SUPREME COURT OF NOVA SCOTIA

Citation: Shannon v. Frank George's Island Investments Ltd., 2015 NSSC 133

Date: 2015-04-30
Docket: Hfx No. 420496
Registry: Halifax

Between:

Joel Shannon, David and Dinah Grace, and Gower Holdings Limited

Applicants

– and –

Frank George's Island Investments Limited, Anton and Gabriele Viehbeck, Seabright Holdings Limited and Paul Pleau

Respondents

– and –

The Attorney General of Nova Scotia

Intervenor

DECISION ON COSTS

Judge:	The Honourable Justice James L. Chipman
Written Submissions:	April 23, 2015
Counsel:	A. Douglas Tupper, Q.C. for the Applicants Matthew J.D. Moir for the Respondents No submissions from the Intervenor

By the Court:

Introduction

[1] By decision issued March 11, 2015 (2015 NSSC 76), I determined that Captain Hemlock Lane and Tern lane are private roads that do not benefit Frank George's Island.

[2] This decision addresses costs. The Intervenor did not seek costs and no costs were sought against the Intervenor.

[3] In support of this costs claim, the Applicants filed April 23, 2015 affidavits of their counsel, A. Douglas Tupper, Q.C., attaching legal accounts and a list of disbursements. Additionally, they filed the accounts of their expert, Allen B. Robertson, Ph.D. Both the Applicants and Respondents filed briefs and authorities.

Positions of the Parties

Applicants

[4] Joel Shannon et al take the position that since they were the successful party, they should be awarded costs. The Applicants submit that the question of whether the road was private or public was the critical issue to be determined in the Application.

[5] The Applicants say that this is not a case warranting application of Tariff A costs under Civil Procedure Rule 77.06(2). Rather, they assert the matter is suited to a lump sum award under Rule 77.08. In this regard, the Applicants point out the Application did not involve a specific amount. They say that to assign an amount would make the Tariff more distracting than useful.

[6] The Applicants state that whereas their total legal fees on this matter are approximately $136,000, when an appropriate deduction (relating to other matters not in issue in the Application) is considered, total estimated fees are $125,000. They further submit 60% of the actual fees incurred; i.e., $75,000 is an appropriate costs award along with their disbursements of $5,231.46 and expert fees of $5,050.00.

Respondents

[7] The Respondents agree the Applicants successfully defended the Respondents' claim that the entire road originally described as Umlah Road was public. They state that had this been the only issue in question, the Applicants would be entitled to party and party costs. However, the Respondents go on to argue that there were several other issues, as set out at pp. 2,3 of their brief:

1. A claim based on *res judicata* (cause of action estoppel and issue estoppel) that the Respondents incorporated a sham company to:
    a. evade the effects of Justice Scaravelli's decision in *Seabright Partners, LLC v. Frank George's Island Investments Ltd.*, 2010 NSSC 368 – a decision which dealt with different parties and different rights of way (see, for example, paragraphs 17-24 and 28-30 of the amended Notice of Application). As your Lordship determined at paragraph 23, the findings being sought by the Applicants involved allegations of fraud. The allegations were dismissed; and
    b. improperly enable the commercial development of Franks George Island – an allegation for which there was no corroborating evidence as confirmed in paragraph 13 of Your Lordship's decision.
2. allegations of contempt which were only abandoned shortly before trial as indicated at paragraph 2 of your Lordship's decision; and
3. allegations of trespass and a corresponding claim for damages (see, for example, paragraph 31 and 34 of the amended Notice of Application). In fact, the amended Notice of Application (paragraph 15-16) said that the Respondents "repeatedly" and improperly used the right of way in question. These inflammatory allegations were wrong and ultimately dismissed.

It is respectfully submitted that these inflammatory, damaging and ultimately unsupportable allegations should attract the Court's sanction in the form of offsetting costs.

Overall, it is respectfully submitted that the highly prejudicial allegations made against the Respondents are such that both sides be required to bear their own costs. Alternatively, if your Lordship is inclined to grant costs to this application, any award should be reduced by 75% in recognition of the scandalous and unproven allegations made.

In terms of quantum, the Respondents submit that Tariff A be applied, as is the norm. Furthermore, the "amount involved" should reasonably reflect the underlying financial

> risks (including an unproven monetary claim for damages); the complexity of the issues in this litigation and the importance of the issues to the parties.

[8] Accordingly, the Respondents argue that there should be no costs award. Alternatively, they say any award in favor of the Applicants should be reduced by 75%. As for quantum, they say Tariff A should be applied and that a reasonable amount involved should be set in a range of $125,000-$150,000, plus $2,000 per day of trial along with reasonable disbursements.

Governing Law

[9] Civil Procedure Rule 77 deals with costs. Justice Wright nicely sets out the principles of the Rule in *Henneberry v. Compton*, 2014 NSSC 412 at para 13:

> 13 As I have summarized on previous occasions, the following principles can be extracted from the relevant provisions of Civil Procedure Rule 77:
>
> (a) An award of costs is in the discretion of the trial judge who may make any order about costs as the court is satisfied will do justice between the parties;
>
> (b) Costs of a proceeding follow the result, unless a judge orders otherwise;
>
> (c) Party and party costs must be fixed in accordance with tariffs of costs and fees incorporated into Rule 77, unless a judge orders otherwise;
>
> (d) A judge who fixes costs may add an amount to, or subtract an amount from, Tariff costs;
>
> (e) A judge may award lump sum costs instead of Tariff costs;
>
> (f) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[10] In the following para Wright J. comments on the difficulty in using Tariff A in the context of a boundary line dispute:

> 14 The difficulty with the utilization of Tariff A in a case such as this is that the claim is a completely non-monetary one. Although it is provided in the tariffs under Rule 77 that where there is a substantial non-monetary issue involved, the "amount involved" is to be determined having regard to the complexity of the proceeding and the importance of the issues, those guidelines are of little practical assistance in assessing costs following the adjudication of a boundary line dispute.

I find what he says to be of application to the characterization of a road, such as we have here.

[11] A lump sum costs award approach was taken by the Nova Scotia Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 136 and *Williamson v. Williams*, 1998 NSCA 195. I find these decisions to be of guidance in my analysis of the within matter.

Analysis

[12] I am not persuaded by the Respondents' argument reproduced from their brief at para 7, supra. I note that costs of a proceeding follow the result… (Rule 77.03(3)). At the outset of the main decision I introduced the case as follows:

> [1] This proceeding involves the question of whether a particular stretch of road is a public road or a private one.

[13] The question was answered that the road is private. I do not view the case as having been one of divided success. In this regard, I am mindful of two recent costs decision of Justice Coady. In *Podgorski v. Cook*, 2012 NSSC 418, the unsuccessful party claimed partial success, and argued for a division of costs. Justice Coady stated at para 3:

> [3] Ms. Podgorski started this application in chambers seeking an order as to the location of the subject property line. She also requested damages for trespass as well as special damages and costs.

[14] He continued at paras 10 and 11:

> [10] In my decision dated May 2, 2012 I found in favour of Ms. Podgorski. I ruled that the mutual property line is as shown in the 2009 Berrigan Survey. I declined an award of damages as I did not find Mr. Cook's trespass to be worthy of damages.
> [11] The principle issue in this application was the location of the property line. The claim for damages was clearly a secondary issue. Assessment of damages played a minor part in pre-trial and trial proceedings. Very little of the witness examination involved damages. Consequently I rule that Ms. Podgorski is the successful party.

[15] In *Northbridge Consulting Services v. Quigley*, 2015 NSSC 49, Coady J. stated at paras 2 and 3:

> [2] Southridge Technical Services Ltd. (Southridge) and Messrs. Quigley, Grant and Murray take the position they were largely successful. They suggest three scenarios. One, each party should bare its own costs; two, if the plaintiffs

> are entitled to costs they should be based on Tariff "C"; three, Southridge and the individual defendants should be awarded costs for their success.
>
> [3] I do not accept the defendant's submission that they were largely successful. I recognize the defendants successfully turned back an application for an interlocutory injunction. I recognize that the $315,831 award represents only 24% of the damages sought. I recognize that Northbridge failed in their claims for solicitor-client costs and significant punitive damages. These litigation successes must be viewed in the context of the overall case.

[16] In the context of the overall case, the Applicants were the successful party. The use of the right of way to service the island and the Respondents' claim that the road was public, were the central themes of the overall case, and occupied most of the evidence and argument. On these issues, the Applicants were the successful party.

[17] Costs are not determined on an argument by argument basis. In the normal course of an application or trial, one may expect skirmishes which will be decided one way or the other. Consistent with the decisions of Coady J. and several other costs judgments, I see my role as adjudicating costs disputes in the context of the overall case. In this regard, I adopt the argument of the Applicants as set out at pp. 4,5 of their brief:

> 1. The Applicants argued res judicata/issue estoppel, and the judge did not agree. One day out of five days of hearing spent on this argument. In fact, the two critical issues to be decided in this Application were, whether these were private roads, and whether Frank George's Island could benefit from the right of way. The Applicants presented two arguments on those issues (1) Res Judicata and (2) on the facts these were private, not public, roads. Costs are not determined on an argument by argument basis. In an action for negligence, a party may put forward various arguments to support the claim for negligence. For example, excessive speed, and alternatively inattention. A trial Judge may dismiss the allegation of 'inattention', but still find there was negligence, based on 'excessive speed'. The successful plaintiff has succeeded on his claim for negligence, and is entitled to his full costs, even though one of his arguments on the critical issue was dismissed. In this case, the Applicants were successful in this Application on the two matters in issues, and the Respondents were unsuccessful. The Decision directed exactly the Order concerning Captain Hemlock Lane and Tern Lane, that the Applicants were seeking. Under CPR 77.03(3), costs follow the 'result', not individual arguments on each issue.
>
> 2. The Applicants claimed trespass, and damages. This was based on the argument of res judicata. This claim was dismissed by the trial judge. This argument would be expected from the Applicants. This was the second time the use of

> these roads has been fought with the Viehbecks. While the judge dismissed this argument, it is clear he was concerned about any repetition of abuse of the roads, and he specifically warned the Respondents about any repetition, contrary to his Order. The argument concerning trespass was ancillary to the main issues concerning the nature of the roads, only nominal damages were sought, the allegation only occupied one page of written argument, no separate evidence on the issue was offered, and virtually no time was taken in oral argument.
>
> 3. The Applicants in their prehearing brief argued contempt. This claim was not actually pleaded in the Applicants' notice, it only occupied one page of written argument, and the claim was withdrawn before the actual hearing.
>
> In all the circumstances, the Applicants had complete success – they received the very order they were seeking. The status, and the use, of Captain Hemlock Lane and Tern Lane were reconfirmed. Full costs should be awarded to the Applicants.

[18] The Respondents invite the Court to proceed under Tariff A and assign an amount involved. To my mind, this would be an arbitrary approach for which I could assign a number far different than the range of $125,000-$150,000 they have suggested.

[19] Returning to *Henneberry, supra*, Justice Wright declined to adopt any formula or rule of thumb for the determination of the amount involved that would lead to the application of Tariff A. In so doing, he cited Justice Murphy's decision of *MGL Consulting & Investments Ltd. v. Perks Coffee Ltd.*, 2010 NSSC 426 and the late Justice Pugsley's decision in *Veinot v. Veinot Estate*, 1998 NSCA 164 as authority for this approach. I endorse this line of reasoning as I see no rationale in this case to, in effect, pick a number out of the air. Accordingly, I decline the invitation to apply Tariff A and instead, chose to proceed by way of a lump sum amount.

[20] In *Armoyan, supra*, at para 16, Justice Fichaud drew on the words of Freeman, J.A., in *Williamson, supra*, as to the approach that should be taken to quantify a lump sum:

> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to

> have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[21] Since I have decided to grant a lump sum, the question arises as to whether the Respondent should be given an opportunity to provide submissions on the legal accounts. Indeed, this is something they specifically requested at pp. 5 and 11 of their brief.

[22] With respect, I do not believe that a post application or trial costs determination should take on the characteristics of a taxation. Rather, and in keeping with what Justice Wood said in *Jeffries v. Hendriksen*, 2013 NSSC 153, the party seeking substantial indemnity has the burden of providing to the Court details regarding the actual accounts. These details must include the activities, hours spent and hourly rates. I find that the legal accounts attached to Mr. Tupper's affidavit are sufficiently thorough. I do not believe submissions on the accounts would serve to assist with the Court's ultimate disposition.

[23] In this case, the Applicants have suggested 60% of their proposed legal fees and I find this percentage to be reasonable. As for the proposed legal fees of $125,000, I have carefully reviewed the entries and hourly rates. On balance I find the accounts to be appropriate; however, and as acknowledged by the Applicants, the fees do not all solely relate to the Application. Rather than reducing the fees by $11,000, I believe it is more appropriate to incorporate a $36,000 reduction. In the result, I find the lump sum should be quantified at $100,000. To this I would apply the 60%, resulting in a costs award of $60,000 (inclusive of HST) plus disbursements of $5,231.46, plus Dr. Robertson's fees of $5,050.00 for a total of $70,281.46 payable by the Respondents to the Applicants.

Chipman, J.