IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: ***K.N. Umlah Insurance Agency Ltd. v. Christie,*** **2009 NSSM 15**

Date: 20090526
Claim: SCCH 301914
Registry: Halifax

Between:

K. N. Umlah Insurance Agency Ltd

Claimant

v.

M. J. Christie

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: December 4, 2008 and January 8, 2009 in Halifax, Nova Scotia; written submissions respecting costs received May 4 and May 14, 2009

Appearances: Stephanie Atkinson, for the Claimant
Andrew D. Taillon, for the Defendant

By the Court:

Introduction

[1] It sometimes happens that a case started in the Supreme Court of Nova Scotia is transferred to the Small Claims Court. One of the parties is eventually successful. The question then arises whether the successful party is entitled to claim any part of the costs he or she incurred in the Supreme Court prior to the matter's transfer to the Small Claims Court. In particular, is the party entitled to claim any part of what would be called party-and-party costs?

[2] This decision attempts to address that question.

Procedural Background

[3] The details concerning the claim for damages are dealt with in my earlier decision to dismiss the action: see *Umlah Insurance v. Christie* 2009 NSSM 7. Insofar as the procedural history is relevant to the issue of costs, the following facts are relevant.

[4] This claim began life as an action in the Supreme Court of Nova Scotia. The plaintiff was the former employer of the defendant. The plaintiff claimed $16,194.00 for breach of an employment contract. The action was commenced in the Supreme Court on July 30, 2004. (At this time the jurisdiction of the Small Claims Court was $15,000.00.)

[5] Lists of Documents were filed by the claimant (then plaintiff) on November 22, 2004 and by the defendant on November 24, 2004. Mr Umlah and Ms James were discovered on behalf of the claimant on March 31, 2005. Mr Christie was discovered on April 15, 2005. The plaintiff filed a supplementary list on August 22, 2005.

[6] On April 1, 2006 the jurisdiction of the Small Claims Court was increased from $15,000.00 to $25,000.00. Neither party applied to transfer the matter to the Small Claims Court at this time.

[7] The plaintiff filed its Notice of Readiness for Trial in the Supreme Court on July 18, 2007. A date assignment conference was held on January 10, 2008 and four days were set aside for trial at the end of September 2008.

[8] On August 8, 2008 counsel for the defendant filed a Notice of Election under s.9 of the *Small Claims Court Act* to transfer this matter to the Small Claims Court. Plaintiff's counsel objected. By a letter dated August 20, 2008 the Prothonotary of the Supreme Court advised that in her view the defendant had the absolute right to transfer a proceeding to the Small Claims Court where there was no claim for general damages and where the matter was otherwise within the Small Claims Court's jurisdiction (which at this point it was). She gave the plaintiff the option of applying to a judge to prevent the transfer, which option the plaintiff elected not to pursue.

[9] The action was accordingly transferred to the Small Claims Court on or about September 19, 2008. A special hearing was scheduled by the court for December 4, 2008 before me. The matter proceeded on that evening. Further evidence, and submissions, was heard on January 8, 2009. For reasons dated March 4, 2009 I dismissed the claim in its entirety: see *Umlah Insurance*

v. Christie 2009 NSSM 7. In dismissing the claim I noted that section 15(1)(e) of the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93, as amended by NS Reg 213/2008 (the "SCC Reg.") provides that an adjudicator may award "(e) costs incurred prior to a transfer to the Small Claims Court pursuant to section 10" of the Regulations. I stated, without the benefit of submissions from the parties, that "the defendant ought to receive his costs of the transfer to Small Claims Court as well as those incurred in the Supreme Court action prior to its transfer." If the parties could not agree on those costs they were to make further submissions.

[10] The parties were not able to agree on costs. The defendant made written submissions dated May 4th, 2009 and the claimant made written submissions dated May 14th, 2009.

The Position of the Parties

[11] Mr Taillon submitted on behalf of the successful defendant that approximately 90% of the pre-hearing work was conducted in the Supreme Court; and that Tariff A under the *Civil Procedure Rules (1972)* should be applied. He submitted that an appropriate "amount involved" in the parlance of Tariff A was $25,000.00. In detailed submissions that applied the type of costs analysis one sees in Supreme Court discussions of cost awards he concluded that a figure in respect of costs of $3,780.00 ought to be awarded. To that he added various disbursements, totalling $1,497.31, for a total claim for costs of $5,277.31. However, because the defendant had made an offer to settle he submitted that the costs ought to be increased by 25% to $7,915.95.

[12] Ms Atkinson on behalf of the unsuccessful claimant took a different tack. She disputed the jurisdiction of this court to employ Tariff A and, indeed, to make any award in respect of costs, at least insofar as they pertained to legal fees. She submitted that the only costs that could be awarded pursuant to s.15(1)(e) of the SCC Reg. were disbursements that had been incurred in the Supreme Court proceedings. No costs with respect to barrister's fees could be awarded in virtue of the express prohibition in s.15(2) against agent or barrister fees "of any kind."

Analysis

[13] The Small Claims Court is a creature of statute, and as such its powers, and those of its Adjudicators, are confined to those expressly conferred upon them by the Act and its regulations, as well as any other Act or regulations: see, for e.g., *Carruth v. Singleton Murphy* (1998) 169 NSR (2d) 170 (TD), and, more recently, *Howard E. Little Excavating Ltd. v. Blair's Custom*

Metals 2006 NSSC 251 at para.6. This limitation on the jurisdiction of Adjudicators is particularly important given that the power to award costs is itself purely a statutory creation–there is no common law power to award costs: see *Re Charles Brown* (1928) 60 NSR 76 (CA) at 78; *Johnson v. Halifax (Regional Municipality)* 2005 NSCA 70 at *para*.21ff.

[14] What then are the express statutory powers of Adjudicators insofar as costs are concerned?

[15] Section 29(1) of the Act provides that upon hearing a matter an Adjudicator may:

> a. make an order
>
> > i. dismissing the claim, defence or counterclaim,
> >
> > ii. requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding twenty-five thousand dollars, and any pre-judgment interest as prescribed by the regulations, or
> >
> > iii. for any remedy authorized or directed by an Act of the Legislature in respect of matters or things that are to be determined pursuant to this Act; and
>
> b. make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.

[16] Given that the power to award costs is not an inherent or implied part of a power to make an order (for which see above, para.[13]), s.29(1)(a) on its own does not create a power to award costs. Such a power was expressly granted in s.29(1)(b), but the Legislature was careful to circumscribe that power to those "costs and fees as may be determined by the regulations." The fact that this power to award costs was to be strictly construed is emphasized by s.29(2), which provides that "[n]o costs other than those authorized by this Act or the regulations may be awarded by an adjudicator." The Act then confers upon the Governor in Council the power to make regulations "(d) providing for costs, including costs on appeal:" s.33(1).

[17] It is clear then that Adjudicators do have the power to award "costs." It is equally clear however that that power is strictly limited to only those costs "authorized by" the Act or its regulations.

[18] What then are the costs that can be awarded by an Adjudicator? Section 15 of the SCC Reg. provides the answer.

[19] Section 15(1) of the SCC Reg. specifies the cost awards that may be made by an Adjudicator “to the successful party”

a. filing fee;

b. transfer fee;

c. fees incurred in serving the claim or defence/counterclaim;

d. witness fees;

e. costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;

f. reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;

g. additional out of pocket expenses approved by the adjudicator.

[20] Section 15(2) provides that “[n]o agent or barrister fees of any kind shall be awarded to either party.”

[21] The use of the word “costs” in s.15(1)(e) presents us with a question of statutory interpretation because the word in normal legal parlance can and does refer to one or both of two things:

a. the costs associated with the cost of retaining a barrister to represent one in court or before a tribunal, and

b. the costs associated with the out-of-pocket expenses incurred during the course of the proceeding in question.

[22] The former are often referred to as party-and-party (or in the rare instance, solicitor-and-client) costs; the second as disbursements. But both fall within the overall rubric of the word "costs." That being the case we are driven to ask whether the word "costs" in s.15(1)(e) of the SCC Reg. refers to *all* costs that may be incurred in the Supreme Court prior to a transfer to the Small Claims Court, or whether it refers only to out-of-pocket costs (*i.e.*, disbursements)?

[23] On balance, having considered the question carefully, I have concluded that the word "costs" in s.15(1)(e) must mean only out-of-pocket costs (disbursements) incurred by the successful party in the Supreme Court. I came to this conclusion for two reasons.

[24] First, I must interpret the word in its context. Sections 15(1) is the section that confers the Adjudicator's power (which is otherwise lacking) to award costs *of any kind*. And *all* of the costs referred to in s.15(1)(a)-(d) and (f)-(g) are costs in the nature of disbursements. That suggests that the word "costs" in s.15(1)(e) is meant to include disbursements only. This conclusion is reinforced to some degree by the fact that s.15(2) expressly forbids the award of agent or barrister fees "of any kind."

[25] Second, there is the question of the social policy. I concur in the view that the prohibition of any claim for agents or barristers' fees represented "a policy decision by the Legislature to promote access to the Small Claims Court without fear of having to pick up the tab for the other party's legal expenses:" *Burgess v. Rickard* 2008 NSSM 15, per Adjudicator Slone. To read s.15(1)(e) as permitting the award of party-and-party costs would defeat that policy. A claimant could start his or her action in Supreme Court (since there is no minimum limit to a Supreme Court claim), obtain disclosure and conduct discoveries, and then transfer the matter to Small Claims Court and claim costs. They would be obtaining something (an award in respect of legal fees) indirectly that they could not obtain (if they had started the claim instead in Small Claims Court) directly.

[26] I am accordingly of the opinion that the word "costs" in s.15(1)(e) of the SCC Reg. means only costs incurred in the Supreme Court prior to transfer that are in the nature of disbursements. It does not include costs (sometimes termed party-and-party costs) referable to the cost of retaining a lawyer.

[27] That leaves us with the defendant's claim for disbursements.

Disbursements

[28] The defendant claims the following disbursements incurred in the Supreme Court prior to transfer to the Small Claims Court:

a. postage, photocopies and courier costs in the amount of $387.33, which he reduces to $290.50 “in light of the Court’s position on photocopy costs;”

b. cost of filing a defence and administration fees in the amount of $105.00;

c. discovery service in the amount of $1,014.75; and

d. transfer fee from Supreme Court in the amount of $87.06.

Postage, *etc*.

[29] The materials submitted in support of this claim are not particularly detailed. They do not include the number of pages or the cost per page being charged. The claimant submits that $208.20 of the charge represents the cost of copying documents when the defendant changed solicitors; and that much if not all of the rest “does not coincide with any provision of documents to KN Umlah.”

[30] In my view, the photocopying expenses of a successful party are not limited under s.15(1)(e) solely to documents provided to the other side. In my opinion the party’s entitlement extends to all *reasonable* photocopies–*at a reasonable price*. This conclusion is supported in my view by s.15(1)(g), which allows for “additional out of pocket expenses approved by the adjudicator.”

[31] On the evidence before me I am not prepared to say that the cost of photocopying documents as the result of a change in solicitors was unreasonable in and of itself. The defendant was forced to retain a solicitor because the claimant sued him in Supreme Court. That being the case, if the defendant was forced for some reason to change solicitors he ought to be able to recover reasonable photocopying expenses arising out of that change. And there were certainly a lot of documents produced at the hearing before me.

[32] On the other hand, I have not been provided with any information as to the actual number of pages copied or the cost per page charged. In similar circumstances the courts have often

reduced claims for photocopying by 50%, and I will do that here for that reason. I accordingly allow a claim for photocopying in the amount of $193.67.

Defence and Administration Fees

[33] The administration fee in question is $25.00. In my view such fees are overhead and are not normally recoverable as a disbursement: *Boyne Clarke v. Gosbee* 2002 NSSM 4 at para.34.

[34] That leaves the claim at $80.00 for the cost of filing the defence, which I allow.

Discovery Service

[35] The defendant claims $1,014.75. The claimant submits that this was the *total* amount of all discovery costs, which amount was actually shared between the parties–and that accordingly it only should have to pay one quarter of the shared amount, or $255.00.

[36] The difficulty I face is that the facts as set out in the briefs of the parties are not clear. I can however say the following: the defendant is entitled to recover from the claimant whatever out-of-pocket disbursement in respect of the cost of discovery services and transcription of discovery transcripts that he paid at the time. If he paid $1,014.75 then he is entitled to recover that amount. If he only paid half that amount, or $507.38, then he is entitled to recover that amount.

[37] The parties should be able to determine what the defendant paid and it is that amount that the claimant must pay to him. If the parties cannot determine or settle what that amount is they may make submissions to me on the point.

Transfer Fee

[38] The cost of transferring the matter from Supreme Court to Small Claims Court was $87.06. That amount, for obvious reasons, is not disputed by the claimant and I allow it.

Conclusion

[39] For reasons set out above I will make an order awarding costs as follows:

a. $360.73, plus

b. whatever the defendant paid in respect of the discovery service's attendance and transcription costs (including any photocopying charged by the discovery service).

Dated at Halifax, this 26th day of May, 2009

Original: Court File)
Copy: Claimant)
Copy: Defendant)

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W. Augustus Richardson, QC
ADJUDICATOR