IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald v. McCormick, 2008 NSSC 6

Date: 20080110
Docket: ST No. 234849
Registry: Truro

Between:

John William MacDonald and Lorraine Marie MacDonald
Plaintiff(s)

v.

Roger Mark McCormick and Angela Louise McCormick
Defendants

DECISION ON COSTS

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: June 8 and 9, 2006, in Truro, Nova Scotia

Final Written Submissions: August 29, 2007

Counsel: Peter Lederman, Q.C. for the plaintiffs
Jerome T. Langille for the defendants

By the Court:

Introduction

[1] This decision on costs arises from the trial of a dispute between the parties respecting an alleged right-of-way between their respective shore lots. The issues at trial were the location of the boundary between the properties and the existence or non-existence of a right-of-way. I concluded that the plaintiffs had established prescriptive title to the disputed land and that a prescriptive right-of-way did exist, albeit that it was five feet wide, not ten feet.

Law

[2] Costs are in the discretion of the Court: *Civil Procedure Rule* 63.02. Unless the Court otherwise orders, costs follow the event: Rule 63.03(1). The general rules applicable to determining party-and-party costs are set out at Rule 63.04:

> 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.
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> (2) In fixing costs, the Court may also consider
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> (a) the amount claimed;
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> (b) the apportionment of liability;
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> (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
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> (d) the manner in which the proceeding was conducted;
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> (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
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> (f) any step in the proceeding which was taken through over-caution, negligence or mistake;

> (g) the neglect or refusal of any party to make an admission which should have been made;
>
> (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
>
> (I) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
>
> (j) any other matter relevant to the question of costs.

[3] I am satisfied that the plaintiffs were substantially successful. While there was an element of mixed success, the plaintiffs successfully retained title to all of the land that they claimed to occupy, partly by establishing possessory title over certain areas to which the defendants had a claim by paper title. As to the width of the right-of-way, while I reduced it to five feet from the ten feet claimed, this was immaterial to the plaintiffs' stated objective of establishing their right to access to the waterfront.

[4] The determination of party-and-party costs in land disputes has been examined in a line of cases by Justice Goodfellow.

[5] In *Collin v. Speight* (1993), 123 N.S.R. (2d) 71 (S.C.), a dispute over the plaintiffs' entitlement to a right-of-way, the plaintiffs established that there had been a mutual mistake of omission, which could be rectified by deed or declaration. Goodfellow J. said:

> [58] The plaintiffs' claim herein was for a declaration with regards to the main right-of-way. The plaintiffs also asked that the compensation be set, and they sought punitive and other damages. On the whole, the plaintiffs have been successful, although there is an element of mixed success, but there is such a substantial degree of success on the part of the plaintiffs that, in my view, costs should follow the event.

[6] After considering the effect of a Rule 41A offer – and exercising the Court's discretion not to give effect to it – Justice Goodfellow concluded:

> [66] As important as the matter is to all parties, it is not a terribly complex proceeding and really resolved on a determination of fact which I had absolutely no difficulty in finding that the intent of Lenn Speight was to establish a subdivision to which all of the lots at the back have the right to use an entitlement to use the main right-of-way. It is not terribly complex, but it has required a great deal of time and effort because these things are tedious and land matters require a great deal of concentration.
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> [67] To some extent I am trying to relate this to what an award would be in other cases of the same duration, time and effort and give some consideration to the fact that there was an offer of settlement which was very dramatic in the direction of the court determination. Somehow this matter ought to have been resolved.
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> [68] In doing the best I can in exercising my discretion as carefully as I can in a judicial manner, I conclude that the amount involved for the purposes of taxation is $45,000, that scale 3 is appropriate, that the plaintiffs are entitled to their costs, taxed and allowed in the amount of $4,500.

[7] In *Wyatt v. Franklin* (1993), 122 N.S.R. (2d) 252 (S.C.) the plaintiff failed in his claim that a verbal agreement entitled him to a conveyance of part of the defendants' property in return for having helped to build their home. In supplementary argument on costs, the defendants' position was that they had successfully defended the plaintiff's claims of adverse possession, express agreement, ownership through prescription and estoppel. After reviewing the requirements of Rule 63, Goodfellow J. said:

> [12] The *Costs and Fees Act* does provide, where there is a substantial nonmonetary issue involved and whether or not the proceeding is contested, an amount determined having regard to (1) the complexity of the proceeding and (2) the importance of the issues.
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> [13] As important as the matter is to all parties, it is not a terribly complex proceeding with respect to the law, and was resolved on a determination of fact. It is also clear that a property dispute matter generally requires a great deal of time and effort.
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> [14] The Franklins were successful in defending the claims of Mr. Wyatt and are entitled to their party and party costs. In a recent boundary, right-of-way dispute, *Collins v. Speight S.Bw.* No. 1831, May 12, 1993, the court dealt with a property matter which took the same amount of time as this trial, namely two and one half days, and where there was no monetary issue involved, the "amount involved" for the purpose of taxation was set at $45,000. This case bears a number of

> similarities to the *Collins* case, and in doing the best I can in exercising my discretion as carefully as I can in a judicial manner, I conclude that the amount involved for the purpose in this case is $45,000, and that scale 3 is appropriate so that the Franklins are entitled to their costs taxed and allowed in the amount of $4,500.

[8] In *Whiting v. MacDonald*, 2000 Carswell NS 409 (S.C.), Goodfellow J. again addressed costs in a land dispute. The plaintiffs had applied for, and received, a declaration of use and occupation of certain disputed lands, having proven adverse possession. The defendants' paper title did not include the disputed area. As to costs, he said:

> 40 Having heard counsel with respect to costs, it is difficult to fix the amount involved when dealing with rights-of-way and relatively small pieces of land. *Collins v. Speight* (1993), 123 N.S.R. (2d) 71 (N.S. S.C.). *Wyatt v. Franklin* (1993), 123 N.S.R. (2d) 347 (N.S. S.C.). Normally I equate the effort required to something akin for a two day trial perhaps $30,000.00 as the amount involved and for a three day trial something in the vicinity of $45,000.00 as the amount involved. In this case it's clear that although we sat on three different days the trial was more in the nature of two days or less and I have a distinct impression that the actual value of the land was somewhat less than $30,000.00. The matter while detailed and time consuming was not complex and as counsel indicated substantially turned on the issue of credibility. In the circumstances doing the best I can I fix the amount involved at $20,000.00 with costs in accordance with Tariff A, Basic Scale 3 $2,625.00 plus disbursements of $353.65. Total costs and disbursements tax allowed in the amount of $2,978.65.

[9] In *Lavin v. Lessard*, 2002 NSSC 16, the plaintiffs successfully sought a declaration that the boundary line between their lot and the defendants' lot was the line claimed by the plaintiffs. They were also awarded damages on account of timber cut on their lot by the defendants. On the matter of costs, Goodfellow J. said:

> 39 The requests on costs is for disbursements of $944.00 and $3,000.00 actual party and party costs. I find both to be extremely reasonable. In determining costs on a property matter, the Court often has to simply relate it to another type of action with respect to the amount involved and the requests for costs of $3,000.00 would put this at something under $15,000.00 at Scale 5 and I think it's probably at least that. In addition to that, other factors the Court would have considered if Mr. Lavin had not taken such a reasonable position would be that there was an opportunity to settle this. There was an offer for settlement. It did not reach the formalities of CPR 41A, but all offers to settle should be open to the Court for

> consideration. *Annand v. Peter M. Cox Enterprises Ltd.* (1992), 111 N.S.R. (2d) 196 (N.S. T.D.) and in many cases of this nature, I have gone as high as $30,000.00 in cases such as *Wyatt v. Franklin* (1993), 123 N.S.R. (2d) 347 (N.S. S.C.). There is also the consideration that the Defendants are self-represented. The fact that parties represent themselves does not itself give rise to costs, *Gilfoy v. Kelloway* (2000), 184 N.S.R. (2d) 226 (N.S. S.C.). It's the consequences of people being self represented. I have no doubt in saying the consequences of being self represented precluded this matter from being settled, precluded any objectivity and certainly added at least a day to what should have been only a two day trial. Overwhelmingly, the request for costs is reasonable and costs are taxed and allowed, including disbursements, in the amount of $3,944.00. The total judgment against Lessard and LaChance will be in the amount of $14,506.20 and an order will go forth.

These decisions suggest that boundary and title disputes akin to the present matter are to be regarded as time-consuming as opposed to legally complex.

[10] The applicable tariff is Tariff A, Scale 2. This is a substantial non-monetary claim; as such, the *Tariff of Costs and Fees* requires the "amount involved" to be determined having regard to (I) the complexity of the proceeding, and (ii) the importance of the issues. As in similar cases, the decision here was highly fact-dependent, requiring time and effort, but not raising significant legal issues. This case did not take up a great deal of court time, and the conduct of the parties was reasonable in all respects. It would have been a difficult claim to settle short of trial, and I am not convinced that the defendant refused or neglected to make any admissions that should have been made. I therefore award costs of $4,000.00.

[11] I allow disbursements as claimed, with the exception of travel costs of $176.00 and disbursements relating to Rayworth and Roberts Surveys Ltd. for attendance at discovery and trial. Counsel for the plaintiff is invited to prepare the order.

J.