SUPREME COURT OF NOVA SCOTIA

Citation: *The Roy Building Limited v. Install-A-Flor Limited*, 2024 NSSC 174

Date: 20240617
Docket: 525196
Registry: Halifax

Between:

The Roy Building Limited, a body corporate

Applicant

v.

Install-A-Flor Limited, carrying on business as Floors Plus Commercial

Respondent

COSTS DECISION

Judge:	The Honourable Justice James L. Chipman
Written Submissions:	June 7, 2024
Counsel:	W. Harry Thurlow, Michael Gallagher and Sarah Dobson, for the Applicant William L. Mahody, K.C. and Shane McCracken, for the Respondent

By the Court:

INTRODUCTION AND BACKGROUND

[1] By Notice of Application in Court filed July 7, 2023 the Applicant, The Roy Building Limited (The Roy) sought to have an arbitrator's award set aside. Three affidavits (including one with extensive exhibits) were filed. I heard the matter on April 25, 2024 and rendered my decision – *The Roy Building Limited v. Install-A-Flor Limited*, 2024 NSSC 139 – on May 9, 2024. I dismissed the Application, concluding as follows at para. 65:

> [65] In all of the circumstances, I conclude that there was no procedural unfairness inflicted on either party by the arbitrator. The Roy was not denied the opportunity to present its case. There is absolutely no basis to invoke the statutory provisions for set aside. Accordingly, the Application is dismissed with costs to Floors Plus. If the parties cannot agree on costs I will receive written submissions within 30 days.

[2] The parties could not agree on costs and on June 7, 2024 I received briefs, authorities and an affidavit sworn and filed on June 7, 2024 by Mr. Mahody.

PARTIES POSITIONS

[3] Install-A-Flor Limited (Floors Plus) incurred $36,043.88 (inclusive of HST) on the Application. Months before the Application, Floors Plus offered to settle on a without costs basis. The Roy responded by rejecting the offer. Floors Plus now seeks approximately 60% of their outlay, i.e., $21,626.32.

[4] The Roy submits that the appropriate costs range should be in the realm of $3,000.00 plus disbursements for an all-inclusive figure of approximately $5,000.00.

ISSUE

[5] The sole issue to be determined is what costs award would do justice between the parties and when should they be payable by the Roy?

GUIDING CASES

[6] The parties submitted these costs decisions for the Court's consideration:

1. *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861

2. *Popack et al. v. Lipszyc et al.*, 2018 ONCA 635

3. *Armoyan v. Armoyan*, 2013 NSCA 136

4. *Mattamy (Downsview) Limited v. KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013

5. *Medjuck v. Medjuck*, 2023 NSSC 345

6. *Campbell v. Toronto Standard Condominium Corp. No. 2600*, 2022 ONSC 3870

7. *Aroma Franchise Company Inc. v. Aroma Espresso Bar Canada Inc.*, 2022 ONSC 6188

8. *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2021 ONSC 2575

9. *Gandhi v. Liao*, 2021 NSSC 247

10. *Goulden v. Fownes*, 2021 NSSC 301

11. *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2018 ONSC 4926

12. *Nasjjec v. Nuyork*, 2015 ONSC 4978

13. *Sharecare Homes Inc. v. Cormier*, 2010 NSSC 252

14. *The Armour Group Limited v. Halifax Regional Municipality*, 2008 NSSC 123

15. *Bevis and Karela v. CTV Inc., Burns and Kelly*, 2004 NSSC 209

ANALYSIS AND DISPOSITION

[7] The Roy brought the Application in Court seeking the relatively rare remedy of setting aside a commercial arbitration award. Had The Roy's Application been

successful, Floors Plus would have been ordered to repay $810,577.70 to The Roy forthwith.

[8] The Civil Procedure Rules govern costs awards. There is a broad, general discretion under Rule 77.02 to "make any order about costs as the judge is satisfied will do justice between the parties".

[9] Although this Court has a broad discretion regarding costs, the Rules and Tariffs also set parameters. Rule 77.06(2) provides:

> Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

[10] Notwithstanding the above, The Roy argues that the Application should be considered to fall under the far less generous Tariff C. The Roy notes that the explanatory note found within this Tariff says: "such Applications might include, but are not limited to, successful applications for summary judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as *certiorari* or a permanent injunction". The Roy goes on to submit that the Application was similar to a judicial review hearing, or a statutory appeal. They note that even though it was an Application in Court as opposed to an Application in Chambers, the matter was heard in Special Chambers and did not resemble a trial.

[11] Our Court of Appeal in *Armoyan*, made the following observations about Tariff A and C, which I find to be apposite:

> [17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.
>
> [18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved

> everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity -- e.g. to define an artificial "amount involved" as Justice Freeman noted in *Williamson* -- that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law.

[12] In all of the circumstances I conclude that the application of either Tariff A or Tariff C will not do justice between the parties.

[13] In the final analysis, I conclude that this Application significantly resembled an appeal. Certain errors (both procedural and substantive) were alleged to be made by the decision maker. This required the Court and the parties to revisit the entire arbitration record (exhibits to the affidavits). The time spent in Court for the hearing of the Application, including the Motion for Directions, was also proximate to what would be expected in an appeal process.

[14] Tariff B requires that “On an appeal, the costs allowed shall be 40% of the costs awarded at trial excluding the ‘length of trial’ component unless a different amount is set by the Nova Scotia Court of Appeal”.

[15] Having regard to the Tariffs, submissions, offer, Mr. Mahody’s affidavit and in order to do justice between the parties, I am of the view that a lump sum award of $14,000.00 is appropriate in the circumstances. This figure represents nearly 40% of the costs incurred on the successful resistance to the Application. The Roy shall forthwith pay $14,000.00 to Floors Plus.

Chipman, J.