

SUPREME COURT OF NOVA SCOTIA

Citation: Webber v. Investors Group Financial Services Inc., 2012 NSSC 201

Date: 20120522

Docket: Hfx No. 260487

Registry: Halifax

Between:

Edward Webber

Plaintiff

v.

Investors Group Financial Services Inc. and Kevin Gildart

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: March 9, 2012

**Last Written
Submissions:** May 9, 2012

Counsel: Blair Mitchell, for plaintiff
Alan V. Parish, QC, for Investors Group Financial
Services Inc.

Moir J.:

[1] Investors Group delivered interrogatories to the plaintiff, Mr. Webber. Mr. Webber never responded. Investors Group took him to appearance day chambers, and he was ordered to provide a response. Investors Group requests a substantial indemnity against its own counsel's time; \$2,000 against \$2,722.

[2] Rule 19.07(1) provides: "A person to whom a demand for answers is delivered must deliver a response to each party no more than twenty days after the day the demand is delivered." I emphasize the mandatory "must". This is not excused by a disagreement over whether an interrogatory is proper. In such a case, the other party must respond with "a refusal to answer the question and the reason for the refusal": Rule 19.07(3)(b).

[3] Rule 19.08(2) provides:

A judge may order a person who fails to respond to a demand or unreasonably refuses to answer a question to indemnify the party who made the demand for the expense of obtaining an answer.

[4] Rule 19.08(2), and similar provisions for indemnification, have a companion in Rule 77.09. That Rule defines indemnification as "a substantial contribution towards the cost of necessary services of counsel": 77.09(2)(a). (It also covers "a fair payment for the work of a person who acts on their own".)

[5] The indemnity includes "necessary and reasonable out of pocket expenses or disbursements": 77.09(2)(b).

[6] Some indemnification provisions in the Rules refer to a kind of harm or loss. Rule 77.09(2)(c) provides for compensation to cover that harm or loss.

[7] Many indemnification provisions expressly refer to an adjournment as a harm of the kind provided for in Rule 77.09(2)(c): Rules 4.18(4), 4.21(e), 4.21(f), 5.11(3), 23.12(3), 39.04(5), 50.14(4), and 51.03(2). Full indemnification may be ordered for legal fees thrown away because of an adjournment: *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105.

[8] However, there are other kinds of harm referred to, such as delay in Rule 51.02(3). Also, there is no reason to restrict "compensation for a harm or loss

referred to in the applicable Rule" to legal fees. It may be that adjournment or other delay will cause personal loss to the aggrieved party.

[9] The phrase "substantial contribution" in "substantial contribution towards the cost of necessary services of counsel" brings to mind the purpose of a party and party award of costs: *Salman v. Al-Sheikh Ali*, 2011 NSSC 30 at para. 26 and 31. However, a lump sum reflective of a substantial contribution by way of party and party costs is not determined on counsel's own bill: *Salman*, para. 31 and 39.

[10] Rule 77.09(2) is not repetitive of the principle of substantial contribution by way of party and party costs . The Rule is not redundant. In its text, and in its context, the Rule embraces substantial indemnification for actual expenses. That is to say, the phrase "necessary services of counsel" contemplates an actual solicitor and client bill. So do the words "indemnification" in 77.09(2) and "indemnify" in Rule 19.08(2).

[11] Rule 77.09(2) and the provisions to which it is companion respond to the public concern over the cost and delay of litigation. The purpose of these provisions is a specific instance of the fundamental purpose of reducing expense

and delay: Rule 1. The specific purpose is to shift the expense of some kinds of wasteful behaviour to the party who causes the waste.

[12] Accordingly, an indemnification under Rule 19.08(2) must substantially indemnify reasonable and necessary expenses actually incurred when counsel pursued the overdue response to interrogatories.

[13] Mr. Mitchell argues that a substantial indemnification should not be ordered on an appearance day motion. He suggests that such would make a simple and efficient procedure become complex and inefficient.

[14] The simple answer to Mr. Mitchell's point is that Rules 19.08(2) and 77.09(2) provide no exception for a response to interrogatories secured through an appearance day motion. It is enough that his client engaged in behaviour that wasted the time of counsel opposite, and it makes no difference to liability that Mr. Parish's client chose a quicker and less expensive procedure to enforce the Rules.

[15] Mr. Mitchell also objects that the indemnity would be assessed on counsel's representations about actual fees and expenses, and not on affidavit evidence. Mr.

Parish says, "it is common practice to accept representations by counsel with respect to time billings".

[16] The representations are uncontroverted. That being the case, no injustice results from reliance on them rather than insistence on an affidavit, the cost of which would also be for the indemnity.

[17] Finally, Mr. Mitchell argues that giving an indemnity would result in a figure much higher than party and party costs on a motion. As discussed, the purpose of the provisions that allow for indemnification is to shift actual expense to a party who causes loss or harm in some circumstances. As Mr. Parish puts it:

... Rule 19.08(2) is an *indemnification* because of a failure to follow the rules, rather than costs following a chambers motion in which different but legitimate positions were put to a judge.

[18] The plaintiff's evasion of his obligation to respond to the interrogatories cost the defendants \$2,722 in counsel's time. I will order a substantial indemnity in the amount of \$2,000 payable immediately.

J.