SUPREME COURT OF NOVA SCOTIA
Citation: Salman v. Al-Sheikh Ali, 2011 NSSC 30

Date: 20110127
Docket: Hfx. No. 256952
Registry: Halifax

Between:

Najah Salman and Abdel Salman

Plaintiffs

v.

Mariam Al-Sheikh Ali, Fawzi Al-Sheikh Ali, Fathia Shahin and Omar Shahin

Defendants

COSTS DECISION

Judge:	The Honourable Justice Suzanne M. Hood
Final Written Submissions:	October 15, on costs, November 17, 2010 on disbursements
Written Decision:	January 27, 2011
Counsel:	**Najah and Abdel Salman**, self-represented (on issue of costs) **David G. Coles, Q.C.**, for the defendants, Fathia and Omar Shahin **Hanaa Al-Sharief** for Mariam and Fawzi Al-Sheikh Ali, (on costs issue only)

By the Court:

[1] By action commenced in October 2005, Najah Salman and Abdel Salman (the "Salmans") commenced action against Mariam Al-Sheikh Ali, Fawzi Al-Sheikh Ali (the "Al-Sheikh Alis"), Fathia Shahin and Omar Shahin (the "Shahins").

[2] The Al-Sheikh Alis filed a defence in November 2005. Also in November 2005, the Shahins filed a Demand for Particulars. A Reply and Amended Reply to Demand for Particulars were filed in March 2006. In May 2006, the Shahins filed a Defence and an Amended Defence. The trial was set for eight days, August 16 to 19 and August 23 to 26. The Salmans concluded their case on August 19 at which time the Shahins gave notice that they would make a non-suit motion and the Al-Sheikh Alis said they would join in that motion. The motion was formally made on August 23 and the non-suit was granted in an oral decision given on August 24.

[3] In my oral decision, I requested written submissions on costs. Thereafter, I received a notice that the Salmans were now representing themselves and an extension of time was granted to them to file their response to the defendants' submissions on costs.

[4] The submissions from the Salmans did not really address the issue of costs. They said they did not believe any defendant should receive a costs award, in spite of my ruling in my decision that they were to be awarded costs. Their submissions focussed on the evidence at trial and their continuing belief that witnesses were not truthful in their testimony. The conclusion to their submissions, after reviewing the evidence, was

> ... we do not believe that the defendants are entitled to any amount of money.... we respectfully submit that a message must be delivered to the defendants to state that it is a crime to mislead and deceive the Salmans, the community, the courts, avoid being caught, and then claim money.

[5] Successful defendants are almost invariably awarded costs. The amount can range from a small contribution to legal expenses to a complete indemnity. It is established law that the decision with respect to the amount of costs is in the discretion of the trial judge.

SOLICITOR-CLIENT COSTS

[6] The Shahins seek solicitor-client costs. They refer to *Nova Scotia Civil Procedure Rule 77* as follows:

> **Scope of Rule 77**
>
> 77.01 (1) The court deals with each of the following kinds of costs:
>
> ...
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
>
> **Liability for costs**
>
> 77.03 ...
>
> (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

[7] In Orkin, *The Law of Costs*, 2nd Ed. (2007, Canada Law Book), the author summarizes the purpose of solicitor-client costs as follows:

> An award of costs on a solicitor-and-client scale is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation.

[8] The Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 said, with respect to solicitor-client costs, at p. 153:

> ... Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; ...

[9] In *Toronto-Dominion Bank v. Lienaux*, [1997] N.S.J. No. 199 (C.A.), in para 37, the Court quoted *Orkin, supra*, and *Young, supra*. Hallett, J.A. said in that same para:

> **37** In *Young v. Young* the Supreme Court of Canada stated the general rule.

Hallett, J.A. then said in para 38:

> **38** In *Leung v. Leung* (1993), 15 C.P.C. (3d) 42, 77 B.C.L.R. (2d) 314 (S.C.) the court stated that 'reprehensible' is a word of wide meaning. It can include conduct which is scandalous or outrageous misbehaviour but it also includes milder forms of misconduct as 'reprehensible' simply means deserving of reproof or rebuke. This meaning of "reprehensible' is in accord with the meaning of that word as stated in Random House Dictionary of the English Language, 2nd edition, unabridged, and in The New Shorter Oxford English Dictionary (Lesley Brown)).

[10] In *Chisholm v. Nova Scotia (Attorney General)* 2009 NSSC 29, Murphy, J. considered solicitor-client costs. He relied on *Petten v. E.Y.E. Marine Consultants*, [1998] N.J. No. 37, (Nfld. S.C.T.D.). Murphy, J. said in para. 11:

> 11. Although the Defendants achieved complete success, this is not a case where the Plaintiff's conduct was so egregious as to warrant a solicitor-client costs award. Decorum and courtesy prevailed in the courtroom during trial. While it may have been misguided for the Plaintiff to pursue the claim, I am not convinced it was advanced maliciously or recklessly, or that the Plaintiff fully appreciated that the claim was groundless. In reaching this conclusion, I find support in **Petten**, *supra* at paras. 87 and 88, where the Newfoundland Supreme Court offered the following guidance when considering whether to award solicitor-client costs:
>
> > 87 The analysis of this issue must be undertaken from the point of view, reasonably assessed, of the party who is potentially subject to the award, and not from the judge's point of view with the benefit of hindsight after having heard the case. To do otherwise would expose potential litigants to a significant risk of costs, dissuade the development of the law by the submission of novel claims and discourage or impede litigants' access to the courts. The deliberate, or even possibly the reckless, pursuit of a claim known or believed to be unfounded will often be good evidence of having taken the action out of malice or for other improper motive and thereby constitute an abuse of process which would fall within the notion of reprehensible, scandalous or outrageous conduct. The importance of examining whether a claim is in fact unfounded is with respect to the inferences which may be drawn concerning the motivation of the claimant. It is for this reason that when examining the question of whether a claim is unfounded the focus must be on the knowledge base of the claimant and his solicitor rather than on the basis of hindsight. The correct approach is exemplified by the following comment of Hardinge, J. in **Shedwill v. Wilson** (1991), 48 C.P.C. (2d) 70 (B.C.S.C.) at p.73:

> With the benefit of hindsight I have decided the allegation was unfounded. However, looking at the matter from the point of view of the plaintiffs when they commenced their action and even at trial, I am not prepared to go so far as to say the allegation was obviously unfounded, made recklessly or out of malice.

> 88. The distinction must be drawn, when viewing cases from the point of view of the claimant, between those which have 'little merit' which Young tells us does not form a basis for awarding solicitor-client costs, and those which have obviously no merit. This distinction explains comments in some of the Newfoundland Court of Appeal cases which assert that solicitor-client costs are appropriate where a party has commenced or defended an action 'on an obviously frivolous or groundless basis' and where there is a 'deliberate advancing of a frivolous claim' which would normally require, additionally, 'fraud or other malicious, wanton or scandalous conduct'. The advancing of a weak case or one which becomes clear, only with the benefit of hindsight, that it was groundless, will not be sufficient....

In *Chisholm*, Murphy, J. said at para. 12:

> 12 Solicitor-client costs awards are reserved for very limited circumstances, and I do not find the Plaintiff's conduct fell so far short of the norm as to attract censure by requiring full indemnity of the Defendants' expenses.

[11] In their brief at pp. 9-11, in para. 19, the Shahins set out their reasons for an award of solicitor-client costs. The following is my summary of their reasons. The Shahins allege:

1) the Salmans knew that their witnesses would deny publication of the slander and continued with the action nonetheless;

2) the Salmans pleaded special damages but never provided particulars;

3) they then claimed slander *per se* without amending their pleadings and did not prove it;

4) Najah Salman said she kept notes but said she destroyed them;

5) Abdel Salman gave conflicting evidence on discovery and at trial about whether he made a profit on the Al-Sheikh Ali's home construction and financing, or whether it was done as a favour;

6) the Salmans made a motion to adjourn the trial solely to delay matters;

7) one witness said Najah Salman told her she lost $75,000 by helping the Al-Sheikh Alis;

8) that same witness testified that Najah Salman said very nasty things about the defendants and what she hoped would happen to them;

9) Najah Salman called witnesses liars after their discovery examination;

10) the Salmans continued to litigate after they knew there would be a non-suit motion.

[12] The Shahins refer to *Silvester v. Lloyd's Register North America Inc.*, 2003 NSSC 84 in support of their claim for costs on a solicitor-client basis. In that case, the plaintiff, a marine surveyor, alleged he was wrongfully dismissed. Tidman, J. awarded party-party costs for all but one portion of the matter. He said in para. 91:

> [91] The plaintiff also seeks costs on a solicitor/client basis for that portion of the costs allegedly incurred resulting from the defendants decision to amend its defence alleging so-called 'after acquired' reasons for dismissal. Mr. Youden submits that the defendant should be at liberty to conduct its case in a manner that provides every possible defence to the action. I agree, but where serious allegations are made involving the honesty and integrity of the plaintiff and are not subsequently supported by the evidence, then the defendant must face the consequences of its decision to conduct the defence in that manner.

He then said in para. 97:

> [97] ... In this case the defendant very late in the game amended its defence to claim after acquired reasons for dismissal. Most of the allegations against the plaintiff in the amended defence attacked the honesty and personal integrity of the plaintiff, including that he claimed fraudulent expense and travel costs, failed to repay a house loan, acted in bad faith and misrepresented facts. I found that the plaintiff [sic] failed to prove those allegations and further that in my view those allegations were made in a vain attempt to bolster an already weak defence to the plaintiff's action. The consequence of the defendant's failure to prove those allegations relating to the plaintiff's honesty and integrity will be an award of solicitor/client costs.

[13] He then concluded that solicitor-client costs were warranted for an additional three days of trial resulting from the plaintiff having incurred costs directly related to defending allegations which were subsequently unproven.

[14] In my view, this is not support for an order for solicitor-client costs in a defamation action which, by definition, involves reputation. If that were so, all defamation cases would result in solicitor-client costs which is not the case.

[15] The Shahins also rely on *MacKay v. Bucher*, 2001 NSCA 171. In that case, the trial judge awarded solicitor-client costs and the decision was appealed. In para. 5, Bateman, J.A. said:

> [5] In ordering solicitor client costs the judge found that Ms. MacKay swore a false affidavit misrepresenting, among other things, the quality of the legal advice which she had received at the time of entering into the lump sum agreement. That finding of fact is supported by the record.

She continued in para. 6:

> [6] Ms. MacKay was represented by counsel at the costs hearing. She provided no explanation for the statements in her affidavit. The judge accepted that her false evidence on the various issues drew the respondent into disproving the allegations. In this regard Mr. Bucher incurred substantial additional expense. The judge accepted that this was a reasonable course of action.

[16] In that case, as well as in *Silvester*, *supra*, the solicitor-client costs award was based upon an additional expense incurred arising from the conduct of one of the parties. In my view, these authorities do not assist in determining whether solicitor-client costs should be ordered in this defamation action. They were specific instances within trials which otherwise did not address the reputation of the other party.

[17] The Shahins say that the Salmans should not have commenced the action or continued it once they knew what their witnesses said at discovery, that is, having denied any defamatory statements were made. However, the case law referred to above says that the focus is to be on the knowledge base of the parties at the time the action is commenced. In the Amended Reply to Demand for Particulars, the Shahins set out in substantial detail the allegations upon which they relied in their action. There is no evidence to establish that this was reprehensible conduct on the part of the Shahins. I therefore look at the conduct of the parties during the litigation. According to the Statement of Claim and the Amended Reply to Demand for Particulars, the Shahins had a cause of action. It is not apparent that the claim was made maliciously or frivolously, although it is clear in hindsight that the claim was not made out. However, that is not the test.

[18] The conduct of the parties at trial was civil. The plaintiffs were not difficult witnesses or disruptive to proceedings. Najah Salman did say she had destroyed notes which she said she had made of her conversations with the persons referred to in the Amended Reply to Demand for Particulars. Although it was suggested that there was a bad motive on the part of the Salmans in requesting an adjournment, it would be speculative to base an award of solicitor-client costs upon such an allegation. There

was evidence that Najah Salman was angry with certain persons who testified on discovery and called them liars. I am not satisfied that this is sufficient evidence of reprehensible conduct such as to merit an award of solicitor-client costs. That was her viewpoint and, according to the Salmans' submissions with respect to costs, it appears still to be their point of view.

[19] The Salmans did not seek substantial damages and, in my view, that is some evidence of their motivation at the commencement of this action. In their costs submissions, the Salmans addressed this issue. They said they commenced the action because of the damage to their reputation and all they wanted was an apology and for the truth to be told to the community. They said, in their costs submissions, their "motive was never to gain money. A proof of this is that they only claim $10 in special damages."

[20] Nor am I satisfied that their continuation of the case is sufficient reason to award solicitor-client costs. Had even one witness recanted discovery testimony at trial, the Salmans' position would have been quite different.

[21] I am not satisfied either that the Salmans should have abandoned their action before the non-suit motion was brought when informal notice of it was given at the end of the fourth day of trial. They were entitled to have the motion brought formally. Nor should they be faulted for defending the non-suit motion.

[22] I, therefore, do not find that the conduct of the Salmans during the litigation was reprehensible, scandalous or outrageous. Anger and high emotions are not sufficient, especially in a defamation case, to warrant an award of solicitor-client costs. Not every non-suit leads to an award of solicitor-client costs nor does every defamation action warrant an award of solicitor-client costs.

[23] The purpose of costs is to encourage settlement and a party that does not settle at an early stage runs the risk of incurring an award of costs. As Saunders, J. (as he then was) said in *Landymore v. Hardy*, [1992] N.S.J. No. 79 (N.S.S.C.T.D.):

> Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[24] I conclude that this is not one of those rare and exceptional circumstances where an award of solicitor-client costs should be made.

PARTY-PARTY COSTS - Fathia and Omar Shahin

[25] Having concluded that the Shahins are not entitled to solicitor-client costs, I must consider the amount of party-party costs to which they are entitled. In this regard, *Rules 77.01(1)* and *77.08* are relevant:

> **Scope of Rule 77**
>
> 77.01 (1) The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> ....

Lump sum amount instead of tariff

77.08 Lump sum amount instead of tariff

[26] In *Landymore*, *supra,* Saunders, J. set out the underlying principle of party-party costs. He said:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > ... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.

[27] The phrase *"substantial contribution"* was considered by Freeman, J.A. in *Williamson v. Williams*, [1998] N.S.J. No. 498 (C.A.). In para. 24, he referred to the *Landymore* decision and the reference of Saunders, J. to the Statutory Costs and Fees Committee. He continued in para. 25 as follows:

> 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 lawyer'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. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much

> lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[28] The calculation of party-party costs is referred to in *Civil Procedure Rule 77.06 (a)* as follows:

> **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.

[29] The Tariffs provide as follows:

> In these Tariffs, unless otherwise prescribed, the 'amount involved' shall be ...
>
> > (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to:
> >
> > (i) the complexity of the proceeding; and
> >
> > (ii) the importance of the issues; ...

[30] In addition, Tariff A refers to the "length of trial" and provides that it is to be "fixed by a Trial Judge." Tariff A continues:

> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

[31] In *Campbell v. Jones and Derrick*, 2001 NSSC 139, Moir, J. thoroughly canvassed the issue of costs and, in particular, costs in a defamation case. He referred to a number of decisions on the subject of costs and then said on pp. 65-67:

> These decisions do not lay down rules of law. The establishment of an 'amount involved,' the selection of a scale or the decision to depart to lump sum costs all involve the exercise of discretion in light of circumstances particular to each case. Previous decisions provide guidance. The guidance I take from these decisions is as follows. It appears that usually tariff costs are awarded. Apparently this has often been so even where tariff costs fail to meet their objective of a substantial but partial indemnification: *Williamson*. Judges have expressed reluctance to artificially increase the 'amount involved' in order that tariff costs should reflect a substantial indemnity: *Williamson, Keddy, Cashen and Gilfoy*. I understand the comments of Justice Goodfellow in *Cashen and Gilfoy*, but there certainly are cases in which the objective has been considered and variations in the 'amount involved' or choice of scale have been applied to achieve the objective: *Hines, Landymore, Armstrong, Adams and Balders Estate* are examples. Further, the failure of tariff costs to meet the objective has been a factor in decisions to depart from tariff costs and to exercise the discretion under Rule 63.02(a) to award a lump sum: *Conrad, Williamson, Keddy, Matheson and Founders Square*. When judges have increased the amount involved or the scale to take account of the objective, they have sometimes made reference to the successful party's actual costs: eg. *Hines and Landymore*. However, it is clear that the court will not lay down any percentage of actual costs as a rule of thumb: *Mathers*. Similarly, when judges have departed from tariff costs in order to serve the objective of partial but substantial indemnity, reference has sometimes been made to evidence of actual costs: *Williamson, Matheson and Founders Square*. However, the same caution expressed in *Mathers* should apply. Also, the costs are subject to objective assessment: *Williamson*. And, I would add that another feature of the tariffs should be respected when there is a departure from the tariffs to a lump sum. The party's choice of counsel and the terms of retention have no bearing on tariff costs. The tariffs were designed to achieve a substantial indemnity but without regard to the

> arrangements between the particular party and counsel. One might say the objective was substantial indemnity against what would generally or ordinarily be charged to a client in like circumstances. To preserve some element of that where a lump sum award is in order, the court should try to assess counsel's efforts on a general basis, and should take the actual fees into account only to the extent they tend to show generally what any client of any competent lawyer might expect reasonably to be billed for services necessary to the case at hand. In summary, the discretion to award a lump sum is not so restricted as with an award of solicitor and client costs; tariff costs are usual and a lump sum is a departure from the usual; the discretion has been exercised where tariff costs would not produce a partial but substantial indemnification without artificially setting the 'amount involved'; the objective of a partial but substantial indemnification may or may not be sufficient reason to exercise the discretion; care must be taken to avoid employing fixed percentages or embracing the party's actual bill over a more generalized assessment.

[32] Tariff costs are usually awarded and therefore should be considered. In doing so, I must determine "the amount involved." It needs to be based upon the complexity of the proceeding and the importance of the issues. A defamation action is, by its nature, a complex one although less so when not argued before a jury. The issues involved in defamation actions are important ones. In this case, there were lengthy discoveries beginning in November 2007, continuing in February 2008 and concluding in April 2008. Fourteen witnesses were discovered as well as the parties. The claim began as one for special damages and, later, allegations of slander actionable *per se* were made. There were two sets of defendants, each husband and wife, and one set of those defendants represented themselves. In addition, there was a need for an interpreter for many witnesses.

[33] In some cases, a “rule of thumb” approach has been used where the claim is a non-monetary one. In 1998, Justice Goodfellow suggested an amount involved of $15,000 for each day of trial (*Urquhart v. Urquhart*, [1998] N.S.J. No. 310 (S.C.)). That amount was updated in *Jachimowicz v. Jachimowicz*, 2007 NSSC 303 where Lynch, J. concluded that the amount of $15,000 was out of date and the amount should be increased to $20,000 per day of trial.

[34] The trial was originally set for eight days. Evidence was heard over four days and submissions were made with respect to the non-suit motion on the fifth day followed by my oral decision on the sixth day. However, in my view, it is reasonable to use the original eight day trial estimate only for the purpose of applying the “rule of thumb.” Counsel prepared for an eight day trial. That calculation would result in an “amount involved” of $160,000. Such an amount involved would result in costs ranging between $12,563 and $20,938 with the basic scale resulting in costs of $16,750.

[35] Although the courts have been cautioned against artificially setting an “amount involved”, the rule of thumb, in my view, proves somewhat useful in this case. However, the rule of thumb provides guidance only and there may be occasions where

the amount involved arising from its use may need to be increased. In my view, this is one of those cases. Its complexity, the importance of the issues, the number of discoveries and the role of self-represented parties lead me to conclude that the amount involved be considered to be $220,000. That increases the costs to a range between $17,063 and $28,438 with the basic scale being $22,750.

[36] The Shahins submit that the appropriate tariff scale should be Scale 3. They submit that the conduct of the Salmans is to be considered when determining the scale. This conduct was referred to in the Shahins' submissions on solicitor/client costs. I considered those submissions in that context and conclude that they were not sufficient to result in an award of solicitor/client costs. Nor do I consider them to be sufficient to depart from the basic scale of tariff costs, especially since I have increased the "amount involved." Tariff costs, therefore, on Scale 2 are $22,750. To that amount is to be added an additional $2,000 for each day of trial. Evidence was given on four days, argument on the non-suit motion took an additional day took an additional day and my decision resulted in another one-half day court appearance, a total of 5 ½ days. Accordingly, $11,000 should be added to the tariff costs on scale 2. This would result in tariff costs of $22,750 plus $11,000 for a total of $33,750, to which would be added disbursements. The Shahins submit that even the amount they propose, ($31,938)

based upon Tariff 3 and an amount involved of $160,000, is not a partial yet substantial contribution towards their reasonable legal expenses. I echo the caution referred to in *Campbell v. Jones* about too great a reliance upon actual costs. Moir, J. referred to *Mathers v. Mathers* (1992), 113 N.S.R. (2d) 284 (N.S.S.C.), reversed on other grounds (1993), 123 N.S.R. (2d) 14 (C.A.). He said:

> The Chief Justice of the Trial Division, as she then was, rejected an argument that *Landymore* stood for the proposition that the successful party should recover roughly half of their actual costs and she expressed concern that such a rule could lead to abuses: para. 136.

[37] The actual costs to which counsel for the Shahins refers in his submissions is of some guidance to me in determining what amount a client might reasonably expect to be billed by competent counsel for services necessary in a case such as this. Without relying on the amount referred to by the Shahins' counsel, I conclude that, in all the circumstances of this case, a costs award in the amount of $33,750 is inadequate. I therefore consider a lump sum costs award.

[38] In my view, there are good reasons in this case for departing from the usual practice of awarding tariff costs. I am reluctant to artificially increase the amount involved beyond the amount I have concluded above is appropriate and I cannot

conclude that the basic scale should be departed from. However, $33,750 is not, in my view, a substantial but not complete indemnification of the costs incurred by the Shahins.

[39] I take guidance from the decision of Moir, J. in *Campbell v. Jones, supra*, in concluding that the counsel the Shahins chose and the financial arrangements they made with him do not determine the amount of costs they are to be awarded. They say they should have costs on a lump sum basis of $77,023.33 which is 2/3 of their actual costs. In my view, this is not the correct approach to lump sum costs, based upon the authorities.

[40] In my discretion, I conclude that a costs award of $65,000 represents a partial but substantial contribution to the costs incurred by the Shanins.

Disbursements

[41] The Shahins are also entitled to their reasonable disbursements. They claim a total of $10,022.29. The most substantial portion of that claim is $6,441.60 for discoveries. I requested and received further information about these costs. Discoveries were held on November 5, 6 and 7, 2007; November 15 and 16, 2007; February 7 and 8, 2008; and April 15, 17 and 18, 2008.

[42] I am satisfied, based upon the material submitted, that the Shahins' disbursements of $10,022.29 should be allowed.

Party and Party Costs: Mariam and Fawzi Al-Sheikh Ali

[43] The Al-Sheikh Alis did not have counsel at trial or for pre-trial procedures and preparation with the exception of their pre-trial brief. They are nonetheless entitled to some measure of costs.

[44] In *McBeth v. Dalhousie College and University*, [1986] N.S.J. No.159 (C.A.), the court concluded that a self-represented litigant should be awarded his or her costs.

The Court of Appeal revisited that concept in *Crewe v. Crewe*, 2008 NSCA 115. The court said in para. 17:

> **17** ... the principles underlying the awarding of costs could not justify a rule denying costs to self-represented parties.

[45] The court continued in that paragraph:

> ... I agree with and adopt the following statements by Sharpe J.A. in **Fong**:
>
> [24] A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.
>
> [25] I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge and as Ellen Macdonald J. observed in **Fellows, McNeill v. Kana**, [1997] O.J. No. 5130 *supra*, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.
>
> [26] I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the **Chorley** case, *supra*, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote

> to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a 'moderate' or 'reasonable' allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a *per diem* basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.

[46] In this case, it is within my discretion to award costs to the Al-Sheikh Alis. The purposes of such an award are twofold: to ensure that the Salmans are not immunized against costs because the Al-Sheikh Alis represented themselves and, overall, to encourage settlement in cases even where parties are representing themselves.

[47] There is nothing to indicate that there was, during this litigation, any conduct on the part of the Al-Sheikh Alis that was inappropriate. It is clear they devoted substantial time and effort to trial preparation and at trial, much in the same fashion as a lawyer would have done. In my view, there should be some recognition that they played a role in this litigation in addition to being parties.

[48] In some cases, the courts have recognized an opportunity cost which was lost, but in *Dechant v. Law Society of Alberta*, 2001 ABCA 81, the court concluded that it

is not necessary to prove the actual value of any lost opportunity. The court said in that case in para. 19:

> **19** ... Nonetheless, whether a person has lost time from work to represent themselves is a relevant factor to consider. If any unrepresented litigant was not otherwise employed, the fee portion of costs attributable to lost opportunity may not exist or, at a minimum, would be significantly less than a person who has suffered a loss of income due to employment absences.

[49] In this case, Mariam Al-Sheikh Ali was not employed and did not lose income. Fawzi Al-Sheikh Ali used vacation time rather than lose paid time from work. In my view, that is a factor which merits consideration.

[50] In *Dechant*, the court listed factors to be considered in determining costs to which a self represented party is entitled. The court said in para. 21:

> **21** When awarding costs above disbursements for the unrepresented litigant, the court must look at the particular factors of each case. Was the matter complicated? Was the work performed of good quality? Did the self-representation result in unnecessary delays? Did the litigant take up an unreasonable amount of time of opposing parties or the courts? Did the litigant lose time from work? In general terms, what is the lost opportunity of the unrepresented litigants? What would they have earned if not required to prepare their own case? Did the other side take advantage of the fact that they were facing unrepresented litigants by take frivolous and unnecessary steps to thwart that litigant? Did the other side refuse to entertain reasonable requests to discuss settlement? What is an appropriate amount for the issues involved? ...

[51] This was a complicated matter and the effort put forward, and the work performed, by the Al-Sheikh Alis was of good quality. The Al-Sheikh Alis were prepared and, in my view, did not cause unnecessary delays or, as is often the case with self-represented parties, stray from the issues at hand. I have mentioned above that Fawzi Al-Sheikh Ali took vacation time for attendance at the trial. The trial was set for two weeks and it is reasonable to anticipate that he took two weeks vacation in order to be available for the entire trial, although it ended early.

[52] In her submissions on behalf of the Al-Sheikh Alis, their counsel referred to the *Civil Procedure Rules* with respect to costs and to the tariffs. She submitted that, if they had had counsel, they would be entitled to party and party costs. She based this upon the rule of thumb equating one day of trial to $20,000 and using only the five and a half days of trial actually utilized. Using Tariff A, counsel for the Al-Sheikh Alis submitted the self-represented litigants should be entitled to one-half the costs to which they would have been entitled had they retained counsel: that is $12,000.

[53] When considering the costs award to the Shanins I used an “amount involved” of $220,000. If the argument of counsel were applied to that, that would result in a costs award of fifty per cent of $33,750, that is $16,875.

[54] In my view, both those numbers are too high taking into account all the factors to be considered with respect to self-represented litigants. The award of costs to the Shahins will not represent a windfall to them since the account from their counsel will be an amount greater than the costs awarded to them. The Al-Sheikh Alis, on the other hand, have not incurred out-of-pocket expenses other than the disbursements to which I will refer below. Accordingly, their costs award should be a great deal less than the costs award in favour of the Shanins.

[55] Taking all of the factors into consideration, I conclude that a costs award in the amount of $4,000 is the appropriate award of costs to be made to the Al-Sheikh Alis.

Disbursements of Al-Sheikh Alis

[56] The Al-Sheikh Alis are also entitled to recover their necessary and reasonable disbursements according to *Rule 77.10* of the *Civil Procedure Rules.* They claim disbursements in the amount of $6,358.28.

[57] They incurred a cost of $5,000 in preparing and photocopying their pre-trial brief and the documents which accompanied it. The invoice for that amount is attached to the materials submitted by their counsel. In *Canada (Attorney General) v. Kahn*, [1998] F.C.J. No. 1542 (Fed Ct – T.D.) a self-represented litigant was awarded costs to reimburse expenses he incurred to obtain legal advice. In my view, this is an appropriate amount to reimburse in this case as it appears to have greatly increased the efficiency of this trial with two parties representing themselves.

[58] The Al-Sheikh Alis claim $112.20 for photocopying at $.15 per page. I am satisfied with the calculation set out in their counsel's submissions as to the reasonableness of that photocopying charge.

[59] In addition, had the Al-Sheikh Alis called witnesses, those witnesses would have required an interpreter. The interpreter, although not needed, had to be paid, pursuant to the contract. A copy of the invoice has been provided. I am satisfied that the cost of $760 is a reasonable disbursement as well.

[60] However, I am not satisfied that the claims for mileage and parking are reasonable disbursements. All parties incurred transportation costs to attend

discoveries and court. Had the Al-Sheikh Alis retained counsel, they would still have incurred these costs. The same is true of their claim for parking expenses.

[61] I therefore conclude that the Al-Sheikh Alis are entitled to their reasonable disbursements in the amount of $5,872.20.

CONCLUSION:

[62] The Shahins are awarded costs of $65,000 plus disbursements of $10,022.29.

[63] The Al-Sheikh Alis are awarded costs of $4,000 plus disbursements of $5,872.20.

Hood, J.