SUPREME COURT OF NOVA SCOTIA
Citation: MacCormick v. Dewar, 2011 NSSC 10

Date: 20110111
Docket: Tru No. 334080
Registry: Truro

Between:

Constance MacCormick and Graham MacCormick

Plaintiffs

v.

Alexander William Dewar and Natalia Valentinovna Dewar

Defendants

Decision on Costs, Etc.

Judge:	The Honourable Justice Cindy A. Bourgeois
Last Written Submissions:	October 21, 25, November 3, 5, and 10, 2010
Counsel:	Dennis James, for the Plaintiffs Thomas MacEwan, for the Defendants

By the Court:

[1] This matter extended over four days of trial in April, 2010. In a written decision released June 2, 2010, the Plaintiffs were successful in establishing the boundary line between their cottage property and that of the Defendants in accordance with the expert survey evidence presented on their behalf at trial. Their claim for damages relating to trespass was also successful, however, the award of $400.00 was less than what was sought at trial. It is clear however, that the decision substantially favoured the Plaintiffs.

[2] In the event the parties were unable to agree regarding costs, Counsel were invited to make written submissions to the Court. Although agreement has been reached regarding all disbursements except the costs relating to the survey evidence, the Court has been asked to render a decision respecting those expenses, as well as party and party costs.

POSITION OF THE PARTIES

a) The Plaintiffs' View

[3] In terms of costs, the Plaintiffs are seeking a costs award of $25,000.00. The Court was advised that the Plaintiffs incurred "fees, disbursements and taxes of approximately $36,057.85" in relation to the litigation. It is asserted that any lesser amount would not constitute a "substantial contribution" to costs, which is recognized as a fundamental goal of party and party cost awards.

[4] The Plaintiffs assert that the above amount is appropriate, and turns to a consideration of Tariff A. Arguing that the "amount involved" for the purpose of Tariff A should be calculated at $20,000 per day of trial, this would create basic costs of $12,188.00 under Scale 3, plus $2000.00 for each day of trial, for a total of $20,188.00. Relying on Rule 77.07, the Plaintiffs assert that the Tariff amount should be increased, both to reflect a closer contribution to the actual costs, but also in consideration of the conduct of the Defendant in the presentation of the case.

[5] Specifically, the Plaintiffs are critical of the Defendants' extensive and time consuming attack on their expert witness, especially in light of their failure to call any contradictory expert evidence. In addition, the Plaintiffs point to the Defendants' late determination to no longer seek to rely on the opinion of an

opposing surveyor, as a factor which the Court should consider in setting an amount beyond tariff costs.

[6] In the alternative, the Plaintiffs seek the Tariff costs as calculated above, should the Court decline to exercise its discretion to award an additional lump sum.

[7] As noted above, the parties have reached agreement on the Plaintiffs' out of pocket disbursements, other than those associated with surveyor MacDonald. There are two invoices relating to Mr. MacDonald's expenses for which the Plaintiff is seeking full recovery. The first invoice (23877), dated June 15, 2005, is in relation to the survey work, plan preparation and preparation of written survey report. It is in the amount of $9263.15. The plan and written survey report were referenced extensively at the trial. The second invoice (27419), dated May 7, 2010, relates to Mr. MacDonald's preparation for trial, provision of file material at the request of the Defendants, and attendance at the hearing for two days. It is in the amount of $8548.76.

b) The Defendants' View

[8] The Defendants assert that the Plaintiffs' claim in relation to costs is unreasonably high. Although they recognize that the Plaintiffs are entitled to party and party costs, the Defendants assert that the ultimate award in that regard should be in the range of $10,409.00 "representing 35% of the legal fees incurred by the Plaintiffs". In reaching that position, the Defendants assert that it did not conduct itself in a manner which should give rise to the Court awarding additional costs beyond that contemplated by the Tariff, and in fact, the Plaintiffs' conduct may justify a downwards adjustment.

[9] The Defendants also vigorously challenge the appropriateness of the Plaintiffs collecting in full, the two invoices relating to Mr. MacDonald's work. With respect to the initial survey work, the Defendants argue that this invoice should be significantly discounted to reflect that the Plaintiffs will receive a permanent benefit from the survey, well beyond the litigation. In terms of the invoice relating to the trial preparation, the Defendants assert that the onus is on the Plaintiffs to prove the reasonableness of the expense, and point to many concerning charges on the invoice. Additionally, the Defendants assert that the cost of the expert's attendance at trial should be limited to $600.00 per diem.

DETERMINATION

a) Party and Party Costs

[10] Both parties acknowledge that the awarding of costs is entirely within the discretion of the Court. As noted earlier herein, the Plaintiffs were the successful litigants, and as such are entitled to an award of costs.

[11] In the circumstances, I see no reason to vary away from costs as contemplated in Tariff A. I agree with the Plaintiff, that in determining the "amount involved" where this matter was not a monetary claim, the Court should apply a formula which assigns a value reflective of the length of trial. Given this matter extended over four days, I find that the "amount involved" should be $80,000.00, and note that a similar approach has been recently applied by the Court (see ***Urquhardt v. LeBlanc*** 2009 NSSC 324 and ***Jachimowicz v. Jachimowicz*** 2007 NSSC 303).

[12] I do not agree with the Plaintiffs however, that Scale 3 of Tariff A should be applied in the present instance. Although the survey work required of Mr.

MacDonald to reach his conclusion was complicated by the state of the properties and their descriptions, I do not find that such complicated the trial to such an extent that the basic scale should not be applied. Accordingly the Tariff costs would amount to $7250.00 plus an additional $8000.00 reflecting of the four trial days, totalling $15,250.00.

[13] I have also given serious consideration to the Plaintiffs' position that the costs should be increased beyond tariff costs. Again, I do not see the circumstances before the Court justifying an additional award of costs. Although the Plaintiffs are quite correct that a "substantial contribution" to actual fees incurred is a valid consideration in determining costs, here, the Court was provided with no indication of the actual fees incurred, other than a reference in the Plaintiffs' written submissions referencing the "approximate" legal expenses incurred by them. Although not a taxation of a legal account, parties putting forward an argument that party and party costs should be increased to reflect a "substantial contribution" to legal fees, should be prepared to have some evidence before the Court to permit it to knowledgeably and objectively assess that argument. In support of its position for increased costs to account for the actual expense incurred in litigation, the Plaintiffs rely upon the recent decision of

Warner J. in ***Burns v. Sobeys Group Inc***., 2008 NSSC 102, where the Court awarded a lump sum amount beyond the tariff. However, it is clear that in reaching that determination, the Court was provided with detailed information relating to the legal fees incurred, including counsel's accounting records setting out the time incurred and corresponding fees billed. I am not prepared to consider a similar argument in the absence of similar information regarding the actual fees incurred.

[14] The Plaintiffs have also pointed to the Defendants' conduct in terms of its pre-trial positions and trial conduct to justify an increase in costs. Clearly, Rule 77.07 permits a party to make such a request and for the Court to give it consideration. It is clear, and it was noted in the Court's decision following trial, that the Defendants extensively challenged the expert evidence adduced by the Plaintiff. As it turned out, the attempts to erode the propositions upon which Mr. MacDonald based his opinion were entirely unsuccessful. The Defendants chose not to call expert evidence to challenge Mr. MacDonald, relying instead primarily on his cross-examination. This determination, namely that the Defendants would not be relying upon the earlier boundary referenced by Mr. Keen, came on the eve of trial. I do not believe however, that any of those factors are such that an

increase in costs is warranted. Parties are entitled to vigorously challenge the opinion of experts, and in many instances, the challenge turns out to be warranted. Further, the Defendant was entitled to choose not to call expert evidence - there is no requirement that they do so. The late in the day determination to no longer rely on Mr. Keen's boundary is somewhat more concerning, however, that factor can be adequately addressed in my view when considering the costs incurred in relation to Mr. MacDonald.

b) Expenses Associated with Surveyor MacDonald

[15] As noted above, there are two invoices relating to the work of Mr. MacDonald. I will deal with each in turn. I have reviewed Invoice 23877 relating to the survey work conducted in 2005, as well as the plan and report preparation. The Court has already referenced in the decision following trial and herein, the complexity of the surveying task faced by Mr. MacDonald in sorting out a complicated situation. I have no hesitancy in finding that the amount of this invoice is reasonable given the circumstances.

[16] I am also mindful however, that the work conducted by Mr. MacDonald in surveying the Plaintiffs' property does have lasting value to them beyond the present litigation. The Court was made aware of problems relating to the boundary line between the Plaintiffs' property and that of another neighbour. The survey addresses not only the issue with the Defendants, but provides clarification with respect to other boundaries as well. Undoubtedly, a thorough and well prepared survey as resulted from Mr. MacDonald's efforts will benefit the Plaintiffs in future for other reasons. I therefore view it as being reasonable to reduce the amount claimed in this invoice for that reason. I find that the Plaintiffs are entitled to $5000.00 in this regard.

[17] Invoice 27419 relates to Mr. MacDonald's direct involvement in the litigation, including preparation of file materials in response to disclosure requests, meeting with Plaintiffs' counsel for trial preparation, his own independent file review and attendance at trial. The Defendants are entirely correct when they assert that the onus is on the Plaintiffs to establish the reasonableness of the expert invoice being claimed. I have carefully reviewed the invoice in that regard.

[18] The Court is also mindful of the regulations passed under the **Cost and Fees Act**, R.S.N.S. 18989, c. 104, and those relating to recoverable expense relating to the attendance of experts at trial. Although an important consideration, it is clear that the Court has the discretion to vary from the suggested amount of $600 per diem for trial attendance, where appropriate (See ***Glen Arbour Condominiums Inc. v. Learning 2006 NSSC 5 and Maritime Travel Inc. v. Go Travel Direct.Com Inc.2008*** NSSC 306 with addendum 2008 NSSC 328).

[19] I find Invoice 27419 as being entirely reasonable in terms of Mr. MacDonald's preparation and attendance at trial. The Defendants criticize the quantum, however, the Court views two factors in particular as contributing to the expense, which fall squarely at their feet. As referenced above, the Defendants on the eve of trial indicated that they would not be seeking to establish that the boundary was as depicted by Mr. Keen. Although that may have been a helpful concession to have made for the purposes of evidence at trial, it came late in the day, well after Mr. MacDonald would have prepared to address how that boundary opinion impacted on his own, both independently and potentially with Plaintiffs' counsel.

[20] Secondly, it was clear from the Defendants' pre-trial written submissions, as well as the cross-examination of Mr. MacDonald, that they questioned not only the methodological validity and factual foundations of his opinion, but were calling into question his professionalism and ethics - it being suggested that his opinion was crafted to meet the expectation of his clients, not reflecting proper survey practice. Following Mr. MacDonald's cross-examination, Counsel for the Defendants stated for the record, that this argument was no longer being advanced. It is open to a party to question the objectivity of an expert. The Defendants are not the first, nor will they be the last to advance that type of argument. However, allegations of unprofessionalism will likely result in the expert and Counsel spending additional time in trial preparation to address those types of allegations. From the evidence adduced from Mr. MacDonald in his direct testimony, it is clear that such was in fact done.

CONCLUSION

[21] Based on the above, the Plaintiffs are entitled to recovery as follows:

a) Party and party costs in the amount of $15,250.00;

b) Recovery in relation to Invoice 23877 in the amount of $5000.00;

c) Recovery in relation to Invoice 27419 in the amount of $8548.76; and

d) Additional disbursements agreed to between the parties in the amount of $2897.26.

[22] Given that there has been divided success in relation to the arguments advanced by both parties on the issue of costs and expenses incurred, each party shall bear their own costs in relation to this assessment.

J.