SUPREME COURT OF NOVA SCOTIA

Citation: Visual Design Consultants Inc. v. Royal and Sun Alliance Insurance Company of Canada, 2013 NSSC 125

Date: 20130419
Docket: Hfx. No. 259250
Registry: Halifax

Between:

Visual Design Consultants Incorporated

Plaintiff

-and-

Royal and Sun Alliance Insurance Company of Canada

Defendant

Costs Decision

Judge: The Honourable Justice Robert W. Wright

Last Written Submission: February 5, 2013

Written Decision: April 19, 2013

Counsel: Counsel for the Plaintiff- Christopher I. Robinson
Counsel for the Defendant - Murray Ritch, Q.C. and Wayne Francis

Wright, J.

INTRODUCTION

[1] Following a six day trial, in a judgment reported at 2012 NSSC 387, the plaintiff was awarded damages against the defendant insurer for its business interruption loss caused by Hurricane Juan in the amount of $230,990 plus pre-judgment interest and costs. Pre-judgment interest has since been calculated at the sum of $44,275 for a total judgment of $275,265. However, the parties have since been unable to agree on costs.

[2] In written submissions, counsel for the plaintiff has requested an award of costs in the total amount of $102,873.02 which is comprised of increased Tariff A costs of $70,766 and disbursements of $32,107.02. Counsel for the defendant, on the other hand, submits that the total costs award should be $52,869.36 comprised of Tariff A costs (without any increase) of $34,750 and total disbursements of $18,619.36 (less costs of $500 for an interlocutory motion).

[3] This dispute centres on the question of whether or not tariff costs should be increased as well as the propriety of certain components of the disbursements incurred.

CIVIL PROCEDURE RULE 77- COSTS

[4] The following costs principles can be extracted from the relevant provisions of Civil Procedure Rule 77:

(a) An award of costs is in the discretion of the trial judge who may make any order about costs as the court is satisfied will do justice between the parties;

(b) Costs of a proceeding follow the result, unless a judge orders otherwise;
(c) Party and party costs must be fixed in accordance with tariffs of costs and fees incorporated into Rule 77, unless a judge orders otherwise;
(d) A judge who fixes costs may increase or reduce tariff costs, for example, when a written offer of settlement, whether made formally or otherwise, is not accepted or where the conduct of a party affects the speed or expense of the proceeding;
(e) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[5] Tariff A sets out the tariff of fees allowable to a party entitled to costs on a decision or order in a proceeding. The amounts set out in the tariff are dependent upon the "Amount Involved" and which of the three Scales is adopted. In the present case, where the "Amount Involved" falls within the range of $201,000 - $300,000, the tariff amounts are $17,063 under Scale 1, $22,750 under Scale 2 (Basic) and $28,438 under Scale 3.

[6] In addition, the length of trial is another factor to be included in calculating costs under the tariff, which is prescribed at the rate of $2,000 for each day of trial as determined by the trial judge.

DETERMINATION OF TARIFF A COSTS

[7] Counsel for the plaintiff submits that it is Scale 3 costs which should be adopted in the present case, rather than the basic Scale 2. This submission is based on the unilateral offer made by the plaintiff during the Date Assignment Conference on November 18, 2011 to remove its claim for indemnity for the

damage to the plaintiff's building (siding and windows) which had the result of reducing the number of witnesses required and the number of trial days required. It is argued that this is "conduct of a party affecting the speed or expense of the proceeding" which, under Civil Procedure Rule 77.07(2), is grounds for increasing tariff costs from the basic Scale 2.

[8] I am not persuaded that a departure from the basic Scale 2 is so warranted. This early concession by the plaintiff did not have a major impact on trial management and, of course, only served to shorten the length of the trial by an estimated two days. Typically, this rule is applied against a party whose conduct has detrimentally affected the speed or added to the expense of a proceeding. That is not the case here where the defendant has moved this matter forward from its end in a timely way.

[9] Neither can it be said that this case was an overly complex one. The sole issue was the determination of the quantum of the plaintiff's business interruption loss arising from Hurricane Juan, based on judicial interpretation of the relevant provisions of the insurance policy. Scale 3 costs are normally reserved for a complicated or prolonged trial involving more complex issues and testimony than this case generated (see, for example, **GE Canada Equipment Financing G.P. v. 3068485 Nova Scotia Ltd.**, [2010] N.S.J. No. 309 and **Hayward v. Young**, 2012 NSSC 56).

[10] In the result, I find that the Tariff A costs in the present proceeding should be fixed at $34,750, comprised of Scale 2 costs of $22,750 plus $12,000 for the

length of trial component (six days @ $2,000 each).

EFFECT OF PLAINTIFF'S FORMAL OFFER TO SETTLE

[11] On July 8, 2011 (before the case was set down for trial), the plaintiff delivered to the defendant a formal offer of settlement in the amount of $235,000 inclusive of costs. That offer remained open for acceptance until the commencement of trial but was never accepted by the defendant. Having obtained a more favourable judgment at trial, the plaintiff now seeks increased costs under Civil Procedure Rule 10.09.

[12] Rule 10.09 deals with costs consequences if a formal offer is not accepted and the plaintiff wins a "favourable judgment" at trial, as is the case here. The rule confers the discretion upon a judge to award costs to a party who obtains a favourable judgment in an amount based on the tariffs, increased by one of the specified percentages which are based upon the timing of the offer. The provision relied upon by the plaintiff here is Rule 10.09(2)(b) which allows for an increase of 75% of the Tariff A costs where its offer to settle was made more than 25 days after the close of pleadings and before the case was set down for trial.

[13] Counsel for the plaintiff argues that there is no principled reason for departing from this rule in the present case. Counsel for the defendant counters that there is a good reason to do so. The argument so made is based on the change in the plaintiff's expert witness and the late filing of the new expert report (albeit by consent order) only two months prior to the commencement of trial. The submission is made that the court should not exercise its discretion to increase

costs under Rule 10.09 where the formal offer to settle made on July 8, 2011 was based on the expert report of the plaintiff's expert witness first retained. It is argued that the delivery and reliance on the replacement expert report (filed on August 15, 2012) represents a significant change in circumstances such that the offer to settle should be treated as one made after the finish date of August 10th.

[14] What happened here is that the expert witness first retained by the plaintiff, Mr. Lawrence Cosman at Price Waterhouse Coopers ("PWC") became ill and was unable to testify at trial (which became known sometime in June, 2012). The plaintiff then retained Ms. Nikki Robar at PWC who, although she reviewed Mr. Cosman' report and working papers, prepared a completely new expert report.

[15] The defendant recognizes that Mr. Cosman's unfortunate illness caused inconvenience and additional costs for the plaintiff. However, it argues that in these unique circumstances, where it received a completely new report from Ms. Robar at the deadline of August 15th, and only obtained copies of Mr. Cosman's working papers as a result of a successful Chambers motion heard in September, the court should not exercise its discretion to increase costs based on the formal offer to settle at all. In the alternative, it is argued that if an increase is allowed, it should be restricted to 25%, that being the specified percentage under Rule 10.09(2)(d) where the offer is made after the finish date.

[16] In my view, that argument is not sustainable. As pointed out by counsel for the plaintiff in his reply, his formal offer to settle of July 8, 2011 was made eight months before the filing and delivery of Mr. Cosman's expert report. The

plaintiff's settlement position did not later change with the filing and delivery of the replacement expert report prepared by Ms. Robar, which indicates that her valuation of the business interruption loss was in all likelihood not substantially different from that of Mr. Cosman.

[17] There is no indication that the defendant ever made any formal counter offer to the plaintiff. It continued to rely, all the way through the trial, on the valuation of the loss prepared by its own expert, Ms. MacMillan, who gauged it to be within the range of a low of $371 to a high of $37,536. I am therefore not satisfied that the replacement expert opinion of Ms. Robar had any material effect on the settlement positions of the parties or their negotiations.

[18] The application of the 75% increase to the Tariff A costs sought by the plaintiff produces a total costs figure of $60,812.50 ($34,750 x 1.75). Counsel for the plaintiff has not provided to the court any information about the actual legal expenses incurred on an hourly rate basis, or whether there is a contingency fee basis, but in my estimation, the sum of $60,812.50 likely reflects a substantial contribution to the plaintiff's legal costs which is the overall objective of our costs regime. Costs in that amount are accordingly awarded to the plaintiff.

DISBURSEMENTS

Expert Witness Fees of PWC

[19] PWC has invoiced the plaintiff for professional fees in the amount of $18,398, almost 90% of which is accounted for by the work of Ms. Robar. In addition, PWC has charged an administration fee pertaining to disbursements of $919.90 which represents 5% of the fee component.

[20] Counsel for the defendant raises two issues pertaining to this invoice. Firstly, it is noted from the time sheets provided that about $3,973 of the fees charged relate to a motion brought by the defendant for disclosure of Mr. Cosman's working papers. That motion was contested by the plaintiff but the defendant was successful in the outcome, including an award of costs in its favour in the amount of $750, which presumably has already been paid. The defendant submits that this component of fees charged should not be recoverable by the plaintiff as a disbursement. In its reply submission, counsel for the plaintiff has not raised any objection to that position.

[21] I fully agree that this component of the PWC fees charged should not be recoverable by the plaintiff. Having lost the motion, with costs awarded against it, there is no basis upon which the plaintiff ought to be able to recover those expenses. The fee component of the bill is accordingly reduced from $18,398 to $14,425.50.

[22] The second point raised by counsel for the defendant is that the invoice bills its disbursements by way of an administration fee calculated at 5% of the professional fees. No evidence or information has been provided to establish the actual disbursements or reasonableness of that administration fee. Counsel for the defendant therefore suggests a flat administration fee of $250 to cover all disbursements.

[23] As a general rule, this court does not permit recovery of administration fees as a taxable disbursement although here it is obviously intended to cover unspecified disbursements. In the absence of any specifics of the actual disbursements incurred, I will allow the sum of $500 as a reasonable level of recovery in this regard.

[24] In the result, the amount of the PWC invoice to be recovered by the plaintiff, including HST, is $17,164.32.

Professional Fees Invoiced by Boyd Hunter, C.A.

[25] As reflected in my decision, Mr. Hunter was an important witness in this case. He also played an instrumental role in providing all necessary financial information concerning the plaintiff not only to the insurer initially, but also to both experts to enable the preparation of their respective expert reports for trial.

[26] As dealt with at paras. 92-95 of my decision, the measure of recovery under the insurance policy included reasonable fees paid to the insured's auditors for producing and certifying particulars or details of its business required by the insurer in order to arrive at the amount of the loss payable. Under those terms of coverage, I awarded the plaintiff recovery of the $25,000 maximum permitted.

[27] Mr. Hunter's firm has since submitted a further invoice to the plaintiff under date of December 17, 2012 in the total amount of $8,064 for professional fees plus

HST. The plaintiff now seeks recovery of that amount as an additional disbursement, less the sum of $1,932 representing Mr. Hunter's time for attendance at trial.

[28] In support of its position, the plaintiff relies upon the decision in **JB Technologies Inc. v. Independent Armoured Transport Atlantic Inc.**, 2009 NSSC 183. That case, following the appellate authority therein cited, stands for the proposition that where an unusual amount of witness preparation time is necessary as a practical matter, and where it is reasonable to pay a fee to the witness for such preparation, and where liability for a fee is incurred, an allowance on account of the preparation fee may be allowed as a disbursement in an award of party and party costs. Both the allowance of such a disbursement and its amount are discretionary.

[29] Counsel for the defendant acknowledges the court's discretion in this regard but argues that when the individual time entries are examined, the invoice relates little to providing financial information and for Mr. Hunter's preparation of his evidence for trial. The defendant submits that the plaintiff should only be entitled to a fee for a single time entry of 2.5 hours clearly identifiable as time spent by Mr. Hunter in preparing for his testimony.

[30] Mr. Hunter's time entries on this invoice began on April 18, 2011. I agree in part with defence counsel that the fees pertaining to the time entries between that date and July 19, 2012 should not be recoverable as a disbursement. Those

time entries appear to relate primarily to bringing the newly retained Mr. Robinson up to speed on the file and in assisting with the preparation for Mr. Oram's discovery. I agree that those professional fees would fall under the Professional Fees Extension coverage under the policy above mentioned, the maximum amount of which has already been awarded.

[31] The next block of entries I will refer to are those between the dates of October 11 and 15, 2012, the trial having actually commenced on the latter date. Although the description of these time entries lacks clarity, I am satisfied by their temporal nature that they pertain to Mr. Hunter's preparation for the trial. I am prepared to exercise my discretion to allow those fees as a recoverable disbursement under the **JB Technologies** case authority.

[32] The most difficult series of time entries for consideration are those between the dates of July 19, 2012 (when he first contacted Ms. Robar) and August 15, 2012 (the date on which Ms. Robar's expert report was completed and filed). These entries account for 11.4 hours of work billed in the aggregate amount of $2,736 (at the hourly rate of $240).

[33] It is evident from this group of time entries that they pertain to the work performed to enable the preparation of Ms. Robar's replacement expert report. As reflected in my decision, Ms. Robar's report was largely relied upon by the court in its assessment of the plaintiff's business interruption loss. This work was therefore vital to the outcome of the case.

[34] Strictly construed, this was not the production and certification of details of the insured's business required by the insurer, within the meaning of the Professional Fees Extension coverage. Rather, it represents fees for time spent providing all the necessary financial information to the plaintiff's expert witness for purposes of trial and in my view, the amount so billed in that regard should be considered as both necessary and reasonable.

[35] I acknowledge that Mr. Hunter was not an expert witness. I also acknowledge that these time entries do not pertain to his own preparation for trial as a fact witness. Nonetheless, the incurrence of these fees for professional services was absolutely essential in bringing this case to trial and I therefore exercise my discretion to allow them as a recoverable disbursement.

[36] In the overall result, I allow the recovery of Mr. Hunter's professional account to the extent of 20.2 hours of work performed at an hourly rate of $240, which produces a recoverable amount of $4,848 plus HST.

Law Firm Disbursements

[37] Counsel for the plaintiff has provided statements of account for disbursements in the aggregate of $2,546.83 covering various charges for photocopies, faxes and couriers. These statements of account are not accompanied by any supporting materials or details.

[38] Counsel for the defendant raises three points in opposition. First, an affidavit has been provided showing that the photocopying costs should be

reduced by reason of two credits to which the defendant is entitled in the combined amount of $441.77. These credits were not disputed in the reply submission from counsel for the plaintiff and I am satisfied that they should be allowed.

[39] Secondly, counsel for the defendant argues that the internal photocopying charges of about $950 are excessive and should be reduced by 50%. Where these charges are not detailed as to the volume of pages copied or the rate per page, I agree that this amount should be reduced and I do so by allowing only the sum of $500 in this respect.

[40] The third point raised by counsel for the defendant concerns courier charges in the aggregate amount of $500 which again are not detailed. These, however, are normally hard costs and I am prepared to allow them in full as a seemingly reasonable amount.

[41] In the overall result, I allow recovery of the law firm disbursements in the rounded amount of $1,600.

CONCLUSION

[42] By my arithmetic, as a result of the foregoing findings the plaintiff is entitled to recovery of costs in the amount of $60,812.50 plus disbursements in the amount of $24,339.50 for an overall costs award of $85,152. In making that award, I have declined to give the defendant a requested deduction of $500

pertaining to its successful interlocutory motion for disclosure of documents heard in 2008, where the costs disposition at the time was costs in the cause.

J.