SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Dunn v. Raymond*, 2018 NSSC 121

Date: 20180518
Docket: 1201-070091
Registry: Halifax

Between:

Robert Daniel Dunn

Petitioner

v.

Kathryn Ann Raymond

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Written Submissions on Costs:

Counsel: Judith A. Schoen, counsel for Robert Dunn

Robyn L. Elliot, Q.C. for Kathryn Raymond

By the Court:

[1] On December 22, 2017, Kathryn Raymond filed a Notice of Motion in a Divorce proceeding requesting "enforcement of the terms of the settlement reached between the parties on November 3, 2017 by way of issuance of the Consent Corollary Relief Order filed with this Notice of Motion; and Costs (solicitor and client).

[2] The settlement completed the division of matrimonial assets and debts and payment of child support. The custody and parenting arrangements had previously been resolved.

[3] Robert Dunn objected to this Motion alleging no settlement agreement had been reached and, if one had, the draft Corollary Relief Order did not properly reflect its terms.

[4] A divorce trial was scheduled to occur on March 22 and 23, 2018.

[5] On March 8, 2018 I considered the Motion and provided the parties with an oral decision. My decision was based upon counsel's written and oral submissions and by reference to the letters and e-mail exchanged between them that formed the

basis of the alleged settlement. That review resulted in my decision Robert Dunn had, on October 30, 2017, provided an unambiguous offer to resolve all outstanding issues between the parties. The offer was "open for acceptance until Friday, November 3, 2017". No notice was given to withdraw that offer prior to that date. On November 3, 2017 Kathryn Raymond accepted his offer. I decided Mr. Dunn was required to abide by the terms of that offer. I also decided Mr. Dunn's draft Corollary Relief Order did not reflect the agreement made. The draft provided by Ms. Raymond did comply with the accepted offer. Mr. Dunn had rejected that order for reasons I did not accept as valid. Ms. Raymond's draft was approved and issued in finalization of the parties' divorce proceeding.

[6] Ms. Raymond has requested solicitor and client costs, or in the alternative, party and party costs. She requested solicitor and client costs because:

- Mr. Dunn was an experienced litigant and knew or should have known his accepted offer would be enforced.
- On November 24, 2017 he was warned Ms. Raymond would seek solicitor and client costs if a court proceeding was required to confirm that her acceptance of his offer settled all outstanding issues.
- He failed to accept corrections for patently obvious errors in the draft Corollary Relief Judgment he provided to Miss Raymond.

- He failed to comply with some Court directions and deadlines while insisting upon Ms. Raymond's compliance with other Court directions and deadlines.
- He communicated directly with Ms. Raymond while under a court order prohibiting that contact.
- He tactically used the litigation process and procedures to prevent or complicate the hearing of Ms. Raymond's motion.
- His entire course of action was an attempt to pressure Ms. Raymond into changing the terms of the offer to provide him "a better deal".

[7] After November 24th, Mr. Dunn continued to have his counsel send letters requiring changes to the offer accepted by Ms. Raymond. Ms. Raymond's lawyer was compelled to respond because her client did not want the expense of a motion hearing unless it was necessary. The Motion had to be resolved before the trial because if the Motion was successful no trial was required.

[8] After Ms. Raymond accepted Mr. Dunn's offer, he attempted to convince her to agree to different terms. Some of the letters from his counsel required changes to the draft Corollary Relief Order and threatened the withdrawal of his offer (after it had already been accepted) if the changes were not made within the deadlines he set out. Most of those deadlines were very short and totally unrealistic.

[9] One of the most egregious examples of Mr. Dunn's efforts to change his offer relates to the provision about support of the parties' adult children. The Corollary Relief Order, prepared by Ms. Raymond's counsel, contained the exact wording that appeared in Mr. Dunn's offer, but he insisted on the inclusion of additional wording. The change requested would fundamentally alter the child support provision. Had it been accepted, the change was to his benefit alone. It provided no benefit to their children or to Ms. Raymond. There is little doubt Mr. Dunn was using every tactic he could to pressure Ms. Raymond into an agreement different from the offer she had accepted.

[10] In an attempt to convince Kathryn Raymond to agree to his requests Robert Dunn communicated directly with her on December 20, 2017. His letter insulted her lawyer and stated, "I do hope she has honestly shared with you the risks of the course you are contemplating." He attached an article "Negotiation – Being Right or Getting What You Want". He ended his e-mail, "That you would ever allow a matter like this to be dealt with in this way baffles me completely. Nobody will "win"… everyone loses except your lawyer." This e-mail was sent although he knew he had agreed, and was under an Order, not to communicate with Katheryn Raymond except through counsel.

[11] None of the arguments and submissions made before me, or contained in the brief from Mr. Dunn's counsel, had merit. Mr. Dunn was not prepared to acknowledge his offer was accepted and that he that could not "change his mind" about the terms contained in his offer. His failure to recognize the obvious legal result flowing from the acceptance of his offer substantially increased Ms. Raymond's legal costs.

[12] There were several appearances before me to determine how the Motion would be heard. This included the possibility that both counsel resign so each could be a witness if a hearing was required. If that occurred the trial dates would need to be rescheduled. Both parties wanted to preserve the trial dates, but Ms. Raymond was prepared to reschedule the trial dates. Mr. Dunn was not and in two of the conferences before me I had to explain why those dates likely could not be preserved. Because the parties did not come to a quick resolution about how the Motion was to proceed each was required to meet filing deadlines for the trial.

[13] Solicitor and client costs are awarded in "rare and exceptional circumstances". In *Brown v Metropolitan Authority*, 150 N.S.R. (2d) 43 (C.A.) Justice Pugsley stated:

> 81 While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (*P.A. Wournell Contracting Ltd. v. Allen* (1980), 37 N.S.R. (2d) 125) (C.A.).
>
> 82 This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible. (*Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29; *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146)
>
> 83 The word "reprehensible" is defined in The Concise Oxford Dictionary (1990) as "deserving censure or rebuke".
>
> 84 The conduct of the Authority, in my opinion, deserves that description.
>
> 85 There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

[14] In *Brown, ibid para.80,* the court found the Authority's conduct not only deserving of censure or rebuke but also to have been "arbitrary and highhanded". A review of case law suggests solicitor and client costs may be reserved for those cases when there is proven fraud or a deliberate attempt to mislead. However, bad behavior can justify an increased cost award.

[15] I do find much of Mr. Dunn's behavior to be reprehensible, arbitrary and highhanded. I accept it does not meet the criteria for a solicitor and client cost award. It does argue in favour of an increased party and party cost award.

[16] Ms. Raymond was the successful party on the Motion and it "was determinative of the entire matter at issue in the proceeding". (*Civil Procedure Rule* 77.18, Tariff C (4)

[17] I do not consider it appropriate to apply Tariff C to calculate this cost award. This was not a typical Motion. The procedure to be used was unclear and the issue to be resolved was of extreme importance to the parties. Several court appearances were required.

[18] I have decided it is also inappropriate to use the tariff of cost and fees to resolve the quantum of this cost award. While a court is directed to use the tariff as the first guide in determining the appropriate quantum of a party and party cost award, it is also directed to "make any order about costs as the judge is satisfied will do justice between the parties". (*Civil Procedure Rule* 77.02(1))

[19] If the tariff does not represent a substantial contribution towards reasonable legal expenses it is preferable not to artificially increase the amount involved, but rather, to award a lump sum. The amount of a party and party cost award should represent a substantial contribution towards reasonable expenses but should not amount to a complete indemnity. A substantial contribution suggests an amount

more than 50% and less than 100% of a lawyer's reasonable bill. (*Armoyan v. Armoyan*, 2013 NSCA 136)

[20] Although the parties were arguing about money, the form used was not similar to a trial. This was a motion that required several court appearances and judicial direction. The amount involved does not reflect the work required to resolve the dispute.

[21] There was a flurry of correspondence exchanged between the parties after Ms. Raymond accepted Mr. Dunn's offer. This correspondence was initiated primarily by Mr. Dunn and it required response. Because the trial dates were fast approaching, timelines for filing affidavits and other material could not be ignored. Mr. Dunn's failure to recognize the obvious legal implications arising from Ms. Raymond's acceptance of his offer directly increased her legal costs because she was required to file those materials for a trial that did not occur. She was not driving this dispute bus - he was. He did not like the numbers he had quoted her in his offer and wanted to change them. He wanted to sell the matrimonial home that he had agreed she should keep by purchasing his interest. He wanted to change the provisions for child support. Quite justifiably she refused to agree to those and other requested changes.

[22] Ms. Raymond's legal expenses from November 24, 2017 until March 8, 2018 are $19,409.25. She wants $16,000.00 as the cost contribution toward those expenses. She is entitled to costs. Although less than 100% the amount requested is considerably more than 50%.

[23] A decision about costs must include a consideration about what are "reasonable legal expenses". On what basis can I make this determination? I have not been provided with any decisions about how this task can be undertaken.

[24] Although *Civil Procedure Rule* 77.13 relates to the taxation of counsel's fees and disbursements, it may provide some guidance.

> 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 be 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.

[25] I have considered each of these factors with the exception of item (f). Counsel in this case, as is common, has not provided information about the terms of engagement. Even had counsel done so, what would be the comparative analysis the court could use to determine whether, for example, hourly rates charged are "reasonable"? Counsel may charge different hourly rates within the same jurisdiction for a multitude of reasons.

[26] The direction that costs are to be awarded to indemnify a client for his or her "reasonable legal expenses" guides the exercise of discretion towards an examination the factors listed in (a) to (e) rather than a minute examination of the dollar for dollar charge attached to that legal expense. For example, legal expenses in the amount of $19,000.00 would not be reasonable in an uncomplicated case, quickly resolved with few court appearances.

[27] Ms. Redmond's legal expenses were reasonable. A lump sum approach is to be used to determine quantum. Her legal costs were incurred because Mr. Dunn insisted on litigating when his case had no merit in the course of which his behaviour is deserving of rebuke. This argues for an award approaching but not providing full indemnity.

[28] Mr. Dunn must immediately pay costs in the amount of $15,000.00.

_____

Beryl A. MacDonald, J.