SUPREME COURT OF NOVA SCOTIA

Citation: *HarbourEdge Mortgage Investment Corporation v. Can*Sport Incorporated*, 2024 NSSC 356

Date: 20241120
Docket: Hfx No. 467712
Registry: Halifax

Between:

HarbourEdge Mortgage Investment Corporation

Plaintiff

v.

Can*Sport Incorporated and Lee Adamski

Defendants

COSTS DECISION

Judge: The Honourable Justice Ann E. Smith

Counsel: Sara L. Scott and Adam R. Downie, for the Plaintiff
Chris Robinson, for the Defendants

By the Court:

Introduction

[1] This Court rendered a decision on April 9, 2024 which was totally in favour of HarbourEdge Mortgage Investment Corporation ("HarbourEdge"). The decision is reported at 2024 NSSC 98. In that decision the Court dismissed the Defendants' counterclaim against HarbourEdge.

[2] In that counterclaim, Can*Sport Incorporated ("Can*Sport") and Lee Adamski ("Adamski") claimed close to $5 million from HarbourEdge for loss of profit. The exact amount, as clarified by Mr. Robinson, counsel for Can*Sport and Adamski, in a brief to the Court dated June 23, 2023 was $4,792,114. Additional damages were also sought.

[3] The parties were unable to agree on costs. The Court received written submissions from each.

Background

[4] To put this costs decision in context, the Court refers to the opening paragraphs of its decision following trial:

[1] This action concerns a claim by Can*Sport and Lee Adamski against HarbourEdge, the company that loaned them approximately two million dollars. This loan was to provide initial funding for the construction of a complex to house a hockey school, tenants and a multi-pad hockey arena in Bedford, Nova Scotia. I will refer to this as the "Project" or the "Complex".

[2] The building was never built; there were no tenants, no school, no new ice rinks and Can*Sport did not repay the loan. HarbourEdge wants its money back.

[3] Can*Sport and Lee Adamski say they owe nothing to HarbourEdge and claim close to five million dollars for breach of contract, loss of profits and other damages as though the Complex was up and running and turning a profit.

…

[5] Can*Sport and Adamski claim that HarbourEdge was solely responsible for its difficulties in completing the Project. They say that HarbourEdge acted in bad faith throughout the contractual arrangement and, in particular, at crucial junctures where it failed in its duties to them.

[6] HarbourEdge responds that the difficulties in completing the Project are the direct fault of Adamski including delay and cost overruns.

[7] Part of the contractual arrangement was that Can*Sport would be advanced funds in three swatches, or "facilities", but there were preconditions which had to be met before each swatch would be advanced. The parties disagree as to whether those preconditions were met, and whether the preconditions for access to the third swatch of funds were waived by HarbourEdge. That third swatch, "Facility 3" was for funding the hard costs of construction in an amount close to eight million dollars.

[8] All of this started in the fall of 2014 when Can*Sport made a proposal for mortgage funding to HarbourEdge. HarbourEdge thought that the proposal looked interesting and eventually the parties entered into the Commitment on November 24, 2014. The term of the Commitment was two years, ending on December 31, 2016, or January 7, 2017 (nothing turns on this difference).

[9] By August 2016, with only four months or so left in the term of the Commitment, no construction had started. One of the initial contractors, Harbour Construction, which had been hired to do site work (breaking and clearing rock) had submitted another invoice for work it had done. That invoice was for an amount which exceeded the budget for site work provided by Can*Sport and was part of the Commitment.

[10] HarbourEdge was concerned. It took the position that there were cost overruns and that the Project was not on track. Around the same time HarbourEdge learned that a proposed tenant of the yet to be built building had pulled out of the Project. This tenant had been a part of Can*Sport's initial proposal for mortgage financing.

> [11] Shortly thereafter, in early November 2016, HarbourEdge learned that Harbour Construction had filed a lien against the property for non-payment of invoices totalling over $400,000. Lee Adamski had not advised that there were such invoices.
>
> [12] Later in November 2016, HarbourEdge advised Lee Adamski that it would not advance more money to Can*Sport for the Project. Can*Sport could not find alternate financing. The Project was over.
>
> [13] In March 2017 HarbourEdge demanded payment from Can*Sport and Lee Adamski for 100% of the loan balance, plus interest, fees and expenses. The demands included a Notice of Intention to Enforce Security under the Bankruptcy and Insolvency Act, R.S.C. 1985, c, c. B-3. At the date of demand, the amount owing under the loan was $2,478,132.12. Interest has been accumulating on that amount at a rate of 12.00 % per annum.
>
> [14] In June 2021 HarbourEdge successfully moved before this Court to have a receiver appointed over the assets of Can*Sport, including the property. A receivership order was issued appointing MNP Ltd. ("MNP") as receiver of all of the assets and properties of Can*Sport. The recovery under the receivership order has not yet been determined, including any amount that could still be owing by Can*Sport to HarbourEdge.
>
> [15] This trial concerned only whether HarbourEdge breached the Commitment with Can*Sport and damages that flow from such breach.

The Law - The *Civil Procedure Rules*

[5] The starting point in determining the amount of costs is the Tariffs of costs and fees determined under the *Costs and Fees Act*.

[6] The Court has discretion to raise or lower the tariff costs applying factors such as those listed in Rule 77.02:

> 77.07 (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 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.

[7] Furthermore, a judge "may award lump sum costs instead of tariff costs": Rule 77.08. However, costs are the norm and there must be a reason to depart from them and award a lump sum: *Armoyan v. Armoyan*, 2013 NSCA 1136 at paras 14-15.

[8] Wood, J. (as he then was) in *Homburg v. Stichting Autoriteit Financiel Markten*, 2017 NSSC 52 stated that the "substantial contribution principle underlies the tariffs but does not supersede them. Most cost matters should be disposed of based upon an application of the tariffs with the built-in discretion to adjust amounts for the factors identified in Rule 77" (para 9). Justice Wood also noted that "[T]he mere fact that the party's actual legal account is significantly more than the tariff does not automatically justify a departure".

[9] Another basic principle is that a costs award should do justice between the parties (Rule 77.02). That means that a judge has a discretion when addressing costs.

[10] Tariff A which is the tariff which applies here following a decision in a proceeding. The length of a trial is an additional factor to be included in calculating costs. The trial judge determines the number of days of trial.

The Position of the Parties

HarbourEdge

[11] HarbourEdge submits that it is entitled to costs pursuant to Rule 77.

[12] HarbourEdge says that the Court should apply Tariff A costs and that the "amount involved" is the amount Can*Sport and Adamski claimed against it, i.e., $4,986,614.

[13] Since that amount exceeds $1 million, counsels says that the basic scale should be applied. The basic scale is calculated by multiplying $4,986,614 by 6.5%. The calculation of 6.5% of $4,966,614.00 is equal to $322,829.91. Counsel for HarbourEdge says that HarbourEdge is also entitled to $2,000 per each of the seven days of this trial, pursuant to Tariff A, which amounts to $14,000.

[14] HarbourEdge says that the breadth of legal issues being claimed was significant, with fairly complex legal research required. Counsel says that that the primary legal question for trial was whether HarbourEdge acted in breach of contract and that that question involved fairly complicated principles of contractual interpretation, including: (i) waiver of terms; (ii) contractual renewal; (iii) notice and (iv) allegations of bad faith.

[15] HarbourEdge says that the counterclaim was highly important to its business, both with respect to the allegations of how it operated with its borrowers and from a reputational perspective. Counsel for HarbourEdge points out that the allegations advanced by Can*Sport against HarbourEdge were based on bad faith and were serious allegations for any business, but particularly for a lender. HarbourEdge considered it imperative to defend the counterclaim and the serious allegations made against it.

[16] HarbourEdge claims $336,829.91 in costs from Can*Sport, payable forthwith.

Can*Sport and Lee Adamski

[17] Counsel for Can*Sport and Lee Adamski says that HarbourEdge did not provide the Court with any evidence with respect to its actual legal fees. Therefore, counsel says that there is no ability for the Court to determine whether an award of

$336,829.91 represents a substantial contribution to HarbourEdge's reasonable fees. Counsel refers to *Armoyan* where the Court of Appeal stated:

> 16 The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In Williamson, while discussing the 1989 tariffs, Justice Feeman adopted Justice Saunders' statement from *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (N.S.T.D.):
>
> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
> >
> > > …the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity.

[18] Counsel for HarbourEdge says since there is no evidence before the Court as to HarbourEdge's actual legal fees, a costs award in the amount it claims, $336,829.91, could represent full indemnification of its legal fees, or perhaps constitute a profit, which would be improper. He says that it is simply unknown and before Can*Sport can reasonably address whether the cost award sought by HarbourEdge would do "justice between the parties", HarbourEdge's "actual legal fees must be disclosed, otherwise an award based on Tariff A may well work a serious injustice".

[19] The Court received no further costs submissions from HarbourEdge or from Can*Sport and Lee Adamski.

Analysis

[20] There is no obligation for a successful party to provide evidence of its actual legal fees.

[21] As noted by Wood, J. (as he then was) in *Homburg*, the "substantial contribution principle underlies the tariffs but does not supersede them. Most cost matters should be disposed of based upon an application of the tariffs with the built-in discretion to adjust amounts for the factors identified in Rule 77" (para 9).

[22] There is no reason why this Court should not first consider the "amount involved" in accordance with Tariff A, Scale 1.

The Amount Involved

[23] The first step in the process is determining the "amount involved". The calculation flows from that determination.

[24] In its pre-trial brief, Can*Sport and Lee Adamski summarized their claim for damages as follows:

(a) $27,500 (alternate financing)

(b) $167,000 (lender's fees)

(c) $4,792,114 (lost net income)

(d) Aggravated and punitive damages (no amount specified)

[25] HarbourEdge says that it successfully answered to a claim of at least $4,986,614 and that that is the "amount involved" for the calculation of costs under Tariff A.

[26] The Court notes that the amount loaned by HarbourEdge to Can*Sport was in the range of $2,000,000.

[27] The Court agrees that HarbourEdge was faced with a claim that it owed Can*Sport close to $5 million.

[28] As noted in the Court's decision following the trial, in March 2017 HarbourEdge demanded payment from Lee Adamski and Can*Sport for 100% of the outstanding loan balance, plus interest, fees and expenses. The demands included a Notice of Intention to Enforce Security under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. At the date of that demand, the amount owing under the loan was $2,478,132.12. Interest then accumulated on that amount at a rate of 12.00% per annum.

[29] In June 2021 HarbourEdge successfully moved before the Nova Scotia Supreme Court to have a receiver appointed over the assets of Can*Sport, including the property purchased by Can*Sport with funds loaned by HarbourEdge. The

recovery under the receivership order has not yet been determined to the knowledge of this Court, including any amount that could still be owing by Can*Sport to HarbourEdge.

[30] The Court observes that very little of the trial was devoted to Can*Sport's damages claim. This is perhaps reflected in the Court's relatively brief discussion of damages claimed by Can*Sport and Lee Adamski in its decision following trial.

[31] The Court noted that Can*Sport's calculations of its lost profits were based upon the unrealistic start date of January 17, 2017, which was not supported by the evidence. Can*Sport provided the Court with a series of estimates and profit projections that it suggested Can*Sport would have received, had the Project been completed.

[32] Can*Sport led no expert evidence. It offered no evidence that it attempted to mitigate its losses.

[33] While the Court appreciates that on paper Can*Sport's claim against HarbourEdge was for close to $5 million, the Court finds that there was no real "air of reality" to the magnitude of that claim, to borrow a phrase from the criminal law context.

[34] The Court finds that what was really at stake was the amount HarbourEdge advanced to Can*Sport. The risk HarbourEdge faced was that the Court would find that it had breached its contract with Can*Sport and that Can*Sport was not required to pay back its loan to HarbourEdge as a result. Also at stake was a possible finding that HarbourEdge had acted in bad faith, including when it refused to make further advances to Can*Sport. Aggravated and punitive damages in that regard were sought.

[35] There is a cost to a lender such as HarbourEdge in facing and defending itself against an allegation that it acted in bad faith. The bad faith aspect of Can*Sport's claim was greatly emphasized by its counsel in his cross-examinations of affiants and in his closing arguments to the Court.

[36] The Court accepts that there were fairly complex legal issues which required significant effort on the part of counsel to address.

[37] I find it appropriate to set $2.5 million as the "amount involved". Tariff A, Scale 1, therefore results in a costs award of $162,500.00. Additional costs of $2,000/day of trial results in costs of $14,000. That amounts to total costs of $176,500. I exercise my discretion to round up that number to $200,000 as a result of Can*Sport's meritless claims of bad faith on the part HarbourEdge and its claims

for punitive and aggravated damages arising therefrom. HarbourEdge was required to respond to those claims and it successfully did so.

Conclusion

[38] HarbourEdge is awarded costs against Can*Sport and Lee Adamski in the amount of $200,000, inclusive of disbursements. These costs are payable within thirty (30) calendar days of this decision.

Smith, J.