

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Winlow v. ACF Equity Atlantic Inc., 2004 NSSC 22

Date: 20040128

Docket: S.H. 198294

Registry: Halifax

Between:

Robert J. Winlow

Applicant

v.

ACF Equity Atlantic Inc., a body corporate,
Jose Spiwak, Alan Vaughan, Dennis Tumminello

Respondents

Before: The Honourable Justice Glen G. McDougall

Heard: July 31, 2003

**Last Written
Submissions:** January 16, 2004

Counsel: John A. Keith, Esq. and Jonathan T. Kenyon, Esq., on behalf of
the applicant

George W. MacDonald, Q.C., and Jane E. O'Neill, on behalf of
the respondents

DECISION ON COSTS

McDougall, J.:

[1] This matter was heard by me in Special Chambers commencing at 11:00 o'clock in the forenoon on July 31, 2003. The matter consumed approximately three

hours of court time. Counsel relied solely on affidavits, written submissions and oral argument to present their respective client's position. There was no cross examination of the affiants.

[2] A written decision was released on September 11, 2003 leaving it to counsel to agree on costs failing which I would be willing to hear from them.

[3] Unfortunately, counsel could not agree and as a result they have each filed written submissions. Counsel for the applicant, Robert J. Winlow ("Winlow") has also filed a response to the written submission of counsel for the respondent, ACF Equity Atlantic Inc. (ACF Equity). The other three individual respondents, although named in the application, did not participate in the hearing. They had all tendered the funds required to complete their purchase obligations under the Agreement of Purchase and Sale prior to the hearing. Although they were all late in tendering their purchase funds they did eventually ante-up prior to the hearing. It was only ACF Equity that refused to tender the requisite funds to complete the purchase of Winlows shares of Micro Optics Design Corporation. By refusing to complete the agreement ACF Equity forced Winlow to make the application for specific performance.

WINLOW'S POSITION:

[4] Counsel for Winlow is seeking costs based on Scale 1 of Tariff "A". In total he seeks a contribution towards fees of \$4,994.95 and additional disbursements of \$2,525.36 for total costs of \$7,520.31.

[5] He urges the Court to award costs according to the Tariff because of the length and complexity of the hearing and the fact that it brought finality to the matter.

ACF EQUITY'S POSITION:

[6] Counsel for ACF Equity on the other hand urges the Court to fix costs as it would in an ordinary Chamber's matter of a moderate duration and of no particular complexity. He recommends a contribution of \$750.00 towards the applicants fees and disbursements of \$323.52 for a total of \$1,073.52.

DECISION:

[7] One of the major items of disbursement was Sheriff's fees and commission totalling \$2,075.00 for an attachment order for funds held in ACF Equity's solicitors' (at the time) trust account representing the funds paid by two of the individual respondents to cover the purchase price for the shares they agreed to purchase from Winlow. ACF Equity's then solicitors arbitrarily set a deadline for closing which if Winlow could not meet then these funds were going to be returned to the two respondents. It is suggested by ACF Equity's current counsel that a cheaper alternative could have been pursued by "Winlow's" solicitors to have these funds preserved. Based on the evidence presented to me I cannot find fault with the course of action taken by Winlow's solicitors. I therefore accept this as a reasonable disbursement necessitated by the intended actions of ACF Equity's then solicitors. As to the other disbursements I order that the claim for disbursement for photocopies be reduced by 50% as opposed to the 30% reduction suggested by Winlow's counsel. Similarly, I reduce postage by 50%.

[8] With respect to a contribution towards the applicant's legal fees, I am not prepared to follow the suggestion of Winlow's solicitors to follow Tariff "A". As

Justice Walter Goodfellow of this court wrote in the case of *Bank of Montreal v. Scotia Capital Inc./Scotia Capitaux Inc. et al* (2002), 211 N.S.R. (2d) 107 (N.S.S.C.) at p. 110, para 7:

Tariff "A" is primarily for guidance after a trial; however, in exceptional circumstances, it is appropriate to utilize Tariff "A" in a Chambers proceeding. See *HiFi Novelty Co. et al v. Nova Scotia (Attorney General)* (1993), 121 N.S.R. (2d) 63 and *Keating et al v. Bragg et al* (1997), 160 N.S.R. (2d) 363 (N.S.C.A.). While the summary judgment in this application brings about finality, nevertheless, these applications did not reach the magnitude where one would associate it with the preparation and involvement required for a trial and accordingly, I conclude that Tariff "A" is not appropriate in the circumstances of these applications.

Although the application brought finality to the situation that, in and of itself, is not the sole determinant in awarding costs based on the Tariff.

[9] I, therefore, exercise my discretion in awarding costs based on it being a Special Chambers application that took approximately one-half day to complete. The issues in dispute, although involving a significant amount of money, were not overly complex. There was no cross-examination of witnesses. The time to prepare would not be as extensive as would be expended preparing for a trial. This is not to suggest that a considerable amount of time and energy was not devoted to preparation as I am sure counsel on both sides would attest.

[10] I am prepared to set costs in the upper range of the spectrum for Special Chambers matters. Consequently, I order costs paid by ACF Equity only (not joint and several with the other 3 named respondents who had all paid their purchase funds, albeit somewhat late, but in time to avoid litigation) to Winlow in the amount of \$1,750.00 with disbursements taxed and allowed as follows:

(1)	Prothonotary's fee:.....	\$165.00
(2)	Sheriff's fees:.....	75.00
(3)	Sheriff's Commission:.....	2,000.00
(4)	Photocopies (50% of \$317.04).....	158.52
(5)	Postage (50% of \$63.43).....	<u>31.72</u>
	TOTAL:.....	\$2,430.24

[11] The total amount to be paid for fees and disbursements is \$4,180.24 to be paid within 30 days of the date of this decision.

J.