

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cuvelier v. Bank of Montreal, 2002 NSSC 284

Date: 20021231
Docket: S.H. 155910C
Registry: Halifax

Between:

Hugh Cuvelier and Doreen Cuvelier

Plaintiffs

v.

Bank of Montreal

Defendant

Judge:

The Honourable Justice Donald M. Hall

Heard:

July 31, Aug 1, 2 & 3, 2000, in Halifax, Nova Scotia.
Final submission on costs received January 3, 2002.

Counsel:

William M. Leahey, for the plaintiffs
Joel E. Fichaud, Q.C., for the defendants

By the Court:

[1] Counsel have been unable to agree on costs in this proceeding where, after a four day trial, the plaintiffs were successful in recovering the base amount claimed but did not succeed in their claims for aggravated and punitive damages.

[2] Mr. Leahey, counsel for the plaintiffs, submitted that costs should be substantially increased above the usual party and party costs because, as he contended, the defendant ought to have admitted liability at the outset rather than forcing the plaintiffs to trial. Mr. Leahey proposes that the court fix costs in the amount of \$15,000.00 plus disbursements.

[3] On behalf of the defendant, Mr. Fichaud contended that the defendant was justified in contesting the plaintiff's claim as it did and that it did not unduly prolong the proceeding. He does, however, agree that costs be calculated on the amount involved under scale 5 of Tariff A.

[4] Both counsel agree that the "amount involved" is the amount of the recovery, \$29,150.00. Applying scale 5 to this amount would provide costs of \$4,725.00.

[5] In his submission, Mr. Leahey stated that his solicitor and client fees totaled \$18,705.65 plus H.S.T. of \$2,957.83 for a total of \$21,663.48. To my mind, considering that the trial extended over four days and that a good deal of preparation would have been involved, this is not an unreasonable amount for Mr. Leahey to charge to his clients. Of course, what portion the other party is obliged to pay under a party and party award is another matter.

[6] As counsel have noted, Rule 63.04 of the **Civil Procedure Rules** sets out the factors that the Court may consider in fixing costs. These include:

- (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;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (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.

[7] I do not accept Mr. Leahey's proposition that the defendant's ought to have

admitted liability at the outset. As the decision indicates, the case turned entirely on whether the plaintiff's had established that the money was in the safety deposit box at the relevant time as they alleged. The court accepted their evidence in this respect, but did not condemn the defendant for contending otherwise and defending the claim. The court found no fault on the part of the defendant in its conduct of the proceeding. Accordingly, I find that none of the factors (c) to (g) militate against the defendant.

[8] Under paragraph (j), however, the court may consider any other matter relevant to the question of costs. In my opinion, the reasonable cost to a successful party to obtain recovery of a just claim is a relevant matter. Here it appears that it will cost the plaintiffs \$21,663.48 in legal fees to recover \$29,150.00. This may appear to be a disproportionate amount of costs in view of the relatively moderate recovery. However, it was necessary for the plaintiffs to expend this amount in order for them to recover the money they had lost through no fault of their own, which in their circumstances was not an insignificant amount.

[9] I have concluded, therefore, that it is appropriate to go outside the tariffs in determining what is a reasonable amount for the defendant to contribute to the

plaintiffs' costs. In my view the plaintiff should contribute \$10,000.00 toward the plaintiffs' costs plus disbursements. Counsel have agreed on disbursements of \$1,213.16.

[10] Accordingly, I fix the plaintiffs costs at \$11,213.16, including disbursements.

Hall, J.