IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hendrickson v. Hendrickson, 2005 NSSC 202

Date: 20050622
Docket: SFHD 019504
Registry: Halifax

Between:

Peter G. Hendrickson

Applicant

v.

Kim C. Hendrickson

Respondent

Judge:	The Honourable Justice F.B. William Kelly
Heard:	June 17, 2005, in Halifax, Nova Scotia
Written Decision:	July 14, 2005
Counsel:	Michael I. King, Q.C., for the applicant Gordon R. Kelly & Angela Swantee, for the respondent

By the Court: (Orally)

[1] This is an application to fix costs arising from a divorce hearing involving Mr. Peter Hendrickson, the applicant, and Ms. Kim Hendrickson, the respondent.

[2] At the conclusion of the Divorce Hearing, and after the parties had provided briefs on costs, I determined that the parties should bear their own costs, with the

exceptions that Mr. Hendrickson should pay costs for the two interim applications in the amount of $1,250 each, and that Mr. Hendrickson should pay 70 percent of the disbursement of Ms. Hendrickson relating to the charges of Paul Bradley. Mr. Bradley was qualified as an expert for the purpose of giving his opinion regarding the business records and valuation of various companies in which Mr. Hendrickson had an interest. His focus in this regard at the trial was to assist the Court on the matter of the funds properly available to Mr. Hendrickson as potential income.

[3] Mr. Hendrickson appealed from the Corollary Relief Judgment dated July 14, 2004. The issues before the Court of Appeal included the division of assets, the quantum of child support based on my determination of his effective income at $400,000 and my determination that he pay 70 percent of the costs of the 'Bradley disbursement'. The Nova Scotia Court of Appeal dismissed the appeal on all matters except the disbursements, providing Mr. Hendrickson serve upon Ms. Hendrickson a notice of taxation of the 'Bradley disbursements' within fifteen days. The Court further directed that this taxation be before myself, the trial judge, with the costs of that proceeding to be within my discretion.

[4] The Nova Scotia Civil Procedure Rules provide:

Costs in discretion of court

Rule 63.02.

(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

(a) award a gross sum in lieu of, or in addition to any taxed costs;

(b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]

(c) direct whether or not any costs are to be set off.

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

(a) any payment into court and the amount of the payment;

(b) any offer of contribution.

(3) The court may deal with costs at any stage of a proceeding.

...

Disbursements

Rule 63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

[5] With reference to the issue of the ‘Bradley disbursements’, the Court of Appeal commented as follows at paragraphs 21, 22 and 23:

> [21] The bill for Mr. Bradley's accounting fees, presented to the judge in post-trial submissions, totaled $51,863.74. There was no evidence on the make up of the accounting fees.
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> [22] In *Claussen Walters & Associates Ltd. v. Murphy* (2002), 201 N.S.R. (2d) 58; N.S.J. No. 44 (Q.L.)(C.A.), this Court directed that a trial judge, when considering an award of disbursements, must be satisfied that it was reasonable for a party to have engaged the services of an expert and that the quantum of the disbursement is "just and reasonable" (see paras 11 through 18, per Saunders, J.A. for the Court, citing *Irving (J.D.) V. Desourdy Construction Ltée* (1993), 5 N.S.R. (2d) 350 (T.D.), at p.362).
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> [23] While the judge, here, was satisfied that Mr. Bradley's evidence was necessary and helpful, a conclusion with which I would agree, there was no evidence or submission before him upon which to decide that the amount of the disbursement incurred by Ms. Hendrickson in engaging Mr. Bradley was "just and reasonable". The onus was on Ms. Hendrickson to justify this charge.

[6] Mr. Bradley provided Ms. Hendrickson with three accounts, dated December 20, 2002, May 21, 2003 and October 30, 2003, in the total amount of $51,863.74. These accounts list the nature of each individual professional service and disbursement, the time spent on each service, the total number of hours provided and the average hourly rate for the service. The hours, average rate and total of each account are as follows:

Date	**Hours**	**Average Rate**	**Total Due**
December 20, 2002	48.7	$218.00	$12,371.82
May 21, 2003	31.0	$226.00	$ 8,050.00

October 30, 2003	109.7	(not given)	$31,441.92
	189.4	**$273.83**	**$51,863.74**

[7] I have reviewed these accounts and find, from the accounts and the evidence at trial relating to these services, that they properly reflect the nature of the services provided by Mr. Bradley and his company, PriceWaterhouse Coopers LLP. Upon reviewing the reports and the evidence at trial, it is clear that they reflect the gradual release of financial information to Ms. Hendrickson regarding the various corporate interests of Mr. Hendrickson. As noted in my decision, to some extent they reflect a failure on the part of Mr. Hendrickson to provide financial information on his companies in a timely way. On one occasion, the Family Division found it necessary to issue an order for disclosure because of delay. However, the financial structure and complexity of these companies, their interlocking cash transactions and the slow response of corporate professional advisers, may well have also complicated the financial reporting process. On the other hand, the evidence at trial was that the financial picture of Mr. Hendrickson's main business, commonly referred to as Tour Tech, was shown to be available by the company's internal records almost immediately. I would also note that Mr. Hendrickson's reluctance to release information was based, to some extent, on his

belief that if such information was available to competitors, it might negatively affect his business. In all, I conclude that the failure to provide corporate financial information in a timely way did contribute to the cost of the expert assessments reflected in the 'Bradley disbursements'. I agree with submissions of counsel for Mr. Hendrickson that some of the information requested was probably irrelevant, but much of this delayed information was clearly relevant and necessary and, if provided in a timely way, could have promoted settlement of some issues and reduced the suspicion that Mr. Hendrickson was "hiding" relevant income through the corporate process.

[8] When a payor parent is the majority shareholder and has the capacity to control the movement of funds between these companies which he or she controls, the obligation to provide full and timely disclosure is most important to reduce the suspicions and additional costs thereof in assessing the entitlement to asset division and support in the action.

[9] Counsel for Mr. Hendrickson argues that the cost of the 'Bradley disbursements' of over $50,000 is significantly out of proportion to the issues before the court. He notes that Ms. Hendrickson withdrew her claim against Mr.

Hendrickson's business assets on the second day of the trial and argues that therefore, the report of October 9, 2003 should be eliminated or reduced, as a disbursement, as its purpose was to value the shares of the various companies and to assist in producing an estimation of her entitlement in these companies. There is some merit in this objection, but it is clear from the resulting report that the greater emphasis of the assessment was in determining the structure of the companies and the validity of their financial reports for the purpose of assisting the court in its determination of an appropriate income for child support purposes under the *Child Support Guidelines*. The resulting evidence played a significant part in the assessment of the income of the companies, particularly the net profit, an essential part of the information required for the major issue at trial, the calculation of *Guideline* income for the purpose of child support entitlement. The subsequent reports build on this first report, based on additional personal and corporate financial information as it became available to Mr. Bradley.

[10] Mr. Hendrickson's counsel argued that some of the calculations on income were "seriously flawed" in that they included income of Hendrickson Holdings Limited, a retirement scheme of Mr. Hendrickson and his mother, the residual value of which I found was yet to be determined. However, the test relating to a

disbursement is not whether it would eventually be needed, but as indicated in *Claussen Walters* at paragraphs 11 through 18, whether it was "reasonable for a party to have engaged the services of an expert and that the quantum of the disbursement is just and reasonable".

[11] In my opinion, it is abundantly clear that the review of the companies reflected in the Bradley reports was prudent and necessary for the primary issue, that of determining Mr. Hendrickson's income for purposes of child support according to the *Guidelines*. In my reasons, I found Mr. Bradley's evidence necessary and helpful, an opinion agreed with by the Court of Appeal (see para 23). What remains to be determined is whether the amount of the disbursement was "just and reasonable in the circumstances."

[12] The onus is on Ms. Hendrickson to justify the charge for the 'Bradley disbursements', having regard to the test of "what is just and reasonable in the circumstances". Both counsel have referred to *Claussen Walters* as a useful guide to the law with respect to the awarding of disbursements. Saunders, J.A. in delivering the decision of the Court, after determining the disbursement in question was 'relevant and admissible, stated at paragraphs 12 through 18:

[12] A finding of relevance, however, did not end the matter. Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in *J.D. Irving Ltd. v. Desourdy Construction Ltd.* (1973) 5 N.S.R. (2d) 350 at p. 362:

> In my opinion, Civil Procedure Rule 63.37, Clause (5) is to the same effect as the old Order LXVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances.

[13] This case was cited by the trial judge and so it cannot be said that any wrong principles of law were applied. However, and with respect, I find that he erred in his disposition. There was simply no evidence before him upon which to conclude that the disbursements incurred by Mr. Walters in engaging Mr. Hardy were "just and reasonable". The onus was on the respondent to justify this charge against the appellants. He did not.

[14] Three invoices make up the bill. The first, dated October 18, 1999, was for $9,244.10. The second, dated February 22, 2000 was for $2,483.54. The third, dated February 15, 2001, was for $4,743.75. No particulars of any of the "services rendered" are disclosed. The invoice simply records "for services rendered". There is no basis upon which to deduce hourly rates, or the time spent, or the services provided. Thus, with respect, there was no evidence before the trial judge upon which he could have made the determination as to the "justness" or "reasonableness" of the Hardy disbursement.

[15] We cannot accept counsel for the appellants' submission that all or a significant proportion of the Hardy invoices ought not to be recoverable because no use was made of the Hardy reports by the trial judge in his ultimate determination. In our view, this is immaterial. The particular "use" to which an expert's report or opinion may be put by a trial judge may never be discerned. The only question is, as we have noted, whether in fact the disbursement is a "just" and "reasonable" charge against the opposing party.

> [16] We also reject counsel for the appellants' submission that by the time of trial the respondent did not "need" the Hardy report in order to quantify his damages. On the contrary, having regard to the relief sought and the defenses raised, we are perfectly satisfied that retaining Mr. Hardy to prepare a report and to testify at the trial was prudent and necessary. Where the trial judge erred was in concluding that the amount of the Hardy disbursement was "just" and "reasonable" when there was no evidence before him on which he could make such a determination.
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> [17] In the result we find that his decision in this respect was so clearly wrong as to amount to a manifest injustice. The decision and order of the trial judge are set aside insofar as it obliged the appellants to pay - without a proper evidentiary foundation justifying the expense - the full amount of the Hardy disbursement.
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> [18] Upon being satisfied, as we are, as to the necessity of engaging Mr. Hardy to advance the respondent's action and claims for relief, the taxing master need not be concerned with the question whether Mr. Hardy's work on behalf of the respondent was required. We are satisfied it was for the reasons already given. We direct that the matter be referred to a taxing matter for the sole purpose of determining whether, upon a proper evidentiary basis, all or a portion of the Hardy disbursement totaling $16,471.39, is a just and reasonable charge against the appellants having regard to all of the circumstances.

[13] The evidence advanced by Mr. Bradley constituted a significant part of the trial process both in his examination and cross-examination, as well as the evidence of Mr. and Mrs. Hendrickson, Mr. Blom and Mr. Whynot on the subject of these reports. The evidence dealing with the financial information of the companies was essential to the principal matter at issue and most of the time of the trial was related to the material in these reports. The preliminary work of Mr. Bradley was necessary and prudent, considering the broad range of issues

separating the parties at the early stage of pleadings, and the subsequent reports were equally necessary to properly assess the issues in dispute.

[14] In conclusion, I find that it was prudent and necessary to prepare the reports in question and, after review of the facts at trial and the details of the billings of the reports, I find the charges just and reasonable, in spite of some reservations of proportionality of the charges to the matters in issue. I conclude that Mr. Hendrickson should bear the greater cost of the disbursement in the light of the increased cost of the 'Bradley disbursement' due to his lack of best efforts in complying with his obligation to provide financial information within a reasonable time, leading to a more prolonged and costly litigation. I was somewhat surprised and concerned on hearing at the application that Mr. Hendrickson has yet to pay any of the costs already awarded in these proceedings.

[15] I order that Mr. Hendrickson pay 70% of 'Bradley disbursement' costs within forty five days of the Order being issued herein. In addition, he has the obligation to pay the costs which have already been assessed in my trial decision within a reasonable time. Ms. Hendrickson shall have her costs in this application in the amount of $2,000.

J.