SUPREME COURT OF NOVA SCOTIA

Citation: *Alex Lane Properties v. Halifax Regional Municipality*, 2019 NSSC 173

Date: 20190530
Docket: Hfx No. 453063
Registry: Halifax

Between:

Alex Lane Properties Inc.

Plaintiff

v.

Halifax Regional Municipality

Defendant

and

Certified Design Consulting Inc., RMC Construction Management, R. Mullen Construction Limited and Donald Grant and N.C. Designs, Maritimes House Designs Limited and Nigel Collinson

Third Party Defendants

COSTS DECISION

Judge:	The Honourable Justice Christa M. Brothers
Heard:	April 1, 2019, in Halifax, Nova Scotia
Final Written Submissions:	April 15, 2019
Written Release:	May 30, 2019
counsel:	Peter Rumscheidt, for Alex Lane Properties Inc. Randolph Kinghorne, for the Halifax Regional Municipality James MacNeil, for Certified Design Consulting Inc. David Bond, for RMC Construction Management, R. Mullen Construction Limited and Donald Grant Eric Slone, for N.C. Designs, Maritime House Designs Limited and Nigel Collinson

Overview

[1] This is a costs decision in respect of several motions.

[2] The Defendant, Halifax Regional Municipality ("HRM"), for the first time, a month before trial was to commence, articulated a substantive defence to the Plaintiff's claim based on the *Tortfeasors Act*. The Plaintiff offered to consent to HRM amending its pleadings if HRM consented to an adjournment of the trial. HRM did not agree. Three motions proceeded.

[3] On April 1, 2019, I ruled that the pleadings filed by HRM were insufficient in their current form to establish this newly articulated Defence. I granted HRM's motion for leave to amend the Defence. I also granted the Plaintiff's motion to adjourn the trial due to:

1. the late amendment to HRM's defence;
2. the fact the pleadings were not yet finalized;
3. the need for the parties to address this newly relied upon substantive defence; and,
4. the possibility of additional discoveries and expert opinion.

[4] The Plaintiff's motion for an adjournment was necessitated by HRM's refusal to consent to the adjournment, despite the Defence being amended.

[5] The trial was to begin on April 8, 2019. I rescheduled the trial to begin and run from January 13-16 and January 20-23, 2020. Having heard that the parties could not reach agreement as to costs arising from the motions, I received written submissions from the parties.

[6] All parties agreed that costs could be dealt with by way of written submissions.

Positions of the Parties

[7] Alex Lane Properties Inc. suggested that costs be payable forthwith by HRM in the amount of $8,789.09, based on the throw-away costs resulting from the adjournment and the wasted effort to date preparing for the trial. In addition, the

Plaintiff sought substantial indemnity and also referred to payment on a solicitor-client basis for the costs of the three motions.

[8] HRM argues that an appropriate award of costs payable to the Plaintiff is $1,000. HRM argues that no special circumstances exist as a basis to increase costs for these motions in excess of the amounts provided by Tariff C. HRM further argues that any throw-away costs should be left for determination after the trial, when the benefit of hindsight can be applied.

[9] HRM further argues that costs, if any, to the third parties, should reflect what contributions, if any, were made by third party counsel to the motions. HRM argues that no costs should be awarded to Certified Design Consulting Inc. (Certified Design), who provided no written submissions to the Court. In relation to the other third parties, HRM argues that any award should be nominal given the lack of written submissions and their providing "moral support" to the Plaintiff with no additional arguments.

[10] RMC Construction Management, R. Mullen Construction Limited and Donald Grant do not seek throw-away costs, but do seek costs under Tariff C for the motions. These third parties request costs in the amount of $1,000 for the motions payable by HRM. They specifically point to HRM's opposition to the adjournment motion as a basis.

[11] NC Designs, Maritime House Designs Limited, and Nigel Collinson do not seek throw-away costs but do seek costs of $750 payable by HRM as a result of their attendance at the motions.

[12] Certified Design seeks costs in respect of the three motions in the amount of $1,000. Prior to the motions, Certified Design advised, in writing, that it was not taking any position, and it did not file written submissions. The request for costs is based on attending court for a half day, and the time required to read the filed materials, combined with making oral submissions in relation to the second and third motions.

[13] Certified Design is the only third party seeking throw-away costs from HRM payable forthwith. Certified Design seeks payment of $4,700 plus disbursements based on work it says it has done as outlined in its brief. Much of what is referenced in Certified Design's brief is work that will be of assistance to the preparation for

trial in January 2020 and will not necessarily have to be duplicated. Furthermore, there is no mention of the number of hours worked in relation to those tasks and the fee per hour was not provided. In addition, the request for $4,700 in legal fees and disbursements as throw-away costs would amount to solicitor-client costs which, as I articulate later in this decision, are not appropriate in this case.

Facts

[14] On March 1, 2019, HRM raised a defence under the *Tortfeasors Act*, R.S.N.S. 1989, c. 471, for the first time. While the Court acknowledges that HRM's original Statement of Defence pleaded the statute, it did not plead material facts supporting the application of the *Act*, such as the existence of a settlement and release between Alex Lane and Certified Design. HRM's counsel candidly acknowledged that the specific Defence had not been considered by HRM until recently, and was not communicated to counsel for the Plaintiff until March 1, 2019. HRM was granted leave to amend its Defence and an adjournment of the trial resulted.

[15] Prior to the motions, which were heard on April 1, 2019, the Plaintiff offered to consent to an amendment of the defence if HRM consented to an adjournment. This proposal was declined by HRM.

Issues

[16] The issues are as follows:

1. Should costs be payable by HRM to the Plaintiff and third parties on the motions? If so, what is the appropriate quantum?
2. Should HRM pay throw-away costs to any of the parties? If so, in what quantum?

Law and Analysis

[17] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, Justice Ann E. Smith summarized the principles applicable when determining costs:

> [2] The general rule is that costs follow the event. That rule is not absolute. There are no reasons why that rule should not apply here. The real issue is the amount of those costs.
>
> [3] The starting point in determining the quantum of costs is the *Tariffs of Costs and Fees* under *Rule* 77. Costs on a motion are governed by Tariff C, unless the

judge orders otherwise: *Rule* 77.05(1). A judge has the discretion to add or subtract from the tariff amount: *Rule* 77.07. Furthermore, a judge "may award lump sum costs instead of tariff costs": *Rule* 77.08.

[4] The guiding principles in awarding costs were considered by the Nova Scotia Court of Appeal in *Armoyan v Armoyan*, 2013 NSCA 136. Hunt J. recently summarized the Court's comments from *Armoyan* in *Grue v McLellan*, 2018 NSSC 151, [2018] NSJ No 262:

> 6. In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:
>
> > 1. The court's overall mandate is to do "justice between the parties": para. 10;
> >
> > 2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
> >
> > 3. The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15
> >
> > 4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16
> >
> > 5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
> >
> > 6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and
> >
> > 7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[18] In awarding costs in this matter, I have taken these principles into account.

Motions

[19] First, I will decide what, if any, costs should be awarded in relation to the motions which proceeded on April 1, 2019.

[20] The Plaintiff was largely successful on these motions, with HRM having to amend its Defence to rely on a defence it first articulated on March 1, 2019. Furthermore, the Plaintiff was successful in its motion for an adjournment.

[21] Costs should follow the event unless there are reasons that this rule should not apply. No such reasons were provided. The issue is the quantum to be awarded.

[22] I refer to the following Civil Procedure Rules:

> **77.02 (1)** A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> **…**
>
> **77.05 (1)** The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

[23] Tariff C applies to a consideration of costs arising from these motions. It states:

> Tariff C
>
> For applications heard in chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
>
> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

[24] Here it is undisputed that the length of the motion was more than one hour but less than one-half day. The range of costs from such motions are set out in Tariff C as ranging from $750 to $1000.

[25] With regard to costs from the motion, I have considered all the materials filed by counsel, their submissions at the motion and the success each party achieved. I award costs on the motion as follows.

[26] The Plaintiff, who brought the motion under Rule 12 as well as a motion for an adjournment, was successful. The Plaintiff shouldered the burden of these motions, filing materials and taking the lead in oral argument. Consequently, I exercise my discretion and order costs payable by HRM to the Defendant in the amount of $1000, payable forthwith.

Third Parties

[27] The third parties largely took a secondary role to the Plaintiff in these motions. Short written submissions came from the third parties, except for Certified Design who chose to simply rely on oral argument. I acknowledge that the third parties required counsel to review all the submissions and attend to provide oral submissions, as well as be in court for one-half day. However, I find that their effort was clearly much less than the Plaintiff's effort in the circumstances. In fact, for the most part, their written submissions were short and did not rely on case law. In addition, their oral arguments were very brief and merely supportive of the Plaintiff's arguments. Consequently, I order costs payable by HRM to each of the third parties represented by counsel in the amount of $500. I note this is below the low end of the range under the Tariff. The Plaintiff was the party who shouldered the burden of the motions and, given counsel for the third parties were largely present in watching briefs, except for short, minimal submissions. This amount does justice between the parties and is just and appropriate in the circumstances.

Throw-Away Costs and Indemnity

[28] Civil Procedure Rule 4.21(e) reads, in part:

> A judge who … cancels trial dates, or adjourns a trial may do any of the following:
>
> …
>
> (e) order a party whose conduct caused the … cancellation, or adjournment, to indemnify another party for the expense of preparing for and participating in the … motion for an adjournment, and the expenses caused by the … cancellation, or adjournment.

[29] Civil Procedure Rule 77.09 reads, in part:

> (1) This Rule 77.09 applies to an indemnification under any of the following Rules, or a similar Rule:
>
> (a) Rules … 4.21 … (e) … of Rule 4 – Action;
>
> (2) A judge may order indemnification for all of the following amounts under a Rule to which this Rule 77.09 applies:
>
> a. a substantial contribution towards the costs of necessary services of counsel, or a fair payment for the work of a person who acts on their own:
>
> b. necessary and reasonable out of pocket expenses or disbursements;
>
> c. fair compensation for a har or loss referred to in the applicable Rule.
>
> …
>
> 77.03(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
>
> (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
>
> (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
>
> (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
>
> (d) any other way the judge sees fit.
>
> …
>
> 77.09 (3) The indemnification is payable when the order is made, unless the order provides otherwise.

[30] In considering the requests for indemnity and throw-away costs, I agree that HRM is the party whose actions resulted in the need for an adjournment.

[31] The Plaintiff has sought indemnity in the amount of $8,789.09, which includes a 50% allowance for throw-away costs from trial preparation. The Plaintiff sought indemnity as a result of the Rule 12 amendment and adjournment motions as well in the amount of $8,085. I do not consider it appropriate to provide indemnity for the actual motions, but I will consider whether it is appropriate to order indemnity as a

result of the adjournment motion. I have reviewed the cases referred to by the Plaintiff with regard to costs arising from adjournments.

[32] The Plaintiff did not file a solicitor's affidavit concerning the work required for trial preparation which will now either be lost or duplicated. The Defendant did not take issue with the lack of Affidavit evidence.

[33] The Plaintiff contends that time was spent on the following matters, prior to the need for the motions arising:

(a) Reviewing the file;

(b) Communicating with the Plaintiff;

(c) Commissioning an Expert report;

(d) Preparing the Joint Exhibit Book; and

(e) Outline of the Trial Brief.

[34] The Plaintiff contends these are throw-away costs arising from HRM's actions in this litigation.

[35] Plaintiff's counsel said the following in their brief regarding costs:

> I cannot put the time charges themselves into evidence because they contain privileged and confidential information. However, I used our firm's accounting software to delineate the costs associated with trial preparations, and the April 1, 2019 motions. The following is a summary of those fees and disbursements incurred by Alex Lane:
>
> | Description | Disbursements/ Other Expenses | Fees |
> |---|---|---|
> | Trial Preparation | $0 | $4.062.50 |
> | Rule 12/ Amendment/Adjournment Motions | $74 | $8,085.00 |
>
> My hourly rate is $325.00. Some of the fees were also incurred by an associate, whose hourly rate is $175.00

[36] In addition, the Plaintiff stated the following:

Description	Disbursements/ Other Expenses	Fees
Trial Preparation	$0	$4,062.50
Allowance for Trial Preparation not Wasted	-	($2,031.25)
Rule 12/Amendment/Adjournment Motions	$74	$8,085.00
Subtotal	$74	$10,116.25
HST	$11.10	$11,633.69
Total	$85.10	$11,718.79
Substantial Indemnity at 75%		**$8,789.09**

[37] The difficulty with this is the lack of an Affidavit. I do not know how much time was necessitated by senior counsel and how much time was necessitated by junior counsel. There is no information about what time was spent on what tasks, and no itemized list of work done. Will some of the work done be useful for the trial in early 2020? Will some be wasted? Will some result in duplicated effort? I do not know and cannot guess.

[38] I am cognizant of the decision in *Webber v. Investors Group Financial Services Inc*., 2012 NSSC 201, and, in particular, the following statements of Moir, J.:

> 15. Mr. Mitchell also objects that the indemnity would be assessed on counsel's representations about actual fees and expenses, and not on affidavit evidence. Mr. Parish says, "it is common practice to accept representations by counsel with respect to time billings".
>
> 16. The representations are uncontroverted. That being the case, no injustice results from reliance on them rather than insistence on an affidavit, the costs of which would also be for the indemnity.

[39] In *MacKinnon v. Farr,* 2013 NSSC 74, there was agreement concerning how much time counsel spent on certain tasks and at what rate. It was these agreed- upon facts that were the basis of the cost award.

[40] Given this authority, and the lack of opposition by the Defendant and Third Parties, I will consider the information contained in the briefs.

[41] The Plaintiff is seemingly seeking costs on a solicitor-client basis. This is a high bar to meet. The Plaintiff relies on *Caterpillar Inc. v. Secunda Marine Services Ltd*., 2010 NSCA 105. To repair prejudice to the opposing party to an adjournment motion, the Court ordered they be indemnified reasonable costs, on a solicitor-client basis, related to the adjournment and wasted or duplicated effort of preparing for a trial twice. The amount was to be calculated by the trial judge.

[42] Civil Procedure Rule 77.03(2) provides for the award of solicitor-client costs. While solicitor-client costs are available to do justice between the parties they are resorted to in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation" (*Williamson v. Williams,* 1998 NSCA 195).

[43] I find no blameworthy conduct here. HRM advised of its reliance on material facts it says supports a substantive defence (as per s. 3(b) of the *Tortfeasors Act*) as soon as counsel considered the application of the *Act*. While it was not until March 1, 2019 that this was communicated, it was not due to any reprehensible or blameworthy conduct but was communicated when it was considered.

[44] There is no litigation misconduct in this proceeding that would support an award of solicitor-client costs.

Conclusion

[45] The trial is now adjourned for almost nine months. Some of the work needed to prepare for trial will not need to be redone; however, given the amount of time before the rescheduled trial begins, it is clear some work will need to be redone (*McQuaid v. Lapierre* (1993), 128 N.S.R. (2d) 327 (S.C.)).

[46] At the motions, the Plaintiff's counsel could not say whether he would require either additional discoveries or an additional or revised expert report due to this new pleading.

[47] Given the length of time which will elapse before the rescheduled trial commences, some effort will be duplicated. Based on all the circumstances, the sum of $2,500 is payable to the Plaintiff forthwith as throw-away costs.

[48] I find no basis for an award of throw-away costs to Certified Design. Counsel admits, given the motions, that trial preparation was curtailed. Furthermore, counsel noted that, as of March 20, 2019, it became apparent that there was a good chance the trial could be adjourned. As a third party, Certified Design had the luxury of curtailing trial preparation, unlike the Plaintiff who had to be ready on April 8, just one week after these motions, if the adjournment was denied. The Plaintiff has the burden of proof and, not surprisingly, did not curtail trial preparation in the face of an impending trial.

[49] Much of what counsel for Certified Design says was done for trial preparation will not be lost or wasted.

[50] I decline to award throw-away costs to Certified Design.

Brothers, J.