

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Doug Boehner Trucking & Excavation Ltd. v.
United Gulf Developments Ltd., 2007 NSSC 140

Date: 20070508
Docket: S. H. 192468
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited

Plaintiff

- and -

United Gulf Developments Limited, and Greater Homes Inc.

Defendants

AND BETWEEN:

United Gulf Developments Limited, and Greater Homes Inc.

Plaintiffs by Counterclaim

- and -

Doug Boehner Trucking & Excavating Limited and W. Eric Whebby Limited

Defendants by Counterclaim

- and -

W. Eric Whebby Limited

Third Party by Counterclaim

- and -

Garden Crest Developments Limited

Fourth Party by Counterclaim

Judge: The Honourable Justice Charles E. Haliburton

Decision on Costs: May 8, 2007

Counsel: Michael J. Wood, Q. C.,
for the Plaintiff (Defendant by Counterclaim),
Doug Boehner Trucking & Excavating Limited
David P. S. Farrar, Q. C.,
for the Defendants (Plaintiffs by Counterclaim),
United Gulf Developments Limited, and Greater
Homes Inc.
George W. MacDonald, Q. C.,
for the Third Party by Counterclaim, W. Eric
Wheby Limited
David G. Coles,
for the Fourth Party by Counterclaim, Garden
Crest Developments Limited

By the Court:

[1] The parties have been unable to reach an agreement with respect to an allowance for costs in this matter which was decided April, 2006.

[2] Representations have been received from Michael J. Wood, Q. C. on behalf of Doug Boehner Trucking and Excavating and from George W. MacDonald, Q. C. on behalf of W. Eric Whebby Limited. While the action involved several parties and their respective responsibilities as a result of the placing of contaminating materials in a sub-division, when it came to trial it was essentially an action against Whebby to recover remediation expense in the amount of \$500,118.28. As a result of trial and judgment Whebby was found to be liable to the extent of \$221,510.

[3] There was a four day trial March 6th to 9th involving three days of evidence. Mr. Wood in his submission on behalf of the plaintiffs has taken the position that I should use the new Tariff, treating the amount involved as \$500,118. He concedes that “the new Tariff is technically not applicable” because the action was commenced at a time when the former Tariff regime was in place.

[4] Mr. MacDonald, on behalf of the Defendant, naturally reminds me that I indicated that the successful parties would have their costs taxed as one bill against Whebby and that the appropriate “amount involved” is the amount of the judgment \$221,510. He submits that Scale 3 of the old Tariff is appropriate resulting in a costs award of \$11,020.

[5] The current Tariff using the amount involved of \$500,118 results in a costs allowance Mr. Wood says is \$57,750. That amount, he proposes, is appropriate “given the nature of the case, the number of parties and the complexity of the issues”.

[6] The *Civil Procedure Rules* say (63.02(1)) “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

(a) the amount claimed;

(b) the apportionment of liability:

(c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;

- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-cautious, 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.

[7] The relevant Tariff adds:

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount allowed,
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues.

[8] The allowance for costs is in the discretion of the trial judge. In enunciating the guidelines enumerated above, it was intended to offer some guidance in the

exercise of that discretion. It will be helpful if I indicate my understanding of those elements.

[9] The amount allowed is, it seems to me, that portion of the claim which is determined to be payable by the defendant, in this case \$221,510. I note specifically that the Tariff uses the term “allowed” and not the amount that is “claimed”. The wording is wise in that any amount may be claimed and could arguably entitle the claimant to some higher level of costs. The amount adjudicated to be payable is the starting point from which the judge may exercise discretion in raising or lowering the recovery in consideration of other elements affecting the case.

[10] Some cases will be complex in terms of the law involved and some cases have a complex fact situation. Either circumstance might require an unusual degree of preparation on the part of counsel involved or of course the case may not be complex at all. In a case involving a lot of dollars one would assume that a degree of complexity would be compensated for on the basis of the standard formula. In assessing the degree of complexity in this matter, I concern myself only with the complexity of the case as presented at trial. If there were

complexities relating to the pleadings or the positions of the various parties before they arrived at trial; and the sorting out of the positions the various participants would take at trial are not relevant. I am not aware of any significantly complex matters relating to the trial of this proceeding.

[11] I take a similar view with respect to the importance of the issues involved. I am not aware of any precedential values at stake in this proceeding. It involved simply the sale of goods, the quality of the goods and the appropriate remedy for that defective quality.

[12] The proceeding was initiated at a time when the standard Tariff would presumably have triggered costs in the amount of \$10,975. The new Tariff came into effect in September of 2004. Clearly many cases within the system have concluded while entitling the successful party to a cost award under the new Tariff before this matter will have finally concluded. I deem it appropriate to “split the difference”. Most of the pre-trial work involved in this case obviously took place while the new costs regime was in place. I deem it appropriate to allow party and party costs of \$15,000.

[13] The Plaintiffs will have Party and Party costs in amount of \$15,000 together with 14% HST, \$2,100.00 for a total of \$17,100.

[14] With respect to disbursement claimed, Mr. MacDonald makes the point that disbursements were incurred in the action taken by Boehner Trucking against United Gulf. A Mechanics Lien action commenced this proceeding originally. Whebby was later joined as the Third Party. Without having evidence as to when or why the disbursements claimed were incurred, it is impossible to judicially assess the extent to which the disbursements may have been necessary to the claim as it developed. It is however apparent that the Registry of Deeds fees of \$220 would have been in relation to the Mechanics Lien action and have no relevance to the proceeding as it related to Whebby. With the view that I have discretion to allow or not allow disbursements, the claim for disbursements will be reduced by \$220 leaving a balance of \$3,349.83.

[15] The total fees and disbursements are allowed at \$20,449.83.

[16] As agreed between the parties interest will accumulate on the judgment at 3.12% from October 16, 2003 to the date of the order.

Haliburton J.