IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Wall v. Horn Abbot Ltd., 2008 NSSC 4

Date: 2008/01/08
Docket: SN 101331
Registry: Sydney

Between:

David H. Wall

Plaintiff

v.

Horn Abbot Ltd., 679927 Ontario Limited (formerly Horn Abbot Productions Limited), Christopher Haney, Charles Scott Abbott, John Haney and Edward Martin Werner

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	December 18, 2007, in Halifax, Nova Scotia
Counsel:	Kevin A. MacDonald , for the Plaintiff John C. Cotter, for the Corporate Defendants William L. Ryan, Q.C., and Christa M. Hellstrom for the Individual Defendants

By the Court:

[1] Following presentation of evidence by the Plaintiff, the claims against the Defendants 679927 Ontario Limited (formerly Horn Abbott Productions Limited), Charles Scott Abbott, John Haney and Edward Martin Haney were dismissed on a motion of non-suit brought by their respective counsel. On the completion of the lengthy trial, by reasons reported at 2007 N.S.S.C. 197, the claims by the Plaintiff against the remaining Defendants were dismissed.

[2] Both the Plaintiff and the Defendants now seek costs.

[3] The Plaintiff alleged that in late November/early December, 1979, while hitchhiking with a friend, he was picked up and during the drive and at the destination, told to the driver his idea for a board game based on trivia and horoscopes. The Defendant, Christopher Haney, who is alleged by the Plaintiff to have been the person to whom his idea for a game was disclosed, denied any such event and testified that he, together with the Defendant, Charles Scott Abbott, developed the idea for a game based on trivia and together with the Defendants, John Haney and Edward Martin Werner proceeded to create, develop and market the popular board game known as “Trivial Pursuit”. Although the suggested

encounter is stated by the Plaintiff to have occurred in 1979 this proceeding was not initiated until November, 1994 with the trial commencing on May 23, 2006 and after 47 days of trial, concluding on January 6, 2007.

The *Civil Procedure Rules*

[4] In their respective submissions on costs, counsel for the Plaintiff, as well as counsel for the corporate Defendants and counsel for the individual Defendants, referenced a number of the *Civil Procedure Rules* of the Province of Nova Scotia. Included among the *Rules* referenced by counsel:

> **Object of Rules**
>
> **1.03.** The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.
>
> ...
>
> **Costs in discretion of court**
>
> **63.02.** (1) Notwithstanding the provisions of rules 63.0 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

(a) award a gross sum in lieu of, or in addition to any taxed costs;

(b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;

(c) direct whether or not any costs are to be set off.

...

When costs follow the event or are determined by the Rules

63.03. (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

...

(c) proving the truth of any fact or the authenticity of any document, that a party unreasonably denies or refuses to admit, shall be borne as provided in rule 21.04 by that party;

Party and party costs fixed by court

63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the ‘amount involved’ shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider

...

Disbursements

63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

...

[5] Also applicable from the Civil Procedure Rules*:*

Costs arising from misconduct or neglect

63.15. (1) Where any thing is done or an omission is made, improperly or unnecessarily, by or on behalf of a party, the court may order,

(a) any costs arising from the act or omission not be allowed to the party;

(b) the party to pay the costs of any other party occasioned by the act or omission;

(c) a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) and (b).

> (2) Where in a proceeding, costs are incurred improperly, or without reasonable cause, or arise because of undue delay, neglect or other default, the court may, when the solicitor whom it considers to be responsible, whether personally or through a servant or agent, is before the court or has notice, make an order,
>
> (a) disallowing the costs as between the solicitor and his client;
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to any other party;
>
> (c) directing the solicitor personally to indemnify any other party against costs payable by the party;
>
> (d) directing a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) to (c).

Solicitor-Client Costs

[6] Costs, other than solicitor-client costs, are intended to provide "substantial contribution for the reasonable costs incurred during the course of litigation", although not necessarily fully indemnifying the successful party all the costs and disbursements it may have incurred. In *Morgan*, *The Law of Costs*, 2nd Edition, Volume 1 (Aurora: Canada Law Book, 2007, at pg. 1-1 the author states:

> ... A successful litigant has, therefore, a reasonable expectation of receiving an award of costs, but this is subject to the court's absolute and unfettered discretion to award or withhold costs, as well as to the applicable rules of court.

[7] The underlying principle in respect to costs was commented on by Saunders, J., in *Landymore v. Hardy*, 1992 CarswellNS 90 (S.C.T.D.) at pps. 413 - 415:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > ... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.
>
> [Emphasis added by counsel]

[8] The view that costs are to represent a "substantial contribution" of the reasonable expenses incurred in the course of litigation was reiterated by the Court of Appeal in *Williamson v. Williams*, 1998 CarswellNS 465, where at para. 25 the Court stated:

> In my view a reasonable interpretation of this language suggests that a 'substantial contribution' not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred percent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been

> considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[9] In *Turner-Lienaux v. Nova Scotia (Attorney General)*, 1992 CarswellNS 692, Roscoe J., at para. 38, references the decision of Justice Saunders in *Landymore v. Hardy*, *supra*, to the effect that not only should costs represent a substantial contribution of reasonable expenses, but they should also take into account, not only trial, but pre-trial procedures as well. In respect to this, counsel for the individual Defendants submits there have been a "myriad of applications throughout the course of the proceeding", and proceeds to list nineteen different applications brought prior to the commencement of trial. Counsel also suggest there have been various pre-trial applications, including two for adjournment of the trial itself.

[10] In reviewing the background to the trial, counsel for the individual Defendant notes that among the proceedings brought by the Plaintiff against the Defendants were claims in:

(a) Breach of copyright;

(b) Breach of trademark;

(c) Breach of fiduciary duty;

(d) Breach of confidence; and

(e) Equitable fraud and deceit.

[11] Counsel observes that over sixty-five witnesses were discovered and evidence at trial was adduced from fifty-three witnesses, with discovery of six individuals read into the trial record.

[12] On the other hand, counsel for the Plaintiff, after acknowledging *Civil Procedure Rule 63.03,* in referencing the discretion in the court in respect to the awarding of costs, refers to a number of excerpts from Orkin on "*The Law of Costs*", *supra*, including at pp. 2-9, 2-45, 2-46 and 2-46.1:

> A successful litigant has by law no right to costs. That being said, the general rule is that costs follow the event.
>
> ... The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or

vexatious litigation and to discourage unnecessary steps. More recently, the Ontario Court of Appeal has added access to justice as a fifth consideration.

...

Party-and-party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation and in an appropriate case the court may award costs under the rubric of damages.

...

Notwithstanding that costs are intended primarily as indemnification and not punishment courts have, in appropriate cases, imposed costs to reprove improper behaviour on the part of a litigant, for example, to penalize someone who deliberately used the court's process to stifle public discussion of a matter of public interest, or made improper use of a summons to a witness or acted unreasonably and in violation of a case management order, or wrongfully removed a child from its habitual residence, or made grave, reckless allegations of criminal misconduct against opposing counsel. As has been said, the costs sanction is one of the ways in which the court can protect the integrity of its process.

...

[Footnotes omitted from quote.]

Finally, at page 2-48:

Courts have recognized, however, that an award of costs may serve another function than indemnification, for which the party-and-party or tariff scale will ordinarily suffice. Costs may also be awarded on a higher scale as a penalty or deterrent for certain conduct, in which case it matters not that the costs exceed the party's obligation to counsel, or even that the successful litigant has no fees to

> pay. Absent the element of penalty or deterrent, the principle that party-and-party costs are intended as an indemnity for a successful party will apply, and the party should not be allowed costs in excess of the party's liability to his or her own solicitor.
>
> [Footnotes omitted from quote]

[13] Counsel continues by referencing the issue of solicitor-client costs and in his final submissions suggests the Plaintiff is entitled to such costs as against the Defendants. Counsel reviews in some detail the analysis of Hood, J. in *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44 as to the circumstances in which solicitor-client costs have been awarded. At para. 480, Justice Hood notes:

> It is not disputed that solicitor-client cost awards are made only in rare and exceptional circumstances. In Coughlan et al. v. Westminer Canada Limited, et al (1994), 127 N.S.R. (2d) 241, the Court of Appeal upheld the decision of Nunn, J., the trial judge, [1993] N.S.J. No. 129, with respect to costs. The Court of Appeal quoted from his decision at para. 170:
>
> > The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonesty, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pre-trial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client basis as, in my opinion, this does constitute one of those 'rare and exceptional' cases wherein such awards are, and should, be made.

[14] Then at paras. 482 and 483, Justice Hood comments:

> 482 McLachlin, J. (as she then was) of the Supreme Court of Canada said in **Young. v. Young** (1984), 108 D.L.R. (4th) 193 (S.C.C.) at p. 284:
>
> > Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others.
>
> 483 In **Leung v. Leung**, [1993] B.C.J. No. 2909 (B.C.S.C.), solicitor-client costs were also considered. In that case, Esson, C.J.S.C. defined 'reprehensible' to include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. He said it means simply 'deserving of reproof or rebuke.'

[15] Justice Hood found the history of the proceeding, coupled with the unfounded allegations, as well as the public nature of those allegations, combined to make that case one of those "rare and exceptional cases" in which it was appropriate to award solicitor-client costs.

[16] Also referenced by counsel is the observation of Chipman, J.A. in *Merzbach v. McSween,* 1997 CarswellNS 425: 164 N.S.R. (2d) 113 where, on behalf of the court, he stated:

> This Court has made it clear that an award of solicitor-client costs is not to be made except in exceptional circumstances. In *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43, Pugsley, J.A., said at p. 55:
>
> While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation **(Wournell (P.A.) Contracting Ltd. et al. v. Allen** (1980), 37 N.S.R.(2d) 125; 67 A.P.R. 125 (C.A.)).
>
> This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible. (**Lockhart v. MacDonald** (1980), 42 N.S.R.(2d) 29; 77 A.P.R. 29 (C.A.) **Warner v. Arsenault** (1982), 53 N.S.R.(2d) 146; 109 A.P.R. 146 (C.A.))
>
> The word "reprehensible" is defined in **The Concise Oxford Dictionary** (1990) as "deserving censure or rebuke".
>
> The conduct of the Authority, in my opinion, deserves that description.
>
> There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

[17] During the course of the trial, and apparently preceding the commencement of evidence, there was by all counsel, as well as the litigants, allegations made against counsel and the parties opposite. To a large extent, these allegations were

unfounded or, at least, were not supported by evidence tendered during the course of the trial. There is nothing in the circumstances of this litigation that would raise the level of conduct by any of the parties to the extent required to warrant the conclusion that this is one of those "rare and exceptional cases" in which it would be appropriate to award solicitor-client costs.

[18] Counsel for the Plaintiff alleges that the:

> ... Defendants sought to try and stifle the Plaintiff's case and make it as expensive as possible for him to ensure that it did not proceed. The most eggregious acts that they took, however, was suing witnesses based on false evidence. Their actions were designed to intimidate witnesses. Not only did they sue witnesses, they threatened to sue witnesses, including threatening to sue myself and others. Their conduct towards witnesses at discovery was intimidating and once more designed to 'scare them off' of itself cries out for an award of costs against the Defendants.
>
> When coupled with their other acts, including misleading the court, seek an adjournment of Applications without any merit, bringing unnecessary Applications and Appeals, would also entitle [the court] to make an award of costs against them.

Counsel concludes its written submission by suggesting that for these reasons an award of solicitor and client costs against the Defendants, together with all disbursements would be reasonable.

[19] As I have already concluded, there is no basis for solicitor-client costs in the conduct complained of by the Plaintiff.

Lump Sum

[20] The parties appear to be on common ground in seeking a lump sum award of costs, rather than the court requiring taxation. Counsel for the corporate Defendants references the decision of Harrington, J. of the Federal Court of Canada in *Microsoft Corporation v. 9038-3746 Quebec Inc.*, 2007 F.C. 659, apparently currently under appeal, but not in respect to the award of costs. Harrington, J. at para. 27 in the context of an award of solicitor-client costs, outlined the rational for an award of lump sump costs:

> In the cases which admit of it, lump sum costs should be awarded. It saves the time and expense of what could protracted accounting and taxation. The administration of justice is better served if the time of designated officers is not unnecessarily taken up (see: *Barz*elex *Inc. v. "Ebn Al Waleed" (The)*, [1999] F.C.J. No. 2002 (QL), 94 A.C.W.S. (3d) 434 (T.D.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 83 C.P.R. (3d) 31 (F.C.T.D.); and *Consorzio del Prosciutto di Parma v. Maple Leaf Foods Inc.*, previously cited. Although speaking of damages, rather than costs, I ascribe to the view expressed by Winn, L.J. of the English Court of Appeal in *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 All E.R. 119 at page 124:

> I think myself with confidence that there is already sufficient evidentiary material available to enable this court to make a jury assessment in round figures. It would be wrong and indeed an intolerable expenditure of judicial time and money of the parties to embark on any detailed consideration of isolated items in the account on which a balance must be struck.

[21] Later, at para. 29, he observed:

> However, I allowed the transcript, as I was assured by Microsoft that its only point was to prove that Mr. Cerrelli had testified that neither he nor the two numbered companies was in position to satisfy the judgment, and hence any award of costs. A tedious taxation could well be a waste of time and effort, and delay matters.

[22] Counsel for the corporate Defendants notes that from the evidence it appears Mr. Wall lacks sufficient assets to pay any significant award of costs. Consequently, the corporate Defendants are requesting a lump sum award without the need to provide the detailed particulars that would be required at a taxation.

[23] Plaintiff's counsel also suggests, in the event solicitor and client costs are not awarded, that a lump sum award be made in favour of the Plaintiff, notwithstanding the success of the Defendants.

[24] Counsel for the individual Defendants, referencing *Civil Procedure Rule 63.02(1)(a)*, suggests the court should also consider a gross sum in lieu of any taxation. Counsel notes that historically such awards were only considered in "exceptional circumstances" adding, however, that the current threshold did not appear to be so high for such an award.

[25] Counsel references the decision of Freeman, J.A. on behalf of the Nova Scotia Court of Appeal in *Williamson v. Williams* [1998] N.S.J. No. 498 where, after determining that it was not one of the "rare and exceptional circumstances" to justify an award of solicitor and client costs, proceeded to determine whether costs, according to the tariff, would be appropriate in the circumstances. After reviewing a number of factors arising out of the trial, at para. 32, he determined that an award of party and party costs calculated from the tariff was "... so inadequate as to be manifestly unjust and call for an award of a lump sum in addition." Clearly, therefore, a lump sum award is not necessarily equivalent to an award of solicitor-client costs. Circumstances may warrant a lump sum where they do not justify an award of solicitor-client costs.

[26] In *Dartmouth (City) v. Acres Consulting Limited*, 1995 CarswellNS 433, Justice Grant, on an application relating to costs following a six day trial, noted they were in the discretion of the court. In referencing Civil Procedure Rule 63.02(1)(a) he said that counsel had a reluctance to tax their costs and had suggested he proceed on a gross sum basis, to which Justice Grant concurred. At para. 9, he observed:

> Costs are to be a partial indemnity to a party to assist in the expenses involved in a law suit. They generally follow the event. That is, to the successful party go the costs.

[27] In the written submissions of all counsel, no issue is taken with the discretion of the court to award lump sum costs in lieu of taxation. In oral submissions counsel repeated their unanimous suggestion that whatever decision is made as to the recipient of costs, they be awarded in a lump sum. In the circumstance, counsels unanimous submission is with merit, and I will proceed on the basis of awarding a lump sum, rather than requiring the parties to participate in a taxation of the costs awarded.

Costs

[28] Counsel for the Plaintiff, in his written and oral submissions, says the conduct of the Defendants entitles the court to exercise its discretion and deny them costs and, in fact, to award a lump sum to the Plaintiff. There is nothing in his submission that would warrant departing from the traditional award of costs following the event, as indicated in *Civil Procedure Rule 63.03(1)*. This was clearly complex litigation, dating back to events alleged to have occurred in 1979, relating to a legal proceeding only commenced in 1994 and brought to trial in 2006. As already observed, accusations of misconduct, impropriety and abuse have been alleged by the Plaintiff as against the Defendants and by the Defendants as against the Plaintiff. To a large extent, they were not supported by evidence presented during the trial. Nevertheless, the obvious difficulty of dealing with events suggested to have occurred some twenty-seven years prior to the testimony of witnesses in court and, indeed, many years prior to any of the principals or potential witnesses being examined, complicated the ability of all counsel to present evidence supporting the allegations made by their clients or to respond to the allegations made by the parties opposite.

[29] As noted by counsel for the individual Defendants', Wall, at various times, altered his evidence as to when he recalled the encounter with the Defendant,

Christopher Haney, to have occurred. The necessity of responding to the changing allegation as to the date of the suggested encounter, in the submission of counsel, "... placed an undue burden on the defendants in defending this claim". Whether the burden was "undue" is a matter of conjecture but, nevertheless, clearly added to the difficulty of the Defendants in responding to and presenting evidence adverse to the Plaintiff's suggestion of the encounter with Christopher Haney. The circumstances, clearly, as they did in *Williamson v. Williams, supra*, call for an award of costs, and a substantial lump sum.

[30] The Plaintiff suggests lump sum costs, as against the Defendants in the amount of $1,000,000.00. The Defendants, suggest one lump sum award, in the gross sum of $1,500,000.00, to include all costs, interest and disbursements.

[31] During the course of the legal proceedings there have been a number of cost awards made. There have also been a number of applications where costs have been reserved. The award, in this instance, does not subsume costs that have previously been awarded, but does include any reservations of costs, including where they have been awarded to one or more of the parties, but not determined as to quantum.

Conduct of the Parties as a Factor in Assessing Costs

[32] Two of the Plaintiff's witnesses, shortly after they were discovered by the Defendants, were sued on the basis of their being involved in a conspiracy with the Plaintiff in giving their evidence in respect to his suggested encounter with Mr. Haney. Notwithstanding counsel's suggestion that the reason for the lawsuits was because the Defendant, Christopher Haney, knew he never encountered Mr. Wall and, therefore, there must have been conspiracy, I am satisfied that underlying these actions was, indeed, the spectre of "intimidation" and "threat" as suggested by counsel for the Plaintiff. Two witnesses, who eventually came forward, indicated they were aware of the lawsuits. It appears, from their evidence, this was a factor they took into account in not coming forward earlier on behalf of the Plaintiff. They testified that their knowledge of these lawsuits was a concern, and in fact, in one instance it was his wife, and, in the other the sister, who had prevailed on them to come forward.

[33] The suing of witnesses is a practice neither to be condoned nor to be encouraged. If, indeed, these witnesses were involved in a conspiracy, then legal

action could have been subsequently brought against them. The Plaintiff suggested the Defendants acted on false evidence. However, this is a further allegation, not supported by the evidence, since the basis of the lawsuits appears to be the Defendants' conclusion, from the discoveries of the two witnesses, that they must have been involved in a conspiracy. It was the evidence on discovery that apparently prompted the lawsuits, not the creation of contrived evidence on the part of the Defendants or their counsel. I am, having regard to the various authorities and *Civil Procedure Rule 63.15,* prepared to consider their conduct in initiating these lawsuits as a factor in assessing and quantifying costs.

[34] I have taken into account not only the submissions of counsel for the Defendants, but the comments of Justice Hood in *Horn Abbott Ltd. v. Reeves*, 1999 CarswellNS 452. Justice Hood in dismissing Mr. Reeves' application to stay the proceeding by the Defendants against him, at paras. 21-22 commented:

> 21. Mr. MacDonald for Mr. Reeves submits that this action is brought against Mr. Reeves who is an important witness in the *Wall* action 'to discourage him from giving evidence in the *Wall* matter and/or harass him'. This is pleaded in paragraph 4 of Mr. Reeves' defence as follows:
>
> ... an attempt to intimidate him from giving evidence. ...

> 22. Since I am not to try this action on affidavit evidence, I must look at the pleadings in this action and the history of this proceeding and the two related proceedings to determine if it is clear that this is the case. When I do so, I see that the statement of claim in this action alleges fraud. Based upon the facts pleaded in the statement of claim and the history of this and related proceedings, I cannot conclude that this action is clearly brought for an improper purpose or otherwise than to assert the legitimate rights of the plaintiffs in this action.

[35] In allowing Mr. Reeves' appeal, Justice Roscoe, for the Court of Appeal, reported at 2000 NSCA 88, after a detailed review of the witness immunity rule as it related to the evidence given on discovery by Mr. Reeves, at para. 33 stated:

> ...another feature distinguishing this case from those cited by counsel, is that, here, the action against the witness is brought *before* the completion of the trial of the main action. This is a preemptive strike against an intended witness, not a claim after the fact against a person who allegedly conspired in a scheme to defraud the plaintiffs. ... In this case, the action against Reeves was commenced within a couple of months after his discovery evidence in the Wall action.

[36] Justice Hood and Justice Roscoe were commenting on the conduct of the Defendants in the context of the proceeding brought against Mr. Reeves, and whether in view of the witness immunity rule, the proceeding should be dismissed. After hearing the two witnesses who were obviously influenced by the spectre of being sued, whether justifiable or not, I am satisfied these lawsuits were inappropriate, at least, as to their timing.

[37] Another factor suggested by the Plaintiff as relevant in respect to the issue of costs is the omission by the Defendants, in cross examining one of the Plaintiff's witnesses to refer him to a written admission he allegedly made "that the fraud, and Wall's corresponding action...are a "scam" from which he and others intended to profit at the expense of the Plaintiffs" (Defendants in this proceeding). Notwithstanding Plaintiff's counsels belief that he may have raised the alleged written admission during his examination of the witness, I am satisfied that neither he, nor any of the defendants' counsel did so. In the circumstances, and mindful it is open to all counsel to have referred the witness to this alleged written admission, the failure to examine or cross-examine the witness is not a factor I have taken into account in assessing costs.

Conclusion

[38] In the circumstances, and having regard to the complexity and length of this trial, the history of this proceeding, and not being satisfied there is any basis to depart from Civil Procedure Rule 63.03(1) in that costs should follow the event, I award to the Defendants, inclusive of all interest, disbursements, and all non previously quantified cost awards, the sum of $1,250,000.00. This award of costs

shall, however, be reduced by twenty percent, to reflect the courts disapproval of the Defendants' initiation of legal proceedings against two potential witnesses, claiming significant amounts of money on account of an alleged conspiracy by them with the Plaintiff. That these witnesses were not so intimidated as not to testify is no reason to preclude the court expressing it's disapproval. Similarly, as was observed by counsel for the Plaintiff during the course of the trial, and in his submissions on costs, there may have been other persons who would have been willing to come forward, if not, for the fear of being sued for substantial monies, on the basis they were involved in some form of alleged conspiracy with the Plaintiff. Although speculative, the evidence of two witnesses who did testify, suggests the real possibility this may have occurred.

[39] Judgment accordingly.

J.