SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Residential Inspection Services Ltd. v. Swan*, 2013 NSSC 226

Date: 2013-07-11
Docket: *Hfx*, No. 330660
Registry: Halifax

Between:

Canadian Residential Inspection Services Limited,
a body corporate, incorporated under the laws of the Province of Nova Scotia

Plaintiff

v.

Blaine Swan and Goodeye Inspection Limited,
a body corporate, incorporated under the laws of the Province of Nova Scotia

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 3, 4, 5, 6, 10 and 11, 2013,, in Halifax, Nova Scotia
Final Written Submissions:	July 8, 2013
Counsel:	John DiCostanzo, counsel for the Canadian Residential Inspection Services Blaine Swan, self-represented and representing Goodeye Inspection Limited

By the Court:

Introduction

[1] This is a costs decision following a six-day trial and oral decision. The parties were unable to agree upon costs and have made written submissions, received on July 8, 2013.

Background

[2] In 1988 Russell Cook, a contractor, began doing home inspections. In the early 1990's he incorporated Canadian Residential Inspection Services Limited ("CRIS"), to franchise his system of conducting home inspections.

[3] In 2002, Blaine Swan ("Swan"), a licensed oil burner technician, purchased one of the first CRIS franchises for $9,500 and became a home inspector. He signed a Franchise Agreement, giving him as exclusive territory Northern Nova Scotia (from Enfield to Antigonish to the Nova Scotia-New Brunswick border) for a five-year term. He signed a second agreement in 2007 renewing the franchise for a further five years.

[4] Early on, as permitted in the Franchise Agreement, Swan incorporated Goodeye Inspections Limited ("Goodeye") to conduct his home inspection business.

[5] In January 2010, Swan gave notice that he could not afford to continue operating the franchise any longer and was changing his careers. In April 2010, CRIS accepted Swan's decision, and terminated the Franchise Agreement based on various breaches of the Franchise Agreement by Swan and Goodeye. The Franchise Agreement contained terms that, upon termination for any reason, Swan was required to give up use of and turn over to CRIS, any CRIS materials, the telephone number, e-mail and other addresses used in connection with the franchise, and not to compete with CRIS for three years.

[6] The Court found that Swan continued to use the phone number and e-mail address until ordered to cease pursuant to an interim injunction order issued in January 2011.

[7] CRIS advertised for a person to take over the Northern Nova Scotia Franchise. A person agreed and signed an agreement to purchase the franchise for $25,000. When the proposed franchisee attended at Northern Nova Scotia he

found that Swan was continuing to use the telephone number, e-mail address, literature and other advertising associated with CRIS. He walked from the Franchise Agreement.

[8] CRIS sued for the return of its materials, for an injunction to prevent Swan from conducting the business of a home inspector for three years and for special and/or general damages.

[9] Swan defended that the Franchise Agreement was signed under duress and was unenforceable against him. He alleged that CRIS was in breach of certain ethical by-laws of the Canadian Association of Home and Property Inspectors ("CAHPI"), of which Swan was the national president, and he therefore had to quit operating under the franchise. Swan counterclaimed for wrongdoing by CRIS, seeking recovery of all monies he had to CRIS over 7½ years and general damages totalling about $125,000.

[10] At trial, the Court interpreted the Franchise Agreement, found the agreement to be enforceable and found that Swan and Goodeye had breached the agreement. The Court awarded damages against Swan and Goodeye. The Court dismissed Swan's counterclaim. The amount of the damages awarded was $32,000.

Costs decision

Submissions

[11] The Plaintiff seeks party-and-party costs: fees of $22,250 and disbursements of $2,160.13, for a total of $24,340.66. It submits that costs follow the result and it was successful in enforcing the restrictive covenants in the Franchise Agreement, and the counterclaim was dismissed.

[12] It calculates the quantum of fees, in accordance with Scale 2 (basic scale) of Tariff A, based on the amount awarded and the number of trial days. Scale 2 of Tariff A for an award between $25,000 to $40,000 is $6,250. Trial length is multiplied by $2,000 per day; it claims six days for $12,000.

[13] In addition, CRIS seeks to "add-on" to the Tariff the sum of $3,000 pursuant to *Civil Procedure Rule 77.07*. That *Rule* authorizes the Court to add or subtract from Tariff fees. CRIS relies on two factors for the add-on: (a) the number of unnecessary pre-trial motions to get disclosure from the Defendants;

and, (b) the fact that the length of the trial was unreasonably long by reason of the Defendants' irrelevant issues and evidence.

[14] CRIS also claims $1,000 with respect to its January 2011 interim injunction motion.

[15] The Defendants, who are self-represented by Swan, seek that they be awarded Scale 2, Tariff A costs and add-ons for a total of $13,150 plus disbursements of $712.

[16] With respect to the Plaintiff's *CPR 77.07* claim for $3,000 and $1,000 for the interim injunction, the Defendants say that CRIS was unsuccessful in the interim injunction motion; that disclosure motions are normal and that the issue of the relevance of the Defendants' evidence is subjective.

[17] With respect to the Plaintiff's claim for disbursements, the Defendants say they are excessive and unexplained.

[18] Finally the Defendants seek to be exempt from the payment of the Plaintiff's cost by reason of *CPR 77.04*.

Analysis

[19] The starting point for assessment of costs is codified in *CPR 77.03(3)*. Costs in a proceeding follow the result, unless a judge orders or a *Rule* provides otherwise.

[20] The calculation of party-party costs arising from a decision on a proceeding begins with Tariff A, which is based on two factors: "amount involved" and "length of trial". Several sections in *Rule 77* give the Court discretion to deviate from *Rule 77.03(3)* and Tariff A. *Rule 77.02* provides that a judge may make an order about costs as "will do justice between the parties", and nothing in the *Rules* limits the judge's discretion. *Rule 77.07* sets out the non-exhaustive list of factors that may lead a judge to add to or subtract from Tariff costs.

[21] The Defendants/Counterclaimants were not successful. They lost their submissions that the Franchise Agreement was unenforceable, that the Plaintiff breached the agreement, and that the restrictive covenants were unenforceable.

[22] The Counterclaim was entirely misguided and without legal justification. The evidence in support of the defence and counterclaim appeared to be directed

at, and intended to, discredit CRIS in the eyes of CAHPI, the national home inspectors' organization, of which Swan is the current national president.

[23] Swan produced eight witnesses, other than himself, all of whom testified over three days in respect of the unsuccessful defence and counterclaim.

[24] The Defence and Counterclaim were unsuccessful. The Defendants' claim for costs is denied.

[25] With respect to the Plaintiff's claim for costs, the Defendants' first argument involves *Rule 77.04*. The *Rule* reads:

> **Relief from liability because of poverty**
>
> 77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> (a) the party is notified of a proceeding the party wishes to defend or contest;
>
> (b) a claim made by the party is defended or contested.
>
> (3) An order against paying costs may be varied when the circumstances of the party change.
>
> (4) An order against paying costs does not apply to costs under Rule 88 - Abuse of Process, Rule 89 - Contempt, or Rule 90 - Civil Appeal.

[26] The purposes of *Rule 77.04* is not to afford a losing party the opportunity, post-trial, to seek exemption from a costs award.

[27] The *Rules*' policy is to provide access by the poor to the judicial system. Discretion to apply *Rule 77.04* might be entertained where the financial imbalance between the parties may prevent a poor litigant with a legitimate and reasonable claim from receiving justice. The policy was not intended to give an unfair advantage to one party over another.

[28] I adopt entirely the analysis of my colleague Justice Wright in *MacBurnie v Haltern Container Terminal Limited Partnership*, 2011 NSSC322. Justice Wright notes that costs are an important element of the litigation process. Their purpose is to indemnify a successful party, to encourage settlement, to stop frivolous actions, to discourage unnecessary steps and to facilitate access to justice. These purposes are undermined when a party has an exemption from costs exposure.

[29] Because of the imbalance that a cost immunity order would create, the Court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in *Rule 77.04* should be stringently applied and where there is a comprehensive body of evidence adduced in support.

[30] In this case Swan has produced no evidence, let alone substantial evidence, of his financial circumstances, the first of the two criteria listed in *Rule 77.04*.

[31] The timing of the request for exemption affects the second criteria. The Plaintiff has been put through lengthy pre-trial processes and a six-day trial without notice that the Defendants may seek exemption from a costs award if the Defendants lost.

[32] The case law outlines the requirement for full disclosure of the financial circumstances of the party who seeks an exemption under *Rule 77.04*. The Defendants have produced no evidence to support this criterion.

[33] The risk of an impediment to a defendant being able to litigate a plaintiff's claim is a legitimate concern with respect to reasonable, *bona fide* and relevant pleadings, evidence and submissions. The issues raised by the Defendants in this case were, for the most part, not relevant to the interpretation and enforcement of the Franchise Agreement. Some were relevant to the quantum of the Plaintiff's claim. The request for exemption, pursuant to *CPR 77.04*, is denied.

[34] I agree with both parties that the basic scale (Scale 2) of Tariff A applies as opposed to Scale 1 (for very simple matters) or Scale 3 (for complex matters).

[35] The "amount involved" is sometimes determined based upon the amount of the claim, sometimes upon the amount of the counterclaim and sometimes on a lesser amount, such as the amount awarded.

[36] It is not appropriate in this case to base the "amount involved" as the amount claimed by the Plaintiff, about $140,000. It might have been argued that it was appropriate for the Plaintiff to ask the Court to include in the "amount involved" the sums claimed in the unsuccessful counterclaim. The Plaintiff in this claim seeks the "amount involved" to be determined as the amount awarded to it in damages of $32,000. I agree.

[37] The second Tariff A factor is the length of trial. The trial itself consumed six full days. The Plaintiff claims 6 days at $2,000 per day or $12,000.

[38] A Court has discretion to determine that the length of trial was longer than was necessary or reasonable, as a result of the actions of the party seeking costs. In this case, I find that the length of the trial was not the result of any unreasonable conduct on the part of the Plaintiff but was the result of the length of time it took to deal with the issues raised by the defence and counterclaim. The Plaintiff should not be penalized for the fact that the unsuccessful Defendants' conduct at trial caused the trial to last six days.

[39] The Court determines the reasonable length of trial as six days and awards **$12,000** for that factor.

[40] The Plaintiff claims $1,000 respecting the motion resulting in the interim injunction on January 20, 2011. The Defendants say the Plaintiff was not successful and should not be awarded costs for that motion.

[41] The result of that motion was an order requiring the Defendants to deliver CRIS materials to it and to cease using the contact information that the Defendants continued to use in relation to their home inspection business; that is, the phone number and the e-mail address. The Court did not impose an interim injunction preventing the Defendants from competing as a home inspector.

[42] It appears that the Court determined that there was no "irreparable harm" if it did not enforce the restrictive covenant and that any damages could be measured in money, and that the balance of convenience favored leaving the issue of the restrictive covenant against competing to trial.

[43] While the Plaintiff did not get everything they asked for, they were successful in their main points. The Court awards costs of **$500** for that motion.

[44] The Plaintiff claims $3,000 as an "add-on" under *Rule 77.07*. I have already assessed the Plaintiff's entitlement to six days of trial on the basis that the trial time was consumed by the Defendants' misguided evidence and arguments. It would inappropriate to use that same reason to add an additional "add-on".

[45] The Plaintiff claims disbursements of $2,160.13. The disbursements itemized on Schedule "A" to the Plaintiff's brief total $1,232.63. They are legitimate and reasonable.

[46] The photocopy claim for $642.50 is based upon $0.57 per copy. This Court has been in the practice of assessing disbursements on actual costs. Absent proof of the actual cost of photocopying, the Court calculates the actual cost is $0.10 per

copy, particularly where there is a reasonably large quantity. The Court therefore reduces the photocopy claim from $642.50 to $113.00.

[47] No evidence was produced supporting the claim for "courier" charges and "other (fax and e-mail)" charges. These are often normal expenses of a law practice that are incorporated in the overhead and covered by the lawyer's fee.

[48] The Court approves disbursements of **$1,345.63**.

[49] The Court asks counsel for the Plaintiff to prepare the appropriate order.

Warner, J.