SUPREME COURT OF NOVA SCOTIA

Citation: GE Canada Equipment Financing G.P. v. 3068485 Nova Scotia Ltd., 2010 NSSC 204

Date: 20100527
Docket: Hfx No. 264303
Registry: Halifax

Between:

GE Canada Equipment Financing G.P.

Plaintiff

v.

3068485 Nova Scotia Limited, DRL Coachlines Limited, DRL Vacations Limited and Ruth Roberts-Tetford

Defendants

COSTS DECISION

Judge: The Honourable Justice John D. Murphy

Heard: July 13, 14; 16 and 22, 2009, in Halifax, Nova Scotia
{Oral decision rendered November 25, 2009}
{Written decision issued February 5, 2010 - 2009 NSSC 414}

Final Written Submissions (Costs): February 26, 2010

Revised decision: The text of the original decision has been corrected according to the erratum dated July 6, 2010. The text of the erratum is appended to this decision.

Written Decision (Costs): May 27, 2010

Counsel: David G. Coles, Q.C., and Joshua J. Santimaw, for the plaintiff
Gavin Giles, Q.C., and D. Jeffrey Aucoin, for the defendants

By the Court:

INTRODUCTION

[1] The parties have been unable to agree concerning costs following the Plaintiff's obtaining judgment against the Defendants Ruth Roberts-Tetford (Roberts-Tetford) and DRL Coachlines Limited (Coachlines); counsel have filed written submissions, which I have considered when making the following determination of the amount of costs payable.

BACKGROUND

[2] GE Canada is seeking costs against Roberts-Tetford and Coachlines as a result of the trial decision and summary judgment motions.

[3] On March 30, 2006 GE commenced an action to recover an outstanding loan balance of $633,514.44 plus interest against DRL Vacations Limited as principal debtor, and against 3068485 Nova Scotia Limited, Coachlines and Roberts-Tetford as guarantors. Summary judgment was granted as against 3068485 N.S. Ltd. and DRL Vacations Limited on August 30, 2006, but the amount owing was not paid. Motions for summary judgment as against Roberts-Tetford and Coachlines were denied during December 2006, with the motions judge ruling that costs should follow the cause.

[4] Trial of GE's claim against Roberts-Tetford and Coachlines was scheduled for December 2008, and subsequently adjourned to July 2009 when those Defendants obtained new counsel.

[5] Prior to commencement of trial, the Defendants filed a motion seeking an order to amend their defence, which was granted, permitting Roberts-Tetford to specifically deny executing any relevant security documents.

[6] The trial took place July 13, 14, 16 and 22, 2009. Following delivery of an oral decision November 25, 2009, an Order issued December 14, 2009 directing that Coachlines and Roberts-Tetford pay jointly and severally to GE:

> Damages in the amount of $633,511.70 which represents the balance of the loan owing to the Plaintiff GE Canada Equipment Financing G.P.:

> Special damages in the amount of $2,000.00, which represents costs pursuant to the Supplemental Equipment Loan and Security.
>
> Interest on Damages and Special Damages in the amount of $174,861.37.

[7] The Order also provided that if costs could not be agreed between the parties, written submissions should be delivered within 60 days, following which the Court would determine the amount payable.

[8] The reasons for decision delivered orally on November 25, 2009 were released in writing on February 5, 2010 (the "Reasons").

[9] This Court's decision is presently under appeal.

ISSUE

What Amount of Costs Should be Payable to GE by Roberts-Tetford and Coachlines?

POSITION OF THE PARTIES

[10] Frequently when costs are in dispute after a trial, the successful party seeks an award in excess of the "tariff amount" set out in Schedule "A" to the *Costs and Fees Act*, R.S.N.S. 1989, c.104 and *Nova Scotia Civil Procedure Rule 77*, while the paying party suggests the award should be limited to a tariff amount. In this case, however, the successful Plaintiff seeks a payment based on the tariff scale, but the Defendants suggest such an award would be excessive.

[11] The Plaintiff seeks party/party costs of $103,080.37, calculated as follows:

(a) Trial costs following Tariff A Scale 3, based on amount

$810,373.07 in issue $80,938.00

(b) Four days of trial 8,000.00

(c) Motions costs 5,000.00

(d) Disbursements 9,142.37

Alternatively, the Plaintiff suggests that if Tariff A Scale 3 costs are not awarded, it should receive trial costs of $64,750.00 based on Tariff A Scale 2, which would reduce total recovery to $86,892.37.

[12] The Defendants describe the Plaintiff's request for a Scale 3 award based on more than $750,000.00 being in issue as "grossly excessive" and "little short of fanciful"; they submit that the court should objectively assess the Plaintiff's exposure to legal fees to be not more than $52,000.00, and award 50 per cent of that amount inclusive of daily trial attendance allowance, plus a reduced amount for disbursements limited to expenses that the Plaintiff can establish were reasonable and necessary. The Defendants acknowledge that GE can also recover Tariff "C" Motion costs (which they seem to suggest would be $4,000.00) for a total award of $30,000.00, and appropriate disbursements.

CONCLUSION

[13] For the reasons which follow, I have decided that the Plaintiff should recover costs in amount $69,473.42, calculated as follows:

(a) Trial costs using Tariff A Scale 2 based on amount

$633,511.70 in issue $49,750.00

(b) Four days of trial 8,000.00

(c) Motion costs 4,000.00

(d) Disbursements 7,723.42

ANALYSIS

[14] The issues raised by the parties will be addressed based on the premise that party/party costs should represent a reasonable, predictable, and substantial indemnity for expenses incurred. Awards should also encourage settlement and promote sensible conduct of court proceedings.

Applicable Legislation and Rules

[15] Costs awards in Nova Scotia are addressed in the *Costs and Fees Act* and in *Civil Procedure Rule 77*. Both outline criteria and provide guidance for the court's exercise of discretion, and append a series of Tariffs established pursuant to a statutory process. The tariffs, which were substantially amended in 2004, suggest costs payable in various circumstances, based in part upon the amount of money in issue and the court time consumed during litigation.

[16] Revised *Civil Procedure Rules* came into effect January 1, 2009. The Defendants say that the *Nova Scotia Civil Procedure Rules* (1972), and not those in force at the time of trial, should apply to this determination of costs, because the action was commenced and pre-trial steps were undertaken before 2009. They suggest that the 1972 Rules have been interpreted by courts to limit the successful party's recovery to a contribution only to actual legal expenses incurred, while under the current Rules the "default position" may be a higher Tariff A award.

[17] In my view, the 2009 Rules which came into effect more than six months before trial commenced apply to costs determination in this case. However, the adoption of those rules does not materially affect the result; the rule change did not alter the principles upon which an award is based, or diminish the court's discretion to fix an appropriate amount. The more important recent development affecting party/party awards was the 2004 Tariff amendment. The revised Tarriffs, although they did not significantly change the principles upon which awards are based, provide for substantially higher cost recovery, and were developed in response to complaints from litigants and counsel that the previous Tariffs, set in 1989, were outdated and did not reflect litigation expense. Courts frequently found the payments suggested in those tariffs to be inadequate, and prescribed increased amounts, diminishing the predictability of awards. For reasons set out later in this decision, costs in this proceeding, which was commenced in 2006, will be fixed by adopting an amount from a tariff scale. The current tariffs have been in effect with respect to litigation commenced since September 2004, and accordingly, they will be used, and the award will not be different due to the implementation of revised *Civil Procedure Rules*.

Considerations In This Case

[18] Costs are normally set according to the tariff, but when reasonable approaches to amount involved or scale under the tariff do not produce a substantial but partial indemnity, the court may depart from the usual and exercise its discretion to order a lump sum. Care should be taken to avoid employing fixed percentages or embracing the party's actual bill over a more generalized assessment (**Campbell v. Jones** 2001 NSSC 139 {para.102}).

[19] Each party suggests, for very different reasons, that I should diverge from Basic Tariff A Scale 2 in fixing costs. The Defendants refer to the complexity of the proceeding (a criterion in the tariff) and claim that the case was too simple to warrant a tariff-based award, which they say would not represent an objective determination respecting the substantial but only partial indemnity goal. They also submit that case law and Roberts-Tetford's financial position support a below-tariff lump sum award. The Plaintiff suggests that an increased Scale 3 award would be appropriate because the Defendants' conduct "adversely affected the speed or expense of the proceeding", considerations referenced in *Rule 77.07(1)*.

Defendants' Submission

(A) Simple Case

[20] The Defendants' brief includes the following descriptions of the proceeding:

> The case in which the Plaintiff is seeking costs was not complex. It involved the enforcement of a guarantee. There were no novel issues which required development. The trial evidence was all but predictable. (Page 3)
>
> ...
>
> The case was not predicated on significant documentary productions or on lengthy examinations for discovery. In fact, documentary evidence was limited if not scant... (Page 3)
>
> ...
>
> To be remembered is that the instant case offered no complexities whatsoever. Its pleadings were straightforward. It was not in any way "document intensive."

> Examinations for discovery were limited to a few hours. Court time (in trial) amounted to only four days. (Page 11)
>
> ...
>
> ...Rather than being exceptionally complex, the instant case was "garden variety." It could even be said, not unreasonably, to have been simple. Its trial took only four days - one of which was restricted to argument. Even the four days were spread out, almost leisurely, over a period of ten days. (Page 17)
>
> ...
>
> The case involved the garden variety enforcement of a guarantee. It required very little by way of legal horsepower. The trial was short and decidedly to the point. The trial was not predicated on significant pre-trial wranglings or proceedings. (Page 32)

[21] Trial of this case did not include expert testimony and the court did not have to weigh technical, medical, scientific or engineering evidence which can complicate and lengthen a proceeding. However, the Defendants have significantly understated what the proceeding involved, and, with respect, I am unable to reconcile their post-trial assessments with the following circumstances and features of the case:

(1) The issues raised by the Defendants in their pre-trial memorandum and summation included the following, which required response by the Plaintiff and consideration by the court, thereby extending the matter beyond "garden variety enforcement of a guarantee":

(a) Which, if any of several Security documents that bore her name did Roberts-Tetford sign, and how familiar was she with many others (which were canvassed individually at trial)?

(b) If Roberts-Tetford signed any documents, did doctrines of unconscionability or *non est factum* relieve her of liability?

(c) Did Javis Roberts, who was deceased at the time of trial, have authority to execute documentation on Coachlines' behalf?

(d) Did Javis Roberts have authority to sign documentation for Roberts-Tetford?

(e) Was Javis Roberts an agent of the Plaintiff?

(f) If guarantees were valid, did they survive when two Supplemental Agreements and an Acknowledgement were subsequently executed, or did GE's failure to give notice of material changes with respect to security affect the Defendants' liability?

(g) Was evidence truthful?

(h) What relationship did Roberts-Tetford have with Defendant corporations at various times?

(2) Defendants' pleadings were amended twice, during June 2006 and at the commencement of trial, altering factual assertions and bases for denying liability, as described in paragraphs 12A, 12B and 12G of the Reasons.

(3) Documents introduced in evidence during trial comprised more than 830 pages, according to tally by court staff.

(4) At the pre-trial conference, the motion hearing before commencement of trial, and at all times during trial, two lawyers, one with more than 23 years at the Bar and the other with almost five years membership, attended as counsel for the Defendants, and they were usually accompanied by an articled clerk or law student.

(5) The evidence from Roberts-Tetford, the primary witness on Defendants' behalf, who testified for approximately one and one-half days at trial, was not found to be "all but predictable"; rather, as summarized in paragraphs 12, 28 and 30-46 of the Reasons, it was neither consistent nor as forecast. Her version of important facts, including her relationship with other Defendants and execution of security documents, changed as the Defendants' position was

advanced in pleadings, submissions and testimony. There were significant inconsistencies among the contents of Statements of Defence, Roberts-Tetford's evidence in affidavits, her cross examination at summary judgment hearings, the position projected in the Defendants' pre-trial brief, and her direct and cross examination at trial.

(6) The four days of trial were not "spread out, almost leisurely, over a period of ten days" because the case was "simple." Trial was scheduled for July 13th - 16th. When the judge originally assigned became unavailable and I was requested to hear the case, a pre-trial conference with counsel was arranged. I advised at that meeting that due to a scheduling conflict I would not be able to sit on July 15th, but that trial could continue as necessary on the first available days during the following week. When evidence concluded at approximately 5:00 p.m. July 16th, Defence counsel suggested that written argument be provided, with Defendants having until July 31st (two weeks) to provide the first summation. After discussion with counsel I determined that there should be oral argument, to be supplemented in writing if counsel wished, and a choice of dates for oral submissions was offered during the following week. Defence counsel expressed a preference for the latest available day and predicted that oral argument would consume the whole day. To accommodate that request, oral presentations were scheduled for July 22nd; hence, the ten-day time span.

(7) Oral submissions consumed almost a full court day, with counsel for Plaintiff and Defendants each speaking for more than two and one-half hours.

[22] I reject the Defendants' post-trial characterization of the proceeding as "garden variety" or "simple." Indeed, when responding at page 31 of their post-trial costs brief to the Plaintiff's claim that Roberts-Tetford's conduct put GE to significant and needless expense, the Defendants acknowledged

> There were a plethora of other issues as well. The Plaintiff had to deal with all of them.

(B) Case Law

[23] The Defendants referred to several authorities where lump sum, rather than tariff scale costs were awarded. They are distinguishable from this case. Some, despite the citation year, were proceedings started before September 2004, when costs associated with legal services were less and the 1989 Tariff was still in force, (and thus departure from "scale" involved moving from a different base). Others concerned a request for a higher rather than lower award than tariff application would yield, or referenced a much greater monetary amount in issue - $7 million, (approximately ten times the amount in this case) in **Founders Square Ltd. v. Nova Scotia (Attorney General)** (2000), 186 N.S.R.(2d) 189, and $268 million in **Smith v. Michelin North America (Canada) Inc.** (2008), N.S.S.C. 66 - so that using a tariff amount would result in a much higher award than in this case.

[24] Review of the case law provided by the Defendants does not persuade me that prescribing a lump sum is the only reasonable or preferred way to award costs in this case.

[25] The Defendants emphasize that several authorities have considered the actual legal fees incurred by the successful party when fixing costs, and they suggest that GE ought to have advised the court how much the Plaintiff has been billed. While it would be helpful and desirable to have that information, our costs regime does not require disclosure of fees unless solicitor/client costs are claimed, and in this case I do not consider the lack of billing information to be fatal to a tariff-based award.

(C) Defendants' Financial Circumstances

[26] I reject the Defendants' request that I limit the costs award based on Roberts-Tetford's evidence that her assets comprise only her home, automobile and a $300,000.00 R.R.S.P., while she is an $800,000.00 joint and several judgment debtor in this proceeding. Documentary evidence at trial indicated Roberts-Tetford had substantially more assets than she admitted, and I have already determined that her testimony was not credible. Her admission at trial (despite prior denial) that she signed a $7 million guarantee in favour of GE is not consistent with the financial circumstances she now discloses.

[27] Even if I accept that Roberts-Tetford has only modest means, that does not give rise to a right to litigate without responsibility for costs consequences. The concern that access to justice ought not be denied an impecunious plaintiff, which affected costs awards in **Windsor v. Poku** 2003 N.S.S.C. 095 and **Kaye v. Campbell** (1984), 65 N.S.R. (2d) 173(C.A.), is not relevant in this case, as I have found Roberts-Tetford to be a debtor who attempted to avoid liability by giving evidence which was inconsistent, contradictory, and not credible.

[28] I am not convinced by the Defendants' submissions that a normal tariff-based costs award cannot reflect an objective determination honouring the substantial but only partial indemnity principle, and I decline to fix a lesser "lump sum" amount.

Plaintiff's Submission in Support of Increased (Scale 3) Award

[29] GE seeks an increased award on the basis that the Defendants prolonged the trial by advancing different and conflicting positions at various times during defence of the claim, causing the Plaintiff significant and needless expense, which was not in keeping with the object of achieving a just, speedy and inexpensive determination of the proceeding set out in *Nova Scotia Civil Procedure Rule 1.01*. The Plaintiff correctly notes that Roberts-Tetford made admissions concerning signing of security documents in affidavits and during cross examination at summary judgment hearings, and effectively recanted that evidence by amending her Defence at the commencement of trial to deny execution. For the first time very late in the proceeding and after Javis Roberts' death, she also alleged fraud, an agency relationship between GE and Javis, and forgery by Javis.

[30] I agree with GE's assertion that it was required to respond to issues raised at the last minute and go to trial no longer able to rely on evidence the Defendants had previously given, so that the trial extended to include detailed cross examination of Roberts-Tetford to explore her conflicting testimony and establish that she signed security documents. However, I am not satisfied that the obstacles the Defendants raised warrant a Scale 3 costs award, which is normally reserved for a complicated or prolonged trial involving more complex issues and testimony than this case generated. A "basic" scale tariff award premised on a significant amount in issue, with the added prescribed component of $2,000.00 for each trial day, should be sufficient to substantially indemnify GE for its expenses.

Amount In Issue

[31] The costs award will be based on the principal amount of the Defendants' debt to the Plaintiff - the $635,511.70 loan balance claimed in the Statement of Claim, and not, as GE seeks, on the $810,373.07 judgment amount, which includes $2,000.00 special damages and $174,861.37 interest. The "amount involved" in the main issue for determination - whether the Defendants were liable as guarantors for the outstanding debt - was $635,511.70. The trial's length and complexity were not affected by the special damages and interest components; they were resolved entirely as a consequence of the decision that the principal debt was owed. Special damages were fixed by agreement and calculation of interest was a straightforward function of the time the case took to reach the decision stage, and not an issue the court had to determine. There was no dispute that if the principal debt was owed, then the Defendants would be required to pay the special damages and interest. When the Defendants received the decision that they were liable for the debt, they readily agreed to those amounts.

[32] My conclusion that in this case the "amount involved", as that term is used in Tariff A, was limited to the principal debt is not a suggestion that interest and other components of a judgment will not in other cases form part of the "amount involved" when costs are fixed. In this matter, the debt was relatively large in relation to trial time and complexity (but not inordinately so as argued by the Defendants), and while costs should be based on the tariff to encourage consistency and predictability provided that a just award will result, I have determined that restricting "amount involved" to the principal amount owed to GE

is more likely to achieve an award consistent with the substantial but only partial indemnity principle.

Motion Costs

[33] Following two summary judgment hearings, the motions judge directed that costs follow the cause. GE claims a total of $5,000.00, indicating one motion took one and a half days, and the other one-half day. The Defendants suggest the award should be $4,000.00 as the tariff prescribes $2,000.00 for a full day and $1,000.00 for each one-half day. As the motions judge did not fix an amount, I award the "$2,000.00 per full day" prescribed by Tariff C, based on two days total hearing time for both motions, resulting in $4,000.00 total, and not the $5,000.00 sought by GE, which would reflect a "rounding up" not suggested by the Tariff or the motions judge.

Disbursements

[34] The Plaintiff seeks disbursements of $9,142.37, which the Defendants say are not sufficiently detailed to enable the court to assess necessity or reasonableness.

[35] GE's disbursements are divided into 21 categories, and although the Defendants raise a general allegation that particularization is inadequate, their complaint is directed primarily at photocopy charges totalling $3,418.95, which are advanced without specifying rate per page or number of pages copied.

[36] I have no hesitation deeming the disbursements other than photocopying to be reasonable, necessary and recoverable. They are routine, and were not vigorously challenged.

[37] I find that the Plaintiff incurred substantial photocopying expenses - most of the approximately 830 pages of exhibits at trial were produced by GE, who brought to court at least four copies of Exhibit books for use by witnesses, each party, and the judge. My review of the file indicates that most of that documentation was also copied and distributed by the Plaintiff during exchange of documents and at summary judgment hearings. GE was also required to provide briefs and books of authorities in connection with submissions at motions and at trial. Plaintiff's counsel, officers of the court whose advice I accept, state at page 12 of GE's costs

brief that "GE...had the [photocopy] disbursements in pursuing this claim to judgment." Despite the lack of detailed accounting, I have no doubt that the photocopy expense claimed was charged to the Plaintiff. However, without more information concerning number of pages copied and billing rate per page, or counsel's representation that the expense was reasonable and necessary, I decline to approve the full amount claimed. Based on the volume of documentation produced, I am satisfied that reasonable and necessary photocopy expense would be at least $2,000.00. I therefore approve that amount, and deduct $1,418.95 from the claim for photocopy expense at N.S.B.S., the Law Courts and counsel's office, resulting in a total disbursement award of $7,723.42.

Summary

[38] The Defendants, Roberts-Tetford and Coachlines are jointly and severally liable to the Plaintiff for costs as follows:

(a)	Trial costs following Tariff A Scale 2, based on amount	
	$633,511.70 in issue	$49,750.00
(b)	Four days of trial	8,000.00
(c)	Motions costs	4,000.00
(d)	Disbursements	7,723.42
	Total	$69,473.42

J.

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Gavin Giles, Q.C., and D. Jeffrey Aucoin, for the defendants

Erratum:

In paragraph [38] (a), page 14, substitute “Scale 2" in place of “Scale 3"