SUPREME COURT OF NOVA SCOTIA

Citation: *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52

Date: 20170228
Docket: Hfx. No. 438492
Registry: Halifax

Between:

Richard Homburg, Homburg Bondclaim Limited,
and Homburg Shareclaim Limited

Plaintiffs

v.

Stichting Autoriteit Financiele Markten, De Nederlandsche Bank N.V.,
Belastingdienst, Theodor Kockelkoren, Marcus E. Wagemakers,
Government of the Kingdom of the Netherlands

Defendants

Costs Decision

Judge:	The Honourable Justice Michael J. Wood
Heard:	November 1, 2, and 3, 2016, in Halifax, Nova Scotia
Final Written Submissions:	January 31, 2017
Counsel:	Ian Blue, Q.C. and Blair Mitchell, for the Plaintiffs - Richard Homburg, Homburg Bondclaim Limited, and Homburg Shareclaim Limited
	Sheila Block and Davida Shiff, for the Defendants - Stichting Autoriteit Financiele Markten, De Nederlandsche Bank N.V., Belastingdienst, Theodor Kockelkoren, Marcus E. Wagemakers, Government of the Kingdom of the Netherlands

By the Court:

[1] By decision issued November 17, 2016, (2016 NSSC 317) I dismissed the plaintiffs' claims on the basis of sovereign immunity. The parties have been unable to agree on the cost consequences of that decision.

[2] The successful defendants say the party and party costs calculated under Tariff C of *Civil Procedure Rule 77* do not represent a substantial contribution to their actual expenses and they ask the court to exercise its discretion and award a lump sum. The affidavit which has been filed indicates the total legal fees and disbursements billed to the defendants are $336,978.06. In their cost submission the defendants have applied reduced hourly rates of $300 for all lawyers and $150 for articling students, which adjusts the amount to $169,527.14. This is the lump sum they are asking the court to award.

[3] The plaintiffs argue that there are no special circumstances or misconduct that would justify departure from the Tariff C calculation, which they say would be a maximum of $20,000 plus disbursements.

[4] Costs are dealt with under *Civil Procedure Rule 77*, which makes it clear that costs of a motion must be addressed under Tariff C unless a judge otherwise orders (*Rule 77.05* and *77.06(3)*). The court may make any order with respect to costs that would "do justice between the parties" (*Rule 77.02(1)*). In applying the tariff the court is given discretion to add an amount to or subtract an amount from tariff costs *(Rule 77.07(1))*. *Rule 77.07(2)* gives examples of some of the factors which may be relevant in assessing whether to do so. It provides:

> 77.07 (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
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> (a) the amount claimed in relation to the amount recovered;
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> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> (c) an offer of contribution;
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> (d) a payment into court;
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> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

[5] *Rule 77.08* permits the court to depart from the tariff calculation and award a lump sum. On its face the rule does not provide any guidance as to when this would be appropriate, however the jurisprudence does. The Nova Scotia Court of Appeal in **Armoyan v. Armoyan**, 2013 NSCA 136, considered the circumstances when a lump sum cost award might be considered. The recommended approach is found in the following passage from the decision:

> 15 The tariffs are the norm, and there must be a reason to consider a lump sum.
>
> 16 The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In **Williamson**, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410:
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> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
> >
> > > "... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."
>
> Justice Freeman continued:
>
> > In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.
>
> 17 The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.
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> 18 But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far

> disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity -- *e.g.* to define an artificial "amount involved" as Justice Freeman noted in **Williamson** -- that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law.

[6] The court concluded that the circumstances of that case justified awarding a lump sum rather than tariff costs. The court's rationale for reaching this conclusion included the following:

1. The proceeding was brought as a motion which would engage Tariff C but ripened into features of a complex trial involving ten days of hearings over eleven months.
2. The matter involved an issue of jurisdiction between the courts of Nova Scotia and Florida and triggered broad consideration of comity, fairness, and efficiency in the administration of justice. It would be artificial to determine a notional "amount involved" for purposes of Tariff A (the trial tariff) if that were applicable.
3. The respondents had disobeyed court orders with respect to costs and engaged in litigation strategy which resulted in staggering legal accounts for the applicant. In order to do justice between the parties the "mercenary use of costs attrition" warranted a cost consequence.
4. The applicant made an informal settlement offer on terms which were more advantageous to the respondent than the court decision. Had it been accepted the applicant would have saved over $350,000 in legal fees.
5. The tariff calculation represented only 27% of the applicant's legal fees and disbursements and did not approach a "substantial contribution".

[7] In **Andrews v. Keybase Financial Group Inc.**, 2014 NSSC 287, the court considered an award of costs where the plaintiffs had been successful in a claim for financial losses caused by the fraud of a former financial advisor employed by the defendants. The court relied on **Armoyan v. Armoyan** and exercised its discretion to make a lump sum cost order that would do justice between the parties. It decided

this was appropriate for the following reasons:

1. The length and complexity of the case.
2. The claim arose from a deliberate breach of fiduciary duty, such that the appropriate remedy should reflect the principle of restitution.
3. There was a public interest in protecting investor confidence in financial institutions.

[8] In these circumstances the court said a lump sum award of costs should be made to give the plaintiffs a substantial contribution to their reasonable legal expenses. The amount awarded represented 66% of the solicitor client account.

[9] It is important to recognize that the substantial contribution principle underlies the tariffs but does not supersede them. Most cost matters should be disposed of based upon an application of the tariffs with the built in discretion to adjust amounts for the factors identified in *Rule 77*. The mere fact that the party's actual legal account is significantly more than the tariff does not automatically justify a departure. To suggest otherwise would turn the court into a taxing master whose function is to first assess the reasonable solicitor client account and then apply some percentage recovery between 50% and 100%.

[10] The cost analysis should not start with an examination of the reasonableness of a party's account. The court is not equipped on a cost motion to inquire into all of the reasons why the account was rendered in a particular amount. That will depend upon the terms of the fee agreement between solicitor and client, client instructions, efficiency of counsel, etc. By application of the tariff similar hearings will result in costs being awarded in roughly equivalent amounts and the predictability of such a result is desirable. If the focus is on calculating a substantial contribution to actual legal expenses, the result will be different in every case. The variation in counsel fees could be dramatic, even though the actual hearings are comparable in terms of duration and complexity.

[11] In my view the proper approach is to start with the presumption that the tariffs should be applied. If the party who wishes to depart from those rules can establish circumstances which show a lump sum is appropriate in order to do justice between the parties, then the court should engage in a principled analysis to determine the amount. This would lead to an assessment of the party's reasonable expenses and identification of an amount that represents a substantial contribution to them.

[12] The fact that consideration of legal fees incurred comes at the end of the analysis, and after a decision to award lump sum costs is made, is reflected in the following comments from the **Armoyan** decision:

> [29] The propriety of a lump sum award may be tested by comparing the proposed tariff award to the actual legal fees and expenses. Mr. Armoyan's calculation under the tariffs is $117,714.64. Even after the adjustments that I will discuss later, Ms. Armoyan's legal fees and disbursements exceed $450,000 for the Nova Scotia *forum conveniens* proceeding and both appeals. A recovery of about 27% does not approach the "substantial contribution" that Justice Freeman contemplated in **Williamson**.

[13] In this case the defendants' submission that a lump sum is appropriate was based primarily on the size of its solicitor client account and the relatively small contribution a tariff award would make towards that amount. They also referred to the complexity of the matter and the significance of the issues to the defendants as part of the justification for a lump sum.

[14] The hearing itself spanned three days and the last day concluded at noon. A day and a half was devoted to cross-examination of one of the defendants' deponents and *viva voce* testimony from a witness subpoenaed by the plaintiffs. Counsel submissions took approximately a half day for each party. I would assess the hearing as three full days for Tariff C purposes. Because of the finding on sovereign immunity the decision was determinative of the entire proceeding which would bring into play para. 4 of Tariff C which reads:

> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.
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> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000

1 day or more	$2000 per full day

[15] I have no difficulty concluding that the complexity of the matter, the importance to the parties and the effort involved in preparing for and conducting the application would justify increasing the tariff amount by four times. There were extensive affidavits filed, including opinions with respect to Netherlands securities law, translation of documents and cross-examination using an interpreter. Using the maximum daily amount of $2,000 and the multiplier of four, the tariff amount I calculate is $24,000 plus disbursements.

[16] Although the complexity of the matter was such that a multiplier of four was appropriate, I do not think it was sufficient to move outside of the tariff and consider awarding a lump sum. The legal issue of sovereign immunity is not common but that does not necessarily equate to increased complexity. The analysis set out in my earlier decision indicates it is primarily a question of fact. In this case there was not much dispute about what was done by the Dutch regulators and most of the argument focused on its legal significance. In many ways the hearing was no more complex than other matters dealt with by the court including summary judgment, judicial review and forum non-convenience. The amount of the defendants' legal expenses is not enough to convince me that the hearing bore no resemblance to the assumptions under which the tariffs were developed so as to justify departing from them.

[17] I recognize the international nature of this litigation did result in increased costs. Having witnesses in Europe provide affidavits and be cross-examined is not the norm. For this reason I believe the tariff amount should be increased to reflect this. I would increase it by a factor of two thirds and add another $16,000. This brings the award to $40,000 plus disbursements. I allow all of the disbursements requested by the defendants, with the exception of online legal research in the amount of $3,122.01. In my view this is part of counsel's overhead and not recoverable as a disbursement in a party and party cost award.

[18] I would ask counsel for the defendants to prepare a cost order reflecting my decision and forward it to counsel for the plaintiffs to consent as to form.

Wood, J.