IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Bank of Montreal v. Scotia Capital Inc., 2002 NSSC 274

Date: 20021219
Docket: SH 171558
Registry: Halifax

Between:

Bank of Montreal

Plaintiff

- and -

Scotia Capital Inc./Scotia Capitaux Inc.

Defendant
Third Party Plaintiff
Third Party Counterclaim Defendant

- and -

Cathy Lewis

Third Party Defendant
Third Party Counterclaim Plaintiff

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: October the 28th, 2002 in Chambers, Halifax, Nova Scotia (Supplementary Decision on Costs)

Counsel: Alexander S. Beveridge, Q.C., for the Bank of Montreal
Alan V. Parish, Q.C., and Brian K. Awad, for Scotia Capital Inc.
David A. Copp, for Cathy Lewis

By the Court:

BACKGROUND

[1] Cathy Lewis signed guarantees and hypothecations at the request of her husband to support Bank of Montreal loans to his company. She was required to pledge her holdings with Scotia and Scotia gave letters of undertaking to ensure her holdings continued at a level required by the pledges. Bank of Montreal found to be entitled to summary judgment against Scotia and Scotia entitled to summary judgment against Cathy Lewis. The issue of costs was reserved and all parties have now filed written memoranda outlining their respective positions on costs.

[2] Both the Bank of Montreal and Scotia recite the lengthy pleadings filed followed by the filing and exchange of lists of documents. On the applications for summary judgment, several fairly lengthy affidavits were filed and a special time Chambers commencing at 11:00 a.m. lasted through the day, October the 28th, during which Ms. Lewis was cross-examined on her affidavit.

CIVIL PROCEDURE RULES

[3] *Civil Procedure Rule* 63.02 provides that costs are in the discretion of the court and there are several additional *Rules* and, in particular, *CPR* 63.03 through 63.15 plus various tariffs that provide further guidance in the judicial exercise of the court's discretion.

COSTS - BANK OF MONTREAL V. SCOTIA
COSTS - SCOTIA V. LEWIS

[4] The Bank of Montreal, noting that the application brings finality, seeks costs set by Tariff "A", scale 3, on the basis of the amount involved, $60,000.00, which would amount to costs of $5,375.00 and, further, that the costs should not be less, in any event, than $2,550.00 pursuant to Tariff "C". The Bank of Montreal seeks reimbursement of disbursements of $585.67 of which $410.67 was photocopying and the balance comprised of a law stamp and filing fees of $175.00. A detail list of their disbursements was provided to the court. Bank of Montreal deducted from its disbursements $20.00 expended on delivery of documents, etc.

[5] Scotia takes the view that it should receive costs on the Lewis counterclaim in accordance with Tariff "C" with the amount involved fixed at approximately the reduction in the value of Ms. Lewis' account; i.e., $20,000.00 for costs in the amount of $1,850.00. With respect to its claim against Lewis, Scotia seeks a Tariff "A" determination at scale 1 with the amount involved, $60,000.00, producing an award of costs of $3,225.00 or in the alternative, Tariff "C", costs in the amount of $2,550.00. Scotia also takes the position that the appropriate level of costs for the Bank of Montreal is in the range of $2,550.00 to $3,225.00. Scotia goes further and submits that Lewis should pay the Bank of Montreal costs and disbursements and not Scotia and that Lewis should pay costs and disbursements to Scotia. Scotia seeks recovery of disbursements and files its "disbursement activity report" showing total disbursements of $1,982.87, less long distance phone charges of $116.24 for taxation and award of disbursements in the amount of $1,866.63.

[6] Counsel for Ms. Lewis advances a number of positions. First, that the financial position and limited resources of Ms. Lewis should be a consideration and, with respect, the impecuniosity or otherwise of a party should only be considered if there were an application under *CPR* 517. See *Gilfoy et al v. Kelloway et al* (2000), 184 N.S.R. (2d) 226 and *Edward Phillips v. Robert A. Jeffries et al*, 2002 NSSC 114. Ms. Lewis' counsel notes the sole process step taken prior to the interlocutory application for summary judgment was the filing of the list of documents and no discoveries or other proceedings took place.

[7] I agree with counsel for Ms. Lewis that Ms. Lewis' counterclaim is not a factor to consider with respect to costs. I did not expressly reference the counterclaim in the decision as obviously it follows that it is rendered null and void by the granting of summary judgment. Certainly, that was my intent. Counsel for Ms. Lewis takes the position that Tariff "A" is for after trial. 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 Novelity 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.

[8] Counsel for Ms. Lewis suggests that Tariff "B", the default judgment tariff which would result in costs of $450.00, is a more appropriate guideline than Tariff "C" which is the guideline for the discontinuance or abandonment of an action.

[9] Clearly, Tariff "B", where these applications took a day, required cross-examination of one of the parties, briefs, etc., has no relevance. Tariff "C" is of some general guidance but it must be recognized that Tariff "C" itself covers a wide spectrum of circumstances. For example, if immediately after filing a defence, a plaintiff were to discontinue before filing any other documentation or taking any other proceedings, then it might well be that a strict application of Tariff "C" would be inappropriate. On the other hand, if you had a factual situation where the parties had proceeded to interlocutory proceedings, the filing of all documents, interlocutories, examinations for discovery, etc., and were at the stage that a trial date was to be assigned when a discontinuance was filed, Tariff "C" would quite possibly be inadequate. It should be noted that Tariff "C" provides a maximum, as it directs that the "Taxing Master may increase the fees allowed up to, but not exceeding, the following scale;".

[10] In my view, the most appropriate determination and the most fit and proper exercise of discretion is to treat these combined applications as a special time Chambers application. In *HiFi Novelty Co. et al v. Nova Scotia (Attorney General)* above, Chambers costs where the matter took less than 4 hours, were generally in the range of $250.00 to $750.00 and, where the matter was far more extensive, for example, a day and a half with cross-examination, Chambers costs were more in the range of $1,750.00. See *2703203 Manitoba Inc. v. David Parks et al*, 2002 NSSC 265.

[11] The total costs to be allowed in these applications will exceed normal Chambers costs because the applications bring finality to the actions. Similarly, all disbursements of the action are to be taxed and not just disbursements limited to the summary judgment applications.

CONCLUSION

[12] While the court was dealing with two applications for summary judgement which did add a dimension of additional effort, the discretion as to costs must take into account the totality of the effort and further, there is some merit in the view advanced by Ms. Lewis' counsel that she quite rightly was somewhat confused by

the effort of Scotia to have her sign a new and apparently much more comprehensive pledge and, in their representations to her, they suggested this was necessary without giving her any real specifics. The attempt to have her sign a new pledge was, by no means, a waiver or constituted an arguable defence, but it did add a dimension of confusion. In addition, the major focus in the applications was between Scotia and Ms. Lewis. Scotia very clearly at an early date breached its letters of undertaking in allowing Ms. Lewis' account to go below the amount of the pledge. For much of the time, it is quite probable that the amount of the pledge was not actually necessary due to the amount from time to time of the indebtedness but, nevertheless, that was the undertaking of Scotia to the Bank of Montreal which was clearly breached. In the final analysis, what is significant is the breach that results in damages now outstanding.

[13] In all the circumstances, I would tax the Bank of Montreal's portion of the Chambers application at $1,150.00. With respect to disbursements, the photocopying charges have not been justified. Clearly, there was a substantial amount of documentation, given the nature of the dealings between the parties and the application, nevertheless, the reasonableness of disbursements must be established and, further, the disbursements must be necessary for the party and party dealings and not expenditures for communications with one's client beyond reporting that which transpired on a party and party basis. As the application brings finality, the filing fees, etc., are quite appropriately included, however, I reduce the photocopying account by fifty percent to $205.33. See *Balders Estate v. Nova Scotia* (2000), 181 N.S.R. (2d) 201; *Knox v. Inter-provincial Engineering Ltd. et al* (1993), 120 N.S.R. (2d) 288; and *Hudgins v. Danka Business Systems Ltd.*, [1998] N.S.J. No. 293. I tax the Bank of Montreal's disbursements at $380.34.

[14] Turning to the costs entitlement of Scotia, the claim for summary judgment by Scotia against Ms. Lewis occupied considerably more time and required greater effort than the claim of the Bank of Montreal against Scotia. I adopt, however, the same reasoning I expressed, that neither Tariff "A" or Tariff "C" or Tariff "B" are in themselves appropriate and that what I was dealing with was a heavy day-long Chambers matter which required a little more time than usual, particularly, on the part of Scotia in responding to Ms. Lewis. I do take note that Scotia commenced charging time and disbursements as early as the 16th of March, 2001, well before the Bank of Montreal issued its originating notice June the 15th, 2001. It is a contested Chambers matter plus pleadings, etc., and a reasonable party and party

costs award, recognizing the finality of the application, would be the amount of $1,350.00.

[15] The disbursements claimed by Scotia present some considerations. I agree with Mr. Awad that the bailiff fees incurred ($540.00), when Ms. Lewis was unrepresented, are quite appropriate. With respect to documentation preparation and tracing, I am inclined to agree with Mr. Copp, counsel for Ms. Lewis, that Scotia should have had much of the documentation without the heavy copying disbursements that are contained in the statement. Certainly, the filing fees for the defence to counterclaim, etc., are quite appropriately items for party and party recovery but I have not been provided with sufficient representations that the photocopying charges were related to the party and party aspect of the legal proceedings. There are some rather large entries. For example, on the 9th of October, photocopying in the amount of $65.00; the 10th of October, 152 copies, $22.80; the 10th of October, 227 photocopies, $34.05. The total photocopying account is $391.55 and there is also an item, printer's fees, of $299.20. In addition, there is an administration fee bill of $25.00 on the opening of the file and administration is part of one's overhead which is reflected in the fees charged to their client and is not normally an appropriate item for taxation on a party and party basis. There is a claim for a quicklaw computer search fee of $68.89. Prior to electronic research, some firms engaged outside firms or libraries to conduct non-electronic research and such a disbursement was never allowed and I see no basis for allowing an electronic research. I also take the approach of Hall, J. in *Elliott v. Nicholson* (1999), 179 N.S.R. (2d) 264 that computerized legal research fees are (1) work that the lawyer would expect to do and possibly bill to a client, but not party and party; and (2) part of office overhead expense.

[16] In summary, I would deduct specifically the following:

1. Administration fee - $ 25.00
2. Printer's fee - $299.20 (no explanation)
3. Quicklaw computer search - $ 68.89
4. In line with the authorities cited, I reduce the photocopying fee from $391.55 to $195.78.
5. Telefax reduced by fifty per cent from $68.30 to $34.15.

[17] The reduction of $623.02 from disbursements claimed in the amount of $1,866.63 leaves Scotia's disbursements taxed and allowed at $1,243.61.

[18] The Bank of Montreal is entitled to costs $1,150.00 and disbursements against Scotia taxed and allowed at $380.34, a total of $1,530.34 and Scotia is entitled to costs of $1,350.00 and disbursements taxed and allowed of $1,243.61 against Lewis totalling $2,593.61.

[19] There remains the issue of whether or not Scotia should be entitled to recover the costs it pays to the Bank of Montreal from Lewis and I conclude that that is an appropriate exercise of judicial discretion and therefore, the costs when paid by Scotia to the Bank of Montreal shall be recovered by Scotia against Lewis in addition to its costs recovery against Lewis.

[20] Once Scotia satisfies its obligation to the Bank of Montreal, it has whatever entitlement to realize upon the assets of Ms. Lewis deposited with it that may exist under their contractual relationship. The extent of their contractual relationship was not before me and it may well be that Scotia, in the absence of payment, will proceed by way of execution, which would result in expenses, sheriff's commission, etc. Ms. Lewis may wish to cut her losses in this regard and give instructions to liquidate her account in reasonably short order. I simply mention the foregoing in an attempt to direct the possible saving of unnecessary costs and certainly, disposing of the matter at this stage saves the parties many thousands of dollars in further legal fees and expenses and in particular, to Ms. Lewis.

J.