

SUPREME COURT OF NOVA SCOTIA
Citation: Pittson v. Murnaghan, 2013 NSSC 22

Date: 20130111
Docket: Hfx 236026
Registry: Halifax

Between:

Paul N. Pittson

Plaintiff

v.

Norman Brian Murnaghan and Dorothy Theresa Raymond

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Patrick J. Duncan

Heard: By correspondence

**Final Written
Submissions:** November 21, 2012

Counsel: Thomas M. Macdonald for the plaintiff
Peter C. Rumscheidt, for the defendants

By the Court:

Introduction

[1] The parties own adjoining properties and became embroiled in a boundary line dispute that led to the commencement of an action by the plaintiff against the defendants, and counterclaims by the defendants against the plaintiff. That action was settled prior to trial, on terms that were mutually agreeable to the parties and which were committed to a Consent Order issued by this court. Among those terms were requirements for the preparation and execution of a Boundary Line Agreement, a Quit Claim Deed, a Licence and Mutual Releases.

[2] Subsequent to the issuance of the Order, the parties were unable or unwilling to successfully have these four documents satisfactorily prepared and executed. Each party blamed the other for this failure. Ultimately, the plaintiff charged the defendants with four allegations of contempt, alleging that the defendants had failed to comply with these four requirements of the Order.

[3] In my decision reported as *Pittson v. Murnaghan* , 2011 NSSC 402, I dismissed three of those allegations. The defendants were found in contempt on

the fourth charge, but given an opportunity to purge their contempt, which they did.

[4] The parties have been unable to agree to costs arising from the hearing of the motions. They also dispute liability for survey costs associated with preparation of descriptions to be appended to the Boundary Line Agreement and Quit Claim Deed that were required by the Consent Order.

Position of the plaintiff

Costs

[5] The plaintiff submits that he is entitled to costs in the amount of \$4,000 as the successful party on the motion. To arrive at this amount the plaintiff says that costs should be assessed on the basis of **Tariff C** and for a full day of hearing which amounts to \$2,000. (The parties have agreed that although the hearing took place over two days, the amount should be calculated on the Tariff amount for a one day hearing.) He then submits that a multiplier of 2 should be applied due to the complexity, importance and effort involved in the matter.

[6] In the alternative, the plaintiff submits that \$4,000 should be awarded as a lump sum.

[7] The plaintiff argues that the increased cost award is justified because:

1. The defendants have engaged in further contemptuous conduct subsequent to the decision;
2. The defendants unreasonably refused the plaintiff's offers to the defendants after the decision was rendered that he would accept an amount less than the \$2,000 basic **Tariff** amount that a successful party would expect to receive;
3. A motion for contempt is, by its nature, a complex proceeding when compared with motions typically brought before the court and deserving of increased costs;
4. This was an issue of significant importance to the parties.

5. Considerable effort was necessary.

Survey

[8] The plaintiff says that it is not responsible to share in the cost for the work of a surveyor who prepared descriptions to be appended to a Boundary Line Agreement and Quit Claim Deed.

[9] In support of this position the plaintiff submits:

1. My decision directed the defendants to engage the surveyor to provide the required descriptions;
2. The Consent Order did not require contribution by the plaintiff to the cost of the survey work;
3. There is no evidence that the plaintiff agreed to share in the cost.

4. The Consent Order essentially adopted the position set out in the Claim of the plaintiff.
5. The account was rendered to the defendants, not the plaintiff;
6. The surveyor's account was inflated by work that the surveyor unilaterally undertook and which complicated the matter unnecessarily. This required the plaintiff's counsel to expend increased time in responding to difficulties in getting the surveyor chosen by the defendants to comply with the court's direction.

Position of the defendants

Costs

[10] The defendants agree that costs in the amount of \$4,000 would be justified but take the position that since they were successful in defending against three of the four allegations of contempt the plaintiff should pay them \$3,000 in party and party costs.

[11] The defendants say that they too presented an offer for settlement of the costs issue by each party bearing their own costs, which offer was unreasonably refused by the plaintiff. Like the plaintiff, they suggest that this enhances their position in seeking increased costs because of the additional effort needed to deal with costs on a contested basis.

Survey

[12] The defendants submit that the boundary dispute was a shared problem and that the resolution by survey should also be a shared cost. This, it has been submitted, is the "fair and just result".

Analysis

[13] The court has a general discretion with respect to ordering costs and may make any order that satisfies the court that the order will do justice as between the parties. see, **Nova Scotia Civil Procedure Rule 77.02**

[14] In **The Law of Costs** 2nd ed. (Orkin)(Toronto: Canada Law Book, looseleaf) the exercise of this discretion is discussed at page 2-11:

The discretion is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. ...

The principles that should be observed in exercising discretion as to costs have been defined as follows:

First, the principle of indemnity is a paramount consideration.

Secondly, the courts must approach the matter on the basis that encourages settlement of all actions from the outset.

Thirdly, the court must discourage actions and defences which are frivolous.

Fourthly, the court must discourage unnecessary steps in the litigation.

The view has been expressed that costs should not be imposed as a matter of arbitrary or capricious practice by courts, but there should be a consistency of pattern.

[15] The court has a number of options available to it in exercising this general discretion. **Rules 77.03 (1) and (2)** provide that the court may make an order

directing the parties to bear their own costs, pay costs to another on a party and party basis or on a solicitor and client basis.

[16] Costs in this case would typically be assessed on a party and party basis.

Rules 77.06 and **77.07** are relevant:

Assessment of costs under tariff at end of proceeding

77.06 (1) 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**.

(2) ...

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with **Tariff C**.

The amount otherwise determined by the Tariffs may be increased or decreased in accordance with the guiding factors set out in **Rule 77.07**.

[17] **Rule 77.08** which authorizes an award of a lump sum provides an alternative means to the Tariffs for assessing the quantum of costs. The plaintiff has advanced this as his alternative position.

[18] Moir J. set out a very helpful summary of principles of assessing costs in his decision reported as *Bevis v. CTV Inc.* 2004 NSSC 209:

13 ... (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (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.

Conclusion as to Costs

[19] I have considered the positions of the parties and have decided that each party should bear their own costs. My reasons for this follow.

[20] The initial boundary dispute was triggered by the defendants' construction of a fence on lands that had historically been used by the plaintiff. The ensuing dispute over this action was acrimonious and protracted. It became personal for counsel to the plaintiff when a disciplinary complaint was lodged against him by the defendants. When the matter ultimately settled, it did so just before trial and on terms that reflected the plaintiff's position.

[21] To assist in understanding my assessment of the merits of the parties' claims to costs I am, for ease of reference, including here my conclusions taken from the decision on the merits of the plaintiff's motions for contempt:

[56] In my view the defendant could have and should have, at some time prior to the conclusion of the submissions, provided a properly executed Release. If there were continuing concerns about whether it had an effect on the remaining disputes, then it could have been provided, to be held "in escrow" pending the resolution of outstanding questions.

[57] I am satisfied beyond a reasonable doubt that by failing to comply with the order, even after it became apparent that there was an ability to comply, the defendants are in contempt of Paragraph 6 of the Order of Justice Hood dated July 31, 2009.

[58] As to penalty, I suspend the imposition of a penalty to permit the defendants an opportunity to purge their contempt by delivering to the plaintiff a

properly executed Release within 30 days of the date of this decision. If the defendants fail to purge the contempt then they will return to court at a time to be set in consultation with both counsel for further submissions on penalty.

[59] In general, the defendants exhibited good faith efforts to comply with the order of Justice Hood, which was sufficiently ambiguous in paragraphs 2 and 3 so as to cause some confusion about the description of the common boundary line.

[60] Unfortunately, the plaintiff, instead of recognizing the problem created by the drafting of the Consent Order, chose not to make constructive suggestions as to how best to arrive at a description that met the order. The plaintiff rejected proposed plans without offering up his own view as to what would overcome the inconsistency and comply with the order. He did not see an inconsistency.

[61] It was apparent that the plaintiff's disagreement was founded largely in his frustration with the defendant's litigation strategy during the period leading up to the settlement and the Consent order. There was, quite simply, no patience left for the defendants and hence the confrontational and uncompromising stance in the discussions as to the construction of the Deed and the Boundary Line Agreement.

[62] The defendants had not, as at the hearing, tendered on the plaintiff properly executed documents as required under the order, but they took the steps that were available to them to comply. I have concluded that the plaintiff has failed to prove, beyond a reasonable doubt the defendants' contempt in relation to the deed, the Boundary Line Agreement and the licence. The better course of action in this case may have been to seek the court's direction in clarifying the order so that the parties could comply.

[22] In the course of the hearing, it became evident that the disputes over the wording of the documents and appendices were entirely resolvable by reasonable people acting reasonably. Unfortunately, the acrimony between these parties was

too engrained to allow a negotiated resolution. Both parties bear responsibility for this in my opinion. The divided results on the hearing reflect this.

[23] The events subsequent to my Decision do nothing to alter my view. The plaintiff sets out untested allegations of continued trespass by the defendants. He also alleges that the defendants continued to try to delay the process necessary to bringing the parties into compliance with the Consent Order. At the same time, the plaintiff's position advanced on the costs issue takes little heed to my findings that the plaintiff also bears some responsibility for the events that triggered the contempt hearing.

[24] It is correct to say, as the defendants argue, that the bulk of the effort expended in the contempt hearings was devoted to issues on which the defendants were successful which would favor the defendants' position on costs.

[25] The plaintiff submits that the contempt motion was more complex, particularly because it was a two-step process. With respect the plaintiff was already awarded costs for the conduct of the first step. Costs in this matter can only reflect the circumstances of the motions hearing, not the leave hearing.

[26] Costs are not impacted by unproven allegations of subsequent contemptuous conduct. If such conduct is ongoing, then it will need to be separately alleged and proven. Costs for this motion as a punitive measure for subsequent conduct is uncalled for.

[27] I question the efficacy of trying to resolve the dispute by contempt motions. It may have been less costly and more effective if either party presented a motion under **Rule 78.08** to address and correct any ambiguities in the order that were the source of disagreement. I acknowledge that plaintiff's counsel never saw an ambiguity in the terms of the Order. However the defendants' counsel did. In this regard, it may have been that the defendants bore the responsibility of seeking court resolution, when it recognized the impasse. As this relates to costs, it further highlights the mutual responsibility of the parties for the circumstances that triggered the contempt motions.

[28] The defendants' original conduct triggered the action. The defendants then failed to take all available steps to avoid the contempt allegations, notwithstanding that the plaintiff gave notice of an intended contempt motion. The plaintiff's

conduct exacerbated the failure of the parties to fulfill the terms of the Consent Order. When the plaintiff did bring the contempt allegations it only succeeded in one of four and that contempt was quickly purged.

Conclusion as to the Surveyor's Account

[29] The question of who was to pay the surveyor costs for the descriptions to be appended to the Boundary Agreement and Deed was not addressed in the Consent Order.

[30] As discussed in my Decision, this dispute has its origin with the construction of a fence in 2004 by the defendants which ultimately had to be torn down and re-constructed in a location that reflected the original 1990 fence between the two properties. The defendants resisted the claim brought against them when they constructed the 2004 fence, as is their right, until just before the trial and then settled on terms that essentially adopted the plaintiff's position. Rectifying the problem that they created should fall to them and on their account.

[31] I have reviewed the submitted documentary evidence that shows the exchange of information that caused the surveyor to question the directions he was given in preparing the description for the Deed and Boundary Agreement. The increased costs generated by the surveyor's questioning of the proposed terms were reasonably consequential to the task he was retained to undertake. The respective costs of the parties to respond to and assist the surveyor in resolving his concerns were not to be unexpected. I find that the increased account is not relevant to my Decision as to liability for the account.

Summary

[32] The parties will each bear their own costs of the contempt motions hearing. The defendants are responsible for payment of the surveyor's account necessary to the preparation of the documents called for by the Consent Order.

Duncan, J.