SUPREME COURT OF NOVA SCOTIA

Citation: *Payne v. Elfreda Freeman Alter Ego Trust (2015)*, 2019 NSSC 51

Date: 2019-02-12
Docket: 474228
Registry: Halifax

Between:

Elizabeth Payne, Janet Wile, Ponhook Lodge Limited

Applicants

v.

Elfreda Freeman in her capacity as trustee of the Elfreda Freeman Alter Ego Trust (2015)

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 21 and 22, 2019, in Halifax, Nova Scotia
Counsel:	Andrew Christofi for the Applicants Roderick Rogers, Q.C., and Sarah Walsh for the Respondent

By the Court:

Introduction

[1] The Applicants were entitled to use a travelled road to access their properties, as the result of a reserved right-of-way. The Respondent blocked the road and created a detour, of arguably similar quality, around the residential buildings on its lots. The Applicants unsuccessfully sought an interlocutory injunction pending a hearing seeking a permanent injunction (and restoration of the original access through the travelled road).

[2] In my decision (2019 NSSC 34 at para 26), I concluded that the Respondent blocked the existing travelled portion primarily because of their concerns relating to increased vehicular traffic expected to be occasioned by Ponhook Lodge Ltd.'s intended development of a commercial campground. However, I dismissed the application, because I concluded that the Applicants would not suffer "irreparable harm" if the court did not order an interlocutory injunction, and the balance of convenience did not favour the Applicants.

[3] At paragraph 39, I stated:

> Should the parties be unable to agree on costs, which are referenced in Civil Procedure Rule 77.05, and arguably should be "in the cause",[1] I will accept their brief written submissions by February 4, 2019

[4] The parties filed written submissions.

Position of the Respondent

The Respondent says costs should be payable to it forthwith, in any event of the cause, and in the amount of $4,000. The latter amount is based upon Tariff C for a length of hearing that took two full days.

[5] The Respondent says that the default costs position for successful parties on interlocutory motions is that, absent "special circumstances" the court should not depart from the Tariff C guidelines;[2] and that costs should be awarded to them in any event of the cause and payable forthwith.[3] It cites the following authorities:

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[1] And in support I referred to Justice Hood's decision in *Nova Scotia Real Estate Commission v. Lorway*, 2006 NSSC 256.
[2] *Richards*, at paras. 6 and 18, 20-21; Keltic Transportation, at paras. 18-22.
[3] *Richards*, at para. 18; *Keltic Transportation*, at paras. 26-7.

1. *Richards v. Richards*, 2013 NSSC 269 (Muise J.);
2. *Keltic Transportation Inc. v. Montgomery*, 2014 NSSC 414 (Hood J.); both of whom relied upon the reasoning in *Cana International Distributing Inc v. Standard Innovation Corporation*, 2011 ONSC 752 (MacKinnon J) at para 7:

> In my opinion, absent extraordinary circumstances, costs on an unsuccessful interlocutory injunction should be payable forthwith. An application for an injunction is a discrete legal remedy involving substantial costs. There is no reason that costs should not follow the event where the application is unsuccessful. There is never an assurance that there will be a trial, particularly in circumstances where an injunction is not in place. I agree with the submission of the Defendant that the general approach in the recent caselaw is that when a plaintiff seeking an injunction is unsuccessful, costs should be ordered paid forthwith, in any event of the cause.

and

3. *Hong v. Levy*, 2017 NSSC 329, at paras. 10-11 (Edwards J.) - varied on appeal, but only on an ancillary point, 2018 NSCA 28.

Position of the Applicants

[6] They state in their written argument that:

> The relief the Applicants seek on the final injunction application is the same relief they sought on the interlocutory injunction motion. There will not be much to re-litigate on the final injunction application. Your Lordship found as a fact that the Respondent blocked the right-of-way without the agreement of, and without notice to, or other interested landowners. This satisfies the test in *Langille v. Fickes* [1996] NSJ No. 678, at paras. 23 - 24, for a final injunction… costs should be awarded in the amount of $4,000. The Applicants' disbursements on the motion were $225.28… Given your Lordship's finding regarding the Applicants' lack of consent to the blockade, which may be determinative of the final injunction application, the Applicants respectfully request the costs and disbursements be paid in the cause, or to the parties in the cause, pursuant to Rule 77.03(4) (a) or (b)… The judge hearing the final injunction application… may very well take a different view of the harm occasioned to the Applicants from the detour, as well as the balance of convenience…

[7] They cite as authority:

1. *Amec E & C Services Ltd. v. Whitman Benn & Asociates Ltd.*, 2003 NSCA 126 (Bateman J.A., at para. 5);
2. *Nova Scotia Real Estate Commission v. Lorway*, 2006 NSSC 256 (Hood J.); and
3. *Nova Scotia (Minister of Community Services) v. Campbell*, 2014 NSCA 47, per Bryson J.A., in Chambers: "… Costs of the motion should follow the event in the Court of Appeal (*Natural Beauty Products Ltd. (Receiver of) v. Body Reform Canada Ltd*., (1990) 96 NSR (2d) 330 (NSCA).

[8] Notably, in *Natural Beauty*, Justice Hart stated for the court:

> The appellant has also argued that the trial judge should not have awarded costs to the respondent in the court below and with this ground of appeal I am inclined to agree. Costs on interlocutory matters are usually "in the cause" so that if after full trial it becomes apparent that a different view should have been taken of the interlocutory application the party applying should not be penalized with costs. No explanation was advanced by the trial judge to justify his order for costs and as I can see no reason for departing from the ordinary rule in this case I would hold that his award of costs to the respondent was in error.

What is the governing law regarding "costs" in cases of interlocutory injunctions?

[9] Bearing in mind that the purpose of a costs order following an interlocutory motion is to do justice between the parties, since the advent of the new Civil Procedure Rules on January 1, 2009, I agree with the position of the Respondent-namely that "the general approach in the recent caselaw is that when a plaintiff seeking an injunction is unsuccessful, costs should be ordered paid forthwith, in any event of the cause."[4]

[10] The jurisprudence cited by the Applicants relies almost entirely on cases decided under the old Civil Procedure Rules. That factor is significant because of the different wording of the applicable Rule 63.05, which is succinctly referenced by Justice Hood in *Lorway*:

[4] On interlocutory matters, absent extraordinary circumstances, costs will more likely be ordered forthwith [e.g. "where a motion disposes of discrete issues" and "where the award of costs at the interim stage will not prevent the matter from being heard later"]. Most recently, see *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, per Smith J., at paras. 2 – 4; and 10 – 11.

1 The applicant applied for an interlocutory injunction and I rendered my decision on the matter on March 13, 2006 dismissing the application.

In the decision I stated:

> If the parties cannot agree upon costs, I will accept written submissions.
>
> The parties have been unable to agree upon costs and have made written submissions.

2 The respondents say they should have their costs payable forthwith in the amount of $2,500.00 plus disbursements, including the cost of travel by counsel from Sydney to Halifax. The applicant says costs should be in the cause and the travel costs should be taxed. In any event, it says a costs award of $2,500.00 is too high.

3 Costs are dealt with in Civil Procedure Rule 63 and CPR 63.05(1) provides:

> 63.05.
>
> Unless the court otherwise orders, the costs of any interlocutory application, whether ex parte or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

4 In *Natural Beauty Products Ltd. (Receiver of) v. Body Reform Canada Ltd.*, [1990] N.S.J. No. 119, 1990 CarswellNS 449 (NSCA), Hart J.A. said in para. 7:

> 7 The appellant has also argued that the trial judge should not have awarded costs to the respondent in the court below and with this ground of appeal I am inclined to agree. Costs on interlocutory matters are usually in the cause' so that if after full trial it becomes apparent that a different view should have been taken of the interlocutory application the party applying should not be penalized with costs. ...

That was a decision where an application for an interlocutory injunction was dismissed.

5 In *North American Trust Co. v. Salvage Assn.*, [1998] N.S.J. No. 505, 1998 CarswellNS 446 (NSCA), Bateman J.A. referred to the decision of Davison J. in *Uniglobe Travel (Atlantic) Inc. v. Fundy Travel Ltd.* (1991), 113 N.S.R. (2d) 340 (N.S.T.D.) where, in para. 46, she quotes Justice Davison at p. 340, as follows:

> 46 On the question of costs, I have already made reference to the comments of Mr. Justice Hart in *National Beauty Products Limited v. Body Reform (Canada) Limited*, S.C.A. 02250, April 6, 1990 decision, the import of which is that where the issue in the interim proceeding is similar to that which will eventually be decided following full trial, costs should be costs in the cause. ... (emphasis in original)

6 In para. 47, Bateman J.A. says:

> 47 I agree with this interpretation. In my view, *Natural Beauty Products* is not to be taken as authority for the general proposition that costs on all interlocutory matters are to be costs in the cause.
>
> She dismissed the appeal from an order of costs payable forthwith.

7 The *North American Trust Co.* case involved a Chambers application for an order compelling the plaintiff to produce officers for discovery.

8 Furthermore, in *North American Trust Co.*, Bateman said as follows in para. 43:

> 43 In my view Rule 63.05(1) simply requires a judge on an interlocutory application to specifically address the entitlement to costs, failing which this default provision will apply.

I did not specifically address the issue of costs in my decision. In my view, the default provision applies and costs should be in the cause.

9 In any event, the issue for trial is the same as that on the application; that is, the interpretation of s. 3(d) of the *Real Estate Trading Act*, S.N.S. 1996, c. 28. In such a case, costs are to be in the cause.

10 I therefore do not need to deal with the issue of travel costs of counsel claimed as a disbursement. These costs can be dealt with after the trial at taxation, if the respondent is successful at trial, or by the trial judge.

[11] I prefer the approach taken in *Cana International*, that the costs be payable forthwith and in any event of the cause.

What order of costs will do justice between the parties?

[12] I agree that the Tariff C would ordinarily apply (CPR 77.05), and that a proper costs award would be $4,000 for this two-day hearing. However, ultimately, costs must be assessed based on the individual unique circumstances of each case.

[13] This case has an extraordinary factual matrix. The Respondent was not entitled to block the existing right-of-way, and did so without consultation of, or notice to, the Applicants. The blockade remains. The Applicants were still able to access their properties over a qualitatively similar travelled road, created by the Respondent, which was not located on the right-of-way. This latter fact significantly undermined the Applicants' argument that there was "irreparable harm", and that the balance of inconvenience (as it is also sometimes called) should be decided in their favour.

[14] A supervening general discretion exists per Rule 77.02 which permits the court to "make any order about costs as the judge is satisfied will do justice between the parties."

[15] Rule 77.03 (1) permits that one party pay costs to another, or that the parties bear their own costs.

[16] Costs awards are made in recognition that the successful party has won a dispute, and has incurred costs to do so.

[17] However, I conclude that it would *not* do justice as between the parties if the Respondent were to receive costs from the Applicants in the circumstances of this case. The motion brought by the Applicants, seeking restoration of their access to their properties over a right-of-way reserved for their benefit, was necessitated by, in my opinion,[5] the Respondent's deliberate extrajudicial and high-handed behaviour in blocking the travelled portion of the right-of-way for no clearly discernible justifiable reason. While the Freemans may have had legitimate concerns about overburdening of the existing right-of-way, given their understanding that a campground could be built in the near term by Ponhook Lodge Ltd., they built the detour in September 2016, and only resorted to the judicial process on September 7, 2017, by filing a Notice of Action requesting a declaration that the right-of-way is private, and a permanent injunction restraining PLL "from inviting, encouraging or condoning the use of the right-of-way over the Freemans property by general members of the public to access [the campground property]". That proceeding remains inactive.

[18] On the other hand, the Applicants were unsuccessful, and should not be rewarded with costs either.

Conclusion

[19] Therefore, I conclude it is appropriate that the parties bear their own costs.

[20] I direct that the Respondent's counsel prepare the order, and once consented to as-to-form by the Applicants' counsel, forward it for my signature.

Rosinski, J.

[5] I recognize that I have not had the benefit of a full hearing on the matter, but I am satisfied that I have had sufficient insight to make this comment.