

SUPREME COURT OF NOVA SCOTIA

Citation: 3209292 *Nova Scotia Ltd. v. MacDuff*, 2011 NSSC 483

Date: 20111222

Docket: Hfx No. 309982

Registry: Halifax

Between:

3209292 Nova Scotia Limited

Plaintiff

v.

James Leslie MacDuff and
Robert Coles MacDuff

Defendants

Judge:

The Honourable Justice N.M. Scaravelli

Heard:

June 13, 14, 15, 2011, in Halifax, Nova Scotia

Counsel:

Colin D. Bryson, Q.C., for the Plaintiff

James Leslie MacDuff on his own behalf and
on behalf of Robert Coles MacDuff, Defendants

By the Court:

[1] The Plaintiff was awarded costs following trial on the issue of title to lands located in Lawrencetown, Nova Scotia. The parties were unable to reach agreement on costs and have made submissions.

[2] The Plaintiff had purchased approximately 350 acres of land at Lawrencetown, referred to at trial as the mainland property and “The Island” property. These properties were connected by marshland. The Defendant claimed ownership of “The Island” portion. The trial involved competing chains of title to the lands in question. The court concluded that the Plaintiff had a better chain of title to the lands and granted a declaration that the Defendants had no interest in the lands.

[3] The Defendants, although represented by counsel throughout legal proceedings, elected to self-represent at trial.

[4] The Plaintiff seeks costs and disbursements in the total amount of \$62,074.89, as follows:

\$34,750.00	Pursuant to Tariff A Basic Scale of the <i>Civil Procedure Rules</i> based on \$500,000 as the amount involved
\$ 6,000.00	For 3 days of Trial according to Tariff
\$ 750.00	Costs in the cause for a Chambers Motion to convert the proceeding from an Application to an Action
<u>\$20,574.89</u>	Disbursements
<u>\$62,074.89</u>	TOTAL

[5] The Defendants submit no costs should be payable.

[6] Rule 77.02 of the *Civil Procedure Rules* grants the court broad discretion to award costs. Rule 77.03 provides that costs normally follow the result unless a judge rules otherwise. In this case, the Plaintiff has been successful in proving its claim of title over the Defendants' claim. There is no reason to deviate from the general rule that party-and-party costs follow the result.

[7] There are a number of factors relevant to determining the quantum of party-and-party costs. The *Civil Procedure Rules* provide a Tariff that acts as a starting point for determining the appropriate quantum of costs. Tariff A is the applicable Tariff for Actions. Under Tariff A, the quantum of costs is determined by:

- (1) The amount involved in the litigation.
- (2) An assessment of whether the matter falls on the basic scale or whether a higher or lower scale is justified.
- (3) The length of the trial.

[8] After determining the appropriate quantum of costs based on the Tariff, the presiding judge may increase or decrease the costs awarded where such an adjustment is deemed appropriate. Rule 77.07(2) provides a non-exhaustive list of factors that may warrant a costs adjustment:

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) a failure to admit something that should have been admitted.

[9] The relevant portion of Rule 77.18 in dealing with the amount involved in this case provides:

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

...

- (c) Where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
 - (i) the complexity of the proceeding, and
 - (ii) the importance of the issues;

[10] In this case, damages were not sought by the Plaintiff. The Plaintiff only sought a declaration that it was the rightful owner of the property in dispute.

While the property obviously has value, the Plaintiff’s claim was in the nature of a substantial non-monetary issue.

[11] In non-monetary claims, it can be difficult to determine the amount involved using a principled and non-arbitrary approach. However, where the non-monetary issue involves use or ownership of property, it may be possible to quantify the amount involved.

[12] In *Duggan v. Nova Scotia (Attorney General)*, [2004] N.S.S.C 144, a Quieting of Titles Action, the court used the assessed value of the land in dispute as a benchmark to determine the amount involved in the litigation but the court ultimately settled on a higher amount involved based on the apparent agreement during settlement discussions on the actual value of the land in the eyes of the parties.

[13] In *Landymore v. Hardy*, [1992] Carswell N.S. 90, a case involving title to property, Saunders, J. (as he then was) used a valuation of the property as a benchmark for determining the amount involved but increased this amount based on the complexity of the proceeding.

[14] In *Poly Corp. Properties Inc. v. Halifax (Regional Municipality)*, [2011] N.S.S.C 241, a case dealing with the appropriate law governing the use of a property, the court held that the amount involved was at least the price the developer paid to purchase the property.

[15] The Plaintiff submits the “amount included” should be \$500,000 based on the proposed sale price of \$538,000 for the two lots that encompass the land

referred to at trial as “The Island”. The two lots as priced, are depicted on a promotional brochure designed by the Plaintiff but each lot also includes part of the mainland property owned by the Plaintiff which was not subject to dispute in this Action. It appears from review of the proposed plan that approximately 15% of each lot is on the mainland leaving 85% of the lot as land on “The Island”.

[16] There was no documentary evidence provided by the Plaintiff on the purchase price of the entire property. There was no documentary evidence provided to support the prospective sale of “The Island” property as an independent valuation. Mr. Robert LeBlanc, one of the three directors of the Plaintiff, testified that the entire property including the mainland portion was purchased for \$257,000. The Plaintiff had not subdivided the land at the time of trial and the Plaintiff had not obtained environmental approval to run a road from the mainland across the marsh to “The Island”.

[17] I am not convinced that a prospective sale price is appropriate for determining the amount involved absent third-party valuation and in circumstances where a sub-division has not been sought or approved. Further, the value of the two lots on “The Island” may depend on whether environmental approval is

obtained for running a road across the marshland and whether they could be re-zoned from provincial lot status to allow for further sub-division. A prospective sale price may be appropriate if there was evidence to support the proposition that the value of the purchased land had risen at the time of trial. In my view in the circumstances of this case, the purchase price is a more appropriate indicator for the amount involved in this litigation.

[18] The court received evidence that the size of the entire land purchased by the Plaintiff was approximately 350 acres, of which “The Island” contained approximately 35 acres. This means that “The Island” represents approximately 10% of the land purchased by the Plaintiff. Ten percent of the entire purchase price amounts to \$25,700. This is within the \$25,000 - \$40,000 range set out in Tariff A of the Rules. In my view it is appropriate to increase the amount involved from this bench mark, based on the importance of the issues to the parties and, more so, the complexity of the proceeding. Title over “The Island” had obvious importance to the parties. For the Plaintiff, it represented an integral part of its development plan. For the Defendants, the land had historical meaning as land passed down to them by their father. But what is really relevant to the amount involved was the complexity of the proceeding. The title chains in this dispute

originated in the 1700s and were not always clear. This necessitated an extensive evidentiary record including multiple documents, survey plans and experts. Some of these costs are absorbed in the disbursements claimed by the Plaintiff and, the length of trial multiplier, but this does not capture the extra effort that Plaintiff's counsel would have needed to expend in order to bring the matter to trial. In my view, the appropriate range should be raised to \$65,001 - \$90,000 resulting in a Basic Cost Scale of \$9,750. A further \$6,000 is added for the three days of trial. I have reviewed the Plaintiff's disbursements and find them to be reasonable.

[19] As a result, I award costs in the amount of \$37,074 which is broken down as follows:

\$9,750	Basic Costs
\$6,000	Three days of trial.
\$20,574	Disbursement
<u> \$750</u>	Costs on Conversion Application
<u>\$37,074</u>	TOTAL

Order accordingly.

J.