SUPREME COURT OF NOVA SCOTIA

Citation: *W5 Business Group v. Cabco Research Limited*, 2021 NSSC 157

Date: 2021-05-12
Docket: Hfx No. 491508
Registry: Halifax

Between:

3294972 NOVA SCOTIA LIMITED, c.o.b.a. **W5 BUSINESS GROUP**

Applicant

v.

CABCO RESEARCH LIMITED and **CRAIG MEREDITH**

Respondents

Judge:	The Honourable Justice Gregory M. Warner
Heard:	February 16 to 18, 2021, in Halifax, Nova Scotia
Final Written Submissions:	March 12, 2021
Counsel:	Richard Norman, counsel for the Applicant Christopher Madill and Sarah A Walsh, counsel for the Respondent

By the Court:

[1] This is a costs decision. At the end of the hearing of the Application in Court, the Court gave an oral decision dismissing the Applicant ("**W5**")'s claim.

[2] The claim was for payment of a "success fee" that, pursuant to an Engagement Agreement between W5 and Craig Meredith ("**Meredith**"), would be payable if Meredith sold Cabco Research Limited ("**Cabco**") to a buyer introduced by W5 within three years of W5 being engaged to sell Cabco, regardless of whether W5 was still engaged by Meredith at the time of the sale. Shortly after being engaged, W5 solicited and provided Meredith with a letter of intent from Jim Mills and Office Interiors. Meredith summarily refused to entertain the letter of intent and approximately one year later terminated the Engagement Agreement with W5. A few months before the expiry of the three year period for which a success fee was payable, Meredith entered non-binding letters of intent to sell Cabco to a group headed by Jim Mills on terms similar to the original letter of intent. Meredith signed a binding agreement of purchase and sale about one month after the three-year period expired. The sale closed about a month later.

[3] The Respondents raised several defences. The Court dismissed W5's application solely on its interpretation of the meaning of "binding agreement" in the success fee provision of the Engagement Agreement. The Court found against the Respondents' other defences had no merit but added length and complexity to the proceeding. The Court further found Meredith's evidence to be not credible, especially his failure to remember about the success fee agreement and the earlier offer from the Mills Group with entertaining the subsequent Mills Group offer.

[4] In its oral decision, the Court indicated that those facts would be considered in making a costs award if the parties were unable to agree on costs.

[5] The successful Respondents, based on a claimed success fee of $201,530.00, claims fees pursuant to Tariff A, Scale 2, in the amount of $22,750.00, plus $2,000.00 per day for three days, plus disbursements of $2,804.83.

[6] W5 submits that the cost awards should be reduced to $7,500.00, as if the application had been a much simpler and shorter hearing dealing solely with the interpretation of the parties' written agreement, and on the basis that it was successful on most of the time consuming issues.

[7] The Applicant states that on September 14, 2020, the Respondents' counsel requested from W5's counsel a settlement proposal, noting that "in order to have a productive settlement discussion, any offer tabled by your client should take into account the available evidence". On September 16, 2020, W5 offered to settle for $95,000.00 and mutual releases. In their October 8, 2020, written reply, the Respondents rejected the offer on the basis that the claim had no merit and was just a cash grab, and added: "Their [Respondents'] offer is this: (a) your client will consent to a dismissal of the claim with full payment of our clients' legal fees to date; and (b) your client will issue a full retraction and apology to each of our clients in AIINS [Allnovascotia.com]". The Court is mystified by the Respondents' request for a settlement proposal, in light of the tone of their October 8th missile, seeking more than the court could have awarded them.

Analysis

[8] The Respondents were ultimately successful and are entitled to costs in accordance with Rule 77.

[9] The starting point for the analysis is Tariff A, and in this case, Scale 2, respecting an amount involved $201,530.00.

[10] In this case, the Applicant's offer to settle and the Respondents' outright rejection without a real counteroffer does not affect the analysis.

[11] What does affect the analysis is that the length of the hearing and the complexity of the proceeding was affected by many unnecessary meritless arguments advanced by the Respondents. At the risk of oversimplification, the issue was the proper interpretation of the success fee provision in the context of the Engagement Agreement as a whole.

[12] Rule 77.02 provides that a judge may make an order about costs as the judge is satisfied will do justice between the parties, and nothing in the Rules limits the general discretion to make an order, except after acceptance of a formal offer under Rule 10.05.

[13] Rule 77.07 sets out a non-exclusive list of factors that may be relevant to increasing or decreasing costs. The factors include:

- "conduct of a party affecting the speed or expense of the proceeding" (Rule 77.02(e));

- "a failure to admit something that should have been admitted" (Rule 77.02(h));

- "a step in the proceeding that is taken … through excessive caution, … or unnecessarily" (Rule 77.02(f)).

[14] Tariff A, Scale 2, for a claim of $201,530.00 barely comes within a range for the range "amount involved" of between $200,001.00 and $300,000.00. The next lower range for amount involved is between $125,001.00 and $200,000.00.

[15] I agree with the Applicant that the Court ruled against the Respondents on some factual issues that lengthened and added complexity to the hearing, but ultimately those findings did not affect the Court's interpretation of the parties' agreement.

[16] Justice between the parties requires a downward adjustment of the costs award in accordance with the factors enumerated in Rule 77.07(2).

[17] The successful Respondents' claim, pursuant to Tariff A, Scale 2, is $28,750.00. Justice requires that this be reduced by one-half to $14,375.00.

[18] The successful Respondents claim disbursements of $2,804.83. This includes $1,410.40 for 28,208 photocopied pages reduced by 50% to 14,104 at $0.10 per page. The Applicant submits that the 14,104 pages photocopied appears to be disproportionate. I agree.

[19] Rule 77.10(1) says: "An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award." In addition to be necessary, they must be actual and "reasonable", pertaining to the subject of the award. "Necessary and reasonable" is an objective test, based on the volume of documents produced at the hearing, and assuming copies to the adverse party and witnesses (per Practice Memorandum 10). It is relevant that likely many copies related to the meritless defences. The Court approves the requested disbursements but reduces the claim for photocopies from $1,410.40 to $700.00.

Summary

[20] I direct the Respondents' counsel to prepare an order that includes:

Costs:	$14,375.00

Disbursements:	$1,750.20
HST on Disbursements:	$262.53
Total:	$16,387.73

Warner, J.