

SUPREME COURT OF NOVA SCOTIA

Citation: Jeffrie v. Hendriksen, 2013 NSSC 153

Date: 20130515

Docket: Hfx No. 346079

Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

Anthony Hendriksen, Inland Marine Services Limited
and Three Ports Fisheries Limited

Respondents

DECISION ON COSTS

Judge:

The Honourable Justice Michael J. Wood

**Final Written
Submissions:**

April 29, 2013

Counsel:

William L. Ryan, Q.C., Christa M. Brothers and
Matthew Pierce, for the Applicant
Michael S. Ryan, Q.C. and Ezra B. van Gelder, for the
Respondents

By the Court:

[1] On February 26, 2013 I issued my written decision in this proceeding (2013 NSSC 50) in which I dismissed the claims made by Roderick Jeffrie against the Respondents. I invited the parties to make written submissions in the event that they were not able to reach an agreement on costs. The parties have now done so and this is my decision on that issue.

POSITION OF THE RESPONDENTS

[2] The Respondents say that they were completely successful and are, therefore, entitled to costs. They seek solicitor/client costs or alternatively a significant lump sum.

[3] The claim for solicitor/client costs is based upon Mr. Jeffrie's allegation that he was entitled to relief for oppression pursuant to the Third Schedule to the *Companies Act*. One aspect of the oppression claim was that Mr. Hendriksen had operated three ports "for improper purposes for his personal financial gain". The Respondents take this allegation and rely on the line of cases where solicitor/client costs are awarded when there are unproven allegations of fraud or improper conduct. The Respondents say that their actual legal expenses are approximately \$175,000.00, but provide no evidence in support of that assertion.

[4] As an alternative, the Respondents seek a lump sum award pursuant to the Court's authority in *Civil Procedure Rule 77.08*. The rationale is that the tariff calculation does not generate an amount which would represent a substantial partial indemnity in the face of the Respondents' actual legal costs. They propose a lump sum of \$120,000.00.

[5] The Respondents filed an affidavit of counsel attaching a statement of the disbursements which they incurred which totals \$21,419.07 without HST.

POSITION OF THE APPLICANT

[6] Counsel for the Applicant argues that success has been somewhat divided. In particular he says that Mr. Jeffrie was successful on the factual question as to whether the parties reached an agreement for the sale of his shares in a meeting

which took place on September 16, 2010. There was significant evidence directed at that question and Mr. Hendriksen argued that no such agreement had been reached at that time. Although I concluded that the parties had reached a consensus at that meeting, Mr. Jeffrie was not successful because I found that the parties had not intended to create legally enforceable obligations and that a further written agreement was required.

[7] With respect to the claim for solicitor/client costs, Mr. Jeffrie says that the allegation relied on by the Respondents was simply one part of the oppression claim. Mr. Jeffrie submits that he was not alleging dishonest or fraudulent conduct *per se*, but simply arguing that the Respondents' actions would trigger relief under the *Companies Act*.

[8] Mr. Jeffrie says that an award of costs at the low end of the tariff scale is sufficient, particularly given the lack of any evidence to support the Respondents' actual legal expenses. He also disputes some of the disbursements which are claimed.

ANALYSIS AND DISPOSITION

[9] This proceeding was an application in Court which required seven days of cross-examination. As noted in my written decision both parties made serious allegations concerning the character and motivation of the other. Counsel for Mr. Jeffrie is correct that on a number of factual disputes Mr. Hendriksen was not successful. Despite this he was ultimately successful on the merits of the application.

[10] I will deal first with Mr. Hendriksen's claim for solicitor/client costs. Mr. Jeffrie's allegations of oppression were clearly secondary to his main claim for enforcement of the agreement to buy his shares. The evidence of the allegedly oppressive conduct occupied less of the Court's time than the contract dispute. This particular assertion is only one of several aspects to the oppression claim. The specific events relied upon by Mr. Jeffrie are described in my decision. These may raise unanswered questions but I do not believe they are of the same character as those in cases where the Court has awarded solicitor/client costs for unproven allegations of fraud or dishonesty. Even if I felt this were the case, I would have to decide what portion of the hearing was devoted to these allegations and attempt

to determine the time and effort incurred by Mr. Hendriksen in responding. It would not be appropriate to simply issue a blanket order for all solicitor/client costs of the hearing.

[11] The Respondents' claim for a lump sum award of costs is premised on the position that their reasonable legal expenses are approximately \$175,000.00. They have provided no evidence whatsoever which would allow the Court to assess whether that is the case. A party seeking substantial indemnity has the burden of providing to the Court details with respect to the actual accounts including activities, hours spent and applicable hourly rates.

[12] In this proceeding there were at least four preliminary motions and, for most of them, costs were assessed. All work associated with these would have to be excluded from the Respondents' legal bills before an assessment of reasonableness could be undertaken. In addition, I would note that both parties filed affidavit evidence which was inadmissible and there was extensive examination of witnesses on topics which were of marginal relevance. In my view, the hearing could have been completed in less than the seven days which it occupied if both parties had been more focussed in their approach. I make this observation only to note that these are all matters that I would have to consider if I was to assess the reasonableness of the Respondents' legal expenses for purposes of calculating a substantial indemnity.

[13] I am satisfied that I can arrive at an appropriate award of costs by application of the applicable tariffs. Using Tariff A I believe that Scale II (Basic) should be applicable. The parties agree that the amount involved should be \$625,000.00 which would result in an award of \$49,750.00. To that I would add \$2,000.00 for each day of the hearing, but limit that to five days in light of the hearing inefficiencies noted above. This would result in an additional \$10,000.00 for a total of \$59,750.00.

[14] With respect to disbursements I have reviewed the items listed in counsel's affidavits as well as the submissions made on behalf of Mr. Jeffrie. The Respondents are claiming slightly more than \$10,000.00 for photocopying and printing, most of which appears to have been done internally at counsel's firm. The submission does not provide information with respect to the unit cost of each

photocopy. In light of the volume of material filed with the Court this appears to be excessive. I will somewhat arbitrarily reduce this item to \$7,000.00.

[15] The Respondents are claiming overtime expenses as well as scanning and library research. I do not think these items are properly recoverable as taxable disbursements and would disallow all of them.

[16] The disbursement claim includes \$4,649.22 for travel with no particulars provided. I will give counsel the opportunity to provide details of the travel expense so that I can determine the reasonableness of the amounts claimed. This should include the name of the person for whom the expense is claimed. It may be useful to first give this information to counsel for the Applicant in order to see if an agreement might be reached on this issue.

[17] Subject to the issue of travel expenses I would otherwise reduce the Respondents' taxable disbursements as set out in counsel's affidavit by \$6,929.90.

Wood, J.