

SUPREME COURT OF NOVA SCOTIA

Citation: *V.J. Rice Concrete v. John Ross and Sons*, 2025 NSSC 58

Date: 20250211

Docket: *Hfx* No. 502886

Registry: Halifax

Between:

V.J. Rice Concrete Limited

Plaintiff

v.

John Ross and Sons Limited

Defendant

COSTS DECISION

Judge: The Honourable Justice James L. Chipman

Written January 15, 2025, Plaintiff's Brief

Submissions: January 24, 2025, Respondent's Brief

Decision: February 11, 2025

Counsel: William Ryan, K.C., for the Plaintiff
Richard Norman, for the Defendant

By the Court:

INTRODUCTION

[1] On December 5, 2024 I released *V.J. Rice Construction v. John Ross and Sons*, 2024 NSSC 376. At para. 218 I stated:

[218] In conclusion, I find that the Contract was indeed a unit price contract. The initial amount of RCC was a reasonable estimate at the time the Contract was signed on July 31, 2019. Just over three months later it became apparent to both parties, mainly on account of the poor quality subgrade, that the Contract would have to be varied. Ultimately, the deficient subgrade and increased Project area resulted in the original estimate of RCC growing by approximately 2,500 metric tonnes. Given that VJR delivered the amount of RCC that was required and agreed to under the Contract, they are entitled to their claim for the outstanding amount of \$161,078.43.

[2] The decision ended with these paras:

[226] In conclusion, I find that September 16, 2020 was the date in which the cause of action arose and consequently the start date from which (the five percent) pre-judgment interest should be calculated on the \$161,078.43 owing by JRS to VJR.

[227] As the successful party, VJR is also entitled to costs. Should the parties be unable to agree on costs, I will receive written submissions on or before January 17, 2025.

[3] On January 15, 2025 the Court received VJR's costs brief and affidavit sworn January 14, 2025 by Bryan Rice, VJR's General Manager. JRS then asked for more time to file their submission and on January 24, 2025 their lawyer filed his affidavit sworn on that day along with a costs brief.

POSITIONS OF THE PARTIES

VJR

[4] VJR submits that the appropriate costs award should be the full legal fees and disbursements spent by VJR in connection with the proceeding, totalling \$116,782.71 (plus legal fees associated with their costs submissions), on a solicitor-client basis.

[5] In the alternative, if it is found that a full indemnity on a solicitor-client basis is not appropriate, then VJR submits that a substantial contribution, in the range of 80% of total costs (approximately \$93,426.17), is justified in the circumstances.

JRS

[6] JRS says that this is an appropriate matter for the Court to award costs based on Tariff “A”. JRS goes on to submit:

According to Scale 2 of Tariff “A”, an amount involved of \$161,000 would result in a cost award to \$16,750. To that Tariff “A” requires \$2,000 per day of trial to be added. If there were 6.5 days of trial that would result in an additional \$13,000. The total would be \$29,750. This would be an appropriate cost award in the circumstances.

DISCUSSION, ANALYSIS AND DISPOSITION

[7] Mr. Rice deposed as follows in his affidavit:

27. To date, the Plaintiff has paid to Stewart McKelvey \$80,056.88 in connection with this proceeding, which includes all legal fees and disbursements up to and including November 20, 2024.
28. This amount does not include the \$34,157.88 in disbursements paid to Dr. Langley for his services as an expert before and at trial.
29. I am informed by our company’s lawyer, William L. Ryan, K.C., and do verily believe, that additional amounts will become owed as the issue of costs is finalized, and that as of January 9, 2025, there is \$2,567.95 of unbilled work in progress (WIP).

[8] At trial I found Mr. Rice to be credible and reliable. JRS did not ask to cross-examine Mr. Rice on his affidavit. In the circumstances, I accept that VJR paid the Stewart McKelvey and Dr. Langley accounts related to this proceeding. I further accept that VJR will be responsible to pay a further Stewart McKelvey account of \$2,567.95.

[9] The three amounts referenced by Mr. Rice total \$166,782.71. In the context of this seven-day trial coming after almost four years of litigation involving (among other things) extensive documents, discoveries, experts and a judicial settlement conference, I find the spend unsurprising and not unreasonable.

[10] I specifically reject JRS’s submission that “Dr. Langley’s fees are not reasonable for a case like this”. In the main decision, I set forth the highlights of Dr.

Langley's report and evidence at paras. 154 – 164. At paras. 210 – 214 I explained why I preferred Dr. Langley's "accepted methodology for measuring the length (depth) of concrete cores" and why his evidence caused me to conclude that JRS's expert's tonnage estimate was low. These were key subjects for consideration put in issue by JRS through their expert. Indeed, I specifically reject JRS's submission that "nothing in Dr. Langley's report was determinative". To the contrary, his rebuttal report and *viva voce* evidence assisted the Court in the penultimate finding that the amount of RCC placed by VJR was what they said it was.

[11] I have reviewed Dr. Langley's five invoices issued (and paid by VJR) attached to Mr. Rice's affidavit. In all of the circumstances I find the expert fees totalling \$34,157.88 to be appropriate.

[12] I have already noted that in the context of this case I find that total legal fees spent by VJR to be reasonable. While I accept that when a lump sum costs award is sought that ordinarily the legal accounts are provided (*Ward v. Murphy*, 2024 NSSC 117 at para. 21), this is not an absolute and in the Court of Appeal's decision – *Ward v. Murphy*, 2025 NSCA 5 – upholding Justice Forgeron, Gogan, JA did not address this specific point. That said, Justice Gogan reiterated the principle that "an award of costs is within a judge's discretion and will not be disturbed absent an error of law or injustice" (para. 87).

[13] Over a decade ago our Court of Appeal set forth guiding costs principles in *Armoyan v. Armoyan*, 2013 NSCA 136 at para. 16. These principles were nicely summarized by Hunt, J. in *Grue v. McLellan*, 2018 NSSC 151 at para. 6:

6 In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;
2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
3. The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15

4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16
5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and
7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[14] As stated in *Armoyan*, Rule 77.07 is relevant in assessing whether a departure from the tariff amounts is justified, and provides several examples of factors which may be relevant to the costs analysis.

[15] In all of the circumstances and to do justice between the parties, I do not regard the standard Tariff "A" amount to be a sufficient amount for the successful party in this case. In this regard, the total suggested by JRS (approximately \$30,000) plus \$3,500 towards Dr. Langley's fees only equates with a third of VJR's actual, reasonable spend. Having said this, I am equally persuaded that this is not a case warranting solicitor-client costs.

[16] Solicitor-client costs (or costs "as between solicitor and client") provide an award on a full indemnity basis. As a rule, solicitor-and-client costs are "reserved for very limited circumstances" and "should not be awarded unless special grounds exist to justify a departure from the usual scale": M. Orkin, *The Law of Costs*, s. 219.1. The Supreme Court of Canada has said that solicitor-client costs are "generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] 4 S.C.R. 3. I discern nothing here warranting the exceptional sanction of solicitor-client costs against JRS.

[17] I am persuaded that there are present factors such that in order to do justice between the parties, I must deviate from Tariff "A" and award VJR a lump sum. To my mind the Tariff amount is inadequate given VJR's spend coupled with the fact

that VJR was entirely successful. In this regard, VJR received the full value of their claim. JRS's (significant) counterclaim was entirely dismissed. Furthermore, I accept the affidavit evidence of Mr. Rice that his father offered to "split the bill" (i.e. half of the \$161,078.43) with JRS before the litigation was commenced. I also accept Mr. Norman's affidavit evidence that five days before the trial started that he received a very favourable settlement overture from Mr. Ryan but that Mr. Norman's client "chose not to pursue the possibility".

[18] I would add that Mr. Norman provided some emails exchanged between himself and Mr. Ryan on the issue of costs. In Mr. Ryan's December 19, 2024 email at 3:01 p.m. he says (among other things), "I have ordered copies of our accounts rendered to our client throughout the proceeding and will have those very shortly". There is nothing further before the Court on this issue. I do not know if the Stewart McKelvey accounts were ever provided to Mr. Norman. In any event, **if** Mr. Norman asked for the accounts and they were not provided, he could have made this known to the Court. He did not. Nor did he advise the Court of his fees, yet he stated in this brief that VJR's expert charged "many times the fees" of JRS's expert. In any event, I repeat that given all of what I have before me that I do not regard the legal fees paid by VJR to be unreasonable.

[19] In conclusion, our Court of Appeal very recently had cause to review (among other issues) a costs award in *Ponhook Lodge Limited v. Freeman Estate*, 2025 NSCA. At para. 52 Justice Bryson reproduced Rule 10.03 adding emphasis:

52 With respect to the emails, Ponhook objects that one "settlement offer" was incapable of acceptance and another offered a right-of-way width which did not accord with subdivision requirements. The judge disagreed. She found both offers more favourable to Ponhook than her decision. She referred to Civil Procedure Rule 10.03:

10.03 Settlement offers and costs

A judge who determines costs **may take into consideration a written offer of settlement made formally** under this Rule **or otherwise**, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

[Emphasis in original]

[20] Justice Bryson went on to re-affirm the principles that trial judges are entitled to consider informal settlement offers and that costs are discretionary. The Court of Appeal then stated at para. 56:

56 The whole point of a costs award is to afford the successful party a substantial but not complete indemnity for the legal cost of the lawsuit. The costs award here represented approximately 80% of the Freemans' actual legal expense.

[21] Given the circumstances of this case, evidence and authorities, I hereby award VJR costs in the amount of 80 percent of their legal fees (i.e. 80% of \$82,624.83 = \$66,100.00). I further award VJR the full amount of their expert fees (\$34,157.88). Finally, I award VJR \$1,500.00 as costs on the within application for an overall total of \$101,757.88 payable by JRS to VJR..

Chipman, J.