SUPREME COURT OF NOVA SCOTIA

Citation: Big X Holdings Inc. v. Royal Bank of Canada 2015 NSSC 350

Date: 20151208
Docket: Hfx. No. 406111
Registry: Halifax

Between:

Bix X Holdings Inc., Robert Leonard McNeil and Margaret Anne McNeil

Plaintiffs

v.

Royal Bank of Canada

Defendant

Costs Decision

Judge:	The Honourable Justice Jamie Campbell
Last Written Submissions:	October 19, 2015
Written Decision:	December 8, 2015

Counsel:	Michael Donovan, Q.C. for the Plaintiffs D. Geoffrey Machum, Q.C., Colin Piercey and Ian Breneman for the Defendant

Campbell, J.

[1] Len McNeil sued the Royal Bank of Canada ("RBC"). He lost.[1] Now, after a ten-day trial, RBC is claiming more than $500,000 in costs. Essentially, Mr. McNeil claimed that RBC, which was his company's bank, was negligent because it failed to detect a fraud committed by his business associate. He claimed $3.9 million in damages. He also said that a personal guarantee for $400,000, bearing his signature, must have been a forgery. His claim against RBC did not succeed. He was held liable under the terms of that guarantee.

Summary

[2] Len McNeil worked his entire professional life to build a solid reputation for integrity, and to save enough assets on which he and his wife could retire. One of the cruel ironies of the situation is that his hard-won financial security has been destroyed because he assumed integrity in a business associate who turned out to have been a rogue. Mr. McNeil would not go gently into financial ruin. He turned his rage on RBC. He pursued his claim aggressively, made what now turns out to have been extravagant claims for damages, and even denied signing documents that bear his signature. He has not, it seems, accepted the painfully evident fact that it was he who was overcome by a con artist's cheques and promises of even more profits. His inability to see that has just made matters worse.

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[1] *Big X Holdings Inc. v. Royal Bank of Canada*, 2015 NSSC 184. As in the original judgment Len McNeil, Anne McNeil and Big X are referred to interchangeably.

[3] RBC is entitled to recover costs from Mr. McNeil. Just because it is the largest financial institution in the country does not mean that it has to forget its own $ 9 million loss from the fraud and bear the cost of three years of pointed accusations from Mr. McNeil. People are required to bear the financial consequences of their actions and costs awards are in part an application of the basic legal principle of personal responsibility. Courts cannot be overcome by sympathy for the sorry plight of a misguided losing litigant.

[4] But in setting the amount of those costs a court has to manage the tension between the sometimes harsh certainties offered by specific rules and tariffs and the exercise of discretion to provide a result that honours some other important legal principles. The principles of proportionality and restraint inform judicial action. Proportionality means that an outcome or result should be faithful to the goals it is intended to achieve. It should rationally relate to those goals and its consequences should not go beyond what is reasonably necessary to achieve them.

[5] The McNeils are facing the prospect of a $500,000 costs award that can best be described a catastrophic. That is especially the case considering the $850,000 judgment against them in favour of RBC. Recognizing that reality, without being overcome by it, is not a compassionate act driven by pity or sympathy but the application of fundamental legal principles of proportionality and restraint. A substantial award of costs is necessary to reasonably compensate RBC and to reflect the level of Mr. McNeil's personal responsibility. But a crushing and catastrophic award of costs would be disproportionate. It would go beyond what is required to do justice between the parties by providing reasonable compensation and recognizing personal responsibility. Rather than encouraging caution on the part of potential litigants it would instill fear.

Party and party costs are awarded in the amount of $135,000. To that will be added $3500 in costs on three motions and $6688.08 in disbursements for a total of $145,188.08 That amount could, and very likely will still be, ruinous. A lesser amount would relieve Mr. McNeil from personal responsibility for the series of decisions that led to the courtroom. A greater amount might well be the coldly accurate product of a calculator. To do justice between the parties requires as much conscience as calculation.

The Theory of Costs

[6] Costs follow the result. In assessing the amount to be recovered a court has to consider the purposes of costs awards and the tension that exists between costs awards and access to justice. It is fair that a successful litigant should be at least partially indemnified for the costs of the litigation. The successful defendant did not ask to be involved and had to spend money on legal fees to be eventually vindicated. On the other side, a plaintiff should not be discouraged from advancing a "legally sound position" because of the legal fees involved.[2] In that sense the awarding of costs helps to make the legal system at least somewhat more accessible.

[7] Costs awards can also serve the purpose of deterring people from pursuing actions that are doomed to failure or from putting up defences that are frivolous. Costs awards are designed to act as a "disincentive to those who might be tempted

[2] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 26

to harass others with meritless claims".[3] Parties are encouraged by the prospect of a costs award to make reasonable settlement offers and to refrain from taking unnecessary steps in the litigation. [4] They serve a "winnowing function" to discourage doubtful cases or defences.[5]

[8] Those purposes exist in some tension with each other. Costs are intended to both make the system more accessible and at the same time, to make it less accessible. Compensation of successful parties can serve as a disincentive to frivolous litigants but can also go a step further to act as a disincentive to public interest litigation or to scare off those who would otherwise pursue valid claims but who cannot afford the risk. Arguably, an aggressive interpretation and application of costs, by raising the stakes, favours litigants with deeper pockets who can better afford the risk. The threat of an enhanced award of costs against an individual litigant is often a strong incentive to settle. It is less of an incentive to large corporate or government entities.

> Everyday litigants, especially those with a house or other modest assets to lose and whose legal costs are not covered by insurance, are most likely to have costs concerns weigh heavily when they decide whether to advance a claim at all. Should these concerns be driving access to the civil litigation system and determining litigation outcomes? …
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> While the amount at stake in the dispute and the estimated eventual cost of the litigation are factors that are weighed by the parties to the litigation, the ability to defray the costs of litigation remains paramount when assessing how a fee regime affects litigation behaviour. …

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[3] Ibid.

[4] *Skidmore v, Blackmore* (1995), 122 D.L.R. (4th) 330 at 339 (B.C.C.A.)

[5] *Catalyst Paper Corp. v. Companhia de Navegacao Norsul*, 2009 BCCA 16 at papa. 16

> By contrast the everyday litigant is paying the bill. This category of litigant is typically the middle-class average income earning Canadian who has some modest savings and assets; having to pay Adverse Party or Settlement costs in litigation may mean the loss of those fundamental finances. The everyday litigant is thus decidedly more risk averse because she has something to lose, and that something is the difference between a comfortable existence and poverty.[6]

Nova Scotia Rules on Costs

[9] Nova Scotia Civil Procedure Rule 77 sets out a regime for costs that reflects those general concerns. Tariff A which applies to actions and applications in court provides for cost awards to be made based on the "amount involved" in the litigation, that is the amount of money at stake. That in itself is a compromise. While the amount involved may typically provide some indication of the complexity of the litigation that is not always the case. Tariff A recognizes this by allowing for adjustments to be made to the amount involved based on the complexity of the litigation and the importance of the issues. Even with those adjustments the amount involved is not determinative. Tariff A provides a range of costs awards again to account for the complexity of the proceeding. And finally, the amount is to be increased by $2,000 for each day of trial.

[10] Costs are not awarded according to the tariffs in every case. There are provisions under Rule 77.04 for a relief from costs to be sought in advance so that a litigant is not facing the risk of a ruinous costs award. And there are provisions under Rule 77.07(2) for increased or decreased awards of costs to be made against those who refuse reasonable offers of settlement and unnecessarily prolong litigation.

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[6] Erik. S. Knudson, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010), 36 Queen's L.J. 113 at paras. 3, 22 and 24

[11] The tariff amount provides something between a presumptive amount and a benchmark. Judicial discretion has to be applied. Rule 77.02 (1) provides that the costs ward ought to "do justice between the parties". The court can therefore depart from the tariff amount entirely and award a lump sum amount. The general intent is to provide the successful party with substantial indemnity for legal fees short of full recovery.[7]

[12] These rules are interpreted to allow judges to manage the tension between predictability and using discretion to do justice in a particular case. And there is a further tension within the concerns that guide the exercise of that discretion. It is important to discourage the unreasonable use of the system by litigants while it is also important not to create a disincentive to serious litigants. But sometimes successful litigants behave unreasonably and serious ones still lose. There is a web of case-specific considerations and system related considerations that cannot be simplified into a list.

[13] In short, costs are highly discretionary. Judicial discretion is not the arbitrary exercise of authority, symbolized by John Selden's 17th century metaphor of the Chancellor's foot. It is not judicial whim or even unguided judicial intuition. It is not used to depart from established legal norms but to bring specific cases within

[7] *Giffin v. Soontiens*, 2012 NSSC 354 at para.55.

larger legal norms.[8] It allows the principles that animate the law of costs to be applied in a way that addresses the circumstances of a particular case.

Mr. McNeil's Argument for No Award of Costs

[14] Mr. Donovan, on Mr. McNeil's behalf argues that there should be no award of costs at all. He says that Mr. McNeil actually saved RBC millions of dollars by detecting and reporting his business associate's fraud, and that ought to be recognized.

[15] Mr. McNeil noticed that what purported to be an audited year-end statement submitted by Paul Burden was dated the wrong year. He contacted his former accounting partner whose firm was supposed to have done the audit. It was a professional courtesy. The purpose was to ask about what seemed to be a significant oversight. It was very quickly determined the accountants had not performed an audit at all and the document was fraudulent.

[16] Mr. Donovan argues that had Mr. McNeil not done the right thing and reported the fraud to both RBC and the accountants, RBC would have continued to accept the fraudulent documents. The fraud would have continued. Burden would have drawn down on the line of credit based on the fake audited statement. Preventing that saved RBC some $3 million immediately and potentially twice that amount.

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[8] Robert Sharpe, "The Application and Impact of Judicial Discretion in Commercial Litigation" (1998) 17:1 Advocates' Soc. J. 4 at 10; see also Martha Nussbaum, "Equity and Mercy" (1993) 22 Philosophy and Public Affairs 83 at 96.

[17] But Len McNeil was not suspicious about any fraudulent activity by Burden. He did not engage in any kind of investigation of Burden's activities. He just noticed the wrong date on the document. He immediately called his former partner at the accounting firm knowing that they would not want to have a document circulating with an important error on it. Only then did he become aware that the accountants had not done the audit at all.

[18] Then he did the right thing. He told RBC. Len McNeil's motivation was really his own reflex of honesty. There is no suggestion that he weighed the options or ever even considered trying to cover up what he had found. Had he done so, honesty was not only the best policy but the only realistic one in the circumstances. Burden's fraud was then known to Burden himself, Len McNeil and the accountant. There is no realistic way that it could have kept going. A national accounting firm had become aware that its name was being used on a forged document to defraud RBC. It would be compelled for a host of reasons to disclose what was going on, which was the commission of a crime. If Len McNeil had not reported it someone else would have very quickly.

[19] And had Mr. McNeil acted entirely out of character and for whatever reason tried to cover up the discovery he would have exposed himself to other sanctions and even greater financial losses. He would have had no financial or personal interest whatsoever in continuing to receive interest and dividends from the company that Burden was funding through the proceeds of his fraud of RBC. This was not a situation in which Mr. McNeil's honesty had to overpower his self-interest. Len McNeil "saved" RBC money only in the sense that it was he who happened to notice the error in the date. He had no crisis of conscience to confront.

[20] Mr. Donovan has argued that the trial had a benefit to RBC in highlighting the bank's practices that allowed the fraud to take place. The fact is RBC lost $ 9 million. It did not need ten or so days of a trial in Nova Scotia to remind it of that or expose how it was done. It would be a monstrously inefficient way of either coming to grips at a corporate level with the significance of the loss and of developing better procedures. The fraud itself was not a complicated scheme that could only be detected by equally complicated practices.

[21] Mr. McNeil did RBC no favours. When he suspected Burden's fraud he reported it, as he should have done and as he was morally inclined to do anyway. Had he not reported it his predicament would have been much worse. The legal action was not necessary to expose a problem and even if it did have that affect, it was perhaps the most inefficient way to do that.

[22] Mr. McNeil had to face the facts. He had lost almost everything he and his wife had worked for. He had been duped by Paul Burden. He, as a senior, well-respected, and highly regarded professional had fallen prey to an old-style confidence scam that disguised borrowed money as profits.

[23] That is a harsh reality to have to face. It seems Mr. McNeil, in frustration, turned to litigation as a substitute for confronting this reality. He aggressively pursued RBC, placing the blame squarely on the bank. He was very vocal about it. His reaction took a bad situation and made it worse.

[24] This is not the situation of an unsophisticated litigant of modest means who has cautiously advanced a morally compelling yet ultimately unsuccessful claim against a large institution. Mr. McNeil is a sophisticated and well-educated professional who understood the nature of litigation and should have understood

the risks of the potential outcomes. He was at one time a businessman of some means who was able to retain very senior legal counsel to provide advice and to represent his interests. Mr. McNeil's approach to the litigation itself was not cautious or restrained. In April of 2012 he claimed that rather than he owing RBC on his guarantees it was RBC that owned him some $6 million. He continued to assert through the course of the trial and in the face of overwhelming evidence that a $400,000 guarantee bearing his signature was a forgery. The claim originally included causes of action that were not withdrawn until closing submissions at trial and the main focus of the trial was on a negligence claim that was made only two months before the trial. Mr. McNeil repeatedly contacted RBC employees directly despite instructions to communicate through legal counsel. He threatened criminal charges against the bank and its employees. Justice Moir on a motion in December 2014 described Mr. McNeil's emails to RBC employees as "vitriolic", "threatening" and amounting to "harassment". Furthermore, Mr. McNeil's conduct of the litigation was not cautious. While the claim that he advanced could not be described as frivolous or vexatious or as not having any chance of success at trial, Mr. McNeil did not lose because of a legal technicality or because of a failure to establish proof of a single fact. The trial was not a near run thing.

[25] The McNeils have been financially devastated. RBC was not the cause of that. Paul Burden was. He will never be able to make restitution to his victims. In trying to shift the responsibility to the party with deep pockets, Mr. McNeil allowed his better judgment to be overcome. It is impossible not to feel sympathy for him and for his family. He was a victim. But that sympathy cannot insulate him from responsibility for how he reacted and for the series of decisions that brought this matter to a trial.

[26] Mr. and Mrs. McNeil are facing financial obligations well beyond their ability to respond to them. Their situation is related directly to the circumstances of the case and is to some extent a function of how they have chosen to respond to those circumstances. It is not a case in which they should be entirely relieved from the responsibility to pay costs.

Amount Involved

[27] Mr. McNeil's claim was for $3.9 million as set out in his pretrial brief. That amount has to be taken seriously. It was not an idle threat but a legal claim. Parties cannot make claims of that kind and later suggest the other side should not have taken them seriously. Neither can the plaintiff discount the amount claimed based on his inability to establish the amount.

[28] The RBC's counterclaim was for $849,428.18.

[29] The total of the claim and the counterclaim was then about $4.75 million. As previously discussed, the determination of the "amount involved" is not simply a matter of adding the claim and the counterclaim. The monetary amount of the claim is one consideration. The court also has to consider the complexity of the proceeding and the importance of the issues. That rule reflects the reality that there can be a simple legal issue that involves a large amount of money, or a matter involving a smaller amount that is of great importance to those involved.

[30] This was not a $4.75 million case. There is no question that this matter involved a fairly large volume of documents. When a claim of that magnitude is made, both sides bring to the litigation whatever they can. It is difficult for counsel to know which of the individual documents in the volumes disclosed will

determine the outcome. It is not unfair to note here that of the volumes entered as exhibits, a relatively small proportion received almost all of the attention. The others had to be entered but the vast bulk of them were never actually referenced.

[31] The facts were not particularly complex. Paul Burden's fraud was disarmingly simple. It was just a matter of using a word processor and laying out enough bait. The various reports provided to the bank by the company were not highly detailed or complicated. There was no expert accounting or banking evidence that required interpretation. There were no banking practices or accounting principles that needed to be meticulously explained.

[32] Mr. McNeil claimed losses arising from his early retirement. That claim did not require a great deal of court time and did not involve detailed actuarial calculations. That claim of $2.6 million really added very little to the complexity or volume of the matter at trial but did require attention in the pretrial stages. RBC could not have known in advance that the claim would not be at the forefront but at the same time it was not a claim that necessitated a large amount of evidence or the consideration of opposing experts' reports.

[33] The legal principles were not complicated either. The issue of duty of care is an area where the law is relatively well-developed. Mr. McNeil was trying to fit his case within that established legal framework. It was not a matter of creating new law or interpreting complicated case law, statutes or regulations. Mr. McNeil claimed that RBC owed him a duty under an already well-established test.

[34] The legal issue was an important one to RBC. Had Mr. McNeil established that RBC owed him a duty of care as a shareholder of its corporate customer, the implications could be far reaching. RBC had every reason to respond in full force

to that significant legal argument put forward by an aggressive and sophisticated litigant.

[35] Mr. McNeil's assertion that he had not signed a guarantee was not complicated at all. It was an issue that involved assessing the reliability of the evidence presented.

[36] Again, Mr. McNeil's total claim was for $3.9 million. That was not a threat but a serious claim. Of that amount $2.6 million involved the early retirement claim, which was not time consuming at the trial itself. Given the low to moderate level of complexity of the issue of the duty of care, the potential high significance of that issue to RBC, the absence of expert or technical evidence and the nature of the early retirement claim, a reasonable assessment of Mr. McNeil's claim would be calculated by reducing the total to $ 3 million.

[37] To that must be added the $800,000 in claims against him by RBC. Those claims were not complicated at all. They were entirely fact specific and did not involve the risk of any precedent being set. The amount involved can for them can be set at $500,000.

[38] The total "amount involved" is $3.5 million. One again, that is not determined by the application of arithmetic but is based on the amounts actually claimed, the complexity of the evidence, including its volume, the complexity of the legal argument and the importance to RBC of the potential legal precedent.

Application of the Tariff

[39] Tariff A under Civil Procedure Rule 77.18 provides recovery based on three scales. The basic scale applies to most matters. More highly complex litigation will

attract the higher scale, and uncomplicated litigation attracts the lower, reduced scale. This litigation was characterized by a higher volume of materials but as noted, was not highly complex in terms of law or evidence. It could not be characterized as simple litigation either.

[40] The basic scale sets costs at 6.5% of the amount involved when the amount involved is greater than $1 million. This amounts to $227,500. To that must be added $2000 for each of the ten days of the trial, amounting to $20,000. The amount established under Tariff A is then $247,500.

Settlement Offers

[41] An offer to settle may be considered by a judge in an award of costs. If a formal offer is made after the finish date, and the result at trial is no better than the offer, the successful party may have their costs award increased by 25% under Civil Procedure Rule 10.09(2)(d). Litigants thereby are held responsible for the manner in which they pursue their matters.

[42] RBC delivered two formal offers to settle on May 1, 2015, 26 days before the trial. Those offers dealt with both the claim and the counterclaim and had Mr. McNeil accepted those offers there would have been no trial and he actually would have ended up with a better result. The Rules do not require the offer to have been substantially better than what was achieved by the offering party at trial or that it reflect a true compromise. In this case, the offer was essentially a demand for unconditional surrender but nonetheless, it was an offer of settlement and Mr. McNeil would have been better off had he accepted it. Applying Rule 10.09(2)(d) the Tariff A costs award would be increased by 25% to $309,375.

Other Considerations

[43] Rule 77.07 provides that a judge can increase or decrease the amount of costs established by the application of the tariff and Rule 77.08 provides that a judge may depart entirely from the tariff and award lump sum costs. That discretion is of course to be judicially exercised, with reference to some factors that are noted as being potentially relevant. The judge can consider the amount claimed in relation to the amount recovered. The conduct of a party affecting the speed or expense of the proceeding is also relevant. Similarly, parties who take unnecessary steps or cause others to take steps that would otherwise not be necessary should suffer the consequences of their actions. Parties who fail to make admissions that should have been made will be required to bear the costs of their stubbornness.

[44] Here, RBC was entirely successful. Mr. McNeil failed to make admissions. For example, he refused to accept that his signature was the one on a guarantee. He suggested that it was a forgery because he could not actually remember signing the document in that amount. The evidence established on the balance of probabilities that it was indeed his signature. That said, Mr. McNeil's refusal to admit this fact was not of the same nature as putting the other party to strict proof on matters that are patently obvious.

[45] There were a number of motions made during the course of the litigation. To the extent that Mr. McNeil was not successful in those motions costs have already been awarded against him.

Financial Hardship

[46] Rule 77.04 provides for relief from liability for costs because of poverty. It requires a motion before the trial and would be very unlikely to apply in the circumstances of this case in any event. People with a home, a cottage and a Florida condo, despite owing a pile of money, just cannot claim poverty.

[47] The absence of a prior motion under Rule 77.04 is not a bar to considering a litigant's financial situation on a motion for costs.[9] A court may still consider a litigant's financial situation in the calculation of costs. As indicated, Rule 77.07(2) sets out factors that may be considered in deciding whether an award of costs should be increased or decreased. Although the financial circumstances of the party against whom the award is made is not one of the enumerated factors, Rule 77.07(2) does not set out a complete list. It is not intended to be exhaustive.[10]

[48] Any exercise of judicial discretion requires the application of the fundamental legal principle of proportionality. A legal result should be faithful in the pursuit of its purpose. Proportionality is directed toward ensuring that consequences imposed by law are both rationally related to and in proportion to the goals sought to be achieved. Draconian measures can provide both certainty and deterrence. Proportionality counsels restraint. It is necessary here to consider the

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[9] *MacLellan v. Canada (Attorney General)*, 2015 NSSC 125, [2015] N.S.J. No. 163 at para. 18.

[10] *Hill v. Cobequid Housing Authority*, 2011 NSSC 219, [2011] N.S.J. No. 291 at para. 31.

goals sought to be achieved by an award of costs and to determine whether the amount is a reasonably proportionate response to the achievement of those goals.

[49] Mr. McNeil should be held responsible for his decisions. RBC should not be required to fund his principled conviction that he was right or to pay for his stubbornness. At the same time, an award of costs that totally destroys him financially would be disproportionate to any value it would serve to RBC or to the administration of justice.

[50] Courts in Nova Scotia have addressed the issue. The jurisprudence appears to have developed in the direction of considering a litigant's financial circumstances in exercising discretion as to the amount of costs while not allowing it to be a bar to the collection of some costs by a successful party. In *Gilfoy v. Kelloway*[11] Justice Goodfellow noted that impecuniosity has traditionally not been a factor in costs decisions:

> More importantly, the determination of costs with the rare exception of some family law situations has never been influenced by wealth, lack of wealth or impecuniously of a party. The Registry of Deeds contains many judgments for an including costs and the collectability of costs is not a factor to be considered in the proper exercise of judicial discretion as to entitlement to costs or indeed the quantum of costs….

[51] Associate Chief Justice Smith in *Farrell v. Casavant*[12] took note of some decisions since *Gilfroy* in which impecuniosity had been considered and noted that those were the exception rather than the rule. She was not satisfied that the unsuccessful party's financial circumstances should affect the award of costs.

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[11] (2000), 184 N.S.R. (2d) 226at para. 25 (S.C.)

[12] 2010 NSSC 46 at paras. 25-26

[52] That position was also taken in *Marsh v. Paquette*[13]. After a 19 day trial the defendants were awarded costs because the plaintiff had recovered damages of less than 10% of her claim. Justice Hood noted that the plaintiff did indeed have a major asset and the family was not impecunious. She also said that declining to award any costs to the successful party would defeat the purpose of costs, which are to reward success. For a successful party not to get costs is a form of penalty.

[53] There has been some recognition in Nova Scotia that in some circumstances a party's financial position is relevant.

> I believe the law is clear that, if the awarding of costs would create an undue financial hardship, it would be a proper exercise of judicial discretion to refuse to grant them.…
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> As Hallett J. pointed out in Bennett v. Bennett (1981), 23 R.F.L. (2d) 302, 45 N.S.R. (2d) 683, 86 A.P.R. 683 (T.D.), there must be a good reason not to award costs to a successful party in a matrimonial case. I would but add such reason must be based on principle. Here, Richard J. obviously felt that the additional hardship of costs was a burden the respondent under the circumstances should not be called upon to bear.
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> In our opinion, this decision can be interpreted as denying costs on the grounds of the respondent's impecuniosity. [14]

[54] That 1984 case, *Kaye v. Campbell,* dealt with costs on a divorce matter. It could be considered one of the extraordinary cases but it does not suggest that the circumstances should have to reach that level. What is required is "undue financial hardship."

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[13] 2011 NSSC 70

[14] *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173, 1984 CarswellNS 47 (S.C.A.D.) at paras. 8, 10 &11.

[55] There have been other more recent decisions that have expressed similar views. In *Windsor v. Poku* [15] this Court considered that the unsuccessful party was living on a fixed income with no assets. Costs were awarded in the amount of $10,000 which was substantially less than the amount that would have been calculated by the application of the tariff. Presumably the costs award of $10,000 would have had a very significant personal impact but this fell well short of what it might otherwise have been.

[56] Justice Warner in *Lockhart v. New Minas (Village)* [16] considered the policy implications of financial strain in litigation:

> A fairness concern is the inability of the average Canadian to access the civil justice system because of its complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by proponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool. [17]

[57] It should be clear here that RBC did not use complexity and delay as a tactical tool. However Justice Warner was taking a broader view that considered the policy implications of costs awards.

[58] In *Gillan v. Mount St. Vincent University* [18] Justice LeBlanc estimated solicitor and client costs to be in the range of $30,000 to $40,000 but awarded costs

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[15] 2003 NSSC 95

[16] 2005 NSSC 93, 2005 CarswellNS 297

[17] para. 45.

[18] 2007 NSSC 249, [2007] N.S.J. No. 352

in the amount of $5,000 which he said would provide a substantial contribution and at the same time reflect the financial circumstances of the party who was ordered to pay. "I am mindful that Ms. Gillan may not have the financial ability to pay a substantial costs order; nevertheless I am satisfied that the defendant should not be denied its costs in the circumstances."[19]

[59] In *Hill v. Cobequid Housing Authority* [20] Justice MacAdam provided a thorough review of the case law dealing with the consideration of financial circumstances in costs awards. Justice MacAdam noted that while financial considerations are not listed as one of the factors considered in Rule 77.07(2) it is a factor than can be taken into account.

[60] Recently, in dealing with an application for immunity from costs in *Hatfield v. Intact Insurance,*[21] Justice Gogan commented on the balancing required when such an order or addressing costs generally. She noted that in attempting to balance access to justice with cost consequences it is now recognized that the financial position of a party may be considered as part of the final costs assessment in a proceeding:

> There can be no doubt that cases exist where there is a significant financial imbalance between the parties which may be a perceived or actual disadvantage to the litigant of limited means. This would be the kind of case that Ms. Hatfield referred to as the "David v. Goliath". In providing relief to such litigants, the Court must exercise care to ensure

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[19] para. 12

[20] 2011 NSSC 219

[21] 2014 NSSC 288, 2014 CarswellNS 573

> that the pendulum does not swing too far in the opposite direction. Financial immunity, in the wrong hands, could become a sword and not a shield.[22]

[61] In other words, sometimes, in the David v. Goliath case, David is just wrong.

[62] In *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*,[23] Justice Moir also acknowledged that the court will, in the right circumstances take a party's poverty into account when exercising discretion on the matter of costs. In that case "poverty" was not established.

[63] The case law in Nova Scotia appears to have developed to allow the consideration of the financial circumstances of the party against whom the award of costs is to be made. That does not seem to be limited to matrimonial matters or to cases in which a party would have been granted an exemption from costs had a motion been made under Rule 77.04. Financial circumstances are relevant not only to deciding whether costs will or will not be awarded, but also to determining the amount.

Discretion Guided by Principle

[64] Under Rule 77.02(1) a judge can exercise discretion in making an award for costs "as the judge is satisfied will do justice between the parties". That discretion is exercised with reference to the legal framework of the Rules themselves and is guided by fundamental legal principles. The Rules provide some, albeit incomplete

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[22] para. 31

[23] 2015 NSSC 39

predictability of outcome, and other legal principles provide the flexibility required to do justice on the facts of an individual case.

[65] The discretion should be informed by principles and policy considerations that underlie the Rules themselves. Successful parties and parties that have been subjected to unfounded claims and legal processes by another should be at least partially indemnified. A successful party should not be denied costs in the absence of misconduct. A costs award should provide substantial though not complete indemnity for reasonable legal expenses. A costs award should be proportionate having regard to the tension among concerns related access to justice including the financial imbalances, fair compensation for successful litigants, and discouraging unnecessary litigation.

[66] That does not mean costs are based on the ability of the losing party to pay. Nor are they based on the need of the successful party. If that were the case, there would almost certainly be no costs awarded here. It does mean taking a step back to consider the implications of a costs award that would result from the strict application of the Rules and Tariffs.

[67] The McNeils cannot claim poverty. It would be entirely unfair to exempt them from the obligation to contribute toward the costs of the successful party. There should be serious financial consequences for the decision to focus on the bank to recover what was lost due to Paul Burden's fraud and for the single minded determination in pursuing the case to its conclusion. RBC should be entitled to a significant award of costs well beyond a token amount.

[68] That should be moderated by a number of circumstances all of which are directly related to the case itself. The McNeils have already lost most of what they

had. They spent $200,000 taking the case against RBC. They have a house in Bedford and a cottage in Cape Breton but both of those are encumbered by mortgages that exceed the value of the properties. They have equity $100,000 of equity in a Florida condominium, which dates back to better times. RBC now has judgments against them for $850,000. They will likely now lose everything.

[69] By way of income, they have Mrs. McNeil's $12,000 yearly pension and Mr. McNeil receives $120,000 a year from the sale of another business. Those payments end in 2019.

[70] The case was not taken against another individual litigant. Mr. McNeil took on the Royal Bank of Canada. While need is absolutely not a factor in determining whether costs should be paid or in setting the amount of costs, the magnitudes of difference between the litigants is undeniably part of the larger circumstances to be considered in determining whether a costs award is entirely out of proportion. The impact on the McNeils of ordering them to pay a huge award of costs is massively disproportionate to the impact of receiving those costs for RBC. That is not a reflection of sympathy or an effort to create a "level playing field". The playing field is not level and never has been. That is a fact of life. It is a reflection of proportionality.

[71] Len McNeil was not a litigation speculator in search of an easy payday. His actions were misguided but not unscrupulous. He was not a reckless or frequent litigant. He was ruined and desperate.

[72] People are responsible for their actions even when they involve tilting at very large windmills. The consequences of those actions can be ruinous but they should be within some proportion to damage inflicted on the windmill.

Catastrophic costs awards are sometimes appropriate but only after restraint has been considered.

Conclusion

[73] A costs award in the range of $500,000 as claimed by RBC would be disproportionate. An award of $309,375 which is what Tariff A prescribes would also be disproportionate in the circumstances. It would amount to the delivery of a final crushing blow to add to the $850,000 already owed to RBC.

[74] An award of $135,000 is still likely outside the McNeils' current ability to pay but it is proportionate. It reflects the personal responsibility of the plaintiffs in the matter having regard the circumstances, the nature of the litigation and the formal offer to settle.

[75] RBC did not file an account indicating the amount of legal fees paid. In that case I accept Mr. Donovan's fees of $200,000 as reflecting a reasonable range of legal fees on a 10 day case of this significance. Substantial recovery of that amount would be in the range of $135,000 even having regard to the settlement offer.

[76] Costs have been ordered in three chambers motions in this case in the total amount of $3,500. Those should be added to the total cost award.

[77] Disbursements have been claimed in the amount of $8,615.18. In that amount was included $1,927.10 for witness fees. The materials provided do not provide any breakdown of those fees or indicate which of the three witnesses were paid them. Costs for disbursements are ordered in the amount of $6,688.08.

[78] The total amount of the costs order is then $145,188.08.

J.