

SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd.*,
2021 NSSC 6

Date: 20210112

Docket: Hfx. No. 406818

Registry: Halifax

Between:

The Royal Bank of Canada

Plaintiff

v.

Colorcars Experienced Automobiles Ltd., John T. Early III

Defendants

DECISION ON COSTS

Judge: The Honourable Justice John P. Bodurtha

Heard: June 19, 2020

Costs Decision: January 12, 2021

Counsel: Tipper McEwan, Counsel for the Plaintiff
John T. Early III, Self-Represented Defendant

By the Court:

Overview

[1] On October 22, 2019, the Plaintiff, Royal Bank of Canada (“RBC”) filed a motion for summary judgment pursuant to *Civil Procedure Rule* 13.04. The hearing of the motion was adjourned until June 19, 2020 and the Defendants were

provided a deadline of May 30, 2020 for the filing of their materials. The Defendants did not file any materials in response to the Plaintiff's motion.

[2] The Plaintiff's motion was heard on June 19, 2020. The Defendants were notified of the hearing but did not attend.

[3] On June 24, 2020, I granted the Plaintiff's motion for summary judgment on the evidence and provided the parties an opportunity to reach an agreement on costs. I indicated that, if the parties could not reach an agreement, I would receive submissions by July 24, 2020. The Defendants provided no submissions with respect to costs. The following is my decision on the filed submissions of the Plaintiff with respect to costs.

[4] RBC seeks to recover costs in the amount of \$63,000.00 plus disbursements of \$3,303.47 for a total cost award of \$66,303.47. After eight years of litigation, including trial preparation in 2019, RBC incurred legal costs of \$158,789.50.

[5] The Plaintiff submits that the conduct of the Defendants has increased the costs in this proceeding and that the amounts to be awarded under Tariff C will not do justice between the parties. They argue that the Court should exercise its discretion and award a lump sum pursuant to *Civil Procedure Rule 77.08*.

[6] I agree with the Plaintiff's submission. After considering the conduct of the Defendants throughout the course of the litigation a lump sum award of costs is called for. I award the Plaintiff costs in the amount of \$40,000 plus disbursements of \$3,303.47.

Applicable Civil Procedure Rules

[7] *Civil Procedure Rule 77.02(1)* reads:

77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[8] *Civil Procedure Rule 77.06(1)* reads:

77.06(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.

[9] *Civil Procedure Rule 77.07* provides factors which are relevant to increasing tariff costs:

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(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:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (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.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[10] *Civil Procedure Rule 77.08* provides a general discretion to award costs in a lump sum instead of tariff costs. *Civil Procedure Rule 77.08* reads:

77.08 A judge may award lump sum costs instead of tariff costs.

[11] *Civil Procedure Rule 77.10(1)* reads:

77.10(1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[12] The Plaintiff submits that, in order to do justice between the parties, the Court should exercise its discretion under *Civil Procedure Rule 77.08* and award a lump sum to the Plaintiff.

Analysis

[13] In *Grue v. McLellan*, 2018 NSSC 151, Justice Hunt summarized the principles in awarding costs as described in *Armoyan v. Armoyan*, 2013 NSCA 136, at para. 6:

6 In *Armoyan v. Armoyan*, 2013 NSCA 136 (N.S. C.A.), the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;
2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.07(2)*. These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
3. The *Rule* permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15
4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16
5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

[14] A costs award should represent “a substantial contribution toward a party’s reasonable legal fees and expenses but should not amount to complete indemnity.” (*Lyle v. Myer*, 2019 NSSC 387, at para. 23)

[15] In determining what amounts to a “substantial contribution” towards a party’s costs, the Nova Scotia Court of Appeal suggests that this means something more than fifty per cent and less than one hundred per cent of those costs: (*Williamson v. Williamson*, 1998 NSCA 195, at para. 25)

[16] The starting point with costs is the tariff and, because this was a motion for summary judgment on the evidence, the starting point is Tariff C. Costs under Tariff C are set at \$750-\$1,000 for a motion of more than one hour but less than one-half day. If the motion has the effect of deciding the entire matter at issue, the Court may apply a multiplier of two, three or four.

[17] In cases where the tariff approach is more distracting than useful, it is more appropriate to circumvent the tariff and apply the lump sum approach under *Civil Procedure Rule 77.08*: *Armoyan v. Armoyan*, 2013 NSCA 136, at para. 18.

[18] A lump sum is appropriate in this case to do justice between the parties because an award of costs in the amount of \$4,000 (\$1,000 under Tariff C and applying a multiplier of four) would not provide a substantial contribution to RBC’s reasonable fees and expenses.

[19] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44 (“*Tri-Mac*”), the Court held that a departure from Tariff C is warranted “when the basic award of costs would not adequately serve the principle of substantial but not complete indemnity for legal fees of the successful party.” (See para. 6). In *Tri-Mac* the hearing was extended over months and the matter involved further submissions post-hearing and post-decision, which resulted in added costs to the proceeding. Lump sum costs were awarded even though the motion was not determinative of the legal proceedings as a whole. The Defendant’s legal fees amounted to \$75,000 and they sought a one-third recovery of the actual legal fees being \$25,000, plus \$6,076.77 in disbursements. The Court found both amounts to be reasonable and awarded costs in those amounts.

[20] In the case before me, the Defendants' conduct throughout the litigation demonstrated an indifference to court processes and a "very casual attitude" to Court Orders: *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd.*, 2019 NSSC 283 and 2019 NSSC 391.

[21] Straightforward matters such as setting trial dates, discoveries and production of documents all required the Court's intervention. The Defendants repeatedly did not appear for Court dates and teleconferences, wasting invaluable Court resources and the time of Plaintiff's counsel. All these actions contributed to the increased fees of the Plaintiff. To award costs under Tariff C for this type of conduct would not do justice to the parties.

[22] In *Corfu Investments Ltd. v. Oickle*, 2011 NSSC 223, at para. 17, the Court cites Justice Warner in *National Bank Financial Limited v. Potter*, 2008 NSSC 213, where he notes the five purposes for costs awards from *The Law of Costs*, (2nd ed.):

17 In *National Bank Financial Limited v. Potter*, 2008 NSSC 213, [2008] N.S.J. No. 213, Warner, J. cited *The Law of Costs*, (2nd ed.) by Mark M. Orkin (2007) Canada Law Book (looseleaf service) Chapter 2. He noted:

Orkin identified five purposes for costs awards. Paramount is the principle of indemnification. The others are: to encourage settlement, deter frivolous actions and defences, discourage unnecessary steps that unduly prolong the litigation, and to facilitate access to justice. -- at para. 17.

[23] Indemnification is the primary purpose for costs awards but, in addition, the purpose of costs awards is "to encourage settlement, deter frivolous defences, and discourage unnecessary steps that unduly prolong the litigation". These factors were present in this case and favour an increased costs award.

[24] The Plaintiff offered to settle the matter with the Defendants on March 4, 2016. The Defendants rejected the favourable offer. The Plaintiff submits that the Defendants' defence was frivolous because two of the debts claimed by the Plaintiff were admitted in the Statement of Defence and the remaining arguments of the Defendants did not answer the allegations of the Plaintiff. Lastly, the Defendants prolonged the litigation by a) failing to show up for court appearances, b) having the Plaintiff bring two motions for judgment for which the Defendants did not file any material in response, c) failing to appear for the motion for summary judgment, and d) failing to respond to any communication from the Court or Plaintiff's counsel in 2020.

[25] I have taken this all into consideration in awarding a lump sum of costs.

Disbursements

[26] The Plaintiff seeks disbursements of \$3,303.47 for out-of-pocket expenses related to Court fees, discovery services, process servers, and photocopies.

[27] I have reviewed the expenses and conclude that they are reasonable.

Conclusion

[28] A lump sum is appropriate in these circumstances. I order the Defendants to pay to the Plaintiff, RBC, total costs in the amount of \$40,000 plus disbursements of \$3,303.47. I am satisfied that this award serves justice between the parties, pursuant to *Civil Procedure Rule 77.02(1)*.

[29] I ask that counsel for the Plaintiff, RBC, prepare the form of Order. The amounts payable, as set out above, shall be due within 90 days of the date of issuance of the Order.

Bodurtha, J.