IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Conrad v. Bremner, 2006 NSSC 99

Date: 20060329
Docket: SFH OTH 10325
Registry: Halifax

Between:

Diane Conrad

Applicant

v.

Thomas Bremner

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: June 24 and September 14, 2005 in Halifax, Nova Scotia

Decision: October 27, 2005 - Written Decision
March 29, 2006 - Decision on Costs

Counsel: Patrick Eagan, counsel with Diane Conrad
David Hirtle, counsel with Thomas Bremner

By the Court:

[1] My decision of October 27, 2005 awarded costs to Ms. Conrad. I required written submissions on the question of costs if the parties could not settle the amount to be paid. Those submissions have now been provided. The issues arising from those submissions are:

(i) Does the Tariff of Costs and Fees effective September 21, 2004, or the previous tariff, effective January 1, 1989, apply to this award?

(ii) What is the "amount involved" for the purpose of applying the applicable tariff ?

(iii) Should the "amount involved" be adjusted as a result of the factors described in Civil Procedure Rule 63.04 (2) (c) (d),(e), and (g) , or otherwise?

(iv) Was there an "offer to settle" and if so what is its effect on the award?

(v) What are the allowable disbursements?

(vi) What is the appropriate calculation of pre-judgment interest?

(i) <u>Does the Tariff of Costs and Fees effective September 21, 2004, or the previous tariff, effective January 1, 1989, apply to this award?</u>

[2] Mr. Bremner argues that the tariff effective January 1, 1989 is the appropriate tariff. No authority is provided for this proposition.

[3] Justice Goodfellow in *Little v. Chignecto, 2004, NSSC 265* and *Rhyno Demolition Incorporated v. NS Attorney General et al. 2005, NSSC 147* decided that the appropriate Tariff of Costs and Fees to be applied is the tariff existing at the time the Originating Notice initiating the proceeding was filed. He quoted Dickson, J in *Gustavson Drilling (1964) Ltd. v. M.N.R.* :

> The general rule is that statutes are not to be construed as having retrospective [retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the *Act*.

[4] He considered the following comment of Freeman J.A. in *Royal Bank of Canada v. Woloszyn (1992), 110 N.S.R. (2d) 72* to be supportive of his decision:

> The action was begun prior to the amendments to rule 63 of the *Civil Procedure Rules* introducing what are known as the new tariffs. These are applied to all proceedings commenced after January 1, 1989.
>
> The respondents argue that the new tariffs apply because the particular proceeding in question, the chambers application, was commenced after that date. In our view, interlocutory proceedings must take their date from the main action; the old *Rules* apply. The application was not a separate proceeding; it was simply an interlocutory proceeding in an existing action. The learned trial judge erred in applying the tariff.

[5] However, it appears Justice Goodfellow did not consider the implications of Freedman, J.A.'s comment, in this same case, that:

> The question whether the new tariffs apply to interlocutory applications was argued before us. This raises a serious issue, which it is not necessary for us to decide.

[6] I do not consider the decisions of Justice Goodfellow, and other trial division judges who have followed this line of reasoning, to be determinative in this case. The principles of statutory interpretation have an exemption to the rule relating to retroactive effect. The exemption applies to enactments that are procedural in effect. In *Halsbury's Laws of England, 3rd ed., vol.36, p.423* the following appears:

> The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.

[7] In Ontario provisions regarding costs, including tariffs, are considered to be procedural and are given retrospective effect. *Orkin, The Law of Costs, 2nd ed., vol. 2, p. 7-10*. In Nova Scotia Party and Party Costs are governed by the Civil Procedure Rules. Section 46 of the *Judicature Act, R.S.N.S. 1989, c.240* gives authority to the judges of the Appeal Court and judges of the Supreme Court to make "rules of court" and in subparagraph (j) states rules can be made:

> (j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court.

[8] I consider this provision to support the proposition that the rules relating to party and party costs, including the tariffs, are procedural in nature. The right of the client is to be awarded costs. The procedure is the method by which this right is pursued. The procedure is as described in the party and party costs provisions of the civil procedure rules. Because these provisions are procedural they have retrospective effect. The September 21, 2004 tariff applies to this proceeding even though its commencement date was November 21, 2000.

(ii) <u>What is the "amount involved" for the purpose of applying the applicable tariff ?</u>

[9] My decision in this proceeding awarded the sum of $15,000 to Ms. Conrad. It also resolved some issues relating to furniture for which no specific dollar amounts were relevant. I dismissed Mr. Bremner's counterclaim in which he sought the sum of $31,904.00 to be paid by Ms. Conrad.

[10] I have reviewed several decisions commenting on costs, in particular *Landymore v. Hardy (1992), 112 N.S.R. (2d) 410 (T.D.)* and *Campbell v. Jones et al. (2001), 197 N.S.R. (2d) 212*. I have also reviewed the provisions of Civil Procedure Rule 63.

[11] Several principles emerge from the Rule and the case law:

1. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a cost award.

3. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in

presenting or defending the proceeding, but should not amount to a complete indemnity".

4. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

5. In the first analysis the "amount involved" , required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. These I have not reviewed because they are not relevant to this proceeding.

6. The actual dollar amount awarded at trial, for the purpose of determining costs, may be adjusted upward or downward after considering the complexity of the proceeding, the importance of the issues, and the factors enumerated in Civil Procedure Rule 63.04 (2). Also considered in this analysis is an assessment of the risk faced by the successful litigant as a result of the proceeding.

7. The appropriate tariff scale to be used also appears to depend upon the same factors considered in determining the "amount involved". For example, if the dollar amount of the award is large and the case is complex, a higher than basic scale may be used.

8. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.

9. The "amount involved may include pre-judgement interest in an appropriate case. (Campbell McIsaac v. Deveaux, 2005 NSSC 15).

10. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

> 11. If counsel have not provided sufficient particulars of her or his fee or of the other factors to be considered, the judge may then be required to draw upon her or his personal knowledge and experience to determine what is a "reasonable expense" towards which there should be a substantial contribution but not an indemnity.

(iii) <u>Should the “amount involved” be adjusted as a result of the factors described in Civil Procedure Rule 63.04 (2) (c) (d),(e), and (g) , or otherwise?</u>

[12] In this proceeding Ms. Conrad faced the risk not only of losing her claim but also, if Mr. Bremner’s counterclaim succeeded, of an award against her in the amount of $31,904. This is not a consideration that would suggest the “amount involved” should be greater than the $15,000 awarded at trial but it may affect the scale to be used when considering the tariff.

[13] Ms. Conrad suggests that Mr. Bremner’s conduct in refusing to admit he signed the document in question in this proceeding and his evasive and contradictory testimony in reference to the document unduly prolonged both the discovery proceedings and the trial. She also suggests that Mr. Bremner’s counterclaim was improper and vexatious.

[14] Mr. Bremner considers Ms. Conrad’s counsel to have been responsible for unduly prolonging the proceedings as a result of his inefficient and ineffective questioning at discovery and at trial.

[15] While I did comment on Mr. Bremner’s evasiveness in my decision, should this be a reason for adjusting the amount involved? Costs are in themselves a punishment to the unsuccessful litigant. I do not consider that they should be increased due to “conduct” unless that conduct is egregious. I do not consider Mr. Bremner’s conduct to have reached this standard.

[16] There may be cases where it may be appropriate to adjust the “amount involved” or use a higher than basic scale because of the conduct of counsel. This would be a very rare case. These proceedings do not represent that rare situation.

[17] Ms. Conrad requests the “amount involved” be increased or that a higher scale be used because Mr. Bremner’s counterclaim was “unjustified” and there was a late application to amend his proceedings. It is suggested that the amendment,

which added claims for constructive trust and resulting trust, added complexity to the proceedings. Mr. Bremner argues that the cost award should be reduced because his interlocutory application to amend his pleadings succeeded and Ms. Conrad's application to sever the resulting trust and constructive claims from the main action failed.

[18] Mr. Bremner's penalty for filing the counterclaim will be this award of costs. The counterclaim was arguable but the facts as revealed at the trial did not support the counterclaim. The existence of that counterclaim does not justify an increase in the "amount involved" or the use of a higher scale.

[19] Civil Procedure Rule 15.10 requires the costs of amending a proceeding to be paid by the person making the amendment "unless the court otherwise orders". I am not prepared to "otherwise order". While Ms. Conrad's application for severance was dismissed, her claim succeeded and Mr. Bremner's claims for resulting and constructive trust were dismissed. I would not adjust and award because of the dismissal of the severance request.

[20] Mr. Bremner's counterclaim plead unjust enrichment. The latter claims for resulting or constructive trust did not arise from any new facts or circumstances than did the claim for unjust enrichment. I do not consider these claims to have added complexity to this proceeding. These claims are not unusual in the context of a proceeding involving unmarried persons who have lived together in a "common law relationship". There was nothing complicated about the facts of this situation nor in respect to the remaining evidence presented at the hearing. There was nothing novel about the situation nor about the legal principles to be applied.

[21] Mr. Bremner suggests the lowest scale be applied to the award because this matter could have been removed to Small Claims Court when the monetary jurisdiction of that court was increased to $20,000. However, that would ignore Mr. Bremner's counterclaim that exceeded that amount. No adjustment will be made based on this argument.

[22] Ms Conrad's counsel has not provided any information about the professional fees charged to his client and so I must draw upon my personal knowledge and experience to determine what is a "reasonable expense" towards which there should be a substantial contribution but not an indemnity.

[23] I have determined that the basic scale, which provides an award in the amount of $4,000, is appropriate.

(iv) **<u>Was there an "offer to settle" and if so what is its effect on the award?</u>**

[24] This matter was originally scheduled to be heard January 18, 2005. Both counsel requested an adjournment and the matter was rescheduled to be heard June 24, 2005. On June 9th , 2005 Mr. Bremner filed an Interlocutory Application to amend his pleadings. On June 10th, 2005 Ms. Conrad filed an Interlocutory Application to sever. Briefs were filed and both applications were heard on June 21st, 2005. The trial commenced June 24th, 2005. On June 5th, 2005 at 8:26 p.m. Ms. Conrad's counsel faxed to Mr. Bremner's counsel, a letter and a document having the heading of these proceedings and the words "OFFER TO SETTLE (Rule 41A)". The offer was:

> The Plaintiff, Diane Conrad, offers to accept from the Defendant, Thomas Bremner, the sum of Fourteen Thousand Dollars ($14,000.00), all inclusive, in full settlement of her action against the Defendant.

[25] The second page of this document, unsigned by Ms. Conrad's counsel, was first faxed at 8:26 p.m. The signed second page was faxed to Mr. Bremner's counsel at 9:33p.m. The letter accompanying the offer stated:

> Please find attached a Formal Offer to Settle this matter for the all-inclusive payment by your client to mine of $14,000.00. Failing agreement to pay by Tuesday, June 7, 2005, at the close of business, I will be making an application to a Chambers judge to sever your client's Counterclaim from my client's action on the promissory note.

[26] Mr. Bremner considers this to be a time limited Offer because of the above comment found in the cover letter sent with the offer. I do not consider the letter to in any way have limited the time in which the offer could be accepted. There are no limitations on acceptance in the document itself. The letter merely indicates that an application to sever would go forward on a particular date if the offer had not been accepted by that date. The letter did not state that the offer would be withdrawn on June 7, 2005 and I do not interpret the words to have raised that implication.

[27] The offer to settle faxed to Mr. Bremner's counsel is a valid offer to settle to which effect must be given pursuant to Civil Procedure Rule 41 (A) .09. This offer

was made at least seven days before the commencement of the trial. There is no reason to deny Ms. Conrad the benefit of the provisions of this Rule.

[28] The Rule entitles Ms. Conrad to her party and party costs and taxed disbursements to the date of service of the offer to settle and thereafter to taxed disbursements and double the party and party costs. This adjustment is generally achieved by applying a percentage representing the amount of work done subsequent to the service of the offer to the party and party cost award determined appropriate without consideration of the offer.

[29] I consider the date of service of the offer upon Mr. Bremner's solicitor to be Monday, June 6, 2005. As a result only the percentage of services provided by Ms. Conrad's counsel after that date will be applied. The difficulty in this proceeding is that Ms. Conrad's counsel did not appear to keep meticulous time recordings. The parties held discoveries and there were a number of pre-trial appearances none of which appear on the time sheet information provided. The absence of this information can, an in this case likely has artificially inflated the percentage of work performed after the service of the offer. After the date of service of the offer Ms. Conrad's counsel did have to respond to the interim application to amend the proceedings and prepare an application to sever. He appeared in respect to those applications and filed a brief on behalf of his client in response to that filed by Mr. Bremner's counsel. There was a two day hearing in this matter and submissions made in respect to costs. Ms. Conrad's counsel prepared his two witnesses for trial and he reviewed discovery evidence to prepare for cross examination. There was also a brief prepared for the trial.

[30] Based on the material before me I cannot accept, as Ms. Conrad's counsel contends, that 70% of the total time spent on this file occurred after the service of the offer to settle. Rather than require the parties to engage in further detailed reviews of time spent, at additional cost , I will again draw upon my own personal knowledge and experience to determine what is reasonable in a case such as this. Under these circumstances I think it is reasonable to conclude that 25% of the overall time in this matter did occur subsequent to the service of the offer to settle. This will result in an increase in party and party costs by an additional $1000.00 for total party and party costs of $5000.00.

(v) <u>What are the allowable disbursements?</u>

[31] Ms. Conrad is seeking disbursements as follows:

Originating Notice Filing Fee	$150.00
Barristers Stamp	$ 25.00
Process Service	$ 50.00
Couriers	$ 27.50
Long Distance Telephone / Fax	$ 25.00
Q & A Discovery - Sitting	$ 68.75
Q & A Discovery - Transcript	$288.94
Photocopies - 360 @ .25	$ 90.00
Server - Application Filing Fee	$ 53.00
On-Line Research - eCarswell	$ 70.00

[32] Mr. Bremner takes issue with the long distance telephone / fax fee because it is not itemized, the photocopy charge of .25 alleging it should be .10, the Nova Scotia Legal Aid rate, the courier fee, the server and application filing fee for the interlocutory application for severance, the on-line research by eCarswell, and, although this may more properly have been discussed under the issue relating to party and party costs, the application of the HST to party and party costs.

[33] I accept that there have been long distance charges and fax charges incurred in respect to this proceeding and consider the amount of $25.00 to be quite reasonable. I will allow this disbursement.

[34] I do not consider the amount of .25 per copy to be inappropriate nor do I consider the number of copies inappropriate and I therefore will allow the photocopy disbursement charge.

[35] While Ms. Conrad may not have been granted her application for severance she was granted costs in the proceeding overall and I will grant the server application fee in the amount of $53.00.

[36] It is apparent from the file that there were documents that were couriered to Mr. Hirtle's office and although the receipts provided by Sure Courier Services appear to be somewhat confusing I am satisfied documents were couriered and that a fee of $27.50 is reasonable and it shall be allowed.

[37] I have considered the cases provided by Mr. Bremner's counsel in which justices of the Supreme Court of Nova Scotia, at the trial division level, have disallowed an on-line research fee as a disbursement. This rationale underlying these decisions that these expended amounts should be part of general overhead. In my respectful opinion this same comment might be made in respect to long distance telephone and fax fees, photocopying fees and other charges that have long been accepted as appropriate disbursements. There was a time when research involved attendance at a library and a review of print material. There was no means by which to affix a percentage cost of maintaining the library, and its use, to a particular client account. With the advent of computerization an exact relationship can be drawn between the cost of on-line time and research required for each client in respect to each issue researched. Therefore, I consider it appropriate to permit recovery for these fees and I do so in this case in the amount of $70.00.

[38] There are two aspects to Ms. Conrad's claim to have HST applied to her account. The first relates to the HST applied to disbursements incurred when paying a third party account. These service providers must charge the HST. The HST paid to them has generally been considered part of a proper disbursement and recovery includes that sum.

[39] The second aspect is whether HST is to be applied to an award for party and party costs. Party and party costs are to represent a substantial contribution toward but not an indemnity of a party's "reasonable costs" . Therefore they should attract HST in keeping with the indemnification principal. The decisions in Nova Scotia at the trial level are contradictory but I prefer the approach of Justice Hall in *Eaton v. Manning 2003 CarswellNS 152.* In his decision, when considering whether to apply the HST to a party and party cost award, Hall states:

> "25. ... It would be illogical and unreasonable for a Court to fix an award of costs only to have it subsequently reduced or diminished by the imposition of a tax over which the parties and the Courts have no control.
>
> 26. Accordingly, in order to maintain the quantum of the award of costs made by the Court, the unsuccessful party must bear the proportionate amount of costs that the award attracts as part of the other party's expenses.
>
> 27. Accordingly, the party and party costs award is to be increased by 15%."

[40] As a result of this decision Ms. Conrad's costs are accessed as follows:

Amount under tariff A	$ 4,000.00
Additional award pursuant to CPR	$ 1,000.00
Increased by 15% HST	$ 750.00
Disbursements (including HST)	$ 848.19
Total Costs	$6,598.19

(vi) What is the appropriate calculation of pre-judgment interest?

[41] Section 41 (i) of the *Judicature Act 1989 RSNS C240* states:

> "In any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgement is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgement after trial or any subsequent appeal."

[42] Judgement is defined in the Judicature Act to include an order, rule or decree. In my written decision dated October 27, 2005, I awarded pre-judgement interest to Ms. Conrad in the amount of 4% per annum. This is simple interest, not compounded, and it shall be calculated from the filing date of her action which was November 21, 2000 to the date an Order is taken out representing my decisions in this proceeding.

Macdonald, J.