

SUPREME COURT OF NOVA SCOTIA

Citation: *HSBC Bank Canada v. Livingstone*, 2018 NSSC 317

Date: 20181212

Docket: Ken No 450072

Registry: Kentville

Between:

HSBC Bank Canada

Plaintiff

v.

**Lucille Comeau Livingstone and
Brian Edward Livingstone**

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: July 17, 2018, in Kentville, Nova Scotia

**Final Written
Submissions
on Costs:** December 5, 2018

Counsel: Rachel Taylor, counsel for the plaintiff HSBC Bank Canada
Brian Livingstone, self-represented defendant
Lucille Comeau Livingstone, defendant not represented, not
defending claim

By the Court:

[1] What *CPR 77* tariff is the more appropriate basis for taxing plaintiff's costs in a foreclosure proceeding in which a defence was filed but dismissed on the plaintiff's motion to enforce a settlement reached before trial?

[2] The plaintiff seeks to tax its fees and disbursements in this foreclosure proceeding based on *Tariff F*, a tariff applicable to proceedings that are discontinued or settled, as opposed to *Tariff E*, a tariff applicable for services in an uncontested proceeding for foreclosure or foreclosure and sale.

[3] The fees claimed are \$13,000.00, less \$1,050.00 awarded in two interim motions in which the plaintiff was successful. The amount determined to be owing to the plaintiff in the foreclosure proceeding was \$471,908.59.

[4] Context for the determination for the appropriate basis requires a brief summary of the history of the proceeding:

1. HSBC started the foreclosure action against Mr. and Mrs. Livingstone on April 11, 2016.

2. On April 27, 2016, Ms. Livingstone made an assignment into bankruptcy and, by a deed dated July 12, 2016, Mr. Livingstone acquired her interest in the subject property from her trustee in bankruptcy.

3. On May 2, 2016, Mr. Livingstone filed a defence. He has been self-represented in this proceeding but has received legal advice.

4. In July 2016, Mr. Livingstone listed the subject property for sale. HSBC agreed to give Mr. Livingstone time to try to sell it himself.

5. In April 2017, HSBC filed a Request for a Date Assignment Conference to obtain trial dates.

6. At the DAC, held June 20, 2017, the proceeding was scheduled for a two-day trial on December 1 and 4, 2017, and timelines for pretrial procedures were set.

7. On October 3, 2017, both parties jointly requested an adjournment of the trial. New trial dates of March 28 and 29, 2018 were set.

8. On January 16, 2018, Mr. Livingstone filed a motion for an injunction, seeking to delay the trial while he continued to try to sell the subject property. The plaintiff contested the motion. The motion was heard by Justice Murphy on February 7, 2018. He dismissed the motion and, on the plaintiff's request, awarded costs of \$300.00.

9. On March 21, 2018, counsel for the plaintiff and the defendant together advised the court that they had settled the matter. At their request, the trial dates of March 28 and 29, 2018 were cancelled.

10. Mr. Livingstone did not consent to the draft Order prepared by the plaintiff to implement the settlement. On June 11, 2018, the plaintiff filed a motion to enforce the settlement reached on March 19, 2018. The motion was heard and determined in favor of the plaintiff on July 17, 2018. The plaintiff asked for and was awarded costs of the motion to enforce the settlement in the amount of \$750.00 payable forthwith. The settlement was that the defendant discontinues his defence, leaving the plaintiff was free to proceed to obtain an Order for Foreclosure and Sale.

11. Between August 3 and September 18, 2018, the plaintiff provided the court with an accounting of its claim and other necessary affidavits in support of an uncontested foreclosure order. The uncontested Order for Foreclosure and Sale was granted on September 18, 2018.

12. On November 2, 2018, the subject property was sold at public auction to the plaintiff.

13. On November 15, 2018, the plaintiff filed a motion to confirm the sale and to tax its costs and disbursements. Affidavits and submissions were received to December 5, 2018.

Analysis

[5] Costs in a proceeding are governed by *CPR 77*. Nothing in these rules limits the discretion of the judge to make any order about costs, except upon acceptance of a formal offer pursuant to *CPR 10.05 (CPR 77.02(2))*. A judge may make any order that the judge is satisfied will do justice between the parties (*CPR 77.02(1)*). Costs of a proceeding usually follow the result (*CPR 77.03(3)*).

[6] Costs are usually assessed in accordance with the appropriate tariff in the *Rules (CPR 77.06(1))*, but the court has discretion to add to or subtract from tariff

costs for reasons that include those enumerated in *CPR 77.07(2)*, or may instead, in the appropriate case, award lump sum costs (*CPR 77.08*).

[7] Finally, *CPR 77.05* provides that *Tariff C* applies to interlocutory motions, unless the judge hearing the motion orders otherwise. In this case, the plaintiff asked for and was awarded costs on dismissal of the defendant's injunction motion in the amount of \$300.00, and on its own successful motion to enforce the defendant's consent to dismissal of his defence (\$750.00).

[8] The plaintiff seeks costs pursuant to *Tariff F*. *Tariff F* reads:

TARIFF F
Tariff of fees allowed for Solicitor's Services Allowable to a Party Entitled to Costs in a Proceeding which is Discontinued or Settled

Costs on settlement are always a matter of negotiation between the parties.

This *Tariff F* is to be applied if the costs cannot be settled and must be assessed by a taxing officer.

The "amount involved" for purposes of this *Tariff F* is the amount of a settlement without including disbursements.

When determining costs in a proceeding, which is settled or discontinued, a taxing officer may assess the amount involved and the costs based on the following

Amount Involved	Amount of Costs
Up to \$25,000	Not more than \$3000
\$25,001 - \$50,000	Not more than \$4000
\$50,001 - \$100,000	Not more than \$5000

Where the proceeding is discontinued or settled and the amount involved exceeds \$100,000.00, costs shall not be more than the total of \$5000.00 plus 2% of the amount in excess of \$100,000.00.

[9] The court is of the view that the more appropriate tariff to apply to the matrix of this case is *Tariff E*. *Tariff E* reads:

TARIFF E
Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs in an Uncontested Proceeding for Foreclosure, or Foreclosure and Sale

1. For all steps in the proceeding up to and including the application for an order for foreclosure or foreclosure and sale the allowable fees shall be determined in accordance with one of the following scales:

Scale 1	Scale 2 (Basic)	Scale 3
\$300	\$900	\$1500

2. For all steps in the proceeding subsequent to the application for an order for foreclosure or foreclosure and sale, the allowable fees shall be determined in accordance with one of the following scales:

Scale 1	Scale 2 (Basic)	Scale 3
\$650	\$850	\$1500

3. Notwithstanding anything contained in this Tariff E there shall be, in addition to the allowable fees otherwise provided by this Tariff E, an allowable fee for all steps taken in obtaining a deficiency judgment in a proceeding for foreclosure or foreclosure and sale and that allowable fee shall be determined in accordance with one of the following scales:

Scale 1	Scale 2 (Basic)	Scale 3
\$300	\$500	\$700

[10] *Tariff F* is not the appropriate tariff, not only because *Tariff E* specifically applies to foreclosure proceedings, but also because this foreclosure proceeding was neither discontinued nor settled. The only “settlement” was in respect of the agreement by the defendant to forego a trial on the merits of his defence. This permitted the plaintiff to proceed to Step 2 – the filing of a motion for an Order for Foreclosure and Sale.

[11] Other than the two motions that were heard and determined, and for which costs were separately requested and awarded pursuant to *Tariff C*, the procedures in this foreclosure proceeding track those specifically set out in *Tariff E* – the tariff intended to apply to foreclosure actions.

[12] In particular, the steps up to and including the application for foreclosure and sale were complicated and deviated from by the two motions for which the plaintiff already sought and has been awarded costs in accordance with *Tariff C*, and by communications between the plaintiff or its counsel and the defendant, which lead the plaintiff to agree to delay the foreclosure proceedings while the defendant tried to sell the subject property himself. These additional communications justify applying Scale 3 of \$1,500.00 rather than the normal or basic Scale 2 of \$900.00.

[13] The steps in this action after the July 17, 2018 foreclosure motion track the normal steps in every such foreclosure proceeding. On that basis, the “Basic” Scale 2 of \$850.00 is the appropriate tariff.

[14] Application of *Tariff E* would authorize an award of costs, in addition to the two interim motion awards, of \$2,350.00.

[15] The plaintiff seeks an additional \$11,950.00 in costs pursuant to *Tariff F*.

[16] I am satisfied that the fee of \$2,350.00 should be increased by \$2,000.00 in accordance with the factors in *CPR 77.07*; specifically, by reason of the conduct of the defendant that affected the speed and expense of the proceeding, as well as the steps he took in an effort to improperly and unnecessarily stall the foreclosure sale.

[17] Costs are taxed in the amount of \$4,350.00 and HST on fees of \$652.50, plus disbursements of \$1,958.27 and HST on disbursements of \$195.37, or \$7,156.14, in addition to the \$1,050.00 previously awarded in respect of the two interim motions.

Warner, J.