SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Lockerby v. Lockerby, 2011 NSSC 103

Date: 20110314
Docket: 1201-063145
Registry: Halifax

Between:

Douglas Bruce Lockerby

Petitioner

v.

Ero Anna Lockerby

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Final Written Submissions:	By Doug Lockerby on December 13, 2010 and January 18, 2011 By Ero Lockerby on January 28, 2011
Counsel:	B. Lynn Reierson, Q.C. for Doug Lockerby Ero Lockerby on her own behalf

By the Court:

Introduction:

[1] Over eight days in February and April, 2010, I heard a trial involving Doug and Ero Lockerby. There were a number of disputes between them: whether there should be a shared parenting arrangement for their four children; whether there should be an equal or unequal property division; whether there should be a retroactive award of child support, whether there should be reimbursement for purchases Mr. Lockerby made because Ms. Lockerby would not provide items to him; whether there should be spousal support; whether income should be imputed to Ms. Lockerby for the purpose of quantifying prospective child support; whether Ms. Lockerby should contribute proportionately to the children's expenses pursuant to section 7 of the *Federal Child Support Guidelines*, SOR/97-175; whether Ms. Lockerby should return certain items to Mr. Lockerby and whether Mr. Lockerby should be compensated for the loss of airline flight passes. I rendered my decision on July 21, 2010. It's reported at *Lockerby*, 2010 NSSC 282. Two months later, I granted an application by Mr. Lockerby to give effect to my order for sale of the couple's homes.

[2] Mr. Lockerby succeeded in most of his claims: the children were placed in his primary care, property was divided unequally so as to recognize debts owed to his father and he was awarded prospective child support after income was imputed to Ms. Lockerby. Ms. Lockerby was ordered to return the items that Mr. Lockerby sought. Mr. Lockerby's retroactive child support claim, his claim for compensation for the loss of flight passes and his claim for reimbursement for the expense of items he purchased were dismissed. Ms. Lockerby's prospective spousal support claim was dismissed.

[3] Mr. Lockerby now seeks costs. He is looking for a "substantial award of costs, on a solicitor client basis". He suggests costs in the range of $80,000.00. He argues that this is warranted because of his success in the litigation, his settlement efforts and Ms. Lockerby's conduct, both in the process and substance of the proceeding. The latter element, Ms. Lockerby's conduct, is highlighted particularly in the context of Mr. Lockerby's request for solicitor and client costs.

[4] Ms. Lockerby says that success was mixed and "on that basis alone" the claim for costs should be dismissed.

Costs, generally

[5] A claim for costs is governed by *Civil Procedure Rule* 77. Costs are to be fixed in accord with the tariffs of costs and fees determined under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104.

[6] Costs generally follow the event, according to *Rule* 77.03(3). Ms. Lockerby argues that success has been mixed, so costs should not be awarded.

[7] I've identified the issues disputed at trial. The most important issues and those which consumed the greatest amount of time were the children's parenting arrangement and Mr. Lockerby's request for an unequal property division which recognized the debts owed to his father. He was successful in each of these claims. The debts of $200,000.00 owed to Wayne Lockerby were allocated equally in the division under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. He was successful in having income imputed to Ms. Lockerby and in obtaining child support from her, including a proportionate contribution to the children's health insurance. He was awarded child support of $1,119.00 per month. He had additionally sought proportionate contribution to expenses for the children's education and extracurricular activities. After considering the available tax credit, Ms. Lockerby could have been ordered to contribute $107.24 each month to these expenses. Mr. Lockerby failed in this claim.

[8] Mr. Lockerby failed in his request for contribution to section 7 expenses (other than health insurance), his request for retroactive child support, his request for reimbursement for the expenses he incurred in replacing items that Ms. Lockerby refused to provide to him and for reimbursement for the loss of flight passes. Little trial time was dedicated to these claims by Mr. Lockerby. Similarly, little trial time was devoted to Ms. Lockerby's claim for spousal support: as she says "[t]he issue of spousal support was almost neglected at the hearing in terms of time spent on the issue."

[9] If the issues were equally important it might be possible to say that success was divided. However, the issues were not equally important. The trial focused on the children's parenting arrangement and the property division and Mr. Lockerby was successful in dealing with these issues.

[10] I have discretion to award or withhold costs. The discretion to withhold costs can be exercised where it is based on principled reasons.

[11] One principled reason to withhold costs is that in a custody case children's best interests are at issue and fear of a costs award might deter a parent from pursuing a claim relevant to the children's best interests. Children's best interests ought not be hostage to monetary concerns.

[12] In the fall of 2008, Ms. Lockerby was offered a shared parenting arrangement as part of an overall settlement. This is the arrangement she sought, unsuccessfully, at trial. An email to Ms. Lockerby's lawyer attached an agreement drafted by Mr. Lockerby. The agreement provided that the children "will spend +/- 50% of there [*sic*] time with each respective parent in their homes". It provided that Mr. Lockerby would pay child support to Ms. Lockerby and the parents would equally share the cost of the children's special or extraordinary expenses. The offer was specific in denying each spouse support. The terms of the agreement relating to the division of property did not address all of the property and debts which were dealt with at trial. It divided the couple's vehicles and assigned two debts, each spouse was to keep one of the houses and the amount to be paid to the other was calculated. An overall equalizing payment was not calculated. The draft separation agreement was incomplete and subject to further discussion. This offer was sent to Ms. Lockerby's lawyer after the close of business on October

16, 2008 and a response was required "no later than Thursday, October 21". I've been given no other offer.

[13] Mr. Lockerby says that he was prepared "throughout the proceeding" to enter into a joint custody order. Ms. Lockerby says that the offer of joint and shared custody was withdrawn in July 2009. The correspondence provided to me by Mr. Lockerby is consistent with Ms. Lockerby's assertion that the parenting offer did not continue after July, 2009. The materials do not suggest that Mr. Lockerby ever offered to resolve the parenting issue on its own, rather than as part of a comprehensive settlement.

[14] In *Nemorin v. Foote*, 2009 NSSC 23, *Tamlyn v. Wilcox*, 2010 NSSC 363 and *Goodrick*, 2009 NSSC 119, it has repeatedly been stated that the prospect of an order for costs ought not deter a parent from litigating a *bona fide* parenting claim. I did not order the parenting arrangement that Ms. Lockerby sought. As late as eight months before the trial, shared parenting was presented to Ms. Lockerby as an option that was acceptable to Mr. Lockerby. At trial, Ms. Lockerby argued that complaints about her conduct related to "long since past events". I agreed that there was some merit to this, since Ms. Lockerby's inappropriate remarks to the children about the separation and divorce had been far fewer in the previous six months than they were in the year immediately following the couple's separation. While I did not accept Ms. Lockerby's parenting claim, it was a *bona fide* claim and this is a reason to deny Mr. Lockerby costs despite his success.

[15] A second principled reason to withhold costs has to do with finances. In *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (A.D.) at paragraph 8, Justice Macdonald said that "if the awarding of costs would create an undue financial hardship, it would be a proper exercise of the judicial discretion to refuse to grant them". The Appeal Division upheld Justice Richard's decision to withhold costs on the basis that Mrs. Kaye's income exceeded Mr. Campbell's and Mr. Campbell had been ordered to pay child support. In these circumstances, the additional hardship of costs was a burden Mr. Campbell should not have to bear.

[16] Justice Gass explained this consideration in *Connolly*, 2005 NSSC 203. Mr. Connolly faced significant access costs and had been ordered to pay substantial arrears of child support. Mr. Connolly argued that an award of costs would cause him considerable financial hardship and impair both his ability to exercise access to his children and to meet his child support obligation. At paragraph 9, Justice Gass wrote, "Any order of costs should not have an adverse impact on the children's emotional or material well being. Access with their father is important for their emotional well being and the child support obligations are critical to their material well being."

[17] The Lockerby children reside with their father and Ms. Lockerby pays child support by way of a garnishment on her income. The garnishment was put in place because Ms. Lockerby was not paying the child support she was ordered to pay. In the affidavit Ms. Lockerby filed in support of her submission on costs, she advised that she is "on disability" and she began to receive disability benefits on December 17, 2010.

[18] The evidence at trial indicated that Ms. Lockerby worked very little and was generously remunerated for her work. Mr. Lockerby had argued that a $50,000.00 annual income level should be imputed to Ms. Lockerby to reflect her underemployment and she agreed. Ms. Lockerby has an access schedule that doesn't require her to incur costs for child care and Mr. Lockerby pays for all the children's extra-curricular activities. In these circumstances a costs award would not adversely impact the children.

[19] In keeping with the view that *bona fide* claims relating to parenting ought not be curtailed by the fear of an order for costs, I will not make an order for costs that relate to the portion of the hearing that related to parenting. However, there is no principled reason to deny an order for costs and I will make an order for costs relating to the portion of the trial that relates to the financial issues. In this regard it's important to remember how the trial unfolded. Ms. Lockerby was representing herself at the end of 2009. She retained counsel after a pre-trial conference in early January 2010. The trial began on February 15, 2010. Ms. Lockerby's counsel was double-booked which meant that the scheduled hearing times had to be adjusted. As well, insufficient time had been scheduled for the trial. Three days had been scheduled. The third day of the trial was abbreviated, while three half-days and one full day were added.

[20] The first day of the hearing was dedicated to witnesses (Jayne Simpson, Jimmy Zelios and Karen Lockerby) whose testimony focused on the children. Ms. Lockerby offered some evidence that was relevant to the *Matrimonial Property Act* application. Testimony from Wayne Lockerby consumed the entirety of the second day and almost all of the third day. The third day was scheduled for three and one-half hours in the afternoon when Wayne Lockerby completed his testimony and Doug Lockerby began his. Most of Wayne Lockerby's evidence related to the *Matrimonial Property Act* application. A much smaller amount of his evidence related to the children. The fourth day was abbreviated, running from 10 a.m. until 1 p.m. The fourth day was devoted to evidence from Doug Lockerby, as was the two hours of evidence heard on the fifth day of the trial. Ms. Lockerby took the stand shortly before day's end and she continued her testimony on the sixth day, which ran for a full day. Ms. Lockerby finished testifying on the seventh day, which ran for approximately two and one-half hours. The final half-day of the trial was dedicated to argument.

[21] While the trial proceeded over eight days, it amounted to five days of trial. Reviewing the testimony of the parties and their witnesses, two days were dedicated to the parenting issue, while three were dedicated to the *Matrimonial Property Act* application and financial claims.

[22] Ms. Lockerby issued *subpoenas* for five witnesses (Jayne Simpson, Oscar Lopez, Jimmy Zelios, Troy Landry and Sharon Mitchell) and three of those witnesses (Mr. Lopez, Ms. Landry and Ms. Mitchell) provided affidavits. Mr. Lockerby did not require Mr. Lopez, Ms. Landry and Ms. Mitchell for cross-examination: their affidavits were admitted into evidence unchallenged.

Solicitor and client costs

[23] According to *Civil Procedure Rule* 77.03(3), costs follow the result, unless a *Civil Procedure Rule* provides otherwise, or I order otherwise. Mr. Lockerby has particularly drawn my attention to *Rule* 77.03(2) which makes clear that I may order solicitor and client costs "in exceptional circumstances recognized by law."

[24] In *Young*, [1993] 4 S.C.R. 3, Justice McLachlin, as she then was, commented on an award of solicitor and client costs at paragraph 66, saying that costs on this basis are generally awarded "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." The reprehensible conduct may be in the circumstances giving rise to the cause of action, or in the proceedings themselves.

[25] Solicitor and client costs are limited to rare and exceptional circumstances.

[26] Mr. Lockerby supports his claim for solicitor and client costs on the basis of his former wife's "active delay throughout the proceeding"; her "misuse" of court time (by participating in settlement conferences so as to delay the proceeding); her "misconduct"; and "persistent disclosure problems".

[27] Costs are awarded on a solicitor and client basis in rare and exceptional circumstances only where there has been reprehensible, scandalous or outrageous conduct by one of the parties. To justify an award of solicitor and client costs, Mr. Lockerby must show that the conduct he has identified achieves that level which warrants such a rare award.

[28] In terms of delay, Ms. Lockerby made three requests for adjournments. These trial dates would have been lost even if Ms. Lockerby had not requested an adjournment. While Mr. Lockerby argues that one of these requests was granted, I think it is more accurate to say that the trial was bumped by a child protection case with which it was double-booked. Two were dismissed. To the extent that Mr. Lockerby was required to respond to adjournment requests, this is reflected in the legal expenses he incurred.

[29] The parties took part in two settlement conferences with Justice Campbell. Mr. Lockerby asserts that Ms. Lockerby entered into these "without any apparent willingness to negotiate or disclose". He premises this assertion on his claim that the framework for a settlement had been reached and Ms. Lockerby did not follow through. As I understand the settlement discussions, which were not directly before me, Ms. Lockerby required financing to meet her obligations under the settlement and needed time to confirm she could meet the obligations. I have no evidence that she was able to arrange financing or that she failed to investigate whether financing was available. I would need this information to conclude that Ms. Lockerby was misusing the court's time.

[30] I described Ms. Lockerby's conduct as it related to the children in my earlier decision. Her conduct was integral to my initial decision that the children live with their father. My decision did not dwell on Ms. Lockerby's conduct beyond the context of her children. Aside from actively drawing the children into their parents' disputes, Ms. Lockerby visited any number

of torments on Mr. Lockerby: for example, she took his business papers and his Blackberry; she kept his clothes and personal effects; she interfered with his personal email; and she threatened to gossip to his business associates. Ms. Lockerby's behaviour moderated as the trial approached.

[31] At the trial, Ms. Lockerby alleged there was fraud on the part of Doug and Wayne Lockerby. Aside from making this allegation, she offered nothing to support it. A significant portion of the trial was spent questioning Wayne Lockerby about his financial dealings with his son.

[32] Ms. Lockerby's disclosure was lacking. Her financial statements were incomplete and out of date. She failed to provide information about her income. Information about her work schedule was not made available until the trial, despite requests and court orders. Mr. Lockerby asked that I impute income to Ms. Lockerby and she conceded that income could be imputed to her at the level that Mr. Lockerby proposed.

[33] Ms. Lockerby's conduct has been vindictive and ill-considered. I have considered it and made my decisions accordingly. It has not been reprehensible, scandalous or outrageous as would be required to support an award of solicitor and client costs.

Party and party costs

[34] With regard to *Rule* 77.07(2), Mr. Lockerby argues that there are a number of factors which are particularly relevant. These are:

> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under *Rule* 10 - settlement of otherwise, that is not accepted;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (h) a failure to admit something that should have been admitted.

[35] With regard to these factors, I have been provided with correspondence which indicates that Mr. Lockerby was prepared to resolve issues relating to parenting the children and child support on terms more favourable than those I ordered. His proposal with regard to spousal support is as I ordered. This proposal was made on October 16, 2008 and remained open for acceptance until October 21, 2008 and the offers relating to parenting, child and spousal support came in the context of a comprehensive offer which was incomplete. Ms. Lockerby's conduct added to the expense of the proceeding. Mr. Lockerby was required to respond to repeated requests for adjournments, he had to respond to the allegation that he and his father were attempting to perpetrate a fraud on the court. He had to adduce the evidence to support imputing

income to Ms. Lockerby in the context of her failure to disclose information about her income and her schedule that she had been ordered to provide.

[36] Justice B. MacDonald provided a helpful outline of the general principles applicable to costs awards in *Fermin v. Yang*, 2009 NSSC 222, at paragraph 3. I have addressed some of these principles already. Those which I haven't mentioned are listed below: in her list, these items are numbers five to twelve.

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

2. The ability of a party to pay a costs award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q.* [*sic*] *v. P.L.T.*, 2005 NSFC 27:

> Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *A.E.M. v. R.G.L.*, 2004 BCSC 65].

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

4. 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".

5. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved".

6. If the award determined by the tariff does not represent a substantial contribution towards the parties' [*sic*] 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.

7. 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.

8. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties' position at trial and the ultimate decision of the court.

[37] Mr. Lockerby was successful in almost all of his claims: he failed only in his claims for retroactive child support and for an additional amount of $6,385.69 from Ms. Lockerby because she would not, he said, allow him or the children to take items from her home, so he was required to purchase duplicates of items which were otherwise available.

[38] My first guide in determining the appropriate quantum of a costs award is the tariff. Here, the appropriate tariff is Tariff A, which requires me to fix the length of trial and the amount involved.

[39] The trial was heard over eight days. Not each day was fully utilized as I've outlined already. If the trial days had been scheduled consecutively, the trial would have lasted five days and three days of it were dedicated to the *Matrimonial Property Act* application and financial matters such as child support and spousal support.

[40] Mr. Lockerby suggests that the amount involved in the trial was the amount owed to his father, $200,000.00 and I accept this.

[41] Mr. Lockerby asserts that the amount involved is appropriately calculated by adding the amount of the debt he owed to his father ($200,000.00) and $20,000.00 per day for each day of trial. Using my assessment that the trial lasted three days (to deal with those issues where I am awarding costs), the amount involved is $260,000.00.

[42] Tariff A provides for a cost award of $22,750.00. There is no reason to award anything other than the basic scale. The presentation of the case and the evidence was not complicated.

Mr. Lockerby's legal expenses

[43] I have been provided with a detailed summary of the actual cost of the proceeding to Mr. Lockerby from 2008 to 2010. I am told that the total legal fees paid by him to October 4, 2010 were $109,631.00, disbursements were $5,513.74 and the HST was $14,773.41 for a total of $129,918.15. I was not provided with a breakdown of this expense which identified the amount which related to Mr. Lockerby's claim for child support.

[44] The legal expenses were not broken down to isolate the expenses incurred to pursue child support which Mr. Lockerby could claim as a deduction from his income when calculating his taxable income. In his submissions, Mr. Lockerby submits that twenty-five percent of the costs award is a reasonable amount to attribute to child support because the child support award flowed from the parenting decision. In other decisions (*D.L.P. v. S.J.*, 2010 NSSC 107 at paragraph 75, *Hamilton*, 2010 NSSC 381 at paragraph 15 and most recently in *Peraud*, 2011

NSSC 80), I have noted the deductibility of legal expenses incurred to pursue a claim for support. These expenses incurred pursuing child support should be known because the expenses must be proven to the Canada Revenue Agency in order to make this deduction.

[45] Since I have not been provided with detailed information about Mr. Lockerby's expense, I cannot determine his actual expenses (rather than those he paid prior to his income deduction) or the portion of his expenses that relate to the portion of the trial for which he is being awarded costs.

The spectre of bankruptcy

[46] Mr. Lockerby asks that I "structure [a costs] award in a manner which will prevent Ms. Lockerby from eliminating the award if she declares bankruptcy and which will prevent Ms. Lockerby's [former] counsel from receiving a share of the matrimonial assets ahead of Mr. Lockerby". In October 2010, the law firm which had represented Ms. Lockerby at the trial registered a judgment against Ms. Lockerby for her legal fees of approximately $38,000.00. Mr. Lockerby says that Ms. Lockerby told him that "if she owes me any money she will simply declare bankruptcy and make the debt go away." He says she also told him she had met with a trustee in bankruptcy, that she would "go off work to ensure" Mr. Lockerby didn't receive child support. Mr. Lockerby did not indicate when Ms. Lockerby made these comments to him.

[47] I responded to the request that I structure a costs award so it would survive bankruptcy, by saying that it would be for Mr. Lockerby to provide evidence of those costs which would survive a bankruptcy and to make submissions on this point. Mr. Lockerby referred me to sections 173(1)(a) and (f) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Section 173 refers to facts for which a discharge from bankruptcy may be refused, suspended or granted conditionally. Specifically, section 173(1)(a) refers to the value of the bankrupt's estate *vis à vis* the bankrupt's unsecured liabilities and the bankrupt has not satisfied the court (the Supreme Court of Nova Scotia, according to section 183(1) of the *Bankruptcy and Insolvency Act*) that this has arisen from circumstances for which the bankrupt cannot justly be held responsible while section 173(1)(f) refers to 'the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt".

[48] With regard to the former section, where Ms. Lockerby has not made an assignment in bankruptcy, I cannot determine whether section 173(1)(a) applies to her. I do not know the value of her assets or the amount of her unsecured liabilities. With regard to section 173(1)(f), I do not conclude that Ms. Lockerby put Mr. Lockerby to unnecessary expense by a frivolous or vexatious defence to any action properly brought against her.

[49] An award of costs is not a claim provable in bankruptcy where it relates to an action for child or spousal support. This is the subject of sections 178(1)(b) and (c) of the *Bankruptcy and Insolvency Act* which provides that an order of discharge does not release the bankrupt from "any debt or liability for alimony" (section 178(1)(b)) or any debt or liability arising under a judicial

decision "respecting support or maintenance [. . .] of a spouse, former spouse, former common-law partner or child living apart from the bankrupt" (section 178(1)(c)).

[50] In *Ffrench*, 1994 CanLII 4252 (NS S.C.), Justice Goodfellow determined that one-third of the costs and disbursements were related to support, so that if Mr. Ffrench made an assignment into bankruptcy, that portion of his costs award would survive the bankruptcy and ultimate discharge. Left to my own to allocate costs, I am comfortable with assigning eighty-percent of the trial to the parenting and property division issues. The remainder of the trial dealt with child support (retroactive and prospective) and Ms. Lockerby's claim for spousal support. For Mr. Lockerby, the portion of his costs award that relates to child support is one-third.

[51] Mr. Lockerby's incurred disbursements of $5,513.74. Rather than put the parties to the further effort of having disbursements taxed, I order Ms. Lockerby to pay sixty percent of this amount ($3,308.24) to reflect the fact that sixty percent of the trial's time was devoted to those matters where I am awarding costs. In total, Ms. Lockerby shall pay costs of $26,058.24.

Conclusion

[52] Ms. Lockerby is ordered to pay Mr. Lockerby costs of $26,058.24. One-third of this amount relates to Mr. Lockerby's claim for child support.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia