SUPREME COURT OF NOVA SCOTIA
Citation: Fougere v. Blunden Construction Ltd., 2013 NSSC 412

Date: 20131126
Docket: Hfx No. 288177
Registry: Halifax

Between:

William Fougere

Plaintiff

and

Blunden Construction Limited

Defendant

and

Fowler Bauld & Mitchell Ltd.

Third Party

Decision on Costs

Judge:	The Honourable Justice Patrick J. Murray
Heard:	By written submissions, July 12, 2013
Written Decision on Costs:	November 26, 2013
Counsel:	Gavin Giles, Q.C., for Blunden Construction Limited James P. Boudreau for Fowler, Bauld and Mitchell Ltd. Sean MacDonald, for William Fougere

By the Court:

Introduction

[1] These are my reasons for the fixing of costs on a motion for summary judgment on the evidence pursuant to *Rule 13.04* of the *Nova Scotia Civil Procedure Rules*.

[2] The third party, Fowler, Bauld and Mitchell Ltd. (FBM), brought the motion seeking that the third party claim by the Defendant, Blunden Construction Limited (Blunden), be dismissed, as it was without merit. FBM argued there was no genuine issue of material fact to be tried against the third party by the Defendant contractor.

[3] The Plaintiff, William Fougere, seeks damages against the Defendant, Blunden Construction Limited, for negligence. Mr. Fougere alleges he has suffered very serious personal injury as a result of exposure to dust particles during the construction and installation of an elevator at the Fairview Junior High School in the year 2005.

[4] The Defendant, Blunden Construction Limited**,** a contractor, was the successful bidder on the project and had the contract with the Halifax Regional School Board. The third party, Fowler, Bauld and Mitchell Ltd., was the architectural firm retained by the Board to oversee the project as architects.

[5] While the Plaintiff, Mr. Fougere, has not yet proven its claim against the Defendant, Blunden, the Defendant contractor, if liable, looks to FBM for compensation and to share in the responsibility, in whole or in part.

[6] At issue, on this motion, were the respective roles of the architect and contractor under the renovation project, as well as technical terms such as “hoarding”; “scope of work”; and “specifications”.

[7] The court concluded, on the evidence, that there was genuine issue of material fact, as to whether Fowler, Bauld and Mitchell Ltd did or failed to do anything which caused or contributed to the risk of harm, for which Blunden Construction Limited could be liable to the Plaintiff.

[8] The motion for summary judgment was, therefore, dismissed. The Defendant, Blunden, now seeks costs on the motion against FBM. The amount the Defendant seeks in costs is $7,500, inclusive of disbursements. Blunden states, this "is a fair and reasonable amount", considering the complexity, the amount of preparation and the serious consequences, if the motion has been granted.

[9] It is evident that the Defendant "pulled out all the stops" on the motion. Its preparation was extensive as was that of the third party. The documentation filed by both parties pointed to the importance of the motion, for each of them.

[10] The Defendant submits that the seminal principle to be applied in the present circumstance, is that the cost award shall be a substantial, but incomplete indemnity for the Defendant's litigation expenses.

[11] The third party recognizes that the Defendant's success on the motion warrants the payment of costs. However, it points out that, for chambers motions, the *Rules* state that the guidelines in Tariff C, "shall apply".

[12] Mr. Boudreau, counsel for the third party states that there was but one affidavit filed for each party without cross examination. The total court time, including attendance for the oral decision was 2.5 hours, less than one-half day. He states further that the matter was not complex. The Plaintiff's counsel, had "watching brief" and did not participate. While the matter was set for special chambers, the oral submissions were brief, requiring less than 2 hours on May 23, 2013.

[13] The third party submits the Tariff calls for costs in the range of $750 - $1,000. Fowler, Bauld and Mitchell Ltd does acknowledge that while a judge may exercise their discretion to go beyond this range, it is not a requirement, in these circumstances.

[14] The third party, further acknowledges, in referring to the *Rule* in Tariff C(3); that:

> a judge presiding in chambers, notwithstanding Tariff C, may award costs that are just and appropriate in the circumstances of the application.

[15] If anything, the third party states that only a modest increase in the Tariff is needed to make a just and appropriate award of costs. In this regard, FBM points to the decision of Justice Hall in **Saturley** v. **Lund**, 2006 NSSC 331. In that case, the hearing had been little more than an hour in length, with one affidavit filed by each party. Justice Hall departed slightly from the range in awarding $1,500, given that the application was not a simple one (alleged breach of Agreement of Purchase and Sale) and the fact that considerable preparation was required.

[16] The third party, FBM, relies primarily on the case of **Armour Group Limited** v. **HRM**, 2008 NSSC 123. In **Armour**, Justice Goodfellow ruled that for costs to be levied above the ranges provided in Tariff C, there must be special circumstances. At paragraph 20 the learned justice provided a list of nine (9) factors, noting at paragraph 21 that the list is by no means exhaustive. These paragraphs are as follows:

> 20 In my view to go beyond the Tariff C in Chambers matters requires special circumstances such as the following or a combination of some of the following:
>
> > 1) **Complexity**. Complexity may relate to questions of law or questions of fact or of mixed law and fact. Rarely does a half-day, let alone a day long Chambers Application, have the degree of complexity by itself that would amount to a factor warranting abandoning the new Tariff C or Chambers costs.

2) **Public interest**. For a case where it was determined public interest did not exist see Okoro v. Nova Scotia (Human Rights Commission et al.), [2006] N.S.J. No. 340. The Court stated:

> Counsel for Dr. Okoro is correct that the Court has, on occasion, departed from Rule 63.02 entirely or reduced costs when there is a matter of public interest. Public interest, however, requires that the litigation be of some public benefit. For example, when you have an ambiguous section in a Statute, an application that clarifies it for the general benefit of the public might call for a denial of costs or a reduction of costs. In the case before me, there is no discernable public benefit result.
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> For a case where public interest called for the conclusion that no costs should be awarded, see Newfoundland and Labrador (Consumer Advocate) v. Newfoundland and Labrador (Public Utilities Board), [2005] N.J. No. 83. To quote R.M. Hall, J. at para. 37:
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> > Therefore, the application of the Consumer Advocate is dismissed in its entirety. In light of the nature of the proceeding and a general review of public policy in which all of the parties to this proceeding have a direct interest, costs are not appropriate in the circumstances.

3) **Pre-chambers process**. This generally relates to areas of disclosure or non-disclosure, interrogatories, exceptional documentation, review etc. etc.

4) **Questions of law that are unsettled**, i.e. diversity of decisions by lower or appeal courts or represent a unique area of law. Landymore v. Hardy (1992), 112 N.S.R. (2d) 410. This was one of the considerations of Saunders, J. (as he then was).

5) **Conduct or misconduct of a party and/or solicitor**. For an example, in a trial setting see Landymore v. Hardy, above. See also Gilfoy et al. v. Kelloway et al.(2000), 184 N.S.R. (2d) 226 (S.C.).

6) **Settlement/alternatives**. It is not unusual in chambers applications for there to be an alternative process or time frame etc. etc. that more appropriately provides a less costly determination of the matters/issues advanced in the chambers application. Failure to advance such or failure to accept such that are reasonable is a factor that should be taken into account in the exercise of discretion relating to costs. Often the determination may only relate to the application of the tariff

limits, however, the factual situation on any application will determine the weight to be attached to this factor.

7) **Associate counsel** - prior to the adoption of the initial trial Tariff scheme in 1989 , the Costs and Fees Act provided party and party costs on an item by item basis. For example, recovery was limited to $5 for one letter sent prior to commencement of the action and post the commencement of the action. Five dollars for every necessary letter required thereafter. In addition, counsel fee was set at the rate of $300 per day with a specific associate counsel fee of $150 per day. The change from an item base to a Tariff base resulted in the items being subsumed in the Tariff and the presence of associate counsel is not, by itself, a factor giving rise to a departure from the new Tariff C on Chambers costs. The determination to have associate counsel is a contractual determination between a solicitor and a client. The onus on a party advancing the utilization of associate counsel as a factor for consideration of special circumstances is on the person seeking a departure from the Tariff scale. The necessity for additional counsel for one party must be clear. By way of example, it most often arises in a multi-witness hearing. Although there is always lead counsel, it happens that associate counsel may, in such circumstances, actively participate usually in the direct and cross-examination of witnesses etc.

8) **Multi Counsel**. The presence of multi counsel usually reflects the number of parties interested in the issue(s) before the court but most often it is, at best, confirmatory that there are factors warranting the determination of special circumstances. Often there is a multitude of counsel whose clients have some interest in the issue(s) but do not participate or participate on such a limited basis that such existence of multi-counsel does not bring the circumstances anywhere near the "special circumstances" required to depart from the Tariff. For an example of where the existence of multi counsel was confirmatory, see Keating v. Bragg, February 27, 1997, [1997] N.S.J. No. 122, (unreported) S.H. 133691, where, in this application, there were 10 solicitors involved and although there were lead counsel for the parties, all counsel did have a part to play in what I concluded was really an application clearly related to the requirements of a several day trial.

9) **Expert witnesses.** The presence of expert evidence is not a usual occurrence in a Chambers Application, however, it does occur, for example, in an application seeking a second medical examination or a speciality medical examination of a party seeking damages. Whether or not it becomes a factor depends often on whether or not the expert

> evidence is disputed, contrary expert evidence advanced, cross-examination required etc. The mere existence of an expert report rarely by itself suffices.
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> 21 The foregoing is by no means exhaustive and is only indicative of the kinds of situations and factors that are likely to give rise to the possible consideration of an exercise of discretion in the area of chamber's party and party costs.

[17] In its brief (at page 7), the third party referenced the factors in **Armour**, in urging this court to stay within the Tariff. The third party's submission is as follows:

> In looking at the factors outlined in *Armour Group,* supra, the level of complexity of the issues before Your Lordship was not such as to require going beyond what is provided as being reasonable under Tariff C. In the present situation, the question of whether there is a genuine issue for trial as between the Defendant and Third Party was not an overly complex legal issue to be sure, it continued elements of both a factual and legal nature, but none that we so complex as to require any cross-examination of the parties or lengthy submissions from Counsel.

[18] In addition to the matter before me not being complex, the third party submits the mere presence of additional counsel, as was the case here, does not automatically take the costs beyond the Tariff. I concur.

[19] The third party's position with respect to the factors in **Armour** was summarized in its brief as follows, by Mr. Boudreau and Ms. Bath:

> Following from Goodfellow, J.'s considerations in *Armour Group*, supra, we submit this is not a situation of "special circumstances" that requires going

> beyond the range provided by Tariff C for matters requiring more than one hour but less than half a day of the Court's time.

[20] I am further urged by the third party to consider the views of Wright, J., in **Estate of Chapin** v. **Drum Head Estates Limited**, 2013 NSSC 214, which was a decision on summary judgment. In **Chapin,** the hearing lasted one full day and involved cross examination. Justice Wright awarded costs of $2,000 in accordance with Tariff C. He did not see the need to depart from the Tariff while acknowledging he had the discretion to do so.

[21] Each case must be decided upon it's own circumstances.

[22] In terms of special circumstances, I will comment on what I consider to be a fair and proper assessment of the factors, as outlined in **Armour Group Inc.**, as it relates to the present case.

[23] Complexity varies between the issues at trial and the issues on a motion for summary judgment. The issue in this matter involves professional negligence.

The industry standard and expert evidence on that point becomes relevant. Expert opinion was referred to on the summary judgment motion.

[24] In addition, a motion for summary judgment by a third party is not common, procedurally. On the motion, the roles of the respective parties as contractor, architect, and interpreting the contract documents were all relevant issues. These things added to the complexity of the matter on the motion for summary judgment.

[25] In addition, the amount of preparation and importance of the matter to the parties, are relevant considerations. The affidavits of Mr. MacCormack and Mr. Freeman were detailed. The briefs filed were detailed and extensive. The affidavits included numerous exhibits. The caselaw was thoroughly reviewed.

[26] It is evident that both Fowler, Bauld and Mitchell Ltd and Blunden Construction Limited considered the motion serious and of high importance. By their nature, summary judgment motions can be final and conclusive. As well, the indications are that the Plaintiff's allegations, if proven, will result in significant loss. Potentially, at least, a lot was at stake on the motion for summary judgment.

[27] I have considered the affidavit evidence submitted by the Defendant as to the amount expended in legal fees on behalf of Blunden Construction Limited. I am satisfied that these were incurred, at varying rates so as minimize costs and maximize service to the client. At times, increased preparation time can result in less court time being expended. It should be noted that costs are not legal fees as such. The objective, as stated, is for the successful party to receive a substantial contribution toward its actual costs.

Decision

[28] Having considered the matter carefully, I am of the view that the Tariff amount of $7500- $1,000 would not "do justice" as between the parties, on this motion.

[29] Further, I do not agree that the motion was devoid of any of the special circumstances outlined in **Armour**. It is the presence of these special circumstances which make it just and appropriate for me to depart form the Tariff. In my view, the Tariff falls far short of a substantial, but incomplete indemnity of the Defendant's costs in the present case.

[30] In **Coady v. Burton Canada Company**, 2013 NSCA 95, the Nova Scotia Court of Appeal recently recognized the importance of the motion and the degree of preparation as relevant factors in determining costs on a summary judgment motion.

[31] I concur with the third party, that using the multiplier approach as outlined in Tariff C (4) is only appropriate when an order following Chambers is determinative of the entire matter at issue in the proceeding. The *Rule* notes as an example, successful applications for summary judgment. This application, by the third party, was not successful.

[32] Nonetheless, I consider that factors such as complexity, importance and the amount of effort are valid considerations in the exercise of my discretion in awarding costs, which are just and appropriate.

[33] *Rule 77.08* states that a Judge may award a lump sum cost instead of Tariff costs.

[34] A party may expect that in matters involving allegations of faulty construction, professional negligence, and serious personal injury, that a motion to have the matter dismissed will be met with vigorous opposition. That is what happened here. That such matters would be considered routine, in terms of costs, does not square with the drastic remedy sought, dismissal. This must and should be a consideration for any party contemplating seeking such a remedy from the Court. Each case, of course, will be decided on it's own merits.

[35] I have reviewed the recent affidavit of Mr. Giles, enclosing a summary worksheet of the Defendant's actual legal expenses in responding to the motion for summary judgment. As well, I have reviewed and considered the pro-forma statement of professional time spent, once again, in responding to the third party's motion.

[36] While I am not purporting to tax these amounts or approve them as a taxing master would, I do not consider the hours spent, while considerable, to be excessive. I note that not all of these fees were actually billed and a portion (approximately ½) is claimed.

[37] In these circumstances, having considered the authorities and the submissions from counsel, I am satisfied that a substantial, but incomplete indemnity would represent approximately one third of the Defendant's actual expenses. This would equate to a lump sum cost award of $5,500.

[38] In the result, and for the foregoing reasons, I find it is just and appropriate to award costs in the amount of $5,500, inclusive of disbursements. This represents in my view a substantial contribution toward the Defendant's litigation expenses.

[39] Order accordingly.

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Murray, J.