

NOVA SCOTIA COURT OF APPEAL
Citation: Metlin v. Kolstee, 2003 NSCA 95

Date: 20030922
Docket: CA 175075
Registry: Halifax

Between: John Metlin, Michael Metlin and Beatrice Metlin

Appellants

v.

Hank W. Kolstee and Donna L. Kolstee

Respondents

Judges: Roscoe, Bateman, Saunders, J.J.A.

Appeal Heard: September 22, 2003, in Halifax, Nova Scotia

Written Judgment: September 24, 2003

Held: Leave to appeal is granted. The appeal is allowed, only to the extent noted with respect to the HST, and costs of the appeal are payable by the appellants to the respondents in the amount of \$500.00 as per reasons of Roscoe, J.A.; Bateman and Saunders, J.J.A. concurring.

Counsel: Jeff Forbes, agent for the appellant
Gary Richard, for the respondent

Reasons for judgment: (Orally)

- [1] This is an application for leave to appeal and an appeal from a decision respecting costs after a two day trial of a boundary dispute in the Supreme Court. The background of the dispute is thoroughly recorded in a decision of this court which allowed the present appellants' appeal from the original trial decision. See: **Kolstee v. Metlin** 2002 NSCA 81. After the appeal, for which costs of \$1,000 were awarded, the parties appeared before the trial judge for the determination of the trial costs. Justice Richard Coughlan set the amount involved at \$40,000, and using Scale 3, ordered that the respondents pay the appellants' costs in the amount of \$4,125 plus disbursements as taxed by the taxing master. The appellants' trial counsel had previously taxed his account for legal services to the appellants, in the amount of \$16,999 plus Harmonized Sales Tax (HST) of 15%. The disbursements were taxed at \$1,310.44 plus HST.
- [2] The appellants had submitted that a higher amount involved be fixed, that a higher scale be used, that costs be increased because of an offer to settle, that a portion be payable by the respondents' counsel, and that additional compensation for disbursements made prior to the commencement of the action be awarded. These requests are reiterated in the notice of appeal. As well, it is submitted that the judge erred by not ordering that the respondents also pay HST on the fees and disbursements.
- [3] In the discussions with the agent for the appellants during the oral submissions and in his oral decision the trial judge dealt briefly with all the issues raised before him. The parties had agreed that the value of the land in question was \$10,000. The trial judge determined that Rule 41A was not applicable because the offer in question had explicitly expired long before trial. The use of scale 3 and an amount involved of \$40,000 was based on a finding that the trial was short and the matters were not complex. Furthermore, the trial judge was not persuaded that there was any basis to order that any costs be payable by the respondents' counsel personally.
- [4] The standard of review of a costs order is as stated by Bateman, J.A. in **Founders Square Ltd. v. Coopers & Lybrand (2000)**, 179 N.S.R. (2d) 375 at § 46:
- Costs are within the discretion of the trial judge. As with any discretionary order, appellate courts are reluctant to interfere. In *Conrad v. Snair et al.* (1996), 150 N.S.R. (2d) 214; ... (at p. 216), Flinn, J.A. said:
- 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.)).

- [5] After carefully reviewing the record, we are unanimously of the view that while the amount ordered appears low in relation to the fees taxed by the appellants' solicitor, there are several other factors to be considered, and we are unable to find that the trial judge applied wrong principles of law, or that the decision is so clearly wrong as to amount to a manifest injustice. We would, therefore, not interfere with the amounts taxed.
- [6] However, as indicated during the hearing of the appeal, and conceded by respondents' counsel, through inadvertence the amounts awarded for disbursements did not include HST, as taxed by the Taxing Master. We agree that ordinarily HST should be added to any taxed disbursements. (See **MacDonnell v. M. & M. Developments Ltd.** (1998) 164 N.S.R.(2d) 81 at ¶99) We would therefore order that, in addition to the amount paid by order of the trial judge, the respondents pay an additional 15%, that is, \$196.57 representing HST on the taxed disbursements. Leave to appeal is granted. The appeal is allowed, only to the extent noted with respect to the HST, and costs of the appeal are payable by the appellants to the respondents in the amount of \$500.00.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.