

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Glen Arbour Condominiums Inc. v. Learning,
2006 NSSC 5

Date: 20060111
Docket: SH 250504
Registry: Halifax

Between:

Glen Arbour Condominiums Inc., a body corporate

Appellant

v.

Lisa Learning and Egan Wallett

Respondents

Judge: The Honourable Justice Glen G. McDougall

Heard: September 27, 2005, in Halifax, Nova Scotia

Counsel: Sean P. Mudge, Esq. , for the appellant
Eric K. Slone, Esq., for the respondents

McDougall, J:

[1] This is an appeal pursuant to section 32 of the *Small Claims Court Act* (the “Act”).

[2] The appellant alleges jurisdictional error and error of law on the part of the learned adjudicator in relation to an award of costs which included experts’ fees totalling \$8,511.99. These fees included the cost of preparing reports and attending at trial.

[3] A second ground of appeal was abandoned prior to the hearing.

BACKGROUND

[4] The respondents contracted to buy a condominium unit from the appellant. The agreement of purchase and sale included a clause whereby the appellant warranted and covenanted to “construct and complete the unit and common elements in a good and workmanlike manner substantially in accordance with the plans and specifications of the architects...”. Prior to closing, an inspection revealed the presence of mold which was later shown to be caused by water incursion into the basement of the unit.

[5] The respondents refused to close and, based on the reports of two experts engaged by them to investigate the problem, they sued for damages and costs alleging a fundamental breach of contract.

[6] Based primarily on the experts’ reports, the learned adjudicator ruled in favour of the respondents awarding them the statutory maximum of \$15,000.00 in damages along with prejudgment interest and costs totalling \$9,221.99. The amount awarded for experts’ fees was \$8,511.99.

ISSUE

[7] The issue for this court to decide is:

- 1.) Did the Learned Adjudicator err in law or exceed his jurisdiction when he awarded costs that included experts’ fees totalling \$8,511.99?

DISCUSSION

[8] The Small Claims Court (the “Court”) was created by Statute (R.S.N.S. 1989, c. 430).

[9] The jurisdiction of the Court is established by section 9 of the *Act*. There are also specific exclusions from jurisdiction listed in section 10.

[10] Section 29 of the *Act* authorizes an adjudicator to make certain orders including an order for costs. In particular, section 29, subsection 1, paragraph (b) states:

- 29 (1) Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator may
- (b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.

Subsection 2 of section 29 states:

- (2) No costs other than those authorized by this Act or the regulations may be awarded by an adjudicator.

Section 33 of the *Act* authorizes the Governor in Council to make Regulations. It states:

- 33 (1) The Governor in Council may make regulations
- (a) ...
- (b) respecting fees and allowances;
- ...
- (d) providing for costs, including costs on appeal;

[11] By Order in Council 93-110 (February 2, 1993, effective January 10, 1993), N.S. Reg. 17/93, Regulation 15 was enacted. It states:

- 15 (1) The adjudicator may award the following costs to the successful party:
- (a) filing fee;
- (b) Transfer fee;
- (c) fees incurred in serving the claim or defence/counterclaim;
- (d) witness fees;
- (e) costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;

- (f) reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;
 - (g) additional out of pocket expenses approved by the adjudicator.
- (2) No agent or barrister fees of any kind shall be awarded to either party.

[12] Regulation 23 provides for the award of costs on an appeal to the Supreme Court. As with Regulation 15, a Judge of the Nova Scotia Supreme Court has discretion to award *inter alia* “out of pocket expenses”. [See Regulation 23 (c), O.I.C. 93-110]

ADJUDICATOR’S DECISION

[13] The learned adjudicator dealt with the claim for experts’ costs (including the account of the respondents’ initial legal representation for purchase of the condominium unit) as follows:

Account of Burke Thompson

[13] The account of Burke Thompson dated November 24th is, in my view, more in the nature of costs than damages. As such, in my view, it would not be allowable under Regulation 15(2).

Tupper and Thorpe Reports and Invoices

[14] In aggregate, these expenses are quite significant: \$8,500.00. They are in the nature of costs and to be allowable must fall under Regulation 15(1)(g) or (d). Typically the allowed disbursements in Small Claims Court are, in relative terms, modest. However, I am aware of no Supreme Court Authority and have not been referred to any which would purport to limit the “out-of-pocket expenses” in 15(1)(g) to a “modest” level.

[15] Accordingly, I think the guiding principle in respect of experts’ reports is to consider the degree to which they assist the Court in arriving at the decision. The Thorpe and Tupper reports and Mr. Tupper’s evidence were all significant pieces of evidence in arriving at the conclusion that the mould was a significant issue and, that it was caused by the incursion of water. This was a significant factual issue which, in the absence of the reports, could well

have been found against the Claimants. Accordingly, it seems that it was necessary evidence and certainly helpful to the Court and the case.

[16] Mr. Ling seems to make the point that only reports commissioned for litigation purposes should be recoverable. No authority has been cited for that proposition and I am not sure that the principle ought to be that strict. It seems to me, for example, that if a report was commissioned prior to contemplation of litigation but ended up being used as part of the litigation and is usefully part of the litigation, then it ought to be allowed as an expert's report.

[17] Using that approach, I would conclude that the experts' invoices should be allowable.

APPELLANT'S ARGUMENTS

[14] The appellant argued that the adjudicator erred in law in his interpretation of the *Act* and, furthermore, exceeded his jurisdiction with respect to the amount awarded to the respondents as out of pocket expenses.

[15] Counsel for the appellant suggested that the adjudicator's classification of experts' fees as costs and not damages was an error of law. The initial invoices from the two experts retained by the respondents predated the filing of the Small Claims Court action. As such, the appellant argued that the adjudicator should have included them as a part of the overall claim. If this had been the case, the statutory maximum limit of \$15,000.00 for damages would have been surpassed (as it was even without it being added on) and, as a result, it would not be recoverable.

[16] The appellant further argued that the adjudicator, when deciding the amount of costs to award, failed to consider the purpose of the *Act* as set out in section 2 which reads:

2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice. [emphasis added]

[17] Finally, the appellant argued that the adjudicator failed to properly examine the invoices. If he had, he would have determined that over \$2,500.00 of one expert's bill was for trial preparation and attendance at the hearing and \$318.26 of the other

expert's was for trial preparation. The second expert was not required to testify, however, counsel for the appellant only consented at the last minute to his report being admitted without the need for cross-examination. By then the time and, hence, the expense of preparation had already been incurred.

[18] Counsel for the appellant takes the position that the *Act* caps witness fees at \$5.00, no matter what the witness's classification or qualifications might be. He further suggests that to do otherwise would defeat the purpose of the *Act* which is to provide an informal and inexpensive forum in which to adjudicate claims not exceeding the monetary jurisdiction of the Court.

RESPONDENT'S ARGUMENTS

[19] Counsel for the respondents argued that the decision of the adjudicator regarding costs should be upheld. The fact that the experts' reports were prepared prior to the commencement of litigation should not affect their classification as costs, as opposed to damages.

[20] He further argued that the adjudicator should be permitted to exercise discretion to award costs for expert witnesses, especially in cases where the proffered evidence is crucial in helping the adjudicator make the ultimate decision. Such was the case here. [See paragraph 15 on page 7 of the Decision of the Adjudicator]

DECISION

[21] Counsel were unable to find any reported cases from this jurisdiction dealing with the issue raised on appeal.

[22] There are some reported cases, however, from some other Canadian jurisdictions that have Small Claims Courts similar to our own.

[23] In Ontario where the monetary limit for Small Claims cases is set at \$10,000.00, the legislation is silent on the issue of expert witness costs. Neither does it explicitly cap disbursements. Under section 29 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, costs are limited but does provide some discretion to the Court. It states as follows:

29 An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15% of the amount claimed or the value of the property sought to

be recovered unless the court considers it necessary in the interests of justice to penalize a party, counsel or agent for unreasonable behaviour in the proceeding. [emphasis added]

[24] Orkin's 'The Law of Costs' (Aurora, Canada Law Book: 2004) notes that in the context of Small Claims Court, the costs associated with expert witnesses are assessed by reference to the Tariffs set out in the Provincial Court (Family Division) (reference **Caringi v. Porco**, [1989] O.J. No. 2665 (Ont. Prov. Ct., Small Claims)). In **Caringi, supra**, Caswell, Prov. Ct. J., found the oral and documentary evidence of an Ontario Land Surveyor to be "of great assistance to the Court" (para. 8, page 2) and as a result allowed costs of \$150.00 for preparation of calculations shown on a plan as well as \$300.00 for attendance at trial. The Judge used the Tariff of the Provincial Court (Family Division) as a guide noting that the Provincial Court Civil Division did not provide such a Tariff. It should be noted that Rule 22 limits appearance fees for an expert to \$350.00 a day "... subject to increase in the discretion of the person determining costs."

[25] Judge Caswell also noted that these Tariff items could also be found in the Supreme and District Court Rules at Numbers 23, 24 and 26. [See para 9, p. 2 of **Caringi, supra**]

[26] In another Ontario case, **Jones v. L.T.C. Contracting Ltd.**, [1995] O.J. No. 4927 (Ont. Ct. J., Small Claims), the learned trial Judge, Halabisky, Dep. J., noted at para. 10:

...The trial lasted for a number of days. The evidence was extensive and complex. It is very clear that in order for the defendants to defend the claim, it was necessary to call experts to give evidence. The experts that were called were senior and well respected individuals in their fields. ...

[27] The court then went on to find that the claimant should have made an attempt to settle and had unnecessarily prolonged and complicated the proceedings. At para 12, the learned Judge stated:

The Court, therefore, finds that it does have jurisdiction set out in Section 29 of the Courts of Justice Act to exceed the 15 percent, and also in conjunction with Section 131 of the Courts of Justice Act to use its discretion in awarding costs. It is very clear, as stated, that the costs are excessive due to the nature of the proceedings and the need for expert witnesses. If this was a General Division matter, costs would be excessive, and I do not think they should be any less excessive simply because of the

fact that this is a Small Claims Court matter based on my reasoning of Sections 29 and the discretion allowed in Section 131 of the Courts of Justice Act.

[28] The defendants in that case were awarded in excess of \$17,000.00 to cover the costs of their expert witnesses. It should be noted, however, that the Ontario *Courts of Justice Act* does not have a purpose similar to the one set out in section 2 of the *Small Claims Court Act* (Nova Scotia). It could be argued, however, that the 15% limit on costs contained in section 29 conveys an intention to have small claims adjudicated inexpensively. Based on the cases cited there is an additional discretionary element available to the court when deciding costs.

[29] It should also be pointed out that the Ontario Regulation allows for witness fees of \$6.00 per day for attendance in Court, unless Item 2 applies.

[30] Item 2 of Schedule 3 of Ontario Regulation 432/93 states:

2. For attendance in court by a barrister, solicitor, physician, surgeon, engineer or veterinary surgeon who is not a party to the action, to give evidence of a professional service rendered or to give a professional opinion, \$15.00 per day.

[31] This limit on expert witness fees was considered in **Jackson v. Lennon**, [2003] O.J. No. 1343 (Ont. Sup. Ct. J., Small Claims), where at para 6, Deputy Judge Searle found that this fee was “so antiquated and silly it is largely useless and something to which recourse is seldom had for expert witnesses.”

[32] The Court in **Jackson**, *supra*, went on to allow the full amount of the expert witness’s invoice finding this evidence “immensely helpful to the Court” (para 10) and so added the full \$375.00 expense to the costs award. [See also **Adam v. Consumer’s Choice Home Improvements Corporation**, [2004] O.J. No. 1659 (Ont. Sup. Ct. J., Small Claims); **Kaiser v. Dowsar Yacht Sales Ltd.**, [2002] O.J. No. 5329 (Ont. Sup. Ct., Small Claims)]

[33] In British Columbia, the *Small Claims Act*, R.S.B.C. 1996, c. 430, contains a provision that is very similar in nature to the Nova Scotia Statute. Section 2 states:

- 2 (1) The purpose of this Act and the rules is to allow people who bring claims to the Provincial Court to have them resolved and to have

enforcement proceedings concluded in a just, speedy, inexpensive and simple manner.

[34] Section 19(1) of the British Columbia *Small Claims Act* leaves costs to be determined by the Court and assessed in accordance with the rules. Subsection (3) states:

- 19 (3) If the rules provide for a reasonable fee, charge or other expense, the Provincial Court or a registrar of the court may determine what amount is reasonable.

[35] The rules made pursuant to the *Small Claims Act* (B.C. Reg. 261/93, as amended) indicate that the unsuccessful party must pay filing and service fees, as well as:

Rule 20

(2)

- (c) any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.

[36] It would appear that in British Columbia the cost for an expert witness must be both reasonable and directly connected to the proceeding.

[37] In **Oke** v. **Roy**, [1995] B.C.J. No. 2817 (B.C. Prov. Ct.), the claimant was awarded a total of \$1,469.70 in costs after successfully pursuing a claim of \$4,000.00 arising out of a motor vehicle accident. Included in the cost award was an amount to cover a medical-legal report, clinical records and attendance of a physician at trial. Provincial Court Judge Watchuk considered Rule 20(2)(c) and decided that a judge had discretion in assessing costs on a case by case basis. The Court held at para 9 that “the records and report were relevant and directly related to the claim for damages as was Dr. Smith’s evidence.” The claimant was able to recover the full amount of the costs associated with these items. [See also **Tyerman** v. **Bruce**, [2001] B.C.J. No. 1359 (B.C. Prov. Ct., Small Claims)]

[38] These cases from Ontario and British Columbia suggest a general acceptance of experts' reports and witness fees provided they are both reasonable and relevant to the case.

[39] I have noted some of the similarities and differences between the legislation in these two Provinces as compared to our own jurisdiction. Both Ontario and British Columbia have some provision for limited discoveries and, in the case of Ontario, pre-trial conferences. The purpose is to provide full disclosure. The Nova Scotia *Small Claims Court Act* does not have any such provisions. This is, no doubt, in keeping with its mandated purpose of keeping things informal and inexpensive. It is interesting to note that the Committee set up to revamp the Nova Scotia **Civil Procedure Rules** is advocating the curtailment of the seemingly unlimited right to conduct discovery hearings. The reason, of course, is to cut down the inordinately high costs of litigation. Not all counsel agree that this proposal will produce the desired result. It remains to be determined just how the rules will be improved.

[40] The British Columbia Statute makes it a requirement to disclose the intended use of an expert witness. Rule 10(3) of the Small Claims Rules (B.C. Reg. 261/93, as amended) requires 30 days notice and a summary of the expected evidence to be served on the other party if an expert witness is to be called. Moreover, a party must have the Judge's permission before calling an expert. It would appear that in both Ontario and British Columbia all parties would know in advance whether expert witnesses are likely to be called. This could have a significant impact on settlement discussions.

[41] There are no provisions in the Nova Scotia Statute or in the Regulations requiring advance notice of a party's intention to call an expert witness. Nor is there any requirement to file a written report in advance of the hearing. It would still be left to the presiding adjudicator to decide whether or not to allow any such witness to testify as an expert and what, if any weight, to attach to the evidence if admitted.

[42] In addition to the authority granted to the adjudicator to control the proceedings, the *Act* specifically grants him/her authority to make orders requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the Regulations. [See paragraph 29(1)(b)]

[43] Subsection 29(2) limits the award of costs to "those authorized by this *Act* or the regulations...". Regulation 15 lists the type of costs that an adjudicator "may

award” including “(d) witness fees” and “(g) additional out of pocket expenses approved by the adjudicator.”

[44] Although the term “out-of-pocket expenses” is used quite frequently in the cases, it does not appear to have been given judicial meaning. *Black’s Law Dictionary*, 8th Ed, (St. Paul: Thomson West, 2004) at 618 defines it as “[A]n expense paid from one’s own funds.” Although most often used in the context of incidental expenses there is no limit to the amount involved except that it would have to be an amount considered reasonable in the context of the proceedings.

[45] Although the adjudicator is restricted in the type of costs that can be awarded, there is some latitude or discretion to award “additional out of pocket expenses.” This exercise of discretion by the adjudicator should not be lightly interfered with unless in the exercise of that discretion the adjudicator has made an obvious error. Otherwise, it should be left to the individual adjudicator to decide on a case by case basis. The fundamental purpose of the legislation which is to provide an informal and inexpensive forum in which to adjudicate matters falling within the jurisdiction of the Court should not be forgotten.

[46] Given the importance of the experts’ evidence in assisting the adjudicator to decide this case, it was reasonable for him to award the successful plaintiffs the costs incurred in procuring the two expert reports. This totalled:

\$3,669.21 (Tupper Report)
\$1,973.13 (Thorpe Report)
\$5,642.34

[47] Regarding the additional expense for trial preparation and attendance, Regulation 9(2), O.I.C. 93-110, N.S. Reg. 17/93, as amended, sets witness fees at \$5.00. No distinction is made between witnesses of fact and expert witnesses. As with the Ontario reality (**Jackson v. Lennon**, *supra*), this fee is grossly disproportionate to what most, so-called, experts would charge. Although it is in keeping with the stated purpose of the legislation, it does not reflect reality. If the legislature intended to limit the fees awarded to successful litigants to cover the costs of experts then it should have clearly stated so in the Statute or the Regulations similar to what was done to limit agent or counsel fees. Instead, it granted discretion to adjudicators under Regulation 15(1)(g) to award “additional out of pocket expenses” that he or she might approve.

[48] I see no reason to fetter the discretion of the adjudicator who is in the best position to decide what costs should be allowed. The adjudicator should bear in mind that the *Costs and Fees Act*, R.S.N.S., 1989, c. 104, as amended, limits recoverable disbursements to the “reasonable costs of reports of experts” and “reasonable fees paid to an expert witness who gives evidence, up to \$600.00 for each day examined and each additional day authorized by the taxing officer.” This, however, is not a hard and fast rule and is not always necessarily followed. The discretion to award disbursements remains with the Court. That discretion relates not only to the type of disbursement but also to the overall monetary amount. That is how it should be.

[49] If the value of the expert’s evidence is not significant in helping to decide the case then the adjudicator can exercise his/her discretion to award some lesser amount than that which is requested. He/she might decide not to award any expert costs whatsoever if he/she feels there was no real value obtained from the report and/or the testimony of the witness.

[50] In the case decided by the learned adjudicator in this instance, it was clearly indicated how crucial the evidence of the experts was in helping to decide the case in favour of the plaintiffs. The discretion given to the adjudicator under the legislation was exercised in a reasonable manner and thus should not be interfered with.

[51] As to the appellant’s suggestion that the cost of the experts’ reports should be treated as damages and hence caught in the Statutory cap, I find no merit to this argument. Likewise, with the suggestion that the expense was incurred prior to the commencement of litigation and so should be disallowed. I do not accept this argument and dismiss them both.

[52] The appeal is therefore dismissed with costs to the respondents. If the parties cannot agree on costs for the appeal I invite them to file written submissions within 30 days of the date of this decision.

J.