1993 S.H. No. 93-3746

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Founders Square Ltd. v. Nova Scotia (Attorney General), 2000 NSSC 70

Between:

Founders Square Limited

Plaintiff

-and-

The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant

DECISION ON COSTS

Submissions: Written submissions only, last received on June 2, 2000

Decision: June 23, 2000

Counsel: George W. MacDonald, Q.C., G. Grant Machum,
Jane E. O'Neill, and Janet M. R. Clark, articled clerk, for the Plaintiff

Michael T. Pugsley, Jonathan Davies,
and Susan L. MacPherson, paralegal, for the Defendant

MOIR, J.:

The Province of Nova Scotia successfully defended claims of Founders Square Limited in contract and misrepresentation. The trial lasted for twelve days, and involved many documentary exhibits. The province proposes $302,544 for costs, and Founders Square proposes $34,375. Also, some of the province's disbursements are in contest. I have determined to award $ 50,000 party and party costs to the province, to disallow one disbursement, and to order recovery of the other disbursements only as taxed by the Taxing Master.

The province was represented by officers of the Department of Justice. Mr. Pugsley, lead counsel for the province at trial, points out that the Attorney General is entitled to costs as with any litigant: *Bent* v. *Nova Scotia Farm Loan Board* (1978), 30 N.S.R. (2d) 552 (S.C., A.D.), and he submits that the facts that no one is billed by Department of Justice lawyers and the lawyers do not record their time are not reasons to reduce the award of costs. Mr. MacDonald, for Founders Square, does not take issue with these propositions. As far as I am aware, *City of Halifax* v. *Romans* (1881), 14 N.S.R. 271 (S.C. *in banco*) remains authoritative. The fact that counsel is an employee of the client rather than an independent contractor makes no difference for party and party costs.

The province's submission respecting the amount of party and party costs is based upon Tariff A, which is mandated by Rule 63.04(1) "unless the court otherwise orders", and which provides for costs based on amount involved and five scales, which involve increasing percentages. The province suggests $7,067,372 plus $125,000 as the amount involved, and it suggests scale four. The primary claim was for a declaratory judgment.

As an alternative, Founders Square advanced a claim for damages and it provided an expert valuation calculating and capitalizing the income Founders Square would have received under long term leases allegedly contracted or represented. The $7,067,372 would have to be reduced by $184,626, an amount the province admitted and paid during trial, although it was long outstanding. Founders Square suggests a further and very substantial reduction on account of the fact that it would have had to give something in exchange for the income, namely a long term of years in 50,000 square feet of valuable commercial space. However, the expert calculation was of income net of rents to be received under a tender made by Founders Square, and I think that adequately accounts for the alleged value of the term of years. Whether or not I agreed with the additional $125,000, which concerns a claim for aggravated damages, the amount involved would be in the neighbourhood of seven million, which would lead to costs under the Tariff in the range of $210,000 to $280,000.

Provision of a substantial but partial indemnity for reasonable solicitor and client costs is the principle underlying our rules respecting the amount of party and party costs: *Hines* v. *Registrar of Motor Vehicles* (1990), 105 N.S.R. (2d) 240 (Davison, J.); *Landymore and other* v. *Hardy and others* (1992), 112 N.S.R. (2d) 410 (Saunders, J.); *McManus* v. *Nova Scotia* (1995), 147 N.S.R. (2d) 318 (Palmeter, A.C.J.); *Conrad* v. *Snare* (1996), 150 N.S.R. (2d) 214 (C.A.); *Williamson* v. *Williams*, [1998] N.S.J. 498 (C.A.); and, *Keddy* v. *Western Regional Health Board*, [1999] N.S.J. 464 (Oland, J.). Thus, this court has departed from the Tariff and ordered a lump sum under Rule 63.02(1) where quantification under the Tariff would result in an amount too low to be a substantial indemnity. Similarly, I should depart from the Tariff where the quantification would result in an amount too high

to be a partial indemnity. There has always been a problem with the Tariff in that regard. Because it involves the application of percentages to the amount involved without limit, the results tend to become more and more artificial as the amount involved increases above the low millions.

In *Williamson* v. *Williams* the trial judge had assessed costs using the Tariff. He allowed the highest scale, and applied it to the damage award, which produced a result of $8,575. Damages were increased on appeal, and with this increase in the amount involved, the Tariff would produce $10,129 for party and party costs at trial. Freeman, J.A., with Hart and Cromwell, JJ.A. concurring, held that such an award was "so low as to be manifestly unjust" (para. 21). After referring to the principle of a substantial but partial indemnity, Freeman, J.A. wrote at para. 25:

> 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 per cent of a lawyers'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.

Justice Freeman took a number of factors into account in arriving at his conclusion for a lump sum (para. 32). In my opinion, a finding that application of the Tariff would produce an award approaching or exceeding full indemnity is a sufficient reason to depart from the Tariff and award a lump sum.

In setting a lump sum, it would be appropriate to take into account the amount of fees to be billed to the successful party, but such could not be deternative. "An exercise of judicial discretion to assess objectively what was a reasonable amount would still be

necessary." (*Williamson*, para. 26) Mr. Pugsley points out that a purpose of the tariff system is to avoid an award that reflects the particularities of the arrangement between the successful party and counsel, and of counsel's price and efficiency. I agree that this is one of the benefits of following the Tariff, and the Tariff should not be departed from lightly, but departure is required when it is manifest that the Tariff will not serve the underlying principle. Further, it is not appropriate to exercise the discretion merely by ascertaining actual costs and applying a percentage. As was said by Freeman, J.A., the discretion necessitates an objective assessment of a reasonable amount.

Where counsel is an employee of the successful party and is free of the drudgery of time keeping, I would receive an estimate of the time involved and details supporting that estimate. I would consider that estimate in light of prevailing rates for lawyers of similar seniority in private practice because such will provide a basis for approximating the cost of salary, benefits and overhead. However, even with such an approximation, I would rely upon my own general knowledge of costs, the relevant factors set out in *Rule* 63.04(2) and my knowledge of the case to set a reasonable fee. Because it submitted for an award based on the Tariff, the province did not provide me with information from which I could make an estimation of actual cost. On behalf of Founders, Mr. MacDonald submits "Beyond the number of days spent in court, the Province has not presented any calculation of the time and effort expended in presenting its case." Nevertheless, having tried the case I am in a position to very generally assess the preparation involved. I am aware of the extent to which counsel and the defence of the case seemed well prepared, I am aware of the witnesses and can roughly gage the extent of interviewing or discovering that was required, I know the exhibits and can extrapolate both the effort in digesting them and the

effort in sorting relevant from irrelevant, I am aware of the issues and their complexity in the long period they involved. This gives me the confidence to say that the defence of this case involved much labour, and therefore much cost. A case of this kind could not be defended properly for less than one hundred thousand dollars in lawyer's time, probably tens of thousands more than that. In my opinion, any reasonable application of the Tariff in this case would produce an amount approaching or exceeding full indemnity. A lump sum award of $60,000 would serve the principle of substantial but partial indemnity bearing in mind the amount involved and the complexity of the case, and that is the amount for which I would exercise my discretion, but for one consideration.

Part of the plaintiff's claim was for $184,626, a sum the province owed to Founders Square under a term for reimbursement of the costs of leasehold improvements payable in certain events. The province admitted this debt during trial and paid it. While this was a small amount in relation to the plaintiff's primary claim and the issues surrounding it would not have accounted for much of the cost of trial preparation, it seems to me the debt was clearly due, it ought to have been settled long ago, and the province's failure to do so added some unnecessary expense to trial preparation. I have determined to award lump sum costs of $50,000.

The province argued that the amount of costs ought to be heightened because the plaintiff did not prove allegations it made against the integrity of provincial officials. The province says Founders Square alleged the province deliberately destroyed relevant documents, and, as noted in my decision, it also aired a suggestion that the province sought to bankrupt the plaintiff. While these allegations were unproven, there were occasions when the province adopted unbusinesslike stances in its dealings with Founders

Square, and the province's failure to adequately maintain its business documents is a matter of record in this case. I understand how the suspicions arose, and I am not prepared to increase costs where those suspicions became allegations.

The province has provided a list of disbursements it is claiming. These include $17,561 for "advice and assistance" provided to the province by Ernst & Young. A report signed by Mr. John Carter of Ernst & Young was presented by the province as an expert commentary upon the opinion of Mr. G.R. Williams of Grant Thornton, which opinion was supplied as part of Founders' proof of damages. I presume the amount claimed relates to the preparation of this report including the assistance the expert was able to provide to counsel. The Ernst & Young report dealt primarily with the factual assumptions underlaying the Grant Thornton opinion, provided little by way of expert opinion, and much of it was not admitted. While I accept that counsel drew assistance from this work, I do not see why the defendant's other expert, Mr. Charles Hardy of Hardy Appraisals Ltd., and counsel themselves could not have assessed the assumptions of Mr. Williams without further assistance. I am not prepared to allow that disbursement.

The other disbursements in contest are $2,500 estimated photocopy costs and $31,678 to Hardy Appraisals for "Services regarding law suit", "Disbursements", "Services rendered" and "Consulting Services". I agree with the plaintiff's submission that we lack sufficient detail to assess the necessity and reasonableness of the amounts claimed. Consequently, I will order that the plaintiff pay the defendant's disbursements to be taxed excepting the disbursement paid to Ernst & Young.

J.

CASE NO. **VOL. NO.**

Founders Square Limited

Plaintiff

- and -

The Attorney General of Nova Scotia

Defendant

Justice Gerald R. P. Moir Halifax, NS S.H. No. 93-3746

LIBRARY HEADING

Decision: June 23, 2000

Subject: Costs; Attorney General, amount where tariff inapplicable.

Summary: After a successful defence, the Attorney General submitted for costs under Tariff A, which, on any reasonable application of the tariff, would have produced an amount over $200,000. The Tariff should be departed from where the amount would approach or exceed full indemnification. In the case where counsel is an employee, an estimate of the time involved would be helpful for fixing a lump sum.

Conclusion: Lump sum costs were fixed at $50,000.