

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Parnell v. Collicutt, 2008 NSSC 35

Date: 20080204

Docket: S.Bw. No. 237167

Registry: Halifax

Between:

Elizabeth Parnell, Spruce Cove Wildlife Rehabilitation
Centre, and Tracey Roberts

Plaintiffs

and

Lester D. Collicutt, Lester D. Collicutt Ventures Limited,
Shawn Bernard Martin, and Darla Joyce Johnson

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Gerald R P Moir

Heard: 28, 29, and 30 March 2007 at Halifax

**Deadline for Written
Submissions:** 31 December 2007

Counsel: Ms. Elizabeth Parnell and Ms. Tracey Roberts, acting on
their own behalf
Mr. G. Michael Owen for the defendant Lester D
Collicutt
Ms. Stephanie Atkinson for the defendants Shawn Martin
and Darla Johnson

Moir, J.:

[1] This decision on costs follows my decision on the main issues very lately. The decision of 29 August 2007 called for submissions on costs “no later than one month from the date of the decision”. Ms. Parnell, who had filed an articulate pretrial brief on behalf of the three plaintiffs, twice requested extensions. These were granted, the second over Mr. Owen’s understandably strong objection. The last deadline was 31 December 2007. Another month has passed and I have heard nothing from the plaintiffs.

[2] An argument is made for solicitor and client costs. That argument turns mainly on unfounded allegations of misconduct alleged by the plaintiffs against all defendants. There were allegations of fraudulent misrepresentation and uttering threats. In the circumstances of this case, the allegations should lead to an increased award of party and party costs. The allegations were not the central claims of the plaintiffs in this action. The case is not one of those special and rare ones in which I would exercise the discretion to award solicitor and client costs, but it is a case for increased party and party costs.

[3] The defendants successfully defended the plaintiffs’ many claims except for a minor breach of contract by one of the defendants. The defendants successfully prosecuted a counterclaim to prevent obstruction of a right-of-way by the plaintiffs. On behalf of Mr. Collicutt and his company, Mr. Owen seeks \$28,000 in party and party costs against the plaintiffs and \$5,000 against the other defendants on their cross-claim, which was abandoned one month before trial. On behalf of Mr. Martin and Ms. Johnson, Ms. Atkinson submits the plaintiffs should pay \$18,000 in party and party costs. She submits the parties should bear their own costs on the cross-claim.

[4] The main issue in this case was non-monetary. In that situation, the tariffs call for “the amount involved” to be set by reference to “the complexity of the proceeding” and “the importance of the issues”.

[5] The proceeding was not very complex. The issues were important to the parties. Here is how Ms. Parnell enumerated the plaintiffs’ claims in her closing submission:

1. General damages against Mr. Collicutt and Mr. Martin for interference with Ms. Roberts' and mine quiet enjoyment of our lands;
2. Damages against Mr. Collicutt for allowing trespass upon my property;
3. Damages against Mr. Martin for permitting trespass upon my property;
4. Declaratory relief declaring the right-of-way crossing over my land was created for passenger vehicles and forestry management vehicles only;
5. Declaratory relief declaring that the gate installed by myself on the right-of-way does not interfere with the use and right of passage over the right-of-way of Mr. Collicutt, Mr. Martin and Ms. Johnson;
6. Special damages for the losses occasioned to Tracey and myself as a result of the unlawful conduct of Mr. Martin;
7. General and punitive damages or, in the alternative, general damages in an aggravated amount for the inconvenience and distress occasioned to Tracey and myself, as a result of the high-handed and unlawful conduct of Mr. Martin;
8. Declaratory relief stating the right-of-way crossing over my land is not a recreational road for off-highway recreational vehicles;
9. Declaratory relief declaring I can install a remote controlled gate and provide parties with a remote control so they can open the gate without exiting their vehicles;
10. Declaratory relief declaring the right-of-way crossing over my lands is not an industrial right-of-way;
11. Declaratory relief declaring that if Lester Collicutt Ventures builds an industry on their land and operates out of that land, the right-of-way crossing over my land cannot be used by the industry;

12. Costs on a solicitor/client basis; and
13. Such other relief as the court deems just and equitable.

The plaintiffs failed on all of these, although Ms. Parnell recovered a small award of damages against Mr. Martin for breach of contract.

[6] The bulk of the plaintiffs' claims sought to limit the defendants' use of a right-of-way that provided access to timber lands used by Mr. Collicutt or his company for decades and access to Ms. Johnson's cottage. In turn, counterclaims were made for enforcement of the right-of-way. The behaviour of Ms. Parnell and Ms. Roberts had so obstructed the defendants that Ms. Johnson pretty much gave up going to her beloved cottage and Mr. Collicutt stayed away. That was not such a serious consequence for Mr. Collicutt because his employees were not deterred. However, I note the claims articulated by Ms. Parnell that would have curtailed the commercial uses of the Collicutt lands. I assess the amount involved at \$100,000 for each set of defendants.

[7] Applying that amount to the basic scale, costs would be \$12,250 plus \$2,000 per day of trial, \$18,250 for each set of defendants.

[8] I am satisfied that additional costs should be awarded to Mr. Collicutt and his company. They should receive a lump sum award under rule 63.02(1)(a) to address the allegation of fraud, and they are entitled to increased costs because of a formal offer to settle made under rule 41A.

[9] I will allow \$5,000 to address the unfounded allegation of fraud against Mr. Collicutt. Costs to Mr. Martin and Ms. Johnson should also be increased by \$5,000 to address the unfounded allegation of fraud.

[10] The formal offer was made about three weeks before trial. The plaintiffs fared worse after trial than they would have done had they accepted the offer. Rule 41A.09 provides for "double party and party costs" after the date of the offer. Rule 41A does not fit perfectly with the new tariffs. It may not be fair to double the amount allowed for trial days in every case of an offer made close to trial. I think, though, that it is just to double the amount in this case. There would have been

significant expense for preparation in the three weeks before trial in addition to the expense of trial itself. I will, therefore, award an additional \$6,000.

[11] Rule 40.03(1) provides that a party who discontinues a proceeding or withdraws a cause of action in a proceeding “shall pay the costs of any opposing party to the date of giving notice of discontinuance or withdrawal”. While I doubt that the mandatory language of this Rule overrides the court’s discretion, I would not depart from it without good reason.

[12] Justice Wright said in *Atlantic Business Interiors Limited v. Hipson*, [2004] N.S.J. 331 (S.C.) at para. 20 that “the costs of the counter-claim should relate only to the amount by which the costs of the proceedings were increased as a result of the counter-claim”. I think the same goes for a cross-claim. In this case, I do not see how the cross-claim could have added appreciably to the cost of defending the proceeding.

[13] Mr. Collicutt and his company will have costs of \$2,500 against Mr. Martin and Ms. Johnson on the cross-claim abandoned a month before trial.

[14] In conclusion, Lester D. Collicutt and Lester D. Collicutt Ventures Limited will have costs against the plaintiff of \$31,250 plus disbursements and costs of \$2,500 against the other defendants plus disbursements related to the cross-claim. Shawn Bernard Martin and Darla Joyce Johnson will have costs of \$23,250 plus disbursements against the plaintiffs.

J.