

SUPREME COURT OF NOVA SCOTIA

Citation: *King v. Raftus*, 2023 NSSC 413

Date: 20231214
Docket: 504034
Registry: Halifax

Between:

Brandon King

Applicant

v.

Andrew Raftus and Cynthia Raftus

Respondents

DECISION ON COSTS

Judge: The Honourable Justice John P. Bodurtha

Written

Submissions: August 18, 2023

**Oral Decision on
Costs:** December 14, 2023

Written Decision: December 20, 2023

Counsel: Eugene Y.S. Tan, Counsel for the Applicant
Brian J. Hebert, Counsel for the Respondents

By the Court:

Background

[1] By way of decision, 2023 NSSC 160, I dismissed the Applicant's application for the repayment of monies on the basis of unjust enrichment and damages with costs payable to the Respondents. I advised the parties that, if they were unable to agree on the issue of costs, I would accept written submissions within 30 days of the date of the decision.

[2] On August 18, 2023, the Respondents filed their costs submissions. No submissions were received from the Applicant although they were provided with multiple opportunities to do so. The Court reached out to the Applicant to determine whether they intended to respond to the Respondents' submissions and no response was received.

[3] The Respondents seek solicitor and client costs due to the Applicant's conduct. The Respondents claim that the, "Applicant alleged intimidation, which is a criminal offence, rejected reasonable settlement offers, and fundamentally changed his position in the closing minutes of the hearing, reverting to the position he was in in the first place before he launched these proceedings in an effort to bully the respondents into paying him money he was not entitled to."

[4] My decision regarding costs follows.

Issue

What is the appropriate amount of costs to be awarded by this Honourable Court?

Costs Jurisdiction

Applicable Civil Procedure Rules

[5] *Civil Procedure Rule 77.02(1)* reads:

77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[6] *Civil Procedure Rule 77.06(1)* reads:

77.06(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[7] *Civil Procedure Rule 77.07* provides factors which are relevant to increasing tariff costs:

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[8] *Civil Procedure Rule 77.08* provides a general discretion to award costs in a lump sum instead of tariff costs. *Civil Procedure Rule 77.08* reads:

77.08 A judge may award lump sum costs instead of tariff costs.

[9] The Respondents submit that, to do justice between the parties, the Court should exercise its discretion and award solicitor and client costs in the amount of \$117,194, plus HST, plus disbursements of \$6,943.83 (inclusive of HST), or in the

alternative, the Respondents seek a lump sum award in the amount of \$105,474, plus HST, and disbursements, either scenario is based on the rejection of reasonable settlement offers and other aggravating factors.

[10] *Civil Procedure Rule* 10.03 provides that a judge can take into account formal and informal offers of settlement in determining costs:

10.03 A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

Analysis

Legal Fees

[11] A costs award should represent “a substantial contribution towards a party’s reasonable legal fees and expenses but should not amount to complete indemnity.”: *Lyle v. Myer*, 2019 NSSC 387, at para. 23.

[12] In determining what amounts to a “substantial contribution” towards a party’s costs, the Nova Scotia Court of Appeal suggests that this means something more than fifty per cent (50%) and less than one hundred per cent (100%) of those costs: *Williamson v. Williams*, 1998 NSCA 195, at para. 25.

[13] The Respondents submit their legal fees (including disbursements exclusive of HST) is \$117,194 calculating HST the amount is \$134,773.10 which bears striking resemblance to the amount involved in the application. I note there is no evidence before this Court that \$134,773.10 was the amount actually billed to the Respondents.

Solicitor and Client Costs

[14] In *Brown v. Metropolitan Authority (1996)*, 150 N.S.R. (2d) 43 Pugsley J.A. said the following concerning solicitor and client costs at p. 55:

While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation. (*Wournell (P.A.) Contracting Ltd. et al. v. Allen (1980)*, 37 N.S.R. (2d) 125, 67 A.P.R. 125 (C.A.)).

This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible (*Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29, 77 A.P.R. 29 (C.A.) *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146, 109 A.P.R. 146 (C.A.)).

The word 'reprehensible' is defined in *The Concise Oxford Dictionary* (1990) as 'deserving censure or rebuke.'

The conduct of the Authority, in my opinion, deserves that description.

There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances, which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

[15] I agree with the analysis of Pugsley, JA and conclude that the conduct of the Applicant does not, in my opinion, warrant an order for costs on a solicitor and client basis.

[16] Although, the conduct of the Applicant caused additional work for the Respondents which resulted in a final judgment placing the parties in the same position as their original agreement, and the Applicant rejected favourable settlement offers, an award of solicitor and client costs is only awarded in those rare and exceptional circumstances.

[17] A comprehensive summary of the principles governing the award of solicitor and client costs was provided in *Liu v. Atlantic Composites Ltd.*, 2014 NSCA 58 at para. 17:

...

76. The principles of solicitor-client costs are settled and well-expressed in *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44 [*Smith's Field*][Authorities, Tab 11]. Though lengthy, Justice Hood's comments are worthy of reproduction:

[479] It is not disputed that solicitor-client cost awards are made only in rare and exceptional circumstances. In *Coughlan et al. v. Westminster Canada Limited, et al* (1994), 127 N.S.R. (2d) 241, the Court of Appeal upheld the decision of Nunn, J., the trial judge, [1993] N.S.J. No. 129, with respect to costs. The Court of Appeal quoted from his decision at para. 170:

The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonesty, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pre-trial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client basis as, in my opinion, this does constitute one of those 'rare and exceptional' cases wherein such awards are, and should, be made.

[480] In *The Law of Costs*, Orkin, 2nd Edition, the authors say at pp. 2-144-146:

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional circumstances to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which make such costs desirable as a form of chastisement.

The Supreme Court of Canada has approved the following statement of principle:

Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

...

At the same time, it has been said that an award of solicitor-and-client costs is not reserved for cases where the court wishes to show his disapproval of oppressive or contumelious conduct.

There is, as well, a factor frequently underlying such an award, although not necessarily expressed, namely, that the circumstances of the case may be such that the successful party ought not to be put to any expense for costs.... As well, an award of costs on the solicitor-and-client scale is an important device that the courts may use to discourage harassment of another party by the pursuit of fruitless litigation.

...

[484] In Orkin, the author says at para 219 beginning at p. 2-146:

The exercise of discretion must be based on relevant factors, for example, the conduct of the litigation, and not on otherwise unrelated conduct. Orders of this kind have been made where a litigant's conduct has been particularly blameworthy, for example, where there were allegations of criminality, arson; fraud or impropriety either unproven or abandoned at trial; particularly when the allegations are made against professional persons carrying out their professional duties; Solicitor-and-client costs were awarded where a party brought wanton and scandalous charges; or allegations of perjury; ... or dishonesty; ... or deceit, conspiracy and breach of fiduciary duty;

[Emphasis by Hood, J.]

[18] In the circumstances before me, there is no basis for concluding that the Applicant's conduct falls into the category of "rare and exceptional circumstances" justifying solicitor and client costs.

Calculation of Tariff Costs Against the Applicant

[19] In determining the "amount involved" parties need not engage simply in the mathematical exercise pursuant to the monetary amount allowed in the Order:

In these Tariffs unless otherwise prescribed, the "amount involved" shall be

(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to

- (i) the amount allowed,
- (ii) the complexity of the proceeding, and
- (iii) the importance of the issues;

[20] The Applicant claimed \$138,156 as of September 30, 2020 (Affidavit of Brandon King, Exhibit "D"). On February 3, 2021, the Applicant valued his claim at a minimum of \$140,000 (Affidavit of Counsel, Exhibit B). Based on this I find the amount involved to be between \$125,001 and \$200,000.

[21] Tariff A reads in part as follows:

TARIFF A

Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
\$125,001-\$200,000	\$12,563	\$16,750	\$20,938

[22] The Respondents argue that the conduct of the Applicant is such that it would be appropriate to apply Scale 3 under Tariff A. Applying Scale 3 would result in an award of costs of \$20,938 plus disbursements, plus HST, plus the amount of \$2,000 for each day in court. I am not convinced that this matter falls outside of the Basic Scale 2. The amount involved was not relatively large, the proceeding was not complex, the issues were only of importance to the parties, and the hearing was concluded in two days. The Applicant did cause unnecessary steps within the proceedings but they were not enough to justify Scale 3 under Tariff A, instead *Civil Procedure Rule 77.07* can be applied to address the Applicant's conduct.

[23] In *Grue v. McLellan*, 2018 NSSC 151, at para. 6, Justice Hunt summarised the principles in awarding costs as described in *Armoyan v. Armoyan*, 2013 NSCA 136:

6 In *Armoyan v. Armoyan*, 2013 NSCA 136 (N.S. C.A.), the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;
2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.07(2)*. These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
3. The *Rule* permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15

4. 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: para. 16
5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and
7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

[24] Justice Fichaud's second point in *Armoyan v. Armoyan*, 2013 NSCA 136, at paras. 12 and 13 speaks to the discretion the Court has to increase or decrease the tariff costs applying the factors listed in CPR 77.07(2).

Civil Procedure Rule 77.07(2) Factors

[25] The Respondents have outlined certain factors under CPR 77.07(2) that they submit are relevant in requesting that the tariff costs be increased after the hearing of an application:

...

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

...

(e) conduct of a party affecting the speed or expense of the proceeding;

...

[26] In the case before me, the Respondents consistently had a settlement offer on the table for the Applicant to accept. The Applicant would have been better off had he accepted the settlement offer.

[27] The Applicant's conduct throughout the litigation affected the speed and expense of the proceeding. For instance, at the close of the hearing the Applicant raised a new legal argument. The Applicant claimed to have a life interest in the Property and the right to live there for the rest of his life. I disagree with the Respondents' assessment that "the entire proceedings had been an utter waste of time," however, what it did mean is that the court and parties had to consider an additional issue that was not raised by the Applicant in its pleadings. This required the parties to submit additional written submissions to address the issue which essentially resulted in a court declaration of the original agreement between the parties.

[28] From a review of the Affidavit of Respondents' Counsel it appears that this additional work cost approximately \$4,725.

[29] Parties who force the other side to take steps that would otherwise be unnecessary or who, themselves, take unnecessary steps should be accountable for their actions in costs: *Big X Holdings v. Royal Bank of Canada*, 2015 NSSC 350, at para. 43.

[30] I am mindful of these factors in reaching my decision. Based on the additional work caused by the conduct of the Applicant and the rejected settlement offers, I am increasing the amount of tariff costs under Tariff A pursuant to CPR 77.07 by an additional \$4,000.

Harmonized Sales Tax ("HST")

[31] In *Wolfson v. Wolfson*, 2022 NSSC 263, Forgeron J., considered the conflicting authorities regarding the Harmonized Sales Tax and concluded that:

16 The policy reasons to include HST in a costs assessment were canvassed in *Eaton v Manning*, 2003 NSSC 912 , where Hall, J stated:

- There is no reason why a successful party should bear an additional burden for legal fees as a result of GST. GST is an unavoidable, incidental cost of litigation. To maintain the underlying principle of party and party costs, a court should include the GST in a costs award: para 20, from the cited case of *Prentice v Sipos*, [1992] GSTC 8 (Ont Ct J (Gen Div)).
- To maintain the level of indemnification intended by an award of party and party costs, it is necessary to award GST to the extent that those costs will be subject to that tax: para 21, from the cited case of *Ligate v Abocl* (1991), 50 OR (3d) 332 (Ont Ct J (Gen Div)).

- The purpose of party and party costs is to provide a substantial contribution toward the successful party's reasonable expenses. It would be illogical and unreasonable for a court to fix an award of costs only to have it subsequently reduced or diminished by the imposition of a tax over which the parties and the courts have no control: para 25.

17 In *Conrad v Bremner*, 2006 NSSC 99, B MacDonald, J adopted the reasoning in *Eaton* and included HST in her costs award. Many family law costs decisions follow this approach: *Jensen v Jensen*, 2007 NSSC 354; *Provost v Marsden*, 2010 NSSC 423; *AR v GR*, 2010 NSSC 424; *Burchill v Savoie*, 2011 NSSC 236; *Darlington v Moore*, 2016 NSSC 84; *MacIntyre v Ranni*, 2016 NSSC 238; *Bruce v Ramey*, 2017 NSSC 60; *Austin (Burke) v Casey*, 2018 NSSC 259; *Fedortchouk v Boubnov*, 2020 NSSC 51; and *Pike v Pike (Johannesen)*, 2021 NSSC 257.

18 Other non-family, civil cases have also included HST in costs awards. For example, in *Henneberry v Compton*, *supra*, decided by Wright, J after his decision in *Andrews v Keybase Financial Group Inc*, *supra*, legal fees inclusive of HST were used to calculate costs:

[31] As for quantum, I refer once again to the basic principle that a costs award should afford substantial contribution to the successful party's reasonable fees and expenses without amounting to a complete indemnity. **Bearing that principle in mind, and the manner in which it was applied in the *Williamson* and *Armoian* cases, I conclude that the respondents should receive a party and party costs award of \$20,000, measured against the rounded sum of \$35,000 for legal fees incurred in relation to this litigation (including HST) which represents a recovery in that respect of approximately 57%.** In addition, the respondents will also be entitled to their taxable disbursements earlier reviewed in a rounded sum of \$4,300 plus HST. [Emphasis added]

19 A similar approach is adopted in *Laamanen v Cleary*, *supra*; *Landry v Kidlark*, *supra*; *Shannon v Frank George's Island Investments Ltd*, *supra*; and *Pink v Davis*, 2011 NSSC 237.

Decision

20 I find that HST should be included when calculating the amount of legal fees incurred by Ms. Wolfson. I reach this conclusion for the following reasons:

- The state of the law is not entirely clear, given the conflicting case authorities at the trial and including those found at the appellate level.
- This case involved a strategic and egregious dereliction in the duty to disclose, which likely resulted in a conservative calculation of the true value of Mr. Wolfson's corporate shares: paras 55 to 62, 87 to 89, 103, 104, 107, 109, and 112 of the divorce decision.
- Ms. Wolfson paid all her legal invoices. All WIP has since been invoiced and paid. There are no legal fees outstanding.

- Neither Ms. Wolfson, nor her counsel, had the option of excluding HST in the calculation of legal fees. HST is an unavoidable, incidental cost of litigation.
- It is unfair to ignore the 15% nondiscretionary HST payment. In this case, justice cannot be done, as between the parties, if HST is excluded from the calculation of legal fees.

21 In the event I erred by not following *Roose v Hollett, supra*, I would nonetheless arrive at the same conclusion, by including all HST payable on legal fees as a reasonable, just, and necessary disbursement pursuant to Rule 77.10, which was enacted after *Roose v Hollett* was decided.

[32] I agree with the reasoning of Forgeron J., in *Wolfson* and will add HST to the costs award.

Disbursements

[33] The Respondents seek disbursements of \$6,943.83 (inclusive of HST) as per the Bill of Costs submitted in counsel's affidavit.

[34] I have reviewed the expenses and conclude that they are reasonable.

Conclusion

[35] I find there is no reason not to apply the Basic amount under Tariff A for this proceeding and award \$16,750 plus \$4,000 for the two day hearing, plus the increased tariff amount of \$4,000, plus HST resulting in costs of \$28,462.50, plus disbursements of \$6,943.83 (inclusive of HST) for a total costs amount of \$35,406.33. I am satisfied that this award will do justice between the parties, pursuant to *Civil Procedure Rule 77.02(1)*.

[36] I ask that counsel for the Respondents prepare the form of Order.

Bodurtha, J.