SUPREME COURT OF NOVA SCOTIA
Citation: Cole v. Luckman , 2013 NSSC 6

Date: (20130104)
Docket: 1209-001119
Registry: Annapolis Royal

Between:

Kenneth Gary Cole

Petitioner/Responding Party

v.

Patricia Lee Luckman (Cole)

Respondent/Moving Party

Judge: The Honourable Justice Pierre L. Muise

Final Written Submissions: Received July 30, 2012

Counsel: Kenneth Gary Cole represented by W. Bruce Gillis, Q.C.
Patricia Lee Luckman (Cole) self-represented

BY THE COURT:

[1] Following a three-day divorce trial between Kenneth Gary Cole and Patricia Lee Luckman (Cole) I rendered a written decision bearing ordinal number 2012 NSSC 118. The parties subsequently provided written submissions on costs. This is my decision on costs in relation to that divorce trial.

[2] In ***Lubin v. Lubin***, 2012 NSSC 93, at paragraph 3, Justice Beryl MacDonald provided the following concise summary of costs principles:

> "1. Costs are in the discretion of the Court.
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> 2. A successful party is generally entitled to a cost award.
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> 3. A decision not to award costs must be for a "very good reason" and be based on principle.
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> 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 party 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.Q. 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 *Muir v. Lipon*, 2004 BCSC 65].”

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 one 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.”

[3] In her March 23, 2011 submissions, Ms. Luckman claimed she was entitled to $58, 856.57 worth of assets to complete an equitable division, in addition to $7,200 in retroactive spousal support, plus future spousal support. Mr. Cole submitted that he should be entitled to a reimbursement of over $10,000, on the basis Ms. Luckman would not be entitled to a significant share of business assets. He had advised Ms. Luckman, through his lawyer, prior to trial, that he was prepared to leave the property division as it stood. I determined that Ms. Luckman was to pay Mr. Cole $1,581, plus the child support overpayment of $965, for a total of $2,546.

[4] I have not been provided with Mr. Cole's actual legal fees to help assess reasonable expenses.

[5] Mr. Cole noted that Ms. Luckman withdrew her agreement to a resolution reached at a judicially assisted settlement conference, with both parties represented by counsel, when the parties were preparing to place the agreement on

the record. That agreement included her receiving 25% of the business assets; but, no spousal support. I found her to be entitled to 15% of the farming business assets and 10% of the farrier business assets. He submits that her ultimate rejection of his offer, which was more generous to her than the division determined by this Court, should be considered in determining costs.

[6] However, ***Civil Procedure Rule*** **10.03** states:

> "A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference … ."

[7] That offer was made at a settlement conference. Therefore, I am not to take it into consideration in determining costs.

[8] There is no information establishing that a formal offer to settle meeting the requirements of ***Rule* 10.05** was made. Therefore, the cost consequence guidelines in ***Rule* 10.09** are not engaged.

[9] However, it was noted in the course of the proceedings that Mr. Gillis wrote Ms. Luckman advising her Mr. Cole was prepared to leave the outstanding division of assets and non-payment of support as they were. Under ***Rule* 77.07(2)(b)** that is a factor to be considered.

[10] Ms. Luckman indicated she withdrew her agreement to the resolution reached when it came time to place it on the record because that is when her lawyer explained to her that she would be forfeiting any chance of having an equal division of all assets awarded. Thus it appears she may have misconceived what she was agreeing to.

[11] Mr. Cole, having been prepared to leave the remaining outstanding matters as they were, was of the view that Ms. Luckman insisting on having those matters determined by the Court resulted in unnecessary expense for him.

[12] Ms. Luckman had a different view of her entitlement than he did. She wanted the matter determined by the Court to end her "turmoil". Her valuation of many of the assets, and her contribution to their acquisition and retention, were, on many points rejected by the Court. She did not succeed in proving Mr. Cole had any significant amount of "under-the-table" income, so as to raise his income above hers and give him the means to pay spousal support. In the end, the Court determined her entitlement was far less than what she viewed it to be.

[13] Ms. Luckman complained that Mr. Cole and/or his lawyer, W. Bruce Gillis, Q.C., caused unnecessary: delay; multiplicity of appearances; and, difficulty in obtaining information she saw as relevant.

[14] Some of the delay was as a result of unfortunate and unavoidable issues relating to Mr. Gillis' health. Some was as a result of the requirement to produce further information.

[15] Correspondence from Ms. Luckman to Mr. Gillis, requesting extensive production, was presented to the Court in appearances prior to trial. Mr. Gillis responded to many requests. In relation to some, he questioned the relevance. The Court addressed some of the production issues between the parties. Both parties agreed to proceed to trial despite lacking some of the information they had sought. For example, Ms. Luckman herself refused to provide financial information from an individual she had lived with.

[16] She also stated that she had attempted to persuade Mr. Cole to meet to discuss settlement; but, he had been told by Mr. Gillis, not to agree to such meetings. There was not enough information to determine if this was before, or after, the settlement conference. If it was after, it would be understandable if Mr.

Gillis saw it as a waste of time, given that Ms. Luckman had already withdrawn from one agreement. If it was before, any concern he may have had about the utility of such a meeting, was legitimized by Ms. Luckman withdrawing from the agreement reached at the settlement conference. Therefore, any such refusal to meet ought not attract negative cost consequences against Mr. Cole, particularly given that this Court's decision essentially vindicated the position he was prepared to accept in relation to division of assets. In addition, when Mr. Cole was testifying, it became apparent that he would have welcomed the opportunity to sit down with her to work things out. However, her attitude towards him, together with her conduct, including making false allegations to the police made that impossible.

[17] In my view, this matter ought to have been resolvable between the parties. However, I am not of the view that the conduct of either party reached the level of the reprehensible type required to augment or decrease costs as a remedial penalty.

[18] In ***Lockerby v. Lockerby***, 2011 NSSC 103, the Court awarded costs based on the Basic Scale (Scale 2) in Tariff A, despite finding, that, in addition to increasing Mr. Lockerby's expenses: "Ms. Lockerby's conduct [had] been vindictive and ill-considered." [Paragraph 33]

[19] Mr. Cole submits it is appropriate for this Court to follow ***Lockerby*** and award party and party costs using the Basic Scale (Scale 2) despite Ms. Luckman taking what he saw as an unreasonable stance, which caused him unnecessary expense.

[20] I agree that it is appropriate to use the basic scale as the starting point. The conduct of both sides, intentional or not, has affected the speed and expense of the proceeding. Ms. Luckman's failure to agree to Mr. Cole's informal settlement offer does not warrant a departure from the Basic Scale.

[21] However, to do justice between the parties, I must consider the fact that, though Mr. Cole was essentially successful on the division of assets portion of the trial, success was divided between the parties on the spousal support portion of the trial. Each claimed spousal support against the other at trial. Neither was awarded any spousal support.

[22] It is difficult to accurately calculate how much trial time was devoted to each issue, particularly given that some of the evidence and examinations pertained to both issues. However, I estimate that roughly equal time was spent on each issue.

[23] If both issues were considered together, and one were to base the "amount involved", for the purposes of Tariff A, on the amounts claimed, it would be in the $65,001 to $90,000 range. However, given the mixed result on the spousal support issue, I am of the view that the parties should bear their own costs on that portion of the trial. Mr. Cole would not have claimed spousal support if Ms. Luckman had

not pursued hers. However, he did not have to claim spousal support in response. Unlike the division of assets issue, making his own claim for spousal support added new considerations to the trial. It also "upped the ante" for Ms. Luckman, tending to force her to push the issue of his alleged "under-the-table" income even harder. His position that an equitable division of assets would have Ms. Luckman paying him $10,000 or more did not add such new considerations. The Court had to consider the same evidence and factors to determine an equitable division of assets irrespective of whether Mr. Cole claimed he was owed any amount or not. Either way, the Court had to assess valuation and characterization of the same assets and debts.

[24] The division of assets portion of the trial dealt with Ms. Luckman's claim for $58, 856.57 worth of assets. That amount would bring the claim into the $40,000 to $65,000 "amount involved" range. If one were to take the gap between that amount and the $10,000 or more claimed by Mr. Cole, it would bring the claim into the $65,001-$90,000 "amount involved" range.

[25] Mark Orkin, *The law of Costs*, Second Edition (Canada Law Book -2011, Toronto), at Section 602.3(6) states: "It is the amount awarded at trial not the amount claimed that is significant." Justice MacDonald, in ***Lubin***, also noted that: "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."

[26] However, the Tariffs of Costs and Fees provides that:

> "In these Tariffs unless otherwise prescribed, the 'amount involved' shall be
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> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
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> (i) the amount allowed,
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> (ii) the complexity of the proceeding, and
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> (iii) the importance of the issues;

> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
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> (i) the amount of damages provisionally assessed by the court, if any,
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> (ii) the amount claimed, if any,
>
> (iii) the complexity of the proceeding, and
>
> (iv) the importance of the issues;"

[27] Ms. Luckman's monetary claim for equalization of division of assets was dismissed. Mr. Cole's claim was allowed only to the extent of $2,546. The main issue was that of determining an equitable division of assets. The respective positions were merely based on each party's valuation and characterization of the assets, and their views regarding entitlement to business assets. This was a matrimonial proceeding. It was not a tort or breach of contract claim where there is an assessment of liability and damages. The "Tariffs" guidelines to determining the "amount involved" do not apply as neatly to such a matrimonial cause as they would to a tort or breach of contract claim.

[28] In my view, both the amounts claimed and the amount awarded may be considered in arriving at the "amount involved". On the one hand, the higher the amount claimed, the higher the risk for the defending party, and, thus, the greater the pressure to expend more legal resources defending. On the other hand, the amount awarded is ultimately a more realistic indicator of the "amount involved". Mr. Cole recognized in his pre-trial submissions that Ms. Luckman's claim was unrealistic. In his post-trial submissions he noted that: Ms. Luckman's approach was mathematically wrong; and, even accepting her valuations, Mr. Cole would only need to pay her $10,595. Examples of her mathematical errors included deducting, from her list of retained assets, $26,400 in alleged asset values retained by Mr. Cole, thus doubling the credit to her for that amount. Another such error was omitting to factor in the $27,747.32 mortgage amount paid by Mr. Cole. Mr. Cole clearly was not of the view that his real jeopardy was anywhere near $58, 856.57. In my view, he knew that his jeopardy on the division of assets issue was less than $25,000. Therefore, it is just to set the amount involved at less than $25,000.

[29] In the case at hand, neither the complexity of the proceeding, nor the importance of the issues, were such as to materially impact the determination of the “amount involved”.

[30] The Basic Scale amount for an “amount involved” under $25,000 is $4,000. Tariff A guides the Court to add $2,000 for each day of trial. I have estimated that roughly one and a half day of trial is attributable to the division of assets issue. Therefore, $3,000 should be added to the $4,000 Basic Scale amount. The resulting total is $7,000.

[31] Ms. Luckman shall pay, to Mr. Cole, $7,000 in costs, plus disbursements, as agreed or taxed.

[32] Ms. Luckman indicated that she is in a desperate financial situation and is trying to rebuild her life. She asks for some time to pay any costs ordered. She is

not asking to be relieved from liability for costs. ***Rule* 77.04** provides for a motion for such relief to be made early in the proceedings. She made no motion under ***Rule* 77.04**. I have, however, considered her ability to pay in any event. At the time of trial she worked at the Valley Credit Union, earning approximately $30,000 per year, which was more than Mr. Cole. She stated in her costs submissions, received in July 2012, that she was not employed at the time. She did not say why, nor for how long. She said she was planning to "build a new life for [herself] away from [her] past". I took that to mean she was moving out of the area. That may explain her change in employment status. I have not been provided with information to show she is unable to continue earning $30,000 or more per year. Therefore, in my view, given time, she has the ability to pay this costs award. She had five months after delivering her submissions to the Court. In my view, that ought to have given her enough time to make arrangements to get the funds required for payment. Further, the ability to collect on the costs award will, of necessity, adjust to the ability to pay in any event. Therefore, the costs are payable forthwith.

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PIERRE L. MUISE, J