

SUPREME COURT OF NOVA SCOTIA

Citation: *Clark v. Ewing*, 2023 NSSC 354

Date: 20231103

Docket: 444661

Registry: Halifax

Between:

Paul Clark

Plaintiff

and

Angela Ewing and Andrew Ewing

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Ann E. Smith

Counsel: Laura Kanaan and Morgan Knox, for the Plaintiff
Michael Scott and Emily MacDonald, for the Defendants

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated November 7, 2023.

By the Court:

Introduction

[1] By decision dated June 8, 2023, *Clark v. Ewing*, 2023 NSSC 174, I dismissed this lawsuit stating at para. 160:

160 Paul Clark's Action against the Ewings is dismissed with costs to the Ewings. If the parties are unable to agree on costs, I will accept written submissions within 20 calendar days of the release of this decision.

[2] Counsel for the Ewings submitted a brief, which attached a written offer to settle and a bill of costs. Neither Paul Clark nor anyone on his behalf filed a submission on costs.

[3] This Application in Court was heard on December 12, 13 and 14, 2022. On December 14, 2022, the hearing concluded at approximately 12:30 p.m.

Position of the Parties

[4] The Ewings submit that the amount involved (Tariff A) is \$171,000 (based on the Amended Statement of Claim). They state that the Plaintiff's claim was eventually reduced to \$72,903, but only after the trial had already started, by which point the Defendants' legal expenses had been incurred. The Ewings

also claim prejudgment interest on the sum of \$171,000 in the amount of \$65,193.75 (calculated as five per cent from October 22, 2015 to June 6, 2023). The total is \$236,193.75. Relying on Tariff A, the Ewings say that the “amount involved” falls within the range of \$200,001 – \$300,000, suggesting costs (Scale 2 Basic) in the amount of \$22,750.

- [5] The Ewings note that *Rule 77.07(1)* allows a judge who fixes costs to add an amount to, or subtract an amount from, tariff costs. The Ewings say that several factors warrant increasing the tariff scale in this case.
- [6] First, they point to a written offer to settle Paul Clark’s claims which they made on December 21, 2016. In exchange for a consent dismissal order and release, the Ewings and Paul Clark would each bear their own legal costs and disbursements. That settlement offer was left open for acceptance until it was expressly withdrawn by the Ewings on November 30, 2021. Since the Ewings withdrew this offer before the commencement of trial, it is not a “Formal Resolution Offer” for the purposes of *Rule 10*. However, the Court notes that Paul Clark chose not to accept this offer to settle throughout the period of December 21, 2016 to November 30, 2021. The trial was originally scheduled to begin in January 2021 but was adjourned at the Plaintiff’s request.

[7] The Ewings also say that Paul Clark’s claim included a demand for repayment of a “loan”, a claim which he advanced at the start of trial, despite the bank document which he signed saying that the subject money was not a loan and would not have to be repaid. The Ewings also say that Paul Clark claimed an interest in real property despite having expressly transferred any interest he had to Ms. Clark as part of their separation agreement. Paul Clark also asserted an alternative interest based on a claimed reduction in spousal support that was payable to Ms. Clark while she lived at the property.

[8] The Ewings point out the obvious. All of these claims were dismissed by this Court.

[9] The Ewings also say that Paul Clark’s conduct in this litigation is relevant to an assessment of costs. They refer to para. 126 of this Court’s decision, where I wrote:

126 The picture that emerged from Paul Clark though his own testimony and that of other witnesses, is an unflattering one. Based on the evidence at trial, Paul Clark is a person who is willing to lie under oath, and to coerce others into lying under oath, to get what he believes he deserves.

[10] In suggesting that this Court should sanction such conduct through costs, the Ewings point specifically to the evidence at trial that Paul Clark counselled

Ms. Clark to lie (under oath) during her discovery examination for the express purpose of increasing his claim for damages.

[11] The Ewings say that based upon these various factors, an exercise of the Court's discretion under *Rule 77.07(1)* is warranted, and tariff costs should be increased by 75 per cent.

[12] The Ewings also claim *per diem* costs of two and a half days at \$2,000 per day, which amounts to \$5,000.

[13] The Ewings also claim taxable disbursements of \$1,914.20, which include filing fees, postage, photocopying, courier and discovery recordings/transcripts.

[14] The Ewings provided a bill of costs which they say outlines the associated costs of each disbursement claimed. Photocopy fees are charged at 30 cents per page, which is said to be a reduction from the usual amount charged to a client.

[15] This Court did not receive an Affidavit from the Ewings or their counsel with regard to the amounts they were billed for legal services to defend this action or the disbursements which they were billed and paid.

[16] In summary, the Ewings claim costs and disbursements, payable forthwith as follows:

Tariff “A” (Scale 2 Basic) [\$200,001 - \$300,000]	\$22,750.00
<i>Rule 77.07(1)</i> Tariff increase, plus 75%	\$17,062.50
\$2,000.00 x 2.5 days	\$5,000.00
Total compensable disbursements	\$1,914.20
Total	\$46,726.70

[17] As noted previously, the Court did not receive submissions on costs from Paul Clark or counsel on his behalf.

Law and Disposition

[18] The starting point in determining the amount of costs is the *Tariffs of Costs and Fees* under *Rule 77*. Party and party costs of an Application in Court must, unless the judge who hears the Application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial: *Rule 77.06(2)*.

[19] A judge has the discretion to add or subtract from the tariff amount: *Rule 77.07(1)*. Furthermore, a judge “may award lump sum costs

instead of tariff costs”: *Rule 77.08*. Tariffs are the norm, and there must be a reason to consider a lump sum: *Armoyan v. Armoyan*, 2013 NSCA 1136 at paras. 14-15.

[20] 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: *Armoyan, supra*, at para. 16.

[21] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: *Armoyan, supra*, at para. 17.

[22] In order to determine the appropriate amount of costs in this case, I will consider:

- (a) what the tariff amount would be;
- (b) the amount claimed in relation to the amount recovered (*Civil Procedure Rule 72.07(2)(a)*);
- (c) offers of settlement that were not accepted (*Civil Procedure Rule 72.07(2)(b)*);
- (d) whether the conduct of Paul Clark affected the speed or expense of the proceeding (*Civil Procedure Rule 72.07(2)(e)*);

- (e) whether Paul Clark's conduct in the litigation should be sanctioned in assessing costs; and

Number of Hearing Days

- [23] There were two and a half hearing days. The Ewings are entitled to costs of \$5,000 in this regard (\$200/day x 2.5).

The Tariff Amount

- [24] Scale 2 (Basic) is the norm and I find no reason to depart from it.

- [25] Paul Clark sought the sum of \$171,000 from the Ewings until his counsel advised, during the course of the trial, that he was seeking only \$72,903. This Court agrees with the Ewings in their cost submission that they prepared for and expended legal fees on the basis of potential exposure to a claim of \$171,000. I find it therefore reasonable to set the amount involved at that sum.

- [26] While I agree that the Ewings have been subjected to over seven years of litigation, only for this Court to dismiss all of Paul Clark's claims against them, I decline to exercise my discretion to add prejudgment interest to this basic Tarriff amount, but I will consider delay when I analyze whether the

amount set does “justice between the parties.” As Defendants, the Ewings were not directly out the sum of \$171,000, a circumstance which might be relevant to awarding them prejudgment interest.

Offers of Settlement That Were Not Accepted and Meritless Claims

[27] As set out previously in this decision, Paul Clark did not respond to an offer by the Ewings in late December 2016 to settle all of his claims against them on a without costs basis. The Ewings withdrew this offer on November 30, 2021 shortly before what was scheduled to be the start of the trial. The trial was originally scheduled to be heard on January 4, 5, 6, 10, 11 and 12, 2022. On December 29, 2021, the trial was adjourned at the request of Paul Clark and rescheduled to December 12, 13, and 14, 2022.

[28] This Court finds it highly relevant in assessing costs that all of Paul Clark’s claims against the Ewings failed at trial. He put the Ewings through a trial when he could have walked away from his claims in December 2016 and not have been liable to pay the Ewings any costs. That fact serves to increase tariff costs.

The Conduct of Paul Clark

[29] The Court has outlined previously in this decision, that this Court found that Paul Clark coerced Ms. Clark to lie during her discovery examination in an effort to increase the likelihood that he would increase his claim for damages. That is conduct worthy of this Court's censure through costs.

[30] Also relevant is that this claim hung over the heads of the Ewings for some eight years.

Substantial Indemnification

[31] The Court does not have Affidavit evidence of the Ewings' actual legal costs, so I cannot assess the tariff amount in the light of substantial contribution.

Setting the Tariff Amount and the Amount of Disbursements

[32] The Court sets the Tariff amount (\$125,001 – \$200,000) at **\$16,750** based on an amount involved of \$171,000.

[33] $\$2,000 \times 2.5 \text{ days} = \mathbf{\$5,000}$.

[34] **Rule 77.07(1) Tariff increase, + 55% = \$11,962.50.**

[35] Compensable disbursements (filing fees, postage, photocopies reduced from 30 cents per page to 10 cents per page, courier fees and discovery transcripts) = **\$1773.20**.

[36] Total costs and disbursements are awarded of **\$35,485.70**.

Conclusion

[37] For the above reasons, I find that a costs award against Paul Clark of \$35,485.70, inclusive of disbursements, does justice between the parties.

[38] I order that Paul Clark pay the Ewings the sum of **\$35,485.70** no later than December 15, 2023.

[39] I ask that counsel for the Ewings prepare the form of order to be consented to, as to form, by Paul Clark or his counsel.

Smith, J.

SUPREME COURT OF NOVA SCOTIA

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Date: 20231107
Docket: 444661
Registry: Halifax

Between:

Paul Clark

Plaintiff

and

Angela Ewing and Andrew Ewing

Defendants

<p>Erratum</p>

Judge: The Honourable Justice Ann E. Smith

Heard: December 12, 2022, in Halifax, Nova Scotia

Counsel: Laura Kanaan and Morgan Knox, for the Plaintiff
Michael Scott and Emily MacDonald, for the Defendants

Erratum date: November 7, 2023

Details: Corrects the last sentence of paragraph 7 of the cost decision from stating “Paul Ewing” to “Paul Clark”
Corrects paragraph 39 of the cost decision from stating “Paul Ewing” to “Paul Clark”