IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General), 2008 NSSC 323

Date: 20081121
Docket: SH 184701
Registry: Halifax

Between:

Cherubini Metal Works Limited, a body corporate

Plaintiff

v.

The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia, The United Steel Workers of America and The United Steel Workers of America, Local 4122

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Written Submissions:	May 13, 20, 27, July 31 and August 7, 2008
Decision:	November 21, 2008 (Re Disbursements)
Counsel:	Michelle C. Awad, for the plaintiff, Cherubini Metal Works Limited Bettina Quistgaard, for the defendants, United Steel Workers of America and the United Steel Workers of America, Local 4122

Coughlan, J.:

[1] By decision delivered orally March 18, 2008, I awarded costs to the United Steel Workers of America and the United Steel Workers of America, Local 4122 for their successful application for summary judgment against Cherubini Metal Works Limited. The basis of the Union's application was, as the matters in dispute arose from the collective agreement between Cherubini and the Local Union, the claims were within the exclusive jurisdiction of the grievance and arbitration process established under the agreement. I stated the Unions were to recover the disbursements they incurred in connection with the Supreme Court action which could not be used in the grievance and arbitration process. If the parties could not agree on the amount of such disbursements, I would receive submissions from them. The parties have been unable to agree.

[2] The Unions advised the Arbitrator selected to deal with the Cherubini grievance issued a preliminary award in which he found the United Steel Workers of America was not a party to the collective agreement between Cherubini and the Local Union, and he did not have jurisdiction over the United Steel Workers of America. Consequently, there is no continuing dispute between Cherubini and the United Steel Workers of America. I am

requested to admit the Arbitrator's decision as fresh evidence and reconsider my decision on costs with respect to the United Steel Workers of America.

[3] I gave my decision on costs March 18, 2008, but no order has been taken out. Under the circumstances, I have a discretion to admit fresh evidence (see *Griffin v. Corcoran,* 2001 NSCA 73 at para. 60). In describing the discretion a trial judge has in such a situation, Cromwell, J.A., in giving the Court's judgment in *Griffin v. Corcoran, supra,* stated at para. 72:

> In my view, a similar measure of flexibility applies when the application to reopen is made, as it was here, after trial and decision but before formal judgment. The risk of procedural injustice, including that flowing from a lack of diligence in relation to discovery and presentation of the evidence and the risk of substantial injustice judged mainly by the significance of the evidence to the outcome of the case should both be considered. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice.

[4] The Arbitrator's decision was not available at the time of the hearing on March 18, 2008 - the decision was dated April 19, 2008. The issue for me is whether the Arbitrator's decision is credible and so important that a substantial injustice will occur if the issue of costs is not reopened.

[5] The proposed new evidence is certainly credible, an Arbitrator's decision.

[6] Will an injustice occur if the decision is not admitted as fresh evidence? I find no injustice would occur if the Arbitrator's evidence is not admitted into evidence. The Arbitrator's decision would not impact costs arising out of

the Supreme Court proceeding. In making this finding, I consider all of the circumstances of the proceeding, including:

1. Cherubini's claims against the Unions in the Supreme Court ended with the determination the claims arose out of the collective agreement and were in the exclusive jurisdiction of the grievance and arbitration process provided for in the collective agreement.
2. The proceeding in the Supreme Court ended as a result of a summary judgment application, not a trial.
3. The summary judgment application was determinative of Cherubini's claims against the Unions in the Supreme Court.
4. In making the summary judgment application, the Unions submitted it was not an application for summary judgment on the merits of Cherubini's claims, stating the

application only engaged facts not in dispute, but material for the preliminary issues of law.

5. Although the Supreme Court action ended, the grievance and arbitration process continued.

[7] What occurred in the grievance and arbitration process after the determination of the Supreme Court action does not impact costs arising out of the Supreme Court proceeding. I am not prepared to admit the Arbitrator's decision into evidence.

[8] For the same reasons I am not prepared to admit the Arbitrator's decision into evidence, I am not prepared to reconsider my costs decision of March 18, 2008.

[9] In their submission dated May 13, 2008, the Unions claimed the following disbursements:

Type	**Total Cost (incl. HST)**
Courier	967.62
Photocopies (Adjusted Cost at $0.11 per page)	17,364.01
Online Research	6,740.92
Discovery / Transcription Fee	20,540.05
Digital Copying of Tapes	352.71
Witness Fee	728.64
Filing Fee	428.00
Law Stamp	28.50
TOTAL	**47,150.45**

[10] The parties agree the Unions are entitled to the law stamp of $28.50 and filing fees of $428.00.

[11] By letter dated July 3, 2008, I wrote to counsel requesting additional evidence so I could determine if the disbursements claimed were just and reasonable. In response, Ms. Quistgaard filed an affidavit deposed to July 31, 2008 providing further particulars of the disbursements claimed.

[12] The following are relevant provisions of the Civil Procedure Rules:

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.
>
> . . . .
>
> **Proof of disbursements**
>
> **63.30.** Disbursements, other than fees paid to officers of the court, shall not be allowed unless the liability therefor is established either by the solicitor conducting the matter, or by affidavit.

[13] The onus is on the party seeking costs to show the disbursements claimed are just and reasonable. As Saunders, J.A. stated in giving the Court's judgment in *Claussen Walters & Associates Ltd. v. Murphy*, (2002) N.S.R. (2d) 58 at p. 61:

> A finding of relevance, however, did not end the matter. Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in *J.D. Irving Ltd. v. Desourdy Construction Ltd.* (1973) 5 N.S.R. (2d) 350 at p. 362:
>
> > In my opinion, Civil Procedure Rule 63.37, Clause (5) is to the same effect as the old Order LSVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances.

> This case was cited by the trial judge and so it cannot be said that any wrong principles of law were applied. However, and with respect, I find that he erred in his disposition. There was simply no evidence before him upon which to conclude that the disbursements incurred by Mr. Walters in engaging Mr. Hardy were "just and reasonable". The onus was on the respondent to justify this charge against the appellants. He did not.

[14] The Unions submit none of the disbursements incurred in the Supreme Court action can be used in the grievance and arbitration process. Absent an order of the Court or consent of the parties, the implied undertaking rule prohibits the use by the other parties of both documents and answers obtained on discovery for a purpose other than the litigation in which they were compelled.

[15] In giving the Court's judgment in *Juman v. Doucette*, [2008] S.C.C. 8, Binnie, J. described the implied undertaking rule at para. 27:

> For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). ...

[16] In appropriate circumstances, courts are able to give relief from the implied undertaking rule. In discussing when it is appropriate to give relief from the rule, Binnie, J. stated in *Juman v. Doucette, supra,* at paras. 34 and 35:

> Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings, (see *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba), *Rules of Civil Procedure*, R.R.O. 1990,

Reg. 194, r. 30.1 (Ontario), and *Rules of Civil Procedure*, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

> If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

> The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually nonexistent and leave will generally by granted. ...

[17] There is a limitation on the rule. If a party uses answers or documents obtained on discovery as part of its case in open court, the undertaking is spent (see *Juman v. Doucette*, *supra*, at para. 51). If part of a witness' discovery is used, the implied undertaking ends as regards all of the witness' discovery. In dealing with the right to confidentiality under the Quebec *Civil Code*, Lebel, J., in giving the Court's judgment in *Lac d'Amiante du Québec ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, stated at para. 70:

> Of course, the right to confidentiality will end if the adverse party decides to actually use the evidence or information obtained on discovery, when that party chooses to use all or part of it in his or her own case. ...

[18] The issue here is the use of the discovery obtained in the course of the Supreme Court action in the grievance and arbitration process. Portions of

the discovery of Cal Luedee, Danilo Gasparetto, Renato Gasparetto, Derek Nickerson, Barry Cormier, Kevin McNamara, John G. Siggers and Joseph Simms were attached as exhibits to affidavits used in the applications made in the Supreme Court action. Having been used in evidence in open court, there is no longer any implied undertaking with regard to the discoveries of those individuals.

[19] The issue of the application of the implied undertaking rule with regard to the remaining discoveries remains. In his affidavit dated May 13, 2008, Raymond F. Larkin, Q.C. stated none of the parties to the action consented to the use of documents and discovery evidence in the arbitration. Despite the comments of Binnie, J. at para. 35 of *Juman v. Doucette, supra*, as to situations with the same or similar parties and the same or similar issues, prejudice to the examinee is virtually nonexistent, leave will generally be granted for relief from the rule - this may well be an instance in which relief from the undertaking could be given. There is no evidence of either party making such an application. A portion of a submission from Cherubini's counsel to the Arbitrator in the grievance and arbitration process exhibited to Mr. Larkin's affidavit addressed the issue as to the use which could be made of the discovery evidence in the grievance and arbitration process as follows:

> The Local has indicated that it intends to use the discovery evidence from the lawsuit in this arbitration. Clearly, the *Civil Procedure Rules* do not apply to the arbitration. It will have to be agreed, or determined by you, whether, and to what extent, the evidence obtained during the discovery process in the lawsuit can be used at the arbitration. The Grievor's submissions on that issue are beyond the scope of this brief, but if the parties cannot reach agreement on the point, they will be provided in due course.

[20] The implied undertaking rule applies to the discoveries, other than the discovery of persons parts of which were used in open court.

[21] The Unions will recover the discovery/transcription fees for the discoveries of Michael Bate, Steven England, Robert Power, Ann Gilfoy, Brian Wells, Doug Tupper, Michael DeWare, Jim LeBlanc, Brian Guthro, Allan Ross, Raymond O'Neill, David Walsh, Shelley Gray, Marty Davidson, Aubrey Warren, Gene Frampton, David Morse and Ivano Andriani.

[22] Courier - I have reviewed particulars of the courier charges claimed by the Unions as out in Ms. Quistgaard's affidavit of July 31, 2008. It is reasonable for the Unions to recover the costs of courier charges sending items to the court, other counsel, and obtaining items requested by other counsel. I allow courier charges in the sum of $210.75. There is no evidence before me to show the balance of the courier charges claimed by the Unions should be paid by way of party and party costs.

[23] Online research - The Unions claim the sum of $6,740.92 for online research. Initially the brief was intended to compensate for trial preparation. In determining the amount of costs awarded to a successful party, the importance of the issues to the parties and the complexity of the proceeding are considered. However, I do not have to determine whether the cost of the online research is recoverable as a disbursement as there is no evidence before me on which I can find the disbursement was just and reasonable. There are no particulars of the online research.

[24] Digital copying of tapes - in their submission of May 13, 2008, the Unions stated:

> The charge for digital copying of tapes was incurred in response to a request by Cherubini in the discovery process. The Union had a number of audio recordings of meetings with the employer. In the course of discoveries, Cherubini requested copies of all such tapes. The copies were made by Copy Cat Digital. In total, there were 12 microcassettes copied to 2 cassettes, and 1 cassette copied to 2 cassettes.

[25] No issue with that statement has been taken by Cherubini's counsel. The copies having been made at Cherubini's request, I allow the disbursement in the sum of $352.71.

[26] Photocopies and printing - Tariff D of the Tariff of Costs and Fees which came into force January 1, 1989 provides, in part:

2. Disbursements recoverable from opposite party:

. . . .

(7) Reasonable costs of copies of documents or authorities prepared for the use of the court and supplied to the opposite party.

[27] The Unions claim printing and photocopying totalling $17,364.01. In her affidavit of July 31, 2008, Ms. Quistgaard exhibited invoices from The Printer for printing charges totalling $15,954.79. In the summary of printing charges, the invoice for December 8, 2003 is shown as $917.91, whereas the invoice attached for that charge shows the amount to be $971.91.

[28] Cherubini's counsel submits only $3,327.61 of the printing charges are just and reasonable.

[29] I find printing costs of $15,223.12 are just and reasonable. Extensive materials were filed in support of the various applications. The proceeding was document intensive. The invoices of November 3, 2004 of $336.22 for four copies of documents for witnesses and clients, and January 26, 2005 of $395.44 for copies of transcripts for witnesses and client are not disbursements which should be paid on a party and party basis.

[30] Taking the total claim for printing and photocopies of $17,364.01 and deducting $15,954.79 for printing, leaves a claim of $1,409.24 for photocopies. The Unions are charging photocopies at $0.11 per copy, a reasonable sum. In her July 31, 2008 affidavit, Ms. Quistgaard sets out how in-house printing charges are recorded, as follows:

> 4. In-house printing charges are for both photocopies and printing hardcopies of documents. We have two photocopy machines, which also serve as printers for our computer terminals. The in-house printing charges include the following: photocopies of documents (including original copies of documents sent to the Printer for copying and binding), printing of correspondence and e-mail correspondence, copies of correspondence and some documents for our clients and for counsel for the other parties, and printing of cases in the course of legal research. In order to print documents from our computer terminals or make photocopies, a client and file name must be entered into our system. The system records the client and file name and the number of pages printed or copied with respect to that file.

[31] There is no evidence before me which allows me to determine if the copies claimed are ones which should be allowed as a disbursement. The Unions would have made copies for which they should be compensated. Therefore, I am allowing photocopying charges of $704.61 being fifty percent of the in-house photocopying and printing charges.

[32] Witness fees - In her affidavit of February 18, 2008, Ms. Quistgaard set out witness fees claimed as $728.00. In her affidavit of July 31, 2008, Ms. Quistgaard stated the amount previously claimed was incorrect and that the

revised amount is $5,317.48, which includes mileage for local Union witnesses examined by counsel for the plaintiff, highway tolls and hotel accommodations in Halifax.

[33] Cherubini submits the witness fees were incurred in relation to attendance of witnesses at discovery. The evidence will be used in the arbitration and grievance process and, therefore, should not be recovered. Secondly, all discoveries were held in Halifax by consent. There was no agreement to pay travel expenses for attendances by witnesses who resided outside Halifax County.

[34] Tariff D of the Tariff for Costs and Fees which came into force January 1, 1989 provided:

> 1. Witnesses
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> Attendance money payable to witnesses, excluding parties to the action:
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> (1) Each day of necessary attendance, $35.00.
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> (2) (a) Where a witness resides in the Province but outside the municipality where the trial is held, 20 cents per kilometre between his residence and the place of trial and return.

> (b) Where a witness resides outside the Province, the minimum return air fare plus 20 cents per kilometre to and from airports, his residence and the place of trial.
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> (3) Where the witness resides elsewhere than the place of trial and is required to remain at the place of trial overnight, $30.00 for each overnight stay.
>
> 2. Disbursements recoverable from opposite party:
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> (1) Attendance money paid to witnesses.
>
> . . . .
>
> (6) In the discretion of the taxing officer, reasonable travelling and accommodation expenses incurred by a party in attending discovery or trial.

[35] There is no evidence before me as to what, if any, attendance money was paid to the various persons examined on discovery.

[36] The amounts claimed in relation to Barry Cormier and Brian Guthro do not appear to be reasonable.

[37] It appears from the submissions of Cherubini, the discoveries were held in Halifax by consent of the parties, with no agreement to pay the travel expenses for attendance of witnesses who resided outside Halifax County. In such a case, hotel and travel expenses would not be recoverable.

[38] In any event, there is not sufficient evidence before me to determine whether the amounts set out in exhibit D to Ms. Quistgaard's affidavit of July 31, 2008 are just and reasonable. For example, copies of hotel bills were not exhibited, nor is information given as to the distance from the witnesses' residence to the place of discovery. The Unions have not proven any recoverable disbursements in regard to witness fees paid.

[39] In conclusion, the Unions will recover the following disbursements:

Type	**Total Cost (incl. HST)**
Courier	210.75
Photocopies and Printing	15,927.73
Digital Copying of Tapes	352.71
Filing Fee	428.00
Law Stamp	28.50
TOTAL	**16,947.69**

[40] In addition, the Unions will recover the discovery/transcript fees for the discoveries of: Michael Bate, Steven England, Robert Power, Ann Gilfoy, Brian Wells, Doug Tupper, Michael DeWare, Jim LeBlanc, Brian Guthro,

Allan Ross, Raymond O'Neill, David Walsh, Shelley Gray, Marty Davidson, Aubrey Warren, Gene Frampton, David Morse, Ivano Andriani.

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Coughlan, J.