SUPREME COURT OF NOVA SCOTIA
Citation: *Urquhart v. MacIsaac*, 2018 NSSC 36

Date: 20180223
Docket: Ant No. 421788
Registry: Antigonish

Between:

Richard Urquhart and Kerry Urquhart

Plaintiffs

v.

Daniel MacIsaac, DJMI Legal Services Limited
and Ronald MacIsaac

Defendants

COSTS DECISION

Judge:	The Honourable Justice James L. Chipman
Final Written Submissions:	February 16, 2018
Counsel:	Bruce T. MacIntosh, Q.C. for the Plaintiffs Augustus M. Richardson, Q.C. for the Defendants, Daniel J. MacIsaac and DJMI Legal Services Limited Dennis J. James, Q.C. for the Defendant, Ronald MacIsaac

By the Court:

Introduction

[1] I concluded *Urquhart v. MacIsaac*, 2017 NSSC 313 (the "Decision") with this para:

> In the result, the Urquharts shall have judgment jointly and severally against the Defendants for $80,000. Further, they shall have judgment against Daniel J. MacIsaac and DJMI Legal Services for an additional $904. I also award the Plaintiffs prejudgment interest and costs, with the latter subject to my comments above in respect of Daniel J. MacIsaac and DJMI Legal Services Limited. If the parties cannot agree on costs amounts, I will receive written submissions within 30 days of this decision.

[2] "My comments above …" referred to para. 234 when I said:

> Despite Danny MacIsaac's lapses and what I have described as a litany of failures, I am unable to find that his conduct was so malicious, oppressive or high handed to offend the Court's sense of decency. In the result, I am not prepared to punish Mr. MacIsaac by awarding the Urquharts punitive damages. Rather, I am of the view that the within special damages coupled with an appropriate costs award will ultimately provide the Plaintiffs suitable relief.

[3] The parties have been unable to agree on costs amounts and thus provided briefs, and in the case of the Urquharts, their lawyer's affidavit.

Pre-Judgment Interest

[4] The parties have agreed on interest and it shall be awarded as follows:

i. On $80,000 - $8,071.23 payable jointly and severally; and

ii. On $904 – $91.20 payable by Daniel J. MacIsaac and DJMI Legal Services Limited ("Danny MacIsaac and DJMI").

Disbursements

[5] The Plaintiffs seek $8,511.73 in disbursements. Ronald MacIsaac does not dispute this amount. Danny MacIsaac and DJMI challenge approximately half of the disbursements ($4,276.49), which is the cost of the Urquharts' airfare to travel from the United Kingdom to Nova Scotia (return) for discoveries and the trial. In support of their position, Danny MacIsaac and DJMI refer to *Creighton v. Nova Scotia*, 2011 NSSC 437 at paras. 52 – 53 and *Alto-Import, A. Larsson AB v. Fairbanks* (1990), 98 N.S.R. (2d) 387 (SCTD).

[6] In *Alto-Import,* Justice Richard refused to allow the air travel costs of the plaintiff company, which was registered to do business in Nova Scotia. The principal officers of the plaintiffs were residents of Sweden and attempted recovery of their airfare costs, despite the fact that the plaintiff company itself was registered under the *Nova Scotia Corporations Registration Act*. In my view, the case is distinguishable given the closing comments of Justice Richard:

> For general policy considerations, I am of the view that a losing party in an action ought not be substantially penalized merely because the successful party resides in some distant part of the world. In this case, the Plaintiff, a Swedish company, elected to come to this province to do business. If, in the course of doing business it elects to sue (as in this case) or is sued it ought to be treated as any other party and be regarded as residence in this province…

[7] In *Creighton*, Justice Pickup rejected the plaintiff's travel expenses, which included expenses for his wife (a non-party), and involved travel to Montreal and, hotel accommodations in Bridgewater.

[8] As with *Alto-Import*, I find *Creighton* to be distinguishable from the situation at hand. In the Decision, I touched on the circumstances requiring the Urquharts to move from Nova Scotia (see, for example, paras. 211 – 213). On balance, I have determined the airfare to be appropriate disbursements and hereby grant the total claim of $8,511.73 for disbursements as presented by the Plaintiffs to be paid on an equal basis by the Defendants.

Costs Positions of the Parties

Plaintiffs

[9] The Urquharts request a lump sum party and party costs award in lieu of Tariff A. They say the lump sum should be set at $90,000; i.e., over three times

the total under Tariff A. They also ask the Court to consider solicitor – client costs in respect of Danny MacIsaac and DJMI.

Danny MacIsaac and DJMI

[10] Danny MacIsaac and DJMI note that the amount involved of $80,000 on Scale 2 on Tariff A results in costs of $9,750. To that amount they acknowledge an additional $12,000 should be added; i.e., $2,000 for each of the six days of trial. These figures total $21,750 under Tariff A.

[11] Danny MacIsaac and DJMI argue that the $21,750 would in the normal course, represent appropriate costs, but bump the figure up to $31,000 with this rationale:

> We submit that $21,750.00 would in ordinary course represent a substantial contribution but not complete indemnity to the Urquhart's [sic] notional legal "fees" in conducting litigation of the type involved here. However, recognizing that the Plaintiffs' offer, while revoked, did come closest to the actual result, and taking into account the comments of the Court of Appeal in *Williamson v. Williamson* 1998 NSCA 195, as well as Your Lordship's own comments in the trial decision, we respectfully submit that a lump sum award of $31,000 for party-and-party costs would be appropriate.

Ronald MacIsaac

[12] Ronald MacIsaac calculates the $21,750 under Tariff A, but adds an additional, $5,437.50 (25% per Civil Procedure Rule 10.09, given the Plaintiffs' offer) for a total of $27,187.50.

[13] In the alternative, Ronald MacIsaac suggests an overall costs award of $35,000 in this way:

> As to the Plaintiffs' request for a lump sum award, the Defendant Ronald MacIsaac takes the position that a lump sum is not necessary in the circumstances. Our client respectfully submits that if this Court accepts the Plaintiffs' proposed legal costs as referenced in their brief, but determines the Tariff A amount does not represent a proper contribution in all of the circumstances, then in the alternative, the appropriate step would be for Your Lordship to add an amount to tariff costs which final amount would represent a reasonable contribution to the successful parties' costs.

> The Defendant Ronald MacIsaac submits that in the event the Tariff amount is to be increased, a reasonable increase would be in the range of 30% of the Total Tariff A amount. On the calculations above, that would increase the total Tariff amount to approximately $35,000.

[14] Ronald MacIsaac concludes his costs submission by arguing liability for costs should be apportioned 75% to Danny MacIsaac and DJMI and 25% to Ronald MacIsaac.

Costs – Guiding Law

Lump Sum Costs

[15] In *Big X Holding Inc. v. Royal Bank of Canada*, 2015 NSSC 350, Justice Campbell provided an excellent overview concerning the theory and Rules on costs (see paras. 6 – 13). Later in his decision, Justice Campbell discussed Rules 77.07 and 77.08, which are very much in play in this case:

> 43. Rule 77.07 provides that a judge can increase or decrease the amount of costs established by the application of the tariff and Rule 77.08 provides that a judge may depart entirely from the tariff and award lump sum costs. That discretion is of course to be judicially exercised, with reference to some factors that are noted as being potentially relevant. The judge can consider the amount claimed in relation to the amount recovered. The conduct of a party affecting the speed or expense of the proceeding is also relevant. Similarly, parties who take unnecessary steps or cause others to take steps that would otherwise not be necessary should suffer the consequences of their actions. Parties who fail to make admissions that should have been made will be required to bear the costs of their stubbornness.

Solicitor – Client Costs

[16] In *Geophysical Services Inc. v. Sable Mary Services Inc.*, 2010 NSSC 357, Justice Warner dealt with Rule 77.03(2) and discussed these cases referable to solicitor – client costs:

> *Young* v. *Young*, [1993] 4 S.C.R. 3
> *Brown* v. *Metropolitan Authority*, [1996] N.S.J. No. 146, 1996 CarswellNS 147 (N.S.C.A.) at para. 81
> *23201072 Nova Scotia Limited* v. *Lienaux*, 2004 NSSC 235, which cites *Orkin*'s text, *The Law of Costs*, at s. 219
> *MacDonell* v. *M & M Developments Limited*, [1997] N.S.J. No. 286, 1997 CarswellNS 224 at para. 91

> *Performance Industries Ltd* v. *Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19
> *Claibourne Industries Ltd* v. *National Bank of Canada*, [1989] O.J. No. 1048, 1989 CarswellOnt 1425 (Ont. C.A.)

[17] In declining to award solicitor – client costs, Justice Warner provided this helpful analysis at paras. 13 and 14:

> Essentially the finding at trial was that the corporate defendant over billed the plaintiff and that, in respect of at least 25% of the overbilling, the corporate defendant, with the active involvement of the individual plaintiff (the operating mind and principal of the corporate defendant), intentionally invoiced the plaintiff for more than even their interpretation of the contract. While that conduct is reprehensible, it is not such a rare and exceptional circumstance (as described by Justice McLachlin, as she then was, in *Young*) that it deserves censure or rebuke (as described by Pugsley J.A. in *Brown*).
>
> Justice Saunders' decision in *MacDonell* at para. 91 is not that "proof tantamount to fraud" is determinative of a party's entitlement to solicitor and client costs. What Justice Saunders wrote, I suggest, was that "proof tantamount to fraud" in respect a party's conduct is one of the avenues to finding conduct reprehensible. Said differently, it only opens the door to consideration of solicitor-client costs.

Enhanced Costs

[18] Our Court of Appeal dealt with the notion of enhanced costs in *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104. At para. 181 the Court stated:

> Saying this does not exclude enhanced costs for litigation misconduct if, for example, the judge holds the view that the misconduct unduly burdened the other party with litigation expense. Punitive damages and enhanced costs each serve their own purpose. The judge must not doubly compensate or punish. Here the parties agreed to the quantum of trial costs after Justice Bourgeois issued her decision with punitive damages. So duplication is not an issue.

[19] When Justice Moir decided costs in *Fleet v. Federated Life Insurance Company of Canada*, 2008 NSSC 352, he awarded enhanced costs against one of the defendants on account of his conduct. Justice Moir's comments at paras. 21-24 provide the rationale for such costs:

> A civil justice system that is often beyond the financial reach of many people cannot tolerate unnecessary expense. Rule 63.04(2) recognizes as factors for

> fixing costs "(d) the manner in which the proceeding was conducted" and "(g) the neglect or refusal of any party to make an admission that should have been made".
>
> In my assessment, Mr. Bellefontaine's conduct of his defence and his failure to admit, from the beginning until the last moment, that he was the source of Ms. Lowe's apparent signature on the application caused significant and needless expense to Mr. Fleet.
>
> The main reason for the enhanced costs is Mr. Bellefontaine's conduct. Otherwise, it seems to me that costs should be awarded in the usual way against the unsuccessful defendant. Mr. Fleet will have costs of $25,000 plus disbursements against Federated and an additional $10,000 against Mr. Bellefontaine, although he was technically successful on his defence. Mr. Bellefontaine will be ordered to indemnify Federated.
>
> Federated will have costs against Mr. Bellefontaine, in the requested amount, for the successful crossclaim.

Costs – Determination

Background

[20] This was a six-day Rule 57 trial. Rule 57 contemplates economical conduct by limiting pre-trial and trial procedures (57.02(1)). I have little information with respect to the pre-trial procedures other than to remark that there were no motions or applications. As for the trial itself, I stated as follows in the Decision:

> [6] Rule 57 limits pre-trial and trial procedures in a defended action so that it will be more economical. Although this trial consumed five days of evidence and one day of oral argument and involved lengthy briefs and (now) a lengthy decision, I believe the spirit of the Rule was followed. In short, what may have been a much more protracted trial was accomplished relatively swiftly, within four years of the commencement of the lawsuit.

[21] Having made this observation, for reasons that I will soon explain in detail, I am of the opinion this trial should have been approximately two days less in duration.

Tariff A

[22] As a first step in determining costs I must consider Tariff A (Rule 77.06(1)). I have assessed this in the same way as done by Ronald MacIsaac in his submission. That is to say, I have considered the Decision to be a "favourable judgment" (Rule 10.09) even though the Plaintiffs' offer did not remain open until trial. Accordingly, I consider the total Tariff A costs to be $27,187.50.

[23] Having observed the trial, written the Decision, and now reviewed the costs briefs, Mr. MacIntosh's January 24, 2018, affidavit, and the costs decisions, I am of the view that the tariff amount is woefully inadequate. Accordingly, I have decided to award lump sum costs.

What is the Appropriate Lump Sum?

[24] Counsel have referred the Court to a number of cases where lump sum costs awards have been granted:

> *GE Canada Equipment Financing v. DRL Coachlines*, 2010 NSSC 204
> *Salman v. Al-Sheikh Ali*, 2011 NSSC 30
> *Taylor v. Dairy Farmers of Nova Scotia*, 2011 NSSC 160
> *Creighton v. Nova Scotia*, 2011 NSSC 437
> *Walsh v. Unum Provident*, 2012 NSSC 237
> *Jeffrie v. Hendriksen et al*, 2013 NSSC 153
> *Atiyah v. Twin Lighthouse Farm Limited*, 2013 NSSC 231
> *Tessier v. Nova Scotia Human Rights Commission*, 2014 NSSC 189
> *Andrews v. Keybase Financial Group Inc*., 2014 NSSC 287
> *Henneberry v. Compton*, 2014 NSSC 412
> *Landry v. Kidlark*, 2014 NSSC 432
> *Shannon v. Frank George's Island Investments Limited*, 2015 NSSC 133
> *Laamanen v. Cleary*, 2017 NSSC 153; *Cleary v. Laamanen*, 2018 NSCA 12

[25] At 66 paragraphs, Mr. MacIntosh's affidavit is rather lengthy and portions of the affidavit (as well as the submissions) delve into areas that I do not consider necessary for my proper adjudication of the costs issue.

[26] In his affidavit at para. 46, Mr. MacIntosh provides detail substantiating "total value of recorded time $225,786." Importantly, the Urquharts have yet to be billed. In this regard, Mr. MacIntosh deposes at para. 17:

> I ultimately agreed to accept their retainer on a conventional fee basis, but without expectation of immediate payment. Both Richard and Kerry at that time were determined to remain in Nova Scotia and were actively pursuing alternate employement within Nova Scotia. They provided me personal assurances, which I accepted, that they would pay our account as soon as their financial circumstances permitted. As a consequence, I commenced our retainer and recorded our billable time in the conventional manner.

[27] Due to various issues related to the lawsuit, Mr. MacIntosh subsequentely amended his retainer as he deposes at para. 39:

> I therefore advised the Urquharts that I was prepared to amend our retainer in order to take their case on a partial *pro bono* basis. I explained I would convert our retainer from a conventional hourly basis to one in which Mac, Mac & Mac would provide substantial *pro bono* assistance, as a supplement to what would remain recorded billable time.

[28] Plaintiffs' counsel goes on in his affidavit to discuss "proposed fees" and then states at paras. 48 and 49:

> As a practical alternative to actual fees billed, and to provide this Court some predictability when adjudicating the request for a lump sum award, this Deponent provides an undertaking to charge fees as described below, but only at a time and in a manner appropriate to the best interests of my clients. In particular, the undersigned Deponent undertakes to this Court to charge legal fees not exceeding the following sliding scale:
>
> a. If total recovery for damages, interest, costs and disbursements (net recovery) exceeds $185,000, then actual fees billed to the Urquharts shall not exceed $112,893.00 (being a 50% *pro bono* discount off recorded time).
>
> b. If net recovery is less than $185,000 but more than $175,000, then actual fees billed shall not exceed $100,000 (being a 55% *pro bono* discount off recorded time).
>
> c. If net recovery is less than $175,000 but more than $164,999.00, then actual fees shall not exceed $90,000 (being a 60% *pro bono* discount off recorded time).

> If net recovery is less than $165,000, then actual fees shall not exceed $85,000 in any event (being a 62% *pro bono* discount off recorded time).

[29] The arrangement between the Urquharts and their law firm, while perhaps novel, should not preclude them from an appropriate costs recovery. Accordingly, although I have not been provided with actual accounts billed to the Urquharts (because they have yet to be rendered), I find Mr. MacIntosh's detailed affidavit (and attached billing statements to December 31, 2017) to be helpful and of guidance in assessing a fair lump sum costs award. Having said this, I am mindful of the arguments marshalled by Mr. Richardson, including the proportionality of the proposed fees to a Rule 57 action and the question of whether all of the docketed time was necessary. As well, I accept that the Defendants' pitch that Nova Scotia costs decisions involving lump sum awards (see para. 24) do not support a lump sum in this case of $90,000. I would add, however, that I am of the view that the $31,000 proposed by Danny MacIsaac and DJMI as well as the $35,000 suggested by Ronald MacIsaac are inadequate.

[30] Returning to my "background" comments at paras. 20 to 21, I am of the view that the trial would have been much less protracted had the Defendants acknowledged certain realities; in particular:

1. Danny MacIsaac and DJMI should have admitted negligence and breach of fiduciary duty (but not causation); and
2. Ronald MacIsaac should not have called Boyd MacIsaac as a witness.

[31] In the Decision, I determined expert evidence was not required to find that Danny MacIsaac fell below the standard of a competent solicitor and that he breached his fiduciary duties to the Urquharts. At the end of the day, given all of the evidence, these were not difficult findings. This is why I question the failure of Danny MacIsaac and DJMI to make these admissions. In closing argument, Mr. Richardson essentially acknowledged his client's derelictions, but held to the position that there was a lack of causation. Had this approach been adopted prior to the trial, I have no hesitation in expressing my view that the trial would have been much shorter, with the same result, albeit with far less time required for Mr. MacIntosh to advance his clients' case.

[32] As for the decision to call Boyd MacIsaac, his evidence clearly did not help Ronald MacIsaac. If he had not taken the stand, we would have been left with an identical result, but once again, far less time would have been needed at trial.

Obviously, Mr. MacIntosh's time preparing for and cross-examining Boyd MacIsaac would have been eliminated.

[33] Had the trial proceeded with these adjustments, I suspect it would have been more in the realm of four days in total as opposed to six. This clearly would have meant far less docketed time by counsel and ultimately, a lesser costs consequence.

[34] This is not a case for solicitor and client costs. In this regard, the matter did not involve reprehensible, scandalous or outrageous conduct by the losing parties. Solicitor and client costs are used to express disapproval of the conduct of the losing parties and are unwarranted here.

[35] After presiding over the trial and having considered all of the filings, Mr. MacIntosh's affidavit, the Decision, and jurisprudence, I have come to the conclusion that the appropriate lump sum party and party costs award is $60,000.

[36] As I foreshadowed in the Decision, this is a case for enhanced costs as against Danny MacIsaac and DJMI. This is achievable by apportioning liability for costs in the manner requested by Ronald MacIsaac ; i.e., 75% to Danny MacIsaac and DJMI and 25% to Ronald MacIsaac.

Conclusion

[37] The tariff costs will not give the Urquharts a substantial contribution to what their reasonable costs will be. I have carefully reviewed Mr. MacIntosh's docketed time and his approach to ultimately billing his clients. The handshake retainer permitted the Urquharts to proceed with what was a meritorious case against the backdrop of relatively modest potential damages. To my mind, Mr. MacIntosh's agreement to take the matter on should be commended as it gave his clients access to justice. Costs decisions in this province stand for the proposition that a successful party should recover a substantial portion of their legal costs. In *Williamson v. Williamson*, 1998 NSCA 195, Justice Freeman held that a substantial contribution should not amount to complete indemnity but rather, more than 50% and less than 100% of a lawyer's reasonable bill. With lump sum costs of $60,000, I believe the proper balance is struck.

[38] Taking all of the above into consideration, the Urquharts shall receive the following in costs, prejudgment interest, and disbursements:

i. From Danny MacIsaac and DJMI –

Costs:	$45,000
PJI:	$4,127
Disbursements:	$4,256
TOTAL:	$53,383

ii. From Ronald MacIsaac –

Costs:	$15,000
PJI:	$4,036
Disbursements:	$4,256
TOTAL:	$23,292

Chipman, J.