

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Cashin v. Cashin, 2010 NSSC 70

**Date:** 20100301

**Docket:** 1217-000607

**Registry:** Halifax

**Between:**

Barbara Jean Cashin

Applicant

and

Terrance Jerome Cashin

Respondents

**Judge:** Justice Lawrence I. O'Neil

**Heard:** September 21, 2009, in Halifax, Nova Scotia

**Counsel:** Wayne J. MacMillan, for the Applicant  
Adam Rodgers, for the Respondent

**By the Court:**

**Introduction**

[1] The court rendered a written decision in this matter, filed as *Cashin v. Cashin* [2009] N.S.J. No. 508. The background of the parties' relationship and their litigation history relevant to this costs decision was reviewed in detail as part of that decision.

[2] The court received written submissions on the issue of costs on behalf of both parties.

## **Position of the Parties**

[3] Mr. MacMillan, on behalf of Ms. Cashin, seeks costs on a solicitor and client basis for a number of reasons. He argues in particular that:

- (1) there was a failure on the part of Mr. Cashin to provide timely or full disclosure;
- (2) that Mr. Cashin filed a fraudulent document with the court, and
- (3) that these failings resulted in substantial legal costs for Ms. Cashin. Mr. MacMillan totals these costs as \$17,760.31.

[4] Alternatively, Mr. MacMillan argues for costs under Scale 3 of Tariff A, with \$84,320.00 as the “amount involved”. He submits the calculation flowing from the application of Tariff A results in costs of \$12,188.00 plus \$2,000 for a total of \$14,188.00 payable to his client. He argues that an amount at the higher scale should be assessed because:

- (1) at earlier stages of the proceedings, “higher amounts were involved” and were being contested by Mr. Cashin; and
- (2) Ms. Cashin should be compensated for the various discovery steps she needed to pursue and which delayed proceedings.

[5] Mr. Rodgers, counsel for Mr. Cashin argues:

- (1) that the results of the litigation were mixed with Mr. Cashin gaining a concession that the line of credit was a matrimonial asset;
- (2) that Ms. Cashin’s frequent disclosure requests were based on suspicions that Mr. Cashin had hidden assets - which suspicion was not founded;
- (3) that Mr. Cashin did in fact provide very detailed disclosure as required by the rules of the court;
- (4) that as new requests for disclosure came forward, time was required to obtain the requested information;
- (5) that Ms. Cashin was found to have frustrated Mr. Cashin’s access to the garage and this gave rise to litigation.

[6] Mr. Rodgers acknowledges the court's conclusion that Mr. Cashin did not obtain a loan from Jamie Cooper as he testified to, and as he communicated to Ms. Cashin as part of the disclosure process.

### **General Principles Governing Costs**

[7] Rule 92.02(2) of the New Rules of Court provides that the 1972 Nova Scotia Civil Procedure Rules continue to apply to the Family Division of the Supreme Court.

[8] Rule 70.03(4) of the 1972 Rules provides:

70.03(4) 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.

[9] An award of costs following or during a proceeding is provided for in the 1972 Rules of Court. Rule 57.27, Rule 63.02 and Rule 63.04(1) and (2) provide as follows:

#### **Party and party costs fixed by court**

**57.27(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.

.....

**63.02(1)** Notwithstanding the provisions of rules 63.03 to 63.15, the costs to 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 ...

.....

**63.04(1)** Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

**(2)** In fixing costs, the court may also consider:

- (a) the amount claimed;
- (b) the apportionment of liability;
- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.

The subject proceeding is one that would most appropriately fall within Tariff A, if the Tariff structure was to be strictly applied. The Tariffs are regulatory, adopted pursuant to Rule 63.01(b) and the *Costs and Fees Act*, R.S.N.S. 1989 c.104.

[10] The court considered a decision of Justice Legere-Sers in *Shurson, 2007 NSSC 101*, and the decision of Justice MacDonald in *Conrad v. Bremner, 2006 NSSC 99*. The court has also considered the decisions of Justice Goodfellow in *Gardiner v. Gardiner, 2007 NSSC 282* and Justice Williams in *Grant v. Grant [2002] N.S.J. No. 14*.

[11] It is settled that costs can be granted in matrimonial matters. Justice Williams in *Grant* at paragraph 3 reviews the Rules and the considerations for the court when considering an award of costs. In particular, he references the factors outlined in Rule 63.04(1) and (2).

[12] In *Grant*, Justice Williams was considering costs flowing from a proceeding that included numerous applications and interlocutory notices over four years. There was also **a trial and a pre-trial**. He found that the conduct of the wife had unnecessarily lengthened the matter and that the proceedings contained many **unproven allegations and untrue assertions**. These were significant factors Justice Williams considered when he awarded costs of \$12,000 and \$2,250 for disbursements. I agree with Justice Williams in *Grant*, who stated at paragraph 42 that an “amount involved” analysis has limited applicability in complex, multi-issue matrimonial proceedings.

[13] As stated at paragraph 13 in *Grant*, Justice Williams observes that divorce and family law proceeding “often involve a multitude of separate and inter-related problems”. The result is that determination of success is also more complex.

[14] In *Shurson*, Justice Legere-Sers was considering costs in the context of an **offer to settle**. The case report does not detail the particulars of the outcome. She ordered \$10,000 in costs.

[15] In *Conrad*, Justice MacDonald was dealing with costs **following a trial** and once again the case involved an **offer to settle** as provided by Rule 41.09(a). The case also involved discoveries, pre-trial court appearances and a two day hearing. Justice MacDonald awarded party and party costs of \$5,000.00. Justice MacDonald in *Conrad, supra*, at paragraph 11, has a helpful discussion of principles emerging from the Rules and the Case Law.

[16] Justice Goodfellow in *Gardiner*, declined to order costs. Justice Goodfellow conducted an interim hearing that lasted one half day, other proceedings occurred over the following year. Citing Mr. Gardiner’s financial difficulties as a partial reason for the delay in having matters concluded and the mixed success of the parties, he directed that each party bear their own costs.

[17] Justice Gass in *Pelrine v. Pelrine, 2007 NSSC 123*, a decision of this court dated April 18, 2007, considered the issue of costs claimed by both parties, following a divorce proceeding which was **heard over four days**. Post trial submissions were filed. The Petitioner sought approximately \$11,000 in costs including HST and disbursements and the Respondent sought approximately \$9,000 plus disbursements of approximately \$3,600. Justice Gass reviewed Rule

63.04; the decision of Justice Campbell in *Kennedy-Dowell* 209 N.S.R. (2d) 392 and the decision of Justice Goodfellow in *MacLean* 200 N.S.R. (2d) 34.

[18] Of particular interest is that Justice Gass found a failure to timely disclose on the part of the Petitioner. She also assessed the relative “success” of the parties and the presence or absence of offers to settle. Justice Gass ordered costs to the Respondent in the amount of \$3,031.00 plus \$2,000 towards disbursements.

[19] In *Hanakowski v. Hanakowski* [2002] N.S.J. No. 272 Justice Dellapinna awarded costs of \$2, 500 to the husband where the wife’s failure to provide full financial disclosure added to the husband’s legal costs and hampered the settlement process.

[20] In *Guillena v. Guillena* [2003] N.S.J. No. 76 Justice Dellapina ordered costs of \$4,000 in a case where the matrimonial assets were divided equally. The Respondent had failed to comply with disclosure obligations. The Respondent failed to comply with orders to disclose dated March 15, 2001; May 14, 2001; April 4, 2002; September 4, 2007 and December 10, 2002. The Respondent husband did not attend trial in *Guillena*, nor did he consent to any of the corollary relief.

[21] Justice Coady in *Ghosn* [2006] N.S.J. No. 272 assessed costs against the husband after finding that his non-disclosure and obstruction increased the wife’s legal costs. He found that the tariffs were not drafted with family law in mind. He awarded a lump sum of \$10,000 plus 75% of the wife’s disbursements. Ms. Ghosn’s conduct was found to **be aimed at frustrating** Mr. Ghosn’s application to vary. He was found to have **mislead** both Ms. Ghosn and the Court. Ms. Ghosn was found to have pursued 15 avenues to obtain financial information Mr. Ghosn refused to provide. In addition, Ms. Ghosn made two **offers to settle**.

## **Conclusion**

[22] I am not persuaded that solicitor-client costs should be awarded. The court considered making a costs award on this basis. The decision not to do so was not an easy one. This is not a “rare and exceptional circumstance” requiring the court to express disapproval by awarding party and party costs.

[23] It is clear that Mr. Cashin embarked upon a plan to conceal his interest in the Granville Street property while the parties lived together. Ms. Cashin discovered the contrary but not because Mr. Cashin wanted her to. The court concluded that he exhibited more dishonesty when describing Mr. Cooper's alleged role as a financier of Mr. Cashin's role in the development of the Granville Street property. His willingness to mischaracterize his interest in the Granville Street property extended to a willingness on his part to mislead the court.

[24] He clearly does not appreciate the serious responsibility he bears as a litigant to be forthright with the other party and with the court. Nevertheless, I am satisfied that the court's discretion when awarding party and party costs permits the court to take these findings into account.

[25] Mr. Cashin was not unsuccessful on all issues. The nature of the line of credit was a significant issue of contention between the parties. It was resolved in Mr. Cashin's favour. Ms. Cashin's argument on the nature of the bridging benefit did prevail. However, the argument of Mr. Cashin was not frivolous and given the financial implication of the court's decision on this issue, for both parties, the court can not fault Mr. Cashin for litigating the issue.

[26] The financing of the development of the Granville Street property and Mr. Cashin's involvement and that of any other third party, was the subject of deception by Mr. Cashin. Clearly, he resisted and frustrated efforts by Ms. Cashin's counsel to get to the bottom of the matter.

[27] Although a number of court appearances were scheduled the parties were able to reach agreement on important issues as the litigation progressed. This is not unusual. I am not persuaded that Mr. Cashin should be held responsible for the inability of the parties to reach agreement on various issues, on earlier occasions. Clearly, there was and is significant acrimony between these parties.

[28] In such circumstances, significant legal costs are generally incurred by both parties, even when they are acting in good faith.

[29] Notwithstanding the foregoing, I am of the view that Mr. Cashin should pay substantial costs to Ms. Cashin. I am influenced by the factors set out in Rule 63.04 *supra*, at paragraph 7.

[30] Mr. Cashin was slow to respond to interrogatories forwarded to him in November 2008; the court was required to involve itself and require Mr. Cashin to answer interrogatories and to provide financial disclosure, and the litigation involved numerous court appearances.

[31] In summary, Mr. Cashin:

- (1) was the less successful party;
- (2) in financial terms, Ms. Cashin's success is valued at \$80-\$100,000;
- (3) Mr. Cashin engaged in deception to avoid a transparent accounting of his assets; and
- (4) he was not sufficiently diligent in providing disclosure.

[32] Costs in the amount of \$7,500.00 are awarded in Ms. Cashin's favour, inclusive of disbursements and HST.

**J.**