<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: Slater v. Slater, 2013 NSSC 17

Date: 2013-01-21
Docket: 1206-004771
Registry: Sydney

Between:

William Neil Slater

Plaintiff

v.

Shirley Kathleen Slater

Defendant

Judge: The Honourable Justice Kenneth C. Haley

Heard: August 14, 2012, September 24, 2012 and December 17, 2012, in Sydney, Nova Scotia

Counsel: Robert Sampson, Q.C., counsel for the Respondent
William Neil Slater, the Petitioner, self represented

By the Court:

BACKGROUND

[1] This is an Application, by the Respondent, for costs resulting from the trial heard by this Court on February 16th , and 17th , 2009. The Petition for Divorce was filed by the Petitioner, William Neil Slater, on November 29, 2004. The Respondent received the permission of the Court to proceed by way of counter petition in the Petitioner's absence, who lives abroad. The Court was satisfied at that time that the Petitioner had reasonable and sufficient notice of the proceeding and that he had no intention to attend same. An Interim Order had been in place since 2005.

[2] At trial the Court heard from the following witnesses:

1. The Respondent, Shirley Kathleen Slater;
2. Ms. Barb Larade, Director of the Maintenance Enforcement Program;
3. Mr. Walter Sawler, Expert in Real Property Appraisal;
4. A.N. Sandy MacNeil, Expert Chartered Accountant.

[3] At the conclusion of the evidence the Court requested written submissions from the Respondent's counsel. Due to the illness of the Respondent the required written submissions were not received by the Court until June 22, 2010. A decision was issued September 24, 2010 which is cited as **Slater v Slater**, 2010 NSSC 352.

[4] The Trial dealt with the following issues:

1. Divorce;
2. Custody and access;

3. Imputation of income to Petitioner;

4. Question of imputed income;

5. Child support;

6. Section 7 expenses;

7. Arrears of maintenance;

8. Spousal support;

9. Division of assets;

[5] At trial the following conclusions were made at paragraph 143:

(a) The divorce is granted;

(b) The Respondent shall have the sole care, control and custody of the children of the marriage;

(c)The Petitioner shall exercise access to the children, subject to the wishes of the children;

(d) The Petitioner's income is imputed to be $515,200.00 (Canadian Funds);

(e) Child support is ordered to be $4,000.00 per month commencing March 1, 2009, and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

(f) Section 7 expenses ordered as per Part 4(b) of this judgment;

(g) Spousal support is ordered to be $12,000.00 per month commencing March 1, 2009 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

(h) Outstanding arrears due and payable as of February 12, 2009 are set at $6,674.71;

(I) Retroactive child support arrears accumulated pursuant to this judgment shall be calculated effective, March 1, 2009;

(j) Retroactive spousal support arrears accumulated pursuant to this judgment

shall be calculated effective, March 1, 2009;

(k) Division of assets as per Part 6 of this judgment;

(l) Security for payment Orders granted as per Part 7 of this judgment."

[6] Although the trial proceeded quickly in the Petitioner's absence, his persistent non-disclosure (from 2004 to 2010) complicated the trial process. This placed additional costs upon the Respondent. At Paragraph 125 of this Court's decision in **Slater v. Slater**, I found:

> [125] The following is a list of the material information that the Court finds was not disclosed:
>
> (a) Non-compliance with the Notice to Produce dated June 2nd, 2005 (**Exhibit 9A, Tab 9**);
>
> (b) Non-compliance with the Notice to Produce dated April 8th, 2008 (**Exhibit 9A, Tabs 2-13**);
>
> © Non-disclosure of income information from 2004 onward (evidence obtained by way of subpoena on employer and found at (**Exhibit 9B, Tabs 2-13**);
>
> (d) Non-disclosure of the existence of a bank account in the name of Neil Slater Incorporated, which as of March 2004 had a balance of $5,040.90 (**Exhibit 9B, Tabs 15 and 15**);
>
> (e) Non-disclosure of the separation date value or current value of his pension. The evidence at trial will show a value in 2001 of approximately $81,000.00 (**Exhibit 9B, Tab 19**);
>
> (f) Non -disclosure of the existence of a 401K plan but such a plan existed and the Petitioner made contributions (**Exhibit 9B, Tab 17**);
>
> (g) Non-disclosure of participation in a Stock Option Plan with Weatherford International. The Petitioner does have such a plan and it has generated significant income to him in the period 2005-2007 and apparently generates dividends on an annual basis (**Exhibit 9B, Tab 13**);
>
> (h) Inaccurate disclosure of the value of his RRSP account with the Bank of Montreal and non-disclosure of the fact that he deregistered the RRSP's in 2006. (**Exhibit 14**); and

(I) Non-disclosure of the cash surrender value of his insurance policies. The evidence at trial proved that one of the policies had a cash surrender value of $6,383.90 (**Exhibit 9B, Tab 18**).

[7] I stated at Paragraph 128 to 130 in **Slater**, supra:

"[128] As stated above, I am satisfied that the Petitioner has grossly violated his disclosure requirements and has done so in an attempt to hide assets from the Respondent and the Court to his potential benefit.

[129] The Respondent has no confidence that she has an accurate picture of all of the assets that the Petitioner has accumulated over the years. The Court similarly lacks confidence in this regard due to the repeated non-disclosure by the Petitioner

[130] The Petitioner was well aware of this proceeding and elected, not to attend and participate. His decision not to attend is without explanation. The Court has no option but draw an adverse inference and finds that the Petitioner believes he is beyond the reach of this Court and that he can benefit from his non-appearance. I cannot allow this to occur....."

[8] The Respondent was completely successful at trial. Although the issue of custody and access were not the subject of litigation, all the remaining support, division of assets and financial issues required significant effort by both the Respondent and her counsel to find and present evidence to the Court in support of their case.

[9] Since the issuance of the Divorce Judgment and Corollary Relief Order, on September 28, 2010 and May 4, 2011 respectively, the Petitioner has continued to be non-compliant. At paragraph 34, 35,36, 37 and 39 of the Respondent's Affidavit dated July 13, 2012 she states:

(34) Since the trial, the Petitioner has not respected the division of assets ordered in the Corollary Relief Order;

(35) In particular the Petitioner did not comply with s. 19 of the Corollary Relief Order, which contemplated the conveyance of his 1976 MGB automobile to our son, Cruise Robert Slater. I was forced to take steps to carry out the conveyance myself....

> (36) Similarly, the Petitioner did not comply with s. 18 of the Corollary Relief Order which contemplated the conveyance of his Ford F150 vehicle to our daughter. I was forced to take steps to carry out the conveyance myself.....
>
> (37) The Petitioner has also failed to comply with his maintenance obligation under the Corollary Relief Order. Any amount I received in spousal support has had to be enforced through the Maintenance Enforcement Program. The Petitioner is presently in arrears for spousal support in excess of $200,000. [By the Court ...In excess of $300,000. as of December 17, 2012]
>
> (39) The Maintenance Enforcement Program, through a Reciprocal Agreement with the State of Texas, has been able to secure maintenance payments to the maximum amount of 50 percent of Mr. Slater's reported earnings.

[10] Additional proceedings were necessitated by the Respondent to obtain court orders to assist with conveyance of vehicles, and enforce payments of s. 7 educational expenses. In addition, an order for substituted service was necessitated to provide the Petitioner notice of this Costs Application scheduled for September 24, 2012.

[11] On September 24, 2012, the Respondent, Mr. Slater, appeared in person for the scheduled cost hearing. At that time the Court agreed to adjourn the Costs Application until December 17, 2012 in order to accommodate Mr. Slater's travel schedule and to afford him time to respond. In the interim, Mr. Slater was ordered by the Court to disclose copies of all Notice of Assessments for the years 2009, 2010, 2011 and 2012, whether or not, his income was Canadian or American based.

[12] Mr. Slater was also ordered to disclose and file all financial statements and records of earnings in any state or country in which he may be working and employed. This was to include any benefits, such as recovery of business expenses, educational expenses and isolation benefits. All of this court ordered disclosure was to be filed with the Court on or before October 29, 2012 with copies to be provided to Respondent's counsel.

[13] Counsel for the Respondent sent the following correspondence to Mr. Slater via email and regular mail on November 7, 2012 as follows:

> ...Further, as per the Court Order, you had been directed to provide disclosure of all your financial affairs on or before the end of October, 2012. To date we have not

received any information from you.
As you know, this matter was adjourned, at your request, for a further hearing to be held on December 17, 2012 at 9:30 a.m. before the Court. We assume, based on your remarks to the Court, that it is your intention to attend.
Given that you have a long journey from your current place of employment, it is imperative that we be provided full disclosure immediately.
Further, please accept this letter as notice that it will be our intention to request the Court to find you in contempt in the event you do not comply with the current order......

[14] Counsel for the Respondent sent a second email to Mr. Slater on November 28, 2012 as follows:

> Again, further to our appearance in Supreme Court back in September and my subsequent correspondence to you, to date we have still not received any disclosure information as directed by the Court. As you are aware, the applications before the Court were postponed to Monday, December 17th, at 9:30 a.m. at your request so as to afford you sufficient time to engage legal counsel to represent you or otherwise allow you sufficient time to prepare to represent yourself. The Court directed that you were to provide full disclosure of "all" of your financial records including, but not limited to, your income, investments, etc. This was to be provided by the end of October.
>
> Can you please advise as to whether it is your intention, either alone or with legal counsel, to appear on December 17?
>
> Thank you.

[15] On December 17, 2012, Mr. Slater did appear for the hearing with some financial information in hand. The Court was required to adjourn to make copies for all the parties present. Mr. Slater had earlier attempted to provide the requested information via email, however, incomplete information was received by the Court . This was not rectified until Mr. Slater's appearance at the hearing with the assistance of the Court.

[16] On December 17, 2012 Mr. Slater gave sworn evidence and provided the following financial information:

> (1.) Pay cheque summary from Weatherford Drilling International for the pay periods:

(a) 10/01/2012 to 10/31/2012 confirming regular monthly pay base of $13,608. (U.S) per month;

(b) 12/01/2011 to 12/31/2011 (pay base of $12, 600.(U.S.) per month)

(c) 12/01/2010 to 12/31/2010 (pay base of $12,000.(U.S.) per month)

(d) 12/01/2009 to 12/31/2009 (pay base of $12,000.(U.S.) per month)

> (2) Contract of employment with Weatherford Drilling International dated September 4, 2009;
> (3) Letter from Weatherford Drilling International dated September 9, 2009 confirming Mr. Slater's base salary was increased from $11,250. per month to $12,000. per month."

PRINCIPLES TO BE CONSIDERED IN AWARDING COSTS

[17] Justice B. MacDonald has provided a useful outline of the principles regarding the awarding of costs in **Lubin v Lubin** 2012, NSSC 93 at paragraphs 2 and 3 as follows:

> [2] I have reviewed the Civil Procedure Rules and several decisions commenting on cost, including **Landymore v Hardy** (1992), 112 N.S.R. (2d) 410 (T.D.); **Campbell v Jones** et all. (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.); **Kennedy-Dowell v Dowell** 2002 CarswellNS 487; **Urquhart v Urquhart (1998), 169 N.S.R. (2d) 134 (T.D.)); Jachimowicz v Jachimowicz** (2007), 258 N.S.R. (2d) 304 (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, misconduct, oppressive and vexatious conduct, misuse of the Court's time, unnecessarily increasing costs to a party, and 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 part 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 ability of a party to pay a cost award is a factor that can be considered but as noted by Judge Dyer in **M.C.Z. 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 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 **Muir v. Lipon**, 2004 BCSC65].

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

8. 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”.

9. 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 $20,000.00 in order to determine the “amount involved”.

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

12. 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.

I will consider these principles in deciding the issues before the Court.

RESPONDENT'S SUBMISSION

[18] The Respondent submits Rule 77 of the Civil Procedure Rules empowers the Court to deal with 3 different approaches in determining the appropriate cost award. Rule 77 of the Civil Procedure Rules of Nova Scotia states:

> (1) The Court deals with each of the following kinds of costs:
>
> > (a) party and party costs by which one party compensates another party for part of the compensated party's expenses of litigation;
> >
> > (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
> >
> > © fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

[19] The Court has discretion as to whether or not to award costs and if so in what amount pursuant to Rule 77.02. This rule provides that a presiding Judge may "make any order about costs **as the Judge is satisfied will do justice between the parties"** (emphasis added)

[20] The Respondent submits, as her first argument, that she is entitled to costs on a "solicitor-client" basis based upon the conduct of the Petitioner before, during and after this proceeding. Rule 77.03 is referred to in this regard.

> 77.03 (2):
> A Judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized be law."

The Respondent submits that it is clear that the Petitioner's conduct in this case meets the test of exceptional circumstances as defined by Justice Jollimore in **Lockerby v Lockerby**, 2011, NSSC 103 at paragraph 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."

[21] In this regard the Respondent submits that the Petitioner was completely uncooperative throughout this proceeding. In essence, she submits, he has been "snubbing his nose at the previous court orders". The Respondent submits it has been "tough slugging at every turn" due to the persistent non disclosure by the Petitioner.

[22] The Respondent submits her counsel spent significant time on this file. Counsel was dealing with an international company and was essentially "shadow boxing" throughout the process in order to obtain up to date and reliable financial information from the Petitioner.

[23] In the result the Respondent submits the Petitioner's conduct has been sufficiently reprehensible, scandalous or outrageous to warrant an award of costs on a solicitor and client basis.

[24] The Respondent's "solicitor's affidavit" dated July 13, 2012, outlines its claim for costs as follows at paragraphs 5 to 9:

> 5. Attached hereto as Exhibit "A" are detailed Statements of Account setting out the description, time and hourly rate of all of the legal services performed by Sampson McDougall on behalf of the Respondent herein including details of any disbursements charged to the file.
>
> 6. The total legal fees billed to date amounts to $46,813.50. The disbursements billed to date amounts to $4,944.80. The HST charged to date on the file was $4,037.43. The Respondent has also paid Sampson McDougall the sum of $4,370.83 in accrued interest on her accounts. The total amount paid to Sampson McDougall by the Respondent to date for accounts rendered is $63,155.56.

7. Additional Legal fees and disbursements have been incurred since the date of the most recent account rendered by Sampson McDougall to the Respondent.

8. Presently, there are legal fees to be billed by Sampson McDougall to the Respondent in the amount of $8, 210.50, disbursements in the amount of $200.00, and HST in the amount of $1,261.58. The total amount remaining to be paid to Sampson McDougall by the Respondent is $9,672.08.

9. Based on the foregoing, the Respondent has incurred a total of $55,024.00 in legal fees, $5,133.80 in disbursements, $8,299.01 in HST and $4,370.83 in interest. The total of these amounts is $72,827.64.

[25] In support of this argument the Court is referred to Rule 77.13 and 77.16 which states:

77.13

(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

(a) counsel's efforts to secure speed and avoid expense for the client;

(b) the nature, importance, and urgency of the case;

(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to paid;

(d) the general conduct and expense of the proceeding;

(e) the skill, labour, and responsibility involved;

(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

77.16 - Taxation of costs

(1) A judge who awards costs may fix the amount or order that the amount, or a part of the amount, be fixed by taxation before an adjudicator under the *Small Claims Court Act*.

[26] The Respondent submits that the accounts of Sampson McDougall relating to this proceeding are reasonable. The Respondent requests an Order for costs in the full amount of Sampson McDougall's account, namely $71,871.77, as referenced in Mr. Sampson's written submissions dated July 11, 2012.

[27] The Respondent submits, in the alternative, that if the Court does not find the Petitioner's conduct to be sufficiently "reprehensible, scandalous, or outrageous" to warrant solicitor and client costs, she is nonetheless entitled to a "significant" cost award in accordance with the tariff of costs and fees determined under the *Costs and Fees Act*. Rule 77.06 states:

> 77.06 - Assessment of costs under tariff at end of proceeding
>
> (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[28] It is submitted Rule 77.10 makes it clear that disbursements are to be included in the cost award. The provision states:

> 77.10 (1) an award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[29] The Court is also referred to Rule 77.07 which gives the Court discretion to increase or decrease a cost award calculated under the Tariff. The relevant provisions of Rule 77.07 are submitted to be as follows:

> 77.07 - Increasing or decreasing tariff amount
>
> (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(d) Conduct of a party affecting the speed or expense of the proceeding;

(f) A step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) A step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) A failure to admit something that should have been admitted."

[30] Further it is submitted that the Court has the discretion under Rule 77.08 to award lump sum costs instead of calculating costs and fees under the tariff Rule 77.08 states:

> 77.08
>
> A judge may award lump sum costs instead of tariff costs.

[31] Following the principles as outlined in **Lubin v Lubin**, the Respondent submits that since both monetary and non-monetary issues were dealt with at trial it would be difficult, if not impossible, to determine the "amount involved" under the tariff.

[32] Using the "Rule of Thumb" approach, the Respondent calculates that two days of trial at "$20,000 per day results in an applicable "amount involved" of $40,000. Under tariff A scale 3 (+25%) the Respondent would receive $7,813 in costs. It is submitted this is not a "substantial contribution towards the parties reasonable expenses".

[33] The Respondent therefore submits that the only viable alternative to solicitor and client costs is a lump sum award. In this regard the Respondent submits $60,000. would represent a substantial contribution to her legal expenses and act to deter Mr. Slater and others from disrespecting the Court and its processes.

PETITIONER'S SUBMISSIONS

[34] As noted, the Petitioner did not participate in the trial portion of this proceeding. He has participated only in the hearing for costs and this Court made it clear to the Petitioner that the cost hearing was not to be used as an avenue of appeal so as to vary the present order. The Court has no jurisdiction to do so in any event.

[35] Nonetheless the Petitioner has testified that he cannot pay his current matrimonial obligations and that he has no assets.

[36] Mr. Slater testified he now lives in Saudi Arabia and earns $13,680 per month (U.S.) with an adjusted gross monthly salary of $14, 560.56 (U.S.) . He has a new wife and family. Due to a garnishee order in place Mr. Slater is left with $7,108.03 per month for his personal expenses.

[37] In the result, Mr. Slater has pleaded "under hardship" without having filed any documents in support thereof . He submits that he does not have the ability to pay any cost award since he has fallen and continues to fall behind in arrears with regard to his court ordered support obligations.

[38] Mr. Slater submits that no order for costs should be made against him. He relies upon Rule 77.04 which was brought to his attention by the Court.

ANALYSIS AND DECISION

[39] Firstly I would like to address the application of Rule 77.04 in this proceeding. This Rule permits relief from liability for costs due to poverty. The Rule states:

> (1) A party who cannot afford to pay costs and for whom the risk of an award of cost is a serious impediment to making , defending or contesting a claim may make

a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

(2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:

(a) the party is notified of a proceeding the party wishes to defend or contest,

(b) a claim made by the party is defended or contested.

(3) An order against paying costs may be varied when the circumstances of the party change.

(4) An order against paying costs does not apply to costs under Rule 88, - Abuse of Process, Rule 89 Contempt, or Rule 90 - Civil Appeal.

[40] A formal application as contemplated by Rule 77.04 has not been made by Mr. Slater. The informal application made by him has not been made in a time frame contemplated by the Rule. His request for relief should have been made earlier in the proceeding and not at the end.

[41] This circumstance arose before Justice Bourgeois in **Mader v. Hatfield**, 2011, NSSC 121. At paragraph 10 Justice Bourgeois stated:

> [10] ..... I am satisfied that those two procedural difficulties would not automatically preclude Ms. Hatfield from seeking an exemption specifically later in the proceedings, I rely in that regard on a decision of Goodfellow, J. In **Phillips v Robert A. Jefferies Architecture and Design Limited**, reported at 2002 NSSC 114. Accordingly, I am prepared to give consideration to the argument put forward by Ms. Hatfield. I do not find that she's precluded from making the argument because of procedural irregularities.

[42] I concur with Justice Bourgeois' reasonable approach and will similarly consider Mr. Slater's application under Rule 77.04 which must be proven on a balance of probabilities. This is not withstanding the lateness of his request.

[43] I am nonetheless not satisfied that there is sufficient information before the Court to satisfy me that an exemption would be appropriate. I have listened to the evidence of Mr. Slater. He now earns more salary than the numbers relied upon by the Court to impute his income at trial. He did not provide credible and/or reliable evidence as to his expenses.

[44] I find that Mr. Slater's evidence is not sufficiently clear, convincing and cogent to satisfy the balance of probabilities test as defined by the Supreme Court of Canada in **C. R.) v McDougall**, 2008 SCC 53

[45] I therefore deny his request to be exempt from costs due to poverty or undue hardship reasons. As stated at trial, the Court has no confidence that it has an accurate picture of Mr. Slater's financial circumstances. He has not discharge the burden of proof placed upon him.

[46] I have scrutinized the evidence with care and I find that the Respondent, Mrs. Slater, was clearly the successful party at trial. She is therefore entitled to costs which would represent a substantial contribution to the legal expenses she incurred in this proceeding. As the successful party, the Respondent, should not be deprived of costs except for "very good reason". (**Arab v Izsak**, 2009, NSSC 275) I find that no such reason exists in these circumstances to deny the Respondent's costs application.

[47] As stated at trial, it was Mr. Slater not Mrs. Slater who displayed misconduct in failing to disclose information. He caused the Respondent to incur significant costs. As a result Mrs. Slater is entitled to an award that would represent a substantial contribution toward her costs.

SOLICITOR AND CLIENT COSTS

[48] I have reviewed the cases provided by counsel namely, **Lockerby** and **Cashin v Cashin**, 2010, NSSC 70. In both cases the Court declined to award

solicitor and client costs, finding that the misconduct required, failed to meet the threshold as defined by Justice McLachlin, in **Young v Young,**[1993] 4 SCR 3 at paragraph 66 which concludes that solicitor and client costs are generally awarded only where there has been reprehensible, scandalous, and outrageous conduct on the part of one of the parties.

[49] In **Lockerby**, Justice Jollimore referenced misconduct at paragraph 26 - 32 as follows:

> [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 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 contest 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 person 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 spend 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 lever that Mr. Lockerby proposed.

[50] Justice Jollimore concluded at paragraph 33:

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

[51] Similarly in **<u>Cashin</u>**, A.C. Justice O'Neil concluded at paragraphs 22 - 25 as follows:

> [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.

[52] A.C. Justice O'Neil went on to note that although Mr. Cashin was not successful on all issues his arguments were not frivolous.

[53] In relation to the, alleged misconduct of Mr. Slater he has now testified under oath that he had no idea that the trial was proceeding in his absence and had he known he would have complied with the disclosure requests. I reject this explanation so as to excuse his persistent non-disclosure and continued reluctance to cooperate with the trial process. But when considering his explanation having regard to the decisions in **Cashin and Lockerby** I am unable to conclude that his misconduct amounted to such reprehensible, scandalous or outrageous conduct that it would result in the very rare remedy sought by the Respondent.

[54] This was not an easy decision. Although the Petitioner's misconduct was completely inexcusable I nonetheless find the Respondent can be appropriately and fairly compensated for costs on a party and party basis.

PARTY PARTY COSTS

[55] I have reviewed the decision of Justice Lynch in **Darlington v Moore**, 2011, NSSC 425 which had similarities to the case at bar in terms of the Petitioners' misconduct. Justice Lynch found that the Respondent's lack of disclosure in her case frustrated the proceedings and increased the costs of the Petitioner. Justice Lynch stated at paragraph 18:

> .....The mother is entitled to an award that would represent a substantial contribution to her costs.

[56] Justice Lynch adopted the Rule of Thumb using $20,000. as a per day trial cost. Justice Lynch was able to determine that the Petitioner received an award of almost $600,000 and applied the tariff awarding costs to the Petitioner in the amount of $60,000 plus disbursements of $6,290.87.

[57] I accept the submission of the Respondent that it would be difficult, if not impossible, to calculate the amount invested as requested under the tariff. The tariff calculation of $7813.00 would do an injustice to the Respondent in these circumstances. There were simply too many "unknowns" to calculate the Petitioner's net worth at trial. I find that the amount involved is not calculable in this instance. This was completely the result of the Petitioner's continued and ongoing failure to disclose his assets and financial information to the Respondent.

[58] In support of the above conclusion, I reference paragraph 137 of the Slater trial Decision where I stated:

> In the Court's view it would be unconscionable to require any equalization be paid to the Petitioner based upon the "known" assets only. It is very likely the Petitioner has other non-disclosed assets and I have therefore drawn an adverse inference against him to permit an equitable result for the Respondent.

[59] As a result, the Court by virtue of Rule 77.08, will award a lump sum, I agree with the comments of Justice B. MacDonald in **Lubin v Lubin** , supra. At paragraph 11 Justice MacDonald stated:

> Evaluating the entirety of this case I am satisfied that a lump sum would be more appropriate.....

[60] I agree with the comment of Justice Moir in **Bevis v CTV Inc**, 2004 NSSC 209 at paragraph 13 who states as follows:

> (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum.

[61] In making this award I am cognizant of Rule 77.02 which permits the Court to make an order for costs which the Judge is satisfied will do justice between the parties. To achieve this purpose the Court must exercise its discretion and order a lump sum award.

[62] I am therefore satisfied that a substantial contribution to costs incurred by the Respondent in this proceeding is $60,000, inclusive of disbursements taxes and interest. This is fair and reasonable in the circumstances and does justice between the parties.

[63] Recognizing that the Petitioner is currently in arrears of the existing Court Order, and that any payments to the Respondent in this regard, are made as a result of a Garnishee Order, I find that payment of this cost award should be made on a periodic basis.

[64] I therefore order that the Petitioner pay $1,000.00 per month to the Petitioner, commencing on March 1, 2013, and continuing each and every month therafter, until the total lump sum amount of $60,000.00 is paid in full.

Order accordingly,

Justice