

SUPREME COURT OF NOVA SCOTIA

Citation: *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44

Date: 20190206

Docket: Hfx No. 430257

Registry: Halifax

Between:

Tri-Mac Holdings, Inc. and Bradley D. Ostrom

Applicants/Plaintiffs

v.

Dale R. Ostrom, ZZYZX Financial Corporation, Tollak Place (Canada) Ltd.,
Public Ventures Corporation, Lundina Grace Greenwood a.k.a. Dena Grace
Greenwood and Public Capital Company

Respondents/Defendants

Costs DECISION

Judge:

The Honourable Justice Ann E. Smith

Submissions:

Post Hearing by Applicants – January 29, 2018

Post Hearing by Respondents – February 1, 2018

Post Hearing Reply by Applicants – February 7, 2018

Counsel:

E. Beth Eva; Peter Rogers, QC, for the Applicants/Plaintiffs
Jeffrey A. Baigrie; John A. Keith, QC, for the
Respondents/Defendants

By the Court:

INTRODUCTION

[1] Bradley Ostrom made a motion for interim injunctive relief in an oppression proceeding. That motion was dismissed for the reasons this Court set out in *Tri-Mac Holdings Inc. v. Ostrom* 2018 NSSC 177. The Defendants are seeking the costs of that motion, payable forthwith.

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.

[5] These principles provide the broad background for costs awards generally.

[6] Courts will depart from Tariff C amounts when the basic award of costs under the Tariff would not adequately serve the principle of substantial but not complete indemnity for legal fees of the successful party. The Tariff C costs in this case would amount to \$12,000, for effectively six days at \$2000 for each day. The Defendants have indicated that actual legal fees incurred in responding to the motion were in excess of \$75,000. A payment of \$12,000 does not amount to substantial yet incomplete indemnity.

[7] The hearing in this matter extended over months and took about six days to complete. The date that was originally set was December 12, 2017. The day before the hearing Mr. Ostrom filed another motion seeking to strike portions of the affidavit of Dale Ostrom. That affidavit had been filed a month before. Dale Ostrom responded to that motion and it was withdrawn in court, on December 12, 2017. The matter was then adjourned to January 16-18, 2018. The argument took place over three full days. Even that was not enough. Bradley Ostrom was given the opportunity to file post-hearing submissions, which involved further costs to Dale Ostrom. I released my decision on the matter, on July 20, 2018. Bradley Ostrom made an attempt then to reopen the matter to have me essentially

reconsider the decision that I had made. That resulted in further filing of materials that added to the costs. The materials that were filed were voluminous and complex and the arguments based upon those materials were without merit. The request to have the matter reopened failed but more importantly, it should never have been made. A party may waste his or her own money on unnecessary motions and meritless arguments, but they should not be allowed to drag someone else with them. The manner in which this matter was pursued was wasteful and that willingness to expend money in that way should not be forced upon the opposing party.

[8] This is a case in which a lump sum costs award is required to provide a level of indemnity for the successful party that approaches substantial. The legal fees charged to the defendants amounted to about \$75,000. The amount they seek in costs is \$25,000 with \$6,076.77 in disbursements. That is one-third recovery. The claim is entirely reasonable. Lump sum costs of \$25,000 and disbursements in the amount of \$6,076.77 are awarded.

Costs payable forthwith

[9] Bradley Ostrom argues that costs should be payable in the cause. *Civil Procedure Rule 77.03(4)(c)* authorizes a motion judge to order costs “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...” The question is whether costs should be payable forthwith to the successful responding party on the unsuccessful motion for interim relief in this oppression action.

[10] The leading recent statement on when costs will be payable forthwith is *National Bank Financial Ltd v Potter*, 2008 NSSC 213, [2008] NSJ No 291, where Justice Warner ordered costs payable forthwith to the successful respondents on an interlocutory matter. He said that the length and complexity of modern litigation has led to a reversal of the traditional approach except when the primary issue in the interim application is the same as that intended at the ultimate hearing or where the award of costs at the interim stage may prevent the matter from being heard later. Justice Warner observed that generally the parties are better able to argue and the Court is better able to make an appropriate costs determination at the time of the application. “Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered” (para. 13).

[11] The parties disagree as to whether the evidence establishes that an order for payment forthwith would prevent or be a very serious impediment to the applicants' ability to continue the proceeding. The applicants say that GERALYN Ostrom has lost her job, that "they no longer qualify for their mortgage and have essentially no borrowing power." I determined in the motion decision, that the applicants "failed to come anywhere close to showing that they would be precluded from pursuing the Action without an order for interim costs." An award of costs payable forthwith would not seriously impede the ability of Bradley Ostrom to continue with the action.

[12] In general, where the principal grounds of the unsuccessful motion or application remain to be determined at trial, this will militate against a forthwith costs order. Costs will more likely be payable forthwith where the motion disposes of discrete issues. The parties disagree on whether that is the case here.

[13] Some of the interim remedies sought on this motion overlap with the remedies sought in the main action, such as the removal of Greenwood as a director of Public Capital and the determination of the number of directors. These two issues clearly remain for determination. [Motion decision at paras. 65-68] The challenge to the September 2017 directors' resolution likewise remains for trial, at least as to the sufficiency of notice of employment termination. [Motion decision at paras. 84-109, and para. 108] The complaint respecting the July 2017 directors' resolution was moot. [Motion decision at paras. 69-83] The request for an amendment to Public Capital's articles was legally baseless. [Motion decision at paras. 110-115] The request for an order requiring Public Capital to make distributions of funds to Brad Ostrom was likewise left for determination at trial. [Motion decision at paras. 155-169] As such, the interim motion left certain oppression issues for later determination, while effectively disposing of others.

[14] The other major form of interim relief requested (and denied) was the payment of interim costs, which was not governed by the injunction analysis. The evidence did not support the claim that the plaintiffs would be unable to advance the action without such an order. [Motion decision at paras. 35, 122-140] (A request payment of certain legal fees allegedly incurred by the plaintiffs but which benefited the defendants, was legally baseless.) [Motion decision at paras. 141-154] This issue would be irrelevant at trial, and may be regarded as a discrete interlocutory matter.

[15] Costs should be payable forthwith. While there is some overlap in substance between the issues on the motion and those on the main proceeding, they are not

“the same” issues. The action is now some four years old, with (as I understand it) no prospect of an early conclusion. The matter is of at least moderate complexity, involving an interlocking group of individual and corporate parties (with family relationships as an added complication) and the availability of multiple remedies. This is an example of the long and complex litigation to which Justice Warner referred. These motions were without merit. Whatever the eventual outcome of the litigation that will not change. The litigation has the potential to go on for years and the successful party at this stage should not have to wait for the recovery of money spent on legal fees in responding to a meritless motion.

Smith, J.