IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J. W. L. v. C. B. M., 2008 NSSC 387

Date: 20081218
Docket: 1201-060431, SFHD - 044383
Registry: Halifax

Between:

J. W. L.

Petitioner

v.

C. B. M.

Respondent

Revised Judgment:	The text of the original judgment has been corrected according to the erratum dated January 7, 2009. The text of the erratum is appended to this document.
Judge:	The Honourable Justice Beryl MacDonald
Heard:	March 25, 26 & 27, 2008, in Halifax, Nova Scotia
Written Decision on Quantum of Costs:	December 18, 2008
Counsel:	M. Jean Beeler, for the Petitioner B. Lynn Reierson, for the Respondent

By the Court:

[1] On September 23, 2008 I provided the parties with a written decision that recognized the Husband may be able to satisfy me he was deserving of a cost award as a result of a settlement proposal he had provided to the Wife well in advance of the hearing. I have now reviewed the submissions of counsel and the content and application of the Civil Procedure Rules.

[2] I have reviewed several decisions commenting on costs, including *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.*); Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000) , 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.)

[3] Several principles emerge from the Rules and the case law:

1. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.

4. Deference to the best interests of a child, impecuniosity of the parties, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".

6. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

7. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".

8. The actual dollar amount awarded at trial, for the purpose of determining costs, may be adjusted upward or downward after considering the complexity of the proceeding, the importance of the issues, and the factors enumerated in Civil Procedure Rule 63.04 (2). Also considered in this analysis is an assessment of the risk faced by the successful litigant as a result of the proceeding.

9. The appropriate tariff scale to be used also appears to depend upon the same factors considered in determining the "amount involved". For example, if the dollar amount of the award is large and the case is complex, a higher than basic scale may be used.

10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.

11. The "amount involved may include pre-judgement interest in an appropriate case. (*Campbell McIsaac v. Deveaux*, 2005 NSSC 15).

12. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

13. If counsel have not provided sufficient particulars of her or his fee or of the other factors to be considered, the judge may then be required to draw upon her or his personal knowledge and experience to determine what is a

"reasonable expense" towards which there should be a substantial contribution but not an indemnity.

[4] In considering a cost award Civil Procedure Rule 63.02 confirms :

(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 of .....taxed costs;.....

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

(b) any offer of contribution.

[5] A party entitled to costs is also entitled to “disbursements determined.....in accordance with the applicable provisions of the Tariffs. (rule 63.10A)

[6] The Tariffs are contained in Civil Procedure Rule 63. The provisions governing the application of the Tariffs state that the “amount involved shall be:

(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to:

(i) the amount allowed,
(ii) the complexity of the proceeding, and
(iii) the importance of the issues.

.....

(c) where there is a substantial non-monetary issue involved ....an amount determined having regard to:

(i) the complexity of the proceeding, and
(ii) the importance of the issues.

[7] The Tariffs set out a number of specific allowances for disbursements but concludes with the direction that an award may include “all other reasonable expenses necessarily incurred”.

[8] Civil Procedure Rule 57 deals with matters involving “matrimonial causes’. Rule 57.27 provides:

> (1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.
>
> (2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

[9] Civil Procedure Rule 70 governing “Family Proceedings” has no specific rule relating to costs but rule 70.03 (4) states:

> “ Where any matter of practice or procedure is not governed by statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.”

[10] Civil Procedure Rule 67 deals with Matrimonial Property Act Proceedings. Rule 67.06 provides:

> (1) A party may serve on another party an offer to settle any claim made in an application under the Act or joined with a claim for divorce in a petition.
>
> .....
>
> (5) Where an offer is not accepted, no communication respecting the offer shall be made to the court until the question of costs comes to be decided, and 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.
>
> .....

[11] The Rules do not clarify whether rule 67.06 ousts the application of Civil Procedure Rule 41A “Offers to Settle”. No reported decisions have been brought to my attention that would support this suggestion. Rule 41A.02 provides:

> A party may serve upon an adverse party an Offer to Settle (Form 41A(A)) any claim between them in the proceeding.....

[12] In rule 41A.09 the following appears:

> (1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where that plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, that plaintiff shall be entitled to party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs.

[13] A somewhat similar provision appears in respect to offers from a defendant.

[14] The strict provisions of Rule 41A.09 are alleviated somewhat by rule 41A.11:

> " Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters."

[15] In this case the Husband, the plaintiff in the proceeding, did make a formal "Offer to Settle" and he is seeking to invoke the provisions of Rule 41A.09. If for any reason this rule cannot practicably be applied, he requests that the existence of the offer be taken into account to provide him a substantial cost award.

[16] In this case the court was required to classify assets, to value those assets, to determine contribution made by the wife to the acquisition or maintenance of the husband's business assets, to determine whether an unequal division was justified and to determine the quantum of spousal support. The issues were not particularly complex but they were time consuming and to some extent interrelated. Entitlement to spousal support was not an issue. The Husband argued that the wife had sufficient means to support herself and thus had no "need" for spousal support. While the list of issues appears lengthy the real issue was how much money would each receive in assets, money or spousal support. My award can be viewed essentially as a monetary award. The problem is, this is not a monetary award to only one party. Each party, as a result of my decision, has assets or money of a value determined at trial. Do I use for the "amount involved" the value of the assets retained by the Husband or by the Wife? These are different sums. Should the combined total be used? Should the support award factor into a determination of the "amount involved" ? The Husband suggests that I use the value of the assets

placed at risk to determine the "amount involved". Because I decided that success at trial was somewhat divided there is no clearly identifiable "dollar amount awarded to the successful party at trial".

[17] The application of the tariffs require a dollar amount to be determined. To set a dollar amount in these circumstances would be an artificial exercise and I decline to do so. Because the application of Rule 41A.09 does rely on a mathematical calculation based upon the application of the tariff, the provisions of this Rule cannot assist the Husband. However, Rule 41A.11 does permit consideration of formal offers in the context of the general exercise of my discretion.

[18] When determination of the "amount involved" proved difficult or impossible Justice Goodfellow suggested that the court should use a "rule of thumb" by equating each day of trial to an amount of $15,000 in order to determine the "amount involved" . (*Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.)) In *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.) Justice Lynch considered it appropriate to raise the daily rate to $20,000 to reflect the increased cost of litigation since the *Urquhart* decision. This hearing lasted 4 days, 3 days during which the evidence was presented and almost an entire day for submissions. The "amount involved would be $80,000.00 and the basic Tariff would provide $6,875. Scale 4 would provide party and party costs of $7,650. I am informed that the Husbands legal fees are well in excess of this amount. I am not satisfied that using this rule of thumb will provide a sufficient award after examining the Husband's reasonable expenses and considering the impact of the offer to settle.

[19] The Wife argued the Husband's offer to settle was not "as favourable or more favourable than" the judgment at trial. In that judgment she received $10,695 more than the Husband offered as a property division, and $300.00 more than he offered as spousal support. Also in his offer she was to pay the Husband party and party costs. However, the offer for spousal support was "for life" adjusted annually for inflation. My decision leaves open the possibility that the support awarded may be reduced, or even eliminated in the future. I decided her entitlement was non-compensatory and at some point her own resources may be considered sufficient for her personal support. As a result this aspect of the offer can be considered to be more favourable than my award because it removed the potential for variation or termination. Given the value of the total assets to be divided in this proceeding a difference of $10,695 may not be enough to suggest the judgment was "not as favourable". The Wife argues this amount is significant and if the Husband could

have called upon the provisions of Rule 41A.09, I would be forced to determine this issue. Because he cannot invoke this Rule, I do not need to comment further.

[20] My consideration of the Husband's offer pursuant to Rule 63.02 and Rule 67 is unfettered by the requirement to determine whether the offer was as favourable or more favourable than the award at trial although this may be a valid consideration in the overall exercise of my discretion. There is another consideration, the reasonableness of the offer. (*Kennedy-Dowell v. Dowell* 2002 Carswell NS 487 (N.S.S.C.) As I commented in my earlier decision the Husband had made what I considered to be a reasonable offer in June 2007. This offer remained open to the date of the hearing. At the time of the offer the Husband's legal fees and disbursements were approximately $20,000. The Wife did not accept this offer putting the Husband and herself to the expense of trial. The Husband also contributed to increasing the cost of the trial. Had he admitted the valuations provided by the wife's expert much trial time would have been saved. This is a factor I also have considered in making this cost award.

[21] The Wife has argued that an award of costs against her would have "devastating financial consequences for her". She pleads impecuniosity and the disparity of incomes between the parties. She requests that I take judicial notice that her investments have declined dramatically due to the pending world recession. If this was a factor I could consider, and I do not accept I can use judicial notice in such circumstances, the Husband likely also has suffered a corresponding decrease in his net worth.

[22] After my decision the Wife remained the owner of a home valued at $500,000.00, which was to be purchased by her son, a cottage valued at $127,689.00, a RRIF valued at $163,974.00 and a cash payment from the Husband of $208,694.00. Her income with spousal support was estimated to be $37,400.00. The Husband's net income after payment of spousal support was not significantly greater than her net income. Under these circumstances I do not consider the Wife to be impecunious nor is there a significant disparity of incomes between the parties.

[23] After considering all the factors described in this decision, including the Husbands actual legal fees and disbursements, I award the Husband costs in the amount of $20,000.00.

Beryl MacDonald, J.

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Counsel:	M. Jean Beeler, for the Petitioner B. Lynn Reierson, for the Respondent

E R R A T U M - dated January 7, 2009

On Page 4, Paragraph 6 it now reads:

[6] The Tariffs are contained in the regulations passed pursuant to the Costs and Fees Act, R.S.N.S. 1989.c.104. In the Tariffs the "amount involved" shall be:

.../2

(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to:

(i) the amount allowed,
(ii) the complexity of the proceeding, and
(iii) the importance of the issues

.....

(c) where there is a substantial non-monetary issue involved ....an amount determined having regard to:

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Page 4, Paragraph 6 should read as follows:

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