Federal Court of Appeal

Cour d'appel fédérale

Date: 20120411

Docket: A-375-11

Citation: 2012 FCA 111

CORAM: **EVANS J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

TREVOR NICHOLAS CONSTRUCTION CO. LIMITED

Appellant

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS

Respondent

Heard at Toronto, Ontario, on March 28, 2012.

Judgment delivered at Ottawa, Ontario, on April 11, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In 1995, Trevor Nicholas Construction Co. Limited (plaintiff or appellant) sued the federal Crown (defendant or respondent) in respect of four tenders advertised by Public Works Canada. By order dated January 20, 2011, the Federal Court granted summary judgment dismissing the plaintiff's action. In reasons cited as 2012 FCA 110 we have dismissed the plaintiff's appeal from that order.

[2] Now before the Court is an appeal from a subsequent, unreported decision of the Federal Court which awarded costs to the defendant for the action as a whole, fixed in the amount of $32,955.11.

[3] The appellant raises the following five issues on this appeal:

1. Did the Judge have jurisdiction to deal with or assess costs incurred before the Federal Court of Appeal?

2. Did the Judge err in law by dealing with costs of prior motions that were before other judges and prothonotaries, when only a trial Judge may deal with such costs?

3. Did the Judge act unfairly, or err in law by assessing some costs in excess of that contemplated by Column III of Tariff B to the *Federal Courts Rules*, SOR/98-106, or by awarding costs that were in excess of the defendant's actual costs?

4. Did the Judge act unfairly, or in a biased manner, by permitting the defendant to file an affidavit of disbursements, when the plaintiff had argued that the defendant had failed to prove their disbursements by affidavit as is required in law.

5. Did the Judge err in law by disregarding the fact that the security for costs ordered to be paid into Court were a fraction of the amount awarded?

[4] In my view, this appeal should be dismissed for the following reasons.

[5] With respect to the appellant's first ground of appeal, relating to costs in this Court, the bill of costs submitted to the Judge by the defendant improperly included claims to fees and disbursements in respect of two appeals decided by this Court (appeals A-321-01 and A-154-03). While this Court dismissed both appeals with costs payable to the defendant, it was an error of law for the defendant to have asked that those costs be assessed by the Federal Court. Costs awarded by this Court are to be fixed or assessed by this Court.

[6] It does not appear that the Judge excluded these items when fixing the costs in the Federal Court. His brief endorsement simply states "I have been guided by the fees calculated under the heading 'Column III' of [the defendant's bill of costs], with the following four exceptions". None of the enumerated exceptions related to the claim for fees and disbursements awarded, but not fixed or assessed, by this Court. Given that the Judge made no exception on account of the claims for fees and disbursements in respect of Court files A-321-01 and A-154-03, I conclude that these claims were erroneously included when the Judge made his award of costs.

[7] The question then arises as to how this error should be remedied. To answer this question, it is important to consider the process followed by the Judge when determining the costs to be awarded.

[8] The Judge dealt separately with the costs of the summary judgment motion and the costs of the action. He allocated $11,380.74 for fees and disbursements on the summary judgment motion and $21,574.37 for fees ($19,500.00) and disbursements ($2,074.37) for the balance of the action.

The allowances claimed in respect of the costs awarded by this Court were contained in that part of the bill of costs which dealt with assessable services not related to the summary judgment motion, but related to the action in general.

[9] To reach the lump sum in respect of services rendered in respect of the action, the Judge reviewed the bill of costs submitted by the defendant. He was generally guided by the fees calculated under Column III, but he made certain upward revisions to the amounts claimed as he described in his endorsement. He then slightly rounded up the revised total from $19,260.00 to $19,500.00 in respect of fees relating to the conduct of the action.

[10] During oral argument counsel for the respondent conceded that the award of costs should be decreased by the amount of the fees and disbursements claimed in the bill of costs in respect of costs awarded by this Court. This would result in a reduction of the cost award by $2,210.00 in respect of fees and $121.18 on account of disbursements.

[11] On a practical level, however, the appellant would remain liable to pay those sums after this Court's two outstanding costs awards were assessed. This is because the cost awards made by this Court were not qualified in any way. It follows that they are to be assessed in accordance with Column III (Rule 407). The costs included in the bill of costs submitted to the Federal Court in respect of the two appeals to this Court were calculated on the basis of Column III, and the disbursements were established in the affidavit as to disbursements. In other words, reducing the

amount of the costs awarded by the Federal Court would simply entitle the respondent to claim that same amount in this Court.

[12] In order to avoid the delay and expense inherent in the assessment of the costs ordered by this Court in A-321-01 and A-154-03, I would not intervene to vary the costs ordered payable by the Judge. I would instead order that the respondent is not entitled to pursue any claim for costs in this Court in respect of Court files A-321-01 and A-154-03 on the ground that they have been taken into account in the order under appeal.

[13] With respect to the second ground of appeal, concerning the Judge's ability to deal with interlocutory costs, the Judge reasoned that:

> AND UPON being satisfied that, having dismissed the within action, (i) I have the jurisdiction to make such orders as may be necessary to dispose of the action, including by awarding costs of the entire proceeding, in respect of any reasonable legal services and disbursements incurred by the Defendant; and (ii) it would be in the interest of the efficient administration of justice that I exercise such jurisdiction.

[14] In my view, the Judge was correct in his conclusion about his authority. In substance, the Judge stood in the same position as a judge who had dismissed the action after a trial. A trial judge may deal with prior interlocutory cost orders, subject to one caveat. Once a judge or prothonotary issues an order for costs on an interlocutory motion without expressly varying the general default provision of Rule 407, the issue of the scale of the costs is *res judicata* (subject to a motion to vary under Rule 403) (*Merck & Co. v. Apotex Inc.*, 2006 FCA 324, 354 N.R. 355 at paragraph 15 and

following). Thus, the Judge was entitled to award costs in respect of the entire proceeding. The defendant did not seek interlocutory costs in excess of that contemplated by Rule 407.

[15] Turning to the third ground of appeal, relating to the quantum of the Judge's award, the Judge possessed a broad discretion to award costs in excess of the level set in Column III. A discretionary order as to costs may only be overturned by this Court where the judge failed to give sufficient weight to all relevant considerations, considered irrelevant factors, erred in law or misapprehended the facts (*Merck & Co.* at paragraphs 3 to 4).

[16] In the present case, when the Judge departed from Column III to increase the costs he gave reasons for his departure, including the plaintiff's unreasonable approach to the summary judgment motion and to the conduct of the action as a whole. The appellant has not shown that the Judge misapprehended the evidence, gave insufficient weight to relevant factors, considered irrelevant factors, or otherwise committed any error of law in the exercise of his discretion over costs.

[17] Further, there is no evidence that the costs exceeded the defendant's actual expense so as to constitute any form of windfall. The costs were set with reference to Column III of Tariff B. In *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)*, 2006 FC 42, [2006] F.C.J. No. 69 Justice von Finckenstein wrote at paragraphs 5 to 7:

> 5. According to the Plaintiff, only if the Crown discloses what it actually pays its solicitors can the Assessment Officer be assured the Defendant is compensated rather making a profit on the award of costs on the basis of $110.00 per unit.
>
> 6. There are several things wrong with this argument. First Rule 407 of the Federal Courts Rules provides that, unless otherwise ordered, costs shall be awarded

> in accordance with column III of the table to Tariff B. Secondly, Rule 400(2) provides that costs may be awarded against the Crown. Third there is no evidence that the Crown will profit from an award of $110 per unit. Finally, s. 28(2) of the Crown Liability and Proceedings Act provides:
>
> > "28(2) Costs awarded to the Crown shall not be disallowed or reduced on taxation by reason only that the solicitor or counsel who earned the costs, or in respect of whose services the cost or charge, was a salaried officer of the Crown performing those services in the discharge of the officers duties and was remunerated therefore by a salary, or for that or any other reason was not entitled to recover any costs from the Crown in respect of services so rendered."
>
> 7. […] Clearly awards can be made to the Crown on the basis of column III of the table to Tariff B. There is no requirement for the Defendant to disclose the fee it pays to its solicitors in order to demonstrate that the award does not exceed compensation.

I agree with and adopt Justice von Finckenstein's statement of the law. There is, therefore, no basis to interfere with the quantum of the award of costs.

[18] With respect to the fourth ground of appeal, the assertion of unfairness or bias, the Judge wrote as follows with respect to his decision to receive additional evidence with respect to disbursements:

> 7. In its Reply to the Plaintiff's Response to the Defendant's submissions on Costs, the Defendant offered to "provide copies of all invoices and relevant records of claimed disbursements." In my Direction to the parties dated August 12, 2011, I replied to that offer by requesting, by August 22, 2011, "an affidavit attesting to the fact that the disbursements identified in the Bill of Costs that it filed on February 4, 2011 were in fact made or incurred." I also provided an opportunity to the Plaintiff to file "any responding submissions that it may wish to make regarding the reasonableness of those disbursements." The affidavit of Gabriella Plati Trotto (i) attests to the fact that the disbursements in question were in fact incurred on behalf of the Defendant in connection with the within proceedings; and (ii) attaches

> copies of invoices/receipts for each such disbursement. In this context, and having regard to the provisions of Rule 400(1), which grants the Court full discretionary power over the amount of costs to be awarded in a matter, I am satisfied that the Court does in fact have jurisdiction to award to the Defendant the disbursements that it has claimed in this matter, which I have determined are reasonable. The aforementioned affidavit was accepted for filing prior to the Registry's close of business, namely, 4:30 p.m., on August 22, 2011. However, it was not entered into the Court's system until the following day.

[19] Inherent in the appellant's argument is the suggestion that the Judge conferred some favour or benefit on the respondent by allowing the Crown to file an affidavit of disbursements. In my view, the Judge's action equally provided a benefit to the appellant by insuring that all items of disbursement were properly verified. A judge does not err simply by drawing a party's attention to any gap in the proof of its case (Rule 60).

[20] Moreover, Rules 405 to 414 govern the assessment of costs. They contain no requirement that an affidavit of disbursements be filed and served. Section 1(4) of Tariff B provides that disbursements may be "established by affidavit or by the solicitor appearing on the assessment" [underlining added]. It follows, in my view, that the Judge possessed discretion to receive supplementary evidence or submissions relating to the disbursements. As the Judge gave the plaintiff the opportunity to file responding material, I see no unfairness in the procedure adopted by the Judge and no basis for this Court to intervene in the exercise of discretion.

[21] Nor do I see any real or perceived bias on the part of the Judge. The test for bias is well-settled: the apprehension of bias must be a reasonable one, held by a reasonably informed person with knowledge of the relevant circumstances. The question to be answered is "what would an

informed person, viewing the matter realistically and practically — and having thought the matter through — conclude." (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394). There is a strong presumption that judges will carry out their duties properly and this presumption can only be rebutted by convincing evidence (*Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness*), 2012 FCA 59, [2012] F.C.J. No. 250 at paragraph 39).

[22] The appellant provided no convincing evidence as to any real or perceived bias on the part of the Judge. Given the scope of the Judge's discretion and the fairness of the process he used, a properly informed person viewing the matter in the required manner would not conclude that the Judge was motivated by any real or apprehended bias.

[23] Finally, with respect to the last ground of appeal, the amount of monies ordered to be paid as security for costs is not relevant to the subsequent assessment of costs. This is because, among other things, the amount ordered to be paid by way of security is of necessity an estimate. Further, when exercising its discretion as to the amount of security to be paid, the Court may consider factors such as the possibility that the action may settle or be resolved without a full trial, the defendant may always re-apply for additional security and, as in this case, a party's subsequent conduct may justify an enhanced award of costs (see, for example, *Richter Gedeon Vegyészeti Gyar RT v. Merck & Co.* (1996), 109 F.T.R. 37 (T.D.); *International Hollowcore Engineering Inc. v. Ultra-Span Technologies Inc.* (1997), 137 F.T.R. 60 (Proth.)). These factors illustrate that the

amount paid as security may well fall short of the amount ultimately found to be payable and so is not relevant to the subsequent assessment of costs

[24] It follows, as stated above, that I would dismiss the appeal. In the circumstances, I would not award costs.

"Eleanor R. Dawson"
J.A.

"I agree.
John M. Evans J.A."

"I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-375-11
STYLE OF CAUSE:	Trevor Nicholas Construction Co. Limited v. Her Majesty the Queen as represented by the Minister for Public Works
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CONCURRED IN BY:	Evans J.A. Sharlow J.A.
DATED:	April 11, 2012

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