

SUPREME COURT OF NOVA SCOTIA

Citation: Nassim v. Perth Insurance Company, 2009 NSSC 417

Date: 20091223

Docket: Hfx No. 241552

Registry: Halifax

Between:

Afif Nassim

Plaintiff

v.

Perth Insurance Company

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: December 23, 2009 (Re Costs), in Halifax, Nova Scotia

Decision: December 23, 2009

**Written Release
of Decision:** February 19, 2010

Counsel: Charles D. Lienaux, for the plaintiff
Philip M. Chapman, for the defendant

Coughlan, J.: (Orally)

[1] In this proceeding, Afif Nassim sued Perth Insurance Company for breach of contract of insurance for damages to real and personal property damaged by a flood; loss of the use and enjoyment of the basement of his real property at 924 McLean Street, Halifax, Nova Scotia; for damages arising out of the destruction of personal property removed from the basement; punitive damages between \$290,000.00 and \$400,000.00 for acts of bad faith and malice; and sought solicitor and client costs.

[2] In a decision dated August 27, 2009, I awarded Afif Nassim damages totalling \$31,562.96 for the value of personal property of Afif Nassim damaged in the flood, and repairs to the real property at 924 McLean Street.

[3] In his amended statement of claim, Mr. Nassim claimed:

The plaintiff hereby gives notice that at the trial of this action the plaintiff will request a jury to award damages against the defendant in a range between \$290,000.00 and \$400,000.00 as punitive damages for the aforesaid acts of malice and bad faith.

[4] I found Perth did not act in bad faith and did not allow the claim for punitive damages for bad faith or malice.

[5] I did not accept Mr. Nassim's submission requesting solicitor and client costs, finding the conduct of Perth Insurance did not justify such an award.

[6] I am now dealing with the issue of costs.

[7] Perth made a payment into court on March 12, 2009 in the amount of \$65,385.00. The Notice of Payment into Court provided:

The purpose of this payment is to satisfy the claim of the plaintiff for the claim set out in the Originating Notice and Statement of Claim, bearing court number: Hfx No. 241552 and is exclusive of recoverable prejudgment interest, costs and disbursements.

[8] Mr. Nassim received a copy of the Notice of Payment into Court by letter dated March 12, 2009. The trial took place March 16 to 26, 2009.

[9] Previously by letter dated September 19, 2005 from Perth's solicitor to Mr. Nassim's solicitor, Charles D. Lienaux, Perth offered to settle Mr. Nassim's claim, stating:

In the interest of cutting our losses in what looks like is going to be an expensive claim, we are prepared to make an offer of \$10,000 in full and final settlement of the matter. That amount should be enough to have the repairs done in the basement and the matter can be put to an end.

[10] The offer was rejected.

[11] By letter dated March 27, 2008 from Perth's solicitor to Mr. Lienaux, Perth offered to settle the proceeding for \$35,000.00, which included a \$5,000.00 contribution towards costs. The offer was rejected by e-mail from Mr. Lienaux to Philip M. Chapman, Perth's solicitor, dated June 16, 2008 in which Mr. Lienaux stated:

We're miles apart on a settlement figure so what I will do is file an offer to settle with the court. I presume you will do the same and we'll see where the chips fall.

[12] After correspondence between counsel by e-mail dated January 21, 2009 from Mr. Lienaux to Mr. Chapman, Mr. Lienaux set out his client's claim as \$474,100.00 and stated:

If I receive a reasonable offer in the order of \$275,000.00 I will recommend it to my client.

[13] By e-mail from Mr. Lienaux to Mr. Chapman dated March 3, 2009, Mr. Lienaux stated:

I will take any offer which you propose to my client but I will only recommend acceptance of an offer that provides reasonable compensation for the heads of damage dealt with in my brief. Costs should be paid on the solicitor and client scale and a reasonable allowance for prejudgment interest should be included.

[14] By letter dated March 4, 2009 from Mr. Lienaux to Mr. Chapman, Mr. Nassim offered to settle the action for \$185,000.00. The offer was rejected by e-mail from Mr. Chapman to Mr. Lienaux on March 5, 2009.

[15] By letter dated March 6, 2009 from Mr. Chapman to Mr. Lienaux, Perth offered to pay \$64,016.00 to Mr. Nassim in settlement of the claim. The offer was rejected by e-mail from Mr. Lienaux to Mr. Chapman on March 8, 2009.

[16] By e-mail dated March 10, 2009 from Mr. Chapman to Mr. Lienaux, Perth increased its offer to settle the claim to \$80,000.00. The offer was rejected in an e-mail from Mr. Lienaux to Mr. Chapman the same day.

[17] The Notice of Payment into Court mentioned above was made on March 12, 2009.

[18] Mr. Nassim, in his pre-hearing brief filed by Mr. Lienaux, asks that I reconsider my interpretation of the insurance contract and the issue of awarding him costs on a solicitor and client basis as set out in my August 27, 2009 decision.

[19] Mr. Nassim incurred legal fees and H.S.T. totalling \$71,794.45 to April 2, 2009. To the same date, Mr. Nassim incurred disbursements and H.S.T. totalling \$5,568.59.

[20] Perth Insurance incurred legal fees not including H.S.T. of \$58,532.50. The total expense incurred by Perth Insurance including fees, disbursements and taxes is \$72,983.48.

[21] The Civil Procedure Rules which came into force January 1, 2009 apply in dealing with the issue of costs. The trial occurred in 2009 and the payment into court was made in 2009.

[22] The following Rules are relevant to the issues before me:

Liability for Costs

77.03 (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

Lump sum amount instead of tariff

77.08 A judge may award lump sum costs instead of tariff costs.

Disbursements included in award

77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

(2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

Set-off against party and party costs

77.11 A judge who awards party and party costs may order a set-off against another award of costs or any other amount.

Settlement offers and costs

10.03 A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

[23] The Tariff of Costs and Fees also applies:

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;
- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

- (i) the amount of damages provisionally assessed by the court, if any,
- (ii) the amount claimed, if any,
- (iii) the complexity of the proceeding, and
- (iv) the importance of the issues;

[24] I must determine the “amount involved”.

[25] In this proceeding, the claims addressed were monetary. Mr. Nassim was seeking damages for damage to real and personal property he owned, damage to personal property others owned, and a claim against Perth for malice or bad faith in dealing with the claim. All were to be compensated monetarily. I found the damages suffered by Mr. Nassim total \$31,562.96. I provisionally valued the property of others, which claims I did not allow, at \$5,300.00. The malice and bad faith claim was said by Mr. Nassim in his amended statement of claim to be in a range between \$290,000.00 and \$400,000.00. Taking the \$31,562.96 I awarded and \$290,000.00 as the value of the bad faith claim, the amount involved would be \$321,562.96.

[26] Considering the amount awarded to Mr. Nassim and the amount claimed by him, I fix the “amount involved” as between \$200,001.00 and \$300,000.00, and the length of trial as eight days. This was not a complex proceeding and the Basic Scale 2 is the appropriate scale. These calculations result in costs in the amount of \$38,750.00.

[27] It is important to note that prior to commencing the trial on March 16, 2009, Perth Insurance agreed to pay the sum of \$22,123.82 for repairs to Mr. Nassim’s house. The eight day trial resulted in an additional \$9,439.14 being awarded to Mr. Nassim.

[28] This proceeding would have been settled but for Mr. Nassim’s exaggerated claims. Just twelve days before the trial began Mr. Nassim was offering to settle the action for \$185,000.00. The amount awarded was \$31,562.96, plus prejudgment interest and costs. On March 10, 2009, Perth offered to pay \$80,000.00. The trial was totally unnecessary.

[29] Perth successfully defended Mr. Nassim's bad faith and malice claim. Mr. Nassim was not prepared to settle the proceeding without receiving damages for the bad faith and malice claim. There is no question the malice and bad faith claim increased the time and cost of this action.

[30] Under all the circumstances of this case, Mr. Nassim will have costs in the amount of \$6,250.00, which represents costs at the Basic Scale for an amount involved of between \$25,000.00 and \$40,000.00 - he was awarded \$31,562.96, plus prejudgment interest and costs. Perth Insurance will have its costs in the amount of \$32,500.00, which is the \$38,750.00 costs mentioned above, less the \$6,250.00 awarded to Mr. Nassim. Perth shall also have the \$500.00 costs awarded by Murphy, J. in the order dated October 30, 2007.

[31] With regard to disbursements, Perth Insurance incurred trial disbursements of \$2,678.22 plus H.S.T. of \$348.17, for a total of \$3,026.39. Perth incurred pre-trial disbursements of \$3,131.47 plus H.S.T. of \$407.09, for a total of \$3,538.56.

[32] Mr. Nassim incurred disbursements to April 2, 2009 of \$4,968.69 plus H.S.T. on the disbursements of \$599.90, for a total of \$5,568.59. In his certificate of December 21, 2009, Mr. Lienaux certifies the disbursements were to April 2, 2009 and not to March 12, 2009, the date of the payment into court. Perth Insurance does not take issue with the use of the amount as set out in Mr. Lienaux's certificate.

[33] It was necessary for Mr. Nassim to bring the action as Perth Insurance did not immediately offer to pay an amount which reflected the amount eventually awarded. However, by the time of trial, offers had been made by Perth Insurance which should have been accepted.

[34] Mr. Nassim will have his disbursements of \$5,568.59, including H.S.T.

[35] Perth Insurance will have its disbursements from the date of the trial, together with H.S.T. on the disbursements, which total \$3,026.39.

[36] In conclusion, Mr. Nassim will have his costs in the amount of \$6,250.00, together with disbursements of \$5,568.59, including H.S.T. on the disbursements, for a total of \$11,818.59.

[37] Perth Insurance will have its costs in the amount of \$32,500.00, costs pursuant to the order of Murphy, J. in the amount of \$500.00, together with disbursements from March 12, 2009 in the amount of \$3,026.39, for a total of \$36,026.39.

[38] The amount due to Perth Insurance from Mr. Nassim shall be deducted from the monies Perth Insurance is to pay Mr. Nassim.

Coughlan, J.