Date: 19970703 Docket: C.A. 136436

NOVA SCOTIA COURT OF APPEAL
Cite as: Keating v. Bragg, 1997 NSCA 117
Hallett, Matthews and Freeman, JJ.A.

BETWEEN:

CHARLES V. KEATING, GREGORY KEATING and CATHERINE KEATING	)	John A. Campion, C. William Hourigan and Harry E. Wrathall, Q.C. for the Appellants
Appellants	)	
- and -	)	
	)	William L. Ryan, Q.C. and Roderick H. Rogers for the Respondent John L. Bragg
JOHN L. BRAGG, ROBERT RADCHUCK, WILLIAM SAYERS, DONALD McDOUGALL, DAVID HOFFMAN, RODGER TAYLOR, STUART RATH, BRAGG COMMUNICATIONS INCORPORATED, a body corporate, and HALIFAX CABLEVISION LIMITED, a body corporate	)	S. Bruce Outhouse, Q.C. for the Respondent Halifax Cablevision
Respondents	)	Duff Harper for the Respondent Directors of Halifax Cablevision Limited
	)	Appeal Heard: May 13, 1997
	)	Judgment Delivered : July 3, 1997

THE COURT: Appeal from Goodfellow J. 's decision on costs dismissed per reasons for judgment of Hallett J.A.; Matthews and Freeman JJ.A. concurring.

HALLETT, J.A.:

This is an application for leave to appeal and an appeal from the decision of Justice Goodfellow's award of costs to the respondents arising out of his dismissal of the appellants' application alleging oppressive conduct against

the respondents with respect to the corporate governance of Halifax Cablevision Limited.

It is also necessary to deal with the costs issue arising from our dismissal of the main appeal from Justice Goodfellow's decision.

Justice Goodfellow awarded party and party costs to the respondent Bragg of $55,325.00; to the respondents Radchuck and Halifax Cable the sum of $23,900.00; and to the Directors of Halifax Cable, the other respondents, $23,900.00 for a total of $103,125.00 plus disbursements.

The standard of appellate review of a cost award is well known and was recently restated by Flinn J.A. in **Conrad v. Snair et al** (1996), 150 N.S.R. (2d) 214 at paragraph 5:

> Since orders as to costs are always in the discretion of the trial judge, this appeal is subject to a clearly defined standard of review. This court has repeatedly stated that it will not interfere in a trial judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice. (See Exco Corp. v. Nova Scotia Savings & Loan Co. et al. (1983), 59 N.S.R.(2d) 331; 125 A.P.R. 331 (C.A.); Turner-Lienaux v. Nova Scotia (Attorney General) et al. (1993), 122 N.S.R.(2d) 119; 338 A.P.R. 119 (C.A.); and Hawker-Siddeley Canada Inc. v. Superintendent of Pensions (N.S.) et al. (1994), 129 N.S.R.(2d) 194; 362 A.P.R. 194 (C.A.)); see also Elsom v. Elsom (1989), 96 N.R. 165 (S.C.C.)).

Justice Flinn made further relevant comments in paragraphs 32, 33 and 34 wherein he stated:

> Justice Nunn is an experienced trial judge. He case managed this proceeding for two years prior to its trial, and presided over the trial which lasted 11 days. As such, he is far better able, than we are, to assess the complexity and importance of the issues raised in the trial; how much effort was required to be expended on the case by counsel; how the conduct of the appellant's insurer impacted on the effort required to be expended; and what amount, in dollars, would be a proper award of costs under the circumstances.
>
> It is not the role of this court to second guess the trial judge, and to do our

> own assessment on the relative importance or unimportance of the various matters which the trial judge considered, or to give any one or more of those various matters more or less weight than the trial judge may have given to them.
>
> While the award of costs, here, is high, I am not prepared to say that it is so inordinately high, or so clearly wrong, as to amount to a manifest injustice.

Counsel for the appellants submits that as the proceeding before Justice Goodfellow involved a hearing of an application rather than a trial, that it was an error for Justice Goodfellow to have calculated the cost award by the application of Tariff A of the **Costs and Fees Act**, R.S.N.S. 1989, c. 104.

The **Costs and Fees Act** provides in s. 3 that party and party costs in respect of services mentioned in the Schedule shall be determined by the Costs and Fees Committee. Party and party costs as determined by the Costs and Fees Committee are subject to approval of the Attorney General. The Costs and Fees Committee developed a "Tariff of Costs and Fees determined by the
Costs and Fees Committee to be used in determining party and party costs". The Tariff is attached as a Schedule to the **Act**; it includes "Tariff A" which is described as "Tariff of Fees for Solicitor Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding".

In applying Tariff A a Judge awarding party and party costs must determine what the "amount involved" in the proceedings is, as the costs are calculated on this basis. Tariff A provides that where there is a substantial non-monetary issue, as in this case, and whether or not the proceeding is contested, the amount involved is to be determined having regard to the complexity of the proceeding and the importance of the issues.

It is clear from the wording of the Tariff that it applies to "proceedings". The term is not defined in the Tariff.

The word "proceedings", as defined in **Civil Procedure Rule 1.05(w)**, is a helpful starting point in determining its meaning in the Tariff:

> **CPR 1.05(w)** "proceeding" means any action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons, originating motion, or in any other manner;
>
> (Emphasis added)

The appellants' application, which was commenced by an originating notice, is a proceeding within the meaning of the **Civil Procedure Rules**. Every application to court is not a proceeding within the meaning of that term in Tariff A but where an application involved several days of hearing, including the adducing of evidence, it is not an error by the presiding judge to consider it a proceeding for the purpose of awarding party and party costs. It is a matter within the discretion of the presiding judge, taking into account the extent to which the proceeding mirrors a trial proceeding.

This application involved four days of hearing which included extensive *viva voce* evidence. Justice Goodfellow did not err in applying Tariff A to determine the party and party costs that ought to be awarded.

The appellants submit that Justice Goodfellow erred in determining that the amount involved in the proceeding was $1,000,000. I have reviewed the reasons given by the trial judge for selecting this figure. He considered and applied the criteria dictated by the Tariff in making the determination. It cannot be said that in selecting this amount he applied wrong principles or

was so clearly wrong as to work a manifest injustice on the appellants. The issues were important and, to a degree, complex. The issues involved substantial implications to the respondents had the application succeeded. It must be recognized that the selection of the amount involved, which is a necessary step in the calculation of costs, in a non-monetary matter, is somewhat arbitrary. However, it is a matter within the trial judge's discretion. Justice Goodfellow's decision to fix the amount involved at $1,000,000 is reasonable. I would dismiss this ground of appeal.

The appellants submit that the trial judge erred in applying Scale 5 of Tariff A for the purpose of calculating the costs to be awarded to the respondent Bragg. The selection of Scale 5 causes me some concern as the issues, although important to the parties, were not all that complex. Apparently counsel for the respondents sought solicitor and client costs from Justice Goodfellow. Such costs can be awarded in rare and exceptional circumstances and are not uncommon in this type of proceeding. Justice Goodfellow considered making such an award. However, as an alternative, he decided that party and party costs using Scale 5 of Tariff A was appropriate under the circumstances.

In the course of his reasons Justice Goodfellow stated:

> Mr. Merrick, on behalf of the four members of the Board of Directors, also advanced the argument that this is a rare and exceptional case. I can only repeat that in my view, the proper exercise of judicial discretion that can provide a reasonable and appropriate award of costs is by limiting the recovery to party and party costs but incorporating, as part of the exercise of judicial discretion, the guidance contained in tariff "A" of the **Costs and Fees Act**. The additional time required to address the manner in which the unfounded allegations were advanced, to the extent that I concluded the application was unnecessary, are such that I am satisfied it can be

> addressed by the utilization of scale "A" which in itself is a departure from standard chambers cost determinations and further, by the consideration of a variation from the basic scale 3.

I would infer Justice Goodfellow's reference to Scale A was meant to be Tariff A.

In **Benson v. Third Canadian General Investment Trust Ltd.** (1993), 13 B.C.L. (2d) 265 Farley J. of the Ontario Court of Justice (General Division - Commercial List) dismissed a minority shareholder's application for relief from oppression on the basis that the application was made by the applicant in its capacity as a bidder for the company rather than as a shareholder.

With respect to costs, Farley J. stated:

> As to the question of costs, the general respondents asked for $150,000 on a solicitor-and-client basis, Morgan for $60,000 on a party-and-party basis and Meighen for $3,000 on a party-and-party basis. The amounts were not challenged by the applicants - in fact their own calculation of their own party-and-party costs was $60,000. I do not find the bump up to $150,000 on a solicitor-and-client basis from $60,000 party-and-party in this type of litigation unusual. The general respondents justify their claim for solicitor client-costs on the reasoning of *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Gen. Div.) where Henry J. said at p. 323:
>
> > First, we are here concerned with what is primarily economic opportunity and marketing strategy. Both the plaintiff Apotex and the defendant Novopharm are candidates for entry to the Canadian market of the pharmaceutical product for which there is a significant Canadian market. Apotex has in fact got there first which its principal claims is a very substantial advantage, and it seeks to delay the entry of Novopharm by resort to this litigation. Its attempt to use the injunctive jurisdiction of the court to effect this purpose has, however, failed.
> >
> > If the plaintiff has succeeded in obtaining the injunction sought, the delay in the ultimate entry to the market of the defendants would have been costly to them in terms of business immediately lost, as well as the handicap over time of 'catching up' its loss of market position - an economic prejudice amply highlighted by Dr. Sherman of Apotex. In other words, the cost to the defendants of falling behind the leader Apotex would in business language be incalculable; the financial stakes are high. Clearly the defendants were prepared, and reasonably so, to bear the cost burden of retaining leading firms of solicitors and counsel to oppose the injunction sought.

> I cannot leave this matter without a final comment. Apotex used this court by way of an interlocutory proceeding to "play hard ball" against the defendants and lost. It can scarcely complain if it is required to compensate the defendants for their costs accordingly.
>
> I note that in this case, the applicants did not bring a motion for an injunction with the attendant requirement for an undertaking as to damages. Rather, after one year of multiple offensives and snipings they brought this application on "at the last minute". I have no doubt that AGF was interested in its own economic wellbeing - it was trying to obtain a fund(s) to manage for a fee without the heavy start-up costs of building from a green fields situation. It too was playing major league baseball - not pickup softball.
>
> In my view, the respondents should have the costs they requested payable forthwith.

There are clear analogies between the application before Farley J. and that dealt with by Justice Goodfellow. In **Benson** solicitor and client costs of $150,000.00 were awarded to the main respondents to be paid by the unsuccessful applicant. The hearing before Farley J. was two days in duration. The issues were more complex than that heard by Justice Goodfellow.

On the hearing before Justice Goodfellow, the appellants sought an order for solicitor and client costs to be paid by Halifax Cable. Justice Goodfellow dealt with this issue as follows:

> The litigation was advanced by the applicants to protect their own interests. It was not in the best interests of Halifax Cablevision, and they were not successful in achieving anything that could not have been achieved without resort to litigation. .....
>
> With respect to the submission by the Keatings that Halifax Cablevision Limited should bear all the costs, I take the position that only if it had been established that the proceedings were taken for the benefit of Halifax Cablevision Limited, either directly by representative proceedings or shown to be of real benefit as a consequence of the proceedings should consideration be given to the possibility of Halifax Cablevision paying or contributing to costs.
>
> There is no foundation for any direction that costs, on any basis, should be paid by Halifax Cablevision Limited.
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> In my opinion, article 191 of the Articles of Association of Halifax Cablevision Limited is of no application because the Keatings did not enter into, act or do anything in their capacity as officers or directors in the

> furtherance of any duties for Halifax Cablevision Limited but rather conducted themselves to the contrary.

On appeal, the appellants asserted that Justice Goodfellow erred in not making such an award.

Applying the reasoning in **Benson**, Justice Goodfellow would have been justified in awarding solicitor and client costs to the respondents. Accordingly, his selection of Scale 5 as applicable to Bragg's costs, while not necessarily warranted on the basis of complexity of the issues, effected a reasonable compromise on the cost issue, which compromise accrued to the benefit of the appellants. The trial judge was not clearly wrong in the exercise of his discretion to select Scale 5 rather than one of the less expensive scales.

I reject the appellants' submission that the trial judge erred in concluding that the appellants' application was not for the benefit of Halifax Cable. The evidence supports the trial judge's conclusion that it was for the benefit of the applicants as the controlling shareholders of Access Cable Television Limited.

I reject the submission of counsel for the appellants that the trial judge erred in failing to award the appellants solicitor and client costs of the application. The litigation was not for the benefit of Halifax Cable. The principles enunciated in **Wallersteiner v. Moir (No. 2)**, [1975] 1 All E.R. 849 (C.A.) have no application to the facts of this case. Nor does Article 191 of the Articles of Association of Halifax Cable.

I reject the argument of counsel for the appellants that the appellants sought only information. The relief sought in the application, the whole course of conduct of the application and the relief sought on this appeal point to a contrary conclusion as noted in my decision on the main appeal. The appellants' application was for wide-ranging relief that, if granted, would have prevented the respondent directors of Halifax Cable from participating in the decision whether or not Halifax Cable should enter into the proposed transaction with MT&T. Therefore, it was critical that the respondents vigorously oppose the application.

For the aforesaid reasons I would dismiss the appeal from Justice Goodfellow's award of costs to the respondents.

The appeal to this Court from Justice Goodfellow's decision on the main issues having failed, the respondents seek the costs of the appeal calculated as 40% of the cost award made by Justice Goodfellow. Tariff A provides, pursuant to a note at the end of the Tariff,

> On an appeal, the fees allowed shall be 40% of the sum determined by the Appeal Division of the Supreme Court under the scale above.

Notwithstanding this provision, this Court has a discretion respecting costs. In my opinion, in this case, an award of 40% of the cost award made by Justice Goodfellow would not be just. The respondents, having obtained a favourable decision from Justice Goodfellow, were armed with strong findings of fact made in their favour as set out in the decision. Therefore, they were not at the same risk at the appeal level as they were at the start of the

proceedings. The limitations on an appeal court's power to interfere with findings of fact by a judge of the first instance are well known. Accordingly, it ought not to have taken a great deal of time nor a need for the respondents' counsel to deal with novel issues in preparing for the appeal.

Under the circumstances, an award of party and party costs of 40% of the costs awarded by Justice Goodfellow would be excessive. Considering the range of cost awards which we are accustomed to making in this Court, and considering the fact that Mr. Bragg's counsel has carried the ball in the proceedings, I would award costs of the main appeal and the cost appeal to be paid by the appellants. The cumulative cost awards to be as follows:

To Bragg - $4,000.00 plus disbursements;

To Radchuck and Halifax Cable - $1,500.00 plus disbursements

To the other Directors as a group - $1,500.00 plus disbursements.

Hallett J.A.

Concurred in:

Matthews J.A.

Freeman J.A.

C.A. No. 136436

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CHARLES V. KEATING, GREGORY KEATING and CATHERINE KEATING Appellants - and - JOHN L. BRAGG, ROBERT RADCHUCK, WILLIAM SAYERS, DONALD McDOUGALL, DAVID HOFFMAN, RODGER TAYLOR, STUART RATH, BRAGG COMMUNICATIONS INCORPORATED, a body corporate, and HALIFAX CABLEVISION LIMITED, a body corporate Respondents	REASONS FOR JUDGMENT BY: HALLETT, J.A.