SUPREME COURT OF NOVA SCOTIA
Citation: *Link v. Link*, 2021 NSSC 114

Date: 20210401
Docket: 497455
Registry: Halifax

Between:

Jay Link

Applicant

v.

John E. Link, Troy Link, John Hermeier, and Link Snacks Inc.

Respondents

Decision on Costs

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	By written submissions only, in Halifax, Nova Scotia
Counsel:	Scott R. Campbell and Christopher Madill, for the Applicant Michelle Awad, QC and Michael Richards, for the Respondents

By the Court:

Introduction

[1] Jay Link sought to bring a derivative action on the behalf of "Link Canada" in Nova Scotia as against the Respondents. I denied his application for leave to proceed – 2020 NSSC 293.

[2] Costs are in dispute.

The position of the parties

[3] Jay argues there are no exceptional circumstances here to depart from the CPR 77 tariff "C" scale – at most, costs of $2000 for (effectively) a one full day hearing multiplied by a factor of two or three (i.e. 4000 – $6000) plus disbursements, is a just result.

[4] He says, *inter alia*, that since the Application in Chambers only took a day of court time; did not involve proportionate complexity or unsettled law; and did not require the expanse of evidence presented by the Respondents, no greater amount is required: the *Armour Group Limited v Halifax Regional Municipality*, 2008 NSSC 123; *Grue v McLellan* 2018 NSSC 151; *Cytozyme Laboratories v Acadian Seaplants Limited*, 2018 NSSC 175.

[5] The Respondents counter that ($40,000) lump-sum costs plus disbursements per CPR 77.08 is the "only appropriate outcome", because, *inter alia*, the proceeding bore characteristics, if considered collectively, common to what would be present in an Application in Court given the length of the hearing (which Jay has fairly characterized as "an efficient and respectful piece of litigation"); that the purported claim was estimated by Jay to be up to $80 million US; the volume of

evidence adduced (very extensive affidavits – though I note no cross-examination was required after stipulations/agreements were made between counsel); and the court and counsels were required to consider that evidence in light of the complexity of the issues (which would ordinarily attract a tariff "A" amount): *Tri-Mac Holdings Inc. v Ostrom*, 2019 NSSC 44; *MGL Consulting and Investments Limited v Perks Coffee Limited*, 2010 NSSC 426; *Grue v McLellan*, 2018 NSSC 151 ; *Royal Bank of Canada v Colorcars Experienced Automobiles Ltd*., 2021 NSSC 6.

Some observations on the law of costs

[6] CPR 77 governs the awarding of costs. As much as courts might strive for consistency, each case must nevertheless be determined on its own facts.

[7] This was not an Application in Court – however it was also not an ordinary Application in Chambers. While Jay sought leave to proceed with the derivative action, which is a necessary procedural step, I think it is important not to lose sight of the reality that denying leave precluded an otherwise actionable claim from proceeding, which Jay stated could result in up to $80 million US damages against the Respondents.

[8] Generally speaking, costs awards are fundamentally oriented towards providing to the successful party a substantial contribution to their reasonable costs and disbursements.

[9] While I appreciate that he has argued that a significant portion of the Respondents' evidence was unnecessary, Jay has not suggested that the amount claimed by the Respondents is unreasonable.

[10] As an Application in Chambers, the starting point is tariff "C". A court may depart from that tariff if there are special or exceptional circumstances that suggest doing so is necessary to meet the fundamental objective of costs awards, which is to do justice as between the parties in the circumstances, and provide a substantial contribution to the successful party's reasonable costs and disbursements.

My conclusions regarding a costs award

[11] A significant difference between the parties positions arises as a result of the Respondents' addition of much more expansive evidence, in response to Jay's self-described "minimalist" evidence.

[12] In my opinion, it was entirely appropriate for the Respondents to expand the narrow factual tapestry presented by Jay in order to permit the court to gain a better

appreciation of the relevant factual and legal background regarding *inter alia*, the history of the Link Group of Companies and the associated litigation in the United States-all of which had been raised by Jay in his filings.

[13] The Respondents' position implicates the interests of various corporations, but significantly also three individuals – each of whom likely have distinct legal needs and perspectives in relation to Jay's allegations against them. Had they each had separate counsel their combined costs to defend against this proposed derivative action could well have been even greater. They were each entitled to take Jay's claims of up to $60-$80 million US liability seriously and have their counsels counter with their own positions.

[14] Notably, both sides considered the matter sufficiently serious to each have two senior counsel in court to argue the matter.

[15] Assessing the factors relevant to whether leave should be granted was made more challenging than usual for the court, as a result of, *inter alia*: the lengthy history between the Link corporations and individuals involved; the multi-jurisdictional and integrated nature of the closely-held corporations; the intersection of an argued limitation period – including when/how the court should

treat that issue in this context, and the anticipated effects on the potential main proceeding of which jurisdiction's limitation period would likely be applicable.

[16] This proceeding was consequently extraordinary, *inter alia*, insofar as it placed especial corollary demands on counsel for the Respondents in particular. While heard in one day, the preparation and arguments far exceeded the norm.

[17] Bearing in mind the relevant Rules and the jurisprudence, including those argued by the parties for their respective positions, I find that the application of tariff "C" would not do justice between the parties.

[18] That tariff would not provide a "substantial contribution to, but not… a complete indemnity" for the reasonable legal fees proposed by the Respondents. The $40,000 costs plus disbursements ($625.14 - HST included) claim is approximately 23.5% of the claimed (reasonable) $170,000 costs of the Respondents.

[19] Given the circumstances of this extraordinary Application in Chambers, I am satisfied that:

1. The use by each of Jay and the Respondents (collectively) to use of two counsel in this matter was reasonable;

2. The Respondents' (collectively) claimed ($40,000 of $170,000) fees and disbursements ($625.14) are reasonable; and

3. the claimed costs represent a substantial contribution, but not a complete indemnity, to the Respondents' (collectively) legal fees and disbursements, which will do justice as between the parties in this matter.

[20] I order that the Respondents' counsel prepare an order to this effect pursuant to CPR 78 for my signature.

Rosinski, J.