SUPREME COURT OF NOVA SCOTIA

Citation: *MacQuarrie v. Birch*, 2025 NSSC 308

Date: 20250923
Docket: Hfx No. 510178
Registry: Halifax

Between:

Robert Dion MacQuarrie and Carla Ann MacQuarrie

Plaintiffs

and

Aimee Leigh Birch and Thomas Henry Birch

Defendants

and

Emma Moore

Third Party

Costs Decision

Judge: The Honourable Justice Ann E. Smith

Counsel: Thomas (Tipper) McEwan, for the Plaintiffs
Allison Godwin, for the Defendants
Liza Myers, for the Third Party

By the Court:

Background

[1] In a decision reported at 2025 NSSC 36 (*MacQuarrie v. Birch and Moore*) I dismissed a claim brought by Robert and Carla MacQuarrie against the potential purchasers of their residential property, Aimee and Thomas Birch. Emma Moore was the Birch's real estate agent, and the Birches added her as a Third Party to the action on October 27, 2022. The MacQuarries commenced the action against the Birches approximately a year prior, on October 29, 2021.

[2] The Birches are entitled to their costs. Emma Moore also claims costs, to be paid either by the MacQuarries or the Birches, or partly by each of those parties.

[3] The parties have been unable to agree on the quantum of costs and which party should pay Ms. Moore's costs.

Party and Costs

[4] Civil Procedure Rule 77 governs costs, fees and disbursements. Costs of a proceeding generally follow the result. The overall task of a judge who assesses costs is to do "justice between the parties" (Fichaud, J.A. in *Armoyan v. Armoyan*, 2013 NSCA 136 at para 10). Normally, costs are assessed using the tariffs in Rule

77. Costs may also be awarded as a lump sum pursuant to Rule 77.08, but there must be a reason to consider a lump sum (Fichaud, J.A. in *Armoyan*, at para 15).

[5] Rule 77.07 permits the Court to increase or decrease the amounts in the Tariffs. Rule 77.07(2) sets out a non-exhaustive list of factors that may be relevant where a party requests to increase tariff costs following the trial of an action.

[6] Rule 77.07(2)(b) provides that the Court may consider a written offer of settlement which was not accepted by the unsuccessful party.

[7] This proceeding was a trial of an action which took place over approximately 2 days. Costs for a trial are usually assessed in accordance with Tariff A, with a primary consideration being the "amount involved". The length of the trial is also a factor in assessing costs as the sum of $2,000 per day is added to the Tariff A amount.

The Positions of the Parties

The Defendant Birches

[8] The Birches were entirely successful at trial. The Court ordered the entirely unsuccessful MacQuarries to pay back to them their security deposit with interest.

[9] The Birches say that the Tariff A amount involved falls between $65,001 and $90,000, with the Basic scale for that range being $9,750 and Scale 3 being $12,188.

[10] The Birches say that they incurred disbursements of $2,657.98 for printing, copying, courier fees and court fees.

[11] The Birches submit that they should be awarded costs in a lump sum amount of $20,657.98 based on the following breakdown:

$14,000	(Increase to Tariff A amount)
$4,000	(2 days of trial)
$2,657.98	(Disbursements)
Total Costs:	$20,657.98

[12] The Birches say that the basic Tarriff A amount should be increased to $14,000 because they made a with prejudice settlement offer on June 14, 2022 that would have provided the MacQuarries with $9,000 in exchange for the release of the Birches' $15,000 deposit. The Birches say that this offer was significant since this Court's decision confirmed their entitlement to the return of their deposit ($15,000 plus interest), while dismissing the MacQuarries' claim in its entirety.

The Third Party – Emma Moore

[13] Ms. Moore seeks third party costs in the amount of $13,750 and disbursements in the amount of $1,704.47 to be paid by the Birches, or in the alternative, the MacQuarries. Ms. Moore says that the amount involved ($65,001 - $90,000) results in costs of $9750 to which she adds $4000 for two days of trial, totalling $13,750.

[14] Ms. Moore says that the MacQuarries should pay her costs since it was inevitable that she would be added as a third party. Ms. Moore says that the MacQuarries ought to have foreseen the addition of her as a third party given the nature of their claims with respect to the Birches' notice of dissatisfaction, which was authored by Ms. Moore. In the alternative, Ms. Moore submits that the MacQuarries and the Birches should both contribute equally to her costs. In the further alternative, Ms. Moore submits that if the MacQuarries are found to not be responsible for any of her Third Party costs, that the general principle should be followed, and her Third Party costs should be borne by the Birches.

The Plaintiff MacQuarries

[15] The MacQuarries submit that appropriate costs to be paid to the Birches are $7,313 (Scale 1 for an amount involved between $65,000 and $9,000) plus $2,000 per day for the two day trial resulting in an award of $11,313.

[16] In terms of the costs of the Third Party, Emma Moore, the MacQuarries say that these should be paid by the Birches, who brought Ms. Moore into the lawsuit, even though they say the Birches had a complete defence to their own claim, and added Ms. Moore out of an abundance of caution. They note that the Third Party advanced arguments similar to theirs.

[17] The MacQuarries also say that certain conduct on the part of the Birches significantly delayed and increased the costs of this proceeding. They point out that they first filed a Request for a Date Assignment conference (DAC) on December 3, 2021, and a DAC was scheduled for April 1, 2022. However, on May 9, 2022, counsel for the Birches requested an adjournment in order to file a Third-Party claim against Ms. Moore. The MacQuarries point to further delay caused by the need for Third Party counsel to be appointed, with the Third Party defending the claim against them on January 16, 2023.

[18] The MacQuarries also point out that they were prepared to proceed directly to trial, without discoveries, thereby minimizing costs and delay. However, the Birches sought discoveries, which further increased the costs and inefficiencies of the litigation.

[19] With respect to the order of this Court to return the Birches' security deposit of $15,000, the MacQuarries say that the Court should exercise its discretion pursuant to section 41(i) of the *Judicature Act*, R.S.N.S. 1989, c 240 to reduce the period that 5% prejudgment interest is awarded. They say that given the delay caused by the Birches, prejudgment interest should not be payable to the MacQuarries for what they calculate is 463 days of delay from when the MacQuarries filed their request for trial dates (December 3, 2021) to when the date

assignment conference actually took place (July 7, 2023). The MacQuarries say that prejudgment interest at the rate of 5% on $15,000 should run for a total period of 790 days, only.

[20] In terms of the Birches' offer to settle, the MacQuarries say that it was the Birches' delay in adding Emma Moore as a Third Party which contributed to the cost of this proceeding, and any premium that might be added as a result of the unaccepted settlement offer should be off-set by the costs that the delay occasioned.

Analysis and Findings

[21] In terms of the party responsible for paying Third Party costs, all parties referred the Court to the decision of Justice Pierre Muise of this Court in *Kaehler v. SystemCare Cleaning & Restoration Ltd*., 2020 NSSC 32. At para 36, Justice Muise refers to *Bishop v. Nova International Ltd*., 2010 NSSC 418 where the Court in *Bishop* cited Orkin with approval as follows:

> As to the payment of costs to Third Parties, with respect to the law, Orkin, The Law of Costs states at s. 209.7:
>
>> The discretion of the court to award costs against an unsuccessful litigant extends as well to third parties. Thus, a plaintiff whose action has been dismissed may be ordered to pay the costs of the third party in addition to those of the defendant, depending on the circumstances of the case. The usual rule is that an unsuccessful plaintiff will not be charged with costs of the third party on the reasoning that the plaintiff did not sue the third party, did not want him or her in the case and was not responsible for joining the third party. Depending on the facts of the case, however, fairness may

> require that an unsuccessful plaintiff bear a successful third party's costs. Four categories have been distinguished where such an order may be appropriate:
>
> 1. where the main issue litigated was between the plaintiff and the third party;
>
> 2. where the third party was brought in or kept in by reason of the act or neglect of the plaintiff;
>
> 3. where the case involved a series of contracts in substantially the same terms for the sale of goods;
>
> 4. where the third party proceedings followed inevitably upon the institution of plaintiff's action in the sense that the defendant had no alternative but to join the third party.
>
> [37] At paragraph 12, it cited with approval the following passage from *Chisolm v. Nova Scotia*, 2009 NSSC 29:
>
> > A plaintiff may be responsible for costs of a third party if the joinder of the third party by the defendant was reasonable in the circumstances. Courts exercise discretion to require an unsuccessful plaintiff to pay third party costs when the issues raised in a third party proceedings are closely linked to or interrelated with those in the main action. Courts determine liability for third party costs after assessing what is fair in the circumstances ...
>
> [38] The general principle that the defendant who added the third party pays the costs is particularly applicable when that defendant has a complete defence and added the third party out of an abundance of caution. However, where the third party proceedings followed naturally and inevitably from the institution of the plaintiff's claim, it is proper to order the plaintiff to pay the third party costs. Even if the third party claim did not follow "inevitably", where the plaintiff ought to have foreseen the addition of the third party, it may be proper to require the plaintiff to pay at least a portion of the third party's costs. [Sanofi Pasteur Ltd. v. UPS SCS, Inc., 2014 ONSC 5402, para 6, 7, 9 and 10.]

[22] Accordingly, although the case law makes clear that although the general principle is that the defendant who adds the third party is responsible for their costs, a plaintiff may be responsible for third party costs if the joinder of the third party by the defendant was reasonable in the circumstances.

[23] Here, I find that the issues raised in the Third Party action are closely linked and interrelated with those in the main action.

[24] In all of the circumstances, I find that it was reasonable and necessary for the Birches to join the Third Party, Emma Moore in this case. It should have been obvious to the MacQuarries that Ms. Moore was a necessary party to the litigation including by virtue of her telephone and text communication with their agent which contained key aspects of why the transaction failed. The Third Party proceedings followed inevitably from the principal action, and the joinder of the Third Party was consistent with procedure encouraged by rules of court to avoid multiple proceedings. This Court's decision reflects findings of fact based upon testimony from Emma Moore.

[25] Issues among all parties in this litigation involved a single failed sale of a residential property. Conversations and communications between the MacQuarries' real estate agent and Ms. Moore were detailed in the Court's decision and were an important part of the Court's findings. I find that it reasonable and not over-cautious in the circumstances of this case for the Birches to join the Emma Moore as Third Party and the unsuccessful Plaintiff should bear a portion of the Third Party's costs.

[26] I have concluded that the costs recoverable by the Third Party should be assessed differently than those payable to the Birches. The Third Party could have been added to this action at an earlier point in time. I agree with counsel for the MacQuarries that the delay in adding Ms. Moore caused a delay in obtaining trial dates. That delay also should be reflected in the time over which prejudgment interest should run.

Conclusions

[27] I find that Tarrif A, Scale 2, the basic scale, is the appropriate starting point for assessing costs. Although this proceeding fell within Rule 57 (actions for damages under $150,000), and Scale 1 might have been considered as the appropriate scale to apply (as suggested by the MacQuarries) I find that the issues raised by the pleadings and argued by counsel at the trial resulted in certain complexities which made the preparations involved in defending the case appropriate for setting under Scale 2. There is no reason in this case to apply Scale 3, as suggested by the Birches. Accordingly, basic costs based on the amount involved are $9,750. To that amount, I added $4,000 for two days' trial. That totals $13,750. I exercise the Court's discretion to increase the sum of costs to $16,000 based upon the Birches *with prejudice* settlement offer of June 14, 2022.

[28] The Birches are entitled to disbursements of $2,000, for a total inclusive of HST, of costs payable by the MacQuarries to the Birches of $18,000. I note that the Court does not have evidence of the amount and description of the disbursements claimed.

[29] The normal application of Tariff A, basic scale would mean that costs are awardable to Emma Moore in the amount to $9,750 plus $4,000 (2 days' trial) which amount to $13,750. Ms. Moore also claims disbursements in the amount of $1,704.47, with the sum total amounting to $15,454. I note that the Court does not have affidavit evidence of the amount and description of the disbursement amount.

[30] I find that Emma Moore is entitled to costs in the total amount to $15,000 (inclusive of HST and disbursements).

[31] It should have been obvious to the MacQuarries that Emma Moore would be a necessary party to this proceeding and they could have made her a defendant early in the process. On the other hand, the Birches really had no choice but to add Ms. Moore as a Third Party, but they delayed in doing so.

[32] In the result, the Court considers that what does justice between the parties is for the MacQuarries to pay costs to Emma Moore in the amount of $10,000,

inclusive of HST and disbursements and the Birches to pay costs to Emma Moore, on the same basis, in the amount of $5,000.

[33] The MacQuarries shall pay interest on the sum of $15,000 (deposit) for 790 days at the prejudgment interest rate of 5%.

[34] To be clear, the MacQuarries shall pay costs to the Birches in the amount of $18,000 and costs to Emma Moore in the amount of $10,000.

[35] The MacQuarries shall return the $15,000 damage deposit to the Birches with 5% prejudgment interest, calculated over a period of 790 days.

[36] The Birches shall pay costs to Emma Moore in the amount of $5,000.

[37] All costs are payable on or before December 31, 2025. I ask counsel for Birches to prepare a draft costs order for submission to the Court.

Smith, J.