

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Jensen v. Jensen*, 2007 NSSC 354

Date: 20071204

Docket: SFHD 39320/1201-059629

Registry: Halifax

Between:

Sherry Lynn Jensen

Petitioner

v.

Jorgen Bo Jensen

Respondent

Judge: The Honourable Justice Lawrence I. O’Neil

Heard: November 27 and 28, 2007, in Halifax, Nova Scotia

Written Decision: December 4, 2007

Counsel: G. Douglas Sealy and Diane Paquet, for the
Petitioner
Jorgen B. Jensen, SR, for the Respondent

By the Court:

Introduction

[1] This is the decision on costs sought by the Petitioner, Sherry Lynn Jensen.

Ms. Jensen has been represented throughout by Mr. Douglas Sealy.

[2] The parties were married November 28, 1989. They separated April 20, 2005. They have an adult child.

[3] Mr. Jensen was a salaried employee at the time of separation and he continues in that capacity with Nautel Limited, a Nova Scotia company. Mr. Jensen has been an employee of Nautical Electronic Laboratories Limited since June 4, 1984.

Beginning in 1990, he purchased shares in this company. The calculation of the value of these shares ; the dividends paid under the terms of the shares and the sharing of the value of the shares and the dividends were important issues when the division of the parties' marital property was addressed. The division of Mr. Jensen's employee pension was also an important issue.

May 2005

[4] The subject Petition for Divorce filed by Ms. Jensen is dated and was filed May 17, 2005. Also filed on May 17 were an accompanying interim application and supporting affidavit. The hearing of the interim application was set for June 16, 2005. Ms. Jensen filed a statement of property on May 27, 2005.

[5] The Petitioner's Application, Intake Form, Interim Application, Supporting Affidavit, Affidavit of the Petitioner, Form of Interim Order, a letter and **Notice to Disclose** were all personally served on the Respondent on May 19, 2007. Mr. Jensen's employer received a copy of the Interim Application. The Interim Application was scheduled for June 16, 2005. It requested the "freezing" of the Respondent's shares and pension in Nautel until further court order or the written agreement of both parties.

[6] Mr. Jensen, the Respondent, corresponded directly by e-mail with Mr. Sealy, counsel for Ms. Jensen on May 19, 2007. He explained that he could not respond to the documents served upon him that day. He said he was to be out of the Country for the coming three months or so. Mr. Sealy responded on May 24, 2007 and explained that he, Mr. Sealy, would be away beginning June 17, 2005 for ten days.

[7] The June 16, 2005 hearing was adjourned to June 29, 2005 at the request of Mr. Jensen who appeared June 16, 2005. He requested an opportunity to consult counsel. Nevertheless on June 16, 2005 Justice Coady issued an interim order to cover the next two week period. The order restricted the dealings with the Respondent's shares and pension entitlement. The matter was put over to June 29, 2007. The issue of costs associated with the June 16 appearance was reserved .

[8] On June 24, 2005, Mr. Sealy wrote the Court and advised that the parties jointly requested an adjournment of the June 29, 2005 hearing without day on condition that the interim order would be continued. He also advised the court that Ms. Kay Rhodenizer had been retained by Mr. Jensen and further that the parties were optimistic that a resolution of outstanding issues could be negotiated.

[9] The necessary Consent Order was presented on July 29, 2005 and approved that day. On August 2, 2005 a further consent order was issued providing for certain commercially sensitive information contained in the Petitioner's statement of property to be removed from the file.

August 2005 to July 2006

[10] The Court file does not show any activity between these dates. There was communication between the lawyers and this is confirmed in the detailed fee accounts filed on the costs application. The entries for May 2006 show that an asset division chart and revisions were developed by Ms. Jensen's lawyers.

[11] Mr. Sealy's letter dated May 29, 2006 to Ms. Rhodenizer references a November 19, 2005 letter Ms. Rhodenizer had forwarded to Mr. Sealy on the matter of whether the "shares" were matrimonial property. It appears therefore, that the parties were in active discussions during the period August 2005 to July 2006.

[12] Over the summer of 2006, it appears Mr. Sealy communicated with Mr. Jensen's lawyer seeking disclosure from Mr. Jensen.

[13] On August 28, 2006 Mr. Sealy wrote the court and sought an order to appear and to disclose. He copied Ms. Rhodenizer who by letter dated August 30, 2006, asked that the order to appear not oblige Mr. Jensen to respond prior to October 18, 2007. Ms. Rhodenizer cited her scheduling difficulties. Nevertheless, the order did issue on September 6, 2006.

September 2006

[14] Mr. Jensen did not file any disclosure in response to the initial order to disclose, served on him May 19, 2005. On September 6, 2006 Mr. Jensen was therefore ordered by a Court Officer to appear and to disclose on October 18, 2006. The order was forwarded to Ms. Rhodenizer. The Conciliation Meeting was scheduled for October 18, 2006. That day Ms. Rhodenizer appeared for Mr. Jensen

and explained that Mr. Jensen had medical issues. These issues were expanded upon in a letter to Mr. Sealy from Ms. Rhodenzier on October 20, 2006, and copied to the Court. She requested a filing deadline of January 30, 2007 for Mr. Jensen.

[15] On December 7, 2006, the Conciliation Office issued a Cost Order in the amount of \$250.00 against Mr. Jensen for non-disclosure.

March 2007

[16] By letter and formal request dated March 6, 2007, Mr. Sealy, on behalf of Ms. Jensen, requested a trial date and a pre-trial conference. Ms. Rhodenizer was provided a copy of this correspondence.

[17] On March 26, 2007, Ms. Rhodenizer e-mailed the court to advise that she was withdrawing as Mr. Jensen's lawyer. This was followed by a letter to the court to the same effect dated April 5, 2007, with an accompanying affidavit.

April 2007

[18] On April 4, 2007, the Court issued a Notice to Appear in court to both parties for an Organizational Pre-trial Conference scheduled for April 25, 2007.

[19] On April 25, 2007 a Pre-trial Conference was held before Justice Campbell. Mr. Jensen did not appear and he was not represented. Justice Campbell ordered Mr. Jensen to pay the still outstanding costs order of \$250 and once again directed that he file a Statement of Income and Property. The Petitioner was also authorized to conduct interrogatories. A further Organizational Pre-trial Conference was

scheduled by Justice Campbell for September 10, 2007. Trial dates of November 27 and 28, 2007 were set.

[20] Mr. Jensen was further directed to file an answer.

[21] Over the summer of 2007, Mr. Jensen did not file any statements or file an answer, nor did he provide these documents directly to the Petitioner or her Counsel.

July 2007

[22] In an effort to get the information on Mr. Jensen's financial affairs including his Nautel shares and income, Notices of Examination were issued on July 13, 2007 on behalf of the Petitioner. The notices required the VP Finance at Nautel Limited and its President to appear for examination on August 9, 2007. That examination did not occur. Information was provided in a letter dated August 22, 2007 by the company, apparently with Mr. Jensen's consent. That letter is Exhibit #2, filed November 27, 2007 as part of the application for costs herein.

[23] The September 10, 2007 Organization Pre-trial was held before Justice Scaravelli. Again, Mr. Jensen did not appear. The dates for filing pre-trial briefs were set. Mr. Jensen was ordered to pay \$250 costs for not complying with Justice Campbell's April 25, 2007 order to disclose.

October 2007

[24] As the trial approached, Mr. Jensen and Mr. Sealy communicated. Mr. Jensen was self represented at this time. In a letter to the Court dated October 18, 2007, Mr. Sealy asked that the filings of pre-trial briefs be delayed in the hope that issues could

be resolved. As a consequence, the filing date for Ms. Jensen was moved to November 12, 2007 and Mr. Jensen's filing deadline was set as November 19, 2007.

[25] On October 25, 2007 after meeting with Mr. Sealy, Mr. Jensen did execute an affidavit. It appears as Exhibit "A" of the partial agreement and minutes of settlement dated November 26, 2007 that was provided to the court on November 27, 2007. Also accompanying the agreement as Exhibit "A" are two waivers of independent legal advice dated October 29, 2007 and November 26, 2007. The court is advised by Mr. Sealy that the October 25, 2007 waiver was witnessed by Ms. Paquet, a lawyer in Mr. Sealy's office. Mr. Sealy also advises that the second waiver dated November 26, 2007 was executed at Mr. Jensen's home on November 26, 2007 in the presence of Ms. Paquet and was witnessed by a staff member in his law office.

November 2007

[26] The Court received Ms. Jensen's pre-trial brief late on Friday, November 23, 2007. Mr. Jensen did not file a pre-hearing brief nor did he file any other documents in this proceeding. Mr. Sealy argues for a substantial award of costs against Mr. Jensen, based on his lack of cooperation in concluding what Mr. Sealy viewed as a straight forward division of marital property. He argues that Mr. Jensen's failure to disclose and his unwillingness to cooperate in concluding the marital issues resulted in a substantial increase in legal costs for his client.

[27] Mr. Sealy places the actual legal costs incurred by his client at \$37,333.54, plus those costs associated with services on November 26 and 27, 2007 and resulting follow up. In addition, he seeks all or part of the \$5,000 legal fee for outside tax advice sought by Ms. Jensen to effect a spousal share trust agreement satisfactory to her. Mr. Sealy places the total fees and disbursements incurred by Ms. Jensen at approximately \$45,000.

[28] He argues that when considering the value of the “settlement” a substantial award of costs should be made in Ms. Jensen’s favour. Significantly he places the value of the shares and the dividend income agreed to be the Petitioner’s as in excess of one million dollars. Consequently he argues the tariffs dictate a substantial award of costs based on an assessment of the value of the proceeding and Ms. Jensen’s success. He suggests costs in the range of \$25,000.

[29] The court did not have the benefit of Mr. Jensen or a representative in court to address the two issues left unresolved by the partial agreement i.e. waiver of spousal support and the assessment of costs.

Spousal Support

[30] The court has no hesitation in ruling that no claim for spousal support having been advanced on behalf of the Respondent no order for the same could be made. The Respondent did not file an Answer and he has not offered any evidence to support an entitlement. The court has neither the jurisdiction nor the evidence upon which to base an order for spousal support in favour of the Respondent. The

Petitioner asks that her claim for spousal support contained in her Petition be dismissed. On November 28, 2007 the court ordered that there would be no order for spousal support in favour of either party. The remaining issue therefore is costs.

Fee Accounts

[31] An overview of the legal costs for Ms. Jensen to November 1, 2007 is as follows:

September 17, 2007 to November 1, 2007	Fee	\$8,460.24
	Disbursements	\$54.26
	HST	\$280.00
June 24, 2007 to September 11, 2007	Fee	\$2,281.79
	Disbursements	\$324.57
	HST	\$280.22
March 27, 2007 to May 11, 2007	Fee	\$1,260.00
	Disbursements	\$34.73
	Total HST	\$181.26
September 13, 2006 to March 6, 2007	Fee	\$1,260.00
	Disbursements	\$42.75
	Total HST	\$114.77
November 8, 2005 to August 28, 2006	Fee	\$1,917.00
	Disbursements	\$26.50
	Total HST	\$272.09
September 14, 2005 to October 31, 2005	Fee	\$759.00

	Disbursements	N/A
	Total HST	\$113.85
July 14, 2005 to September 8, 2005	Fee	\$909.00
	Disbursements	\$15.70
	HST	\$138.71
June 15, 2005 to July 7, 2005	Fee	\$1,635.00
	Disbursements	\$127.75
	HST	\$264.41
May 6, 2005 to May 31, 2005	Fee	\$2,214.00
	Disbursements	\$161.25
	HST	\$356.29
April 11, 2005 to May 3, 2005	Fee	\$920.00
	Disbursements	\$47.20
	HST	\$145.08
March 29, 2005 to April 1, 2005 [initial meeting & follow up]	Fee	\$650.00
	Disbursements	N/A
	HST	\$97.50

[32] The Court has been provided with certain accounting records of Sealy Cornish, the Petitioner's law firm. They are offered to confirm the details of the legal services delivered to Ms. Jensen. As stated, they show \$37,333.54 to November 26, 2007. This figure is arrived at after adding the cost of work in progress to November

27, 2007. As stated, Mr. Sealy argues an additional \$5,000 for an outside tax/corporate counsel must be added to these costs.

The Law on Costs

[33] An award of costs following or during a proceeding is provided for in the 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 F, if the Tariff structure was to be strictly applied. This proceeding was settled prior to the day the hearing was to start.

[34] Mr. Sealy argues further that an offer to settle on the terms outlined in his May 29, 2006 letter to Ms. Rhodenizer is close to the ultimate terms of settlement achieved on November 26, 2007. The court has insufficient evidence upon which to conclude that this is the case. The court has not been provided with the complete exchange of letters between counsel that could lead to this conclusion. The court does not have evidence that a formal offer to settle was made by the Petitioner as contemplated by Rule 41.09 (a). *Bona fide* efforts to settle are nevertheless to be considered when assessing costs and the court has considered the diligence and good faith of Ms. Jensen in her attempts to conclude the various issues. This is a significant factor in her favour when the court considers this application.

[35] The May 29, 2006 letter from Mr. Sealy to Ms. Rhodenizer, at page 3 confirms that Mr. Jensen agreed the shares in Nautel were matrimonial property. It appears in a letter dated November 19, 2005, Ms. Rhodenizer had communicated this. The classification of these shares as business or matrimonial assets had the potential to be a significant point of disagreement between the parties. The division of Mr.

Jensen's pension would appear to be a straight forward issue and less complex. It appears that Mr. Jensen did not contest that position either. Similarly, the classification of the dividend income received by the Respondent post separation was an important and arguable issue. The May 29, 2006 letter from counsel for the Petitioner to Mr. Jensen's counsel suggests the parties did not disagree as to the division of the most valuable assets i.e. the shares; the dividend income and the Respondent's pension. This does seem to make the point that matters could have been concluded much sooner had Mr. Jensen co-operated in formalizing a settlement. On this basis, the relative success of the parties is about the same. For that reason assessing success in this proceeding is not an entirely helpful exercise. Assigning responsibility for the delay in concluding the matter is the most significant point of difference between the parties. As a consequence, there will be cost consequences for Mr. Jensen.

[36] The Court does not have the benefit of Mr. Jensen's perspective or any of the issues as they were managed through the process.

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

[38] 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).

[39] 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.

[40] 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.

[41] For example, the Petitioner herein puts forth a claim for spousal support. Was Mr. Jensen successful in having the Petitioner abandon that claim? An award of spousal support is not part of the Minutes of Settlement. What value is placed on the fact that it is not ? To what extent was the claim for spousal support a factor affecting a resolution of the proceedings ? The court does not know.

[42] 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.

[43] 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.

[44] 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.

[45] 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 v. Dowell*, 209 N.S.R. (2d) 392, and the decision of Justice Goodfellow in *MacLean v. MacLean*, 200 N.S.R. (2d) 34.

[46] 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 disbursement.

[47] 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.

[48] 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.

[49] In *Guillena v. Guillena*, *supra*, 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.

[50] The Respondent husband did not attend trial in *Guillena*, nor did he consent to any of the corollary relief. Mr. Jensen did consent to most of the orders contained in the corollary relief judgment.

[51] Justice Coady in *Ghosn v. 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.

[52] 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**.

[53] Justice MacDonald in *Conrad, supra*, at paragraph 11, also has a helpful discussion of principles emerging from the Rules and the Case Law.

[54] In assessing what contribution Mr. Jensen should make to Ms. Jensen's legal fees, the Court considers the following factors:

1. Mr. Jensen's failure to respond to frequent inquiries and court orders requiring timely disclosure is a significant aggravating factor.
2. Mr. Jensen has been assessed costs of \$250.00 on two occasions for his failure to disclose; in December 2006 by the conciliation office and in September 2007 by Justice Scaravelli; this is considered a sanction that has already been imposed for the failure to not disclose in a timely fashion.
3. The Court is not persuaded that the spousal share trust agreement confers a benefit on Mr. Jensen. The tax/share expert hired to assist Ms. Jensen was advising her, not Mr. Jensen. Similarly, in November 2007 the substantial expenditures of time on this issue by the Petitioner's lawyers were for her benefit. Although the

legal service related to “protecting” Ms. Jensen’s interest in the shares is undoubtedly a valuable investment the Court is not of the view that the advice is a necessary product of this proceeding. The shares must remain in Mr. Jensen’s name by virtue of the conditions attached to them. The June 2005 court order purported to protect Ms. Jensen’s interest in these shares. The Court does not have a copy of the share trust agreement and is not prepared to accept that the cost of the advice and legal services associated with it are properly an expense attributable to Mr. Jensen.

4. The Respondent, Mr. Jensen, appears to have agreed early on that the shares were matrimonial property and he consented to an order protecting Ms. Jensen’s interest in July 2006. The shares remain as they were then and Mr. Jensen has agreed to pay her one half of the dividends attributable to them since the separation. In assessing the value of the “success” of the litigation the value of the shares should not be considered since this was agreed upon to be matrimonial property and presumptively divisible very early on.
5. In assessing success, we cannot lose sight of the fact that on October 25, 2007, Mr. Jensen agreed in most respects with Ms.

Jensen's statement of property. Mr. Sealy argued that the October 25, 2007 affidavit of Mr. Jensen was a concession on property division and consistent with the minutes of settlement. In August 2007, Ms. Jensen had disclosure of the shares value, the dividends paid on them and Mr. Jensen's salary.

6. A hearing was not required in this matter. As discussed, many of the proceedings where substantial costs were awarded involved trials. The November 27, 2007 appearance dealt briefly with the waiver of spousal support, which was unopposed. The bulk of the November 27, 2007 hearing herein dealt with a substantial claim for costs.
7. Justice Coady reserved costs in June of 2005 and they will now be assessed.
- 8.. There was not an offer to settle as per the Rule 43.
9. A number of complex issues required both parties to seek advice whether Mr. Jensen co-operated in providing disclosure or not. These included the following:
 - a. nature of shares - business or matrimonial asset;
 - b. nature/ownership of dividend income received post separation;
 - c. whether so called vacation was divisible.

10. Legal costs were inevitable for both parties in a proceeding of this nature and the mere fact of legal expenses incurred by one party does not give rise to a claim for costs.
11. The matter did settle so when looking at tariffs - look more to "F" than elsewhere - no trial was held in this matter. The court has not strictly applied the Tariffs in this case.
12. The assessment of costs is an imperfect process and at the discretion of the court.

[55] Having stated the foregoing, I order additional costs of \$7,500 against Mr. Jensen and a contribution of \$500 to Ms. Jensen's disbursements. These costs are in addition to the \$500 in costs already assessed and an additional \$250.00 in costs flowing from the June 16, 2005 proceeding presided over by Justice Coady.

[56] This is a total of \$8,750 plus HST. They are to be paid by February 29, 2008.

J.