IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Miller v. Royal Bank Of Canada, 2008 NSSC 139

Date: 20080508
Docket: SN 217125
Registry: Sydney

Between:

Brenda Miller

Plaintiffs

and

Royal Bank Of Canada

Defendants

Revised Decision:	The hearing date on the first page has been corrected, according to the errata released on May 22, 2008.
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	April 30, May 1, 2, 3, 4, 7, 8, 9, 10, 11 2007 In Sydney, Nova Scotia
Counsel:	Hugh R. McLeod, for the plaintiff Harvey M. McPhee for the defendant

By the Court:

[1] In the trial decision in this matter (which can be found at 2008 NSSC 32) I invited submissions on costs from the parties. This decision will address the issue of costs.

Law

[2] Costs are in the discretion of the court. Rule 63.02 provides the following powers to the court in determining costs:

> (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
>
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
>
> (c) direct whether or not any costs are to be set off.

[3] Unless the court otherwise orders, costs follow the event (Rule 63.03(1)) and are fixed in accordance with the tariffs (Rule 63.04(1)). For the purpose of a costs determination under Rule 63, "tariffs" refers to "the Tariffs of Costs and Fees determined pursuant to subsection 2(3) of the *Costs and Fees Act*": Rule 63.01(b).

[4] In fixing costs, the court is also entitled to consider, pursuant to Rule 63.04(2):

> (a) the amount claimed;
>
> ***
>
> (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.

[5] The court has certain powers with respect to costs as between a solicitor and the solicitor's own client. Rule 63.15 provides, in part:

> (2) Where in a proceeding, costs are incurred improperly, or without reasonable cause, or arise because of undue delay, neglect or other default, the court may, when the solicitor whom it considers to be responsible, whether personally or through a servant or agent, is before the court or has notice, make an order,
>
> (a) disallowing the costs as between the solicitor and his client;
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to any other party;
>
> (c) directing the solicitor personally to indemnify any other party against costs payable by the party;
>
> (d) directing a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) to (c).

[6] As to disbursements, "[u]nless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's

disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs": Rule 63.10A.

The applicable tariff

[7] The relevant provisions of the tariff in effect to the date of the commencement of these proceedings was the tariff which came into effect in 1989. In September 2004, while this proceeding was under way, an amended tariff came into effect, providing a number of charges and permitting a higher level of party-and-party costs. The 2004 tariff took effect from the date of its publication in the *Royal Gazette*. It is necessary to determine whether the 1989 tariff or the 2004 tariff is applicable to this proceeding. The plaintiff maintains that the 1989 tariff applies, while the defendant argues for the 2004 tariff. For the reasons below, I am satisfied that the 1989 tariff applies.

[8] The jurisprudence supports the conclusion that the tariff in effect when the proceeding was initiated is the one properly to be applied. The plaintiff can therefore rely on the tariff in force when the proceeding is commenced. Any other approach, in my view, would create uncertainty on the issue of costs.

[9] The *Costs and Fees Act* provides that "[p]arty and party costs in respect of the services mentioned in the regulations, or in respect of other related services or any combination of services, shall be determined by the Costs and Fees Committee": s. 2(3). The Committee includes the Chief Justice of Nova Scotia and the Chief Justice of the Supreme Court (or their nominees) and three barristers appointed by the Barristers' Society: s. 2(4). Party-and-party costs approved by the Committee pursuant to s. 2(3) "are subject to the approval of the Attorney General and shall come into force and be effective upon publication in the Royal Gazette or at such other time subsequent to publication as the Costs and Fees Committee may determine": s. 2(5). The present tariffs were published in the *Royal Gazette*, Part I, vol. 213, No. 39 (September 29, 2004) at p. 2072. The Minister of Justice and Attorney General directed that the tariff "determined by the Costs and fees Committee to be used in determining Party and Party Costs, be established and approved" pursuant to s. 2(5) of the *Costs and Fees Act*. The order was dated September 21, 2004. As noted, the new tariffs became effective upon publication. There was no indication that they were intended to take effect at any other time.

[10] In *Conrad v. Bremner* (2006), 242 N.S.R. (2d) 330 (S.C.), B. McDonald J. took the view that costs are a procedural matter, and that therefore the new tariff had retroactive or retrospective effect:

> [6] ... The principles of statutory interpretation have an exemption to the rule relating to retroactive effect. The exemption applies to enactments that are procedural in effect. In *Halsbury's Laws of England*, 3rd Ed., vol. 36, p. 423 the following appears:
>
> > "The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."
>
> [7] In Ontario provisions regarding costs, including tariffs, are considered to be procedural and are given retrospective effect. Orkin, *The Law of Costs*, 2nd Ed., vol. 2, p. 7-10. In Nova Scotia Party and Party Costs are governed by the *Civil Procedure Rules*. Section 46 of the *Judicature Act*, R.S.N.S. 1989, c. 240, gives authority to the judges of the Appeal Court and judges of the Supreme Court to make "rules of court" and in subparagraph (j) states rules can be made:
>
> > "(j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court."
>
> [8] I consider this provision to support the proposition that the rules relating to party and party costs, including the tariffs, are procedural in nature. The right of the client is to be awarded costs. The procedure is the method by which this right

> is pursued. The procedure is as described in the party and party costs provisions of the *Civil Procedure Rules*. Because these provisions are procedural they have retrospective effect. The September 21, 2004 tariff applies to this proceeding even though its commencement date was November 21, 2000.

[11] With respect, I prefer the approach taken by Goodfellow J. in *Little v. Chignecto Central Regional School Board* (2004), 230 N.S.R. (2d) 1 and *Rhyno Demolition Inc. v. Nova Scotia (Attorney General) et al.* (2005), 233 N.S.R. (2d) 311, which were not followed by B. MacDonald J. Goodfellow J. held that the appropriate tariff is the one existing when the Originating Notice was filed. In *Little* he referred to *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1977), [1977] 1 S.C.R. 271 (as quoted in *Driedger on the Construction of Statutes*, 3rd Edition, at p. 512) where Dickson J. (as he then was) said, at p. 279:

> "[t]he general rule is that statutes are not to be construed as having retrospective [retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the Act."

[12] In *Little*, Goodfellow J. also cited *Royal Bank of Canada v. Woloszyn* (1992), 110 N.S.R. (2d) 72 (S.C.A.D.), where the court said:

> [4] Mr. Justice Jamie Saunders filed a written decision dismissing the application and awarding costs to the Royal Bank. His decision on the merits has not been appealed. After hearing counsel he filed a separate decision on costs which is the subject of this appeal. In it he stated:

> "... I cannot say that it was a complex proceeding. There was nothing difficult about it ..."

> [5] The action was begun prior to the amendments to rule 63 of the Civil Procedure Rules introducing what are known as the new tariffs. These are applied to all proceedings commenced after January 1, 1989.

> [6] The respondents argue that the new tariffs apply because the particular proceeding in question, the chambers application, was commenced after that date. In our view, interlocutory proceedings must take their date from the main action; the old Rules apply. The application was not a separate proceeding; it was simply an interlocutory proceeding in an existing action. The learned trial judge erred in applying the tariff.

[13] Amendments to the *Costs and Fees Act* are not made by the judges of this court pursuant to the *Judicature Act*, but by the Governor-in-Council on the recommendation of a Committee formed pursuant to the *Costs and Fees Act*. Though judges of this court and of the Court of Appeal are members of the Committee, it is not strictly the prerogative of the judges to prescribe changes to the statute. Rather, the Committee makes a recommendation.

[14] I refer also to the decision of Justice Moir in *Bevis et al. v. CTV Inc. et al.* (2004), 228 N.S.R. (2d) 34 (SC):

> [7] With respect, I do not agree with Mr. Boudreau's application of the new Tariff and I do think this is a case for departing from the Tariff system. The new Tariff of Costs and Fees was certified by the Costs and Fees Committee on 1 September 2004 and was approved by the Minister of Justice on 21 September 2004 and was published on 29 September 2004. Under s. 2(5) of the *Costs and Fees Act*, R.S.N.S. 1989, c. 104, the new Tariff comes into force "upon publication in the Royal Gazette or at such other time subsequent to publication as the Costs and Fees Committee may determine". The committee recommended that the new tariffs should "have no retroactive effect" and should "apply to proceedings commenced after they came into effect" except that the new Chambers Tariff "could be adopted as practice immediately". Consequently, this action would fall under the old Tariff system.

[15] This approach was also favoured by Hood J. in *Willis v. Mailman (Bernard L.) Projects Ltd. et al.*, 2008 NSSC 94, at paras. 57-60; by Wright J. in *Driscoll v. Crombie Developments Ltd.* (2006), 247 N.S.R. (2d) 289 (S.C.) at paras. 23-25; and by Warner J. in *Burns v. Sobeys Group Inc.*, 2008 NSSC 102, at paras. 3-6. Agreeing with the approach taken in these decision, I am satisfied that the 1989 tariff is applicable in this case.

The Amount Involved

[16] In the trial decision I assessed damages on a provisional basis in the amount of $139,000.00.

The scale

[17] The plaintiff says costs should be based on scale 3, which would provide for costs of $8,545.00. The defendant argues for the use of scale 3 of the 2004 tariff, leading to an award of costs of $20,938.00. As noted above, I am satisfied that the older tariff applies. This results in costs under scale 3 of Tariff A in the amount of $8,545.00 ($7,375.00 plus three per cent of $39,000.00).

[18] The defendant says the trial took an unusually long time, as the plaintiff attempted to introduce expert witnesses and irrelevant or inadmissible evidence for which it was necessary to conduct voir dires. In addition, there was a delay of one day because the plaintiff had used the wrong date on subpoenas for medical witnesses. The defendants contends that this delay should militate against the plaintiff in determining costs.

[19] The plaintiff argues that costs should be reduced because there was a delay in completing the trial due to the defendant's extensive cross-examination of the family physician and medical experts called by the plaintiff. The plaintiff says these witnesses were not shaken on cross-examination, and points out that the defendant did not call medical evidence. The plaintiff argues that but for the time

spent cross-examining the medical experts, the trial would have been finished in three days. Instead, the plaintiff contends, the trial took seven days because the defendant refused to admit the medical reports.

[20] I am satisfied that each party contributed to the duration of the trial. This includes the time taken by the plaintiff in attempting to introduce collateral evidence of other property owners and the defendant's extensive cross-examination of the family physician. I cannot agree with the plaintiff's submission that, merely because cross-examination did not yield damaging evidence against the plaintiff, I should penalize the defendant for having carried on a complete and extensive cross-examination.

[21] I am not prepared than to reduce the amount of costs to which the defendants would otherwise be entitled. I do not agree that any steps taken by counsel were improper, vexatious, prolix or unnecessary. I reject the plaintiff's contention that the defendant ought to have admitted the medical reports without the benefit of cross-examination. I recall that Dr. Poulos had extensive contact with the plaintiff from 1997 onward and that his evidence was critical in an assessment of damages.

[22] I do not agree with the plaintiff ‘s view that success was divided. The plaintiff failed to convince me on a balance of probabilities that the defendant was liable. I do agree, however, that the conduct of the defendant in launching a lawsuit against Glenn Burton was inappropriate. I view it as an attempt to muzzle the witness. The main action was commenced on March 9, 2004. The defendant commenced the proceeding against Mr. Burton a few weeks prior to commencement of this trial.

[23] I am satisfied that $8,545.00 would be an insufficient amount of costs. The defendant seeks an additional $2000.00 per day for court time, claiming that the amount under the scale does not provide substantial indemnification.

Lump-sum costs

[24] The court may “award a gross sum in lieu of, or in addition to any taxed costs”: Rule 63.02(1)(a). Lump sum costs are typically awarded where the basic award of costs under the tariff would be inadequate to provide “substantial indemnification.” On this basis, I am satisfied that the defendant’s costs award should be increased by $12,000.00. This will be reduced to $5,000.00 on account

of the defendant's decision to issue an Originating Notice against Mr. Burton on the eve of trial was unwarranted and was done an effort to intimidate him at the trial. This results in a total party-and-party costs award of $8,545.00 plus $5,000.00, or $13,545.00.

Disbursements

[25] I have some concern about Dr. Stuart Smith's report and evidence. Dr. Smith tested a similar, but not identical, tile to the ones that had been in the defendant's premises when the plaintiff fell, resulting in my rejecting or giving minimal weight to his report and testimony. Although it may have been appropriate for the defendant to retain an expert to test the co-efficiency of friction, I concluded that the report was fundamentally flawed. Admittedly, it established that the sandals worn by Mrs. Miller were less safe than other forms of footwear. It did not, however, establish that she was negligent in wearing the footwear she did. It also showed that there was not a great deal of difference between wet co-efficiency and dry co-efficiency of friction but did not establish however the co-efficiency of friction with the tiles at the defendant's premises.

[26] In considering the amount claimed for the expert expenses and disbursements, I have taken note of the approach suggested by Goodfellow J. in *Cashen v. Donovan* (1999), 174 N.S.R. (2d) 320 (S.C.). He said, in part:

> [7] The onus is upon the party seeking recovery of a disbursement to establish the cost of such disbursement is reasonable. The costs sought must be reasonable, first in the context of the reasonableness of such disbursement being incurred, and secondly, in the composition and quantum of the disbursement.
>
> [8] There is no exhaustive list of factors to consider in determining whether or not a disbursement is reasonable but such would normally include:
>
> 1. Whether the incurring of the disbursement was necessary or appropriate.
>
> 2. The amount involved in the litigation.
>
> 3. Complexity of the issues.
>
> 4. Whether or not sufficient expert opinion was readily available without incurring the cost. *Osborne v. Osborne* (1994), 130 N.S.R.(2d) 283; 367 A.P.R. 283 (S.C.), where it was held the actuarial expenditure was not at all warranted.
>
> 5. Whether the incurring of the disbursement was necessary for the conduct of the litigation.

Section 2(3)(c) deals with a reasonable cost of reports intended to be used at trial and recovery is not automatically excluded if a report is not used at trial.

In a given situation, it might be considered reasonable for the losing party, to an action to reimburse the costs of an expert's report, which was not utilized in evidence, i.e. the referral of a client to a specialist whose expert report addressed concerns with respect to one possible explanation for the consequences of the injuries suffered by the party in the accident. Another example might be where the engagement of the expert reduced the trial requirements by contributing to admissions or concessions.

You must remember when a person breaches her/his duty to another person causing loss and damages, all reasonable expenses incurred in advancing and establishing such loss and damages, should fall upon the tortfeasor.

6. Whether or not the expert's report was of any assistance to the court?

This determination is to be considered with number 5 and not necessarily in isolation....

***

Section 2(3)(c) permits the recovery of the 'reasonable cost' of an expert's report. If only part of the report is useful at trial, then only part of the claim will be allowed *Knox v. Interprovincial Engineering Ltd.* (1993), 120 N.S.R.(2d) 288; 332 A.P.R. 288 (S.C.), at p. 302. Additionally, if the attendance of the actuary in court was not necessary, the attendance allowance may not be cover able.

> 7. Professional quality of the expert's opinion.
>
> 8. Hourly rates in the profession and the extent to which the particular experts hourly rate may vary from any standard and if so, whether it is justified and to what extent.
>
> 9. The relevance of the expert opinion evidence to the issues in question.
>
> 10. Reduction in the expert's account, to the extent of any collateral benefit. *Wyatt v. Franklin* (1993), 123 N.S.R.(2d) 347; 340 A.P.R. 347 (S.C.). Surveyors report in part, related to and resolved issues not within the litigation.
>
> 11. Examination of the nature of the work and time involved in the preparation of the expert's report and any possible additional time requirement to respond to any subsequent expert's reports."

[27] In view of this, I believe that the amount to be awarded for disbursements on account of Dr. Smith's report and attendance should be limited to $2,000.00. Consequently, reducing the amount claimed for disbursements by $2,600.00, I allow disbursements in the amount of $7,262.78.

Conclusion

[28] For the reasons above, I award costs to the defendant in the amount of $13,545.00, along with disbursements of $7,262.78.

J.