SUPREME COURT OF NOVA SCOTIA

Citation: Northern Pulp Nova Scotia Corporation v. D.R. Brenton Ltd., 2012 NSSC 46

Date: 20120126
Docket: Pic No. 340973
Registry: Pictou

Between:

Northern Pulp Nova Scotia Corporation

Plaintiff

v.

D.R. Brenton Limited, carrying on business as
Don Breton's Fire and Safety Equipment and
Don Brenton's Fire Protection Equipment

Defendant

DECISION ON COSTS

Judge: The Honourable Justice Patrick J. Murray

Heard: September 22, 2011, in Pictou, Nova Scotia

Written Decision: January 26, 2012

Counsel: Donn Fraser, for the Plaintiff
Michael E. Dunphy, Q.C. for the Defendant

By the Court:

[1] These are reasons for decision in fixing an award of costs to the Defendant, D.R. Breton Limited upon is successful motion to strike out discovery subpoenas issued by the Plaintiff, Northern Pulp Nova Scotia Corporation.

[2] My decision, as well, decided the order in which the witnesses at discovery would be examined. I determined that the Plaintiff witnesses (as parties) would be discovered first (on September 27th, 28th) and the Defendant witnesses would be discovered (on September 29th, 30th) after discovery of the Plaintiffs.

[3] The Defendant has in their submission on costs stated that the actions of the Plaintiff constituted an improper use of discovery subpoenas. Instead, says the Defendant, the Plaintiff should have made a motion to determine the order of discovery, without excluding the Defendant's representative, as was suggested by the Plaintiff during negotiations to reach an agreement on Discovery.

[4] The Defendant submits also that Plaintiff's counsel has made unwarranted attacks against Defendant's counsel. As a result, the Defendant argues that the Court must show it's dissatisfaction with this approach by Plaintiff's counsel, in

strong terms. Consequently the Defendant seeks an award of costs on a solicitor/client basis against the Plaintiff.

[5] The starting point, is that the Defendant was successful on the motion. Normally the successful party is entitled to costs. This aspect is not in dispute. What is disputed by the Plaintiff is the amount and also what factors the Court should consider in weighing whether special circumstances exist, that would justify an award, on a solicitor/client basis.

[6] The Plaintiff submits that the motion was straight forward, and argued in the same manner. It argues further that the motion was uncomplicated, and that the motion was not about the exclusion or the attempt to exclude the Defendant's representatives during discovery. Instead the Plaintiff states, the rule in question (Rule 18.16) is uncertain in respect to the order in which the parties are to be discovered. It states therefore that the use of the discovery subpoenas in this instance was permissible or at least arguably so, before the motion was made.

[7] Without detailing all of the facts and without repeating all reasons for my oral decision on the motion, I pause here to add additional facts and circumstances to provide context for my earlier decision and as well, this decision on costs.

[8] In May of 2011 the Defendant solicitor, Mr. Dunphy, contacted the Plaintiff solicitor, Mr. Fraser, to arrange for discovery dates for the parties to the litigation. A tentative date was reached for July, 2011 with the Defendant asking the Plaintiff to confirm his client's availability. Here an honest and innocent mistake occurred. The Defendant's solicitor, was on vacation at that time and failed to hold or "pencil in" the tentative scheduled dates. He states he did not receive confirmation of the dates from the Plaintiff's solicitor as requested. Although Mr. Fraser believes he replied, he does not dispute Defendant's counsel position on this. Mr. Dunphy subsequently scheduled other matters on the dates which had been initially discussed, and reserved by the Plaintiff. The Plaintiff for its part thought the dates had already been agreed upon.

[9] Subsequently the tentative discovery dates in July had to be cancelled. At that point the discussions, emails, and exchanges took on a much different tone, in

particular from Plaintiff's counsel, as he felt that the Defendant was reneging on the agreed upon discovery dates in July, 2011.

[10] In the affidavit of Mr. Guy Harfouche, filed on behalf of the Plaintiff, he states:

> "32. Only on July 5, 2011, in response to the above noted July 4, 2011 letter and after 8 requests over a period of almost 3 months, did Mr. Dunphy cooperate in providing the name of the Defendant's designated manager, being Mike Deglano. This July 5, 2011 letter from Mr. Dunphy was not disclosed by the MacGregor Affidavit but a true copy is attached hereto as Exhibit "E".
>
> 36. Later still on July 5, 2011 Mr. Dunphy emailed Mr. Fraser (as reproduced in Exhibit "L" to the MacGregor Affidavit) advising that that (sic) the dates he proposed in May 2011 for discovery in this proceeding "have been filled in" and that they could look at other dates. This July 5, 2011 email failed to provide any explanation for the lack of any follow-up from the Defendant's counsel for the period following the May 6, 2011 email.
>
> 39. Mr. Fraser advised, and I do verily believe, that out of concern regarding delay in these proceedings and without yet having fully assessed any issue of tainting or tailoring of evidence with the Defendant witnesses (those witnesses just having been identified on July 5, 2011), he emailed Mr. Dunphy on July 6, 2011(as reproduced at Exhibit "O" to the MacGregor Affidavit) stating, among other things:

> "Given the delays you have caused in scheduling, we will not permit discovery of the Plaintiff's witnesses before discovery of the Defendant's witnesses have been concluded. We have legitimate concern at this stage that if we proceed without first completing discovery of the Defendant witnesses there will simply be further unreasonable delays."

[11] On the other hand the affidavit of Amy MacGregor filed in support of the motion on behalf of Defendant states:

> "14. On May 6, 2011, Mr. Dunphy wrote to Mr. Fraser proposing discovery examinations take place from July 19 - 22, 2011. Attached as Exhibit "I" is a true copy of that correspondence.
>
> 17. On July 5, 2011, Mr. Dunphy wrote to Mr. Fraser advising that he did not receive confirmation from Mr. Fraser regarding the proposed July 19 - 22, 2011 discovery dates and was no longer available on those dates. Attached as Exhibit "L" is a true copy of that correspondence.
>
> 19. On July 6, 2011, Mr. Dunphy wrote to Mr. Fraser proposing discovery examination dates of September 27-30, 2011. Attached as Exhibit "N" is a true copy of that correspondence.
>
> 20. On July 6, 2011, Mr. Fraser wrote to Mr. Dunphy confirming the September discovery examination dates and advising that he would not permit discovery of the Plaintiff's witnesses before discovery of the Defendants' witnesses had been concluded. Attached as Exhibit "O" is a true copy of that correspondence."

[12] In Exhibit "I", Mr. Dunphy's email to Mr. Fraser includes the following statements regarding the proposed July 19th - 22nd discovery dates:

> "If these dates are acceptable, I will have to check with my anticipated witnesses.
>
> I look forward to hearing from you."

[13] In Exhibit "L", Mr. Dunphy's email indicates the following statements:

> " I do not have the discovery dates set. I emailed you on May the 6th while I was on holidays proposing discovery dates and asked you to get back to me if acceptable so I would check with witnesses. I never did hear from you and the dates have been filled in.
>
> We can look at other dates."

[14] It was then that Mr. Fraser emailed Mr. Dunphy stating what is contained in Exhibit "O" voicing concern for past and future delays, as mentioned in paragraph 10 (sub para 39) herein.

[15] Having given my decision on the motion, it is not my intention to repeat all of the relevant evidence, as this is a decision on costs only. I have provided the above in an effort to illustrate the attempts by counsel to arrange for discovery, their further attempts to resolve the subsequent dispute, and the circumstances that

gave rise to the issuance (on two occasions) of discovery subpoenas by the Plaintiff and served on the Defendant's representatives Mr. Murphy and Mr. Degiano.

[16] In its brief, the Plaintiff states it held "legitimate concerns with tainting and tailoring of the evidence of Mr. Degiano and Mr. Murphy, if those individuals are privy to the Plaintiff's witnesses in advance of providing their own evidence under oath."

[17] The Defendant in its brief took the position that:

1. The Court should encourage counsel to be reasonable and cooperative in scheduling discovery examination by consent, so as to comply with the objective of the rules.
2. That the Defendant not the Plaintiff first requested discovery examinations (on January 23, 2011).
3. That there had been a tentative agreement to the Plaintiff's witnesses being discovered first (in July) before those dates fell through.
4. The issuing of the discovery subpoenas (party) by the Plaintiff was an abuse of process.

[18] What is clear is that what started as a misunderstanding, quickly escalated into something more. Between July and September of 2011, the parties positions on discovery, when they would be held, and in particular the order in which the parties would be discovered, became entrenched. Beyond the discovery issue, conduct also became an issue, as between counsel.

[19] I turn now to consider what costs should be awarded in respect of this motion.

ANALYSIS

[20] On August 2, 2011, the Plaintiff issued discovery subpoenas (party) on the Defendant's representatives Michael Degiano and Peter Murphy. These were in respect of the new dates agreed upon in September. It was brought to the attention of the Plaintiff's solicitor by the Defendant's solicitor that these subpoenas did not contain all of the representations and undertakings required by Rule 18.04. Mr. Dunphy wrote to Mr. Fraser by letter dated September 7, 2011:

> "I am surprised to see that you have taken the unilateral action that you have in issuing the discovery subpoenas. With respect, I believe the issuance is inappropriate and in non compliance with the Civil Procedure Rules. I have agreed to discovery dates and the witnesses to be examined. I have also agreed to the sequence of the witnesses - as originally agreed for the July discoveries. What I have not agreed to is to have my designated manager for discovery excluded from the examination of your witnesses and not communicate with them regarding the evidence provided by your witnesses."
>
> "It seems to me that we are set to go for the discovery examinations later this month. The *only* question is whether my client's designated manager for discovery should be excluded from the discovery examination of your witnesses. <u>If you wish to seek an Order to that effect it is open to you to make a motion to do so. We see no basis whatsoever for the exclusion of witnesses in this case.</u> I look forward to hearing from you regarding the foregoing. (*Exhibit W of Amy MacGregor's Affidavit*) [emphasis added].

[21] In response, the Plaintiff issued new discovery subpoenas containing the following additional clauses respectively:

> Re: Mr. Degiano:
>
> Clause 3 - A discovery subpoena is necessary because discovery by agreement has not been possible through Counsel for the defendant, with apparent irreconcilable difficulties existing in terms of scheduling and ordering of witnesses.
>
> Clause 4: The witness to whom this subpoena is addressed is the designated manager for the defendant and has not yet been discovered in this proceeding.
>
> Re: Mr. Murphy:
>
> Clause 3 - A discovery subpoena is necessary because discovery by agreement has not been possible through Counsel for the defendant, with apparent

> irreconcilable difficulties existing in terms of scheduling and ordering of witnesses.
>
> Clause 4 - The witness to whom this subpoena is addressed is an individual party.

[22] These new discovery subpoenas were issued on September 7, 2011, with Mr. Degiano being required to attend discovery on Tuesday, September 27, 2011, at 9:30 a.m. and Mr. Murphy being required to attend at discovery on Wednesday, September 28, 2011, at 9:30 a.m.

[23] In the present case, the Defendant is seeking costs in the amount of $3,500.00 on its successful motion. The Defendant states that the steps taken by the Plaintiff were improper and mistaken. Its position and strategy led to an unnecessary motion. Further it argues that Plaintiff's counsel's conduct in attacking defence counsel was improper and that the Court must show its displeasure for such actions. The Defendant states further that the Plaintiff was given an opportunity to withdraw the motion and is entitled to its reasonable and necessary costs, including travel and disbursements. Also the Defendant says the Plaintiff chose not to withdraw the motion despite having been given an opportunity to do so.

[24] The legal principles governing the awarding of costs are dealt with by Civil Procedure Rule 77. Under that rule, the Court has a general discretion in the awarding of costs and can consider certain factors which may increase or decrease the award of costs by the Court. It also provides guidance to a judge and allows the Court to determine expenses caused by improper or negligent conduct of counsel. (Rule 77.12)

[25] There is a "tariff" which provides that guidance. Tariff C is the standard one for chambers. The standard tariff states as follows:

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1,000 - $2,000
1 day or more	$2,000 per full day

[26] The Court has the discretion to increase the tariff depending upon the circumstances of the case. In this case, the Defendant submits that the Tariff C costs should be increased as a result of two factors (a) the Plaintiff's unreasonable and legally unsupportable position which caused the motion, and (b) the

inappropriate and offensive comments made by the Plaintiff's counsel in its pre-motion brief.

[27] It is important to note that Court may grant any order in respect of costs that will "do justice between the parties". (Rule 77.02). In addition, there is nothing in the Rules to limit the discretion of a judge to make any order. The Court may subtract from or add to the tariff mentioned above.

[28] It should be noted as well that the awarding of solicitor/client costs is reserved for what the Rule refers to as "exceptional circumstances". Specifically, Rule 77.01(b) states that solicitor/client costs:

> ... may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;

[29] Under the same rule, party/party costs would compensate a party for part of the compensated party's expenses of litigation. Solicitor client costs are fees and disbursements which counsel charged to a client for representing the client in a proceeding.

[30] The starting point in Tariff C is governed by the length of the hearing. In the present case, the hearing began at approximately 11 a.m. on September 22, 2011 and was completed at 12:50 p.m. It was reconvened at 1:50 p.m. for my decision and completed at 2:20 p.m. In total it lasted approximately 2 hours and 20 minutes hearing time. The total duration of the hearing (allowing an hour for my deliberation) was 3 hours and 20 minutes. It was longer still if one includes waiting time from 9:30 to 11 a.m. in chambers while other matters were being dealt with. The hour for deliberation coincided, approximately with the normal lunch break.

[31] Counsel for the Plaintiff argues in its brief that costs should simply be party/party costs alone in the amount of $750.00 and that this hearing should fall in the“more than one hour but less than ½ a day” range, which would be $750.00 to $1,000.00. The Plaintiff states the sum of $750.00 is in keeping with the length of the hearing. The Plaintiff also argues that while the Defendant was successful on the motion, the motion was a routine interlocutory procedural matter and not a complex issue. It therefore states $750.00 is the appropriate amount for the Court to award in respect of party/party costs.

[32] There are two points which the Plaintiff raised and in fairness must be considered by the court. These are (1) that the motion was not about exclusion of the Defendant's witnesses; and (2) there is a lack of certainty regarding the application of Rule 18.16 in terms of the order in which witnesses will be examined.

[33] Expanding on these issues, I cite the following from the Plaintiff's brief on costs:

> "The Plaintiff's position was not contrary to the *Trans Canada* case, as suggested by the Defendant. We did not understand the Court to find as much. **The Plaintiff took no position on exclusion of witnesses, as that was not what it was seeking. The Plaintiff was certainly not attempting to deprive the Defendant from having a representative present through the discoveries**. Your Lordship raised the issue of the distinction between a designated manager and an instructing witness. However, in this case, what the Plaintiff sought allowed even the designated manager of the Defendant to be present for all discoveries. **The Defendant was simply insistent on getting to ask discovery questions first and, in our respectful view, has mischaracterized the issue by claiming it was about exclusion of witnesses**. (Page 7)
>
> Further, while ultimately disagreeing that the subpoenas should be allowed, Your Lordship expressly acknowledged the Plaintiff's frustration that it felt it was getting nowhere with discovery arrangements and that the Plaintiff legitimately felt it was entitled to resort to the discovery subpoenas. **There were also clearly arguable issues on this point, given the lack of certainty regarding the application of rule 18.16**. This is demonstrated by the Defendant initially taking the position that the Rule applied, then reassessing this analysis to submit that it did not, with Your Lordship ultimately concluding that the Rule in fact applied. (Page 3)"

[34] Dealing first with the exclusion, the Plaintiff had earlier proposed to the Defendant that the Defendant proceed first to discover the Plaintiff's witnesses, on certain conditions. These included the Defendant's representative being excluded from the discovery hearing and , also that there would be no communication between the Defendant and their solicitor. (Paragraph 23 of Amy MacGregor's affidavit of September 12th and paragraph 32 of the Defendant's brief of September 13, 2011.)

[35] In my respectful view, if exclusion was not the main issue on the motion, it was the underlying issue. In terms of negotiations leading up to the issuing of the subpoenas by the Plaintiff, the matter was not about exclusion only if the Defendant's witnesses were discovered first by the Plaintiff. Otherwise, the Plaintiff proposed, sought in fact that the Defendant's representative be excluded form the discovery.

[36] Secondly, although Rule 18.16 does not deal specifically with the order in which witnesses will be called, it does deal with the conduct of the discovery in general. I ruled therefore, it was applicable to these circumstances.

[37] I will allow and acknowledge that the application of Rule 18.16 is subject to interpretation. I interpreted the Rule as being applicable. In so doing, I made the following findings in my oral decision.

> (I) Brenton would have the right to examine the Plaintiff's witnesses first, both as a result of the legal concept that the Defendant has the right to know the case against them and that the Defendant first gave notice pursuant to Civil Procedure Rule 18.16.
>
> (ii) The Plaintiff did not have any authority for the proposition to exclude the Defendant's representative from the discovery of the Plaintiff's witnesses. The case law is applicable in that a corporate defendant has a right to be represented at discovery. (Trans Canada)
>
> (iii) There was no material delay by the Defendant or Defendant's counsel in moving to discovery examinations.
>
> (iv) The use of the discovery subpoena for this purpose is something to be frowned upon.
>
> (v) The appropriate practice would be to make a motion to have the order of witnesses determined or the exclusion of witnesses determined.

[38] It should also be noted that in my decision, I made the following additional observations . (1) The issuing of the discovery subpoenas (which in effect dictated the order of witnesses) made exclusion a mute issue. (2) That the issuance of the discovery subpoenas occurred in the midst of the parties attempting to make arrangements for discovery in good faith. (3) Both parties agreed initially that Rule 18.16 was applicable. I ruled that if 18.16 was not applicable, that I had

discretion pursuant to Rule 94 and Rule 2 to grant the order to strike the discovery subpoenas and to direct that the Plaintiff's witnesses be discovered first by the Defendant.

[39] In terms of costs, I am of the view that any decision I make should be tempered by the following factors: (1) there was an implicit agreement regarding the discovery in July including the order of witnesses; (2) that when this agreement fell through, the Plaintiff became "frustrated" and became concerned about further delay resulting; (3) the Plaintiff believed it had a legitimate position in issuing the discovery subpoenas or the parties had differing interpretations of Rule 18.16. In rendering my decision, I must also consider Rule 77.07 which states that a court may consider the following factors in increasing costs:

> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

[40] I agree with the Plaintiff that both these factors apply to this case. I further agree that the Defendant's pre-motion brief is relevant in respect to the

determination of costs. However, with respect to the latter, I believe it is most relevant, in regard to the Defendant's request for solicitor/client costs as opposed to party/party costs. I intend therefore to deal with it on that basis.

DECISION

[41] It is my determination that the Tariff C costs should be increased. In awarding increased costs to the Defendant, there are several reasons for doing so. While falling short in my decision of finding that the issuing of the discovery subpoenas was an abuse of process, I did find that their issuance was an improper step in these circumstances. In addition, this required the Defendant to take a step in the proceeding it would not otherwise have had to take, the Motion to Strike. Further the Plaintiff was given the opportunity, as suggested by the Defendant to withdraw the subpoenas. It did not, and instead proceeded ahead.

[42] In my decision I found that it would have been proper for the Plaintiff to make a motion to address its concern as to the order of witnesses. I note in the evidence (Exhibit O, Amy MacGregor) that the Plaintiff contemplated such a motion (on July 28th or August 11th). I am mindful also that as part of the

Defendant's motion I granted an order determining the order in which the parties would be discovered. The Plaintiff's insistence on first discovering the Defendant's witnesses was initially based on its concern for further delays by the Defendant (also expressed as the unreasonable and uncooperative approach) and as well a concern for "tainting and tailoring", in other words to protect credibility.

[43] In my decision I found that the delay between July and September for discovery dates was not unreasonable. I found also that there was not evidence presented which warranted special consideration as to credibility issues, as compared to other cases or situations.

[44] In my decision I stated that the use of subpoenas in this matter should be frowned upon. In fixing the amount, the Court's dissatisfaction should be expressed. Consequently I am fixing party/party costs within the range for a hearing based a half day in length at a range. For that time the range would be at approximately $1,000 and my decision is to increase that (by $500) to $1,500 in total for party/party costs.

[45] I turn now to consider whether further costs should be awarded having regard to the Plaintiff's Pre-Motion brief. While such alleged conduct may indeed be relevant in an award of party/party costs as part of my general discretion, it is more appropriate in my view to consider this issue under the heading of solicitor/client costs (Rule 77.03(2) and Rule 77.12(1)).

SOLICITOR/CLIENT COSTS

[46] The Defendant seeks an Order for payment of costs on a solicitor/client basis, pointing out that it advised the Plaintiff it would seeking same on the motion to set aside the subpoenas.

[47] I note from the evidence that the Defendant's counsel in July (Exhibit Q on July 8, 2011) raised with the Plaintiff that "civility issues" had crept into the case and expressed the hope that the strong language, and assertion of blame could be eliminated. The Defendant in it's submissions points out, correctly, that counsel have a duty not to try each other.

[48] I have considered and weighed the Plaintiff's position on this as well. The Plaintiff states that its characterization was fair, given the unresponsiveness of counsel and that the jurisprudence and practice is not uniform (on the point of which party proceeds first to discovery examinations). It states further that the prevailing practice is different (in the view of the Plaintiff's counsel) than what was suggested by Defendant's counsel. It states also, correctly, that counsel giving evidence ought to be avoided and the same improper treatment complained of by Defendant's counsel is contained in their cost submissions. The Plaintiff states further that the particular characterizations, were made honestly and in good faith. In the end the Plaintiff leaves it to the Court's judgment whether to comment further on the specifics of these allegations.

[49] The Court has inherent jurisdiction over counsel, as its officers. Any award made on costs must be fair and reasonable overall. Under rule 77.12 conduct of counsel is a factor more so than the conduct of a party, the latter being contained in Rule 77.07.

[50] In exercising the inherent jurisdiction of the Court I do not intend to detail further the "back and forth" allegations. I find, as I am sure both counsel here

would agree, that normal practice would dictate that discovery by consent should be encouraged.

[51] Further detailing of the allegations serves only to perpetuate the unfortunate dealings as between counsel here. Suffice it to say I have thoroughly considered the positions and submissions of both sides.

[52] The particular concern of Defendant's counsel is in respect to use of language such as "without prudence or courtesy", "refusal to honour dates", "reneged", "misrepresents", and "repeatedly misrepresents". On the whole I am of the view that the comments in the Defendants pre-trial motion were unduly harsh and unnecessarily strong.

[53] On the merits of the case, whether there was implicit agreement or otherwise, these allegations added a layer of complexity and seriousness to the case, which undoubtedly caused the Defendant's counsel to expend additional time preparing a response. In this way these are special circumstances which warrant, in my view, an award of costs on a solicitor/client basis. The Court must discourage such submissions and encourage a spirit and level of cooperation among counsel

which requires, courtesy, respect and professionalism. I therefore award solicitor/client costs to the Defendant payable by the Plaintiff in the amount of $1,050.

[54] I am aware that the amount claimed by the Defendant's solicitor is more than this and that the time expended was more than what was sought. I have been given minimal information and an estimate of fees only. In reaching my decision, I am exercising my discretion with respect to costs generally. My award is intended to compensate the Defendant (in part only), taking into account the seniority of counsel for the moving Defendant. (**Sheng v Ontario**, 1997, 72 ACWS (3rd) 912 (Ont. SCJ.)).

[55] In terms of the disbursements, it is normal to allow reasonable and necessary disbursements and this is the requirement of Rule 77.10(2). I have reviewed the case law submitted in respect to the disbursements by the Plaintiff. I see nothing unnecessary or unreasonable about the Defendant's disbursements in the amount of $332.21. In my view the retention of local counsel to respond to the issues in this matter would not have been appropriate. Although the claim for photocopying has

not been proven as such, I consider it to be legitimate, considering the substantial amount of documentation provided.

[56] Prior to concluding, I will comment briefly on the case of **Gouin v Gouin** 2005 Carswell Alta 1960, submitted by the Plaintiff. In **Gouin**, like here, there was no Rule establishing the order for examination for discovery. Here however, there is a rule establishing who has conduct of the discovery itself. Also, in **Gouin** the Court considered relevant, the practice in its jurisdiction, which may or may not vary from other jurisdictions. Lastly the Court in **Gouin** appeared ready to deviate from the "usual order", but concluded that no good reason was shown to do so. In the present case, the Court considered counsels' positions offered on the practice in Nova Scotia (including under the 1972 Rules) and exercised its discretion, in rendering its decision on the motion. The Defendant first knowing the case it has to meet formed the basis of that decision.

[57] In conclusion the total costs payable by the Plaintiff to the Defendant on the motion shall be $2,550 plus disbursements of $332.21, for a total of $2,882.21 payable within 20 days.

J.