SUPREME COURT OF NOVA SCOTIA
Citation: Andrews v. Keybase Financial Group Inc., 2014 NSSC 287

Date: 20140730
Docket: Hfx. No. 339660
Registry: Halifax

Between:

Martin Douglas Andrews and the Estate of Sheila Rebecca Andrews (2010HfxNo339660)**, David Bateman and Sharleen Bateman** (2011HfxNo343599)**, John Cameron and John Cameron as Executor of the Estate of Linda Cameron** (HfxNo300385)**, Charles Raymond Michael Crowell and Darlene Joyce Crowell** (2011HfxNo343611)**, Jeffrey H. Phillips and Denise Kowalski-Phillips** (2009HfxNo306313)**, Jared Raymond Phillips and Becky Lynn Waterfield** (2010HfxNo327381)**, James Edward Maxwell Ramsay and Lisa Elayne Matheson** (2010HfxNo343604)**, Wilma Lee Shane and Wilma Lee Shane as Administrator of the Estate of Ruth Shane** (2009HfxNo316695) **and Robert Andrew Verney and Janice C. Verney** (2010HfxNo327213)

Plaintiffs

-and-

Keybase Financial Group Inc. and Global Maxfin Investments Inc.

Defendants

Supplementary Decision on Damages and Costs

Judge: The Honourable Justice Robert W. Wright

Last Written Submission: July 4, 2014

Written Decision: July 30, 2014

Counsel: Counsel for the Plaintiffs - Jamie MacGillivray
Counsel for the Defendants - Brian Awad and David Moorhouse

Wright, J.

BACKGROUND

[1] In a decision rendered on February 4, 2014 (cited as 2014 NSSC 31), the defendants were found fully liable to the plaintiffs for heavy financial losses which they all incurred as a result of the fraudulent conduct of John Allen, a financial advisor who was successively employed with them between 2005 and 2007.

[2] In proof of the valuation of those losses, plaintiffs' counsel obtained an expert report prepared by Krofchick Evaluation Partners pertaining to each plaintiff (or pair of plaintiffs), all nine of which were entered in evidence with the consent of defence counsel. It was stipulated at trial that both counsel agreed on the methodology used in these expert reports on how the pecuniary losses for each plaintiff were to be calculated. That calculation depended on the "valuation day" chosen as well as the appropriate rate of interest for potential loss of interest income by the plaintiffs had they invested in hypothetical fixed income investments. The reports as filed were all calculated using a valuation date of December 1, 2013 (which coincided with the trial dates).

[3] In each of the reports, the economic loss to the plaintiffs respectively was described as "the difference between the sum of loan balance outstanding and the amounts invested by them and the sum of net income earned and the proceeds that would be received from the potential sale of the portfolio, plus the potential loss of interest income if their own funds were invested in hypothetical fixed income investments, as at December 1, 2013". In appropriate cases, the loss was increased

by interest paid by plaintiffs on refinanced mortgages used to invest in the leveraged investment plan.

[4] Both counsel having agreed to this methodology of evaluating the plaintiffs' pecuniary losses, none of these expert reports were specifically addressed at trial. More particularly, defence counsel did not require the plaintiffs' expert for cross-examination, nor did the defendants obtain any expert valuation reports of their own.

[5] In closing submissions, defence counsel confirmed the acceptance by the defendants of the Krofchick methodology, subject to the determination of the appropriate valuation date(s). It was proposed that the Court rule on liability (and in particular the mitigation defence) and that once the appropriate valuation dates were fixed for each plaintiff (again dependant on the mitigation defence), counsel would work with those findings in determining the quantum of the pecuniary losses for each plaintiff.

[6] After making the finding that the defendants were fully liable for the plaintiffs' pecuniary losses, and fixing a valuation date of December 1, 2013 across the board, the Court could have simply adopted the Krofchick reports and made a corresponding award to each plaintiff (or pair of plaintiffs). However, out of an abundance of caution, where these reports were not specifically addressed during the trial, the Court preferred to have counsel submit an agreement on the specific amount to be awarded to each pair of plaintiffs, rather than simply plugging in the numbers from those reports in the trial decision. It was further

ruled that if there was any disagreement on these amounts, notwithstanding the agreement on methodology and the Court's determination of the valuation date, the Court would retain jurisdiction to resolve any remaining dispute.

[7] What has since occurred was entirely beyond the contemplation of the Court. In a lengthy post trial brief, defence counsel raised a litany of valuation issues and arguments in support of his submission for the reduction of pecuniary losses from an aggregate of $1,262,406 (using a 3.5 % interest rate as set out in the Krofchick report) to an aggregate pecuniary loss of approximately $575,000. The most dramatic example of this reduction was the proposed valuation of the Shane pecuniary loss at nil, compared to the Krofchick valuation of that loss at $215,165 (which, in my view, properly included the loss from a bank line of credit improperly obtained by Mr. Allen on the Shanes behalf).

[8] A minor aspect of the proposed reduction was based on certain adjustments that needed to be made to the valuations for six of the nine plaintiffs by reason of omitted income payments and/or interest expenses. Upon review, Krofchick Evaluation Partners agreed with the propriety of those adjustments and reduced the aggregate pecuniary loss to the amount of $1,239,298. This was presented to the Court, at its direction, through a supplementary expert report in the form of a letter. Essentially, this supplementary report serves to correct a number of clerical errors pointed out by the defendants. It does not alter the methodology used.

[9] In response to this, the defendants reiterate their many remaining challenges to the Krofchick calculations of the pecuniary losses of the various plaintiffs, supported by intricate calculations of their own contained in the written submissions of defence counsel. Defence counsel now also requests the opportunity to provide support for those calculations through attestation by a third party, which I take to mean an expert in the valuation of pecuniary losses.

[10] That request is denied. Permitting the plaintiffs' expert to correct its initial reports by making minor clerical adjustments (indeed in the defendants' favour) does not open the door to the submission of new evidence on loss valuation from the defendants, whether through experts or in-house. It is simply too late for that to be permitted, given the defendants' admissions and representations at trial, upon which counsel for the plaintiffs relied in his conduct of the case.

[11] It would be prejudicial to the plaintiffs were the defendants now permitted to submit their own untested calculations in an effort to reduce the pecuniary losses by almost 60% of the Krofchick valuations. If the defendants wanted to challenge the veracity of the Krofchick reports to the extent they now propose to do, that ought to have been done through cross-examination of the plaintiffs' expert and/or submitting an expert report of their own at trial. The trial will not now be reopened for that purpose.

ASSESSMENT OF PECUNIARY LOSSES

[12] In light of the foregoing, the Court accepts each of the nine expert reports prepared by Krofchick Valuation Partners, with the minor adjustments of a clerical nature made post-trial as aforesaid. In so doing, the Court also fixes an interest rate of 3.5% for the potential loss of interest (had the plaintiffs invested in fixed income investments), being generally the median rate between the alternatives posed in the reports. That produces an aggregate pecuniary loss amount, based on a valuation date of December 1, 2013 of $1,239,298. A breakdown of that amount (per the individual expert reports), together with the awards earlier made for general damages and disgorgement of profits (and interest accruing thereon) is set out as follows:

Plaintiff(s)	Pecuniary Loss	Interest on Pecuniary Loss	General Damages	PJI on General Damages	Disgorg. of Profits	Total Judgment
Cameron	150,601	5,020	7,500	1,297	2,056	166,474
Phillips	161,108	5,370	15,000	2,594	2,056	186,128
Andrews	102,467	3,416	7,500	1,297	2,056	116,736
Verney	197,858	6,595	7,500	1,297	2,056	215,306
Shane	215,165	7,172	7,500	1,297	2,056	233,190
Waterfield	55,736	1,858	15,000	2,594	2,056	77,244
Crowell	51,961	1,732	15,000	2,594	2,056	73,343
Matheson	113,415	3,781	15,000	2,594	2,056	136,846
Bateman	190,987	6,366	15,000	2,594	2,056	217,003
TOTAL	1,239,298	41,310	105,000	18,158	18,504	1,422,270

[13] It should be noted that interest on the pecuniary losses has been calculated at 5% per annum since the valuation date of December 1, 2013. The interest on general damages has been calculated at 2.5% per annum since September of 2007. The amount for disgorgement of profits is based on a principal amount of $2,250 per year at an interest rate of 5% per annum over 3½ years (an averaging of 7 years) divided equally among the plaintiffs.

[14] In the result, each of the plaintiffs, or pairs of plaintiffs as the case may be, will be entitled to judgment against the defendants for the amount shown in the last column of the foregoing chart.

[15] As referred to in paragraph 217 of the trial decision, the Court was asked not to rule on the issue of contribution as between Global and Keybase but rather to find the two defendants jointly and severally liable given their agreement to be jointly represented. It appears that Global and Keybase have agreed privately between themselves to decide the issue of apportionment of damages under the guiding principle that Global's liability for pecuniary damages excludes losses arising from any investments made after Mr. Allen left its employ.

COSTS

[16] The following principles can be extracted from the relevant provisions of Civil Procedure Rule 77:

(a) An award of costs is in the discretion of the trial judge who may make any order about costs as the court is satisfied will do justice between the parties;

(b) Costs of a proceeding follow the result, unless a judge orders otherwise;

(c) Party and party costs must be fixed in accordance with tariffs of costs and fees incorporated into Rule 77, unless a judge orders otherwise;
(d) A judge who fixes costs may add an amount to, or subtract an amount from, Tariff costs;
(e) A judge may award lump sum costs instead of Tariff costs;
(f) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[17] I also refer to Civil Procedure Rule 77.13, the full text of which reads as follows:

> **(1)** Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
> **(2)** The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:
>
> > (a) counsel's efforts to secure speed and avoid expense for the client;
> > (b) the nature, importance, and urgency of the case;
> > (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
> > (d) the general conduct and expense of the proceeding;
> > (e) the skill, labour, and responsibility involved;
> > (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[18] In the present case, plaintiffs' counsel attests to a contingency fee agreement

having been entered into with all of the plaintiffs, under the terms of which legal fees are to be paid on the basis of 33% of the total judgment, including costs, but exclusive of disbursements. Where the aggregate of the total judgments for the plaintiffs respectively has been assessed at $1,422,270, the application of the 33% contingency fee produces a solicitor-client costs figure of $469,349. This does not take into account the same percentage recovery of the party and party costs award to be made.

[19] Although no time records have been produced with hourly rates, plaintiffs' counsel attests in his supporting affidavit that even if the client billings were made on a time basis, the result would be similar to the amount provided by the contingency fee agreement.

[20] In his submissions on costs, counsel for the plaintiffs draws a comparison between these actual solicitor-client costs and the amount of party and party costs that would be derived from the basic scale under Tariff A. It is there provided that where the Amount Involved is more than 1 million dollars, the basic scale is derived by multiplying the Amount Involved by 6.5%. That calculation produces a sub-total of $92,447 to which must be added $24,000 (twelve days of trial at $2,000 per day) thus producing a total costs figure under Tariff A of $116,447. By comparison, that figure represents approximately 25% of the solicitor-client costs to be charged under the contingency fee agreements (again excluding the percentage recovery on the costs award itself).

[21] Given that comparison, it is the submission of counsel for the plaintiffs that

Civil Procedure Rule 77.08 should be applied whereby the Court may award lump sum costs instead of Tariff costs. It is proposed that the appropriate lump sum of costs to be awarded is $350,000 (plus HST) which would represent recovery of approximately 75% of the solicitor-client costs figure of $469,349.

[22] Defence counsel, on the other hand, submits that this is an appropriate case for Tariff A to be applied without deviation. His suggested costs figure of $75,000 is based on an Amount Involved in the $501,000-$750,000 bracket under Tariff A, an amount since rejected by the Court.

[23] Of the several Nova Scotia cases that I have been referred to where a lump sum costs award has been made, I need cite only two of them in this decision, namely, the appellate decisions in **Williamson v. Williams**, 1998 NSCA 195 and **Armoyan v. Armoyan**, 2013 NSCA 136.

[24] In **Williamson**, Justice Freeman writing for the Court adopted the underlying principle by which costs ought to be measured as one requiring a "substantial contribution" towards the party's reasonable expenses in presenting or defending the proceeding, without amounting to a complete indemnity. Reasonably interpreted, a "substantial contribution" was taken to mean more than 50 and less than 100 percent of a lawyer's reasonable bill for the services provided. Justice Freeman went on to say that "A range for party and party costs between two-thirds and three-quarters of solicitor-client costs, objectively determined, might have seemed reasonable".

[25] Justice Freeman then went on to compare Tariff costs with solicitor-client costs (based on time records). In so doing, he added the observation that even if evidence of the exact legal fees to be charged were before the Court, this would not be determinative. Rather, an exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary.

[26] In the application of those principles, Justice Freeman concluded that Tariff costs of $14,180 were insufficient when measured against reasonable solicitor-client costs of approximately $80,000. Accordingly, the Court made an order for lump sum costs of an additional $30,000 for a total costs figure of $44,180 which represented a 55% recovery of actual legal fees.

[27] The **Williamson** case is all the more helpful because it also involved a breach of fiduciary duty owed by a financial advisor to an investor. In that context, Justice Freeman identified the following three factors as calling for an award of lump sum costs:
(1) the length and the complexity of the case;
(2) the appellant's claim resulted from a deliberate breach of fiduciary duty owed to him by the respondents, such that the appropriate remedy should reflect the principle of restitution; and
(3) there is a public interest in protecting investor confidence in financial institutions.

[28] Those factors have similar application in the present case. As for the first one, which is case specific, counsel for the plaintiffs attests in his affidavit that this litigation involved 14 days of discovery, two motions, an application to certify as a class action, dealing with experts on liability and damages, and a very large volume of documentary evidence, all of which culminated in a 12 day trial.

[29] The **Williamson** case was recently followed by the Nova Scotia Court of Appeal in **Armoyan**, even though it applied the former tariffs from the 1989 costs regime. Justice Fichaud, in the latter case, affirmed the basic principle that a costs award should afford substantial contribution to the party's reasonable fees and expenses. He also affirmed that generally speaking, the "substantial contribution" should exceed 50% of the appropriate base sum, but should not approach the full indemnity of a solicitor and client costs award. He further noted that the percentage should vary, in a principled manner, according to the circumstances of the case and that a principled calculation of a lump sum should turn on the objective criteria that are accepted by the Civil Procedure Rules or case law.

[30] In similar fashion to **Williamson**, Justice Fichaud tested the propriety of a lump sum award by comparing the proposed tariff award to the actual legal fees and expenses to be charged to the client. He concluded that a recovery of about 27% did not approach the "substantial contribution" that Justice Freeman had contemplated in **Williamson**. Hence, a lump sum was appropriate which the Court then fixed at a total amount of $306,000 (including disbursements) measured against solicitor-client legal fees and disbursements in the aggregate of approximately $477,000.

[31] Bearing these principles in mind, as well as the representation by plaintiffs' counsel that the solicitor-client fees would be similar whether computed under the contingency fee agreements or by time records, I conclude that this is clearly a case where a lump sum award of costs should be made so as to effect a substantial contribution to the plaintiffs' legal expenses. Considering as well the three factors identified earlier in this decision in common with the **Williamson** case, I am of the opinion that an appropriate award of lump sum costs to be made here is $310,000 representing a rounded recovery of 66% of the solicitor-client fees of $469,349 (recognizing that the latter figure does not include the contingency fee recovery on the costs award itself).

[32] The plaintiffs also seek recovery of HST on the Court's award of party and party costs.

[33] The weight of authority in this province does not support the additional recovery of HST on costs. It was not included in the award of costs by the Nova Scotia Court of Appeal in either the **Williamson** or **Armoyan** cases. It was also specifically disallowed by this Court in **MacIntyre v. Cape Breton District Health Authority**, 2010 NSSC 170 (at para. 27), relying on the earlier decision of the Nova Scotia Court of Appeal in **G.B.R. v. Hollett** [1996] N.S.J. No. 345. I therefore decline to add HST to the lump sum costs award to be recovered by the plaintiffs.

DISBURSEMENTS

[34] There is significant disagreement between the parties concerning the scope of recoverable disbursements incurred by the plaintiffs.

[35] Civil Procedure Rule 77.10(1) provides that an award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award. It is well established that the onus is upon the party seeking recovery of a disbursement to establish that the cost thereof is reasonable. Reasonableness is required both in the context of the incurring of the disbursement and in its composition and quantum.

[36] Plaintiffs' counsel has filed an extensive affidavit which includes a summary of the disbursements incurred on behalf of each client, most of which are accompanied by supporting invoices or receipts. These are listed in summary form as follows:

Client	Disbursements
Cameron	21,474.41
Phillips	22,786.90
Andrews	15,950.31
Verney	14,392.28
Shane	29,262.77
Phillips & Waterfield	16,048.13
Crowell	13,436.91
Ramsay & Matheson	15,671.17
Bateman	16,717.40
TOTAL:	**165,740.28**

[37] The foregoing total includes shared disbursements spread evenly amongst all nine plaintiffs (or pairs of plaintiffs) in the amount of $32,265.37. All but $274.16 of this latter amount is comprised of certain expert fees which will be addressed later in this decision.

[38] Apart from the expert fees, I have examined all the remaining disbursements for each of the plaintiffs. Most are supported by receipts or invoices but there are a few missing, as identified by plaintiffs' counsel, which will therefore be disallowed. I would also disallow certain bailiff costs for service upon other parties and, as well, reduce the recoverable photocopying charge from 25 cents per page to 10 cents per page.

[39] Without trying to put too fine a calculation on these other disbursements, I have estimated the amount to be disallowed (other than in respect of expert fees yet to be considered) to be approximately $5,000.

[40] There are three categories of expert fees claimed on behalf of each of the plaintiffs. The first is for the services of psychologists, obviously related to the plaintiffs' claims for damages for mental distress. Although no such expert reports were actually filed or in evidence, I am satisfied that it was reasonably necessary for the plaintiffs to engage such services in formulating their claims. The amounts appear to be reasonable as well.

[41] The big ticket items are the expert fees charged by Mr. Davidson, a chartered accountant, and by Krofchick Evaluation Partners, who calculated the pecuniary loss for each plaintiff.

[42] As summarized at paragraphs 163-167 of the trial decision, Mr. Davidson was asked to provide an opinion on whether Keybase was required to disclose to the clients its own potential liability for the losses incurred, according to mutual fund industry standards. Mr. Davidson was also asked to address the quality of the supervision of Keybase and its managers. He further advanced an alternate theory of liability on the part of Keybase, based on the conflict of interest rules of MFDA.

[43] Mr. Davidson submitted a total of six invoices to plaintiffs' counsel between December 31, 2011 and December 5, 2013 in the aggregate of $23,836 (including HST). This amount represents approximately 84 hours of work billed at the hourly rate of $250. The services provided are not itemized, but rather are described in very general terms.

[44] As noted in my earlier decision, I accepted one part of Mr. Davidson's opinion but otherwise found it to be of little assistance in the disposition of this case.

[45] The work of Krofchick Valuation Partners, on the other hand, was instrumental in the disposition of this case in providing the Court with expert evidence on the calculation of the pecuniary losses of each plaintiff. As noted

earlier, the methodology used in the calculation of these pecuniary losses was agreed to by the defendants and has been accepted by the Court in assessing damages.

[46] The Krofchick firm submitted a total of 20 invoices since early 2011 in the aggregate of $108,723.54. Of that amount, $8,155.21 was billed for work in June, 2014 in responding to the position on damages advanced by the defendants post trial. Prior to that, the Krofchick firm submitted two successive invoices pertaining to each plaintiff (or pair of plaintiffs) for the preparation of their expert reports and the work associated therewith. Again, none of these invoices are itemized but rather simply describe the professional services rendered in a general way, without disclosing the hours expended or the hourly rate charged and by whom. This makes it more difficult for the Court to assess the reasonableness of the quantum of these accounts.

[47] The proper approach to be followed in assessing the reasonableness of these disbursements was confirmed by the Nova Scotia Court of Appeal in **Claussen Walters & Associates Ltd. v. Murphy** [2002] N.S.J. No. 44. I quote from para. 12 of that decision:

> Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in J.D. Irving Ltd. v. Desourdy Construction Ltd. (1973) 5 N.S.R. (2d) 350 at p. 362:
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>> In my opinion, Civil Procedure Rule 63.37, Clause (5) is to the same effect as the old Order LXVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the

> amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances.

[48] Although Civil Procedure Rule 77.10(1) speaks in terms of recovery of "necessary and reasonable disbursements", I do not consider the test in **Claussen** to have been altered in substance. Courts will continue to look for a proper evidentiary foundation justifying the expense as being necessary and reasonable.

[49] I also refer to the case of **Cashen v. Donovan** [1999] N.S.J. No. 77 where Justice Goodfellow enumerated a list of factors that might be considered in determining whether or not a given disbursement is reasonable. In the interest of brevity, I will simply incorporate those considerations by reference here.

[50] As noted by Justice Goodfellow as well in **Rhyno Demolition Inc. v. Nova Scotia (Attorney General)** [2005] N.S.J. No. 225 (at para. 37), the mere fact that the litigant enters into a contractual relationship with an expert does not create an obligation for the unsuccessful party to accept that contractual arrangement. It is for the Court to make a determination of what in the circumstances is reasonable, with respect to both its incurrence and its quantum.

[51] Bearing these principles in mind, I will first revisit the Davidson accounts. Although the hourly rate of $250 is reasonable, I consider that the 84 hours of work billed in these accounts, without itemization, is excessive for the work done. The report prepared by Mr. Davidson was a short one and was of limited assistance to the Court in its disposition of the case. I therefore will allow as a

recoverable disbursement the amount of $15,000 (representing 60 hours at $250 per hour) plus GST at 13% for a total of $16,950 (a reduction of $6,886).

[52] The Krofchick reports, as previously noted, have been instrumental in the disposition of this case. However, in the absence of any itemization of the accounts submitted, it appears to me that the total sum charged of $108,723.54 is excessive, considering that the same methodology and template was used in the analysis and preparation of the nine expert reports. Recognizing, however, that all documentation for each plaintiff (or pair of plaintiffs) had to be individually assembled, analyzed and tabulated, I am prepared to allow the median sum of $7,500 inclusive of GST for each of the nine reports. I am also prepared to allow in full the two supplementary accounts rendered in June of this year in the aggregate of $8,155.21 (as being necessarily and reasonably incurred) for a rounded total of $75,000 (a reduction of $33,723).

[53] In summary, the plaintiffs, in one bill of costs, are entitled to recover the rounded sum of $120,000 in disbursements. This rounded figure is derived from the subtraction of the three reductions herein made of $5,000, $6,886 and $33,723 respectively from the originally claimed amount of $165,740.28.

CONCLUSION

[54] The plaintiffs, in each of these nine actions heard together, will respectively be entitled to recover from the defendants the amount of the total judgment set out in the last column of the chart shown in paragraph 12 above.

[55] The plaintiffs are also entitled, in one bill of costs, to recovery of a lump sum costs award of $310,000. They are further entitled to recovery of taxable disbursements in the rounded amount of $120,000.

[56] I will await from counsel the Order for Judgment, consented to as to form.

J.