IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as: *Cape Breton Development Corporation v. D. Roper Services Limited*, 2002 NSSC 39)

Between:

CAPE BRETON DEVELOPMENT CORPORATION

Plaintiff/Defendant by Counterclaim

v.

D. ROPER SERVICES LIMITED

Defendant/Plaintiff by Counterclaim

DECISION ON COSTS

HEARD: Before the Honourable Justice A. David MacAdam, at Sydney, Baddeck and Halifax, Nova Scotia

DATES: Trial dates: May 2, 3, 7, 8, 9, 22, 23, 24, 28, 29, 30, 31, June 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 27, 28, 2001; Oral Argument: October 3 & 5, 2001; Final Written Submissions: October 25, 2001; **Written Submissions on Costs: January 15, January 31, 2002**

WRITTEN RELEASE OF DECISION: March 5, 2002

COUNSEL: George W. MacDonald, Q. C. & Aidan J. Meade, counsel for the plaintiff/defendant by counterclaim
Gary J. Corsano & Nicole E. LeBlanc, counsel for the defendant/plaintiff by counterclaim

Date: 20020305
Docket: SN No. 04087

MacADAM, J.:

[1] Following a trial involving 25 days, or more, of evidence, lengthy written submissions followed by two days of oral argument and further written submissions, the plaintiff, Cape Breton Development Corporation, (herein "Devco"), was awarded damages in the amount of $270,307.0, and the defendant, D. Roper Services Limited (herein "Roper"), was awarded damages on its counter-claim in the amount of $10,000.00. The parties have applied for costs, having regard to the claims made by each party and the decision of the court.

[2] In respect to the plaintiff's claim, Devco acknowledges it was originally in the amount of $772,946.00, but was amended at the outset of the trial to a claim of $313,946.00. On the other hand, it says, Roper, pursuant to one of the expert reports it had filed, claimed the sum of $7,310,000.00 under its counter-claim, although under a subsequent report claimed the sum of $3,757,000.00. In effect, a review of the expert's reports filed by Roper shows varying amounts being claimed, depending on which scenario advanced by the expert was accepted by the court.

[3] Devco says, having been substantially successful in both maintaining its own action and in defending Roper's claim, it is entitled to costs in both actions. Counsel observes that based on a claim of $3,757,000.00, the award of $10,000.00 represents .266% of the claim and therefore Roper can only be regarded as being a nominally successful and Devco should be entitled to costs in defending.

[4] The discretionary power of the court in respect to costs is contained in ***Civil Procedure Rule 63.02***, which provides:

> 63.02(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
>
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]
>
> (c) direct whether or not any costs are to be set off.

[5] ***Civil Procedure Rule 63.04(2)*** stipulates a number of factors the court may consider in fixing costs, including the amount claimed, the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding and the manner in which the proceeding was conducted.

[6] Recognizing that traditionally and pursuant to ***Civil Procedure Rule 63.03(1)***, costs follow the event, it is clear a party may "lose" not only by having an adverse decision on liability or responsibility, but also in obtaining an award substantially less than the amount claimed. Thus, in ***Nathu v. Imbrook Properties Ltd.***, (1992) 4 Alta. L.R. (93d) 149 (C.A.), the Court of Appeal considered costs where the defendant had challenged and

successfully reduced the plaintiff's damage award for economic loss. The court, at p. 151, stated:

> While costs routinely follow the event, all costs are not dictated by the bottom line of recovery. Sensibly the expense of litigating unsuccessful issues may not be recoverable, or may even be awarded to the successful opponent, notwithstanding that the plaintiff succeeds on other issues. It must and does lie within the Court's discretion.

Within the case law, the award of selective costs was recognized as long ago as 1893 see **Forrester v. Farquhar** [1893] 1 Q.B. 564. It was recently affirmed in **Herman v. Miller**, [1988] 2 W.W.R. 72, where Gerein J. ruled:

> In short, the plaintiff put forth a serious and very substantial claim which is notoriously difficult to prove. The defendants of necessity had to resist and they did so successfully. It would be grossly unfair were the successful defendants still required to indemnify a party who had been unsuccessful in pursuing a claim and had expended large sums of money in such a pursuit.
>
> As I see it, the plaintiff obtained a part of what he sought and having been successful in the broad sense he is entitled to taxable costs as I ordered in my judgment. However, in this instance he should not be permitted to include in those taxable costs any tariff items or disbursements which relate to the witness tendered on behalf of the losing cause.

A similar result calls for similar relief here. The plaintiff - respondent, Mrs. Nathu will recover the costs of the trial to be taxed under Column 6 of Schedule "C" with no restrictive rule to apply. That was the trial direction. But having failed in the outcome, on damages, the plaintiff will not be allowed to tax as tariff items fees or disbursements pertaining to her witnesses on the calculation of damage issue.

THE PLAINTIFF'S CLAIM

[7] Both counsel agree the plaintiff's claim should be taxed under Tariff A, using as the amount involved the sum of $270,307.05 being the sum recovered by Devco. Counsel also agree the appropriate scale to be applied is Scale 5. In this regard, Devco references the decision of Justice Stewart in ***Hines v. Englund*** (1993), 124 N.S.R. (2d) 156, where, following an 11 day long trial and evidence from several experts, and in determining the appropriate scale was Scale 4, Justice Stewart, at p. 162, stated:

> I agree with the plaintiff that costs should be allowed on something more than the

basic scale suggested by the defendant, given the length of the trial, the number of expert witnesses, the preparation required both at discovery and at trial, the numerous medical reports and documentation, and the detailed medical questions and actuarial evidence.

[8] Also, even where successful, parties have been denied costs when it was determined to be appropriate. In ***Cranwill (Next Friend of) v. James***, [1995] A.J. No. 789, Lomas, J., denied costs to a successful defendant. Although finding the defendant was negligent, and the negligence was a material factor resulting in the commencement of the litigation, judgment was awarded in favour of the defendant on the courts finding of a lack of causation. Justice Lomas stated he was exercising his discretion, in the circumstances, and depriving the successful defendant of his costs.

[9] Counsel says the length of the trial, the complexity of the issues, the extensive exhibit books and expert evidence, all of which were complicated by the length of time between the date of the events in question and the trial, combined to make Scale 5 appropriate. Roper simply adds that costs should be calculated on the basis of Scale 5 of Tariff A.

[10] Notwithstanding the concurrence and apparent agreement of counsel on this issue, I am not satisfied this case involved the degree of complexity that would warrant the application of Scale 5 and, therefore, only allow costs at Scale 4. Why this matter took some 15 years to proceed to trial is unclear and certainly there was nothing in the evidence to justify this long delay. Although there was extensive evidence, involving more than twice the number of days that apparently were required in ***Hines v. Englund,*** *supra*, the factual issues were not particularly complex, other than the degree to which the witnesses, because of the long delay in bringing this matter to trial, had to rely on documents to refresh their memories and recollections of the events. There were a number of legal issues, but again, none so complicated or unique to warrant the application of Scale 5.

[11] Roper, notwithstanding Devco was successful in obtaining a substantial award of damages, says it is entitled to costs because Devco, at the outset and during the course of the trial, discontinued or dropped significant portions of its claim. Counsel calculates that in excess of 50% of the amount claimed by Devco was dropped or discontinued by the plaintiff and in this regard refers to ***Civil Procedure Rules 40.02*** and ***63.03(3)***, where provision is made for costs against a party discontinuing a proceeding or withdrawing a cause of action. Counsel also references ***Civil Procedure Rule 63.04(2)***, where, as noted earlier, provision is made for the court to consider, in fixing costs, the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding, as well as to consider the manner in which the proceeding was conducted. Counsel suggests, given the discontinuance of these claims, Roper should be compensated for the preparation, and in some cases dealing with the claims until withdrawn during trial, by awarding costs on an amount involved of $462,090.64, being the total of the claims withdrawn. Counsel also suggests Devco failed to introduce any evidence to support its claim of misrepresentation against Roper and therefore this is a further factor to be taken into consideration in reducing any costs awarded to Devco.

[12] Counsel says Devco failed to meet its obligations in respect to disclosure of documentation, having in mind a number of documents introduced during evidence

which had not previously been disclosed to Roper. Counsel suggests had these documents been properly disclosed there would have been an opportunity to review them in preparation for trial and this may very well have affected the duration of the proceedings. Counsel again suggests this is a further factor to be taken into account in reducing the amount of costs awarded to Devco.

[13] Although the late withdrawal of claims, as well as the late production of documents are matters to be taken into account in view of the general discretion provided under ***Civil Procedure Rule 63***, including ***63.04***, I am not persuaded the appropriate course is simply to award Roper costs based on the amount of the claims withdrawn, nor to disentitle Devco to costs, if indeed that is an alternative position advanced by Roper, on the basis of late production and disclosure. They are, however, circumstances and factors which I am prepared to take into account in determining an adjustment against the costs otherwise payable to Devco as the successful party on its claim. Having regard to ***Civil Procedure Rule 63.04(2)***, it would appear appropriate that an adjustment be made to reflect the issues and concerns raised by Roper in respect to Devco's conduct in handling this matter preceding and up to and including the commencement and conduct of the trial itself.

[14] Devco is therefore awarded, on its claim, costs calculated on an amount involved of $273,3007.05, on the basis of Scale 4 of Tariff A, less 20%. The reduction of 20% applies only to the fees and not to the proper disbursements incurred in the presentation of the case, although, of course, disbursements relating to any withdrawn claims are not awarded.

THE DEFENDANT'S COUNTERCLAIM

[15] Roper claimed against Devco for breach of contract alleging damages, as noted earlier, ranging from in excess of $3,000,000.00 to in excess of $7,000,000.00. The decision and reasons of the court found there was a breach of contract by Devco. However, damages were only awarded in the amount of $10,000.00. Roper was substantially unsuccessful in its claim for damages on the findings that had Devco not breached its contract it was unlikely Roper would have been able, having regard to its lack of performance to the date of its termination, to have carried out its obligations under the contract. Additionally, on the evidence, it was clear that even had Devco performed in accordance with its obligations under the contract, Roper would have lost money and therefore the termination by Devco had not caused any financial loss to Roper. Roper was losing money under the contract and on the evidence, even had Devco provided the quantities of material to which it had obligated itself under the contract, Roper would have continued to lose money and therefore there was no financial loss arising as a result of the termination by Devco.

[16] In noting ***Civil Procedure Rule 63.03(1)*** provides that unless the court otherwise orders, costs of a proceeding or of any issue of fact or law therein shall follow the event, Devco references the decision of the Court of Appeal in ***Griffin v. Corcoran*** (2001), 193 N.S.R. (2d) 279, where Cromwell, J.A., for the court, at para. 82, stated:

> The general rule that costs follow the event also applies to counterclaims. However, for costs purposes, the counterclaim should be treated as a separate proceeding and, generally, the costs of the counterclaim should relate only to the amount by which the costs of the proceedings are increased as a result of the counterclaim.

[17] Counsel says that having regard to the amount claimed by Roper, when compared to the amount awarded, the success, if any, was token and should merit an award of damages to Devco in resisting Roper's claim. Counsel observes that in ***Griffin v. Corcoran,*** *supra,* the claim had only involved a small portion of the trial and as the costs associated with bringing the counter-claim were negligible, no award was made, while on the other hand, in the present instance, a considerable amount of the evidence and time was expended by Devco in resisting the claim presented by Roper.

[18] Counsel for Devco suggests the amount claimed should be the amount involved for purposes of applying costs, citing the decision of Associate Chief Justice Palmeter, in ***McManus v. Nova Scotia (Attorney General)*** (1995), 147 N.S.R. (2d) 318, where he awarded costs based on $100,000.00 "amount involved" even though, if successful, the plaintiff who had claimed damages in the range of $100,000.00 would have only received an award of $25,000.00. In this regard, counsel references the decision of then Justice Saunders of the Nova Scotia Supreme Court in ***Fillier v. Merlin Estate*** (1999), 181 N.S.R. (2d) 115, in noting risk and consequences to the parties were factors to be considered in determining the appropriate "amount involved".

[19] On the other hand, counsel for Roper, in his submission, states Roper's claim involved two issues, namely, the issue of liability based on an alleged breach of contract and secondly, the claim for loss of profits. Counsel notes Roper was successful on the first issue by virtue of the finding Devco had fundamentally breached its contract by failing to provide tonnages "approximating" the estimates contained in the contractual documents. Counsel's brief continues:

> Given that Roper was wholly successful in establishing a breach of contract on the part of Devco with respect to tonnages, and given that Devco was able to establish no loss of profit, it is respectfully submitted that success with respect to this claim for breach of contract was equally divided between the parties, and that each party should therefore bear their own costs with respect to this issue.

[20] Counsel adds, in addition, that Roper, having been successful in obtaining an award of $10,000.00 is entitled to costs on the basis of Tariff A, Scale 5 with respect to this amount.

FINDINGS

[21] As earlier noted, I am satisfied Devco is entitled to costs based on Scale 4, on an amount involved of $270,307.05, less 20%. The reduction, as noted, relates to various issues raised by counsel for Roper in respect to the late withdrawal or reduction in claims, as well as the issues of disclosure and abandonment of issues by Devco at the outset and throughout the trial proceeding.

[22] Devco's claim for costs, in defending the claim by Roper, is not allowed. In denying

Devco costs in defending the claim advanced by Roper, I have considered the fact Roper was successful in establishing a breach of contract on the part of Devco and the further circumstance that there was an award of damages, albeit, nominal, made in favor of Roper.

[23] In respect to Roper's claim for costs based on the amount awarded on the counterclaim, this is not allowed, since having regard to the extent of the claim advanced, it represented only a nominal amount of the claim. As such, having regard to the discretion of the court, no costs are awarded to Roper.

[24] In his written submission, counsel for Roper suggests the amount of $3,757,000.00 is, in fact, in excess of the amount claimed in that it includes $1,200,000.00 which effectively related to a claim in lieu of interest. This does not materially affect my reasons, nor conclusion, that this would not be an appropriate circumstance for the awarding of costs to Roper, notwithstanding he was successful in establishing damages in the amount of $10,000.00.

PRE-JUDGMENT INTEREST

[25] Devco claims pre-judgement interest pursuant to ***Section 41*** of the ***Judicature Act*** and indicates it is prepared to accept the rate of interest suggested in the Roper expert's report, being 8% calculated on a simple basis. Counsel suggests that interest should be awarded from the date of the breach of contract, March 13, 1986, to the date of judgement on the basis it cannot be said that Devco was responsible for "undue delay" in bringing its claim. Counsel notes the Originating Notice (Action) was filed on September 10, 1986, but yet maintains there is no basis for the court to determine that Devco has been responsible for undue delay in bringing this matter to trial.

[26] Counsel for Roper suggests fairness requires both parties to be treated the same in the sense, pursuant to the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c.C-50, Roper would not have been entitled to claim interest preceding February 1, 1992. Similarly Devco should not be entitled to interest preceding that date.

[27] Again, notwithstanding the apparent concession by counsel for Roper that Devco is entitled to interest from February 1, 1992, I am not satisfied, absent explanations from the parties, and in particular the successful party, as to the reason for the extraordinary time period from the date of these events to the date of the trial, that pre-judgement interest should be awarded for anything more than five years. Devco is therefore entitled to interest from March 13, 1986, to and including, March 12, 1991, at the simple rate of 8%.

J.