NOVA SCOTIA COURT OF APPEAL
Citation: ***Barkhouse v. Wile***, 2011 NSCA 50

Date: 20110607
Docket: CA 341634
Registry: Halifax

Between:

Kimberley Barkhouse

Appellant

v.

James Wile

Respondent

Judges:	Saunders, Oland and Bryson, JJ.A.
Appeal Heard:	May 26, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Saunders, J.A.; Oland and Bryson, JJ.A. concurring.
Counsel:	Patrick J. Eagan, for the appellant Damian J. Penny, for the respondent

Reasons for judgment:

[1] After considering counsels' submissions we recessed and then returned to court to announce our unanimous decision that while leave to appeal was granted, the appeal was dismissed with costs to the respondent and reasons to follow. These are our reasons.

[2] In a decision (the "costs decision") now reported at 2010 NSSC 400, Nova Scotia Supreme Court Justice Beryl MacDonald awarded costs to the respondent after presiding over a full day hearing and reserving to consider the lengthy post-trial briefs and lists of authorities which the parties had filed on the subject.

[3] In a notice of application for leave to appeal and notice of appeal dated December 23, 2010, the appellant challenged Justice MacDonald's costs decision and confirmatory order, citing nine grounds of appeal.

[4] Our leave is required in such matters. However, on appeal to this Court the respondent did not oppose the appellant's request for leave and was content to challenge the substance of the appeal on its merits. Accordingly, these reasons will not address the leave threshold. We will restrict our comments to the substance of counsels' submissions.

[5] In addressing the merits, we need not canvass the circumstances surrounding this lengthy dispute in any detail. It is enough to describe the backdrop to this proceeding, summarily.

[6] The parties lived together in a common law relationship from 1993 to 1995. They had twin sons, Nicholas Connor Close and Brandon James Close, born on November 8, 1994.

[7] Following their separation in 1995, extensive litigation ensued covering a host of subjects including custody, child support, access, arrears, and child care expenses. The acrimonious history of legal proceedings between the parties is nicely chronicled in Mr. Penny's brief to the trial judge which is included as part of the record, 1 AB 183 *ff*.

[8] The parties appeared with counsel before Justice MacDonald on September 30, 2010, for what was to have been a full day hearing. The respondent, James Wile, had brought an application seeking a variation of a previous order granted in October, 2005. The variation would essentially give effect to the fact that Brandon had chosen to live with the respondent, and had for some considerable time, such that provisions for child maintenance ought to be adjusted as a result. On the day of the hearing counsel advised that they had settled some of the outstanding issues. That left certain discrete and significant matters to be resolved by Justice MacDonald. These included defining and characterizing the custodial and parenting situation in light of the separate living arrangements chosen by each of the twin brothers; child support, retroactive child support; disputes over income and disclosure; and retroactive contributions towards childcare expenses.

[9] The hearing took most of the day. Both parties were cross-examined at length, followed by counsels' closing arguments. MacDonald J. then gave a brief oral decision disposing of the issues which the parties had left for her determination. Counsel for the respondent asked to be heard on costs. Justice MacDonald then set dates for the filing and exchange of briefs. Lengthy post-hearing written submissions on costs were filed: by the respondent on October 19, by the appellant on October 25, and a final reply by the respondent on October 28, 2010.

[10] In her written decision dated November 2, Justice MacDonald was satisfied that a costs award in favour of the respondent was justified. She awarded costs of $4,000 plus disbursements of $877.56. Her confirmatory order was issued December, 2010.

[11] The standard we apply when reviewing costs awards is well known. Costs are left in the discretion of the trial judge. We will not interfere with a judge's exercise of discretion in awarding costs unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice.

[12] On appeal to this Court, counsel for the appellant was not able to articulate any error in principle. Rather, the thrust of his submission was two-pronged. First, he challenged the "fairness" of certain comments made by Justice MacDonald regarding the positions taken by the appellant throughout these proceedings.

Second, he urged that nothing more than a modest costs award ought to have been imposed, in light of the appellant's personal circumstances.

[13] With respect, it seems to us that these submissions simply repeat the same arguments made at trial. There the appellant resisted the respondent's claim for costs, principally on the basis that she was a person of limited means and that her opposition to the respondent's variation application was not unreasonable.

[14] We see no reason to intervene. The "errors" alleged by the appellant are little more than an expression of dissatisfaction with the trial judge's findings, and an invitation that we retry the case. That is not our function.

[15] The respondent's claim for costs put the conduct of both parties squarely before the court. Whether positions taken were "reasonable" was clearly a question that had to be answered. Given her familiarity with the record and her distinct advantage in seeing and hearing the parties while presiding over the trial, Justice MacDonald was in the best position to assess what had occurred and then decide whether, and to what extent, a costs order was justified.

[16] In her reasons, Justice MacDonald made strong findings which were critical of the appellant's conduct. Simply to illustrate I will quote from a portion of her reasons:

> [2] On the day of the hearing counsel informed me the parties had settled the parenting plan. One child would continue to reside with Mr. Wile and the other with Ms. Barkhouse. However, Ms. Barkhouse wanted to take the child in Mr. Wile's primary care to physicians, other than those advising Mr. Wile, for a second opinion. This had become a contentious issue between the parties and I ultimately determined Ms. Barkhouse's request was unreasonable and had more to do with her desire to retain control over the child than a genuine concern about his best interest.
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> [3] By March 24, 2010 Mr. Wile had provided his calculation of the amount of child maintenance he should have paid from Oct 2005 until March 31, 2010 based upon changes in his income. He was prepared to pay this amount and I ordered him to do so at the hearing. He did not agree to pay for the child care amount claimed by Ms. Wile. Initially the alleged payment was to her mother for the years from September 1998 until October 2002. The total amount requested was $8,600.00. In her affidavit dated September 21,2010 the payment requested was $16,800.00 for a period from 2000 until 2007.

[4] During the hearing, Ms. Barkhouse provided no evidence to deny the correctness of the calculations provided by Mr. Wile in respect to the table child maintenance to be paid from October 2005 until March 31, 2010. In addition, while giving testimony Ms. Barkhouse withdrew her request for contribution toward the alleged child care expense.

[5] There were offers to settle exchanged between the parties. The parenting plan could have been settled by May 2009 if Ms. Barkhouse had accepted the offer then provided to her. Her reasons for not accepting the proposed arrangement, which is what was eventually agreed upon on the date of the hearing, were unreasonable and only served to continue the conflict between the parties and create expense for both.

[6] A similar offer was provided to Ms. Barkhouse in March 2010. Although it did not provide for an appropriate set off amount for child maintenance this could easily have been corrected if Ms. Barkhouse had been forth coming about her financial circumstances and health impediments the prevented her from actively engaging in the workforce. During the course of the proceeding Ms. Barkhouse did not respond in a timely fashion to requests that she confirm her annual income.

[7] The March 2010 settlement offer did require a payment from Ms. Barkhouse to Mr. Wile that was not the subject of the proceeding before me but there is no suggestion that Ms. Barkhouse made a counter offer to accept all terms of that offer other than this one item.

...

[12] A cost award is justified. Mr. Wile is the successful party notwithstanding the pretial settlement of the parenting issues. There were meaningful opportunities to settle this matter before September 30, 2010. Ms. Barkhouse took unreasonable positions prior to the hearing and then abandoned them at the last minute. She changed the relief requested as the proceeding continued making it difficult for Mr. Wile to understand the case he had to meet. Although Ms. Barkhouse is of limited means I am not satisfied this is a reason in this case to relieve her from the obligation to pay costs.

[13] The issues involved in this proceeding were not complex. The attention required from counsel was not extensive. There were however a number of interim orders negotiated and a number of court appearances required including the hearing conducted on September 30, 2010. Having considered all of these

> circumstances the basic scale (scale 2 of Tariff A) is appropriate. That amount is $4,000.00 and together with the disbursements the total cost award is $4,877.56.
>
> (Underlining mine)

[17] From the transcript it is obvious that Justice MacDonald was alive to all of the issues the case before her elicited. She considered and explicitly rejected the appellant's professed impecuniousity as a reason to deny the respondent his costs. She focused counsels' and the parties' attention on the matters in dispute and did not allow them to get sidetracked in the periphery. She managed the proceedings effectively and intervened when necessary.

[18] The transcript also confirms that the parties' relationship was still fractious. As the trial judge noted at one point during the appellant's cross-examination:

> THE COURT: The evidence so far doesn't show a great platform for co-operation.

[19] Self-described intentions may not turn out to be the motivation later ascribed to impugned actions by a trial judge.

[20] Litigants - whether successful or unsuccessful - may well feel upset or hurt by the way in which trial judges later characterize their actions. But that is simply a bi-product of litigation. Trial judges are obliged to review the evidence objectively and impartially and then provide the parties with a decision that is unambiguous, sound in law, and supported by the facts. When faced with an assessment of conduct in the context of a costs award judges must decide whether intransigence, strategy, delay or other factors prolonged proceedings, increased expense, or caused prejudice to the other side. Judges are frequently called upon to make hard decisions, to declare strong findings, and to express themselves plainly. Such is the reality of our adversarial system. It should come as no surprise that in such circumstances those on the receiving end may feel offended by a judge's conclusions. But disappointment, irritation or embarrassment can never be the keys to reversal on appeal. Here, the appellant's complaints all relate to specific factual findings made by the trial judge. Sitting on appeal, we defer to such findings, recognizing the distinct advantage held by trial judges who occupy a preferred seat as referee and impartial arbiter in proceedings over which they preside. As long as their findings find reasonable support in the evidence we will not intervene. Their conclusions in such matters are protected by a margin of

tolerance ascribed to such findings. Applying the oft-stated standard of palpable and overriding error, we will invariably defer to a trial judge's assessment of facts because of the edge they have in seeing and hearing the witnesses firsthand. That is the principal reason deference is paid to trial judges in the context of appellate review. Unless the appellant can persuade us that there are significant factual findings which have no support in the evidence and are so obvious (palpable) and significant in terms of result (overriding), we have no business intervening. The appellant has failed to demonstrate any such error here.

[21] We see Justice MacDonald's thoughtful analysis in this case as a careful exercise of her discretion. There is no cause to intervene.

[22] In conclusion, it is ordered that while leave to appeal (which was not challenged) is granted, the appeal is dismissed with costs of $1,500 inclusive of disbursements payable to the respondent.

Saunders, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.