SUPREME COURT OF NOVA SCOTIA
Citation: *Medjuck v. Medjuck*, 2023 NSSC 345

Date: 20231027
Docket: 461806
Registry: Halifax

Between:

Harold L. Medjuck

Plaintiff

v.

Hedda Medjuck
(in her capacity as the Executrix of the Estate
of the late Franklyn D. Medjuck, Q.C.)
Medjuck and Medjuck, a law firm,
Ralph M. Medjuck, Q.C. and
51/56 Investments Limited

Defendants

COSTS DECISION

Judge: The Honourable Justice James L. Chipman

Heard: October 27, 2023, in Halifax, Nova Scotia

Written Decision: October 30, 2023

Counsel: John T. Shanks and Calvin DeWolfe, for the Plaintiff/Applicant
Gavin Giles, K.C. and Robert G. Belliveau, K.C., for the Defendants/Respondents, Ralph M. Medjuck, Q.C. and Hedda Medjuck, in her capacity as Executrix of the Estate of the late Franklyn D. (Frank) Medjuck, Q.C.
Matthew McEwen and Sarah Gray, for the Defendant/ Respondent, 51/56 Investments Limited
Augustus (Gus) M. Richardson, K.C., for the Defendants/ Respondents, Franklyn Medjuck/Medjuck & Medjuck (a law firm) (not appearing on the motion)

By the Court (orally):

INTRODUCTION

[1] I am the case management judge (CMJ) in this matter. My most recent decision was released four months ago, *Medjuck v. Medjuck*, 2023 NSSC 206 (the Motions Decision). At para. 108, I stated in the last two sentences:

> [108] …. I order costs to the largely successful parties, the Defendants / Respondents. If the parties cannot agree on costs (and disbursements) within 30 days of this decision, I will look forward to scheduling an appearance to deal with this.

[2] The appearance was ultimately scheduled for today's date. In advance of the oral submissions, I received briefs from all of the parties and a non-party, Universal Property Management (Universal), involved in the motions. I also received these twelve Nova Scotia cases referable to costs:

Williamson v. Williams, 1998 NSCA 195

Link v. Link, 2021 NSSC 114

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

Lyle v. Myer, 2019 NSSC 387

Tri-Mac Holdings Inc. v. Ostrom, 2019 NSSC 44

Grue v. McLellan, 2018 NSSC 151

Urquhart v. MacIsaac, 2018 NSSC 36

Laamanen v. Cleary, 2017 NSSC 153

Oliver v. Elite Insurance Company.2015 NSSC 70

Andrews v. Keybase Financial Group Inc., 2014 NSSC 287

Armoyan v. Armoyan, 2013 NSCA 136

The Armour Group Limited v. Halifax Regional Municipality, 2008 NSSC 123

[3] Finally, I received Mr. Giles, K.C.'s uncontested affidavit sworn and filed on August 17, 2023 (Giles affidavit).

POSITIONS OF THE PARTIES

[4] The parties are unable to agree on costs. The unsuccessful Plaintiff/Applicant (Harold) argues that Tariff C ought to be followed without any multiplication such that the Court should award $3,000.00 apportioned amongst the successful Defendants/Respondents and Universal. Alternatively, "…on the basis of the somewhat unusual complexity of the motion, and the efforts undertaken to prepare…", Harold submits that $9,000 should be awarded in costs, distributed per the Court's discretion.

[5] Hedda Medjuck (In Her Capacity as Executrix of the Estate of the Late Franklyn D. Medjuck, Q.C.), and Ralph M. Medjuck, K.C. (collectively, the Medjuck Defendants) through the Giles affidavit state that they are responsible for legal fees of $122,009.00, together with applicable HST and disbursements, all to respond to most aspects of the motions. The Medjuck Defendants seek a substantial contribution of this amount. In particular, they should that they should receive the sum of $40,000.00 plus HST ($6,000.00) for a total of $46,000.00.

[6] As for Medjuck & Medjuck they seek costs pursuant to Tariff C as follows: $2,000.00 per day for two days, multiplied by three, for a total of $12,000.00.

[7] The Defendant 51/56 Investments Limited (51/56) and Universal each seek costs in the amount of $8,000.00.

[8] I pause here to observe that the above position represents an outside range of $3,000.00 versus $66,000.00. In all of the circumstances, I am of the view that the stated positions are extreme and for the reasons set out below, will not be adopted by the Court.

BACKGROUND

[9] In the Motions Decision I dismissed two interlocutory motions brought by Harold seeking the following:

(a) Production of certain financial information from the Defendants/ Respondents and certain non-parties; and,

(b) Leave for Harold's Statement of Claim to be amended such that One Sackville Place Limited (OSPL) could be included as a plaintiff in the proceeding, or, in the alternative, leave for Harold to bring a derivative action in the name of OSPL.

[10] In support of his position on the motions, Harold filed an affidavit sworn on May 29, 2023.

[11] In support of its position on the motions, the Medjuck Defendants filed the affidavit of Gavin Giles, K.C. and the affidavit of David J. Nunn, respectively sworn on May 26, 2023.

[12] The motions involved cross-examination of two of the affiants: Mr. Nunn, witness on behalf of the Medjuck Defendants, who was cross-examined for approximately one hour, and Harold, who was cross-examined for about three hours. Harold's cross-examination was started on June 5 but had to be put over until the next day as he did not have the (tabbed) documents required to readily access material that he was being questioned about.

ISSUE

[13] The sole issues to be determined are what costs award on the motions would do justice between the parties and when they ought to be payable by Harold.

GUIDING CASES

[14] The Medjuck Defendants submitted the bulk of the aforementioned cases. Most of the authorities are readily distinguishable from what I am dealing with here. By way of example, in *Tri-Mac* the matter extended over months and took about six days to complete. *Grue* concerned a seven day trial. *Armoyan* was a complex family matter that involved protracted litigation. *Urquhart* concerned a six day (Rule 57) trial. *Royal Bank of Canada* was a summary judgment decision which resulted in the end of the lawsuit. Justice Bodurtha was considering the successful party's legal costs in the context of eight years of litigation.

[15] I could go on but perhaps the most efficient approach is to extract the provided cases that are on point with respect to the within motions that occupied June 5 and 6, 2023. In this regard, I find *Link* and *Oliver* offer some guidance.

[16] In *Link* at paras. 6 – 10, Justice Rosinski made "some observations on the law of costs" in the context of what was before him:

> [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.

[17] Justice Rosinski continued at paras. 15 – 18 as follows:

> [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.

[18] *Oliver* was an earlier costs decision of Justice Rosinski arising from a two day motion. At para. 1 the background is set forth:

> [1] Mr. Oliver made a successful motion, over two days, which disallows the defendant insurer from relying on the limitation period defence -- 2014 NSSC 413. As the decision demonstrates, the court had to consider: the previously unsettled question about when a SEF 44 endorsement limitation period found in motor vehicle insurance policies begins to run; the effect of the doctrine of estoppel on the contractual limitation period; and whether the plaintiff should be entitled to rely on section 3 of the *Limitation of Actions Act*, to extend the time to file a statement of claim. Moreover the court was presented with a substantial factual matrix which arose from detailed affidavits and cross examination of two of Mr. Oliver's counsel, another counsel involved in the case from the law firm representing Mr. Oliver, and an insurance adjuster for the defendant.

[19] Justice Rosinski continued by setting out the parties' positions which drew upon *Richards v. Richards*, 2013 NSSC 269 which in turn quoted from two of the authorities provided here: *Williamson* and *Armour Group*. Justice Rosinski's analysis contains these helpful passages at paras. 7 – 11:

> [7] "Lump-sum costs are typically awarded where the basic award of costs under the Tariff would be inadequate to serve the principle of a substantial but incomplete indemnity": *Gammell v. Sobeys Group Inc.*, 2011 NSSC 190.
>
> [8] In *Bevis v. CTV Inc.*, 2004 NSSC 209, at paragraph 13, Justice Moir summarized his decision on lump sum costs in *Campbell v. Jones*, [2001] N.S.J. No. 373, as follows:
>
> > "(1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula."
>
> [9] In *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (S.C., T.D.), Justice Saunders, as he then was, at paragraph 17, noted, citing the words of the Statutory Costs and Fees Committee, that costs "should represent a substantial contribution towards the parties' reasonable expenses". At paragraph 19, he referred to the

information required to assess the reasonableness of legal expenses in order to determine what will constitute a substantial contribution, as follows:

> "As it is the court's responsibility to assess the fairness and reasonableness of the effort expended, the trial judge will have to be told how much it cost the successful party to present or defend its case. Counsel will be expected to outline the amount of time spent on the file and the total fees charged the client, preferably in the form of a short affidavit filed with the court. Only then will a judge be able to assess whether those expenses were "reasonable" before going on to decide whether the costs to be awarded will in fact represent a significant contribution to such expenses."

[10] Our Court of Appeal, in *Williamson v. Williams*, [1998] N.S.J. No. 498, at paragraph 25, provided the following guidance on the meaning of "substantial contribution":

> "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."

[11] This suggests, in my view, that party and party costs awards considerably below the range of 2/3 to 3/4 of solicitor and client costs, may now satisfy the "substantial contribution" requirement. However, as noted by Justice Moir, "the Courts have usually avoided percentages", and, as noted by Justice Goodfellow, in *Armour Group*, the "level of exceptional services required" may vary from case to case. Therefore, no fixed costs-to-expenses ratio can be used. Nevertheless, it appears that lower contribution ratios are more likely to be acceptable now, than they were in 1989.

ANALYSIS AND DISPOSITION

[20] In the Motion Decision I made several observations which bear repeating in the context of the current dispute over costs. In this regard, I now reproduce paras. 29, 33, 68 – 71, 77 and 82:

> [29] It was put to Harold that from 1995 onwards, Frank was the sole director of OSP yet Harold had himself appointed to this position in 2016. He replied, "everything was revealed two months after Frank passed away …I was the director pro temp." He then acknowledged that it was "fair to say" that he knew he was not

president and secretary when he completed and submitted the application attesting to this.

…

[33] It was put to him that he knew of this alleged claim in 2016 because he had provided his (previous) lawyer with a balance sheet from 1962 which showed that OSP was lending money. Harold responded by saying that at the time it was not an issue and only became one after "analyzing all of the statements …an aggregate." Harold was then shown further documents (that were attached with his lawyer's letter) and he agreed that he knew of the $300,000 account receivable almost 50 years ago. He further agreed that the claim for this sum is being proposed for the first time in 2023.

…

[68] In my view, both decisions in Link v. Link are highly instructive regarding the application of the "good faith" element to the facts of this case. Having regard to the evidence, I must conclude that Harold did not bring the present action in good faith.

[69] Here, as in Link, OSP is not currently an independent going concern. It has always been a closely held family company, and it has not been operating as a going concern since 1996, as detailed in the supporting affidavits and exposed in the cross-examination. OSP was completely dormant for almost two decades when Harold purported to resurrect the company by way of what I can only conclude (given the cross-examination evidence and documents within the Giles' affidavit) were misrepresentations by Harold to the Registrar of Joint Stock Companies.

[70] Given all of the evidence, I have great difficulty with Harold's claim that he applies for derivative leave for the "primary purpose" of advancing the interests of OSP. The cross-examination exposed Harold for resurrecting OSP in an attempt to advance his longstanding grudge against his brothers. In my view, the evidence discloses that the primary purpose of the proposed derivative action is for Harold's sole benefit.

[71] Here, as in Link, the dispute is properly characterized as a "personal dispute with the trappings of corporate structures." (Justice Rosinski at para. 60). From the evidence, I am left to find that Harold has attempted to use the derivative action as a means of continuing and expanding the scope of the current litigation. In my view, the only conceivable beneficiary of the proposed derivative action is Harold.

…

[77] In my view, upon considering all of the arguments and evidence, OSP would face prohibitive limitation barriers if permitted to join this litigation in a direct or derivative capacity. Surely it is not in OSP's interests to involve itself in prosecuting claims which are likely to fail.

…

> [82] As matters presently stand, I view this aspect of Harold's motion as a desperate, belated attempt to side-step the proper procedure. To permit this aspect of Harold's motion would allow a wrong-doer to effectively pursue a derivative action under the guise of a pleadings amendment. Ultimately, this approach would reward Harold's deception. In the result, I dismiss Harold's motion to add OSP as a Plaintiff. At the same time, I deny leave for Harold to proceed alternatively to bring a derivative action.

[21] I find the above-quoted comments to be of guidance as I consider appropriate costs to award. In exercising my discretion I have bourne in mind the substance of the motions, which had they been successful, would have meant for potential exposure in the neighbourhood of three times the original pleaded $7 Million. In assessing reasonable costs I also must consider Rule 77 and whether the Tariff C starting point should be set aside in favour of an award that more closely reflects the legal spend to deal with the motions. At the same time I have to bear in mind that these motions did not bring this litigation to an end, coming as they did prior to the close of pleadings and before any discoveries.

[22] Having regard to my Motion Decision, I am cognizant of the fact that the motions were unfounded, put forward by in many instances, deceptive evidence exposed through Mr. Giles, K.C.'s cross-examination of Harold. The stakes were high insomuch as success for Harold would have meant for a claim within the realm of $20 Million. I am also cognizant of the uncontradicted evidence of Mr. Giles, K.C. on this costs hearing and recognize that the Medjuck Defendants made a significant legal spend in their resistance to the motions. Harold's conduct and his failure to achieve almost all of what he sought on the motions causes me to readily conclude that this is a case where I am prepared to exercise my discretion and award more than bare Tariff C costs to the Medjuck Defendants.

[23] Before saying anything more about my costs finding *vis-à-vis* the Medjuck Defendants, I wish to address the costs Harold shall pay to Medjuck and Medjuck, 51/56 and the non-party, Universal. While I accept that these parties and Universal had to deal with and sit through what even Harold acknowledges to have involved unusual complexity and significant preparation, it is apparent that the heavy lifting was bourne by the Medjuck Defendants. Indeed, counsel to these entities have acknowledged that the substantial bulk of the work in resisting the motions was carried by counsel to the Medjuck Defendants. While I appreciate that the interests of Medjuck and Medjuck, 51/56 and Universal do not entirely overlap with the Medjuck Defendants and that their interests had to be protected by their respective lawyers, I am also mindful of the filings and time spent by counsel "on their feet"

during the June 5 and 6, 2023 attendances. With respect to the former, their written submissions were relatively brief and there were no affidavits filed by these entities. As for oral submissions, both counsel for these parties (and the non-party) were succinct with their submissions. Frankly, this is laudable in these circumstances; however, the fact remains that the Court attendance and the written materials were far less involved than the situation with counsel for Harold and the Medjuck Defendants.

[24] In all of the circumstances and to do justice between the parties, I hereby award $4,000.00 to Medjuck and Medjuck and an identical sum to be split ($2,000.00 each) between 51/56 and Universal. This figure is representative of the two days in Court on these motions (Tariff C - $2,000.00 per day times two) with the multiplier considerations (owing to Harold's actions as described in the Motion Decision along with the complexity and voluminous overall documentary burden) offset by the "labouring oar" exercised by counsel for the Medjuck Defendants. In making these costs awards I am alive to the fact that Mr. McEwan represented both 51/56 and Universal.

[25] With respect to appropriate costs for the Medjuck Defendants I return to my above comments and the above excerpts from the motion costs decisions of Justice Rosinski. I am of the view that the constellation of factors here make it one of those rare motions where the Court must depart from Tariff C to effect a fair and appropriate costs disposition. The matter was sufficiently legally and factually complex and undoubtedly required significant pre-motions preparation by counsel for the Medjuck Defendants.

[26] In *Link* Justice Rosinski noted that what he had dealt with was "not an ordinary Application in Chambers". I say the same of the motions which occupied the Court's time here. In the end Justice Rosinski exercised his discretion and awarded the successful party 23.5 percent of their claimed reasonable costs.

[27] There are distinguishing features between *Link* and this case such that I am not prepared to award a percentage approaching nearly a quarter of what was characterized as "reasonable" costs in *Link*. There was considerably more money at stake in *Link* and that decision resulted in a final disposition.

[28] Mr. Giles, K.C. was at one time – as he deposes to in his affidavit – a "taxing officer". He must understand that such a role is not normally the job of the Court on a motion. Indeed, Mr. Giles acknowledged this fact during his remarks today. In any case, when I consider the relevant caselaw and all of the circumstances of this

situation, I have exercised my discretion in order to do justice between the parties on costs (and disbursements) such that Harold shall pay the Medjuck Defendants the lump sum of $20,000.00.

CONCLUSION

[29] In the result Harold shall forthwith pay the following amounts representative of his costs and disbursements obligations arising from the Motions Decision:

1. $20,000.00 to the Medjuck Defendants
2. $4,000.00 to Medjuck and Medjuck
3. $2,000.00 to 51/56; and
4. $2,000.00 to Universal

[30] I would ask Mr. Giles, K.C. to prepare and present the required Order to the Court.

Chipman, J.