C.A. No. 115107

NOVA SCOTIA COURT OF APPEAL

Hallett, Bateman and Flinn, JJ.A.

Cite as: O'Brien v. Clark, 1995 NSCA 232

BETWEEN:

NORMA LOUISE O'BRIEN and BARBARA CLARK Appellants	)	R. Malcolm MacLeod J. Hunt for the appellants
- and -	)	J. Brian Church M.E. Wortman for the respondents
ROBERT E. CLARK, PAULETTE CLARK, an infant by her guardian ad litem, Robert E. Clark Respondents	)	Appeal Heard: September 20, 1995 Judgment Delivered: November 2, 1995 Supplementary Decision on Costs Delivered December 12, 1995

THE COURT: Each party shall bear its own costs on the appeal and of the trial per reasons for judgment of Bateman, J.A.; Hallett and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

By decision dated November 2, 1995 this court allowed the appeal, herein

and ordered a new trial. The matter of costs was reserved pending submissions by counsel.

The circumstances of this matter are unusual. The appellant unsuccessfully sought to tender undisclosed video surveillance evidence at trial. The respondent opposed the appellant's use of the evidence. On appeal this court determined that the appellant was in error in the manner in which he attempted to use the evidence, but that the learned trial judge had erred in refusing to allow the appellant's request to correct his error. A new trial was ordered.

The issue now arises as the appropriate disposition of costs.

In an interlocutory decision rendered January 6, 1995, during the trial the learned trial judge said:

> The consequences of failure to disclose documents is addressed in Rule 20.09 and I shall refer to that subject in the final disposition of this case. As Ewaschuk, J. said, "A breach of a basic rule in fair advocacy can be dealt with in the ultimate decision concerning costs".

At the conclusion of the trial the judge fixed the costs as follows:

> The amount involved in this action is $410,000. The appropriate scale, given the nature of the case, is Scale 4. That is, the indicated costs are $20,850. *I have selected Scale 4 keeping in mind the decision I rendered during the course of the trial concerning the videotaped evidence sought to be adduced by the defendants and the increased scale is intended to award the plaintiffs extra costs for that as well as for the overall complexity of the case.* I will hear counsel further with respect to the question of costs, if necessary. (emphasis added)

The appellant appealed the award of costs submitting that "the Learned Trial Judge erred in awarding costs on Scale 4 of the Tariff because of the non-disclosure of the video surveillance by the defence." On the appeal the appellant submitted that the complexity of the case was not such as would warrant an increased scale of costs. Costs are always within the discretion of the trial judge.

The trial judge refers in his interlocutory ruling to **Civil Procedure Rule 20.09**, which **Rule** empowers the court ". . . to impose on the party . . . such terms or

penalty as it thinks just." Clearly, at least part of the reason for the increased scale was the failure of the appellant to disclose the existence of certain video tapes at trial. We have found that, as there was no obligation on the appellant to make such disclosure, the trial judge erred in such a ruling.

Generally, when an appeal is allowed, the order for costs at trial is set aside. It is usual that costs on an appeal follow the event, most commonly fixed at 40% of the costs at trial. This general practice varies, of course, with the circumstances of each case. This appellant has succeeded. The issue now is the appropriate disposition of costs of the appeal and of the first trial.

The appellant proposes that each party bear its own costs of the trial, with the respondent paying costs of the appeal fixed at 40% of the costs at trial, using Scale 3. The 'amount involved' for the purposes of the appeal was the $410,000 awarded at trial. This would result in costs on the appeal of $6563.79.

The respondent seeks costs of both the trial and the appeal, on the basis that it was the appellants' mistake at trial which has occasioned these proceedings. While I have found that the appellants' counsel was in error at trial in his tendering of the evidence, he was not without some authority for the manner in which he proceeded. It cannot be said that the trial record reveals any misconduct by the appellant such as might disentitle a successful party to costs, nor is such suggested by the respondent.

This appeal has involved a novel issue. The governing law in this area was unclear. In such circumstances it seems appropriate that neither party receive costs of the appeal notwithstanding the appellant's success.

As to the costs of the first trial, I have some sympathy for the respondent, as she will incur the expense of a new trial. Presumably, however, there will not be a duplication of all costs on the retrial.

It is of some relevance that the respondent opposed the appellants use

of the evidence at trial on the same basis as did the trial judge. He did not support the appellant's request to recall the witness, which request we have found to have been reasonable and which procedure would most likely have avoided the retrial. In these circumstances it seems appropriate that each party bear its own costs of the trial. In this regard, I have been guided by the decision of the Ontario Court of Appeal in **McKenzie et al. v. Bergin et al.**, [1937] O.W.N. 200.

J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.

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NORMA LOUISE O'BRIEN and BARBARA CLARK appellants - and - ROBERT E. CLARK, PAULETTE CLARK, an infant by her guardian ad lite, Robert E. Clark respondents	) Supplementary) Decision on) Costs