SUPREME COURT OF NOVA SCOTIA
Citation: Oliver v. Elite Insurance Company, 2015 NSSC 70

Date: 2015-03-05
Docket: Hfx No. 415765
Registry: Halifax

Between:

Regan Oliver

Plaintiff

v.

Elite Insurance Company

Defendant

Judge:	The Honourable Justice Peter Rosinski
Heard:	September 11, 2014, in Halifax, Nova Scotia
Final Written Submissions:	January 28, 2015
Counsel:	John Rafferty, Q.C., and Daniel Roper, counsel for the plaintiff J. Scott Barnett, counsel for the defendant

By the Court:

Introduction

[1] Mr. Oliver made a successful motion, over two days, which disallows the defendant insurer from relying on the limitation period defence – 2011 NSSC 413. As the decision demonstrates, the court had to consider: the previously unsettled question about when a SEF 44 endorsement limitation period found in motor vehicle insurance policies begins to run; the effect of the doctrine of estoppel on the contractual limitation period; and whether the plaintiff should be entitled to rely on section 3 of the *Limitation of Actions Act*, to extend the time to file a statement of claim. Moreover the court was presented with a substantial factual matrix which arose from detailed affidavits and cross examination of two of Mr. Oliver's counsel, another counsel involved in the case from the law firm representing Mr. Oliver, and an insurance adjuster for the defendant.

[2] The parties are unable to agree on an appropriate disposition of the costs issues.

The position of the parties

[3] Mr. Oliver claims costs in the amount of $25,000 plus $668.85 disbursements [HST included therein for both]. His counsel has submitted an affidavit outlining suggested reasonable fees and disbursements in the amounts of $43,938.63 and $668.85 respectively.

[4] Mr. Oliver argues that it is appropriate to depart from the Tariff C guidelines and that the circumstances permit a 57% contribution towards actual solicitor and client costs – i.e. $25,000. Furthermore, he argues that the costs should be "in any event of the cause" and payable forthwith.

[5] Mr. Oliver justifies these positions as follows:

(a) Based on Justice Goodfellow's comments in *Armour Group Ltd v. HRM*, 2008 NSSC 123, there are "special circumstances" here to permit a departure from Tariff C, specifically that: the matter was complex; the pre-chambers motion process required counsel to do an exceptional amount of prehearing preparation given the factual and legal issues herein, particularly because the law in Nova Scotia was unsettled regarding the interpretation of the SEF 44 endorsement

limitation period [and that this also justified the use of associate counsel].

(b) Nominally, the appropriate amount in such cases, is intended to provide a substantial contribution to the legal costs associated with the relevant and reasonable legal costs and disbursements. As Justice Muise stated in *Richards v. Richards* 2013 NSSC 269, at paras. 10 – 11:

> [10] Our Court of Appeal in *Williamson v Williamson* [1998] NSJ No 498 at paragraph 25, provided the following guidance on the meaning of 'substantial contribution':
>
> > In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than 50 and less than 100% of the lawyer`s reasonable bill for the services involved. A range for party and party costs between two thirds and three quarters of solicitor client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.
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> [11] This suggests, in my view, that party and party costs awards considerably below the range of 2/3 to 3/4 of solicitor and client costs, may now satisfy the "substantial contribution" requirement. However, as noted by Justice Moir, "the Courts have usually avoided percentages", and, as noted by Justice Goodfellow, in ***Armour Group***, the "level of exceptional services required" may vary from case to case. Therefore, no fixed costs-to-expenses ratio can be used. Nevertheless, it appears that lower contribution ratios are more likely to be acceptable now, than they were in 1989.

In *Richards v. Richards*, at para 17 Justice Muise concluded that: "consequently, absent an order specifying when costs are payable, the

default position appears to now be that the successful party in an interlocutory motion receives costs in any event of the cause which are "either added to or subtracted from the costs calculated under Tariff A at the end of the trial." In the case at Bar, the limitation period issue has been fully decided and cannot be revisited at the trial on the merits; therefore, it is appropriate to award costs in any event of the cause.

The costs should be payable "forthwith" in accordance with the five factors referenced in Justice Wright's decision in *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2011 NSSC 3 [overturned on appeal and costs ordered payable by the respondent to the appellant in the same amounts – 2011 NSCA; overturned in part 2013 SCC 66]. Here, the motion disallowing the limitation period defence was a discrete issue, final and could not be raised in the future trial, therefore there is no prospect of hindsight after trial affecting the disposition of the cost award; and it was of considerable complexity and a major undertaking for both parties. There is no indication that the defendant would find an immediate payment of cost to be burdensome, and since consequent to the motion, it would be sometime before the matter

proceeded to trial, it would be unfair to require the plaintiff to have to wait that long for costs on the motion.

[6] In response, Elite states its position as follows:

(a) There are good reasons why the parties should each bear their own costs: the plaintiff's omissions caused his statement of claim to be filed in May 2013 when the limitation period had expired (either in June 2009 or June 2010 if estoppel is permitted) – but for those omissions the motion would not be necessary; the law on when the limitation period began to run pursuant to the wording of the SEF 44 endorsement was not settled in Nova Scotia, and therefore there was good reason for both parties to contest the law and facts, which did provide a public benefit – i.e. resolution of the issue for other potential litigants.

(b) Alternatively, Elite argues that there are no "special circumstances" for departing from the Tariff C guidelines. Therefore, for a two-day hearing, $4000 is an inappropriate cost award [plus disbursements]. Elite says there are insufficient grounds to conclude that the motion required "a level of exceptional services" by legal counsel. It notes that the matter was not that complex, and that the pre-chambers

motion process was occasioned by the plaintiff's omissions and was not that more labour intensive than other motions for which Tariff C costs are awarded. It points out that there was a strong public interest in obtaining an answer to the controversy surrounding the wording of the SEF 44 endorsement limitation period regarding its commencement, in the case at Bar.

(c) Elite points out that the Tariff A guidelines can be seen to provide a useful maximum amount that would be relevant on trial. It estimates this amount to be $23,000 plus $2000 for every day of trial [assuming even five days of trial that would be a total of $33,000]. That calculation suggests that Mr. Oliver's claim of $25,000 is too high.

(d) Having regard to Rule 77.03(3), the default position is that "costs of the proceeding follow the result, unless a judge orders or a rule provides otherwise", and that this wording has been found generally to be intended to be applied to interlocutory motions –*Leigh v. Belfast Mini-Mills Ltd*., 2011 NSSC 320 per Duncan, J at para.18.

(e) Costs are generally not ordered "forthwith", unless there is some misconduct on the part of the unsuccessful party – *North American Trust Co. v. Salvage Association*, 1998 NSCA 210. Moreover, they

note that paragraph (2) of Tariff C makes costs presumptively payable "in the cause", and that orders making costs payable "forthwith" pursuant to Rule 77.03(4) are exceptional. They suggest there is no reason for the costs to be payable forthwith here, since the costs of the motion can be deducted at the conclusion of the trial from the Tariff A amount, and there is no demonstrated unfairness if the plaintiff has to wait to receive those costs until trial.

Analysis

[7] This matter was sufficiently legally and factually complex, and required sufficient pre-motion preparation to justify a departure from the Tariff C guidelines. In my view, a lump sum award is appropriate. In determining what costs award is in the interests of justice as between these parties and in these circumstances, I bear in mind that: generally it is appropriate that costs follow the result and the successful party receive costs in its favour; but for the plaintiff's failing to file his statement of claim before June 2009 or possibly 2010 [it was filed in May 2013] the motion would have been unnecessary; that the law in Nova Scotia was unsettled regarding the interpretation of when the contractual limitation period in the SEF 44 endorsement began to run; the purpose of a costs award is to provide a substantial contribution toward the successful party's reasonable costs.

[8] Such award should be a substantial contribution to what would be the reasonable costs and disbursements associated with the preparation and presentation of the motion. I have reviewed the affidavit of plaintiff's counsel and the documentation underlying the suggested reasonable fees and disbursements in the amount of $43,938.63 and $668.85 respectively. Without parsing the accounts, or placing too much weight on the time expended, the use of associate counsel and articled clerk in addition to a very senior member of the bar, one could conclude that objectively, reasonable costs for the preparation and presentation of the plaintiff's motion could range from fees exclusively arising from a single associate lawyer's work through to and including a senior lawyers work, supplemented by an associate lawyers work and that of an articled clerk. While that range cannot be precisely identified, in my view an amount tending to be in the average of that range is $30,000 plus HST and disbursements [including HST].

[9] Given that a substantial contribution thereof should be paid to the successful party on the motion, I believe that $18,000, which is 60% thereof, is an appropriate amount to award as costs to the plaintiff.

[10] I conclude, given the significance of the issue, and its potential to be largely determinative of the plaintiff's cause of action, and the fact that that issue has been

fully decided and cannot be revisited at a trial on the merits, that it is appropriate that the costs be paid in any event of the cause.

[11] While there is no demonstrated unfairness if the plaintiff would have to wait to receive these costs until after trial, neither is there any demonstrated unfairness for the defendant to have to pay these costs immediately; moreover given the lengthy time since this litigation started, and the prospect that it might take some time yet for it to be concluded, I conclude that it is in the interests of justice that the costs be paid "forthwith".

Summary

[12] Therefore, the court orders that the defendant pay forthwith to the plaintiff, costs in any event of the cause, in the amount of $18,000 plus HST in addition to the $668.25 disbursements [including HST].

Rosinski, J.