

SUPREME COURT OF NOVA SCOTIA

Citation: *Ballam Insurance Services Limited v. Fundy Computer Services Ltd.*,
2022 NSSC 373

Date: 20221221

Docket: No. 356720

Registry: Halifax

Between:

Ballam Insurance Services Limited

Plaintiff

v.

Fundy Computer Services Ltd and Atlantic Datasystems Inc.

Defendants

Judge: The Honourable Justice Gatchalian

Heard: September 29, 2022, in Halifax, Nova Scotia

Costs Submissions: Defendant, October 17, 2022
Plaintiff, October 19, 2022

Counsel: Gavin Giles, K.C., for the Plaintiff
Colin Piercey and Manon Landry, for the Defendants

By the Court:

[1] In a decision dated October 3, 2022, I dismissed the motion of the Defendants, Fundy Computer Services Ltd. and Atlantic Datasystems Inc. (“Fundy”), for an order dismissing this Action for want of prosecution under *Civil Procedure Rule* 82.18, which says that a judge may dismiss a proceeding that is not brought to hearing within a reasonable time: 2022 NSSC 277.

[2] The parties have not been able to agree on the costs of the motion.

[3] Both parties filed written submissions on the issue of costs. Fundy’s primary position is that neither party should be awarded costs, given the divided success of the parties on the motion. Fundy says that, while Fundy’s motion was dismissed, I found that there had been inordinate delay on the part of the Plaintiff, Ballam Insurance Services Limited (“Ballam”), and that the vast majority of the delay since early 2017 was inexcusable. In the alternative, Fundy states that Ballam should be awarded \$750 to \$1000 in costs in the cause in accordance with Tariff C.

[4] Ballam seeks \$3,000 in costs, based on the principle that costs normally follow the event, on its assertion that its actual costs were \$7500, and on its

submission that Tariff Costs will not come close to compensating it for its actual legal expenses.

General Principles

[5] The general rule is that costs follow the event. That rule is not absolute.

[6] In determining costs, the court's overall mandate is to do "justice between the parties": *Armoyan v. Armoyan*, 2013 NSCA 136 at para. 10.

[7] The starting point in determining the amount of costs is the Tariffs of Costs and Fees under Rule 77. Costs on a motion are governed by Tariff C, unless the judge orders otherwise: *Rule 77.05(1)*.

[8] A judge has discretion to raise or lower the tariff costs applying factors such as those listed in Rule 77.07(2). These factors include an assessment of whether the parties' conduct affected the speed or expense of the proceeding.

[9] Furthermore, a judge "may award lump sum costs instead of tariff costs": Rule 77.08. Tariffs are the norm, and there must be a reason to consider a lump sum: *Armoyan, supra* at paras.14-15.

[10] The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to, the party's reasonable fees and expenses: *Armoyan, supra* at para.16.

[11] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: *Armoyan, supra* at para.17.

Application of General Principles

[12] The starting point in determining the costs of this motion is Tariff C. The hearing of the motion lasted more than one hour but slightly less than half a day. The normal range of costs would therefore be between \$750 to \$1000.

[13] Ballam did not file affidavit evidence to establish its fees. Based on the representations of counsel, Tariff C costs would not represent a substantial contribution to Ballam's fees. However, this is but one factor that I may take into account.

[14] Despite Ballam's success on the motion, I found that there had been inordinate delay on the part of Ballam:

... The Action was filed eleven years ago. It concerns events that happened eleven to twelve years ago. Discovery examinations were conducted over eight years ago. Since that time, Ballam has done little to advance the matter. Half of Ballam's

discovery undertakings remain outstanding and Ballam has still not produced an expert report.

Para.6

[15] I also found that the vast majority of the almost six-year delay since early 2017 was inexcusable: para.10.

[16] Moreover, I ordered Ballam to provide the answers to the outstanding undertakings within two months of the date of my decision, and I ordered Ballam to file within two weeks of my decision a further amended Notice of Action adding J.F.B. Holdings Limited as a party, to which all rights and claims of Ballam had been assigned in 2017: paras. 20 and 21.

[17] In my view, it was Ballam's inordinate delay in moving the matter forward that resulted in Fundy filing the motion. In these circumstances, it is my conclusion that it would not do justice between the parties to award any costs to Ballam.

[18] The parties shall bear their own costs of the motion.

Gatchalian, J.