

Federal Court



Cour fédérale

Date: 20151221

Docket: T-456-15

Citation: 2015 FC 1390

Ottawa, Ontario, December 21, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE NATIONAL BANK OF CANADA

Plaintiff

and

DONALD BURNS ROGERS,
JANICE MARILYN ROGERS, AND
THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP "KICK AFT"

Defendants

and

STEVEN CRATE

Third Party

AMENDED DIRECTIONS RE: COSTS
(RULE 397(2))

[1] By decision dated 26 October 2015, 2015 FC 1207, the National Bank of Canada's motion for summary judgment was granted against the defendants *in personam* and *in rem* against the ship "Kick Aff" in the amount \$603,406.26, with post-judgment interest.

I. Costs sought

[2] As regards costs, at paragraph 52 of that decision, the Court stated:

The contractual documents deal with costs, which nevertheless remain in the Court's discretion. The Bank shall have 15 days herefrom to either inform the Court that costs have been agreed or to move for directions.

[3] Counsel for the Bank informed the Court that no agreement was reached on costs and, therefore, moved for directions. It seeks costs on a full indemnity basis. Mr. and Mrs. Rogers propose that costs be granted in accordance with Column III of Tariff B.

II. The Bank's Case

[4] The financing documents signed by the Rogers specifically provide that in the event of default they are to indemnify the Bank for legal costs incurred. This is a valid, non-punitive *proviso*.

[5] In addition, the Rogers raised a number of "red herrings" which had to be dealt with.

[6] The Bank also submits that full indemnity costs should be granted on the grounds that the Rogers have attempted to make themselves judgment proof by selling their home. They claim fees of \$151,303.50, plus disbursements and harmonized sales tax.

III. The Rogers' Case

[7] The Rogers submit that although judgment was rendered against them for the full amount claimed, they were certainly entitled to defend the case, and found themselves in a lamentable position because of the actions of the third party, Steven Crate, whom they unsuccessfully attempted to identify as the Bank's agent.

[8] Costs are a matter of discretion. Solicitor-client costs, much less full indemnity costs, are exceptional. They did not sell their home (and buy another) to make themselves judgment proof. The sale took place before the action, and has already been commented upon in an earlier order by Prothonotary Aalto.

IV. Analysis – Tariff A

A. *\$2,465.66 for two appraisals of the Kick Aft*

[9] Tariff A of the *Federal Courts Rules* deals with necessary disbursements while Tariff B deals with fees. The Rogers dispute \$2,465.66 for two appraisals of the Kick Aft. They say this disbursement is related to the sale of the Kick Aft, which has yet to take place, and should not be costs of the summary judgment motion. I am issuing a direction to the assessment officer on the

action as a whole, not on the motion for summary judgment. In his order authorizing the sale, Prothonotary Aalto specifically directed that the Bank obtain two independent appraisals. This is a necessary disbursement and is allowed. In accordance with the order of Prothonotary Aalto, these appraisals shall be paid out of the proceeds of the sale as sheriff's costs.

B. *The Bank's \$5,113.80 insurance premium*

[10] After the Rogers went in into default, the Bank insured the Kick Aft at a premium of \$5,113.80. In the circumstances, this was a prudent step, and so the disbursement is allowed.

C. *The Bank's \$394.64 filing fee*

[11] The Bank is claiming a filing fee of \$394.64. Counsel for the Rogers point out that the filing fee to issue a statement of claim is \$150. Counsel for the Bank explained that the \$394.64 included the cost of service. As this had not been brought to the Rogers attention before, I leave this matter to the assessment officer.

D. *Costs of photocopying and printing*

[12] The Rogers also question the costs of photocopying and printing. Again, the photocopying does not simply relate to the summary judgment motion but to the action as a whole. Certainly, some photocopying is necessary as the Court requires many documents to be filed in triplicate and expects case books. However, I leave photocopying and printing to the assessment officer.

E. *Other disbursements*

[13] To the extent other disbursements are not mentioned herein, they are left to the assessment officer.

V. Analysis – Tariff B

[14] Rule 400 and following of the *Federal Courts Rules* give the Court wide discretion in the award of costs. All things being equal, costs usually follow the event. There is no reason why the Bank should not be awarded costs. The only issue is the basis of that award. The default proviso is Column III of Tariff B.

[15] To deal first with the allegation that the Rogers have attempted to make themselves judgment proof, this is outright speculation. See also Mr. Roger's affidavit of 19 November 2015 upon which he was not cross-examined.

[16] Contracts, particularly contracts of adhesion, often deal with pre-judgment and post-judgment interest and costs. Nevertheless, the Court maintains discretion. See *Mount Royal/Walsh Inc. v Jensen Star (The)* (1988), 17 FTR 289 (FCTD), reversed in part on another point, [1990] 1 FC 199, 99 NR 42 (FCA). For instance, in cases where a ship is sold and the proceeds are insufficient to satisfy all creditors the Court often awards interest on the fund created by the sale at the rate the Federal Court grants interest on deposits (*Nordea Bank Norge ASA v Kinguk (The)*, 2007 FC 434).

A. *Counsel fees*

[17] This was a reasonably straightforward case. As explained during the hearing on directions, the Bank's current counsel had hired admiralty counsel to prepare and issue the statement of claim *in rem* and *in personam*, the affidavit to lead warrant, the warrant for arrest and to arrange for the arrest of the Kick Aft. This was a prudent step, and the time spent by admiralty counsel is quite reasonable.

[18] Thereafter, the matter reverted back to the Bank's current counsel. Although they are experienced litigators, they were not familiar with the Federal Court, and certainly were not at all familiar with *in rem* proceedings. Consequently, the learning curve was steep, and far too much time was spent on routine matters. Two counsel were used, when one would have sufficed.

[19] Contractual indemnity clauses do not give a party "carte blanche", in this case to take an admiralty course at the expense of the Rogers. This is precisely why the Court maintains discretion. See the decision of D.M. Brown J in *Romspen Investment Corp v 6711162 Canada Inc*, 2014 ONSC 3480, [2010] OJ No 273 (QL). On the other hand, the Rogers also contributed to the raising of extraneous issues, such as equating an action *in rem* on a ship mortgage with a mortgagee in possession of real estate.

[20] Counsel claim full indemnity fees of \$151,303.50. Neither party provided calculations based on Column III of Tariff B. A quick glance on my part suggests that counsel are claiming at least 10 times more than the high-end of Column III. This simply will not do. In the

circumstances, I have determined in my discretion that fees should be fixed in accordance with the high-end of Column III of Tariff B. There shall be no second counsel fee for attendance on cross-examinations on affidavits and on the motion for summary judgment.

[21] However, in light of the contractual documents, and the fact that the Bank had to deal with submissions which had little or no bearing on an action *in rem*, it shall be entitled to an additional fee of \$15,000.

B. *Bank's claim for full indemnity on a motion by the defendants*

[22] One particular claim of the Bank requires comment, it is claiming full indemnity of \$15,733.50 on a motion by the defendants to adjourn the summary judgment, which motion was granted without costs. The Bank shall be entitled to nothing on this motion.

C. *The Bank's grouping of fees under various headings*

[23] The Bank has grouped the fees it has claimed under various headings, but they do not match up with the headings of Column III of Tariff B. The assessment officer shall deal with Column III, no more, no less.

[24] As there was divided success on the directions with respect to costs, no costs shall be awarded thereon.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-456-15

STYLE OF CAUSE: NATIONAL BANK OF CANADA v. DONALD BURNS
ROGERS ET AL

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN TORONTO,
ONTARIO AND MONTRÉAL, QUEBEC

DATE OF HEARING: DECEMBER 14, 2015

DIRECTIONS RE: COSTS HARRINGTON J.

DATED: DECEMBER 16, 2015

AMENDED: DECEMBER 21, 2015

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