SUPREME COURT OF NOVA SCOTIA
Citation: Amaratunga v. Northwest Atlantic Fisheries Organization , 2011 NSSC 3

Date: 20110110
Docket: Hfx. No. 267432
Registry: Halifax

Between:

Tissa Amaratunga

Plaintiff

-and-

Northwest Atlantic Fisheries Organization, a body corporate

Defendant

Costs Decision

Judge: The Honourable Justice Robert W. Wright

Date of Last Written Submissions: November 30, 2010

Written Decision: January 10, 2011

Counsel: Counsel for the Plaintiff - David Copp
Counsel for the Defendant - John Shanks

Wright, J.

[1] In a decision reported as *Amaratunga v. Northwest Atlantic Fisheries Organization* 2010 NSSC 346, the court ruled on an interlocutory motion that the defendant ("NAFO") is not entitled to rely on the defence of international organization immunity as a basis for defeating the plaintiff's claim for damages for wrongful dismissal. With that successful outcome, the plaintiff was awarded costs of the motion in any event of the cause.

[2] Since that decision was released on September 30, 2010 counsel have been able to agree on the quantum of costs which the defendant is obliged to pay. However, counsel have not been able to agree on whether these costs are to be paid forthwith, or rather at the end of the litigation. The court directed that written briefs on this narrow issue be filed and with those now having been examined, this supplementary decision now follows on the timing of the costs payment to be made.

[3] As further background, it should be noted that the costs to be dealt with in this decision are comprised of the following three components:

(1) Costs on the above referenced motion disallowing the defence of international organization immunity, the quantum of which has been agreed to by counsel in the total amount of $25,109.11 (consisting of costs of $15,000 and disbursements of $10,109.11);

(2) Costs on the prior contested motion before Justice Robertson for severance of the immunity issue to be determined as a preliminary question of law (where costs of $500 plus taxable disbursements were assessed as costs in the cause); and

(3) Costs on the prior motion before Associate Chief Justice Smith ordering additional document and electronic information disclosure by the defendant with respect to the claimed defence of immunity (where costs were likewise fixed at $500 plus taxable disbursements as costs in the cause).

[4] The aggregate of the costs and taxable disbursements now agreed upon by the parties is the sum of $26, 620.46. That does not include a further order of costs made by me on April 6, 2010 upon the dismissal of a prior motion by the defendant for an order striking out certain portions of the affidavit of the plaintiff's expert witness. Costs of that motion, which was viewed as a tactical move of little merit, were fixed at $1,500 plus taxable disbursements and were made payable by the defendant to the plaintiff forthwith. Presumably, those latter costs have already now been paid.

[5] A review of the legal principles to be applied to this costs scenario begins with **Civil Procedure Rule** 77.05 (1). It reads as follows:

> The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

[6] Tariff C, thereby invoked, reads as follows:

> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
>
> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

[7] The default position of costs in the cause on interlocutory motions set out in subparagraph (2) of Tariff C essentially tracks the same language as its predecessor Rule 63.05(1) under the **Civil Procedure Rules (1972)**. That Rule was interpreted by the Nova Scotia Court of Appeal in *Salvage Association v. North American Trust Company*, 1998 NSCA 210 as simply requiring a judge on an interlocutory application [motion] to specifically address the entitlement to costs, failing which this default provision will apply. The Court of Appeal expressly refuted the existence of a general proposition that costs on all interlocutory matters are to be costs in the cause.

[8] As repeatedly recognized in the case law, the **Civil Procedure Rules** vest in the court a wide discretion with respect to costs, including those related to interlocutory proceedings. The approach which a Chambers judge is required to take in the exercise of that discretion under the Tariff C guidelines is to first assess the amount of costs at the time an order is made (on the premise that the Chambers judge is in a better position to fix those costs as opposed to the trial judge at a later

date). It is then open to the Chambers judge to determine whether the assessed costs are payable:

(a) to the successful party on the final outcome of the case (i.e., costs in the cause);

(b) to the successful party on the motion in any event of the cause;

(c) to the successful party on the motion only if that party is ultimately successful at trial; or

(d) to the party successful on the motion forthwith.

[9] If the Chambers judge decides that costs are to be payable at the end of the proceeding, having been fixed and preserved, they will be either added to or subtracted from the Tariff A costs by the trial judge.

[10] In the present case, I chose to award costs of the motion to the plaintiff in any event of the cause. I did so essentially for two reasons. First, the decision on the motion represented the final determination of a crucial and discrete issue, namely, the availability to NAFO of the defence of international organization immunity and hence the jurisdiction of the court to hear the case. Secondly, this very complex motion entailed a tremendous amount of time, energy and resources of the parties, including extensive expert opinion evidence. The plaintiff was found to be deserving of an award of costs in any event of the cause, as the successful party on such a critical issue (indeed, international organization immunity is the sole defence plead by NAFO to date).

[11] What I did not specify in the decision above referred to, however, is whether

the costs thus awarded to the plaintiff are payable at the end of the proceeding or payable forthwith. It is only that issue that now remains to be decided.

[12] Our **Civil Procedure Rules** are silent on the timing of the payment of costs awarded to the successful party on the motion in any event of the cause. One must therefore look at the costs jurisprudence for guidance, the following cases having been referred to me.

[13] In *Salvage Association*, Justice Bateman reviewed some of the history of costs on interlocutory matters, dating back to *Ford v. Canadian National Railway*, 1937 CanRepSask (C.A.). In that case, the Court noted that at common law, the successful party on a motion was usually entitled to costs, although not payable forthwith.

[14] The practical reasons underlying this general rule against immediate payment of costs, as identified in *Ford*, were that the objective of the courts was to have one taxation of costs in an action; and also to avoid making a costs order which might prevent someone with a just claim from pursuing it because of inability to pay the costs of some interlocutory proceeding. Neither of those practical reasons arose in the *Salvage Association* case, however, and the Nova Scotia Court of Appeal upheld an award of costs on an interlocutory application made payable forthwith, after inferring that the Chambers judge was expressing his disapproval of the appellant's meritless resistance to a discovery examination.

[15] Justice Bateman also made reference to other jurisprudence which illustrate

the principle that costs may be used by the court in order to control its processes (for example, by directing that costs be payable forthwith in any event of the cause in order to discourage unnecessary interlocutory proceedings).

[16] The question of whether costs on an interlocutory motion should be made payable to the successful party forthwith also arose in two recent cases before Justice Warner, namely, *National Bank Financial Ltd. v. Potter*, 2008 NSSC 213 and *Merks Poultry Farms Ltd. v. Wittenberg*, 2010 NSSC 395. I refer to the following passage drawn from both those decisions:

> While at one time it may have been usual to defer costs of interlocutory applications to the end of the case, the length and complexity of modern litigation has led to a reversal of that trend except in those circumstances where the primary issue in the interim application is the same as that intended in the ultimate hearing, or where to award costs at an interim stage may prevent the matter from being determined on its merits at a later date. Generally the parties are better able to argue and the Court is better able to make the appropriate costs determination at the time of the application. Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered.

[17] In both those decisions, Justice Warner found it appropriate to make costs payable in any event of the cause forthwith. He did so in *National Bank Financial* after finding that the motion was a tactical move made without any apparent *bona fide* basis connected to the issues to be decided. In *Merks*, he did so without any expression of disapproval of the conduct of the unsuccessful party, noting that the historic rationale reviewed in *Salvage Association* for deferring both the assessment and the timing of payment of costs until the end of the litigation were not factually relevant in the case before him.

[18] The other decision of this court to which I have been referred is *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2006 NSSC 294. In that case, the Chambers judge fixed the costs of the motion but found that it was not an appropriate case for costs to be payable forthwith. That case is clearly distinguishable from the case at bar, however, because some of the grounds relied on in support of a summary judgment motion were held to remain as live issues for determination at trial.

[19] The main thrust of the submissions of counsel for the defendant on this issue is that where the default position under Tariff C is costs in the cause, an order for costs payable forthwith reflects a punitive element that cannot be supported without cause. It is argued that typically when a court departs from this default position by ordering costs to be paid forthwith, the decision is intended to be punitive and is justifiable because of the court's disapproval of the actions of the unsuccessful party.

[20] The application of this argument to the present case is that neither the initial decision to bring the motion for the determination of the validity of the immunity defence as a preliminary point of law, nor the time necessary to properly canvass this issue may be viewed as unreasonable or requiring the court to express its disapproval regarding NAFO's conduct. Absent those factors, it is submitted that an award of costs payable forthwith is not supported by case law in this province.

[21] It will be readily apparent from my written decision on this motion that there was nothing inappropriate or unreasonable whatsoever on the part of NAFO in its pursuit of the determination of the validity of the immunity defence as a preliminary point of law. Indeed, as I have observed earlier, counsel for NAFO ably presented their case for the immunity defence, albeit unsuccessfully. In my view, however, that is not a complete answer to the costs issue before me.

[22] The court recognizes that the most common basis in the case law for an award of costs to be payable forthwith is the situation where the court thereby reflects its disapproval of some conduct on the part of the unsuccessful party. However, in light of the wide discretion that the court has when it comes to costs, it is my view that that is not the sole situation in which an award of costs payable forthwith can be justified. The *Salvage Association* case, in my view, does not stand for such a broad proposition.

[23] Counsel for the plaintiff has pointed to a number of factors in his written submissions that are said to favour an award of interlocutory costs payable forthwith. These can be summarized as follows:

(a) At the instance of the defendant, it was determined on a prior contested motion that the validity of the immunity defence should be adjudicated by the court as a preliminary issue of law. That discrete issue has now been determined with finality and cannot now be raised further in the trial of this action. Under those circumstances, there is no prospect of there being any benefit in hindsight after trial that might otherwise have affected the disposition of the costs of the motion;

(b) This motion was of considerable complexity and was a major undertaking for both parties. It required a tremendous expenditure of time, energy and resources for both parties including the preparation and dissection of extensive expert reports (and rebuttal reports) along with comprehensive briefs on international law principles and the law of international organization immunity. This motion substantially increased the cost of this litigation and protracted it from the motion filing date in March, 2009 until the decision of the court released September 30, 2010;

(c)The quantum of the costs payable on this motion have been fully agreed to by the parties such that no taxation of costs will be necessary. No concern arises over a multiplicity of taxation proceedings;

(d) This is not a fact situation whereby an unsuccessful plaintiff might be disadvantaged from pursuing a meritorious action by inability to pay an interim costs award (as noted in *Salvage Association*). Conversely, no suggestion has been made on behalf of NAFO that having to pay the agreed upon costs forthwith would be burdensome to that organization;

(e) With the dismissal of the immunity defence, this action (commenced over four years ago) now reverts to an early pre-trial stage where the defendant must now proceed to amend its pleadings to contest the wrongful dismissal action on its merits. The court is informed that there has not yet taken place any discovery of documents or witnesses with respect to the claim for damages for wrongful dismissal. It will therefore likely be another two years or more before this case

gets to trial for a final determination, thereby delaying the payment of costs on this motion for a considerable further period of time. It is argued that that is an unfair burden to place on the plaintiff for the duration of the litigation.

[24] Counsel for the plaintiff further argues that two additional factors may also be properly considered as to whether it is just and appropriate for the award of costs to be made payable forthwith, which I will now address. The first is the absence of any pleaded defences to the merits of the wrongful dismissal claim (only the immunity defence having been plead thus far and ruled against). Counsel for the defendant counters that NAFO filed its defence specific to the issue of jurisdiction so as to assure that it would not attorn to the jurisdiction of the court prematurely and that the determination of this issue as a preliminary matter was therefore reasonable. I agree that this factor should not hold sway.

[25] The other additional factor urged by the plaintiff for consideration is the defendant's refusal to respond to two settlement offers earlier made, one to resolve this motion and the other to resolve the entire action. More specifically, prior to the hearing of this motion the plaintiff communicated a written offer to settle the motion by an order for dismissal of the immunity defence without costs to either party, coupled with a broad accommodation of amendment of defence pleadings. Subsequent to the hearing of the motion, the plaintiff communicated a further written offer to settle the entire action by proposing payment of a lump sum amount by the defendant.

[26] In my view, neither of these settlement offers should have any bearing on the disposition of this costs award. As pointed out by counsel for NAFO, the latter settlement offer was made after the completion of the hearing of the motion. With respect to the prior offer, it was perfectly reasonable for the defendant to have refused it after having been successful in its earlier motion to have the validity of the immunity defence determined as a preliminary point of law.

[27] Nonetheless, I am persuaded by the cumulative effect of the other factors above recited that this is a proper case for an order that the amount of costs agreed upon be made payable to the plaintiff forthwith. I conclude that such an award of costs is just and appropriate in the exercise of the court's discretion in the unusual circumstances of this case. I further award to the plaintiff an additional $500 in costs on the determination of this issue, which also is payable forthwith in keeping with this decision.

J.