SUPREME COURT OF NOVA SCOTIA

Citation: *Hatfield v. Intact Insurance Company*, 2014 NSSC 288

Date: 2014-07-24
Docket: Syd. No. 316086
Registry: Sydney

Between:

Linda Hatfield

Applicant

v.

Intact Insurance Company

Respondent

Motion Decision
(Civil Procedure Rule 77.04)

Judge:	The Honourable Justice Robin C. Gogan
Heard:	June 18, 2014, in Sydney, Nova Scotia
Written Decision:	July 24, 2014
Counsel:	Linda Hatfield, Applicant, in person Guy LaFosse, Q.C. and Stephanie Myles, for the Respondents

By the Court:

Introduction

[1] Linda Hatfield applies for immunity from costs pursuant to *Civil Procedure Rule* 77.04. Intact Insurance Company ("**Intact**") contests the Motion.

[2] *Rule* 77.04 provides authority to grant relief from costs to a party in a proceeding. Relief may be granted if a person cannot pay costs and the risk of a cost award is a serious impediment to making a claim. The relief applied for by Ms. Hatfield is clearly discretionary. Ms. Hatfield says that she qualifies for the relief provided by this *Rule*.

[3] Ms. Hatfield is a frequent litigant before this Court. She has financial and other challenges in her life.

[4] This decision considers the scope of relief offered by *Rule* 77.04 and whether Ms. Hatfield is entitled to such relief in this proceeding.

Background

[5] The background to this proceeding was set out in a previous decision (***Hatfield v. Intact Insurance Company***, 2014 NSSC 232). For convenience, some of the relevant facts bear repeating:

> [6] Linda Hatfield commenced an Action against Intact on August 28, 2009. Her claim alleges that on August 29, 2007, her property suffered loss and damage as a result of an oil spill from a residential oil tank. Intact was then the insurer of Linda Hatfield's property and she notified her insurer of a claim.
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> [7] Linda Hatfield alleges that Intact carried out remediation without her consent and in a negligent manner. Linda Hatfield claims damages from Intact and says that it is responsible for damage to her real and personal property and to her health "resulting from her continued residence in the dwelling." Ms. Hatfield further seeks various damages from Intact, including punitive and aggravated damages and mental distress damages.
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> [8] At the time she commenced her action against Intact, Linda Hatfield was represented by counsel. Her initial lawyer was permitted to withdraw in 2010. Ms. Hatfield acted on her own for a period until she retained new counsel in November 2012. Linda Hatfield then moved for a renewal and amendment of her claim. This motion was granted on April 11, 2013.
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> [9] Intact filed a Defence on May 28, 2013. It denied any negligence. It said that all remediation efforts carried out were done so with Linda Hatfield's knowledge and consent. It further alleges that Linda Hatfield refused to accept expert remediation plans which prevented further remediation from proceeding. She failed to mitigate by maintaining heat in her home and totally disregarding it while she dealt with other legal proceedings. Finally, Intact raises a causation issue saying that any health damage, including any mental health damage, either pre-existed the oil spill or was caused by other events, unrelated conditions or other litigation.
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> [10] Linda Hatfield's new counsel proceeded with the litigation against Intact until March 6, 2014 when he was permitted to withdraw as counsel. Linda Hatfield has acted on her own since that time.

> [11] After obtaining her file from her former lawyer, she found that her file from the Department (of Community Services) had been obtained and disclosed to Intact. On April 15, 2014, Linda Hatfield moved for an Order returning the file contents to her. She also seeks a "ban" on any reference to her involvement in other litigation.

[6] On May 29, 2014, Ms. Hatfield's motion for return of disclosure was heard. A written decision was released on June 20, 2014. Ms. Hatfield's motion was denied and costs were provisionally assessed pending the outcome of the present motion.

[7] Ms. Hatfield moved her present motion on December 9, 2014. The motion was adjourned once by consent and was heard on June 18, 2014. The adjournment was requested by Ms. Hatfield because she did not want to rely upon the documents her former lawyer had filed in support of the motion. By explanation, Ms. Hatfield said that she couldn't "defend or address things" that she "didn't agree to or his wording or thought process".

[8] In support of her motion, Ms. Hatfield filed her Affidavit (amended) dated April 11, 2014. She says that she has both financial and health challenges in her life. Her only asset is her home which is presently uninhabitable and of no value. Exhibited to her Affidavit are copies of her Income Tax Returns which verify that her sources of income are social assistance and Canada Pension Plan disability

benefits. She also exhibits numerous medical reports to verify her medical status. She concludes her Affidavit by stating:

> 19. I believe that all of my claims are founded in solid evidence and not spurious and I do believe that any risk of an award of costs I would not be able to pay do (sic) to my extreme circumstances.

[9] Ms. Hatfield was cross-examined. She was questioned at length about her participation in various legal proceedings. She is or has been a litigant in multiple proceedings. She is the plaintiff in the present proceeding against Intact. She is also the plaintiff in ongoing separate actions against the Cape Breton Regional Hospital and Dr. Glen Worth.

[10] In September of 2012, Ms. Hatfield commenced an Application in Chambers against William Mader. In November of 2012 she commenced an Action against the Parish of the Resurrection Church. Both of these proceedings have since concluded.

[11] Ms. Hatfield also recently concluded an Action she commenced against Darren and Susan Mader. In the latter proceeding, Ms. Hatfield participated in a trial in this Court, an appeal to our Court of Appeal and a taxation of costs in the

Small Claims Court. In the end, Ms. Hatfield was awarded party and party costs totalling $24,895.92.

[12] In the context of these various proceedings, Ms. Hatfield has been the applicant or respondent in a number of motions. In the proceeding against Dr. Worth she made a motion to hold the matter in abeyance and sought an order pursuant to *Rule* 77.04. The latter motion has not been determined. Recently, in the proceeding against Intact, Ms. Hatfield sought Orders amending the pleadings, returning disclosure and banning reference to other legal proceedings. Ms. Hatfield has responded to a number of dismissal motions brought by the Prothonotary as well as motions by former counsel to be permitted to withdraw.

[13] Throughout the various legal proceedings, Ms. Hatfield has at times been represented by legal counsel and at other times acted on her own. She testified that she has funded some of the past litigation with the financial assistance of friends. She intends to repay this assistance but is of the view that she "owes more money than she will get".

Issues

[14] Is Linda Hatfield entitled to an Order pursuant to *Civil Procedure Rule* 77.04?

Position of the Parties

Linda Hatfield

[15] Ms. Hatfield submits that she is poor and disabled. She argues that she lives below the poverty line and that she is in a "David v. Goliath" position relative to Intact. She says that she clearly cannot afford to pay costs and that she should be granted relief pursuant to *Rule* 77.04. She says in her written submission that "the award of costs would be a great hardship against me that I could not pay". She concludes her written submission with the following statement:

> In closing I state once again that my Motions are not frivolous, and do not need the threat of costs to deter me from addressing the truth and what should have been done by my previous attorney's. And I should not be before this Justice system if there was not so much deceit and corruption by Intact Insurance from the outset of this claim, as well as the lack of representation by my attorney's regarding this claim, this should not have come this far or the loss of my home and ill effects on my health etc. If both sides were being truthful (lawyers), and issues address (sic) accordingly, instead of someone trying to fill their pockets. It is not about the victim it is about how we can deprive the individual of what is rightfully theirs.

[16] Ms. Hatfield relies upon the test set out in ***MacBurnie v. Halterm Container Terminal Limited Partnership***, 2011 NSSC 322.

Intact Insurance

[17] Intact says that this motion should be dismissed. It relies on *Rule* 77.04 and on the 2 part test established in ***MacBurnie***, *supra*. Intact argues that Ms. Hatfield has not demonstrated that the prospect of a cost award is a serious impediment to advancing her claims. She is a frequent litigant and there is no evidence that the threat of costs has impeded her access to the courts.

[18] Intact further submits that the relief available under *Rule* 77.04 is extraordinary. It should not be granted unless it is demonstrated that denying the motion would result in abandonment of the proceeding. Finally, Intact argues that the possibility of relief under *Rule* 77.04 must be balanced with the overall purpose of costs in litigation.

Analysis

The Civil Procedure Rule

[19] This motion is brought pursuant to *Rule* 77.04 which provides:

Relief from liability because of poverty

77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

(2) A motion for an order against a party paying costs must be made as soon as possible after either of the following occurs:

(a) the party is notified of a proceeding the party wishes to defend or contest;

(b) a claim made by a party is defended or contested;

(3) An order against paying costs may be varied when the circumstances of the party change.

(4) An order against a party paying costs does not apply to costs under Rule 88 – Abuse of Process, Rule 89 – Contempt, or Rule 90 – Civil Appeal.

[20] It is interesting to note that neither party to this motion presented a case on *Rule* 77.04 in which the relief sought was granted. No doubt this underscores the extraordinary nature of the remedy.

The Test

[21] The relief available under *Rule* 77.04 has been considered in a number of decisions of this Court. In a significant number of those cases, the *Rule* has been considered as part of a cost assessment following trial and not on a prospective basis as contemplated by the *Rule*.

[22] In ***MacBurnie v. Halterm Container Terminal Limited Partnership***, 2011 NSSC 322, the plaintiff brought a formal application for an order under *Rule* 77.04. The application was brought after the close of pleadings in a wrongful dismissal action. In dismissing the motion, Justice Wright wrote:

> 6 Costs are an important element of the litigation process. The purposes of costs can be summarized as follows (see Orkin on *The Law of Costs* (2 ed.) Vol. 1 at page 2-1):
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> (a) As a partial indemnity or, in some limited circumstances, full indemnity to the successful party for the legal costs incurred;
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> (b) To encourage settlement;
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> (c) To deter frivolous actions or motions;
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> (d) To discourage unnecessary steps that unduly prolong the litigation; and
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> (e) To facilitate access to justice.
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> 7 These purposes are undermined when a party has an exemption from cost exposure. In the words of Justice Gruchy in *Rafuse v. Zink's Bus Co*. 1992 CanLii 4552 (NSSC), (1992), 122 N.S.R. (2d) 183 (when considering the predecessor Rule 5.17 under our 1972 Rules), "… when a party has such an exemption, it becomes a very significant tool. A party with such an exemption may then pursue an adversary with financial immunity."
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> 8 Justice Gruchy concluded in that case that the exercise of judicial discretion in awarding costs was best left to the trial judge after the case had been fully exposed and the relative merits of both sides evaluated.
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> 9 Because of the imbalance that a costs immunity order would create, the court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and only where there is a comprehensive body of evidence adduced in support.
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> 10 Those two criteria are:

> (1) That the party cannot afford to pay costs, and
>
> (2) The risk of an award of costs is a serious impediment to litigating a claim.
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> 11 In my view, the stringent application of these criteria requires that the court be satisfied that without an order granting immunity from costs, the applicant would not be able to pursue the claim because of impecuniosity and the action would have to be abandoned. This in turn requires that the court have a full picture of the applicant's financial situation, a requirement articulated and applied by the Ontario Superior Court of Justice in *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847, 2009 CarswellOnt 7124. (Emphasis added)

[23] Motions for immunity from costs were dismissed, or submissions rejected, in ***Mader v. Hatfield***, 2011 NSSC 121; ***Peraud v. Peraud***, 2011 NSSC 80; ***Walsh v. Unum Provident***, 2012 NSSC 237; ***Doncaster v. Chignecto-Central Regional School Board***, 2012 NSSC 383; ***Canadian Residential Inspection Services Ltd. v. Swan***, 2013 NSSC 226; ***Slater v. Slater***, 2013 NSSC 17; ***Doncaster v. Field***, 2013 NSSC 110 (***Doncaster*** No. 1); ***Doncaster v. Field***, 2013 NSSC 213 (***Doncaster*** No. 2); ***Cole v. Luckman***, 2013 NSSC 6; ***Walsh v. Atlantic Lottery Corp.***, 2014 NSSC 157.

[24] There are a number of broad themes that emerge in the interpretation of this *Rule*.

[25] The first relates to procedural requirements. The *Rule* requires that a formal motion be made "as soon as possible" and be supported by a robust body of

evidence. Although it has been held that relief under the *Rule* may be considered as late as the cost assessment stage, there has been no success raising it at that point. There are also a number of decisions where relief has been denied as a result of the failure of the moving party to provide the required "comprehensive body of evidence".

[26] Another broad theme is the requirement to balance the legitimate interests and barriers of the parties in advancing the proceeding. In such cases, the goal of access to justice for an impoverished or impecunious litigant must be balanced with fundamental purposes served by having parties subject to the cost consequences in any proceeding.

[27] An award of costs to a successful party is an important and fundamental part of our litigation system. As Saunders J. (as he then was) said in the oft-cited case of ***Landymore v. Hardy*** (1992), 112 N.S.R. (2d) 410 (S.C.) in para. 17:

> [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[28] Cost awards are most frequently associated with a party's success or lack of success. However, as explained by Justice Saunders in ***Landymore***, and many other authorities on costs, a cost award represents more than a simple indemnity to a successful party for some or all of the costs incurred. As emphasized by Justice Wright in ***MacBurnie***, an award of costs is also a tool used to encourage settlement, efficiency and good conduct in the course of litigation.

[29] While there is a very legitimate interest in improving access to the court system for impoverished litigants, there remains an overriding concern about removing the ultimate governor over the conduct of litigation. This balancing of legitimate interests is well served by the requirement to stringently apply the test under the *Rule* to a comprehensive body of evidence.

[30] There is a final theme emerging from the decisions on *Rule* 77.04. It becomes evident as judges attempt to balance access to justice with the impact of cost consequences. It involves recognition that financial position of the party may be considered as part of the final cost assessment in a proceeding. This was the approach taken by MacAdam J. in ***Hill v. Cobequid Housing Authority***, 2011 NSSC 219. In that case, Justice MacAdam was asked to award no costs against an

unsuccessful plaintiff in view of the plaintiff's financial circumstances. At para. 31, after an extensive analysis of the issue, he concluded:

> [31]...Financial considerations are not listed as one of the factors to be considered in Rule 77.07(2), but I am satisfied it is a factor that can be taken into account.

[31] There can be no doubt that cases exist where there is a significant financial imbalance between the parties which may be a perceived or actual disadvantage to the litigant of limited means. This would be the kind of case that Ms. Hatfield referred to as the "David v. Goliath". In providing relief to such litigants, the Court must exercise care to ensure that the pendulum does not swing too far in the opposite direction. Financial immunity, in the wrong hands, could become a sword and not a shield.

Determination of the Motion

[32] At the outset, I find that Ms. Hatfield has met the procedural threshold under the *Rule*. Although the events giving rise to this proceeding arose in August of 2007, the pleadings only closed when Intact filed its Defence on May 28, 2013. I find it appropriate to move to a consideration of the motion on the merits. I will return to the timing of the motion in the reasons below.

[33] The first substantive criteria for consideration is whether the moving party can afford to pay costs. I am satisfied Ms. Hatfield has a very limited ability to pay costs based upon her current financial circumstances. It is uncontested that she is of very modest means. Her sources of income are social assistance and Canada Pension Disability benefits. She has monthly expenses that she incurs to live and which must fully expend her total income.

[34] I am further satisfied that Ms. Hatfield presently has a very limited asset pool which could be called upon to pay costs. There was evidence that she owns an older vehicle but no evidence as to value. Formerly, her home would have been a significant asset. Now it has very limited, perhaps notional value. While this proceeding holds the possibility that she will have insurance proceeds to repair her home, the final outcome of the matter is far from being determined.

[35] While Ms. Hatfield was challenged on the extent of her assets and her ability to pay costs, this criteria was not the focus of the motion hearing. The more contested issue was in relation to the second criteria – whether the risk of a cost award is a serious impediment to Ms. Hatfield's claim.

[36] Ms. Hatfield's evidence is that she is of limited financial means and cannot afford to pay costs. She has concerns about the impact a cost award may have on

her. In having such concerns, Ms. Hatfield shares the concerns of most litigants. I am not satisfied that having such concerns, even if they are legitimate and grave, discharges the requisite threshold.

[37] In her evidence, Ms. Hatfield stops short of saying that she would abandon her claim without financial immunity from costs. The absence of such evidence, while perhaps not fatal, is significant. If I am to allow Ms. Hatfield's claim for such extraordinary relief, I must be satisfied that her legitimate claims are in jeopardy in the face of the potential cost consequences.

[38] As I assess this factor, Intact urges that consideration be given to Ms. Hatfield's past litigation conduct. It further urges consideration of the caution of Goodfellow J. in ***Edward Stephen Phillips v. Robert A. Jeffries Architecture and Design Limited et al.***, 2002 NSSC 114 at para. 22:

> It seems to me that it is the proper exercise of judicial discretion to the Application pursuant to C.P.R. 5.17 where it is clear that the person applying fails to come within the policy consideration of the Rule and has, as here, a track record not of denial but of heavy and lengthy participation in the judicial system by virtue of the fee arrangement, contingency contract, between him and his solicitor.

[39] Having read the reasons of Justice Goodfellow in ***Phillips***, *supra*, it is not entirely clear what was meant by "heavy and lengthy participation in the judicial

system". However, I find the policy consideration a sound one and important in the present case. Past participation in the legal system may be considered and active participation in the absence of cost immunity is a relevant factor.

[40] Ms. Hatfield is a frequent litigant. She has been involved in a multitude of proceedings. She has been without relief under *Rule* 77.04 to date in this or any other proceeding. The absence of immunity from the cost consequences of litigation has not proved to be a barrier to her in the past.

[41] I note that Ms. Hatfield moved for relief under *Rule* 77.04 in 2 other proceedings. One of those motions has yet to be determined and has been in abeyance for a considerable period of time. In the second instance, Ms. Hatfield's motion was denied by Bourgeois J. (as she then was, in ***Mader v. Hatfield***, 2011 NSSC 121). In spite of not having cost immunity, Ms. Hatfield went on to successfully appeal. Clearly, the specter of costs was not a deterrent to Ms. Hatfield in that case.

[42] In the present proceeding, it is relevant that the matter has been ongoing for almost 5 years and Ms. Hatfield is only now raising the issue of relief under *Rule* 77.04. There has been no sense of urgency in pursuing the relief sought. In the meantime, she made at least two motions in the proceeding.

[43] I find that Ms. Hatfield has not established that the absence of cost immunity will prevent her from proceeding or result in abandonment of her claim against Intact. For this reason, I deny the motion for relief pursuant to *Rule* 77.04.

[44] In making this decision, I am ever mindful of the purpose of costs in litigation. In the present case, it is my view that it is not appropriate to grant cost immunity and allow Ms. Hatfield to act with impunity. Aside from the prospect of the cost consequences of success or failure, parties must be encouraged to act efficiently, behave appropriately and consider settlement prospects. I am not persuaded that this is an appropriate case to take away the cost governor at this stage in the proceeding. In my view, consideration of Ms. Hatfield's financial circumstances is better left to the trial judge.

Conclusion

[45] Ms. Hatfield's motion for relief from liability from costs pursuant to *Rule* 77.04 is dismissed.

[46] Intact seeks costs on this motion. This was a motion which took more than 1 hour and less than half a day. It was not frivolous. There were some inflammatory and irrelevant submissions by Ms. Hatfield and I find it was unnecessary for her to adjourn the motion to make amendments to her evidence. That said, the motion

was adjourned by consent. I have considered her financial position. I award Intact costs of $500.00 which shall be payable in any event of the cause at the conclusion of this proceeding.

Gogan, J.