicants vigorously contest that a court can determine an amount involved in this case based upon the assessed value of the property in dispute. They also contest the submission that there was not a hearing, and that the respondents lack of participation effectively simplified the determination of the proceeding.

Cook and Dixon

[12] The respondents contested the amount of costs sought by the applicants. It is argued that there is a monetary aspect of the claim, based upon the assessed value of the land, and submit that a fair cost award flowing from this type of assessment is $4000.00. If this approach is not accepted, it is submitted that the proceeding was simplified by the fact that Cook and Dixon did not file evidence and did not appear at the hearing. Accordingly, 40% of the legal costs is a more appropriate quantum in the circumstances.

Issue

[13] What is the appropriate award of costs in this proceeding?

Analysis

Civil Procedure Rule 77

[14] Successful and well behaved litigants are generally entitled to their costs. It is well established that costs are in the discretion of the Court. Rule 77.02 provides:

> **General Discretion (party and party costs)**
>
> **77.02** (1) A presiding judge may, at any time, make an order about costs as the judge is satisfied will do justice between the parties.

[15] The appropriate cost award must be determined in a principled way and in accordance with Rule 77. Rule 77.06 (2) provides that costs on an application in court must be assessed in accordance with Tariff A, unless the judge who hears the application orders otherwise. The use of Tariff A requires the determination of an amount involved, and by virtue of Rule 77.18(c), an assessment of the complexity of the proceeding, and the importance of the issues. Rule 77.08 provides that a judge may award lump sum costs instead of tariff costs.

[16] Let me first address a preliminary point. Cook and Dixon argue that this matter can be determined with reference to an amount involved. It is proposed that the amount involved, in the absence of an appraisal, can be based upon the assessed value of the property. I do not agree.

[17] This method has been addressed in recent decisions on costs and had been held to be artificial, irrelevant, and manifestly unjust (See ***Hennebury v. Compton***, 2014 NSSC 412 and ***Donovan v. Gunn***, 2016 NSSC 234 and ***Shannon v. Frank George's Island Investments Ltd.***, 2015 NSSC 133). Oft cited is the conclusion of Wright, J. in ***Hennebery v. Compton***, *supra*, at para.14:

> [14] The difficulty with the utilization of Tariff A in a case such as this is that the claim is a completely non-monetary one. Although it is provided in the tariffs under Rule 77 that where there is a substantial non-monetary issue involved, the "amount involved' is to be determined having regard to the complexity of the proceeding and the importance of the issues, those guidelines are of little

> practical assistance in assessing costs following the adjudication of a boundary line dispute.
>
> …
>
> [20] Counsel for the applicants, on the other hand, takes a different approach in this determination. It is argued that the "amount involved" should be determined by multiplying the percentage of the respondent's land area claimed by adverse possession to the municipal assessed value of the respondents' residential property…
>
> [21] In my view, this is a completely artificial and irrelevant method for the determination of the "amount involved" under Tariff A in assessing costs in a boundary dispute case. Such an approach is entirely without merit.
>
> [22] What the court must always bear in mind in making a costs award is that it should afford a substantial contribution towards the successful party's reasonable fees and expenses in presenting or defending the proceeding, without amounting to a complete indemnity. It is because of that principle that judges have the discretion under Civil Procedure Rule 77 to add an amount to, or subtract from, tariff costs or to make an award of lump sum costs instead of tariff costs.

[18] Justice Wright went on to assess the reasonable legal fees and expenses and awarded lump sum costs to the successful party at 57% of their actual costs. In ***Shannon v. Frank George's Island Investments Ltd.***, *supra*, at paras. 19 and 23, Justice Chipman adopted a similar approach and awarded 60% of the actual costs.

[19] In reaching a conclusion in this proceeding, I adopt the foregoing approach. I also consider the reasons of the Nova Scotia Court of Appeal in ***Armoyan v. Armoyan***, 2013 NSCA 136.

Determination

[20] This proceeding involved an application in court and the outcome was a final resolution of the matter. It was a contested proceeding and there was a hearing. I consider that the respondents did not comply with the motion for directions, did not file evidence, and did not attend the scheduled hearing. While this conduct no doubt reduced the length of the hearing, and the applicants' potential costs, it did not necessarily reduce the complexity of the proceeding. The respondents' non-compliance, coupled with otherwise egregious behaviour, left the applicants to prepare for and deal with a multitude of uncertainties. The applicants remained obligated to prove their claim and the respondents made no form of concession and no offers to settle.

[21] The applicants submitted both actual accounts and a summary of legal fees, disbursements and taxes. In my view, the amounts submitted are entirely reasonable.

[22] I consider that the applicants' conduct throughout the proceeding was exemplary. The respondents hired counsel subsequent to the hearing and the submissions provided were helpful on the issue of costs. Unfortunately, before the respondents hired counsel, their conduct in the proceeding was a negative consideration, and their conduct in building a structure within the "disputed" territory, very close to the applicants' house, and then operating a zip line business for an extended period cannot be condoned.

[23] I am prepared to award lump sum costs to the applicants as a result of the substantial non-monetary issue, and to ensure a substantial contribution to their reasonable fees and expenses. In reviewing similar cases, it seems to me that a substantial contribution is often is the 60% range. I consider that the reasonable fees of the applicants already account for the fact that the hearing was abbreviated by the absence of the respondents. What is not accounted for is the respondents' conduct. Some premium should attach to their non-compliance and otherwise poor conduct.

[24] Considering all of the foregoing, I award costs to the applicants in the amount of 70% of their fees, disbursements and taxes. This results in a cost award in the amount of $8,891.61.

Conclusion

[25] For the preceding reasons, I order costs payable to the applicants in the amount of $8,891.61. Order accordingly.

[26] I would ask the applicants' counsel to draft the appropriate Order and submit it within 10 business days.

Gogan, J.