SUPREME COURT OF NOVA SCOTIA
Citation: Action Management Ltd. v. Archibald, 2012 NSSC 163

Date: (20120424)
Docket: Docket Number SpH 291925
Registry: Port Hawkesbury

Between:

Action Management Limited

Plaintiff

v.

Karen Archibald

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Final Written Submissions:	January 17, 2012.
Written Decision:	April 24, 2012
Counsel:	Ralph Ripley, for the Plaintiff Karen Archibald, In Person for the Defendant

By the Court:

Introduction

[1] These are reasons for fixing an award of costs in a Landlord and Tenant dispute. The lease involved was a commercial lease. The leased premises were located at a mall known as the Town Shopping Center situate at 811 Reeves Street, Port Hawkesbury.

[2] The trial in this matter was held over two (2) days on March 29th, 30th 2011 in Port Hawkesbury. The Landlord (Action) claimed that the Tenant (Archibald) has left the premises before the five year lease had expired, and therefore owed rent to the Landlord for 11 months at rent of $2,100 per month. With arrears the amount claimed for rent by the Landlord was $41,454.16 as in the Statement of Claim.

[3] The Tenant defended the Landlord's claim on the basis that she had reached an agreement with the Landlord on an amount of rent for the balance of the term. She paid this amount to the Landlord and claimed it was accepted in satisfaction of the lease, thus allowing her to vacate the premises. The issue then, was whether there had been an agreement between the Landlord and Tenant, otherwise known

as an accord and satisfaction, with respect to the lease. On this issue I ruled there had been an accord and satisfaction, thus finding in favour of the Tenant.

[4] On a related issue, I ruled in favour of the Landlord, finding the Tenant had stayed beyond the date of the accord and satisfaction, and thus owed the Landlord six (6) months rent. This amount totalled $12,600 plus HST and interest.

The Law on Costs - Rule 77

[5] Rule 77 addresses the issue of costs. The Court in awarding costs has discretion to make any order that will, "do justice between the parties". The Rule contains a Tariff of fees to be awarded based on various types of matters, including Chambers appearances (Tariff C) and for trials and full hearings. (Tariff A). The Rules allow also for the granting of a lump sum cost award in the right circumstances. The Rules give a discretion to the Court to vary the Tariff award by increasing it or decreasing it, based on certain factors. (Rule 77.07(2)) These factors are included in the Rule, set out as follows:

> "77.07(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

> (a) the amount claimed in relation to the amount recovered;
> (b) a written offer of settlement, whether made formally under Rule 10 -Settlement or otherwise, that is not accepted;
> (c) an offer of contribution;
> (d) a payment into court;
> (e) conduct of a party affecting the speed or expense of the proceeding;
> (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;
> (h) a failure to admit something that should have been admitted.**"**

[6] In Nova Scotia, costs are intended to be a substantial but incomplete indemnity to a party. Rule 77.06(3) states:

> "Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge 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 this Rule 77."

[7] Each Tariff has also three (3) scales. Scale two is the basic scale, scale one is an amount equal to the basic scale less 25 percent. Scale three is the basic scale plus 25 percent. Depending on the facts in each case, the Court may apply one of the three scales to a particular case. The factors affecting which scale is used are not set out specifically but they include things such as the length and complexity of the trial or hearing.

[8] In the case before me the Plaintiff and Defendant have both stated in their cost submissions that Tariff A is the applicable Tariff. The parties in their respective submissions stated they each believe that the basic scale (scale 2) is the one that applies. The Court will, consider those submissions in this decision. Clearly Tariff A is the applicable Tariff subject to the Court's decision on which scale should apply and to whom.

[9] In this matter both the Plaintiff and Defendant are claiming costs. Therefore the key issue is whether costs should be awarded to either or both parties. If both, then the Court must then consider whether there should be a set off of those costs. Rule 77.11 deals with this. I will refer to that Rule later in my decision.

[10] There are general principles which are stated both in the rules and under common law. As Justice Hood stated in a recent decision of **Salman vAl-Sheikh Ali** 2011 NSSC 30 at para. 5:

> "Successful Defendants are almost invariably awarded costs."

[11] Similarly in **Arab v Izsak**, 2011 NSSC 30 the Court commented in para. 6:

"A decision not to award costs must be for a very good reason and based on principle."

[12] In particular Rule 77.03(3) confirms that "costs of a proceeding follow the result, unless the Court orders or a Rule provides otherwise". This is consistent with the principle that successful parties are almost invariably awarded costs.

Analysis

[13] The Plaintiff seeks costs under the basic scale, Tariff A. For the amount involved , the Landlord claimed the six (6) months rent awarded by the Court. This totals $12,600 plus HST, and using this amount the Plaintiff's costs are $4,000. To this the Plaintiff added $2,000 per day as allowed by Tariff A for a total of $8,000 plus disbursements of $1,438.71 for a total of $9,438.71.

[14] The Plaintiff's claim for costs is simple, straight forward, and easy to follow. It is based simply on the amount awarded of $12,600. It is irrelevant whether this amount includes HST and interest, because the total amount ($16,810.50) remains

less than the minimum amount of $25,000. The question that remains however is, whether the Plaintiff is entitled to costs?

[15] The Claim of the Defendant is set out in a similar manner in terms of the calculation, except using a different amount, a higher amount for the “amount involved”, under Tariff A.

[16] Neither party has recognized the other party’s claim for costs. As such neither party has in their submission included reasons why the other party is not entitled to costs, leaving it to the courts’ determination.

[17] Determining the “amount involved” is not simply a matter of using the amount claimed. In the present case the Plaintiff did seek the sum of $41,454.16 in rent as contained in paragraph eight (8)(a) of the Plaintiff’s Statement of Claim, plus interest and costs. The rent represents a portion of the total amount claimed with the amount of interest (at 2 % per month) representing $34,398.77 as of March 31st, 2011 or approximately 40% of the total amount claimed as stated in paragraph 8 of my decision, which was $82,837.00 (Exhibit “5").

Complexity of Proceeding:

[18] Under Rule 77, the complexity of the proceeding is a factor, in several instances. It is one of the factors in determining the amount involved. It is a factor also in determining whether to increase or decrease costs under the Tariff (Rule 77.07). Finally it is typically considered in whether to use basic scale or scales one or three.

[19] There is little question here that the main issue was whether the parties had reached an accord and satisfaction. There is no question that the Defendant was entirely successful on the main issue, which was decided in her favour.

[20] Had the Plaintiff been successful, however, I would have determined whether the total amount claimed should be awarded. Clearly for the purposes of determining her position, the amount claimed is what the Defendant was exposed to in the proceeding. She made her decision to proceed to trial knowing this. Similarly the Plaintiff knew there could be cost consequences, based (potentially) on the amount claimed by it as Landlord. With such a large portion of the claim consisting of interest arising at the time of the claim, the Court would have to have

determined the legitimacy of this claim. This would include whether the rate of 2% per month in the lease was payable or the alternative rate claimed by the Plaintiff which was the pre-judgment interest rate of 5% per annum.

[21] Clearly there would be a significant difference in the amount awarded. At the lower rate (of 5 % per annum) the interest claimed would be reduced by approximately 80%. Instead of $34,000 (as of March 31st, 2011) in interest, the amount would be in the range of $7,000, using approximate figures. This would bring the total claim of the Landlord to less than $60,000. The range in Tariff "A" above $60,000 for amount involved, begins at $65,000. The 2% per month interest rate was contractually agreed upon by the Tenant and pursued by the Landlord (with case law) as a strong claim. Since the total claim of $82,837 is at the upper end of the range I find the amount involved is within the range of $65,000 to $95,000. In other words I decline to lower the range even though there was a potential for the interest (and thus the total amount) awarded to be lower.

[22] Before determining whether the "amount involved" is appropriate for the Defendant's claim of costs, a more basic question arises. Is the Defendant entitled to costs?

[23] The Defendant's position is that she is entitled to costs and the Plaintiff is not. She argues the claim succeeded upon was not pleaded by the Plaintiff. She argues further the issue of her as an "overholding Tenant" was not properly framed by the Plaintiff.

[24] While not specifically pleaded, the Statement of Claim at paragraph 8(d) stated "Such further and other relief as this Honourable Court may see as just".

[25] Section 41 of *Judicature Act* R.S., c. 240, s. 1., allows this Court, as a superior court to grant legal or equitable relief as the Court deems appropriate, based on the evidence and circumstances.

[26] The bulk of the evidence in the two (2) day trial related to whether there was an accord and satisfaction. As part of the trial, however, evidence was given in relation to when the Defendant as Tenant had vacated the premised and under what circumstances.

[27] As the relationship was governed by a lengthy written commercial lease, the parties must be aware of the lease contract and potentially what liability may flow from it, including at common law.

[28] Once again I repeat the Defendant states she is the one entitled to costs, not the Plaintiff. She further states that the cost award claimed by her should be set off against the total amount awarded to the Plaintiff in the main judgement, this amount being $12,600 plus HST plus pre-judgement interest for a total of $16,810.50. In her submission on costs the Defendant stated,

> "Had the Plaintiff brought this issue to my attention prior to going to trial, I would have had the opportunity to seek an opinion from my lawyer regrading the probability of the Plaintiff's success on this issue. If the probability of success was deemed high, I would have had the opportunity to reconsider going to court and may have negotiated a settlement with Action Management on this issue only. Had the Plaintiff properly advanced this issue, my costs would had only been $12,600 plus taxes. Instead, we proceeded to court on the issue of the breach of the lease only and legal costs were incurred which should be reimbursed to put me back to an equitable position."

[29] CP Rule 77.11 allows for an award of costs to be set off against an amount awarded for costs to the other party or against any other amount. This however would be rare as costs normally follow the cause (the event) meaning the

successful party only receives costs. That is the starting point. Rule 77.11 states as follows:

> "77.11 A judge who awards party and party costs may order a set-off against another award of costs or any other amount."

[30] In this case both parties were successful but to varying degrees. A key consideration here is the fact that Ms. Archibald represented herself at the trial. Self represented litigants do not have a solicitor to pay nor do they have law office overhead. The Tenant stated in her cost submission, that she had a lawyer from whom she obtained advice. I find that the Defendant, for the purpose of the trial, was a self represented litigant.

[31] In Nova Scotia it is well established, that self represented litigants are entitled to costs as is a party represented by counsel but not at the same rate. (**National Bank Financial Ltd. v Potter**,[2005] NSJ No. 383 and **Gilfoy v Kelloway** [2000] N.SJ. No. 103**.**

[32] In **Gilfoy**, Goodfellow J. awarded costs to a self represented litigant in the amount of $7,525 with disbursements of $3,200. This represented approximately one-third of the costs claimed by the Plaintiff of $23,400. The Court fixed the

amount involved under the tariff at $60,000. The Court noted it is the manner of representation that is important, not the mere fact of self representation. The Court as well took note of whether or not any undue delay had been caused by the self represented litigant and concluded there had been, stating at para. 30:

> "It is the manner in which a proceeding is conducted and not whether a person was self-represented. If the court is faced with counsel who have conducted themselves responsibly and substantially shorten the proceedings, then that is a factor to be weighed similarly if counsel take a particular approach which unnecessarily lengthens the proceedings or is repetitive and lengthens the otherwise reasonable duration of the proceeding, then these are the type of factors that are to be weighed in the exercise of judicial discretion in the taxation of costs."

[33] In **National Bank** , Scanlan J. awarded lump sum costs and disbursements, in an interlocutory proceeding, approximating 1/3 of the amount claimed but at an amount ($70,000) substantially above the Tariff ($28,000). In that particular case the self represented party was a lawyer. The Court noted the key role this party had in the presentation of complicated evidence, it having been presented in an efficient and helpful manner. The Court found that costs above the Tariff were appropriate noting the Applicant's fundamental rights were affected and that the bank's applications did nothing to advance the litigation.

[34] In the present case the Defendant, Karen Archibald, represented herself admirably. She had a command of the issues and as well was reasonably informed on the legal issues and the law. This is evident by the results she achieved. The case was presented in a clear fashion, without undue delay or difficulty caused by her representing herself.

[35] To their credit the approach of the Plaintiff and in particular Plaintiff's counsel, Mr. Ripley, assisted the Court in the presentation of the relevant evidence. This included a professional, reasonable and accommodating approach in responding to issues. The Plaintiff was not overly technical or unreasonable in regard to procedural matters in which the Defendant was unfamiliar. A joint exhibit book containing the relevant documents was submitted and agreed upon. In summary both sides presented their case with efficiency and in a cooperative manner.

[36] Case law [1] was presented by the Landlord in respect of the law of costs, and how they should be assessed . In assessing costs to the Plaintiff pre- judgement interest should not be calculated in determining the amount involved .The normal rule is to determine the amount awarded as the amount involved.

[37] While not a long trial, (two full days), the subject matter of the trial is considered somewhat complex. The subject matter involved the remedies available to a Landlord in a commercial lease situation. The courts have long since struggled with this issue, as evidenced from the case law leading up to **Highway Properties Ltd. v Kelly Douglas Ltd.** 1971 CanLII 123 (SCC).

[38] The Plaintiff was not successful on the main issue and the relief it sought. I repeat again that the Defendant was successful on this issue. The Plaintiff was successful on a secondary issue, and one which was not as apparent as the main issue. Nevertheless the Plaintiff had a degree of success, though much less in terms of the amount claimed, and much less again than the Defendant on the main issue.

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1 **Canadian Geotechnical Construction Ltd. V Meridian** 1995 CanLII 4459 (NSSC)
Diversity Special Interest Publishing Company v Atlantic Grand Prix Inc. 1994 CanLII 4351 (NSSC)
Cashen v Donovan 1999 Can LII 6886 (NSSC)

Decision

[39] These circumstances in my view give rise to both parties being entitled to a level of costs, but to varying degrees. Dealing first with the Plaintiff, the ultimate amount awarded was on the basis of relief not claimed specifically but granted as a

remedy which the Court decided was appropriate. This question alone might be answered in terms of costs by saying the Plaintiff is entitled to costs under Scale One (1) which is 25 % less than the basic costs under Scale Two (2).

[40] Under Rule 77 where the main issue is a monetary claim allowed in whole or **in part**, the **amount allowed** is a consideration along with the complexity and importance, of a proceeding.

[41] Exercising my discretion, and considering the manner the Plaintiff conducted the trial I find it would be just and equitable to allow the Plaintiff , costs at the basic scale (scale 2) less (12.5 %) based on the amount involved being the amount awarded. I accept the Plaintiff's calculation in this regard, as set out earlier in my decision, in the amount of $9,438.71 which less 12.5% would amount to **$8438.71** ($7000. plus 1438.71). This recognizes that the Plaintiff was successful but only in small measure compared to the amount claimed. It recognizes the Plaintiff's limited success.

[42] The Defendant's claim for costs, predicated on relative degrees of success is a stronger claim than the Plaintiff's. The amount involved is considerably higher as the Plaintiff claimed an amount much higher than was ultimately allowed. There

is a reasonable probability the Plaintiff, if successful on the main issue may not have achieved the total amount claimed. The court would have carefully considered whether the substantial amount of interest was to be awarded. Tariff A already allows for a considerable variance under the amount claimed. In this case the amount claimed is at the high end of the range. (the range being $65,001 to $90,000)

[43] In my respectful view, the Defendant should receive the basic scale Tariff costs for an amount in the range of the amount claimed by the Plaintiff against her, this amount being $82,837. I find that the Defendant, being successful in defending against this amount, is entitled to costs in the amount of $9,750.00 plus 2 days of trial at $2000 per day, for a total of $13,750.

[44] From this amount an adjustment is warranted given my earlier finding that she was a self represented litigant (at trial). In my view the Defendant should receive 60 percent of her basic Tariff costs at **scale 2** which amounts to **$ 8250.00.** This recognizes both the Defendant's success on the main issue as well as the fact of her self representation. At 60 % it recognizes also that she had presumably incurred some legal fees, in consulting a lawyer.

[45] In this decision I have applied the principles and reasons discussed throughout, in rendering what I believe to be a just and equitable decision having regard to the relative success of each party . In addition I have considered the complexity of the proceeding, the manner and conduct of the parties, and the amount claimed in relation to the amount recovered.

[46] I further direct, pursuant to Rule 77.11 that the Plaintiffs costs and the Defendants costs be set off so as to simplify the amounts owed, including the final Judgement amount. Such a set off and allocation serves the purpose of Rule 1, which calls for a just, equitable and efficient resolution of every proceeding. In my view, such a proceeding includes a cost proceeding, as well as the final order to be taken out in the entire proceeding.

[47] When the costs are calculated, as I have in this decision, the Plaintiff is entitled to costs in the amount of $8,438.71 and the Defendant is entitled to costs in the amount of $8,250.00. When set -off is applied the difference is less that $200. In these circumstances, I find therefore that a fair and just result is for each party to bear their own costs in this matter.

[48] The net result is that the Defendant owes to the Plaintiff the sum of $16,810.50, all inclusive.

[49] Order accordingly.

J.