SUPREME COURT OF NOVA SCOTIA
Citation: *Trenholm v. H & C Trucking Ltd.*, 2014 NSSC 418

Date: 20141124
Docket: Hfx No. 253018
Registry: Halifax

Between:

Melissa Mae Louise Trenholm

plaintiff

v.

H & C Trucking Ltd. and Robert Daniel Izzard

defendant

DECISION ON COSTS

Judge: The Honourable Justice Michael J. Wood

Defendant's Written Submissions: **August 18, 2014**

Counsel: David W. Richey, for the Applicant
Murray J. Ritch, Q.C., and Christine Nault for the Respondent

By the Court:

Background

[1] The adversarial system is premised on the court hearing from both parties to a dispute prior to making a decision. This ensures that the decision maker has a clear understanding of the merits of each litigant's position. It is only in the most extreme circumstances that a court should consider rendering a decision without hearing from one of the affected parties. This is such a case.

[2] After twenty days of trial I issued a decision on March 21, 2014, awarding damages to the plaintiff in the amount of $101,000.00 (2014 NSSC 90).

[3] Paragraph 277 of the decision states:

> If the parties are unable to agree on the issue of costs, I will receive written submissions within 45 days from the date of this decision.

[4] On May 9, 2014, I received a letter from David W. Richey, counsel for the plaintiff, indicating he had discussions with Murray Ritch, counsel for the defendant, and had been unable to reach an agreement on costs. He requested an extension of one to two weeks from the forty-five day deadline referred to in the decision. On that same date I received a letter from Christine Nault, an associate of Mr. Ritch indicating they had yet to receive anything from Mr. Richey on the subject of costs. On that same date I wrote to counsel extending the period for filing submissions on costs to May 23, 2014.

[5] On May 22 I received a letter from Mr. Ritch requesting a further extension of the May 23 deadline. He indicated he had received some materials from Mr. Richey on May 16 and was seeking clarification of a number of points. On May 23, 2014, Mr. Richey sent a letter supporting an extension of time for counsel to discuss costs. He proposed that counsel update the Court on the issue by Friday, June 13. On May 26, 2014, I sent a letter to counsel which read as follows:

> I acknowledge receipt of Mr. Ritch's letter of May 22 and Mr. Richey's of May 23, 2014. This correspondence indicates that it is very unlikely that the parties will be able to reach an agreement on costs and, as a result, I believe we should set a schedule for written cost submissions.

> I would ask Mr. Ritchey(sic) to file his submissions and any supporting materials by no later than June 16, 2014. I would ask for Mr. Ritch's response by no later than June 30, 2014. If Mr. Ritchey(sic) wishes to file any reply submissions, he must do so by July 10, 2014.
>
> Once I have reviewed all the submissions, I will determine whether it is necessary to have a further oral hearing on the cost issue.

[6] On June 16, 2014, Mr. Richey wrote to the Court requesting additional time. The letter included the following:

> I am hopeful that **another couple of days will be sufficient to complete submissions for the Plaintiff**, and respectfully request the further indulgence of the Court in bringing this long outstanding matter fully before Your Lordship, and thence to conclusion. Nothing, it seems, is ever as simple as it may at first appear, and I can only express my deep regret and apologize for any inconvenience this may entail to the Court, the parties and their counsel. **(emphasis added)**

[7] By letter dated June 17, 2014, Mr. Ritch requested a date certain for the plaintiff's cost submissions. Mr. Richey responded by a fax of the same date which included the following:

> I have Mr. Ritch's letters of yesterday and today, and want to assure you that **I am working on nothing but this file until my submissions are complete**, although I have been interrupted to take some phone calls, and deal further with the expert witnesses. **(emphasis added)**

[8] On June 20, 2014, Mr. Richey wrote to the Court to advise that work on this file had been interrupted. He indicated that he was travelling outside the Province for a CPD program but would resume work on the costs submission the following Monday.

[9] On June 27, 2014, Mr. Richey wrote to advise that once again his work on the file had been interrupted by a number of personal circumstances. The letter concluded as follows:

> **I had hoped to finish the affidavit and brief this week**, but will have to resume work on those Monday (our office will be open). If not ready to file and deliver then, **I am confident this can be done when offices reopen on Wednesday, July 2nd**. I again apologize for any inconvenience this may cause the Court, the parties and their counsel. **(emphasis added)**

[10] Mr. Ritch wrote on June 26, 2014, advising he did not know when Mr. Richey would submit his cost materials but he would respond within seven days of receipt.

[11] On June 30, 2014, I sent the following letter to counsel:

> I acknowledge receipt of your correspondence, including Mr. Ritch's letter of June 26, 2014. I confirm that Mr. Ritch will have a reasonable opportunity to respond once he receives materials from Mr. Ritchey(sic). I will not set a particular time frame for his response as that will depend upon when Mr. Ritchey(sic) produces his materials as well as Mr. Ritch's personal schedule.

[12] Mr. Ritch wrote on July 25, 2014 setting out the timeline of dealings with Mr. Richey on the issue of costs. He attached correspondence between counsel on the issue. His letter concluded as follows:

> It has become extremely difficult for me to explain to my client why I am unable to conclude this matter given the various time line requirements. I fully expect that it is costing the individual plaintiffs considerable ongoing legal expenses as well as my own clients.
>
> I am now in a position that I will be on vacation until August 12 and still nothing to review. Might I suggest that we set a date to appear before you and have an actual taxation so as to bring this matter to a conclusion. If the process is not fixed I am fearful that it may be difficult to conclude this matter this year.

[13] As we now know Mr. Ritch's words were prophetic.

[14] On July 31, 2014, I wrote to counsel as follows:

> I acknowledge receipt of Mr. Ritch's letter of July 25, 2014 and Mr. Richey's handwritten response of July 28, 2014.

> I share Mr. Ritch's frustration with Mr. Richey's inability to provide his submission on costs. I am not prepared to set a hearing a date as I still believe the issue is capable of being disposed of based upon written submissions.
>
> I believe that it is appropriate to consider a cost award specifically as it relates to the process for finalizing trial costs. Mr. Richey's failure to adhere to deadlines and overall delay in making submissions are factors that I will take into account in that award. I will also consider if it is appropriate for Mr. Richey to be personally liable for some portion of those costs.
>
> I would ask each of you to include your position on these issues when you provide your written briefs on trial costs.

[15] On August 18 two events took place. The defendants filed their costs submissions even though the plaintiff had not yet done so. In addition Mr. Richey sent the following fax:

> The server/main computer has been repaired (although the replacement unit could not be made functional) so we have our network back in operation with the **hope we can have the Plaintiff's costs filings to you this week**. Original correspondence to be retained on file. Again, my apologies for this delay. **(emphasis added)**

[16] On August 27, 2014, Mr. Richey wrote again to indicate that his approach to the costs submissions had changed because of his perception that the defence position on costs was overly critical of his conduct of the matter. His letter included the following:

> This is a progress report, and to advise that my work on this file has taken a direction that will likely prevent me from completing submissions on behalf of myself, Melissa Trenholm and her family this week. As much as I would prefer not to have this hanging over my head over the coming long weekend, I am skeptical I can mount an adequate defence to these allegations by Friday. I have never seen anything quite like it, and this amounts to much more than the differences of approach typical of defence counsel generally, to the task of marshalling masses of evidence and numerous witnesses which falls to plaintiffs' lawyers.

> I again seek the patience of the court, and apologize for any inconvenience this may cause the court, the parties and their counsel.

[17] On September 19, 2014, Mr. Richey sent to the Court a copy of an email which he had sent to Mr. Ritch the previous day. That email stated as follows:

> Thanks for your inquiry. My daughter starting university ran into some unexpected issues, not least of which was residence problems which required my intervention with the head of that department. I had to take charge of repairs to her brand-new laptop which spent the last couple of weeks with HP, including waiting for parts, and kept me in almost constant contact with them to keep things moving. Needless to say, I was thrown off the file for most of that period, but I am back at it now. As you know these are complex issues, but **work continues until it is done.** Believe me, my clients and I are anxious to get this over with! **(emphasis added)**

[18] On October 15, 2014, I sent the following letter to counsel:

> It is now more than six months after I released my decision and I have yet to receive the cost submissions of the Plaintiff despite having set a number of deadlines for filing these materials. The defendant filed its cost submissions on August 18, 2014.
>
> I am writing to advise counsel that I am currently working on my cost decision which I will release as soon as it is complete. If Mr. Richey wishes me to consider any submissions on behalf of the Plaintiff, he should ensure that I have them by no later than October 31, 2014.

[19] Mr. Richey wrote on October 31, 2014, and said the following:

> **I did not want the week to pass without updating the court regarding the Plaintiff's costs submissions which I expected to be able to file today. Regrettably, I am close but unable to do so.** If there was any chance of my outside printer being able to do the copying and binding on the weekend, delivery on Monday might be a possibility. But more likely Monday will be required to have my affidavit sworn, and printing completed. As you know from previous correspondence, this has been the most complex cost brief I have ever faced, and the time invested in it has been inordinate. **(emphasis added)**

> The Court's patience has been greatly appreciated by my clients and me; deadlines could have been set when there would have been no hope of meeting them. I again most humbly seek the indulgence of the court, and apologize for any inconvenience this may cause the Court, the parties and their counsel.

[20] On November 5, 2014, Mr. Richey sent the following fax:

> I was unduly optimistic last week; **every effort is continuing to complete these filings.** Please wait for them. Original correspondence to be retained on file. Again, my apologies for this delay. **(emphasis added)**

[21] Mr. Ritch wrote to the Court on November 5 and said as follows:

> I have spoken to my client as a result of Mr. Richey's correspondence of today to the Court.
>
> It is virtually impossible for me to explain this continuing course of action to my clients and why Judicial deadlines seem to have no meaning to counsel, particularly after the Court's correspondence of October 15th.
>
> I await your direction.

[22] Mr. Richey sent the following letter on November 7, 2014:

> I have just returned to the office from two outside commitments this morning, which were unavoidable, and this is **to update the court regarding the Plaintiff's costs submissions which I had hoped to file today. This will not be possible, and again I apologize. The brief itself is more than 25 pages long and I hope to find some duplication which will allow me to shorten it. (emphasis added)**
>
> The Court's patience has been greatly appreciated by my clients and me, and I continue to humbly seek the indulgence of the court, and apologize for any inconvenience this may cause the Court, the parties and other counsel.

[23] Despite deadlines, promises, requests and even the threat that a decision might be issued without hearing from the plaintiff I have yet to receive any cost submissions from Mr. Richey. I am not prepared to wait any longer. To do so would appear to justify his delinquent conduct.

[24] I am mindful that I should not penalize Ms. Trenholm for the behaviour of her counsel. As the successful plaintiff she has a *prima facie* entitlement to costs. I believe that with my knowledge concerning the conduct of the trial and Mr. Ritch's comprehensive and fair submissions on costs I have adequate information in order to determine the plaintiff's entitlement.

[25] There are three distinct issues which I need to address and these are: party and party costs, disbursements and the costs of the taxation process.

Party and Party Costs

[26] This was not a complex case, although a relatively large number of witnesses were called. Most were health care providers of Ms. Trenholm. In my view, the trial ought to have been somewhat shorter than it was although responsibility does not lie totally at the feet of the plaintiff and her counsel. Much of the cross-examination at trial was focused on whether Ms. Trenholm suffered from Post-Traumatic Stress Disorder caused by the motor vehicle accident. By the time of final submissions that was not really in dispute and in fact the defendant's expert had conceded this during his examination. If the defence had come to this realization at an earlier point the length of trial might have been reduced somewhat. I make this point not to be critical of defence counsel but to respond to their argument that the length of the trial was due only to the approach taken by Mr. Richey.

[27] The defendant's initial submission is that no costs should be awarded to the plaintiff due to the unfocused trial and the conduct of plaintiff's counsel. The defendants' argument is not overly forceful on that point and in my view there is no merit to it. The plaintiff is entitled to an award of costs. To the extent that there were specific problems causing needless expense to the defendants, those can be dealt with through the exercise of judicial discretion in the assessment process.

[28] Although the plaintiff's health status was somewhat complicated the essential issues in the case were not. I believe this is an appropriate situation where the amount involved for Tariff purposes should be the damages awarded of $101,000.00. Using the Scale 2(basic) this would amount to $12,250.00.

According to Tariff A an amount of $2,000.00 shall be added to the Tariff amount for each day of trial as determined by the trial judge.

[29] The defendant complains that time was lost due to medical witnesses arriving at trial with documents that had not previously been disclosed. In those cases there was an adjournment to permit counsel to review the new materials. This certainly did occur although I cannot necessarily blame the plaintiff or her counsel. The health professionals neglected to send the information to plaintiff's counsel, although I have no information as to whether they were asked to do so. I am not prepared to assign responsibility for that inefficiency to the plaintiff or Mr. Richey.

[30] The defendant argued that a number of the health professionals were unnecessary witnesses. I reviewed in some detail the nature of their evidence in my written decision. I do not agree with the defendant that any of the witnesses were unnecessary and in fact each was cross-examined by counsel for the defendant. I accept the defendant's argument that Ms. Miller was of marginal assistance, however, her testimony took a total of two hours and therefore was not a significant problem.

[31] I agree there were some inefficiencies in the conduct of the trial for which neither party was at fault. There was also some shared responsibility for spending time on evidence which was of marginal relevance. Taking all of this into account I would reduce the number of days to which the $2,000.00 Tariff should be applied to sixteen for a total of $32,000.00.

[32] The defendant submits that once the Tariff amount has been set there should be a reduction in the award of costs due to Mr. Richey's handling of the trial. For example on June 3, 2014, the first day of trial, we were unable to proceed because the plaintiff's exhibit books were not ready. In addition there were several motions within the trial to deal with the relevance and admissibility of the file from the Section B insurer. After my initial determination that the file was irrelevant and not admissible Mr. Richey continued to try and have the contents entered as evidence. One example was showing the letters from the file to the plaintiff and her father. I accept the defendant's submission that unnecessary time was spent on these issues.

[33] The plaintiff opened her case on June 4, 2013. At that time a Mr. Seitl and Ms. Fenn were potential witnesses. The trial was adjourned on June 25 until December 2 for continuation of the plaintiff's case. At that time Mr. Richey was

unable to confirm whether Mr. Seitl and Ms. Fenn would be called. Mr. Ritch wanted to know whether he needed to prepare cross-examination questions. Mr. Ritch advised that he would begin preparation for their testimony unless Mr. Richey informed him they would not be called. I directed Mr. Richey to inform Mr. Ritch if he decided not to call these witnesses and said if notification came too late it might be a factor to consider on costs. Mr. Richey sent an email to Mr. Ritch informing him the witnesses would not be called late on the evening of December 5, the day before they were scheduled to appear. Presumably Mr. Ritch had completed his preparation by that time. His client should not bear the cost of this unnecessary work which arose solely because Mr. Richey could not make a timely decision about these witnesses.

[34] The defendants also say there should be a reduction to reflect their success on various motions including those related to efforts during the trial to introduce the Section B materials. There were a number of pre-trial motions on the issue of expert reports in which costs were in the cause which would ultimately go to the plaintiff's credit. Mr. Ritch suggests a net reduction in the amount of $5,250.00 for these motions. Included is an amount of $2,000.00 for the loss of the first day of trial due to unavailability of the plaintiff's document books.

[35] I do not necessarily endorse the defendant's suggestion that mid-trial motions can be assigned a specific cost amount, however, I agree that some adjustment in favor of the defendant is appropriate in the circumstances. I would apply the more general approach of The Honourable Justice Pierre L. Muise in *Brock Estate v. Crowell* 2014 NSSC 269. In that case he reduced the plaintiff's costs by 45% as a result of the manner in which their case was conducted. The defendant suggests a reduction of 50% in this case.

[36] In my view there were problems with the plaintiff's conduct of the case particularly as it related to the Section B file, the lack of preparation for the first day of trial and the indecision concerning witnesses. Any remaining inefficiencies were not so egregious that the plaintiff should be penalized. I believe a 15% reduction in the Tariff costs would be appropriate to account for these issues as well as the various mid-trial motions.

[37] The party and party costs that I award to the plaintiff will be $12,250.00 plus $32,000.00 less the 15% reduction of $6,640.00 for a total of $37,610.00.

Disbursements

[38] In order to make an award for disbursements the Court needs evidence with respect to the amount of the plaintiff's expenditures. Typically this would be accomplished by way of an affidavit with attached receipts. In this case I have nothing from the plaintiff to substantiate any disbursement amount. The only exception is the expenses associated with the plaintiff and her family travelling to Halifax for the trial. These costs total $5,254.10 and were proven at trial as part of the plaintiff's damage claim. I agree with the defendant's submissions that the expense of travel to trial for the plaintiff and her family are not recoverable. This was the conclusion of The Honourable Justice Arthur Pickup, J. in *Creighton v. Nova Scotia (Attorney General)* 2011 NSSC 437 (at paras. 52-53) and I adopt his reasoning.

[39] In reviewing the defendant's brief it is clear they have received some information from the plaintiff concerning the disbursements being claimed. They identify the amount of each item, provide some analysis as to its recoverability and suggest what they consider to be reasonable.

[40] Although I have no evidence from the plaintiff of disbursements incurred I do have the defendant's submissions in which they acknowledge they are satisfied that disbursements totalling $26,405.79 are reasonable and recoverable. I believe I can take this admission from an adverse party as sufficient evidence to support that quantification.

[41] The defendant's cost brief is fair, comprehensive and reasonable. As part of those submissions they have indicated the amount being claimed by the plaintiff for various categories of expense. Leaving aside the travel costs for attendance at trial those items total $47,379.23. I would add that the defendant's explanations for why they would reduce that amount to $26,405.79 appear to be reasonable and reinforce my decision to use that admitted amount as evidence in support of a cost award to the plaintiff.

[42] I will therefore award disbursements to the plaintiff in the amount of $26,405.79.

Costs on taxation

[43] Logically there is no reason why there should not be a separate assessment of costs in relation to the taxation process particularly if it is time consuming. In

my letter to counsel of July 31, 2014, I advised that I would be considering a separate award relating to the finalizing of trial costs. I also suggested that I would consider making Mr. Richey personally liable for some portion of those costs.

[44] In my view Mr. Richey's behaviour in dealing with the question of costs and his inability to file submissions in a timely fashion (or, in fact, at all) has resulted in additional work on the part of defence counsel. There was correspondence from Mr. Ritch to Mr. Richey seeking information on costs and additional correspondence with the Court. In addition, preparing a brief when there is nothing specific to respond to is presumptively inefficient. I do not think it appropriate that the defendant bear these increased legal expenses. They should be the responsibility of Mr. Richey since it was his action and inaction that caused them to be incurred. I would award the defendant costs of the taxation process in the amount of $2,500.00 and make them payable personally by Mr. Richey.

Conclusion

[45] The plaintiff is entitled to party and party costs in the amount of 37,610.00 and disbursements in the amount of 26,405.79 payable by the defendant. In addition Mr. Richey shall pay the defendant $2,500.00 in costs related to the taxation process. If the parties believe that an order is necessary I would ask Mr. Ritch to prepare it and forward it me.

Wood, J.