SUPREME COURT OF NOVA SCOTIA
Citation: Bain v. Nova Scotia (Attorney General), 2013 NSSC 82

Date: 20130228
Docket: Syd. No. 313233
Registry: Sydney, N.S.

Between:

SANDRA BAIN of Saint John, Province of New Brunswick, and LEOTHA SEALE, of Sydney Nova Scotia

Plaintiffs (Defendants by Counterclaim)

and

THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province

Defendant

and

SCOTIA LIMESTONE LIMITED and LLOYD FRASER and PATRICIA FRASER

Defendants (Plaintiffs by Counterclaim)

DECISION ON COSTS

Judge: The Honourable Justice Patrick J. Murray

Heard: Final written submissions on Costs received from the parties on November 7th, 9th, 20th, 27th, and December 6th, 2012.

Written Decision on Costs February 28th, 2013

Counsel: David MacIsaac, Counsel for the Plaintiff, Sandra Bain
Ralph W. Ripley, Counsel for the Plaintiff, Leotha Seale
Robert H. Pineo/Jeremy P. Smith, Counsel for the Defendants, Scotia Limestone Limited and Lloyd and Patricia Fraser
Duncan MacEachern, Counsel of Record for the Attorney General (without appearing)

By the Court:

INTRODUCTION

[1] These are reasons for the fixing of costs in a trial under the *Quieting of Titles Act.* The proceeding was commenced by Notice of Action. The two (2) Plaintiffs each sought a Certificate of Title for their lots, in close proximity to one another in New Campbellton, Victoria County, Nova Scotia. The Defendants were the paper title holders of the lots in question.

[2] The trial lasted five (5) days and both claims were fully defended by the Defendants. There were common exhibits, including a Survey and an Abstract of Title. There were also certain witnesses who gave evidence in respect of both claims, including the Plaintiffs themselves. Both claims were intertwined, and involved the use of a roadway. A joint Exhibit Book was presented in evidence by the parties.

[3] At trial, I found in favour of one of the Plaintiffs but not the other. I allowed the claim of Leotha Seale and granted a Certificate of Title to her lot. I was satisfied she met the requirements for title by adverse possession, both under the *Limitation of Actions Act*, and at common law.

[4] I disallowed the claim of the Plaintiff, Sandra Bain, finding that she occupied the lot claimed with the consent of the true owner and finding also that her use and occupation was not exclusive to that of the true owner.

[5] The successful Plaintiff, Leotha Seale, seeks her full costs against the Defendants. The Defendants seek costs against the unsuccessful Plaintiff, Sandra Bain, but only for one half (½) the length of the trial. In turn, the Defendants state they should pay only one half (½) of the successful Plaintiff's costs. In effect, the Defendants say the length of the trial must be divided in ½ in awarding costs. As a result, they (the Defendants) state: "The Plaintiffs are entitled to two and one half (2 ½) days as the length of the trial and not five (5) days." Similarly they state, they (the Defendants) are entitled to claim only two and one half (2 ½) days and not five (5) days in calculating costs from the unsuccessful Plaintiff, Sandra Bain.

COST PRINCIPLES

[6] The following principles may be taken from *Rule 77 on Costs*.

(i) Costs are in the general discretion of the presiding judge. (*Rule 77.02(1));*

(ii) There is no limit on that discretion except for under *Rule 10,* a formal offer to settle. (*Rule 77.02(2));*

(iii) A judge may order one party to pay the costs of another. *(Rule 77.03(1));*

(iv) Most commonly, party/party costs are awarded by which one party compensates another party for "part" of the compensated parties' expenses of litigation. *(Rule 77.01(a));*

(v) Costs normally follow the result, meaning the successful party is usually awarded costs *(Rule 77.03)*. For a successful party not to receive costs, there must be a very good reason.

(vi) The main test is that a judge may grant any Order about costs that will "do justice" between the parties. *(Rule 77.02(1));*

(vii) Party/party costs, unless a judge otherwise orders, shall be fixed in accordance with the Tariff of costs and fees, produced at the end of *Rule 77 (Rule 77.06(1));*

(viii) A judge may add or subtract to the Tariff amount in fixing costs. *(Rule 77.07(1));*

(ix) Some factors which may be relevant to increase or decrease the amount of the Tariff, include the amount claimed in relation to the amount recovered, the conduct of a party affecting the speed or expense of the proceeding, or an improper step taken in a proceeding. *(Rule 77.07(1).*

(x) Costs awarded are intended to be substantial but incomplete indemnity for the successful party.

POSITION OF THE PARTIES

[7] ***Matters Agreed Upon***

It is agreed between the parties as follows:
(1) Costs should be awarded;
(2) Costs awarded should be party/party costs;
(3) Tariff A should be used in awarding costs;
(4) Costs should be paid by the Defendants to the Plaintiff, Leotha Seale;
(5) Costs should be paid by the Plaintiff, Sandra Bain, to the Defendant;
(6) The parties agree the value of the land may be used in determining the amount involved.
(7) It is agreed that the disbursements claimed by the Plaintiff, Leotha Seale, are acceptable to the Defendants.
(8) It is agreed in principle that the Plaintiff Sandra Bain should pay only one half of allowable disbursements to the Defendants.

Matters Not Agreed Upon

[8] The parties are not in agreement with respect to the following:
(1) Method of applying the Tariff in respect of (a) the amount involved; and (b) the length of trial;
(2) It is not agreed that the disbursements claimed by the Defendant against Sandra Bain should be allowed in total, but rather only in part.

POSITION OF THE PLAINTIFF, LEOTHA SEALE

[9] The Plaintiff, Mrs. Seale, submits that a conservative value for her land is $24,000.00. In her Brief, her Counsel stated, "Using that as the "amount involved" and adding $2,000.00 per day for the five (5) day trial equates with $16,250.00 in party/party costs". In fact, the party/party costs for an amount of $24,000.00 would be $4,250.00, for a total of $14,250.00. The Plaintiff, however, further suggests that a valuation of $30,000.00 is reasonable, relying on the Decision of **Chisholm v. The Attorney General of Nova Scotia,** 2009 NSSC 29**.** In **Chisholm**, Justice Murphy used the value of the property in determining the amount involved in assessing the scale to be used. Justice Murphy assessed the

value of the property at $30,000.00, which when the basic Scale 2 is applied, the amount for costs is $6,250.00. In **Chisholm**, as well, the trial had lasted five (5) days.

[10] Mr. Ripley, on behalf of Ms. Seale, claims costs in the amount of $6,250.00 based on the "conservative" figure of $24,000.00. In fact, the Tariff reads the costs for that amount should be $4,250.00, as stated in Paragraph 9 herein.

[11] In terms of the length of the trial, Mr. Ripley simply claims five (5) days and provides no reasons why it should be less. The trial was, in fact, five (5) days and beyond that no further explanation is provided. In terms of the Plaintiff's disbursements, no objection was taken by the Defendants, except that the Defendants asks for a similar treatment with respect to their disbursements claimed against the Plaintiff, Sandra Bain.

POSITION OF THE PLAINTIFF, SANDRA BAIN

[12] The Plaintiff, Sandra Bain, submits the value of the land is less than $25,000.00. Further, she submits that the length of the trial should be reduced by one half (½) from five (5) days to two and one half (2 ½) days. This is based on the fact that both claims were tried over a period of five (5) days. Fairness, she says, dictates that the costs should be awarded for one half (½) of the length of the trial due to the evidence of the Seale claim consuming the other one half (½) of the trial. No legal authority has been cited by the Plaintiff, Sandra Bain to warrant a reduction to reduce the trial from five (5) to two and one half (2 ½) days.

[13] The Plaintiff, Sandra Bain, argues that certain of the Defendants' disbursements should be disallowed. She further argues that she should only be liable to pay one half (½) of the Defendants' disbursements, because they were incurred in respect of both her and the claim of Leotha Seale. Whereas the Defendants were unsuccessful in respect of the Seale claim, Bain says one half (½) of those disbursements should be paid directly, by the Defendants themselves.

POSITION OF THE DEFENDANTS, SCOTIA LIMESTONE LIMITED AND LLOYD AND PATRICIA FRASER

[14] The Defendants state that the amount involved under Tariff A, having regard to the complexity and the importance of the issues should result in a value of under $25,000.00. Similarly, if the value of the land is used to establish the amount above, the value of the land would be less than $25,000.00 once again based on the assessed values submitted at trial.

[15] Further, the Defendants take the same position as the Plaintiff, Sandra Bain, in that the length of the trial, for cost purposes, should be shortened from five (5) days to two and one half (2 ½) days and that the Defendants should pay to the Plaintiff, Leotha Seale, costs attributed to her claim and not to both claims. The Defendants, in turn, state they should receive costs from Ms. Bain, for her claim only, namely, two and one half (2 ½) days of trial as opposed to the five (5) days of trial time actually spent.

[16] The Defendants are agreeable to paying the disbursements of the Plaintiff, Leotha Seale. The Defendants further claim one half (½) of their disbursements against the Plaintiff, Sandra Bain, which total $7,198.97. The basis for the Defendants claiming one half (½) of their disbursements appears consistent with their position that the trial time should be reduced by one half (½). If the costs should be reduced by one half (½) given the length, then presumably one half (½) of the disbursements would also be attributed to the Plaintiff, Sandra Bain.

ALLOCATION

[17] As stated, there has not been shared success here among the Plaintiffs. Collectively, the Plaintiffs had fifty per cent (50%) success as did the Defendants. Consequently, all of the Defendants costs should not be claimed. It is clear, however, that the Plaintiff, Leotha Seale, was one hundred per cent (100%) successful as against the Defendants and the Defendants were one hundred per cent (100%) successful in defending the claim of the Plaintiff, Sandra Bain.

[18] The Court must recognize that it is important to ensure the unsuccessful Plaintiff does not end up “subsidizing” the costs due to each of the other parties.

COSTS PAYABLE TO PLAINTIFF LEOTHA SEALE

[19] I have considered what is just, as between the parties Leotha Seale and the Defendants. I have weighed and given due consideration to the cost factors at issue, to ensure a fair result for all parties.

[20] As to the amount involved, the Plaintiff has suggested $24,000.00 as a conservative figure. What was at stake was the land, with the cottage attached, built in three (3) sections many years ago. It was not apparent at trial the cottage would not be lost if title to the land were not granted.

[21] Both Plaintiffs were seeking title to the land and cottage at trial. Thus, in terms of costs, it is unfair to separate land and building for valuation purposes. It is neither appropriate to do so, considering the common law, which is that land includes all structures appurtenant thereto. The position taken by the Plaintiffs, at the conclusion of the trial, was that the Plaintiffs may remove the buildings, if the Defendants were successful. The ultimate decision of the Court to allow the buildings to be removed did not change what was at stake during the trial, namely both land and building.

[22] In addition, the Bain lot is closer to the lake and has frontage on the public road known as the New Campbellton Road. I find that a realistic value of the Bain lot is at least $30,000.00, including land and cottage.

[23] The Seale cottage, while perhaps larger than the Bain cottage, is on a smaller lot (0.6 acres). The lot has no road frontage, it is farther from the lake, and it has access by way of a right-of-way over a marshy wet area. Its privacy has now been affected by the Fraser property which contains a mobile home between the Seale cottage and the New Campbellton Road. The Fraser property is assessed at $41,000.00, with the mobile home and services included.

[24] Using the Bain lot as a comparison, I find that the Seale lot is probably worth between $24,000.00 and $30,000.00, whether it is above or below accounts for a difference of $2,000.00 in terms of costs, under the Tariff ($4,250.00 vs. $6,250.00).

[25] The Defendants have argued the matter may be approached in a manner without an amount involved but based on the complexity of the proceeding and the importance of the issues. It is my view that the issues in this case were complex and certainly of importance to the parties. At the same time, the Defendants acknowledge that determining the value of the land can be a method for determining the amount involved in this case.

[26] I agree with the Plaintiff, Leotha Seale, that $24,000.00 is a conservative value for the Seale property. I find a more reasonable amount would be between $24,000.00 and $30,000.00. Therefore, I set Tariff costs at $5,250.00, said amount being the average of the amount below and the amount above the $25,000.00 Tariff range.

[27] To this must be added the amount of $2,000.00 per day for the length of the trial.

[28] I do not accept the Defendant's position that determining the length of the trial is as simple as dividing the five (5) days by two (2). I have considered the evidence and the issues. In many ways, both claims were intertwined. There was a joint Survey and a joint Abstract as well as a joint Exhibit Book. Many of the witnesses for each party were cross examined by all solicitors. For example, the Plaintiff, Sandra Bain, was cross examined by Mr. Ripley. The Plaintiff, Leotha Seale, was cross examined by Mr. MacIsaac.

[29] I am of the view that the two claims were so intertwined, they should not be separated for cost purposes.

[30] In addition, I am not convinced that separate trials would have resulted in shorter trials, for reasons that I have already indicated. There were certain efficiencies and economies of scale present by both claims being heard together in one (1) trial.

[31] I am satisfied further the Plaintiffs knew and assumed the risk of combining these claims, in terms of the cost consequences.

[32] Mr. Ripley was required to be present for all five (5) days of trial, as of course was the Defendant's Solicitor, Mr. Pineo. Mrs. Seale had complete success

against the Defendants, and the matters were, as I said more or less inextricably intertwined. I am, however, going to employ a measure that would allow for any repetition or duplication that may have occurred in respect of this trial. I therefore determine the length of the trial to be four and one half (4 ½) days. At $2,000.00 per day, this would add the sum of $9,000.00 to Mrs. Seale's cost figure for a total of $14,250.00. I believe this to be a substantial but incomplete indemnity to the Plaintiff, Mrs. Seale, for her legal costs.

[33] Disbursements are not an issue between these parties, and therefore the costs award to the Plaintiff, Leotha Seale, is $14,250.00, plus taxable disbursements in the amount of $6,246.71, and non-taxable disbursements of $149.09, which I hereby approve.

[34] I turn now to consider the cost award as between the Defendants and the Plaintiff, Sandra Bain.

COSTS PAYABLE BY MRS. BAIN TO THE DEFENDANTS

[35] In terms of the amount involved for the Bain lot, I am satisfied the value of $30,000.00 is both reasonable and supported by the evidence. Using this as the amount involved, the costs payable under Tariff A would be $6,250.00. The real value of the land is in its location. Most properties in that area are used for summer cottages.

[36] At common law, land includes all "appurtenances" to it, for legal purposes. This means that both the Seale and Bain cottages are included as part of the land, notwithstanding that the Court made provision for its removal of the Bain cottage, at the option of Ms. Bain.

[37] The Defendants, in their submissions at trial, invited such a ruling in the position taken by them in connection with the buildings. The Court acceded to the concession made by the Defendants to allow the buildings to be removed, in the event the Defendants were found to be the proper land owner.

[38] When one considers the assessed values of the buildings, it is readily apparent that the total values for land and building could well exceed the amounts submitted by the parties. As such, those valuations are conservative.

[39] Valuing land only does not do justice to what was at stake during the trial, namely, the lots with the cottages thereon. It is not intended that any reasoning or finding in this Costs Decision would alter any reasoning or finding in the Decision given at trial.

[40] As to the length of the trial, I am of the view that the evidence in relation to the Bain claim, consumed at least one half (½) of the trial and probably more than one half (½). The Bain claim figured prominently in the evidence throughout the trial. Arguably, between the two (2) claims, it consumed the most time.

[41] In **Landymore v. Hardy** 1992, 112 N.S.R. 410 (SC), Justice Saunders observed that persons who initiate legal proceedings assume certain risks. One of those risks is cost consequences. I concur. Here the risk assumed included the likelihood that trying both claims could lengthen the trial and thus increase the costs. This, in turn, increases the cost consequences.

[42] I have already expressed the view and so find that these claims were, in many ways, inseparable and that it made sense to try them both at the same time. I am not satisfied that separate trials would have reduced the length of time by any appreciable amount. If it would have, the amount of such reduction would be speculative and arbitrary.

[43] I am also aware that the Defendants' position is that the value of the Bain property is under $25,000.00. Since the Defendants are the parties affected by the valuation and the parties who will receive payment for costs from Bain, it stands to reason that I should accept this amount.

[44] For the reasons I have given, however , I am of the view that the Bain property exceeds $25,000.00. I have made and stand by my finding as to its value, namely $30,000.00.

[45] Having determined that the length of trial for the Plaintiff, Leotha Seale, was four and one half (4 ½) days, it would be consistent as well for the reasons given that I should find the same for the costs awarded to the Defendants against the Plaintiff, Sandra Bain. Accordingly, I am going to reduce the length of the trial by one half (½) day in arriving at the cost award, payable by Ms. Bain, which

shall be four and one half (4 ½) days at $2,000.00 per day plus disbursements of $6,250.00 for a total of $15,250.00, not including disbursements.

[46] In the case of each of the successful Plaintiff and the Defendants, the costs awarded amount to approximately $3,000.00 per day for the litigation. When one considers the nature of the issues as well as the extensive time required to prepare for trial, this amount, while conservative, represents a substantial but incomplete indemnity. Thus, it meets that fundamental principle of awarding costs.

DISBURSEMENTS

[47] The Plaintiff, Leotha Seale, claims disbursements in the amount of $6,395.80 against the Defendants. The Defendants take no issue with these disbursements, but ask that their own disbursements be approved and paid by the Plaintiff, Sandra Bain. Each of Leotha Seale and the Defendants have filed an Affidavit setting out the disbursements incurred and paid. Mr. Ripley's Affidavit sets out total disbursements incurred and paid, inclusive of HST of $6,246.71 plus $149.09 (Leotha Seale's share of Prothonotary fee), the latter which is exempt of HST.

[48] The Affidavit of counsel, Jeremy P. Smith, sets out the Defendants' disbursements incurred and paid, inclusive of HST, which total is $14,397.84 of which one half, $7,198.97 is claimed by the Defendants against the Plaintiff, Sandra Bain.

[49] The Plaintiff, Sandra Bain, through her counsel, Mr. MacIsaac, argues that certain disbursements claimed by the Defendant should not be allowed. Specifically, these include travel, meals and accommodations. There is also a bill for photocopying and computer research which is disputed. These costs in total are as follows: (1) photocopying, $1,873.50; (2) computer research, $89.49; (3) travel, $2,586.39; (4) meals and other, $630.91; and, (5) accommodations, $2,774.78.

[50] The Plaintiff, Bain, submitted recent case authority in which claims for travel, meals and accommodations have been disallowed. In these decisions, reliance was placed on there not being a provision which allows such

disbursements. The Court's view has always been that a party may retain counsel of their choosing. However, the resulting costs for travel, meals, and accomodations, if the trial is held outside of counsel's hometown, are not recoverable as disbursements, in the awarding of party/party costs. **(Creighton v. Nova Scotia (Attorney General)**, 2011 NSSC 437).

[51] Under the previous *Rules* (1972) dealing with costs, *Rule 63* had two (2) provisions pertaining to the payment of disbursements as follows:

> **Disbursements**
> **63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.**
>
> **...Proof of disbursements**
> **63.30 Disbursements, other than fees paid to officers of the court, shall not be allowed unless the liability therefor is established either by the solicitor conducting the matter, or by affidavit.**

[52] Those provisions provided that a party's disbursements were subject to approval by the Taxing Master and that disbursements, other than fees paid to officers of the Court, shall not be allowed unless liability for same was established by the solicitor conducting the matter.

[53] In this matter, the Defendant's solicitor, Mr. Pineo, has provided no authority to support an order from the Court, allowing these disputed disbursements.

[54] Under the "newer" 2009 *Civil Procedure Rules*, the language is different in that it permits the Court to approve such disbursements as are reasonable and necessary. In this regard *Rule 77.10* states as follows:

> **Disbursements included in award**
> **77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.**

> **(2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.**

[55] There are many expenses necessarily incurred in litigation. The fact that they were incurred alone does not mean they should be recoverable as disbursements. Unlike an expert's report, for example, which goes directly to the substantive issue in the litigation, meals, travel and accommodation, while necessary, do not relate to the issue which gave rise to the litigation. A survey in a real estate matter is a further example of an issue which would normally be recoverable.

[56] It is necessary for counsel to travel, have meals and have a place to stay during the trial. Let me say also, there is no question here that the funds were expended or even that they are not reasonable. However, there is nothing to show me whether they are reasonable either. I have no break down of, for example, the number of nights stayed, the rate, the daily cost for meals and so on.

[57] There is a burden of proof that must be met, and that burden is on the party seeking payment and approval. Even if I were prepared to depart from the caselaw provided, such disbursements are not valid without proof .The Affidavit of Mr. Smith states only that these expenses were incurred, not that they were reasonable and necessary and how that is so.

[58] Costs and disbursements are discretionary. This case is somewhat unique in that the Plaintiff's combined their two (2) claims into one (1) quieting action. Ordinarily, the retention of counsel and related accommodation expenses would not be recoverable. The combining of the Plaintiffs' claims here, I think, made it reasonable for the Defendant to be represented by more than one (1) counsel. In that sense, the expense of additional counsel is an additional expense which is more directly related to the trial issues, than merely living expenses. I will allow certain of the costs within that context. A reasonable *per diem* rate for meals, in my view, would be $60.00 per day times five (5) days. The claim for this amount is reasonable, at any rate, at $315.46. Similarly, the amount of $1,387.39 for a 5-6 night stay, is reasonable, assuming the hotel rate to be between $150.00 to $190.00 per night.

[59] The balance of the contested amounts, for travel ($2,586.39) and computer research ($89.49), I will not allow. Relying on **Creighton**, these may be described

as the "cost of doing business". I have no breakdown as to the travel costs, which are substantial .

[60] I will allow one half (½) of the claim for photocopying, the total of which is $1,873.50. The Plaintiff, Bain, states in her Brief that it should be reduced to half, which is $936.75. I will, therefore, approve that amount.

[61] Finally, I have considered whether to again divide the meals and accommodations by two (2), making the amount recovered , one quarter (1/4) of the total. I have decided that doing so would defeat the basis for awarding these costs in the first place. The disbursements allowed to the Defendants, therefore, shall include the amount of $315.46 (meals) and the amount of $1,387.39 (hotel and other) without any further reduction. The disbursements for travel, and computer research are not approved. One half (½) of the total photocopy bill is approved in the amount of $936.75. The total disbursements as set out by the defendants in relation to the Bain costs is $7,198.97 . From that figure the amounts of $44.75 and $1,293.20 must be deducted for research and travel leaving a total in relation the Bain costs of $5,861.02.

CONCLUSION

[62] The Plaintiff, Leotha Seale, is hereby awarded party/party costs against the Defendants as follows:

Tariff Costs	$14,250.00
Taxable Disbursements	$ 6,246.71
Non-Taxable Disbursements	$ 149.09
TOTAL	**$20,645.80**

[63] The Defendants are hereby awarded party/party costs against the Plaintiff, Sandra Bain, as follows:

Tariff Costs	$15,250.00
Taxable Disbursements	$ 5,339.16
Non-Taxable Disbursements	$ 521.86
TOTAL	**$21,111.02**

[64] The Attorney General of the Province of Nova Scotia submitted its account. While the amount is slightly above the guideline, it has been substantially reduced and no objection to the amount claimed has been received from any party. I hereby allow the account as submitted by Mr. MacEachern.

[65] Order accordingly.

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J.