

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GDC NNP Limited Partnership, by its General Partner NNP (G.P.) Ltd.

Plaintiff

-and-

Town of Inuvik, Inuvik Gas Ltd., Plumb Crazy Mechanical Ltd., Northwind
Industries Ltd. And John Doe

Defendants

MEMORANDUM OF JUDGMENT

[1] This is an application by Plumb Crazy Mechanical Ltd. (“PCM”) seeking costs in relation to an action brought by GDC NNP Limited Partnership, by its General Partner NNP (G.P.) Ltd. (“GDC”). GDC discontinued the action against PCM but the parties were unable to agree on costs. PCM has asked the court to determine the measure of costs that are appropriate in the circumstances.

STATEMENT OF CLAIM

[2] The underlying action is a claim for damages arising from a fire at a commercial property in Inuvik on January 20, 2018 (“the Property”) which is owned by GDC. The building and contents located on the Property were destroyed in the fire. GDC commenced the action by Statement of Claim filed on December 4, 2019.

[3] GDC claimed against PCM, the Town of Inuvik, Inuvik Gas Ltd., Northwind Industries Ltd. and John Doe. The claim was for damages arising from liability in negligence and/or breach of contract.

[4] The Property included an industrial building which consisted of five bays. PCM was the general property manager for the Property at the time of the fire.

[5] GDC alleges the fire originated in Bay 3 of the building and was caused by the migration and accumulation of gas from the damaged gas meter and line, which was ignited by flame from an oil boiler.

[6] GDC alleges that the building was not appropriately vented, and that the Town of Inuvik fire department and Inuvik Gas Ltd. did not take appropriate steps to clear the gas when they were alerted to the issue.

[7] GDC alleges a snow plow operated by the Defendant Northwind struck a gas meter or gas riser while clearing snow at the Property, and this caused the gas leak. PCM, in their role as property manager, retained Northwind to clear snow at the Property on the night of the fire.

PCM's INVOLVEMENT IN THE LITIGATION

[8] PCM filed a Defence on April 25, 2020.

[9] On March 4, 2021, PCM made an offer to settle for the sum of \$100 all-inclusive, and indicated that if the offer was not accepted, PCM would be pursuing a summary judgment application. This offer was rejected by GDC.

[10] PCM filed a Statement as to Documents on April 30, 2021.

[11] The Plaintiff questioned Douglas Daniel Murray Gillis, a representative of PCM, at an examination for discovery on May 13, 2021. Mr. Gillis confirmed PCM was the property manager and that as part of their responsibilities PCM would arrange snow removal. His evidence was that PCM hired Northwind for snow removal and they did not supervise Northwind's work. Mr. Gillis also testified that on the night of the fire, PCM was called to the Property to steam the ground in order for a gas line to be pinched off, as the ground was frozen. His evidence was that they attended the Property either during or after the fire.

[12] PCM filed an application for summary judgment on May 21, 2021.

[13] Another representative of PCM, Melissa Gillis, swore an affidavit in support of the summary judgment application, dated May 19, 2021. In her evidence, Ms. Gillis referenced certain records which she said showed that Inuvik Gas arranged for

PCM to dispatch personnel to help steam a valve sometime between 12:00am and 1:00am on the night of the fire. Ms. Gillis said there were records showing no one requested further service from PCM beyond the steamed valve. In her affidavit she said that PCM was not aware of a gas leak or any related concerns when they attended the Property on the night of the fire.

[14] GDC asserts that the records referenced by Ms. Gillis in her cross examination were not disclosed to GDC in a timely manner, and this contributed to PCM's continued involvement in the litigation.

[15] Specifically, the records in question were not included in PCM's Statement as to Documents dated April 30, 2021, and PCM did not produce them to the insurance company when they were contacted by the adjuster in January of 2018.

[16] GDC offered to discontinue as against PCM without costs in June of 2021, after the summary judgment application had been filed. PCM sought costs and the parties were unable to agree on either the amount or appropriate measure of costs at that time. Therefore, the litigation between GDC and PCM continued.

[17] GDC cross examined Ms. Gillis on her affidavit on August 9, 2022. At the cross examination PCM undertook to provide the records referenced in Ms. Gillis' affidavit. The records were provided on August 10, 2022, which were an invoice and work order from PCM to Northwind that provided further details about what transpired between PCM and Northwind on the night of the fire.

[18] The response to Undertaking # 2 from the cross examination of Ms. Gillis, provided on August 10, 2022, also provided information about the timing of Northwind's attendance at the Property on the night of the fire and PCM's knowledge of the gas leak, which was inconsistent with earlier evidence offered by PCM on these points.

[19] The document disclosure and undertaking response from August 2022 is hereinafter referred to as the "August 2022 Disclosure".

[20] The application for summary judgment was scheduled to be heard in May of 2023, but in February 2023 GDC discontinued their claim against PCM.

GDC's POSITION

[21] GDC says the August 2022 Disclosure contained material documents and that failure by PCM to include them in the Statement as to Documents filed on April 30, 2021, put PCM in breach of Rule 219 of the *Rules of the Supreme Court of the Northwest Territories* [the Rules].

[22] GDC asserts that PCM was an appropriate party to the litigation as it was the property manager, it hired Northwind, it was notified of the gas valve rupture prior to the fire, and it was involved in the events in advance of and in response to the fire.

[23] GDC says the August 2022 Disclosure impacted their assessment of PCM's liability. Further, GDC says the August 2022 Disclosure assisted in resolving material discrepancies in PCM's evidence. GDC argues that only after receiving this information were they able to properly assess the strength of their claim and this ultimately led them to discontinue their claim against PCM.

[24] GDC submits there was no abuse of process or other improper actions on their part to attract solicitor-client or punitive costs.

[25] They submit that at most, PCM is entitled to its party and party costs as per the tariff at Schedule A to the Rules.

PCM's POSITION

[26] PCM asserts that there was no basis for the claim against them, and that GDC prolonged the litigation by rejecting their March 4, 2021 settlement offer and opposing the summary judgment application. PCM alleges that GDC made the decision to keep them in the litigation with the intention of driving PCM's costs up.

[27] PCM submits that GDC failed to show how the August 2022 Disclosure impacted their assessment of liability. They point to the cross examination of GDC representative, Roy Erasmus Jr., held on April 2, 2024, wherein Mr. Erasmus refused to answer questions related to GDC's assessment of PCM's liability.

[28] PCM relies on Rule 201(2) of the Rules and says that because the outcome of the litigation was ultimately less favorable to GDC than their offer to settle of March 4, 2021, PCM should be entitled to solicitor-client costs.

[29] In the alternative, PCM asserts they are entitled to solicitor-client costs based on an abuse of process by GDC.

[30] Further, PCM alleges that GDC's conduct was intentionally wasteful and was "the action of a deep pocketed litigant trying to escape its own contractual responsibilities to defeat the ends of justice by driving up an ordinary litigant's costs". As such, they are claiming punitive costs, in addition to solicitor-client costs.

ANALYSIS

PCM's Offer to Settle and Reliance on Rule 201

[31] PCM's offer to settle in March of 2021 was prior to examinations for discovery, prior to the summary judgment application and associated affidavit of Ms. Gillis being filed, and prior to the cross examination of Ms. Gillis taking place.

[32] Although it was economical for PCM to seek resolution prior to incurring additional costs of participating in examinations for discovery, I conclude it was reasonable on the facts for GDC to seek to question PCM before agreeing to settle their claim. This is particularly so given PCM's Statement as to Documents had not yet been filed.

[33] PCM argues the March 2021 offer to settle triggers Rule 201(2) which states:

Where a defendant makes an offer to settle at least 14 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if

- (a) the offer to settle is not withdrawn and is not accepted by the plaintiff; and
- (b) the plaintiff obtains a judgment on terms as favourable as or less favourable than the terms of the offer to settle.

[34] Further, Rule 203 requires a settlement to address the plaintiff's claim against all defendants:

203. Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences set out in rule 201 do not apply to the offer to settle unless (emphasis added)

...

- (b) in the case of an offer made to the plaintiff,

- (i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or
- (ii) the offer is made by all the defendants and is an offer to settle the plaintiff's claim against all the defendants and, by the terms of the offer, the defendants are made jointly and severally liable to the plaintiff for the whole amount of the offer.

[35] PCM acknowledges that the discontinuance does not meet the technical requirements of Rule 201(2) because the Plaintiff did not actually obtain a judgment. Notwithstanding this deficiency, PCM argues the rule should still be applied because the outcome for GDC (discontinuing the action against PCM) was less favorable than PCM's offer to settle (\$100 all-inclusive). PCM acknowledges the requirements of Rule 203 are also not met because the offer in question does not settle the claim against all defendants but asks the court to disregard this requirement.

[36] PCM asserts the purpose of the rule is to promote fair and efficient resolution of disputes. PCM says that to allow solicitor-client costs under Rule 201 in this case would be consistent with the purpose of the rule and the court should take a flexible approach as opposed to strict interpretation of the language. PCM offers a hypothetical scenario where a plaintiff rejects an offer to settle but files a discontinuance at a late stage (for example, mid-trial), thereby avoiding a judgment against them, effectively circumventing the rule. They say this is not consistent with the spirit of the rule and urge the court to interpret the rule in a liberal way to account for these concerns.

[37] In my view, the language of the Rules is clear and does not align with PCM's proposed interpretation. Solicitor-client costs under Rule 201 are only available in certain circumstances prescribed under Rules 201 and 203, and this case is not one of those circumstances. There are other pathways to support solicitor-client costs if the facts warrant. I therefore reject PCM's request for solicitor-client costs in reliance on Rule 201.

GDC's offer to settle

[38] The second attempt to settle the claim took place in June of 2021 when GDC offered to discontinue against PCM without costs. This was shortly after PCM had filed a summary judgment application. Ultimately PCM refused this offer to discontinue without costs because PCM wanted to recover some of their costs, which had increased significantly during the examination for discovery and summary judgment processes.

[39] PCM takes issue with GDC's approach to the litigation and questions why GDC would be prepared to discontinue in June 2021 but continue to oppose the summary judgment application. They compare GDC's approach to that of the plaintiff in a separate action related to the same fire, who ultimately discontinued against them and did not oppose their summary judgment application.

[40] Further, PCM points out that GDC was prepared to discontinue without the August 2022 Disclosure, which of course was not yet produced at the time GDC's offer was made in June 2021. In PCM's submission, this proves the August 2022 Disclosure was not determinative of GDC's position against PCM and supports their theory that GDC was simply trying to drive up PCM's costs by keeping them involved in the litigation.

[41] The Court cannot speculate about why GDC made the decision to offer a discontinuance without costs in June 2021, or why they opposed the summary judgment application. Also, the Court cannot expect GDC's witness to reveal legal advice they relied on in making litigation decisions, and failing to do so cannot be used to draw an adverse inference against them. Further, what a plaintiff did in another action related to the same event is not particularly relevant to the application before me.

Was it reasonable to sue PCM?

[42] The crux of PCM's argument is that the claim against PCM was not warranted, and they should either have never been sued, or been released from the litigation much earlier.

[43] PCM relies on the case of *Commissioner of the Northwest Territories v 923115 NWT Limited*, 2019 NWTSC 13 [*Commissioner v 923115 NWT Ltd*]. This was a case with multiple defendants named in an action relating to a construction project. One defendant was successful on summary judgment, and the issue of costs was then litigated. The court found that there was no reasonable basis for suing the defendant and that during the course of the litigation, the defendant raised a number of reasonable issues which would have warranted a re-assessment of the claim by the plaintiff. Further, the plaintiff in that case admitted it was their intention to discontinue against certain parties once expert reports and testing were complete, all of which the court found to be an abuse of process. Ultimately, the court awarded solicitor-client costs against the plaintiff. PCM asserts the facts of *Commissioner v 923115 NWT Ltd* are similar to the facts of this case, and as such an award of solicitor-client costs is justified.

[44] The court in *Commissioner v 923115 NWT Ltd* acknowledged that each case must be considered on its specific facts:

This is not to say in every case where a defendant disputes a claim the plaintiff is required to re-assess the allegations it has made against that defendant or, as in this case, meet with a defendant for an informal form of discovery. Context is very important.

[45] In my view, the context of this case distinguishes it from *Commissioner v 923115 Ltd*. On GDC's theory of the case, the fire was caused by a broken gas line. It is alleged that Northwind, the snow-plow operator hired by PCM, broke the gas line while clearing snow on the Property. PCM was responsible for retaining contractors such as Northwind as the general property manager. GDC did not have a contractual relationship with Northwind, only with PCM. Based on these facts, I accept that it was reasonable for GDC to name PCM as a defendant in the litigation.

[46] Further, waiting until discovery and cross examination had been conducted before deciding to discontinue the claim was reasonable in the circumstances. As stated by the court in *Commissioner v 923115 NWT Ltd* at para 69:

Discovery serves a number of purposes in civil litigation. It may be used to better define and narrow issues, augment disclosure of documents and facts, obtain admissions and assist the parties in assessing the strengths and weaknesses of their won and the parties' cases...there is a great difference between using the discovery process to gauge the strengths and weaknesses of a case and using to perform a preliminary investigation. The former is appropriate. The latter is not.

[47] There was unclear or inconsistent evidence as the litigation evolved about PCM's role on the night of the fire, and their knowledge of the gas leak. No new issues were raised that would warrant GDC re-visiting the claim against PCM. In fact, there was deficient disclosure by PCM that contributed to them remaining in the litigation as long as they did.

[48] I therefore conclude that GDC's decision to continue the litigation towards discovery and cross examination served a valid and appropriate purpose in the litigation.

Measure of Costs

[49] GDC asserts that PCM should be entitled to party and party costs, at most. PCM seeks solicitor-client costs and punitive costs.

[50] Although costs are within the discretion of the court, the measure of costs is typically party and party costs, according to the tariff set out in Schedule A of the Rules. The party and party scale provides partial indemnity, with the tariff assigning a monetary value to certain steps taken in the action, in relation to the value of the claim.

[51] If, in the opinion of the court, the tariff will not yield a just result, the court may order additional costs such as “enhanced” party and party costs, solicitor-client costs, full indemnity costs, or punitive costs.

[52] The legal framework that governs costs awards is reviewed by this court in *Commissioner v 923115 NWT Ltd*, *GNWT v 831594* 2017 NWTSC 78, and most recently in *Marlowe et al v Barlas et al*, 2025 NWTSC 12 [*Marlowe v Barlas*].

Solicitor-Client Costs

[53] Costs may be awarded on a solicitor-client basis where there has been “reprehensible, scandalous, or outrageous conduct on the part of one of the parties” *Young v Young*, 1993 CanLII 34 (SCC), as referenced in *Commissioner v 923115 NWT Ltd* at para 33.

[54] In *Marlowe v Barlas*, this court considered the meaning of “reprehensible” at para. 51 and referenced *Town of Norman Wells v Mallon* 2020 NWTSC 2, where this court held that reprehensible conduct would include “conduct that is deliberately designed to delay, derail or otherwise undermine the litigation process”.

[55] PCM asserts that GDC abused the litigation process by commencing an action against PCM without a reasonable basis to do so. PCM asks the court to draw certain conclusions about GDC’s motivations in keeping PCM in the litigation, alleging that GDC was a “deep pocketed” litigant attempting to drive up costs for PCM and abusing the court’s process to gain an advantage.

[56] I reject that argument as there is no evidentiary basis to support such claims.

[57] I have found that there was a reasonable basis to sue PCM, and that it was also within reason to continue the litigation in the manner GDC did. I do not accept that the conduct of GDC was reprehensible, scandalous, or outrageous, or that there has been an abuse of process.

[58] The cases submitted by PCM can be distinguished on the facts and in my view the test for solicitor-client costs has not been met.

Punitive Costs

[59] The court has the ability to award punitive costs in order to deter and denounce a party's conduct in litigation. In this case, PCM submits that it is important to "send a message to GDC's insurer and other like-minded litigants".

[60] I have already concluded that there is no abuse of process or other conduct that would attract solicitor-client costs. The allegations in the Statement of Claim were not outrageous, made in bad faith or designed to cause harm to PCM. As such, there is no need for deterrence and denunciation on these facts, and the application for punitive costs is denied.

CONCLUSION

[61] PCM's costs shall be calculated on a party and party basis.

[62] GDC is awarded costs of this application on a party and party basis, to be set off against costs payable to PCM.

Karin L. Taylor
J.S.C.

Dated at Yellowknife, NT, this
14th day of March, 2025

Counsel for the Plaintiff: Anthony W. Slemko, K.C.

Counsel for the Defendant: Alan R. Regel

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MEMORANDUM OF JUDGMENT OF
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JUSTICE KARIN L. TAYLOR
