SUPREME COURT OF NOVA SCOTIA
Citation: *Betts v. Bezanson-Gallant*, 2022 NSSC 177

Date: 20220621
Docket: Halifax No.153660
Registry: Halifax

Between:

Elsie Betts
(Defendant by Counterclaim)

Plaintiff
(Moving Party)

v.

Carol A. Bezanson-Gallant and Blair A. Gallant

Defendants

COSTS DECISION

Judge:	The Honourable Justice Darlene A. Jamieson
Heard:	March 29 and 30, 2022 in Halifax, Nova Scotia
Submissions on Costs:	May 10, 2022 and May 27, 2022
D**ecision on Costs:**	June 21, 2022
Counsel:	Mr. Jeremiah Raining Bird, for the Plaintiff Mr. David Coles, Q.C. and Katie Short (Articled Clerk), for the Defendants

By the Court:

[1] This is my costs decision arising from the unsuccessful contempt motion brought by Ms. Betts. The contempt motion was heard over two days on March 29 and 30, 2022. My written decision on the merits was provided on April 28, 2022. The parties have been unable to agree on the cost consequences of that decision.

[2] The Gallants take the position that solicitor and client costs should be awarded in the circumstances of this matter, or alternatively costs should be awarded on a substantial indemnity basis. The Gallants say Ms. Betts' claim was wholly unfounded. They say that civil contempt is to be a last resort, whereas here it was used as a first resort, despite other alternatives being open to Ms. Betts. They further say that Ms. Betts, in the Notice of Motion for Contempt, indicated she was seeking costs on a solicitor and client basis and, therefore, she has established solicitor and client costs as being appropriate to the successful party.

[3] The Gallants say that if solicitor and client costs are not found, the Defendants should at least be awarded costs on a substantial indemnity basis. They say while substantial indemnity is also exceptional, courts have found them to be warranted in cases of "reprehensible" conduct which is deserving of rebuke and where claims are wholly devoid of merit. They say similar circumstances exist in the present case. The Gallants claim solicitor and client costs in the total amount of $30,505.27, inclusive of disbursements.

[4] Ms. Betts says there was no finding by this court that her conduct was reprehensible or vexatious, or that she engaged in any litigation misconduct so as to bring it within the exceptional circumstances required in Rule 77.01 (1)(b). Ms. Betts says that Rule 77.05, which indicates that the provisions of Tariff C apply to a motion, unless the hearing judge orders otherwise, are applicable here. She further says the factors set out in subsection 4 of Tariff C might justify a multiplier of 2 in light of the importance to the parties. She says an appropriate award of costs would be somewhere in the $8,000 range.

[5] The general rule is that costs follow the event. As this is a motion, the starting point is Tariff C whereby the range of costs awarded for a hearing lasting one day or more is $2,000 per day (Rule 77.05(1) and Tariff C). Where, as here, an order following a motion is determinative of the entire matter, the presiding judge

may multiply the maximum amount in the range of costs set out in Tariff C by a multiplier of 2, 3 or 4 times. In determining a multiplier, a judge is to be guided by the following factors: the complexity of the matter; the importance of the matter to the parties; and the amount of effort involved in preparing for and conducting the application (Tariff C, s. 4)

[6] Tariff C acknowledges the discretion to depart from the Tariffs when just and appropriate. In particular, Tariff C states:

> 3. In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

[7] Rule 77.08 provides that a judge may award lump sum costs instead of tariff costs. The Nova Scotia Court of Appeal has said that the tariffs are the norm and there must be a reason to consider a lump-sum (*Armoyan v. Armoyan*, 2013 NSCA 136 at paragraph 15). The Court went on to discuss the purpose of the tariffs and deviation from them:

> 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:
>
> > 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.
>
> [18] … 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.

[8] Here the Gallants seek costs on a solicitor and client basis and alternatively substantial indemnity. Rule 77.01(1)(b) provides that the court can award solicitor and client costs in exceptional circumstances. The Court of Appeal in *Armoyan, supra*, said the following in relation to solicitor client costs:

> 10 The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties".
>
> 11 Solicitor and client costs are engaged in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation". *Williamson v. Williams*, 1998 NSCA 195, [1998] N.S.J. No. 498 (N.S. C.A.), per Freeman, J.A.. This Court rejected most of Mr. Armoyan's submissions on the merits. But there has been no litigation misconduct in the Nova Scotia proceedings that would support an award of solicitor and client costs. So these are party and party costs.

[9] While an award of solicitor and client costs is available in exceptional circumstances, I am of the view that such exceptional circumstances do not exist in the present case. While Ms. Betts pursued a motion for contempt rather than other alternatives available to her, I cannot find that her conduct was reprehensible. There has been no litigation misconduct in the proceedings that would support an award of solicitor and client costs. Further, she did not take a position that was totally devoid of merit or frivolous, I simply found there was insufficient evidence before me for a finding of contempt.

[10] The Gallants rely on the decisions of the Ontario and British Columbia courts in support of their position. However, they are not Nova Scotia cases interpreting our Rules and are easily distinguishable from the present case. For example, in *Tsigirlish v. Walker*, 2016 ONSC 4712 there were allegations against a

lawyer for misappropriation of funds and professional misconduct that the judge found were meritless and damaging to reputation. Further, the court found that Mr. Tsigirlish made statements under oath that were directly contradicted by court transcripts, documentary evidence or his own evidence. The court awarded costs on a substantial indemnity basis of 80% of counsels rate. In *Standard Life Assurance Company v Elliott et al*. [2007] OJ No 2031 (ONSCJ), the court found there was litigation misconduct or abuse, with the party deliberately causing excessive costs. In awarding costs on a substantial indemnity basis, the court noted that such costs are rare.

[11] I now turn to the Defendants claim for substantial indemnity, which, I assume, refers to a lump sum award under the Rules. In any event, it is a request to increase the usual tariff costs. As Justice Wood (as he then was) said in *Homburg v. Stichting Autoriteit Financiele Markten,* 2017 NSSC 52 the proper approach is to start with the presumption that the tariffs should be applied. If the party who wishes to depart from the 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.

[12] I am of the view that there is no reason in the present circumstances to depart from the Tariff to consider a lump-sum. I acknowledge the general discretion to depart from the tariffs and to award lump sum costs, but there must be reason to do so. I do not find that the Gallants have satisfied me that this case possesses special characteristics which would justify a departure from Tariff C, given that the multiplier is available in the present case.

[13] I am satisfied that the appropriate amount of costs under Tariff C for this motion, which took two days, is $4,000. As the motion was determinative of the entire contempt matter, I have discretion to multiply the maximum amount by a multiplier of 2, 3 or 4 times. I am to be guided by the following factors: the complexity of the matter; the importance of the matter to the parties; and the amount of effort involved in preparing for and conducting the application. This matter was not particularly complex. However, I am swayed by the fact that this matter was of significant importance, given the fact that Ms. Betts alleged contempt against the Gallants. Such allegations bring with them the possibility of criminal type sanctions, thus making such claims inherently important. As the Supreme Court of Canada in *Carey v. Laiken*, 2015 SCC 17 at paragraph 36 said:

> "…Rather, it should be used "cautiously and with great restraint…It is an enforcement power of last rather than first resort…"

Such motions, bringing with them such potentially serious sanctions, must not be brought lightly. There was also significant effort involved in preparing for and conducting the contempt motion.

[14] In recognition of the importance of this matter to the parties and the effort involved in relation to this Motion, I am satisfied that the appropriate multiplier is the highest available, being a multiplier of four. Therefore, the Defendants will have their costs on the contempt motion in the amount of $16,000. I am satisfied that costs in the amount of $16,000 do justice between the parties and also represent a substantial contribution to the Gallants reasonable fees and expenses.

[15] With reference to disbursements, I note that Practice Memorandum 10 ("PM 10") addresses the amounts for certain disbursements. For example, it provides guidance on what photocopying charges are recoverable. It states: "One half of the number posted to the client account" at "ten cents a page." The legal accounts appended to Mr. Coles affidavit do not specify the number of copies, nor the price per copy. PM 10 provides the following regarding courier costs being recoverable: "charges by couriers who deliver to the other parties, witnesses, and the court. (Those for delivery to clients should not be recoverable." Again it is not clear from the accounts to whom the couriers delivered. PM 10 further notes what should be recoverable for binding stating: "One half of the amount actually charged by commercial printers, or the equivalent if done internally and charged to client. (The 50% is based on the same reasoning as with photocopies.)"

[16] The legal accounts presented simply reference binding, copy print/ scan charge, courier. Oddly some disbursements are listed as 'other charges' and some as 'disbursements,' however, they appear to be similar categories of disbursements. The accounts also include fax charges which are not recoverable under PM 10. I have examined the accounts and conclude $300 inclusive of interest is a reasonable award for disbursements.

[17] In summary, I award costs in the amount of $16,000 plus disbursements of $300 to the Gallants. I would ask counsel for the Defendants to prepare a cost order reflecting my decision and forward it to counsel for the Plaintiff to consent as to form.

Jamieson, J.