SUPREME COURT OF NOVA SCOTIA

Citation: *Harriss v. Keating Construction Company*, 2014 NSSC 135

Date: 20140410
Docket: Syd. No. 337036
Registry: Sydney

Between:

Patricia Harriss and Kevin Sutherland

Plaintiffs

v.

Keating Construction Company Limited and Allan R. Keating

Defendants

DECISION ON COSTS

Judge:	The Honourable Justice Frank Edwards
Heard:	February 17, 18, 19, 20, 21, 2014, in Sydney, Nova Scotia
Written Decision	April 10, 2014
Counsel:	Robert Pineo, Jeremy P. Smith and Alison Morgan, for the Plaintiffs Hugh R. McLeod, for the Defendants

By the Court:

[1] I rendered a Decision in this matter on March 6, 2014 followed by a Supplementary Decision on March 21, 2014. I invited Counsel to file written submissions on costs and they have done so.

[2] The relevant Civil Procedure Rules regarding Costs are as follows:

> 77.02 - General discretion (party and party costs)
>
> (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 – Settlement.
>
> (…)
>
> 77.06 - Assessment of costs under tariff at end of proceeding
>
> (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.
>
> (2) Party and party costs of an application 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.
>
> (3) Party and party costs of a proceeding for judicial review or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

77.07 - Increasing or decreasing tariff amount

(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(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.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

77.08 - Lump sum amount instead of tariff

A judge may award lump sum costs instead of tariff costs.

77.10 - Disbursements included in award

> (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.
>
> (2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

[3] The governing principle on the recovery of costs is that they should represent "…a substantial contribution towards the parties' reasonable expenses…" [**Landymore** v. **Hardy** (1992) 112 N.S.R. (2) 410 (N.S.S.C.)]. Here the Plaintiffs' gross recovery was $37,319.93 less $22,500.00 for taxes left payable under the contract. Their net recovery was therefore $14,819.93. The Plaintiffs had sought to recover $119,776.28. The Plaintiffs successfully defended against a Counterclaim by the Defendants for $71,848.97. I dismissed the Counterclaim with costs to the Plaintiffs.

[4] I dismissed the Plaintiffs' claim against the Defendant personally without costs to the Defendants. Contrary to the Defendants' submission, it is clear that the Plaintiffs' suit against Keating personally was solely because of the collection agency issue. At no point was there ever any indication that Keating personally would be liable for the breach of contract.

[5] As a gauge of the Plaintiffs' success in this lawsuit, the numbers in isolation are deceptive. It would be wrong to say they recovered only $14,000.00 on a

$120,000.00 claim, and costs should be assessed on that basis. That would ignore that a major component of this lawsuit (and the trial in particular) dealt with whether or not there was a fixed price contract. The Plaintiffs were successful on that issue.

[6] That the Defendants' chose to contest this lawsuit by denying the existence of a fixed price contract is almost beyond belief. The Defendants' own document dated November 13, 2009 virtually disproved their contention of a November 9, 2009 oral contract. Mr. Keating's bland dismissal of the November 13 contract as "an unsigned piece of paper with words on it" is indicative of the unreality of the Defendants' position.

[7] The Defendants' Counterclaim for over $70,000.00 left the Plaintiffs with no choice but to go to Court. As it turned out, that claim was totally unjustified. It was all but eliminated by the Defendants' own expert. Not until he was on the witness stand did Mr. Keating indicate he would accept his expert's assessment. The Defendants did not amend or withdraw the counterclaim even after they knew (over a year prior to trial) that their expert would contradict it.

[8] The whole counterclaim issue is aggravated by the fact that Mr. Keating sent it to the collection agency. He did this **before** he sent the invoice to the Plaintiffs

when he knew the Plaintiffs would contest it. He did not withdraw the invoice from the collection agency while the litigation proceeded.

[9] Although I dismissed the Plaintiffs' collection agency claim, I do not fault them for making it. It was wrong for Keating to do what he did. For that reason, I dismissed the claim without costs to the Defendants. But it is an aspect of the Defendants' conduct that is also relevant to the costs issue regarding the overall case. It is consistent with my assessment that it was the Defendants who were responsible for the fact that this case went the distance.

[10] Defendants' Counsel argues that the case should never have come to trial. I agree but he misplaces the blame. In his view, the case should have settled but the Plaintiffs refused to attend a settlement conference. This is one of the rare cases where I believe a settlement conference would probably have been futile. I have already referenced Mr. Keating's cavalier and dismissive attitude. I am sure he would have settled for nothing less than the Plaintiffs' complete capitulation. If the Plaintiffs doubted that Keating would bargain in good faith, I have seen nothing to contradict that.

[11] Defendants' Counsel makes much of the fact that I dismissed the Plaintiffs' allegation that Keating had made a fraudulent claim. I said it was unjustified and

inflated and possibly due to managerial incompetence. Counsel says I found that "Keating did not make a fraudulent claim." My exact words were: "I am not convinced that Keating made a fraudulent claim."

[12] In any event, in that context, I am not prepared to fault the Plaintiffs for pursuing that aspect of their claim. It was a reasonable position for the Plaintiffs to take in light of the facts as I have found them.

[13] I have already penalized the Plaintiffs for what I determined to be their (in particular, Sutherland's) shortcomings in this case. But Keating left them little choice but to do battle on almost every front; whether there was a contract, the poor quality of work, the inflated counterclaim, the deplorable collection agency referral. Keating should therefore expect to shoulder a major portion of the Plaintiffs' legal costs.

[14] The Plaintiffs say they have incurred legal fees of $74,322.50, plus disbursements. At trial, there were three lawyers present at the Plaintiffs' table. Senior counsel tracked just two hours per day as he was present in a mentoring role. Still, that attendance accounted for over $3,000.00 of the above total. That charge is the Plaintiffs' responsibility. The submitted account also contains some charges for driving to and from Sydney (e.g. for discovery February 5 – 7, 2012

and by Jeremy P. Smith for driving to and from Sydney for trial). I had earlier indicated that the Plaintiffs would be responsible for any additional expense incurred because they retained non-local counsel.

[15] As noted, the Plaintiffs had to fight this case on several different fronts. Some of the legal issues involved were not straight forward. The time spent on aspects of the case where the Plaintiffs were not ultimately successful was necessary and justified. The unsuccessful claims were not frivolous. There was an evidentiary basis for each claim made though in some (e.g. the allegation of Keating's fraudulent claim), the evidence fell just short of the mark.

[16] For purposes of assessing a "substantial contribution," I am going to deem the Plaintiffs' legal fees to be at least $65,000.00 plus disbursements.

[17] In their post-trial brief on costs, Plaintiffs' Counsel put forward the following to justify an award of costs above the basic tariff amounts. I am in complete agreement with their submissions which I now adopt.

[18] It is the Defendants' position that this case is one which warrants costs above the basic tariff amounts. As noted in **Lienaux et al v Toronto-Dominion Bank** (1997), 159 NSR (2d) 305 (NSCA) at ¶34, a party's conduct both before and

during the litigation process, as well as the degree of success achieved, are relevant to the exercise of the Court's discretion as to costs.

[19] As noted, I found at paragraph 111 that there is no question that the Defendants' actions were "deplorable, high-handed, and arbitrary" and that this case came close to the exceptional circumstances in which punitive damages would be awarded. The Defendants not only, as I found at paragraph 28, bid lower than his own estimate in order to get the job at issue, but fully anticipated that, when the agreed contract funds inevitably ran out, he would be in a strong position to pressure the Plaintiffs to come up with more money. He would know that the Plaintiffs would be anxious at that point and highly dependent on him to complete the job. As I found at paragraph 29, Keating knew that if the Plaintiffs refused to put in more than the agreed-to amounts of money, he would do exactly what he did; walk away.

[20] I found at paragraph 30 that Keating did not, as he claimed, form an agreement with the Plaintiffs at their rented cottage on November 9, 2009 to switch to a cost-plus contract.

[21] In **Cuvelier v Bank of Montreal,** 2002 NSSC 284**,** the successful plaintiffs submitted that costs should be substantially increased above the usual party and

party costs. Applying the highest scale under Tariff A at the time would have given costs of $4,725.00. The Court noted, however, that it would cost the plaintiffs over $21,000 in fees to recover $29,150. The court said:

> [8] …In my opinion, the reasonable cost to a successful party to obtain recovery of a just claim is a relevant matter. Here it appears that it will cost the plaintiffs $21,663.48 in legal fees to recover $29,150.00. **This may appear to be a disproportionate amount of costs in view of the relatively moderate recovery. However, it was necessary for the plaintiffs to expend this amount in order for them to recover the money they had lost through no fault of their own, which in their circumstances was not an insignificant amount**. [emphasis added]
>
> [9] I have concluded, therefore, that it is appropriate to go outside the tariffs in determining what is a reasonable amount for the defendant to contribute to the plaintiffs' costs. In my view the plaintiff should contribute $10,000.00 toward the plaintiffs' costs plus disbursements. Counsel have agreed on disbursements of $1,213.16.

[22] In **Founders Square Ltd v Nova Scotia (Attorney General),** (2000) 186 NSR (2d) 189, (NSSC**)**, the Province of Nova Scotia successfully defended claims of Founders Square Limited in contract and misrepresentation. In assessing the award of costs, the Court said:

> In setting a lump sum, it would be appropriate to take into account the amount of fees to be billed to the successful party, but such could not be deternative [sic]. "An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary." (Williamson, para. 26) …[**T]he Tariff should not be departed from**

> **lightly, but departure is required when it is manifest that the Tariff will not serve the underlying principle**. Further, it is not appropriate to exercise the discretion merely by ascertaining actual costs and applying a percentage. As was said by Freeman, J.A., the discretion necessitates an objective assessment of a reasonable amount [emphasis added].

[23] Courts in Nova Scotia have repeatedly endorsed the idea that it is unfair for a Plaintiff to lose the lion's share of an award of damages to legal fees. In **Burns v Sobeys Group Inc,** 2008 NSSC 102 **[*"Burns"*],** Warner J. noted specifically that "It would be entirely unfair for Ms. Burns to lose most of the damage award by reason of her obligation to pay legal fees. It would be a pyrrhic victory." The Court in **Burns** concluded that 36% did not represent a substantial contribution to Ms. Burns' legal fees of $30,000, and awarded a lump sum representing over 50%. It is noteworthy that this award was made in the absence of a finding of any conduct on the part of the defendants deserving of sanction by the court.

[24] In **Boutcher v Clearwater Seafoods Ltd. Partnership**, 2010 NSSC 64, the court furthered this idea, stating:

> 29 To allow costs that would be significantly less than their actual legal costs would result in the plaintiffs using a significant part of their damage awards to pay their lawyer. In the case of **Burns v. Sobeys Group Inc.,** [2008] N.S.J. No. 117, Warner J. of this court made a lump sum award in addition to the tariff amount in circumstances where the tariff amount would not adequately compensate the plaintiff for his actual legal costs. In **Morash v. Burke**, [2007] N.S.J. No. 95,

> Wright J. of this court did the same thing by increasing the tariff amount of costs there from $12,700.00 to $22,500.00.

[25] As noted, I have found that in order to pursue this claim and defend against the counterclaim, the Plaintiffs' incurred legal fees of at least $65,000.00 plus disbursements.

[26] Legal fees incurred by counsel for the Plaintiffs were unforeseeably raised by an unfortunate adjournment of the trial scheduled for the week of May 6, 2013. On May 2, 2013, when Plaintiffs' counsel had already prepared for trial, an adjournment was requested by the Defendants due to a family illness. Given the circumstances, the request was consented to by the Plaintiffs. The trial was rescheduled for February of 2014, which resulted in unavoidable duplication of effort as Plaintiff's counsel had to again prepare for trial, including witness preparation and document reviews.

[27] This adjournment was not the fault of either party. This explanation was put forward to explain why the legal fees are higher than they otherwise would have been.

[28] Conversely, all of the work and time put into the collection agency issue was required because of the Defendants' "deplorable, high-handed, and arbitrary" actions. I ordered that the Defendants take action to remove the collection agency

claim. The Plaintiffs therefore achieved some beneficial though non-monetary success on this issue.

[29] Tariff A under Nova Scotia Civil Procedure Rule 77, with an Amount Involved of $25,000-$40,000, results in a Scale 2 (basic) amount of $6,250 and a Scale 3 (+25%) of $7,813.00. I am using the gross award ($37,319.93) as the amount involved because it is the actual monetary entitlement the Plaintiffs were able to prove. Given the foregoing, the latter should be applied in the case at bar and that $7,813.00 should be awarded to the Plaintiffs in relation to the Main Action. I rounded that figure up slightly to $8,000.00.

Counterclaim:

[30] The Defendants put forward a Counterclaim for $71,848.07. At paragraph 29, I noted that this figure was "inflated". At paragraph 21, I noted that Mr. Leonard, the Defendants' own expert, drastically reduced this amount.

[31] Mr. Leonard's "third binder" (Trial Exhibit 3C) was dated January 4, 2013 (Tab 10). It is reasonable to infer that the Defendants were aware since at least that time that their own expert had reduced their claim to at most $5,947.00 (Trial Exhibit 3C, Tab 10, Point 12) plus the taxes that would have been owing on $155,947.00. Mr. Keating testified at trial that despite not agreeing with Mr.

Leonard, he would have to accept this amount. However, despite this knowledge, at no point before or during the trial did the Defendants reduce or discontinue the counterclaim, and likewise they did not remove or even reduce the claim for the full amount of their counterclaim from the collection agency.

[32] Defendants' Counsel argued that the Plaintiffs were also aware of Leonard's report well in advance of trial. He argues that they should have known that Keating would not be able to contradict his own expert. I reject that argument. The fact remains that Keating clung to the original counterclaim amount until he was on the witness stand.

[33] Civil Procedure Rule 77.07(h) lists a failure to admit something that should have been admitted as one factor to be taken into account when deciding whether or not to increase a costs award beyond the Tariff amounts. Rule 77.07 also lists the following as factors:

> (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;

[34] Putting forward the counterclaim for $71,848.07 with the knowledge that even their own expert had drastically reduced this "inflated" amount constitutes an improper step in the proceeding, which required the Plaintiffs (Defendants by Counterclaim) to work to meet a much greater counterclaim than should have been put forward.

[35] Furthermore, the Defendants' "deplorable, high-handed, and arbitrary" conduct in sending the claim to the collection agency was based on this inflated counterclaim, which the Defendants knew was disputed by the Plaintiffs.

[36] The evidence shows that the collection agency claim was made well before litigation in this matter began. Undoubtedly, this was a significant factor in the Plaintiffs' decision to bring this matter before the Court.

[37] Given the caselaw cited and the Civil Procedure Rules, as well as the expenses associated with this case, I am satisfied that costs should be awarded above the Tariff amounts.

[38] An Amount Involved of $65,001-$90,000 would result in a basic amount of $9,750.00 (Scale 2 (Basic)) or a Scale 3 (+25%) amount of $12,188.00. Scale 3 represents the minimum of what should be awarded to the Plaintiffs to respond to this inflated counterclaim which I wholly dismissed, and which was founded on

deplorable, high-handed, and arbitrary conduct. As such, I shall exercise the discretion provided for by Civil Procedure Rules 77.02 and 77.08 to award a lump sum to the Plaintiffs which would represent a "substantial contribution" (**Landymore v Hardy**, supra) towards the actual legal expenses in this matter.

[39] I am satisfied that a lump sum of $20,000.00 would represent a substantial contribution towards actual legal expenses in this matter.

Length of Trial:

[40] Under Tariff A in Civil Procedure Rule 77:

> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

[41] This matter took 4.5 days of trial, including both the Main Action and Counterclaim. As such, I am satisfied that $9,000.00 should be awarded to the Plaintiffs under Tariff A in addition to the amounts requested *supra*.

Disbursements:

[42] The Affidavit of Alison A. Morgan shows that $19,790.13 has been incurred in this matter by way of disbursements. However, this amount includes

copying/printing fees of $2,558.60. Given recent guidance from the Supreme Court of Nova Scotia in **Bain v Nova Scotia (Attorney General),** 2013 NSSC 82, the Plaintiffs claim half this amount: $1,279.30.

[43] As per paragraph 114 of my decision, expenses related to travel to and from Sydney, as well as expenses related to accommodations and meals have been removed.

[44] An agent fee (expert) for site visit, appraisal and report for $12,092.76 is excessive. I will allow $8,000.00. There is no explanation for Travel (Mi., Bridge, Taxi, Parking $895.72; Accommodations $510.55; Meals and Other $410.51.) I will therefore allow disbursements of $10,710.46 ($16,610.00 - $5,909.54).

Conclusion:

[45] I have carefully weighed the Plaintiffs' submissions as well as those of the Defendants. I agree with those of the Plaintiff. I have rounded up the Tariff figure on the Main Action from $7,813.00 to $8,000.00. I have allowed the proposed lump sum on the counterclaim of $20,000.00. By my record, the trial lasted 4.5 days, not 5 days. I have therefore adjusted the Length of Trial figure from $10,000.00 to $9,000.00.

Summary:

Main Action	$ 8,000.00
Counterclaim	$20,000.00
Length of Trial	$ 9,000.00
Total Costs	$37,000.00
Disbursements	$10,710.46
	$47,710.46

Edwards, J.

Sydney, Nova Scotiaq