SUPREME COURT OF NOVA SCOTIA

Citation: *3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2014 NSSC 313

Date: 2014-08-25
Docket: Yarmouth No. 404871
Registry: Yarmouth

Between:

3021386 NOVA SCOTIA LIMITED, a corporation

Plaintiff

-and-

MUNICIPALITY OF THE DISTRICT OF BARRINGTON, a corporation

Defendant

Judge:	The Honourable Justice Pierre L. Muise
Heard:	By correspondence.
Final Written Submissions:	April 11, 2014
Counsel:	Christopher I. Robinson, for the Applicant Kevin C. MacDonald, for the Respondent

[1] In ***3021386 Nova Scotia Limited v. Municipalitiy of Barrington***, 2014 NSSC 1, I dismissed the Applicant numbered company's application for a declaration of an implied grant of easement to draw water from a well on the lands of the Respondent Municipality. The parties have been unable to agree on costs. Therefore, I received written submissions on that issue and this is my decision in relation to it.

[2] The Applicant suggests that appropriate costs would be in the amount of $5,000.00, as a lump sum, inclusive of disbursements. It indicates that the starting point should be Tariff "A" using an amount involved of less than $25,000.00 which, considering two days of hearing, would produce costs of $8,000.00 . However, it argues, based on ***Viehbeck v. Pook***, 2012 NSSC 113, that there should be a reduction from the tariff amount to account for: the significant expense that the Applicant will have to incur to hook up to another water source; the fact that the Municipality was paying its legal bill with tax payer money, including property tax which the Applicant itself paid in excess of $30,000.00 in 2014/2015; the application was not speculative or frivolous; the application was not complex; there was no expert testimony; and, the evidence was primarily historical, not critical, with credibility not being in issue.

[3] The Respondent seeks a lump sum award of costs in the amount of $17,750.00 plus reasonable disbursements. It also suggests using Tariff "A" as a starting point; but, with the amount involved being $40,000.00 based on the $20,000.00 per hearing day "rule of thumb" approach used in ***MacCormick v. Dewar***, 2011 NSSC 10, and in ***Macdonald v. Holland's Carriers Limited***, 2011 NSSC 436. Adding $2,000.00 per court day, the total cost would be $10,250.00. However, it argues that that amount would not provide substantial contribution towards its actual reasonable legal expenses. It agrees that the proceeding was not complex. However, there were: discovery examinations; interrogatories; assembly and production of affidavits of documents; and, cross-examination on the affidavits, resulting in a two day hearing with "significant dispute on the legal issue". It also suggested that the Applicant's clear refusal to even entertain the possibility of a settlement on the basis of the action being discontinued without costs should be considered in determining appropriate costs. It suggests that the tariff amount should be increased by $7,500.00 to provide a 49.8% contribution to actual legal expenses.

[4] The most applicable and relevant ***Civil Procedure Rules*** include the following.

"**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.

....

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.

(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

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"

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

[5] Immediately following ***Rule* 77.18** are reproduced the tariffs entitled:

"TARIFFS OF COSTS AND FEES DETERMINED BY THE COSTS AND FEES

COMMITTEE TO BE USED IN DETERMINING PARTY AND PARTY COSTS". They provide, among other things, the following:

> "In these Tariffs unless otherwise prescribed, the 'amount involved' shall be
>
> ....
>
> (C) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
>
> (i) the complexity of the proceeding, and
>
> (ii) the importance of the issues ... ."

[6] The first tariff, Tariff "A" is entitled "Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding".

[7] It states:

> "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."

[8] For an "amount involved" of less than $25,000.00 the tariff costs, from Scale 1 to Scale 3, are $3,000.00, $4,000.00 and $5,000.00. For an "amount involved" between $25,000.00 and $40,000.00, the tariff costs from Scale 1 to Scale 3 are $4,688.00, $6,250.00 and $7,813.00.

[9] I will first address the issue of the "amount involved".

[10] Both parties agree that the proceedings were not complex.

[11] Each party indicates that the issue to be determined was of importance to it. The Applicant suggests that the water easement issue was of greater importance to it than to the Municipality. Although that point is not critical in assessing what is a proper costs award, I tend to agree with the Applicant. Even if a water easement had been granted, the Municipality would still have had use of its water supply. With the easement not being granted, the Applicant was denied use of it. The easement would have created liability issues for the Municipality and caused it to incur water testing costs. Those factors, in my view, were not as significant as a finding that the Applicant had no right to use the water.

[12] I also agree with the Applicant that the "rule of thumb" approach is not the most appropriate approach in the case at hand. As indicated by our Court of Appeal in the 1998 case of ***Veinot v. Veinot Estate et al.***, referred to at paragraph 60 of ***Ocean v. Economical Mutual Insurance Company***, 2013 NSSC 120, it is "an arbitrary classification which in most cases, except by happenstance, would be of little relevance". The approach may be appropriate or necessary where the non-monetary issue involved is one where it is not possible to realistically assign any meaningful financial value, such as child custody and access issues. However, in the case at hand, in my view, it is possible to assign at least a rudimentary financial value to the relief sought.

[13] It appears that the Applicant will have to expend an estimated additional $15,000.00, above and beyond the well drilling and pump installation expenditures it has already incurred, to hook up the well that it will be using and treat the water coming from it. The Municipality's water testing expenditures would average approximately $217.52 per year. At that rate, it would take approximately 115 years before they would spend $25,000.00 on water testing, without considering present value adjustment. The timeframe would be significantly longer with such an adjustment. Further, arguably, if the Municipality did not want to use the well in question itself, it could simply leave it up to the Applicant to maintain the well as a water supply and ensure its safety. Unless indicated, the owner of a servient tenement is not responsible for maintaining an easement. That owner is simply subject to the burden of having to allow the owner of the dominant tenement to use the easement. Further, the entire property which the Applicant purchased from the Municipality cost only $25,000.00. The most reasonable inference is that the value of the well easement, if the Municipality had been inclined to sell it, would have been significantly less than $25,00.00. In addition, the value of the portion of the lot of land upon which the well in question is located, along with a sufficient portion of that lot to connect the well to the Applicant's property, should, in my view, be significantly less than $25,000.00.

[14] Considering these points, in my view, the most appropriate "amount involved" is that of less than $25,000.00.

[15] Given the lack of complexity of the proceeding, and the relatively low financial value of the issue determined, despite its importance to the parties, in my view, there is no reason to depart from the basic scale, Scale 2. The hearing lasted two days. Two thousand dollars ($2,000.00) per day is to be added to the $4,000.00 basic amount. That results in total tariff costs of $8,000.00.

[16] The Court in ***Viehbeck v. Pook*** exercised its discretion to award the basic tariff amount only and not add the $2,000.00 per day. However, as noted at paragraph 10, that case involved the following circumstances:

> "[T]here were no discovery examinations or production of documents. The hearing consisted of legal arguments without cross-examination on affidavits, and lasted slightly more than a half day. There was no significant dispute on the legal issues and the hearing focused on the application of those principles to the facts set out in the affidavits. It was not a particularly complex hearing."

[17] Although the case at hand was also not particularly complex, it involved multiple features which, as the Respondent submits, distinguish it significantly from the ***ViehBeck v. Pook*** case. The case at hand involved: discovery examinations and interrogatories; production of documents; cross-examination on the affidavits; and, significant dispute over a number of legal points. Given those

distinguishing features, in my view, no reduction in tariff costs is warranted based on that decision.

[18] In addition, I agree with the submission of the Respondent that no reduction is warranted due to increased costs incurred by the Applicant to hook up to and treat another water source. In my view, that is irrelevant. In addition, the reason the water could no longer be accessed from the Courtyard Well by simply opening a valve was because of the demolition work done on behalf of the Applicant.

[19] The fact that the Municipality pays its legal expenses from tax revenue, a portion of which comes from the Applicant, is also irrelevant. Property owners must pay their tax bills and, but for the litigation, the money would be spent elsewhere.

[20] The fact that an application is not speculative or frivolous does not warrant a reduction in tariff costs, though a frivolous application might warrant costs on a solicitor-client basis. In addition, the lack of complicating features in the application, given the extent of work involved in prosecuting and defending it, in my view, does not warrant a reduction below the tariff amount, nor below the basic scale.

[21] I agree with the Applicant that there was no offer to settle bringing into play ***Rule* 77.07** and ***Rule* 10** so as to warrant an increase in costs. The lawyer for the Respondent merely sent an e-mail to the lawyer for the Applicant stating: "On a without prejudice basis if your client was prepared to source its water from its own property at this time and disconnect from my client's well I would be prepared to recommend to my client a dismissal on a without cost basis." In a later e-mail he acknowledged that it was "technically not an offer". Therefore, in my view, it is irrelevant to the issue of cost.

[22] I respectfully disagree with the position of the Respondent that this is an appropriate case to award an additional lump sum to reach a total cost amount that would provide substantial contribution to the Respondent's reasonable legal expenses.

[23] As I indicated at paragraph 6 of ***Sandra Richards v. Robert Richards et al***., 2013 NSSC 269, based on paragraphs 20, 21, 24 and 25 of ***Armour Group Ltd. v. Halifax (Regional Municipality)***, 2008 NSSC 123:

> "The … judge ought not depart from Tariff … costs unless there are special circumstances requiring a sufficient level of exceptional legal services. Examples of such special circumstances include the following: 1) complexity; 2) public interest; 3) pre-chambers process; 4) unsettled questions of law; 5) conduct or misconduct of a party and/or solicitor; 6) failing to use an alternative and less costly process to determine the dispute; 7) the need for additional counsel; 8) the presence of multiple counsel, unless the additional counsel have limited

> participation; and, 9) the presence of expert witnesses. The 'level of exceptional services required' as a result of one or more of these, or other applicable circumstances, provides the grounds for whether the … judge should exercise his or her discretion to depart from Tariff [costs], and to what degree."

[24] In my view, it has not been shown that there was anything about the pre-hearing process which was special or out of the ordinary in any way. The test for implied grants of easement has been well established for over 100 years. Legal dispute only arose over details of the application of some elements of the test. None of the other factors are of relevance in the case at hand. In my view, there are no special circumstances in the case at hand which required "a sufficient level of exceptional legal services" to warrant the award of a lump sum over and above tariff costs to provide substantial contribution. It may be that the tariff has not kept pace with what has now become a substantial contribution towards reasonable legal expenses, due to the increase in those expenses over time. However, that in itself, in my view, does not create sufficient special circumstances to award such a lump sum. Otherwise, the general rule of following the Tariff would become the exception. The Tariff would only be applied in the most simple and straightforward of matters where little legal expense was required.

[25] I also do not find that any of the factors in ***Rule* 77.07(2)**, nor any other relevant factors, obtained in the case at hand so as to warrant either an increase or a decrease in tariff costs.

[26] The costs order that I am satisfied will do justice between the parties is the Tariff "A" costs, using the basic scale, following a two day trial, which total $8,000.00.

[27] I have reviewed the list of disbursements submitted by the Respondent, along with the evidence in support of them. I agree that they are reasonable disbursements with the exception of the unit price for internal photocopies. Instead of $ .20 per photocopy, I am of the view that $ .10 per photocopy is reasonable. Therefore, I will reduce the internal photocopying expense by $140.53, leaving total disbursements, inclusive of HST, of $1,656.36. That is the amount which I award.

[28] I ask counsel for the Respondent to prepare the order.

Muise, J.