

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Carter v. Carter*, 2015 NSSC 376

Date: 2015-12-31

Docket: *SFSND* No. 1206-6516

Registry: Sydney

Between:

Carolyn Carter

Petitioner

v.

John Carter

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Written Submissions: October 23 and 27, 2015

Counsel: Elaine Gibney for the Petitioner
Lisa Fraser-Hill for the Respondent

By the Court:

[1] This divorce trial came before the court on June 24, 29 and 30, 2015. A written decision followed (*Carter v. Carter* 2015 NSSC 273).

[2] Counsel for both parties filed written submissions in relation to the claim for costs.

MS. CARTER'S POSTION

[3] Ms. Carter claims costs as the party who obtained a "favorable judgment" in the divorce trial. In this respect, she relies upon *Civil Procedure Rule 77.07(2)(b)* and *Rule 10.09*. Her claim totals \$24,706.87. She calculates this claim on an award of 66% of legal fees and disbursements incurred prior to a settlement offer which was not accepted. In addition, she calculates 80% of the fees and disbursements incurred after the settlement offer was made.

[4] Ms. Carter presents her claim as follows:

Legal fees incurred before the Offer to Settle (April 9th, 2015):

Fees (Unbilled + Billed)	-	\$11,912.50
Disbursements	-	\$ 440.39
Taxes (Unbilled + Billed)	-	<u>\$ 1,851.00</u>
	-	<u>\$14,203.89</u> x 66% = \$9,374.57

Legal fees incurred after the settlement offer:

Fees	-	\$16,290.00
Disbursements	-	\$ 373.85
Taxes	-	<u>\$ 2,501.53</u>
	-	<u>\$19,165.38</u> x 80% = \$15,332.30

[5] The total is \$33,369.27, of which Ms. Carter claims \$24,706.87. She argues these legal fees and expenses are reasonable, as the proceeding required numerous appearances for pre-trial conferences, an interim hearing, a settlement conference, date assignment conferences, and three days of trial.

MR. CARTER'S POSITION

[6] Mr. Carter raises two main points in rejecting Ms. Carter's claim for costs: he argues first that although Ms. Carter was successful on a number of important issues at trial, she was not successful on all issues. He says effectively, the parties were equal in their success. Secondly, he argues that the costs claimed on behalf of Ms. Carter are excessive.

[7] Mr. Carter points out that six issues were resolved prior to trial, and that an agreement on those issues was read into the record at the commencement of the hearing. The agreement includes the equal division of RRSP's and Mr. Carter's pension, division of the vehicles, the appropriate disposition of the house proceeds

(subject to any amounts to be set-off as determined by the court) and a credit to Ms. Carter for half the closing fees paid by Mr. Carter's employer when the home sold.

[8] Mr. Carter also points out that a significant amount of preparation and court time was used in tracing payments made from the joint bank account, calculating expenses paid on behalf of Ms. Carter, and calculating sums paid to maintain the matrimonial home until it was sold.

[9] Though no fee account is included in Ms. Carter's disbursements for her psychiatrist's attendance at trial, trial time was required to hear his evidence. Mr. Carter argues that it was necessary to have the psychiatrist testify, to determine if Ms. Carter had taken steps to rehabilitate herself and seek employment. She claimed she has been, and will continue to be, totally disabled and unable to work since separation. Mr. Carter disagreed. He argued she had failed to pursue timely and regular treatment, and he asked the court to impute income to Ms. Carter post-separation.

[10] The court accepted Dr. Christians' expert opinion regarding Ms. Carter's inability to work post-separation. However, in accordance with Dr. Christians'

evidence that if she follows a regular treatment plan she will see improvement, income was imputed to Ms. Carter at a future date.

[11] Ultimately, Mr. Carter argues that this is a case where each party should bear their own costs. In the alternative, he argues that the court should reduce the amount claimed by Ms. Carter and award a lump sum for a reasonable portion of her costs in accordance with *Tariff A* under *Rule 77*.

AUTHORITIES:

[12] Counsel for Ms. Carter cites and relies on case law including *Hamilton v. Hamilton* 2010 NSSC 381, *Yang Fermin v. Yang* 2009 NSSC 322, *Cameron v. Cameron* 2014 NSSC 325 and *Armoyan v. Armoyan* 2013 NSCA 136, as well as several other costs decisions where a significant award was made after a multi-day trial.

[13] In *Armoyan* (supra) the court of appeal outlined the relevant factors to be considered in making a costs award. It noted that: “The tariffs are the norm and that there must be a reason to consider a lump sum.” The court awarded a lump sum in that appeal where there was no amount involved, rather a legal issue to be determined.

[14] The court of appeal listed factors to be considered in determining whether the tariffs should be used in setting costs:

- Some cases do not lend themselves to a *Tariff A* costs award as there is no “amount involved”;
- Some cases are very complex, with a corresponding workload, that is disproportionate to the court time used;
- Some cases involve a significant sum at stake, but which turns on a concisely presented issue.

DECISION:

[15] I find this is an appropriate case to award costs. However, it is difficult to calculate the amount involved for purposes of *Tariff A*. The amount of retroactive spousal support is known, and life insurance of at least \$400,000.00 was ordered as security for support. But the cottage was not appraised, future support obligations may change, and how does one value a health plan ?

[16] I could use the “rule of thumb” that each day of trial equates to an amount involved of \$20,000.00, which would amount to \$60,000.00. However, a *Tariff A* award based on that amount under the basic scale, plus \$2,000.00 per day for trial,

equates to only \$13,250.00. Even allowing disbursements and taxes, the award would be \$14,186.38. That would be less than half of her actual fees and expenses incurred, which is not a “substantial contribution”.

[17] A costs award is in the discretion of the court, bearing in mind the factors set out in *Rule 77*. One of the more persuasive factors in awarding costs in a family law case is a written settlement offer which has not been accepted. *Rule 77.07* specifically recognizes that even where the tariffs are used, costs may be adjusted where a settlement offer was made, but not accepted. This reflects the premise that litigation is expensive and time consuming. Parties are encouraged to settle matters where possible. In this case, the parties did reach agreement on several issues before trial. However, a number of major issues remained outstanding at the time of trial, including quantum of spousal support, imputation of income to Ms. Carter, and a claim for monies spent on the cottage.

[18] Quantum of support and imputation of income was the most contentious issue. Ms. Carter claimed support in the high range of the *SSAG*, as she insisted at trial she could not return to work. Her formal offer was based on her having no earned or imputed income.

[19] Ms. Carter also sought an equal division of the value of the cottage, but at trial she only claimed reimbursement of half the matrimonial funds she said Mr. Carter spent on the cottage. Her claim for \$5,000.00 was dismissed, but in an effort to refute the claim, Mr. Carter adduced evidence on ownership, use and improvements made to the cottage.

[20] The settlement offer made by Ms. Carter was communicated almost three months before the trial, well in advance. It addressed all of the issues which were determined in the court's decision. Though success was somewhat divided, I find she was the party who received the more "favorable judgment".

[21] I take into consideration the following factors in reaching this conclusion:

- Ms. Carter was more successful in her support claim than under the settlement offer, though that is tempered by the fact that income was imputed in future, which may reduce the amount payable. So success on this issue was divided.
- Her claim for security for spousal support by way of life insurance was granted.
- Her claim for coverage under the health plan was granted.

- Her claim for a division of the monies held as of separation in the joint bank account was granted.
- Her claim for retroactive support was calculated by the court almost exactly to the dollar amount set out in her offer.
- Her claim for half the value of the RBC insurance policy was successful.
- She was successful in her claim to a division of Mr. Carter's employment bonus, which had been waived in the offer.
- She was unsuccessful in her claim for a division of the cottage.
- She was unsuccessful in her claim for a division of the Aeroplan points.
- Trial time was required to hear evidence regarding the joint bank account and a detailed accounting of the monies paid by Mr. Carter for Ms. Carter's support, and to maintain the home pending sale, but though Mr. Carter received a credit for monies paid, it was not in the amount claimed. Success on this issue was divided.
- Ms. Carter was awarded interim spousal support but no costs were awarded after the interim hearing.

[22] The court's overall mandate is to do justice between the parties in accordance with the results of the trial and any offers made to settle. A costs award should make a substantial contribution to the parties reasonable fees and expenses, though not necessarily a complete indemnity. I find in this case, a lump sum is the best way to do justice between the parties in all these circumstances.

[23] Having reviewed Ms. Carter's claim for fees and expenses and disbursements incurred prior to the offer, as well as those incurred after the settlement offer, I see nothing unreasonable about the amount claimed. Her total fees and expenses are \$33,369.27. Given the nature of this litigation and the issues involved, as well as the detailed evidence adduced, there is no doubt that significant time and effort was invested in the file. In determining the reasonableness of Ms. Carter's fees and expenses, I have considered the numerous pre-trial steps taken, the unsuccessful settlement conference, the interim hearing and the settlement offer.

[24] However, I am not prepared to award the full sum claimed by Ms. Carter. In view of the fact that success was divided on the issue of imputation of income, and her position on the cottage was rejected, I exercise my discretion in reducing the costs award to a lump sum of \$20,000.00 in total. This lump sum costs award does justice between the parties.

CONCLUSION:

[25] Mr. Carter will pay costs of \$20,000.00 inclusive to Ms. Carter within thirty days. Counsel for Ms. Carter shall prepare the order.

MacLeod-Archer, J.