

**IN THE SUPREME COURT OF NOVA SCOTIA**  
Citation: Atlantic Business Interiors Ltd. v. Hipson, 2004 NSSC 166

Date: 20040826  
Docket: S.H. No. 153027  
Registry: Halifax

Between:

**Atlantic Business Interiors Limited**

Plaintiff

-and-

**Scott Hipson and MMP Office Interiors Incorporated**

Defendants

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**Supplemental Decision on Costs**

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**Judge:** The Honourable Justice Robert W. Wright

**Last Written**

**Submission Filed:** May 31, 2004

**Written Decision:** August 26, 2004

**Counsel:** Counsel for the Plaintiff - Peter Bryson, Q.C. and Cheryl Hodder  
Counsel for the Defendants - Jonathan Stobie, Q.C. and Lisa Gallivan

By the Court:

**Introduction**

[1] This is a ruling on costs following the release of my decision in this proceeding on March 11, 2004 (reported at 2004 NSSC 032). In the overall result, the main action by Atlantic Business Interiors Limited (“ABI”) against the defendants Scott Hipson and MMP Office Interiors Inc. (“Office Interiors”) was dismissed with costs to those defendants and Mr. Hipson’s counter-claim was likewise dismissed with costs to ABI.

[2] At the close of my decision, I left it to counsel to deal with the costs ramifications as between themselves in the first instance with further recourse to the court by written submissions if they were unable to reach agreement. No agreement has been reached and it is now left to the court to decide the appropriate amount of costs recoverable by the defendants in the main action and the costs recoverable by the plaintiff ABI on the counter-claim. Taxable disbursements are also in issue.

**Costs payable by ABI in the main action**

[3] It is well established that in fixing costs following a trial, the court must first determine the “amount involved” and then select the appropriate scale of costs as set out in Tariff A pursuant to Civil Procedure Rule 63. In the introduction to the tariffs under that rule, it is provided that the “amount involved” shall be, where the main issue is a monetary claim which is dismissed, an amount determined having regard to:

- (i) the amount of damages provisionally assessed by the court, if any,
- (ii) the amount claimed, if any,
- (iii) the complexity of the proceeding, and
- (iv) the importance of the issues.

[4] When going on to select the appropriate scale of costs, the court is then to consider, pursuant to Civil Procedure Rule 63.04(2), various factors including (of relevance here either in the main action or in the counter-claim);

- a) the amount claimed;
- c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- d) the manner in which the proceeding was conducted;
- g) the neglect or refusal of any party to make an admission which should have been made;
- j) any other matter relevant to the question of costs.

[5] Counsel for the defendants submit that the “amount involved” should be set at \$450,000 taking into account that the amount of damages initially pleaded by ABI was approximately \$500,000 which was later quantified by expert evidence at \$432,033 (representing the financial gain to be extracted from the defendants), or alternatively \$298,420 (representing the net gross profit loss to ABI). Coupled with that is the submission that the case was sufficiently complex to warrant Scale 4.

[6] Counsel for the defendants further submit that the costs figure of \$22,850 thus produced under Tariff A should be increased by 50% because of the Offer to Settle it made on May 7, 2003 for a dismissal of ABI's claim on a without costs basis. That offer was clearly more favourable than the outcome at trial, which resulted in a dismissal of ABI's claim with costs in favour of the defendants. Counsel rely on the decisions of Justice Goodfellow in *Wheel Ranch Limited v. Sun Alliance Insurance Company* (1995) 142 N.S.R. (2d) 154 and *MacWilliams Engineering Ltd. v. D.M.L.P. Holdings* (1995) 139 N.S.R. (2d) 84 in support of that submission. No claim is otherwise advanced for increased costs by way of an additional lump sum.

[7] Counsel for ABI, on the other hand, submit that the "amount involved" should be set at \$280,691 being the amount of damages provisionally assessed. Coupled with that is the submission that either Scale 2 or 3 ought to be applied with no additional costs imposed by reason of the Offer to Settle aforesaid.

[8] As observed by Justice Freeman in *Williamson v. Williams* [1998] N.S.J. No. 498, when there is a monetary award of damages, the practice appears to favour adopting the amount awarded as the "amount involved". However, it is not uncommon for the court to depart from this general practice where the other enumerated factors to be considered in fixing the "amount involved" significantly come into play. In this case, it is appropriate to also consider, in my view, the amount claimed, the complexity of the proceeding, and the importance of the issues to the parties.

[9] Firstly, there was nothing arbitrary or artificial about the damages figure of \$432,033 advanced by ABI as their lead argument. This was the amount ultimately calculated by ABI's expert (which calculation *per se* was not disputed) on the footing that the defendants ought to be required to disgorge the financial benefit which they attained by acquiring ITI's business. Although damages were provisionally assessed on a different footing, namely, the calculation of the net gross profit loss to ABI, the higher figure was an amount in respect of which the defendants were certainly at risk.

[10] Secondly, while the proceeding was not overly complex, it consumed 8 days of trial (most of which was taken up by the main action by ABI) and was preceded by 13 days of discovery examinations and fairly extensive document production and legal research. There were several issues which the court was required to decide in writing a 46 page judgement. This added degree of complexity, combined with the obvious importance of the issues between the parties as keen competitors in the office furnishings industry, warrants a departure from simply treating the amount awarded as the amount involved. All things considered, the "amount involved" should be fixed at \$400,000.

[11] Counsel for both parties are to be commended for the efficient manner in which they presented their respective cases at trial. Nonetheless, in view of the amount at stake and in a modest effort to improve the restitution level of costs recoverable by the defendants, given their significantly higher solicitor and client costs, I conclude that Scale 4 ought to be applied, producing a costs figure under Tariff A of \$20,850.

[12] The question remains whether or not those costs should be increased by 50% by reason of the May 7, 2003 Offer to Settle above recited. There were actually two formal Offers to Settle sent to ABI's counsel on that date. The first was an offer to settle the claim of ABI on the basis of a Consent of Order for dismissal without costs. The second was made on behalf of the defendant Hipson alone, offering to settle his counter-claim for \$58,000 plus interest.

[13] At a subsequent settlement conference before another judge, counsel for the defendants improved their offer by proposing an overall settlement on the basis of an order for dismissal without costs in respect of both the main action and the counter-claim. However, a few days later on December 3, 2003, counsel for the defendants wrote to ABI's counsel advising that the settlement offer communicated at the settlement conference was no longer open for acceptance. On the heels of that, a further Offer to Settle the counter-claim was made for the sum of \$48,717.

[14] Counsel for the defendants submit that the court ought to nonetheless treat the first Offer to Settle made on May 7, 2003 (i.e., a dismissal of ABI's action on a without costs basis) as continuing up to and throughout the trial for purposes of fixing costs. Counsel for ABI understood otherwise, however, in light of the retraction of the offer on December 3, 2003 and considered that offer to be no longer alive.

[15] Based on the correspondence between counsel at the time, I am unable to infer that the May 7, 2003 Offer to Settle formally remained open for acceptance beyond December 3, 2003 and I therefore decline to increase the costs by 50% on the footing of the legal authorities above recited. The total costs recoverable by the defendants in the main action, therefore, apart from disbursements stands at \$20,850.

**Costs recoverable by ABI on the counter-claim**

[16] Prior to trial, counsel agreed that the amount of Mr. Hipson's counter-claim should be valued at \$48,717, representing the shortfall between what he would have earned under his old compensation plan compared to what he actually earned under the new compensation plan. There were, however, two other dimensions to the counter-claim.

[17] As pleaded, the counter-claim originally included a claim for unpaid commissions of \$5,844.65 and a confiscated final salary deposit of \$1,349.52. These claims remained contested until December of 2003 when they were paid with interest. Nonetheless, Mr. Hipson continued to press a claim for punitive damages for ABI's impropriety in withholding payment of those amounts from him for as long as it did.

[18] Because of the claim for punitive damages, which was successfully defended, counsel for ABI submits that the "amount involved" should be set at \$75,000 (comprised of the agreed amount of \$48,717 aforesaid plus an estimated \$25,000 for punitive damages). At the suggested Scale 3, it is submitted that ABI

should recover its costs of the counter-claim in the amount of \$6,125.

[19] Counsel for the defendants argue, on the other hand, that the “amount involved” should be fixed at \$48,717 with no recognition of any amount claimed for punitive damages. Indeed, it is further submitted that because the unpaid commissions and withheld salary deposit were recovered shortly before trial, some recognition ought to be given to the defendant Hipson’s partial measure of success on his counter-claim. Moreover, it is argued that ABI should be penalized in costs for its refusal to admit these claims earlier and in groundlessly asserting errors on the part of Mr. Hipson in justifying its position.

[20] As noted by Justice Cromwell in *Griffin v. Corcoran* (2001) 193 N.S.R. (2d) 279 (at para. 82), a counter-claim should be treated for costs purposes as a separate proceeding and generally, the costs of the counter-claim should relate only to the amount by which the costs of the proceedings are increased as a result of the counter-claim. In the present case, since the issues raised on the counter-claim were separate from those in the main claim, requiring different evidence to be lead, costs of the counter-claim were awarded to ABI accordingly.

[21] In my view, the “amount involved” on the counter-claim should be set at \$48,717 without regard to the punitive damages claim. Although that claim was successfully defended by ABI, at the same time the court was highly critical of its conduct both for manipulating the withdrawal of Mr. Hipson’s final pay deposit from his personal bank account and for the long delay in rectifying that mistake. That finding should sound in costs by restricting the “amount involved” on the



counter-claim to the amount of \$48,717.

[22] Both counsel otherwise suggest, and I accept, that Scale 3 should apply which produces a recovery of costs to ABI under Tariff A in the amount of \$4,875.

### **Disbursements**

[23] Counsel for the defendants have informed the court that their clients' disbursements amounted to \$10,485.33 plus HST. Where it is impossible to make a precise allocation of disbursements between the main action and the counter-claim, it is submitted that the defendants should be allowed a rough estimate of \$8,000 pertinent to the main action.

[24] Counsel for ABI, on the other hand, suggests using a "rule of thumb" approach whereby disbursements should be awarded between the parties proportionately to the amounts involved in the main action and the counter-claim. ABI's total disbursements have been recorded at \$11,317.27.

[25] I decline to adopt the suggested "rule of thumb" approach because the comparable taxable disbursements of the opposing parties are not necessarily reflective of the proportional amounts of their respective claims. I therefore prefer to make rough estimates of recoverable disbursements considering the overall nature of the respective claims which I fix at \$8,000 recoverable by the defendants and \$1,500 recoverable by ABI.

**Conclusion**

[26] In the overall result, the defendants are entitled to recover costs and disbursements from ABI in the main action in the amount of \$28,850. Conversely, ABI is entitled to recover costs and disbursements of \$6,375 on the counter-claim, leaving a net balance of costs owing by ABI to the defendants in the amount of \$22,475.

J.