1991 C.BW. No. 8920

IN THE COUNTY COURT OF DISTRICT NUMBER TWO

BETWEEN:

NOVA WOOD-CRAFT LIMITED

PLAINTIFF

- and -

JOHN HUGHES and **JOANNE HUGHES**

DEFENDANTS

* * *

1991 C.BW. No. 8921

IN THE COUNTY COURT OF DISTRICT NUMBER TWO

BETWEEN:

BRADY BUILDING SUPPLY CENTRE LIMITED

PLAINTIFF

- and -

JOHN HUGHES and **JOANNE HUGHES**

DEFENDANTS

HEARD: At Bridgewater, Nova Scotia, the 4th day of February, A.D. 1992

BEFORE: The Honourable Judge Charles E. Haliburton, A/J.C.C.

DECISION: The 3rd day of March, A.D. 1992

COUNSEL: Michael K. Power, Esq., for the Plaintiffs

Frank E. Demont, Esq., for the Defendants

D E C I S I O N O N A P P E A L

HALIBURTON, A/J.C.C.

This is an appeal from a taxation of party and party costs.

Two separate actions were initiated under the Mechanics' Lien Act. Both Claimants have been represented throughout by Mr. Power. The actions were commenced in March of 1991. The Defendants did not file a defence in either matter and did not represent that they had any defence. Both proceedings came before Carver, J.C.C. at Bridgewater on the 8th of July, 1991, when the Plaintiffs appeared and proved their claims in the absence of the Defendants. I am variously informed that the hearing lasted one and a half hours or one-half day. A single Order for Judgment was taken out in relation to both matters, fixing the debt in favour of Brady Building Supply Centre at $46,986.20 and that in favour of Nova Wood-Craft Limited at $12,546.96. Separate Certificates of Judgment were issued by the Court on the basis of that judgment. The Order for Judgment as presented to the Court and initialled by the Trial Judge included the following at paragraph 3:

> The Plaintiff shall be entitled to the costs of each action, to be taxed.

Pursuant to that Order, a contested taxation took place before Taxing Master David W. T. Brattston on the 26th of September. Two Bills of Costs were taxed and allowed as presented. No question arises with respect to the disbursements included in those Bills of Costs. This appeal or objection relates solely to the "solicitor's fees" "as per Tariff 'A', Scale 3 (basic)".

The Taxing Officer allowed solicitor's fees of $4,500 on the Brady bill and $1,750 on the Nova Wood-Craft bill. The Taxing Officer has provided reasons for his decision. Mr. Brattston considered certain issues; as he phrased them:

> (1) when taxing a party-party Bill of Costs pursuant to an Order of a court, does a Taxing Master possess the jurisdiction, authority or discretion to use a tariff other than Tariff A or a scale other than Scale 3 (basic)?
> (2) if a Taxing Master is so possessed, whether I should depart from Tariff A Scale 3 in the case at bar.
> (3) whether the original proceedings herein were akin to an entry on default, and to be taxed accordingly.
> (4) whether I ought to treat the two original proceedings as one action and accordingly tax costs in a single bill.
> (5) whether I should apportion the costs.

Mr. Demont on behalf of the Defendants/Appellants raises several issues; among them:

(1) **That the Taxing Master made an "error in principle"** in that he failed to apply sections 37 and 41(3) of the Mechanics' Lien Act, R.S.N.S. 1989, c.277. These sections respectively say:

> **37** Where more than one action is brought to realize liens in respect of the same property, the **court or judge**...may

consolidate all the actions into one, and where a Plaintiff fails to take

> **41(3)** ...the least expensive course...the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken.

(2) **That the Taxing Master erred** when he considered himself to be "fettered" by the absence of any reference to apportionment of the costs in the Order for Judgment and that he was, therefore, unable to consider any apportionment between the Plaintiffs as contemplated by s. 41(1) of the Mechanics' Lien Act.

(3) **That the Taxing Master erred** by allowing total costs which are excessive in that the amount allowed represents a penalty to the loser rather than a "partial indemnity" to the winner. As Counsel says:

> The philosophy behind costs has been that costs should reflect a portion of the actual legal fees incurred, the theory of partial indemnity. (as expressed in the article by) R. E. Pizzo, "The New Tariff System of Taxation" (1989) 16 Nova Scotia Law News 37.

Mr. Power, on behalf of the Plaintiffs/Respondents argued that since the Defendants had failed to cooperate in any way during the course of the proceedings, they should not now be heard to complain at the result. He has produced correspondence in connection with his submissions which establishes that his clients sought to have a Consent Judgment, in response to which he was advised that financing was being put in place and that judgments would not be necessary. He was unsure until the matter was actually in the courtroom that the Defendants would not be participating in the trial. As such, he argues that all preparations necessary to a contested action were in place.

Before judgment, the Defendants were not interested in assisting or informing the Plaintiffs. He argues that the matter did take one-half day for the proforma proof of the

accounts outstanding; that the obligation to apply for a consolidation of the actions did not depend on the Plaintiffs alone but could have been initiated by the Defendants who might also have participated in some fashion to promote the use of the "least expensive" method of resolving the issues.

Mr. Power argues that the Taxing Officer made no error in the taxation of solicitor's fees since he dealt with the Order of the Court as it was presented to him. The **"amount involved"** was, in effect, decided by the Trial Judge who fixed **the amount of the judgment** and he argues that the matter was a "basic" case and ought, therefore, to entitle the Plaintiffs to a standard or "basic" allowance for costs.

WAS THE TAXING MASTER RIGHT?

It is well established that the discretion exercised by a Taxing Master ought not to be interfered with on an appeal except where it is established that he "fell into error by the exercise of some wrong principle". In other cases, it has been said that the discretion of the Taxing Officer might be reviewed where "there has been a gross error". Referring to Rent Review Commission v. Rawdon Realties Limited et al, 56 N.S.R. (2d) 309, it appears that such a gross error might be found simply on the basis of a grossly disproportionate allowance for costs in the context of the particular circumstances of a case.

The powers of a Judge on such appeals are set forth in Rule 63.40 in the following terms:

"On an appeal from a taxation, the Court may:

(a) exercise all the powers of a taxing officer;

(b) review any discretion exercised by the taxing officer as fully as if the taxation were made by the court in the first instance; and
(c) **grant such order on the application, including the costs of appeal and taxation, as is just."**

This rule has been interpreted as providing for a hearing **de novo** in appropriate circumstances. Clause (c) permits the Judge hearing the appeal to exercise a jurisdiction larger than that of the Taxing Master.

It is clear that the Taxing Officer was in error.

The costs to be allowed here must be determined in the context of the **Mechanics' Lien Act**. The Legislature has directed that costs be restricted in such actions. Having provided the opportunity for simplicity and diminished costs and after limiting the global amount of fees to not more than 25% of the judgments obtained, the Act provides that in any event, (s. 41(3)) the solicitor costs "shall in no case exceed what would have been incurred **if the least expensive course had been taken".**

The principle, then, to be followed in the taxation of these actions arising as they do under the Mechanics' Lien Act is that the Bills of Costs ought to be allowed on the basis that the actions had been consolidated into one action and pursued in the least expensive manner reasonably available, having regard to the behaviour of the opposing parties. I see no hardship arising in the particular circumstances of this case since both Plaintiffs were represented by one Counsel and, inspite of the fact that the actions were not consolidated, they were heard jointly or contiguously.

The failure to treat the actions as consolidated for

purposes of costs, to apply the "least expensive" rule and to apportion the costs were errors in principle which must be corrected. These are considerations which I may now take into account.

The error made by the Taxing Master, however, was more basic than a failure to apply that principle from the Mechanics' Lien Act.

Having directed his mind to the question of "whether a Taxing Master has a jurisdiction or discretion to depart from Scale 3 of Tariff A in party-party costs", **he concluded that he did have jurisdiction.** He then proceeded to exercise this jurisdiction in the context of the words incorporated in the Order for Judgment that the Plaintiffs "shall be entitled to the costs of each action to be taxed". He concluded that, in the absence of direction from the Trial Judge, the amount involved and the scale to be used can be determined by the Taxing Officer. In fact, the **Taxing Officer has no such authority or jurisdiction.**

The Taxing Master erred when he assumed such jurisdiction and, flowing from that, it is apparent that the "issues" he addressed were beyond his jurisdiction. **The extent to which** "costs", meaning **counsel fees, will be allowed is only for the Trial Judge** who will fix them in the context of the "partial indemnity" philosophy alluded to by Mr. Demont as his issue no. 3 above.

THE NEW RULE 63

Effective with actions commenced after January 1st,

1989, a new regime for the fixing and taxation of costs came into effect in Nova Scotia. This scheme was developed by a Joint Committee which included representatives of the Nova Scotia Barristers' Society, the Judiciary, and representatives from the office of the Attorney General. The scheme adopted was patterned on a system already in place in the Province of New Brunswick. At the time of its implementation, there was circulated, with the revised **Rule 63**, a letter written on behalf of that committee noting two aspects of the new regime which are relevant to my considerations here. The first of those referred to what I've termed the "partial indemnity" philosophy in the following terms:

> ...the recovery of costs should represent a substantial contribution toward the party's reasonable expenses in presenting or defending a proceeding **but should not amount to a complete indemnity.**
>
> (my emphasis)

The second relevant observation contained in that letter was expressed in the following brief sentences.

> Under the new system, costs **will be fixed** in a lump sum **by the Trial Judge.** In fixing costs, the first step will be for **the Court to determine "the amount involved".** In a sense, this is an artificial amount determined by the presiding Judge for the purposes of fixing costs. **The award of costs is in the discretion of the Court.**
>
> (my emphasis)

It should perhaps be observed that "the Court" means (Rule 1.05(1)(e)(iii)):

> in a proceeding in a County Court, the court or a judge thereof, whether sitting in court or in chambers, and where a clerk of the court has power to act, the clerk of the court.

The philosophy enunciated by the Costs and Fees Committee and the assertion that costs are to be fixed by "the Court" found its way into the new Rule 63.02 which sets out the general proposition that **costs "are in the discretion of the Court"**. A refinement of that proposition in dealing with party and party costs is enunciated in Rule 63.04. This latter Rule makes it clear that unless the Court otherwise orders, the costs between parties are to be fixed by the Court except in the case of default judgments (63.06) and in instances where a proceeding has been settled before judgment (63.10).

Part III of Rule 63 deals with the taxation of solicitor/client bills in general (excluding always party and party costs after trial and default judgments) and establishes the authority of any Taxing Officer to approve a solicitor's account without which the solicitor, of course, cannot recover a judgment (Rule 63.27). All the foregoing was accurately enunciated in an article written by R. E. Pizzo, "The New Tariff System of Taxation" (1989), 16 Nova Scotia Law News 37. I quote some excerpts from that article.

> ...The fees will no longer be determined by the number of letters written or documents drafted, but by the complexity of the trial and nature of the action....
>
> In recommending the Tariff system of taxation, the Statutory Costs & Fees Committee adopted the philosophy that the recovery of costs should represent a substantial contribution towards a party's reasonable expenses in presenting or defending a proceeding, but should not be a complete indemnity....
>
> Costs are an indemnity rather than a penalty...a compromise between total cost indemnity (i.e. costs on a solicitor/client basis) and no costs....

There are four tariffs for the calculation of costs. Solicitor fees for a litigant entitled to (party and party) costs on a decision or order in a proceeding are determined according to Tariff "A". For actions in which default judgments are entered, solicitor fees are calculated according to Tariff "B". Tariff "C" is applied to determine solicitor fees on settled or discontinued actions. Tariff "D" deals with disbursements....

Under Tariff "A", the trial judge assesses solicitor's fees at the end of trial. The Tariff system assumes that, by that time, the trial judge is very familiar with the action and is therefore the one most qualified to determine the amount of costs. He or she is the person best suited to assess costs to fit the merits of the case....

Under Tariff "A", the judge must determine:
(a) the "amount involved" in the action;
(b) the scale of compensation....

In monetary cases, the "amount involved" need not be equal to the amount of damages awarded....

The trial judge is given the discretion to disregard the Tariff system. According to Civil Procedure Rule 63.02, costs are in the discretion of the Court. The Court may deal with costs at any stage of a proceeding. It may also disregard rules 63.03 to 63.15, awarding a gross sum in lieu of or in addition to any taxed costs.

Tariff "B"
...According to Civil Procedure Rule 63.06, **the prothonotary shall determine the "amount involved"** and shall tax costs.

Tariff "C"
Tariff "C" applies to proceedings which are discontinued or settled. It is a hybrid tariff....This taxation is done by the taxing officer under Civil Procedure Rule 63.10.

Disbursements are taxed in accordance with Tariff "D". According to Rule 63.10A, **the taxing officer shall tax disbursements.**

(My emphasis)

Mr. Pizzo has analysed what the effect of the new Rule 63 is in his opinion. The letter circulated to the bar by the Costs and Fees Committee indicated what they intended to

accomplish in their drafting. My own review of the Rule outlined above reaches the same conclusion as these writers. In the context of this matter, then, **the Taxing Master did not have the power on a party and party bill after trial to fix either the amount involved or the scale under which the solicitor's costs were to be taxed.** His proper course was to return the matter to the Trial Judge and request him to make those determinations. Under the Rule, **it is clearly the Trial Judge who must exercise his discretion with respect to both of those elements.** Apparently no one raised this question at the time of the taxation.

That brings us to the matter of this "appeal" and the question of what, if any, authority or jurisdiction I may have to hear and dispose of this matter as an appeal under the Rules.

THE APPEAL PROCESS

The process of appeal from taxation is governed by Civil Procedure Rules 63.37A through 63.40. The subject matter of the appeal is limited by Rule 63.39 and the Court's power described in Rule 63.40. In particular, Rule 63.38(5) has given "cause to pause" in deciding this appeal.

> 63.38(5)
> Notwithstanding anything contained in this Part, an **appeal** from a taxing officer's determination of a party's **entitlement to disbursements** in a proceeding in which the costs between the parties were determined by a court **shall be to the same judge** who determined the costs between the parties, unless the court otherwise orders.
>
> (My emphasis)

Not being the "same" judge, I may be the "wrong" judge.

As previously discussed, the philosophy of the new regime dealing with party and party costs is that it is the Trial Judge who is to determine the costs under Tariff "A" and that determination can be appealed only to the Supreme Court, Appeal Division, under Rule 63.37A. Notwithstanding my reservations, both Counsel requested and agreed that I assume the jurisdiction to deal with the "appeal" and invited me to tax the counsel fees. Ordinarily, any "appeal" would have come before Judge Carver under Rule 63.38(5). Inasmuch as the failure to fix counsel fees was an apparent oversight, that question could also be properly referred back to Judge Carver. In view of the circumstances however, and the representations and agreement of Counsel, exercising the authority of Rule 63.40 (supra), I order that this appeal will be heard and disposed of by me, and will not be confined to the grounds specified (63.38(5) and 63.39).

The appeal will be allowed insofar as it relates to counsel fees. The disbursements as allowed by the Taxing Master are hereby confirmed.

FIXING COUNSEL FEES

It remains simply to determine the appropriate counsel fee. This case involved a mechanics' lien action. The text Macklem & Bristow, Construction Builders' and Mechanics' Liens in Canada cites at page 1-2 the dissenting judgment of Kelly J.A. in Clarkson Co. v. Ace Lbr. Ltd. [1963] S.C.R. 110, with the following comments:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes...It constitutes an abrogation of the common law to the extent that it creates in the specified circumstances a charge upon the owner's lands which would not exist but for the act and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor...

The owner and other creditors not belonging to the class of lien holders have rights as well. It would seem that the Courts are admonished to have regard for those rights in applying sections 37, 41(1) and 41(3). To paraphrase these three provisions, the Court is authorized to consolidate the actions of all lienholders into one action to deal with all at once, and to apportion the costs recovered in the action amongst the several plaintiffs, bearing in mind that the total of such costs shall not "exceed what would have been incurred if the least expensive course had been taken".

It is argued on behalf of the owner that notwithstanding two separate actions were taken in this instance, the costs to be allowed ought to be based on a consolidated action. I agree. I take that view notwithstanding the fact that the total costs claimed are less than 25% of the total judgments allowed (s. 41(1)).

In this particular instance, both Plaintiffs were represented by one Counsel and one witness was called to prove both claims. No defence was filed in relation to the claims and while it was, in any event, necessary for the Claimants to establish a prima facie case on viva voce evidence, the two

trials were concluded in something less than one-half day. The total value of the judgments was just under $60,000. With the trial date fixed for July 8th, Claimants' Counsel wrote to Defence Counsel June 28th, offering to settle for the accounts due plus legal fees and disbursements which then totalled $1,721.

As to costs allowed in other jurisdictions, I refer again to the text Macklem & Bristow where I find at page 12-26:

> Suggested Revised Guide to Schedule of Costs Where Lien Filed - Preparation, Appearance and no Actual Trial
>
> | (Lien Amount) | Costs |
> |---|---|
> | $50,001 to 75,000 | $1,200.00 |

I bear in mind that in this case, there was an "actual" trial and that the Claimants were obliged to prove a prima facie case. I accept that Plaintiffs' Counsel was obliged to review the necessary documentation with the witness between June 28th and July 8th. I accept that Counsel was obliged to spend one-half day in Court on the trial, leading to the granting of a single Order for Judgment with respect to both transactions. I observe that the Owners/Defendants might have intervened to ensure that the two actions were consolidated and in view of their tacit admission of indebtedness, might have consented to judgment, thereby obviating the need of both preparation and trial.

It is necessary under Rule 63.04 to fix the "amount involved" and to select the Tariff which will be applied in accordance with Schedule "A". In doing so, it is appropriate in

this case to consider that approximately $60,000 is claimed; that the Claimants, through their Counsel, attempted to short circuit the process by obtaining a Consent Judgment and that the Owners failed to respond to their overtures; that the Owners did, in fact, refuse to make the admissions necessary to reduce costs; that the two Plaintiffs or Claimants were represented by one solicitor with some resulting benefit in terms of time required. I fix the "amount involved" at $60,000 to be paid on the basis of Scale 1, for a total solicitor's fee of $3,225 which shall be apportioned between the Claimants on the basis of one-third to Nova Wood-Craft Limited and two-thirds to Brady Building Supply Centre Limited. In addition, the Claimants will have disbursements as already allowed by the Taxing Master. In relation to Brady Building Supplies, disbursements total $392.68 and in relation to Nova Wood-Craft Limited, disbursements total $385.68.

Because it is my view that neither of the parties raised the appropriate issues before the Taxing Master, no costs will be allowed to either party on this appeal.

DATED at Digby, Nova Scotia, this 3rd day of March, A.D. 1992.

CHARLES E. HALIBURTON
ADDITIONAL JUDGE OF THE COUNTY
COURT OF DISTRICT NUMBER TWO

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CASES AND STATUTES CITED:

Mechanics' Lien Act, R.S.N.S. 1989, c.277

Rent Review Commission v. Rawdon Realties Limited et al, 56 N.S.R. (2d) 309

"The New Tariff System of Taxation", 16 Nova Scotia Law News 37

Macklem & Bristow, Construction Builders' and Mechanics' Liens in Canada, 1990 edition

Clarkson Co. v. Ace Lbr. Ltd. [1963] S.C.R. 110