

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: J.W.L. v. C.B.M. , 2008 NSSC 278

Date: 20080923

Docket: 1201 - 060431, SFHD - 044383

Registry: Halifax

Between:

L. (J. W.)

Petitioner

v.

M. (C. B.)

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 25, 26 and 27, 2008, in Halifax, Nova Scotia

**Written Decision
on Costs:**

September 23, 2008

Counsel:

M. Jean Beeler, for the Petitioner

B. Lynn Reiersen, for the Respondent

By the Court:

[1] Costs are in the discretion of the court. Civil Procedure Rule 63.02 confirms this and adds:

(1)the costs of any party, the amount thereof, the party by whom,....they are to be paid, are in the discretion of the court, and the court may,

(a) award a gross sum in lieu oftaxed costs;.....

(2) The court in exercising its discretion as to costs may take into account,.....

(b) any offer of contribution.

[2] Civil Procedure Rule 69.06 provides:

(1) A party may serve on another party an offer to settle any claim made in an application under the (Matrimonial Property) Act or joined with a claim for divorce in a petition.....

(5) Where an offer is not accepted,..... the court, in exercising its discretion as to costs, may take into account the terms of the offer and the date on which the offer was served.

(6) Where an offer is withdrawn no communication respecting the offer shall be made to the court at any time.

[3] Civil Procedure Rule 41A.09 details the taxation consequences that are to apply when an offer made pursuant to its provisions is not accepted.

[4] Without considering the impact of exchanged offers on the issue of costs, I made a comment in my written decision that success at trial was divided. Neither party at trial had achieved relative success vis a vis the other so as to justify a cost award on that basis. I do not consider this to be a decision about whether costs should be awarded after consideration of the offers for settlement that were exchanged between the parties. Offers were exchanged and I have now been asked to consider whether costs should be awarded after an analysis of those offers. One of the parties may have made an offer that was, given the parties circumstances, very reasonable. To reject such an offer, force a matter to trial, and fail to achieve

one's trial position may be deserving of an adverse cost award. In *Kennedy-Dowell v. Dowell* 2002 Carswell NS 487, Justice Campbell described why this analysis is important in family law cases:

10 One of the purposes of awarding costs is to provide an incentive for the parties to earnestly pursue settlement. To say it another way, costs can provide a disincentive to a party who might otherwise take an unreasonable bargaining position prior to or at trial. It follows that the reasonableness of the bargaining position of the parties is a major factor in the court's exercise of discretion to award costs....

12 In my opinion, the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made. This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process. For that reason, the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. It is also relevant to compare the court's award against each party's position at trial (which is often significantly different from their pre-trial bargaining position).

[5] In this case the Husband did make an offer to the Wife dated June 29, 2007. It covered all issues including costs and provided 4 settlement options. Option A would have resulted in the Wife retaining matrimonial assets worth \$800,008. She would have received \$150,000 in respect to the business assets for a total amount of \$950,008. Spousal support was to be \$500.00 for life, adjusted annually for inflation. Party and Party costs were to be as agreed or as taxed under Tariff C. My award gave the Wife a total asset value of \$960,703 and spousal support in the amount \$800.00 per month subject to potential variation. Assessed as against the result at trial this offer was eminently reasonable. The other options in the offer were variations on this theme; option B was very similar, option C and D less so.

[6] The Wife rejected the offer in its entirety. She made an offer on October 17, 2007. It has a "without prejudice" heading but it does state "Although it is provided to you on a "without prejudice" basis, it will be used on the issue of costs should the matter proceed to trial. The Wife's offer is not reasonable when

assessed against the result at trial. It was not significantly different from her position taken at trial, with which I did not agree. She did have successes at trial, such as my acceptance of her expert's valuation of property. This is one of the reasons why I considered success at trial to be divided. However, in respect to a cost award this factor may be important to the quantum of a cost award. It does not impact the decision to award costs based on the exchange of settlement offers.

[7] The Wife argues that the result at trial in respect to the spousal support award and the reduction of the wife's interest in the jointly owned business assets was so unexpected that no analysis of the reasonableness of the offers can fairly be determined. This argument is not fully developed but its essence suggests my decision is outside the norm and unusual given these parties circumstances. The implication is that it was an unpredictable decision. Given that the Husband's offer was similar to my decision, he appears not to have considered such a decision to be unpredictable. Because I consider my decision to be within the framework of the law, the only objective criteria against which I can analyze settlement offers must be the decision I in fact made. I am not privy to the risk analysis the Wife may have considered, nor should I be. It is unfortunate she rejected settlement Option A but her reasons for doing so are irrelevant to me can have no impact on the decision I must make in respect to costs.

[8] Many of the arguments outlined in the Wife's submissions on costs relate to the quantum to be awarded and the factors that might decrease that quantum. Before determining the quantum I first must decide whether or not there is to be a cost award. I am satisfied that the Husband is entitled to a cost award. There was a reasonable offer made relatively early in the proceedings. The Husband did not maintain the position outlined in his offer at trial and as a result he did not have relative success at trial. This is a factor to consider in assessing the quantum of the award but it does not mitigate against a cost award. Costs must be awarded in this situation to promote serious the consideration of these offers in the family law context.

[9] The amount of the cost award shall be determined pursuant to Civil Procedure Rule 63.04. Submissions may be made in writing, (if the parties agree to deal with this issue by way of written submissions), as follows: the Husband's, submissions are to be filed with the court and copied to the Wife within 20 working days (days exclusive of Saturday, Sunday and holidays) of the date of this

decision. The Wife's submissions are to be filed with the court and copied to the Husband within 15 working days of her receipt of the Husband's submissions. If the Wife has raised an issue in her submissions not considered in the Husband's submissions he may file a further submission addressing those issues within 5 working days of receiving the Wife's submissions.

[10] If the parties do not agree to written submissions, counsel for the parties shall contact the court to arrange a time when this matter may be placed on my docket. Scheduling are to be notified of my request that this matter may be scheduled over a noon hour or placed early on a morning or afternoon docket to ensure it is dealt with as soon as possible.

Beryl MacDonald, J.