IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacIntyre v. Cape Breton District Health Authority, 2010 NSSC 170

Date: 20100426
Docket: 225468
Registry: Sydney

Between:

Duncan F. MacIntyre

Plaintiff

v.

Cape Breton District Health Authority

Defendant

DECISION ON COSTS

Judge: The Honourable Justice Douglas L. MacLellan

Heard: Trial on April 6, 7, 8, 9, 14, 15, 16, 17, 20, 22, 2009, in Sydney and Halifax, Nova Scotia

Final Oral Submissions: February 11th, 2010 (on costs), in Halifax, Nova Scotia

Counsel: Michelle Awad, QC, for the plaintiff
Shelley A. Wood and Nancy G. Rubin, for the defendants

By the Court:

[1] The parties in this action have not been able to agree on costs following my decision dated June 30th, 2009. In that decision I dismissed the plaintiff's claim and found that he had not proven that the actions of the defendant's employees in doing renovations at the New Waterford Hospital where he had an office caused him to ingest dust containing heavy metals.

[2] He had alleged that he suffered from heavy metal toxicity which forced him to leave his job as a dental surgeon and that he had suffered loss of past and future income along with general damages.

[3] I have received written submissions from both counsel and I have heard oral submissions on February 11th, 2010.

The Defendant's Position

[4] Counsel for the defendant in her brief asks that the court apply the new Civil Procedure Rules which came into effect on January 1st, 2009, to this matter since the trial was held after the Rules were in effect. She asks that the court use the

amount claimed by the plaintiff as the amount involved and that I apply the 1989 Tariff A to that amount. She also asks that the court increase the costs to the defendant because prior to the trial the defendant made an offer to settle the plaintiff's claim for the sum of $250,000.00.

[5] The defendant also asks for significant disbursements to cover the cost of producing a number of expert witnesses at the trial.

The Plaintiff's Position

[6] Counsel for the plaintiff submits that the court should not use the tariff to determine costs but that the court award a lump sum to reflect the complexity of the case, the time spent and the financial position of the plaintiff to respond to a large amount of costs. Counsel suggest that the offer to settle should not be a factor in the costs award. Counsel also suggest that the defendant's disbursements are unreasonable and should be reduced drastically.

The Law

[7] This action was started on June 30th, 2004. The notice of trial was filed in March 2008 and the trial commenced in April 2009. Civil Procedure Rules (2009) came into effect on January 1st, 2009. Rule 92.02 provides:

> "**92.02** (1) These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this Rule 92 provides or a judge orders otherwise.
>
> (2) The *Nova Scotia Civil Procedure Rules* (1972) continue to apply to each of the following kinds of proceedings:
>
> (a) an action or other proceeding in the Family Division;
>
> (b) a family proceeding outside the Family Division;
>
> (c) all other proceedings, except an action, started before January 1, 2009, unless a judge orders otherwise."

[8] Rule 92.08(2) provides:

> "**92.08** (2) A judge who is satisfied that the application of this Rule 92 to a proceeding started before January 1, 2009 causes one party to gain an unfair advantage over another party may order either of the following:
>
> (a) these Rules apply to the proceeding, or a part of the proceeding, despite Rules 92.02(2), 92.04, and 92.05(1);
>
> (b) the *Nova Scotia Civil Procedure Rules* (1972) apply to the proceeding or a part of the proceeding despite Rule 92.02(1)."

[9] I conclude here that considering the factors involved in this application that the defendant would not gain an unfair advantage over the plaintiff by applying the new rules and therefore they will apply.

[10] Counsel concede that the only issue which will be affected by this ruling is in regard to the offer to settle made by the defendant.

[11] Both counsel agree that since the action was commenced prior to the adoption of the 2004 Tariff of Fees that the old 1989 Tariff A be used. I agree with that approach. (See ***Bevis v. CTV Inc.*** (2004), N.S.S.C. 209.)

The Amount Involved

[12] The plaintiff here claimed at trial that his total damages should be assessed at $19,147,840.00. I provisionally determined that his damage if he had been successful would be approximately $8,405,000.00.

[13] Counsel for the defendant asks that I apply the tariff to the amount claimed. See ***McManus v. Nova Scotia (Attorney General)*** (1995), 147 N.S.R. (2d) 318.

[14] If I did that it would result in costs of $770,762.00.

Offer to Settle

[15] On January 15th, 2009, the defendant made a formal offer to settle in the amount of $250,000.00. That was 55 days prior to the first day of the trial. The new *Civil Procedure Rules* by Rule 10.09 provides:

> "**10.09** (1) A party obtains a 'favourable judgment' when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
>
> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
>
> (2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
>
> (a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
>
> (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
>
> (c) fifty percent, if the offer is made after setting down and before the finish date;
>
> (d) twenty-five percent, if the offer is made after the finish date.
>
> (3) A judge may award costs in one of the following amounts to a party who defends a proceeding, does not fully succeed, and obtains a favourable judgment:
>
> (a) the amount that the tariffs would provide had the party been successful, if the offer is made less than twenty-five days after pleadings close;

> (b) seventy-five percent of that amount, if the offer is made more than twenty-five days after pleadings close and before setting down;
>
> (c) sixty percent of that amount, if the offer is made after setting down and before the finish date;
>
> (d) nothing, if the offer is made after the finish date."

[16] Counsel for the defendant asks for a twenty-five percent increase in costs bringing total costs requested to $963,453.00.

The Plaintiff's Position

[17] Counsel for the plaintiff submits that such costs are not appropriate and therefore the court should consider using a lump sum award to determine costs. The suggestion is that using the tariff results in an amount which is too high. She suggests that the court award costs of $60,000.00.

[18] Rule 77.06 provides:

> "**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."

[19] Rule 77.08 provides:

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

[20] In ***Williamson v. Williams***, [1998] N.S.J. No. 498, Freeman J.A. of our Court of Appeal said:

> "The present tariffs were adopted in 1989 to replace the antiquated **Costs and Fees Act** then in effect. In **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410 Saunders J. stated:
>
> > '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.'
>
> 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."

[21] In that case the court increased tariff costs by $30,000.00 to reflect the actual legal costs of the plaintiff.

[22] I accept in principle the argument by counsel for the plaintiff that it would not be appropriate to award costs based on what the plaintiff originally claimed. That results in costs of $993,000.00 which is significantly more than the legal costs incurred by the defendant. Counsel for the defendant indicates that the solicitor-client costs for the defendant was $700,000.00.

[23] Counsel for the defendant here in her brief calculated my provisional award of damages at $8,405,000.00, which if used as the amount involved would result in costs of between $320,600.00 to $426,300.00 depending if Scale 3 (Basic) or Scale 4 is used and twenty-five percent is added to reflect the offer to settle.

[24] If the new Tariff A (2004) was used on the provisional award it would result in costs of ($8,405,000.00 X 6.5%) $546,325.00 plus twenty-five percent (Rule 10.05) of $136,581.00 to reflect the offer to settle making a total of $682,906.00.

[25] In ***Founders Square Limited v. Nova Scotia (Attorney General)***, 186 N.S.R. (2d) 189, Moir J. of this court said at paragraph 4:

> "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. Nova Scotia (Registrar of Motor Vehicles)* (1990), 105 N.S.R. (2d) 240 (N.S.T.D.); *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410

> (N.S.T.D.); *McManus v. Nova Scotia (Attorney General)* (1995), 147 N.S.R. (2d) 318 (N.S.S.C.); *Conrad v. Snair* (1996), 150 N.S.R. (2d) 214 (N.S.C.A.); *Williamson v. Williams*, [1998] N.S.J. No. 498 (N.S.C.A.); and, *Keddy v. Western Regional Health Board*, [1999] N.S.J. No. 464 (N.S.S.C.). 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."

[26] In the circumstances here I would use my discretion and award a lump sum amount of costs in the amount of $300,000.00.

[27] There will be no GST added to the costs award. (See ***G.B.R. v. Hollett***, [1996] N.S.J. No. 345)

Disbursements

[28] The defendant claims disbursements totalling $24,279.88 in Canadian funds and $225,719.00 in U.S. funds to reflect amounts paid to two expert witnesses from the United States, Dr. Beth Baker and Dr. Richard Parent.

[29] At the hearing of this costs matter the focus in regard to disbursements was on the bill submitted by Dr. Parent in the amount of $209,850.00.

[30] That bill according to the defendants ... by counsel indicated Dr. Parent billed for 409.75 hours at the rate of $500.00 per hour. At the hearing of this matter I suggested that Dr. Parent had spent much more time than that, however, I have now confirmed the correct amount listed on the bills submitted to the defendant.

[31] In the circumstances I conclude that it is not reasonable for the defendant to have Dr. Parent spend that amount of time on the file. His work was mainly to review research materials on heavy metal toxicity.

[32] His evidence was not significant in regard to my eventual finding on the case. I accepted the evidence of Dr. Beth Baker and her total bill to the defendant was $15,869.00.

[33] In ***Claussen Walters & Associates Ltd. V. Murphy***, [2002] N.S.J. No. 44, the Nova Scotia Court of Appeal dealt with a claim for disbursements for an expert witness. Saunders, J.A. said at paragraph 12:

> "Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in J.D. Irving Ltd. V. Desourdy Construction Ltd. (1973), 5 N.S.R. (2d) 350 at p. 362:
>
> > In my opinion, Civil Procedure Rule 63.37, Clause (5) is to the same effect as the old Order LXVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances."

[34] I would reduce the disbursement claim by the defendant for Dr. Parent to $35,000.00 U.S. funds.

[35] The plaintiff objects to the defendant disbursement claim for Dr. Richard Leckey in the amount of $4,350.00. That represented a cancellation fee for Dr. Leckey who was subpoenaed by the defendant but not called as a witness at trial.

[36] Dr. Leckey was the plaintiff's family doctor during some of the times involved in this claim.

[37] Prior to trial the defendant attempted to force him to consult with it about the plaintiff's file. I refused to order that based on patient confidentiality.

[38] I conclude that it was reasonable for the defendant to have Dr. Leckey available as a witness at trial and to pay his cancellation fee when he was not called as a witness. I would allow that disbursement.

[39] I would allow all the other disbursements claimed by the defendant and therefore the defendant will be entitled to costs of $300,000.00 and disbursements of $24,279.88 Canadian funds and $50,869.06 U.S. funds.

J.