SUPREME COURT OF NOVA SCOTIA

Citation: Corfu Investments Ltd. v. Oickle, 2011 NSSC 223

Date: 20110607
Docket: Hfx. No. 298682
Registry: Halifax

Between:

Corfu Investments Ltd.

Plaintiff

v.

Anna Oickle and Clayton Oickle

Defendants

Judge: The Honourable Justice Peter P. Rosinski.

Heard: March 9, 2011, in Halifax, Nova Scotia

Counsel: Ian Dunbar and Michael Blades, for the Plaintiff
Alex Embree, for the Defendants

By the Court:

Background

[2] On July 15, 2008, Corfu filed an Originating Notice (Action) against Anna Oickle (Oickle) and her son, Clayton Oickle. It alleged that as a tenant (with his mother) Clayton Oickle on November 2, 2005, negligently set on fire the residential tenancy premises they occupied under lease from Corfu.

[3] Clayton Oickle was served with the Originating Notice (Action) in Abbotsford, British Columbia on September 20, 2008. By October 31, 2008, Corfu had obtained a Default Judgment against Clayton Oickle, and had an Execution Order for $57,023.88 and a Judgment in the amount of $56,732.67 registered under the *Land Registration Act*.

[4] On September 11, 2009, Anna Oickle filed a Notice of Defence. In that Defence she pleaded that the matter is in the exclusive jurisdiction of the *Residential Tenancies Act* RSNS 1989 c. 401 and consequently this Court does not have jurisdiction to consider the matter.

[5] On January 18, 2011, Corfu filed a Notice of Motion for Summary Judgment on Evidence, which motion was set to be heard March 9, 2011. On January 28, 2011, Oickle filed a Notice of Motion for summary judgment on Pleadings to be heard on March 9, 2011 (which was amended February 16, 2011).

[6] By letters of September 22, 2009 and January 21, 2011, Oickle specifically alerted Corfu to her argument that the Supreme Court of Canada had commented that the Superior Courts of Nova Scotia had no jurisdiction to consider matters that fell under the *Residential Tenancies Act -Reference re: Amendments to the Residential Tenancies Act* (N.S.) [1996] SCJ No. 13. By Consent Order filed February 9, 2011, Corfu amended its Originating Notice (Action).

[7] In a reserved Decision, after hearing submissions for about 3 hours, I concluded that Oickle had been correct in her assertion that this Court had no jurisdiction to hear Corfu's Action, and I dismissed Corfu's summary judgment application. The matter of costs could not be resolved by the parties - this is my Decision thereon.

Position of the parties

[8] Corfu argues in its written submission, that 750$ costs plus taxable disbursements of the application and action are appropriate. It suggests this is "just" in these circumstances because:

- Oickle took no pre-trial steps other than filing a Defence, and a brief on the Motion;

- No affidavits were filed by either party; thus only oral argument was required;

- The jurisdictional motion dealt with a novel point of law [*Trustee of N.S. Long Term Disability Plan Trust Fund v. Warner* 2006 NSSC 160 (Scanlan, J.); *Citibank Canada v. Begg* 2010 NSSC 95 Bryson, J. (as he then was).]

- Corfu agreed to adjourn its more fact driven and time consuming motion for Summary Judgment on Evidence "to minimize the expense to both parties".

- Oickle was successful on a point of jurisdiction "... no finding in her favour on the merits of the case... Corfu... retains a valid cause of action... simply pursued in the incorrect forum.";

- Ms. Oickle's offer to settle (ie. without costs dismissal in advance of the Motion) is not the kind of "offer" under *Civil Procedure Rule* 10 that has costs consequences;

- While the Motion was determinative, it required no more effort than a typical Chambers Motion, and therefore no multiplier ought to be applied under Tariff "C".

[9] Oickle suggests costs as follows are appropriate:

- Tariff "C" maximum amount 1000$, multiplied by 3 times = 3,000$

(Successful motion for Summary Judgment involving a complex matter of great importance as it also rendered nugatory Corfu's Motion for Summary Judgment)

- Consideration of the rejected settlement "offers" in letters September 29, 2009 and January 21, 2011. = 1,000$

- Filing fees = 59.41$

= $4059.41

Application of law to the facts

[10] Both parties agree that Tariff “C” for Applications in Chambers applies.

[11] *Civil Procedure Rule* 77 contains the general principles in costs awards that should guide my exercise of discretion in this matter.

[12] Basically Corfu and Ms. Oickle differ about whether a multiplier should be applied to the standard range (750 - 1000$) in Tariff “C”.

[13] The penultimate goal is to “do justice” between the parties CPR 77.02(1) by awarding “costs that are just and appropriate” CPR 77 Tariff “C” Guideline 3.

[14] Guideline 4 of Tariff “C” reads:

> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as *certiorari* or a permanent injunction.)

[15] In this case, Oickle's success on its Motion was determinative of not only the Action, but also Corfu's pending Motion.

[16] The matter was legally complex in the sense that it was an intricate issue without direct precedent requiring extra-ordinary preparation time. The briefs filed were infused with a sense of the uncertain state of the law, and this demanded a full 3 hours of argument in Chambers.

[17] In *National Bank Financial Limited v. Potter* 2008 NSSC 213 [2008] NSJ No. 213, Warner, J. cited *The Law of Costs*, (2nd ed.) by Mark M. Orkin (2007) Canada Law Book (looseleaf service) Chapter 2. He noted:

> Orkin identified five purposes for costs awards. Paramount is the principle of indemnification. The others are: to encourage settlement, deter frivolous actions and defences, discourage unnecessary steps that unduly prolong the litigation, and to facilitate access to justice. - at para. 17.

[18] Oickle is clearly the successful party, and did alert Corfu to its precise legal argument twice, which, whether it constitutes “a written offer of settlement made... otherwise” within the meaning of CPR 10.03 or not, still has some significance. Corfu was aware of the precise argument, and decided to take the risk of losing the motion in any event.

Conclusion

[19] I conclude that indemnification should be paramount here, even though the issue was somewhat novel.

[20] An appropriate and just award of costs is 2,000$ plus taxable disbursements of the application and action, payable forthwith.

J.