SUPREME COURT OF NOVA SCOTIA
Citation: Shea v. Bowser, 2012 NSSC 10

Date: 20120109
Docket: Hfx. No. 348548
Registry: Halifax

Between:

James David Shea, Linda Shea

Applicants

v.

Loyal F. Bowser, Wendy Lynn Bowser

Respondents

Judge: The Honourable Justice Peter P. Rosinski.

Heard: October 18, 20, 2011, in Halifax, Nova Scotia

Counsel: D. Mark Gardiner, for the Applicants
Myra Jerome, for the Respondents

By the Court:

Introduction

[1] The Bowsers were successful as Respondents in a Chambers application which was heard for a full day on October 18, and a half day on October 20, 2011 - see 2011 NSSC 450. They claim solicitor client costs, or in the alternative costs under Tariff "C" of $3000 to which they say a multiplier of four should be applied for a total of $12,000 costs plus disbursements of $302.75. The Sheas in response argue this is not an exceptional case warranting solicitor client costs, yet agree that Tariff "C" should apply to an amount of $2750 to which a multiplier of two should be applied for a total of $5500 plus disbursements.

Background

[2] On May 12, 2011, the Sheas filed a Notice of Application in Chambers. Included therewith was the Affidavit of the Sheas sworn November 23, 2010, comprising twenty-three paragraphs and Exhibits "A" through to "U". Mr. Gardiner indicated that "one full day" would be required to hear the matter. A review of the file confirms that the Bowsers received advice from the scheduling

office of this court on May 16 that the hearing had been set for June 23, 2011. Ms. Jerome advised scheduling on May 20, that she would be leaving the country for most of the summer beginning June 24, 2011 and that the hearing would take longer than just one day. By June 6, an email from Mr. Gardiner confirmed he and Ms. Jerome had agreed that two days should be sufficient. Ultimately, they agreed to have the matters heard on August 23 and 25, 2011. Ms. Jerome's June 22 email suggested that Mr. Gardiner was "willing to wait for our Notice of Objection until July 29, 2011".

[3] Those dates were then adjourned to September 20 and 21, 2011, and further adjourned to October 18 and 20, 2011.

[4] On September 14, 2011, the Bowsers faxed a Notice of Contest and their Affidavit sworn September 13, 2011 to the court and filed hard copies thereof on September 16, 2011. Those were initially rejected by court staff and were re-filed on October 5, 2011. Notably, the Sheas did not object to the late filing of the Bowsers' Notice of Contest consistent with their earlier indications. On October 13, the Sheas filed a Rebuttal Affidavit sworn on October 12, 2011.

[5] At the hearing, aerial photographs were introduced as exhibits covering the years 1964, 1974, 1980 to 1992 and 2001. Survey plans dated September 8, 1962, September 5, 1966 and August 3, 1972 as well as September 4, 1991 were introduced. An LRIS form 6A dated June 26, 2007 was also introduced as an exhibit - being a correction to the parcel register respecting PID # 40058349 - the Bowser property.

[6] Both Mr. and Mrs. Shea and Mr. and Mrs. Bowser were cross examined on their affidavits. Pre-hearing written submissions and post hearing written submissions were received by the court.

Analysis

[7] In their Notice of Application in Chambers, the Sheas requested a declaration that there were entitled to a right-of-way across the land of the Bowsers and were seeking a mandatory injunction and a permanent injunction as well as damages for the loss of use and enjoyment of their properties and were seeking costs on a solicitor client basis.

[8] In their Notice of Contest, the Bowsers argued that the application should be dismissed because, while the Sheas may have an express grant of a right-of-way, "its location is not defined in such deeds or subdivision plan of [Nova Scotia Land Surveyor] Wedlock". They contested that the right-of-way was ever located on their property. They suggested that the Sheas express right-of-way may actually be located over an adjacent property. In their affidavit they concluded at paras. 29 and 30:

> We are asking for an award of general damages for loss of enjoyment of our property and stress to Wendy Bowser's health due to the harassment by the Applicants from 1995 to the present, in the amount of $5000.
>
> We are asking for an award of costs and any other remedy this Honourable Court finds appropriate in this matter.

[9] "Costs" are covered in *Civil Procedure Rule* 77.

Solicitor Client Costs

[10] Rule 77.01(1) reads:

> 77.01 (1) The court deals with each of the following kinds of costs:

> ...
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;

[11] Rule 77.03(2) reads:

> (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

[12] In a very recent decision, Justice LeBlanc of this Court in *Ackermann v. Kings Mutual Insurance Company* 2012 NSSC 3, in the context of a trial, discussed the principles associated with the awarding of solicitor client costs at paras. 2 - 8.

[13] Such costs are intended to disassociate the court from a party's conduct, and cross from the usual purpose of partial indemnification into the realm where the circumstances require costs be assessed as punishment to one of the parties. As the Supreme Court of Canada has indicated such costs "are generally awarded only

when there has been reprehensible scandalous or outrageous conduct" - *Young v. Young* [1993] 4 SCR 3 at para. 251.

[14] In their submissions, the Bowsers suggest such costs are appropriate here because of:

> ...the undisputed facts that the Applicants have been harassing the Respondents for over 16 years, including using quasi-criminal means during civil law negotiations, that the Applicants purposefully omitted certain critical information in their claim, and that they started this action with no colour of right, no preparation of an Abstract of Title, and no attempt to rectify their claimed rights while Gladys Bowser was alive...
>
> - P. 1 of December 8, 2011 letter constituting post hearing submissions.

[15] It is true that this dispute has been acrimonious, and that the Sheas omitted some important information in making their claim [for example there were no certified copies of the deeds from the Conrods into the Sheas, or from Gladys Bowser to Lester Smiley, nor was the correction to the parcel register entered by Mr. Kent Rogers in 2007 acting for the Sheas expressly brought to the attention of the court - nor was there an abstract of title or survey plan undertaken to determine the nature and extent of any right-of-way over the property of the Bowsers].

[16] On the other hand, I note that the litigation herein started in May 2011, was generally conducted in a civil fashion as evidenced for example, by the Sheas' consent to a late filing of the Notice of Contest by the Bowsers, and the Bowsers' consent of the late filing of the Rebuttal Affidavit of the Sheas. Ultimately, the Sheas, by omitting some important information in making their claim, undermined the strength of their claim. This should not be seen as outrageous, scandalous or reprehensible conduct.

[17] This is not one of those rare cases where solicitor client costs should be awarded.

Party and Party Costs

[18] Rule 77.01(1)(a) and 77.02(1) and 77.03(3) make it clear that the winning party in the litigation is presumptively entitled to partial compensation of their expenses of litigation. Customarily this has been viewed as a substantial, but not complete, indemnification of their expenses of litigation. As in many other cases, the dispute in this case concerns to what extent there should be partial compensation.

[19] The Bowsers suggest $12,000 plus disbursements whereas the Sheas suggest $5500 plus disbursements.

[20] I agree that Tariff "C" is the appropriate guideline - see Rule 77.06(3). I keep in mind Justice Murphy's observations in *MGL Consulting and Investments Limited v. Perks Coffee Limited* 2010 NSSC 426, that the Tariff "C" chambers scale must be appreciated as having had its origin under the Old Rules [pre-January 1, 2009]. Those amounts relate back to September 1, 2004. Moreover, at the time of his decision, the new Rules did not distinguish between applications in chambers and applications in court as they do now. Generally, he noted at the time that applications in chambers should attract an award under Tariff "C", and that where the main issue is not an identifiable monetary claim, it is best only as a last resort to consider trying to assess a monetary amount for such hearings in order to use that amount as a basis to calculate a cost award.

[21] Tariff "C" (para. 3), reminds the court to "award costs that are just and appropriate in the circumstances of the application". I find that this Chambers application was determinative of the entire matter at issue in the proceeding, and

consequently it is appropriate for me to consider a multiplier of the maximum amounts in the range of costs set out in Tariff “C”.

Conclusion

[22] In this case, the application consumed one full day on October 18 and effectively the morning of October 20, 2011 by ending at 10:45 a.m. I conclude that effectively the hearing consumed 1 ½ days. Therefore I find $3000 is the appropriate base amount.

[23] I conclude that the matter was sufficiently complex and important to the parties that it required a significant amount of effort to prepare for, conduct the hearing and to review the evidence to be able to provide briefs to the court post hearing. Without attaching undue weight to the statement of account dated December 7, 2011 of Ms. Jerome, it does seem to be a reasonable reflection of the effort involved.

[24] In my view, as appropriate partial compensation toward the Bowsers’ expenses of litigation, and to do justice between the parties here, I should apply a

multiplier of two for a total of $6000 in costs. Rule 77.10 allows me to include "necessary and reasonable disbursements", and there having been no apparent dispute about those, I will allow the claimed amount $302.75 plus HST as the disbursements amount.

[25] I would request that the Bowsers prepare a draft order for my signature.

J.