SUPREME COURT OF NOVA SCOTIA
Citation: Gammell v. Sobeys Group Inc. , 2011 NSSC 190

Date: 20110713
Docket: Bwt. No. 192365
Registry: Bridgewater

Between:

SHANNON DAWN GAMMELL

Plaintiff

v.

SOBEYS GROUP INC., a body corporate

Defendant

Judge: The Honourable Justice Margaret J. Stewart

Heard: January 13, 2011 at Bridgewater, Nova Scotia

Counsel: Mark Raftus and Michael Dull, for the Plaintiff
David Miller Q.C. and Nancy Murray Q.C. for the Defendant

By the Court:

[1] Two cost rulings are sought by the parties. One relates to costs and disbursements on the main action prior to the acceptance of a July 18, 2007 Offer to Settle on October 20, 2010 some 39 months after delivery of the offer and some two days before trial, and the other relates to costs and disbursements on an Interprovincial Subpoena, compelling the attendance at trial of a medical doctor resident in New Brunswick, pursuant to motions under each Province's *Interprovincial Subpoena Act*, SNS 1996, c.1 amended; SNB 1979, CI -13.1.

A. Costs of Action

[2] By way of background, the main action involves a personal injury arising out of the plaintiff's (Gammell) slip and fall event in the defendant's (Sobeys) Bridgewater store in 1998. Gammell commenced an action for damages against Sobeys in 2003. The action was scheduled for trial commencing October 25, 2010. Both liability and damages were in issue.

[3] Offers, inclusive of Offers to Settle under the 1972 *Civil Procedure Rules* (1972 Rules) and informal offers were made by both parties. Sobeys delivered an Offer to Settle, pursuant to Rule 41A of the 1972 Rules on July 18, 2007:

> The Defendant, Sobeys Group Inc., hereby offers to settle the claim of the Plaintiff herein for damages on payment of the all-inclusive sum of $3,000 together with prejudgment interest at 21/2% per annum for a period of five years together with taxable costs and disbursements to the date of this Offer.

The damage portion of $3,000 was reflective of the same informal offers Sobeys made in July and September 2006 and in January 2007. The Offer to Settle remained open for acceptance; however, the plaintiff did not immediately respond to it. The proceedings continued. Three years later in July 2010, the plaintiff made an informal offer and then made an Offer to Settle, a month before trial, on September 23, 2010 which Sobeys rejected by way of letters dated October 12th and 15th, 2010. Having made subsequent efforts in October to attempt to persuade Sobeys to increase its settlement offer by emphasizing the costs being incurred as the case moved closer to trial, plaintiff's counsel on October 18, 2010 requested Sobeys confirmation of calculations which counsel had made based on Sobeys' July 18, 2007 Offer to Settle. The defendant replied in an e-mail that the calculations were correct with respect to general damages and prejudgment interest, but that the plaintiff had “made no allowance for costs to Sobeys subsequent to the date of the offer to be set off against the plaintiff's entitlement

under Sobeys offer." Without any discussion or comment on that point, the plaintiff on October 20, 2010, essentially two full business days prior to the commencement of the jury trial, sent the defendant a written acceptance of its July 18, 2007 Offer to Settle.

Positions

[4] Sobeys claims entitlement to costs between the date of the delivery of the offer (July 18, 2007) and the date of the delivery of the acceptance (October 20, 2010) to be set off against what it agreed to pay the plaintiff under the offer; specifically $3,375.00 (general damages plus PJI at 2 ½ percent for five years) plus taxable costs and disbursements to the date of the offer. Sobeys argues that the 2009 Rules (Rule 10.08 (2) (b)) apply to this issue and clearly mandate this award of costs. In the alternative, Sobeys says that if the 1972 Rules apply, the court should exercise its discretion to still award such costs. Finally, Sobeys argues that if the law of contract governs, its entitlement to costs is a term of the settlement agreement.

[5] The plaintiff argues that the terms of the accepted Offer to Settle are clear and unambiguous. They do not include costs to Sobeys or provide for offset. The 1972 Rules apply to this offer and acceptance, as those are the rules that guide the terms of the Offer to Settle. Alternatively, the transitional rules in the 2009 Rules

should be invoked in order to apply the 1972 Rules to this motion as the 2009 Rules give an unfair advantage to the defendant. Under the 1972 Rules, it is in the court's discretion whether to award set off of costs. That discretion should be exercised so as not to award costs to the defendant in this case because the agreement does not contemplate such an award. In the further alternative, if the 2009 Rules are applied, the court should decline to award costs to the defendant under Rule 10.08(2) (b) because to do so would result in an injustice.

[6] Based on the parties' figures for costs and disbursements, inclusive of the interprovincial subpoena motion yet to be addressed, an award of costs to the defendant by way of set off would result in a judgment against the plaintiff. In the main action, the defendant claims $7,500 costs and $4,128 disbursements and in the interprovincial subpoena motion, Sobeys claims $2,500 costs and $280 disbursements totaling $14,408 less set off of $3,375 general damages and prejudgment interest, and $3,764.18 disbursements minus any duplicated items and over charged fees and costs to be determined by the court. The plaintiff claims $3,375 general damages and pre-judgment interest, $3,764.18 in disbursements and $3,000 Tariff "F"costs, totaling $10,139.18 with no set off and no costs payable on the interprovincial subpoena motion.

Issues

Do the 2009 Rules, specifically, Rule 10.08(2)(b) apply to this accepted Offer to Settle, or is it governed by the 1972 Rules, specifically, Rule 41A.08(3)? Is the defendant entitled to costs? What quantum of costs and disbursements should be allowed?

Analysis

Rule 10.08 states:

Determining costs if formal offer accepted

10.08 (1) A judge who determines costs under an accepted formal offer to settle that was delivered by a party who started a proceeding must award costs to that party, unless an injustice would result.

(2) A judge who determines costs under an accepted formal offer to settle that was delivered by a party against whom the proceeding was started must award to the following party the following costs, unless an injustice would result:

(a) to the party who started the proceeding, recoverable disbursements incurred and a contribution towards the expense of the proceeding until the offer was delivered;

(b) to the party who made the offer, recoverable disbursements incurred and a contribution towards the expense of the proceeding between the delivery of the offer and the delivery of the acceptance.

[7] The meaning of the phrase "formal offer" in this Rule has to be determined in context, especially in the context of the surrounding text. (**Rizzo & Rizzo Shoes Limited** [1998] S.C.J. 2).

[8] The scope provision for Rule 10 - Settlement describes the function of Rules 10.05 to 10.10 as "a formal way to make an offer that may affect how costs are awarded." The use of the word "formal", denotes something that follows a form.

[9] The word "formal" is next encountered in the heading of Rule 10.05(1) "formal offer to settle an action", and repetitively in 10.05(1) through 10.05(5). As Rule 10.01 (1)(a) of the scope Rule predicts, Rule 10.05 prescribes forms under which an offer is to be made.

[10] Throughout Rule 10.05 the phrase "formal offer" is equated with "an offer to settle" in one of the forms prescribed by the Rule.

[11] Rules 10.06 and 10.07 provide for withdrawal or expiry of a "formal offer" and remedies for breach of a "formal offer". In their context, they can only be referring to an offer made in a way prescribed by Rule 10.05. They cannot apply to offers made by some other formal means.

[12] Similarly, Rules 10.08 and 10.09 use the phrase "formal offer". They provide the costs consequences of accepting or rejecting a formal offer. If it were

not enough that the textual context supplies the definition of this phrase, this rule 10.05(1) would provide the necessary connection:

> A party who makes a formal offer to settle under this Rule 10.05 may take advantage of the applicable provisions for costs in Rule 10.08 and 10.09.

[13] A similar connection between "formal offer" as used in the new Rules and offer under Rule 10.05 is made in Rule 77.02(2), which limits the broad discretion for costs to give certainty to the Rules 10.05 to 10.10 regime. It refers to a "formal offer" to settle under Rule 10.05.

[14] The subject of Rules 10.08 and 10.09 is the remedy for making an offer under the 10.05 to 10.10 regime. The textual context and the specific object and language of Rule 10.08 makes it clear that the phrase "formal offer" is used in that Rule to mean an offer under Rule 10.05.

[15] Thus, Rule 10.08 applies to an offer made under Rule 10.05 and not to an offer made under any other formality, such as Rule 41A.

[16] Rule 92 - Transition does not assist Sobeys. The Offer to Settle under Rule 41A was a step taken before January 1, 2009, and the acceptance of a Rule 41A

offer is not a subject dealt with in the new Rules. Therefore, any entitlement Sobeys may have to costs is governed by the 1972 Rules.

[17] Under the heading "Effect of Acceptance", 1972 Rule 41A.08(3) states:

> (3) Where the accepted offer is silent as to costs, and the offer was made by the defendant and accepted by the plaintiff, the plaintiff may tax the party and the party costs of the proceeding to the date when he was served with the offer to settle and, unless the defendant pays those costs within seven (7) days after assessment, issue execution therefor.

[18] In respect of Defendant's costs, the provision does not, nor does any other rule, provide for any claim for costs after the date the plaintiff is served with the Offer to Settle. In this regard, Sobeys submits that the new Rule 10.08(2)(b) which entitles the defendant to costs between the delivery date of the offer and the date of acceptance is "essentially a codification of the policy and practice of the court under the 1972 Rules." With respect to this pronouncement, the defendant refers to no reported cases where costs for this period were awarded to a defendant under the 1972 Rules. Neither of the two cases quoted, **Goode v. Oursen** (1991), 105 N.S.R. (2d) 389 (S.C.T.D.) nor **Annand v. Cox** (1992), 111 N.S.R. (2d) 196 (S.C.T.D.) dealt with accepted Offer to Settle under the 1972 Rules. Rather, they both centred on the effect of offers on costs following trial and emphasized court

use of cost consequences to encourage early acceptance of reasonable Offers to Settle.

[19] Sobeys Offer to Settle is not silent as to costs. It provides the plaintiff with the same cost remedy as Rule 41A.08(3), specifically with taxable costs and disbursements to the date of the Offer to Settle and makes no provision for costs payable to itself subsequent to service of its Offer to Settle.

[20] Any award of costs to Sobeys requires an exercise of discretion. All aspects of costs are always in the discretion of the court (1972 Rule 63.02(1)) and for context, specific to Offer to Settle, Rule 41A.11 provides for broad discretion.

> Discretion of Court:
>
> 41A.11 Not withstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account, any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[21] With the application of the 1972 Rules, Sobeys presses for the exercise of the court's discretion. The plaintiff should not be allowed to wait until the last minute prior to trial in the hope of the defendant increasing its offer in order to avoid costs and then be allowed to accept the offer at the last minute leaving the defendant in the position of having incurred very substantial costs against which it

receives no off set from the plaintiff. "To do so would discourage the making of offers and their acceptance at an early stage rather than promoting the opposite and more desirable objective of having settlements occur as early as possible and with the least expense to the parties." (**Roser v. Huang** (1999) 44 O.R. (3d) 669). If the underlying purpose of settlement offers is to bring litigation to an early conclusion without incurring further costs, the plaintiff should not have the "costs holiday" referred to by Nordheimer, J. in **Roser v. Huang**, supra with the defendant continuing to expend costs, and in this case, substantially all its trial preparation costs. As noted earlier, this specific time period is now addressed through mandatory costs award under 2009 Rule 10.08(2)(b) and overseen by monitoring any "injustice that would result".

[22] Furthermore, Sobeys stresses one of the purposes of awards of costs is to encourage the just, speedy and inexpensive determination of litigation in accordance with the Objects of Rules (1972 Rule 1.03). The acceptance only days before the trial of an offer which had been outstanding for 39 months and after the defendant had incurred essentially all the trial preparation costs is contrary to the object of the rules. This is particularly so in circumstances where, as it argues is the case here, the plaintiff accepted the offer to settle only after extensive, but unsuccessful, efforts to persuade the defendant to increase its offer. In itself, this is

contrary to the policy of the court to encourage offers of settlement and should have costs consequences.

[23] The plaintiff argues foremost the Offer to Settle makes no provision for defendant's costs and there is no reason for the court to exercise its discretion to award same. Indeed, the defendant's conduct should curtail any costs award.

[24] Essential to any exercise of discretion is consideration of the evidence. Plaintiff's counsel in his brief and summation argues Gammell did not needlessly delay accepting the Offer to Settle in the hope of obtaining a better offer given that Sobeys' costs of trial preparation were escalating. Gammell fully intended to go to trial but was prevented from doing so for a number of reasons. One of her key witnesses, Dr. Reid, advised days before trial that he was unable to attend the trial due to illness. She was unable to take the time off work in New Brunswick and attend a two week trial in Nova Scotia. Also, she was unable to afford child care for her two children during the trial. Thus, she was compelled “with hesitation and regret” to accept the Offer to Settle that was still on the table. It, therefore, would be an inappropriate exercise of discretion to apply cost consequences for late acceptance in this case because her acceptance on the eve of trial is excusable for these noted reasons.

[25] The law is clear that a judge should not consider evidence not contained in an affidavit. Affidavits afford counsel the opportunity to cross-examine which, in turn, impacts on the value, reliability, and relevance of the evidence (**Halifax (Regional Municipality) v. Nicholson**, 2009 NSCA 109, at para 24).

[26] The above reasons and comments are in various paragraphs of the plaintiff's brief and reiterated in summation. In essence, as the defendant argues, they are unsworn hearsay or facts not proven by affidavit. The facts asserted do not appear in any affidavit filed. They are inadmissible and the plaintiff has, by citing same, adduced no evidence for consideration. Alerted to the issue prior to hearing, no request for an adjournment was sought. Based on Sobeys' evidence, I find the plaintiff delayed needlessly. She accepted the offer to settle only after extensive but unsuccessful efforts in October to persuade the defendant to increase its offer, specifically citing the defendant's ongoing and escalating trial preparation costs as a reason to increase its offer. In so stating, she revealed the rational behind the late acceptance. It was not sudden and unexpected or driven by third party agenda. Indeed, with the acceptance only days before the trial, the defendant’s evidence reveals that it had incurred essentially all trial preparation costs. Sobeys breaks down the total 152.2 hours of lawyer time (subject to a number of exclusion

caveats) into 25.1 hours pre delivery of its offer and 100.2 hours subsequent its delivery on the main action with only 32.9 hours of that lawyer time occurring pre the trial readiness conference on August 25, 2010.

[27] Turning then to whether Sobeys conduct influences against any exercise of discretion with respect to costs in its favour, I find the argument to be without merit. In this regard, the plaintiff asserts that Sobeys was uncooperative and obstructional in maintaining its position on settlement; firstly, on the basis of refusing to negotiate, thereby not addressing settlement effectively, or at all, while both parties costs escalated and, secondly, on the basis of not filing its defence nor serving its List of Documents until after the plaintiff and a witness had been discovered and some two and one half years after the Originating Notice (Action and Statement of Claim) was issued.

[28] Sobeys offers, both informal and Offer to Settle, were not made in a vacuum. They were subsequent to discovery examination of the plaintiff and her companion in response to the plaintiff's offer of $51,815. Sobeys never wavered in its view that there was no liability and was constant in maintaining its settlement position. As argued, a party in these circumstances cannot be penalized by costs in relation to a position taken in the course of settlement negotiation on the basis of

the position taken in and of itself. Rather, the court can impose such penalties or take such a view of the party's conduct if it has been found that the party acted unreasonably. That determination can be made only when all the facts and circumstances of the case are before the court. Here, the plaintiff accepted Sobeys' Offer to Settle and the trial did not proceed. The verdict which the jury would have reached is unknown. The evidence on liability and damages is not before the court. There simply is no basis upon which the court can conclude, as plaintiff's counsel claims, that Sobeys was uncooperative and obstructional in maintaining its settlement position. Although incurring costs, Sobeys never withdrew its offer to settle. I agree that the basic proposition that a party is always under an obligation prior to trial to pay more, failing which it will be penalized in costs, is without merit.

[29] At no point did Sobeys refuse requests by the plaintiff to file its defence and to serve its List of Documents. There were none nor was concern expressed. Given the circumstances, Sobeys questioned the logic of filing the defence. Rather, than sitting back, Sobeys was proactive in pointing out to the plaintiff, within days of being served with the action that counsel had named as defendants, three companies which had no connection with the claim and had failed to name the proper defendant. Indeed, Sobeys offered agreement that the defendant

proposed by Sobeys was the correct party as to occupation of the property and the operator of the Sobeys Store as at the date of loss.

[30] On September 14, 2005, some two and a half years later, the plaintiff amended the pleadings to reflect same. Six days after the consent order amending the pleadings was taken out, Sobeys filed its defence on September 29, 2005.

[31] Discoveries were scheduled at the plaintiff's initiative. Discoveries were not made conditional upon the filing of the defence or List of Documents. Although certain other additional document production was requested of the plainfiff by Sobeys prior to discovery examination, discovery was not made conditional upon the filing of those documents. No demands from plaintiff's counsel preceded the filing of the List of Documents in May 2007 and no complaint was raised, as to the timing of the filing of the List of Documents. It was pursuant to prothonotary's June 2009 motion to dismiss that the plaintiff's Request for Date Assignment Conference, at the objection of Sobeys, was directed to be filed within the month to avoid the consequence of the motion.

[32] I conclude evidence is such that the court should exercise its discretion to award Sobeys costs of the action subsequent to service of the Offer to Settle in

order that the object of the rules and purpose of settlement offers, as argued, are fulfilled and maintained.

Quantum of Costs and Disbursements

[33] The cost rule under the 2009 Civil Procedure Rules is Rule 77. Among other things, it provides for costs always being in the discretion of the court (Rule 72.02(1)). It provides for the fixing of party and party costs, unless the Judge orders otherwise, 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 Rule 77 (Rule 77.06(1)). It provides that the court may add an amount to or subtract an amount from, Tariff costs (Rule 77.07(1)). It provides that the court may award lump sum costs instead of Tariff costs (Rule 77.08). This latter rule equates to 1972 Rule 63.02(1)(a).

[34] This proceeding was commenced by Original Notice Action and Statement of Claim issued on July 14, 2003. I do not interpret the words "a copy of which is reproduced at the end of this Rule 77", as they relate to Tariff F (Tariff of fees allowed for Solicitor's Services Allowable to a Party Entitled to Costs in a Proceeding which is Discontinued or Settled) in the 2009 Rules changing the

rational expressed by Moir, J. in **Bevis v. CTV Inc.,** [2004] N.S.J. No. 454 at para. 7 as to why the 1989 Tariff of Costs and Fees applies when an action is commenced, as here, before the September 2004 Tariff revisions became effective. The 2009 Tariff heading remains "Tariffs of Costs and Fees Determined by the Costs and Fees Committee to be used in determining party and party costs". (emphasis added)

[35] Under the 1989 Tariff C, costs allowable when a proceeding has been settled invokes Tariff C and its itemized assignment of fees to various items and events in the proceeding to arrive at party-party costs. The Offer to Settle allows for taxable costs and disbursements to the date of the offer for the plaintiff. The 1989 Tariff C individual tariff items were not addressed by the plaintiff. Rather, the plaintiff applied the 2004 and 2009 Tariff F in arriving at a proposed cost award of $3,000. Sobeys pressed for the appropriateness of the 2004 Tariff in relation to the plaintiff and also expressed in its brief that it "is content to proceed under the 2004 Tariff".

[36] The amount involved for purposes of taxation is $3,000 being the settlement amount in the Offer to Settle without either disbursements or prejudgment interest.

[37] As noted by Coughlan, J. in **Awa v. Cumberland Health Authority**, supra @ para. 27:

> "While costs are in the discretion of a judge considering all of the relevant factors in the particular proceeding, a party accepting an offer could reasonably consider costs would be on the Tariff scale for settled proceedings."

[38] Under the 1989 Tariff C, bearing in mind the period covered by the Offer to Settle, individual tariff items may, being generous, amount to $1,000 and it is unlikely any of the criteria set out in note 4, resulting in a $750 increase in the fee are met. Under both 2004 and 2009 Tariff F for a settled proceeding, the amount of tax costs on a claim "up to $25,000" is "not more than $3,000." The level of the settlement "does not necessarily preclude an award of the maximum in a claim where a lesser amount is involved. It depends on the totality of the circumstances." (**Roshanimeydan v. Mina Developments Ltd.** 2006 NSSC 39).

[39] In my view, the level of taxed costs that would have been available to the plaintiff at the time of the offer, if accepted, would be a maximum of $1,500. I tax and allow same to the plaintiff. Disbursements of $3,354.32 plus $409.86 HST on the disbursements totaling $3,764.18 are claimed by the plaintiff. Disbursements are fixed at $2,578.57 which reflects a $300 deduction for a previously reimbursed medical report fee, a $156.87 pre action ambulance expense deduction and a 25%

reduction of photocopy, courier, postage and facsimile expense to account for expenses pertaining to the client that were not differentiated in plaintiff's bill of costs.

[40] The court may resort to its discretion under the rules and order a lump sum. Lump sum costs are typically awarded where the basic award of costs under the tariff would be inadequate to serve the principle of a substantial but incomplete indemnity. Moir, J. elaborated on and summarized considerations with respect to lump sum awards in **Bevis,** supra @ para. 13. In order to arrive at an appropriate lump sum, he stated;

> (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

[41] As some indication of the defendant's solicitor-client costs, the defendant detailed the various steps taken in the action chronologically both prior to and subsequent to service of Sobeys Offer to Settle, on July 18, 2007 through to acceptance on October 22, 2010. Sobeys also submitted the following schedule of

hours worked by Sobeys lawyers from commencement of action to the October 22, 2010 acceptance apportioned among specific time periods, as exhibited in counsel's affidavit.

DATE (From - To)	STEP IN ACTION	HOURS	CUMULATIVE HOURS AFTER SERVICE OF OFFER TO SETTLE
January 14, 2003 - July 18, 2007	Commencement of Action to Sobeys Offer to Settle	25.10	
July 19, 2007 - August 5, 2009	Sobeys Offer to Settle to Date Assignment Conference	13.90	13.90
August 6, 2009 - August 25, 2010	Date Assignment conference to Trial Readiness Conference	19.00	32.90
August 26, 2010 - September 24, 2010	Trial Readiness Conference to Pre-Trial Conference	24.00	56.90
September 25, 2010 - October 1, 2010	Pre-Trial Conference to October 1	4.00	60.90
October 2, 2010 - October 8, 2010	Week of October 2 to 8	16.70	77.60
October 9, 2010 - October 15, 2010	Week of October 9 to 15	14.30	91.90
October 16, 2010 - October 22, 2010	Week of October 16 to 22	8.30	100.20

[42] The 125.3 hours set out in the table is broken down into 25.1 hours of work prior to service of Sobeys' offer and 100.2 hours of work between service of the offer and acceptance of the offer. The hours represent work by lawyers only; do not include the hours worked on the interprovincial subpoena motion; do not include hours worked by Article Clerks or summer students on the file and reflect the time of one lawyer only when two attended at the same activity.

[43] Sobeys stresses that it cannot be accused of having undertaken substantial trial preparation efforts long in advance of the trial. I agree. Indeed, of the 100.2 hours, only 32.9 hours were expended between the offer to settle and the trial readiness conference on August 25, 2010, some two months before trial. Trial preparation, however, had been completed when the plaintiff accepted Sobeys offer to settle just two working days before trial.

[44] A modest hourly rate of $200 not particularized to Sobeys counsel's fee or seniority results in solicitor-client costs for the period subsequent to Sobeys offer to settle being in the $20,000 range.

[45] Sobeys in proposing a lump sum cost award of $7,500 as appropriate cites a series of factors for this conclusion - the number of lawyers hours worked subsequent to service of Sobeys offer; both liability and damages being in issue; essentially all of Sobeys' pretrial preparation had been completed by the time the offer was accepted on the eve of the trial and a very significant portion of Sobeys' pretrial preparation costs could have been saved had the offer been accepted only a short time earlier in late August.

[46] In the unique circumstances of this case, neither the old or new tariffs with a costs amount of $3,000 would provide a substantial indemnity to Sobeys. The fact that a very significant portion of Sobey's pretrial preparation costs could have been saved had the offer been accepted two months earlier in late August, adds an impetus toward a lump sum. On the evidence, the delay in acceptance of the Offer to Settle was unwarranted and unnecessary and purpose orientated.

[47] I conclude that this is an appropriate case for the exercise of judicial discretion to order a lump sum costs award of $6,500.

[48] Sobeys seeks $4,127.64 for disbursements subsequent to the Offer to Settle and while the plaintiff questions the expenses relating to enlargement of various exhibits and witness fees, I conclude the disbursements listed are acceptable bearing in mind the acceptance occurred two days before the commencement of a jury trial.

B. Costs of Motion Ordering Interprovincial Subpoena

Background

[49] On August 4, 2010, the plaintiff sent the defendant a package of medical records with covering letter from Dr. Paul Postuma dated July 2, 2010.

[50] On August 25, 2010, defendant's counsel wrote requesting advice as to what, if any use, plaintiff's counsel intended to make of Dr. Paul Postuma's July 2, 2010 letter wherein the doctor stated:

> "I would note that I have personally only ever seen Ms. Gammell, on one occasion, on February 28, 2007. She did not, at that time, disclose anything pertaining to the accident you mention in your letter, nor any sequelae related to the same."

No response was received.

[51] The plaintiff's list of exhibits exchanged on October 5, 2010 did not include Dr. Postuma's letter. Sobeys learned that admission of the letter was a matter in issue on October 13, 2010 when plaintiff's counsel replied to Sobeys' counsel's earlier letter of same date proposing agreement on admission of the letter without formal proof. Unless a"trade off" occurred with Dr. Corrina Golding's medical records and report also going in by consent, without the need to call her, then the defendant was advised by plaintiff's counsel to "take whatever steps it sees fit to enter this evidence, i.e., calling Dr. Postuma."

[52] Dr. Golding was scheduled to testify. She was listed as a witness that the plaintiff intended to call in the plaintiff's July 30, 2009 Request for Date Assignment and included in the plaintiff's August 20, 2010 list of trial witnesses and her medical records and report were included in the plaintiff's list of exhibits.

[53] The trial was due to commence Monday, October 25, 2010.

[54] On Friday, October 15, 2010 Sobeys requested and received a special chambers appearance and moved for an Interprovincial Subpoena requiring Dr. Paul Postuma of Quispamsis, N.B. to attend court in Bridgewater on October 28, 2010 to provide evidence at the trial. Notified and in receipt of the documentation, plaintiff's counsel did not participate in person or by phone or seek an adjournment. There was no suggestion that the Interprovisional Subpoena criteria could not be met.

[55] The motion compelling the attendance of Dr. Paul Postuma at trial in Bridgewater, N.S. on October 28, 2010 required Sobeys' counsel to attend in the Supreme Court of Nova Scotia on Friday, October 15, 2010 and then to perfect same as an Order of the New Brunswick Court of Queens Bench on Monday, October 18, 2010 by motioning for receipt and adoption of the issued subpoena,

with accompanying certificate, per the October 15, 2010 Nova Scotia Interprovincial Subpoena Order. Considering the evidence and hearing no objection that Sobeys was acting unreasonably, or any alternatives, I certified that Dr. Postuma's attendance was "necessary for the due adjudication of the proceeding and… is reasonable and essential to the due administration of justice in the province of Nova Scotia."

[56] Urgency flowed from the required ten days notice to a witness in advance of trial under *Interprovincial Subpoena Act* SNB 1979, c. I-13.1. It necessitated an October 18th notice to the doctor.

[57] The New Brunswick portion of the motion, unlike Nova Scotia's special chambers request, necessitated two court appearances. Although ex parte, Justice McLellan, focusing on concerns about adequacy of witness fees prescribed by the regulations under the Act (supra) and Dr. Postuma's short notice and indeed, the reason behind the necessity of his appearance directed moving counsel to contact and advise plaintiff's counsel of the additional $1,800 compensation for income loss, together with witness fees totaling $1,968 as well as door to door transportation costs between residence and trial location that he intended to order payable to and for Dr. Postuma. Justice McLellan's stated intention in wanting this

communicated to counsel was to see if the costs reality would "encourage opposing counsel to change their position that had made Dr. Postuma's attendance necessary."

[58] In essence, the best part of the day, certainly more than half a day was consumed presenting to the court, receiving and following up with directions from the court and then relaying counsel's response or lack thereof to the court and receiving the court's direction for the final order.

[59] The combination of the Nova Scotia appearance and the New Brunswick perfection appearance resulted in the sought after order. The subpoena and conduct money were served on Dr. Postuma the evening of Monday, October 18, 2010 in compliance with the Act.

Positions

[60] Sobeys submits plaintiff's counsel's refusal to agree to admit Dr. Postuma's July 2, 2007 letter was unreasonable and unjustified and that in the circumstances, without a viable explanation justifying plaintiff's counsel's refusal, Sobeys acted reasonably in motioning for and obtaining the Interprovincial Subpoena.

[61] Referencing the just, speedy and inexpensive determination of every proceeding object of the Rules (Rule 1.01), Sobeys stresses the reduced party costs and trial time that flows from encouraging agreement between counsel for the admission of documents without calling a witness in formal proof of them when there is no dispute. Failing to admit something that should have been admitted and having to take steps in a proceeding because the other party unreasonably withheld consent are factors Sobeys argues that should be taken into account on assessment of tariff costs on a motion, pursuant to the court's general discretion just as they are after trial of the action or hearing of an application (Rule 77.02(2)). Basically, the parties are expected to make reasonable agreements in order to meet the objective of the Rules. Accordingly, serious costs consequences should follow unreasonable refusal to do same.

[62] Sobeys submits that, prima facie, the letter should have been admitted by agreement given;

1) That it was authored by a family physician consulted by the plaintiff;

2) Was provided by plaintiff's counsel to defendant's counsel;

3) Contains a simple statement of fact with no opinion or impression stated therein;

4) Agreeing to admit it, as opposed to the letter and the statement of fact being provided by Dr. Postuma at trial, creates no prejudice to the plaintiff unless the plaintiff contests the truth of the statement of fact set out therein and although not shared with the defendant's counsel, the plaintiff did not intend to disagree with the content.

5) Given Dr. Postuma's residence, the costs of securing his attendance, both in respect of solicitor's costs and disbursements, witness fees, loss of income, and travel expense claims payable to Dr. Postuma, were substantial.

6) And finally, during the perfection of the motion in New Brunswick, the Justice by providing plaintiff's counsel with an opportunity to resile from his position by directing the costs be brought to his attention, was making a comment on his view of the reasonableness of the refusal to omit the letter and he never heard otherwise.

[63] In the process of refusing to admit Dr. Postuma's letter, plaintiff's counsel proposed a "trade off" of his agreement to admit Dr. Postuma's letter in exchange for Sobeys' agreement to admit Dr. Golding's medical records and report without calling either to testify. Sobeys submits its refusal to accept the trade off did not justify plaintiff's counsel's refusal to admit Dr. Postuma's letter. The trade off proposal itself was unreasonable and should not be a factor in determination of the

costs of the motion. In support, Sobeys argues three fold. Firstly, there is no connection between the the issue of Dr. Postuma's letter being admitted and the waiver of the defendant's right of cross examination of Dr. Golding. The characterization of plaintiff's counsel refusal to admit Dr. Postuma's letter must stand on its own. Secondly, if as submitted, it was unreasonable for plaintiff's counsel to refuse to admit Dr. Postuma's letter, the refusal could not be cured by the offer of the "trade off". Thirdly, even if there was some relevance to the "trade off" Sobeys agreement to waive cross examination of the plaintiff's family physician would be completely disproportionate to the benefit of having Dr. Postuma's letter admitted by agreement.

[64] Furthermore, Sobeys submits it is not open to plaintiff's counsel to now argue that it was unreasonable and unnecessary for Sobeys to seek an Interprovincial Subpoena and costs thereof. Given plaintiff's counsel's failure to object to the motion at both stages while repeatedly advised of Sobeys intention to seek costs and given the certification of the court declaring the necessity of Dr. Postuma's appearance for due adjudication, any issue of reasonableness and necessity of the motion for the subpoena is *res judicata*.

[66] Finally, Sobeys vehemently submits the plaintiff is not entitled to any reduction of costs because of Sobeys and counsel's alleged conduct.

[67] It is the Plaintiff's position that no costs or disbursements related to the Interprovincial Subpoena motion are properly payable to the defendant.

[68] The plaintiff submits that as a "foundational" point she can present her case as she sees fit and should not be forced into unreasonable agreement by the defendant. She did not propose to call Dr. Postuma to testify as there was absolutely no utility to her case to do so. There was no need to call the doctor as a witness as there was an extremely small amount of probative evidence to gain by doing so and she did not intend to disagree with Dr. Postuma's letter and the cost to arrange the doctor's attendance was high. Upon review of Dr. Golding's records, she also had limited utility to the plaintiff's case at trial.

[69] Furthermore, the plaintiff submits that the court could have accepted Dr. Postuma's letter as a business record exception to the hearsay rule and ascribed whatever weight it wished to give it.

[70] The plaintiff argues she reasonably proposed that Dr. Postuma's letter be entered by consent at trial if the defendant agreed to enter Dr. Golding's chart records and report by consent as well, thereby saving both parties and the court time and expensive out of province witness appearance fees. The proposal was a reasonable evidentiary and trial streamlining "trade off". The defendant's refusal to agree was unreasonable and the costs Sobeys incurred pursuing the Interprovincial Subpoena were unnecessary.

[71] Finally, the plaintiff submits the defendant does not come to court "with clean hands" as it refused to present its identified liability witnesses unless they were called on the first day of trial when the plaintiff was due to start its case - "ostensibly to make-out-of-assigned - order inroads with the Trier of fact."

Law

[72] In compliance with Rule 77.05, the provisions of Tariff C of 2004 Tariffs of Costs and Fees apply to this motion, unless the judge hearing the motion orders otherwise. Tariff C provides for costs on a motion of one hour or less in the range of $250 - $500 and on a motion of more than one half a day but less than one day in the range of $1,000 - $2,000. Guideline (3) of the Tariff provides:

> In the exercise of discretion to award costs following an application, a judge presiding in Chambers, notwithstanding this Tariff C, may award costs that

> are just and appropriate in the circumstance of the application. (In the context of the Rules "application" is read as "motion".)

Costs are always in the discretion of the court (Rule 77.02(1) and (2); Rule 77.07(1); Rule 77.08) and are not limited to Tariff C table amount.

Anaylsis

[73] Sobeys requested agreement on the admission of Dr. Postuma's July 2007 letter without formal proof. I am at loss why plaintiff's counsel in the circumstances did not appreciate a refusal would result in cost consequences flowing from the necessity of the interprovincial subpoena motion.

[74] Other than the comment of wanting to control her own case, no submission was made as to why it was unreasonable for Sobeys to request such an admission. If indeed, the plaintiff did not intend to disagree with Dr. Postuma's letter, as counsel states in argument, then one is left to query why did plaintiff's counsel refuse to agree to the admission of the letter, thus forcing Sobeys to incur the motion costs.

[75] The plaintiff took the position that unless there was a "trade off" and both Dr. Postuma's letter and Dr. Golding's medical records and report were admitted by

agreement then the defendant could take whatever steps it saw fit to enter Dr. Posutma's letter. In stating same, only one specific; i.e., call the doctor was cited by the plaintiff. It left the defendant, in my view, with no alternative but to proceed with the Interprovincial Subpoena motion.

[76] I agree with defendant's counsel that even if "trade off" has some relevance, it was an unreasonable request. The waiving of cross examination of the family physician was completely disproportionate to the benefit derived from Dr. Postuma's letter being admitted by agreement. To expect the defendant to waive cross examination of Dr. Golding, the plaintiff's family physician and primary health care giver during the seven years following the event, for a one time simple statement of fact forthcoming from Dr. Postuma was obviously not a professionally viable choice. It had nothing to do with the plaintiff's inappropriate labels of the defendant being uncooperative and obstructionists for refusing to agree to the plaintiff's last minute request to waive the attendance of Dr. Golding twelve days away from trial, and after numerous representations from the plaintiff that she would be called as a witness.

[77] Dr. Postuma's February 28, 2007 letter is a single statement of fact with no mention by the plaintiff of the fall or any alleged continuing pain and discomfort.

It is probative going directly to the central issue of credibility when contrasted with complaints reported by Dr. Reid, an independent medical examiner arranged by plaintiff's counsel, on March 20, 2007, only twenty days later.

[78] As argued, Sobeys counsel had no assurances that the plaintiff would acknowledge that she saw Dr. Postuma on February 28, 2007 and that when she saw the doctor, she made no reference to an on going pain which she attributed to the fall at Sobeys. Defendant's counsel had no assurance that the facts set out in Dr. Postuma's letter would not be an issue in some way at trial. Although specifically queried, plaintiff's counsel did not offer any stipulation as to plaintiff's testimony on the point. No undertakings were given. The logical conclusion from the plaintiff's counsel's refusal to admit the letter was that these facts would be in issue. The only means of assuring Dr. Postuma's letter would be tendered in evidence at the trial for proof of its contents was to move for the Interprovincial Subpoena. Refusal to admit Dr. Postuma's letter, rendered the motion for an Interprovincial Subpoena necessary and reasonable.

[79] If, as argued by the plaintiff, it was so obvious that Dr. Golding's evidence would be of only marginal, if any, assistance and if it was so patently unreasonable

to require her to attend, one has to ask why was the request made at the last minute and only then, in the context of the so called tradeoff with Dr. Postuma's letter.

[80] The defendant's refusal to admit Dr. Golding's records and report by agreement and decision to admit Dr. Postuma's letter by formal proof in the circumstances of the plaintiff's refusal were justifiable, reasonable and indeed necessary. Indeed, the reasonableness and necessity were determined at the hearing of the motion.

[81] It was never open, as suggested by plaintiff's counsel, to the defendant to tender the letter in evidence as a business record. Timing of this argument aside, the letter fails to meet the criteria of business record and even if it did, it could not be tendered as such without calling a witness in proof , unless by agreement, and none was offered. Similarly, despite counsel's submission otherwise, the letter was not available for cross examination purposes without being authenticated and given that it was written hearsay could not be put to the plaintiff or tendered for proving the truth of the contents of the letter.

[82] The plaintiff never reassessed her position even when confronted with the New Brunswick justice's pause in the proceeding so his response to the motion

and direction re necessary expenses could be considered in advance of a ruling. It is reflective of his assessment of the reasonableness of the defendant's request.

[83] The plaintiff's equity argument for no relief, centring around the defendant not coming to court with "clean hands" is fatally flawed in its premise and given context of such an assertion should have been withdrawn upon consideration of the defendant's written submissions. As noted in the defendant's brief, such an allegation amounts to a claim that counsel has violated conscience or good faith, or has committed acts of fraud, misrepresentation, illegality, unfairness or is attempting to take advantage of one's own wrong (**Black's Law Dictionary** (6th Ed.) and **Spry, Equitable Remedies**, 5th Ed. (N.S.W., **The Law Book Co. Ltd.,** 1997 p. 5).

[84] The plaintiff asserts Sobeys "refused to present identified Sobeys liability witnesses unless they would be called on the first day of trial which was the start of the plaintiff's case to present, ostensibly to make-out-of-assigned-order inroads with the Trier of Fact." Sobeys simply subpoenaed two of its listed liability/employee witnesses for the first day of trial, made no declaration as to when they would be called, made no modification to the subpoena provision advising of the need to wait and return on adjournment as directed, made no

statement whatsoever that it would be calling them on the first trial day as part of its case in advance or during the plaintiff's case and neither sought nor received any such order of presentation from the presiding judge. Sobeys request to reassess the assertion went unheeded.

[85] Sobeys minimized the plaintiff's exposure to $3,393 in disbursements, by purchasing a fully refundable airfare for Dr. Postuma and requesting of, and receiving from the doctor, the expenses paid to him under the New Brunswick order.

[86] I conclude costs of $2,500 plus disbursements of $248.07 addresses not only the time involved and urgency element of the motion; but, also the unreasonable focus both on the trade off and the insistance, in the circumstances of subpoenaing the doctor, as well as unwarranted references to conduct.

C. Conclusion

[87] In the final outcome, the plaintiff is entitled to damages of $3,375 and to recover costs against the defendant in the amount of $1,500 plus disbursements in the rounded amount of $2,580. The defendant is entitled to recover costs against the plaintiff in the amount of $6,500.00 for the main action, plus disbursements of

$4,128 and $2,500 for the interprovincial motion plus disbursements of $248. With set off, the result is that the defendant is entitled to recover from the plaintiff the difference of $5,921.

J.