SUPREME COURT OF NOVA SCOTIA
Citation: Mader v. Hatfield, 2011 NSSC 121

Date: 20110131
Docket: Syd. No. 294584
Registry: Sydney

Between:

Darren Mader and Susan Mader

Plaintiffs

v.

Linda Hatfield

Defendant

DECISION ON COSTS

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	January 31, 2011, in Sydney, Nova Scotia
Oral Decision:	January 31, 2011
Written Release of Oral Decision:	April 5, 2011
Counsel:	Vincent Gillis, for the Plaintiffs Linda Hatfield, self represented

By the Court:

[1] I am prepared, as I indicated earlier, to render a decision orally today, on the issue of costs arising in the *Mader and Hatfield* matter. A matter that I heard in February and March of 2010, with a written decision being issued June 30th, 2010 and reported at 2010 NSSC 261.

[2] I have had the opportunity to read and hear the submissions of both Mr. Gillis on behalf of the plaintiffs and Ms. Hatfield on her own behalf. I thank both of you for your submissions that you have provided to the Court, which have been helpful.

[3] The awarding of costs is governed by Rule 77 of the *Civil Procedure Rules, 2009*. I find that the new Rules, as they are often called, apply to this particular proceeding.

[4] Rule 77.02(2) incorporates what has been long recognized, which is that the trial judge has discretion to award costs in relation to a matter.

[5] I also noted Rule 77.03(3) which indicates that the costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[6] In this instance, although not receiving all of what was sought, the plaintiffs were clearly overall the successful parties in the outcome of the action.

[7] I have also noted Rule 77.04. That is a Rule which permits relief from liability for costs because of poverty. Ms. Hatfield has asked the Court to give consideration to that Rule to alleviate any requirement that the Court may find that she has for the payment of costs.

[8] That Rule indicates:

> (1) A party who cannot afford to pay costs and for whom the risk of an award of cost is a serious impediment to making, defending or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> (a) the party is notified of a proceeding the party wishes to defend or contest,
>
> (b) a claim made by the party is defended or contested.

> (3) An order against paying costs may be varied when the circumstances of the party change.
>
> (4) An order against paying costs does not apply to costs under Rule 88, - Abuse of Process, Rule 89 Contempt, or Rule 90 - Civil Appeal.

[9] A formal application as contemplated by Rule 77.04 has not been made by Ms. Hatfield. Further, the informal application raised by her has not been made during a time frame as contemplated under Rule 77.04 , which is earlier in the proceedings and not at the end.

[10] However, I am satisfied that those two procedural difficulties would not automatically preclude Ms. Hatfield from seeking an exemption specifically later in the proceedings, I rely in that regard on a decision of Goodfellow, J. in ***Phillips v. Robert A. Jefferies Architecture and Design Limited***, reported at 2002 NSSC 114. Accordingly, I am prepared to give consideration to the argument put forward by Ms. Hatfield. I do not find that she's precluded from making the argument because of procedural irregularities.

[11] That being said however, I am not satisfied in these circumstances that there is adequate information before the Court to satisfy me that an exemption would be

appropriate. Although I certainly have listened to the reasons for Ms. Hatfield seeking an exemption based on poverty, I am not satisfied, based on the information that is before the Court, that such an extraordinary remedy, and one that is not usual in the course of matters, would be appropriate in these circumstances.

[12] Accordingly, I now proceed to assess the ordering of costs and what would be appropriate in these circumstances.

[13] I now turn to Rule 77.06 (1) and (2), which are particularly relevant, in my view, to the matter before me.

[14] Subsection 1 reads:

> (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.
>
> (2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

[15] This obviously was a trial as opposed to an application.

[16] Rule 77.07(1) gives the Court discretion to vary away from Tariff A if it feels appropriate. In fact that Rule reads:

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

[17] Subsection 2 goes on to list a number of items the Court may consider as being appropriate to add to or decrease tariff costs, and I have considered those.

[18] I believe that in adding to or deleting from tariff costs, is where the concept of substantial contribution to legal costs come into play. I will be addressing that particular concept later on in my decision.

[19] In addition to raising the exemption argument, which I have already dealt with, Ms. Hatfield has submitted that this Court should consider not awarding costs for two other reasons; one is because it is very akin to a family matter. As the Court recalls this was, very much, a matter that involved family relationships and all of the difficulties that that gives rise to, emotional and otherwise. She also submits that because this was really substantially a non-monetary matter that the

Court should not award costs. It being her submission that it is quite usual that costs are not awarded in non-monetary matters.

[20] The plaintiffs submit that Tariff A should apply and that Scale 3 should apply resulting in a requested amount of $48,000.00 in costs.

[21] I want to deal in some regards with the argument put forward by Ms. Hatfield, in the view that she takes that no costs should be awarded because of the issue of the matter being a family matter and a non-monetary matter.

[22] There are two cases which this Court has considered which I find address both of those issues. Ms. Hatfield is quite correct in submitting that for a very long period of time it was unusual for costs to be awarded in family matters. There has been a change in that regard however, and it is becoming much more common that costs are awarded in family matters. There is no automatic prohibition that family matters do not attract costs, and although this matter did involve family members, it cannot, in any event, be characterized as a family matter. It was a civil matter involving an adverse possession claim.

[23] I have noted the decisions of ***Urquhart v. LeBlanc***, 2009 NSSC 324 and ***Jachimowicz***, 2007 NSSC 303. In particular, they are family law cases where substantial costs were awarded.

[24] Those cases are also relevant to the non-monetary argument put forward by Ms. Hatfield. Those cases followed an earlier decision of Justice Goodfellow in ***Urquhart v. Urquhart***, (1998) 169 N.S.R. (2d), 134, a decision of the Nova Scotia Supreme Court. In that instance, Justice Goodfellow wrestled with how the court orders costs in a non-monetary matter. It is not a simple matter where it is a contractual dispute involving $150,000.00 or a personal injury matter where a plaintiff may be awarded $40,000.00 for their injuries. It is easier in those instances to apply that to the tariffs involved in terms of the amount involved.

[25] Justice Goodfellow gave some very valuable guidance in ***Urquhart v. Urquhart***, ***supra*** where he indicated that in non-monetary matters the court should apply a formula of $15,000.00 for every day of trial in order to determine the "amount involved" for the purpose of calculating costs.

[26] In ***Urquhart, LeBlanc*** and ***Jachimowicz***, which I have previously cited, that exact approach was adopted and applied, except the amount of $15,000.00 a day was increased to $20,000.00 a day to reflect the increase in the cost of litigation from when Justice Goodfellow originally created that formula in 1998. I agree with that particular approach and I adopt it.

[27] Accordingly, I now turn to Tariff A, which is outlined at the end of Rule 77. There are three important determinations that I must make to consider what the tariff costs would be in relation to this matter. The first is the length of trial, and as I have noted, this matter was heard over 14 days. Although neither party raised this in their submissions, to my recollection, I do definitely recall as the trial judge that those were not 14 full days. I recall in particular at the Court's instance the matter being adjourned late in the morning because Ms. Hatfield in particular was not feeling well that day and I felt that it was important that her evidence provided to the Court be as accurate as possible, and if she was ill the Court did not want to put her through the process of testifying. I know that there were at least two other occasions during the course of the trial where witnesses that were scheduled to testify could not be brought forward at the time that counsel anticipated and that also caused the matter to be adjourned earlier in the day. I am not being critical of

anyone when I state these facts, it is a fact of life when conducting a trial that sometimes things happen that a full day cannot be utilized. I raise this because I do not view it as being appropriate that when we look at the length of trial that we count 14 days as being full days of trial. I think that should be adjusted. Because of those part days I view that it would be appropriate in this circumstance to view this matter as taking ten days of trial.

[28] I turn now to the "amount involved", which is the second component under the tariff that this court has to determine, and as I previously indicated, I adopt the formula that I spoke of arising from the earlier decisions and I agree that in order to calculate the amount involved that it is appropriate to take $20,000.00 and multiple it by the amount of trial days. This is a reasonable means of determining the amount involved as contemplated under the tariff where the outcome is entirely or substantially, as in this instance, a non-monetary award. Accordingly, I determine the amount involved for the purpose of the tariff to be $200,000.00.

[29] The third factor that I need to consider is the appropriate scale to apply. Tariff A provides for three possible scales; Scale 2 being the basic scale with the

other two increasing or decreasing the award of costs, depending on the particular factors or complexity involved.

[30] The plaintiffs are seeking the Court to apply Scale 3 which would result in the basic costs being increased by 25 percent, relying primarily on the length of trial.

[31] In my view, there is nothing in these circumstances that would justify a higher scale other than the basic scale being applied. I acknowledge that 14 days is not a short trial, however, it is my view that the length of the trial is adequately taken into consideration, elsewhere in the tariff, where $2,000.00 is added for every additional day of trial. So in this instance, the plaintiff has not satisfied me that the basic scale should not apply. In all respects at trial, and I think it is important for the Court to state this, both Mr. Gillis and Ms. Scott on behalf of Ms. Hatfield, very professionally and efficiently presented the evidence before the Court. There is nothing that I saw in the conduct of the trial, by either side, that would justify costs being adjusted because of conduct. So accordingly, I view that the basic scale should apply.

[32] That takes us to the next calculation. The “amount involved”, $200,000.00, under Scale 2 generates costs of $22,750.00. As I previously alluded to the tariff also indicates that an additional $2,000.00 for everyday of trial should be added. Based on my determination of ten days of trial, that would amount to an additional $20,000.00 for a total under the tariff of $42,750.00, substantially less than the $48,000.00 being claimed by the plaintiffs. However, my analysis cannot finish at that point.

[33] I turn to my discretion to adjust upwards or downwards contained in the Rules from the tariff costs. I asked Mr. Gillis about the actual amount of his legal costs and I appreciate his candour in responding to that question. Mr. Gillis has yet to finalize his account to the plaintiffs. He did indicate however that his actual time, if billed, would far exceed the $48,000.00 being claimed by his clients, and given the nature of the matter, and the time involved I certainly do not doubt this, nor do I find that questionable in anyway. Mr. Gillis further indicated that he has no intention of billing his clients for the full amount incurred, and will be adjusting his bill downward. He indicates that his bill will be in the area of $40,000.00 for his fees. It will be no less than that was his indication.

[34] Clearly, to award the costs sought of $48,000.00 or the tariff costs which I calculated at $42,750.00 would constitute a windfall for the plaintiffs. They would be getting back more than what they are expending, and that is clearly contrary to the intent of the Rules.

[35] I find that the plaintiffs are entitled to party and party costs. Rule 77.01(1)(a) indicates:

> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation.

[36] The plaintiffs are not entitled to full or even nearly full recovery of their actual legal fees. In my view, they are entitled to a substantial contribution to their legal fees, as has been outlined and acknowledged in the case authorities on many occasions.

[37] In my view, $28,000.00, or 70 percent of the minimum bill to be issued by Mr. Gillis is fair and reasonable in the circumstances and constitutes a substantial contribution to costs incurred. Excuse me I misspoke $40,000.00 would be the maximum amount that Mr. Gillis would be issuing in relation to this matter. He indicated that he would not go less than that given the amount of time that he

incurred, but he could not see himself billing more in the circumstances, and I accept his representation that $40,000.00 is the amount that he would be billing in relationship to his legal fees and therefore, $28,000.00 in my view would be an adequate and substantial contribution to the plaintiffs' fees in that regard. To grant more, in my view, would take this matter beyond compensating the plaintiffs for party and party costs and be approaching something akin to solicitor and client costs or certainly something akin to costs higher on Scale 3, which I have already found is not appropriate.

[38] So to conclude, I order that the plaintiffs are entitled to costs as against Ms. Hatfield in the amount of $28,000.00.

[39] The plaintiffs are also entitled to legal disbursements to be taxed. That being said, I want to raise one issue which I anticipate may cause some additional concern for the parties and that is the potential of the plaintiffs claiming the cost of the Cormier Survey that was undertaken as a result of my June 30th decision, as a taxable disbursement. I think it behoves the Court to provide some clarity with respect to that so the parties have one less issue of potential contention between them on that point. It was this Court's intention in reaching the decision that it did,

that the plaintiffs should bear the cost entirely of the survey incorporating the terms of my June 30th, 2010 decision. It is clearly to their benefit that they have a pictural representation of the boundaries of their property, which I found that they satisfied by way of adverse possession, both for their own certainty and with respect to any potential plans they have with respect to that property, either by way of sale or otherwise. As such, they are not to seek recovery of this particular disbursement from Ms. Hatfield.

MR. GILLIS: May I ask a question?

THE COURT: Yes.

MR. GILLIS: Does that apply to the cost that he incurred or that was incurred to produce the plan that was used at trial as well, or is that separate.

THE COURT: No, the only reference that I am making, the survey work that Mr. Cormier undertook as a result of my June 30th, 2010 decision.

MS. HATFIELD: May I speak on that?

THE COURT: Well normally parties do not have the opportunity to ...if it is a question about what I intend Ms. Hatfield by all means I will permit you to ask clarification okay. If you are unclear with what I intend.

MS. HATFIELD: Okay, what I was unclear was why would that include what he had previously done when it was only submitted as a general, as if the

Maders drew it themselves, there was no expert witness, there is nothing to say that what he did was accurate or right when documentation were to be provided to the court before.

THE COURT: I am not going to answer that question directly, but I am going to give you some clarification. When I am indicating that the survey work that was conducted as a result of my June 30th, 2010 decision by Mr. Cormier, will not be a taxable disbursement. In saying that I am in no way passing judgment on what other disbursements that the plaintiffs may seek to claim are appropriate or not. So I think that clarification addresses your concern.

MS. HATFIELD: Yes thank you.

THE COURT: You are welcome. So Mr. Gillis, as I have indicated your clients are entitled to their disbursements to be taxed. You are obviously aware from Ms. Hatfield's comments that she may have some concerns with respect to that as is her right and that will be dealt with in another form. The issues I needed to deal with today with respect to costs are dealt with and again I thank you for your assistance, to both of you, in permitting me to assist you with that today.

J.