IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Bennett v. Pettipas*, 2023 NSSC 322

Date: 20231109
Docket: SFHOTH 115625
Registry: Halifax

Between:

Cracean Bennett

Applicant

and

Paula Pettipas

Respondent

COSTS D E C I S I O N

Judge: Associate Chief Justice Lawrence I. O'Neil

Heard: January 30, 31 and February 27, 2023, in Halifax, Nova Scotia

Counsel: Michael Owen, Counsel for Cracean Bennett
Douglas Livingstone, Counsel for Paula Pettipas

Overview

[1] This is a costs decision.

[2] A written decision following a hearing on January 30, 31 and February 27, 2023 is reported as 2023 NSSC 198.

[3] Cracean Bennett and Paula Pettipas were previously in a relationship.

[4] Mr. Bennett claimed the parties were living in a common law relationship from which he claimed unjust enrichment of Ms. Pettipas. Mr. Bennett claimed he provided Ms. Pettipas with money and services which benefited her and which caused him to suffer a corresponding deprivation.

[5] Mr. Bennett argued there was no juristic reason for the benefit conferred on Ms. Pettipas and he is entitled to substantial relief. He claimed one-half the value of the properties held in Ms. Pettipas's name at the time of separation and said they were engaged in a joint family venture or in the alternative he based his claim on the law of quantum meruit.

[6] Ms. Pettipas denied the parties were living together in a common law relationship. She said they had an "on" again, "off" again relationship which was not healthy. She denied Mr. Bennett's unjust enrichment claim and his request for a joint venture finding or other monetary relief.

[7] In my decision I answered the following questions:

1. What was the nature of the parties' relationship?
2. Did Mr. Bennett prove his claim of unjust enrichment?
3. If so, did Mr. Bennett prove a joint family venture ?
4. If not, did Mr. Bennett prove that monetary relief is appropriate on a quantum meruit basis ?

[8] I found the parties were engaged in a joint family venture and were a common law couple for approximately nine (9) years leading to their separation in February 2019.

[9] I found Mr. Bennett can rely on the existence of a joint family venture with Ms. Pettipas to bolster his claim for increased compensation for having unjustly

enriched Ms. Pettipas.

[10] I assessed Mr. Bennett's unjust enrichment of Ms. Pettipas to be valued at $70,000, representing a realistic assessment of his contribution to the parties' generation of wealth within their joint family venture over the course of their relationship.

General Principles Governing Costs

[11] The governing Civil Procedure Rule on costs is 77. This Rule incorporates the tariffs mandated by the *Costs and Fees Act* when applying an amount involved assessment to determine costs payable by a party. The Rule provides *inter alia*:

> **General discretion (party and party costs)**
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> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
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> . . . . .
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> **Assessment of costs under tariff at end of proceeding**
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> 77.06 (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.
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> . . . . .
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> **Increasing or decreasing tariff amount**
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> 77.07 (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:
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> (a) the amount claimed in relation to the amount recovered;
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> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) 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.

[12] Justice B. MacDonald of this court summarized the applicable principles when assessing costs in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159 and in *Gagnon v. Gagnon*, 2012 NSSC 137. She stated the following at paragraph 3 in *L. (N.D.)*:

> 3 Several principles emerge from the Rules and the case law.
>
> 1. Costs are in the discretion of the Court.
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> 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.
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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 an otherwise successful party or to reduce a cost award.
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> 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".
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> 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.
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> 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".
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> 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 in order to determine the "amount involved".
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> 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.
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> 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.
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> 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.

[13] Justice Jollimore in *Moore v. Moore*, 2013 NSSC 281 at paragraph 14 addressed the applicability of Tariff "C" to applications in the Family Division:

> [14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to applications. As I said in MacLean v. Boylan, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the Nova Scotia Civil Procedure Rules (1972). Despite the distinction between an action and application created in our current Rules, the Tariffs have not been revised. My view has not changed since I decided MacLean v. Boylan, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the Maintenance and Custody Act or the Matrimonial Property Act. In these situations, I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in Hopkie, 2010 NSSC 345 and Justice MacDonald in Kozma, 2013 NSSC 20.

[14] Arriving at a costs assessment in family matters is difficult given the often-mixed outcome and the need to consider the impact of an onerous costs award on the families; and children in particular. The need for the court to exercise its discretion and to move away from a strict application of the tariffs is often present.

[15] As noted, Rule 77.07 provides that tariff costs may be increased or decreased after considering enumerated factors.

[16] Rule 77.08 provides for a lump sum of costs in cases where a tariff amount is not appropriate.

[17] In *Robar v. Arseneau*, 2010 NSSC 175, I ordered costs of $5,138 inclusive of HST and disbursements to be paid at a rate of $150 per month. In that case, the Applicant's case to set aside the parties' separation agreement was dismissed and Ms. Robar was found to have been unreasonable. She was also found to have rejected offers to settle. The matter required court time on two days. I applied scale 1 of Tariff "A". The amount involved was within the $40,001-$65,000 range. Ms. Robar was subject to significant financial hardship at the time. This was a factor weighing against a higher costs award.

[18] The case of *R. (A.) v. R.(G.)*, 2010 NSSC 377 resulted in a costs award of $3,000 inclusive of HST and disbursements. The hearing concerned the parenting arrangement for the parties' two children. The conduct of the Applicant was found to have been aggravating. The amount involved was $20,000, this representing the amount involved when a full day of court time is consumed (2010 NSSC 424 (cost decision)).

[19] In *Godin v. Godin*, 2014 NSSC 46, I ordered costs of more than $28,000 following a five-day hearing and after having increased the scale by 50% to reflect Ms. Godin's *mal fides* in the conduct of the proceeding.

[20] In *Darlington v. Moore*, 2016 NSSC 84, I ordered costs of $50,000 against Mr. Moore. Mr. Moore appealed resolution of the substantive issues. He was unsuccessful and additional costs of $20,000 were awarded against him. Clearly cost awards can be substantial.

[21] Our Court of Appeal reviewed the law governing awards of costs in family proceedings in *Armoyan v. Armoyan*, 2013 NSCA 136. It is helpful to incorporate the court's discussion of the basis upon which costs are ordered and

the meaning and effect of Rule 77. Fichaud, J. on behalf of the Court summarized how costs should be quantified beginning at paragraph 9:

> [9] Justice Campbell did not quantify costs for Ms. Armoyan. So, there is no issue of appellate deference to the trial judge's exercise of discretion on quantification. The Court of Appeal is calculating costs at first instance for both the *forum conveniens* proceeding in the Family Division and the two appeals in this Court.
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> [10] The Court's overall mandate, under Rule 77.02(1), is to do justice between the parties.
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> [11] Solicitor and client costs are engaged in rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation. Williamson v. Williams, 1998 NSCA 195, [1998] N.S.J. 498, per Freeman, J.A. This Court rejected most of Mr. Armoyan's submissions on the merits. But there has been no litigation misconduct in the Nova Scotia proceedings that would support an award of solicitor and client costs. So, these are party and party costs.
>
> [12] Rule 77.06 says that, unless ordered otherwise, party and party costs are quantified according to the tariffs, reproduced in Rule 77. These are costs of a trial or an application in court under Tariff A, a motion or application in chambers under Tariff C (see also Rule 77.05), and an appeal under Tariff B. Tariff B prescribes appeal costs of 40% trial costs "unless a different amount is set by the Nova Scotia Court of Appeal".
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> [13] By Rule 77.07(1), the court has discretion to raise or lower the tariff costs, applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether or not the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding.
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> [14] Rule 77.08 permits the court to award lump sum costs. The Rule does specify the circumstances when the Court should depart from tariff costs for a lump sum.
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> Tariff or Lump Sum?
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> [15] The tariffs are the norm, and there must be a reason to consider a lump sum.
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> [16] The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In Williamson, while

discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from Landymore v. Hardy (1992), 112 N.S.R. (2d) 410:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
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> > ". . . the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity."

Justice Freeman continued:

> In my view a reasonable interpretation of this language suggests that a substantial contribution not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.

[18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity - e.g. to define an artificial "amount involved" as Justice Freeman noted in Williamson - that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump

> sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law. [emphasis added]
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> [19] In my view, this is such a case for a lump sum award. I say this for the following reasons.
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> [20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: Hopkie v. Hopkie, 2010 NSSC 345, para 7, per Gass, J.; MacLean v. Boylan, 2011 NSSC 406, paras 29-30, per Jollimore, J.; Kozma v. Kozma, 2013 NSSC 20, para 2, per MacDonald, J.; Robinson v. Robinson, 2009 NSSC 409, para 10, per Campbell, J..
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> [21] The *forum conveniens* proceeding was brought by Ms. Armoyan's Notice of Motion that, as Mr. Armoyan's counsel points out, literally would engage Tariff C. But the proceeding ripened with the features of a complex trial that spanned ten days of hearing over eleven months. It was not remotely equivalent to a conventional chambers motion, and its natural home would be Tariff A.
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> [22] But this proceeding had no "amount involved" within Tariff A. The issue was whether the Courts of Nova Scotia or Florida would take jurisdiction. That matter involved broad consideration of comparative comity, fairness and efficiency in the administration of justice. The amounts are for the separate matrimonial proceedings in Florida and this province. In Williamson, Justice Freeman noted that the artificiality of a notional "amount involved" supported the use of a lump sum award:
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> > Any attempt to adjust the amount involved to factor in the special circumstances of the present appeal to arrive at a more just result would require the arbitrary determination of a fictitious Aamount involved@ bearing no real relationship to the matters in issue.
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> [23] Rule 77.07(2)(e) permits an adjustment based on "conduct of a party affecting the speed or expense of the proceeding". The supervening criterion is that the costs award "do justice between the parties" under Rule 77.02(1).

Conclusion

[22] Mr. Owen asks for costs in excess of one-half the legal fees incurred by his client, Mr. Bennett. Those fees totalled $55,621.87. He asks for a costs award of $36,154.

[23] He acknowledges his client's offer to settle was $165,000, well in excess of the $70,000 the Court ordered Ms. Pettipas to pay as damages to Mr. Bennett.

However, he submits Ms. Pettipas' conduct of the litigation should cause the Court to increase the value of a costs award in Mr. Bennett's favour.

[24] On behalf of Ms. Pettipas, Mr. Livingstone argues in response that the amount involved in this matter was $70,000, this being the Court's award and the appropriate costs award should the Court be so inclined, would be $9,750 plus $2,000 for each day of the hearing.

[25] He says Mr. Bennett is wrong to assert the amount involved was $213,919.90, this being one-half the proceeds of the sale of the subject home.

[26] Mr. Livingstone argues Ms. Pettipas was right to reject the option of a settlement conference and did not unnecessarily prolong the opportunity to settle the litigation by doing so.

[27] He says also that Mr. Bennett offered to settle the matter for $165,000 but was only awarded $70,000 and this fact should result in the costs award otherwise due Mr. Bennett being decreased.

[28] The Court is influenced by the unreasonable conduct of Ms. Pettipas in advancing her defence. In particular, I found that she attempted to mislead the Court and offered others to give evidence in support of that objective.

[29] This had the effect of increasing the expense of the proceeding and the prospects of resolution without a trial. She failed to admit the existence of her common law relationship and the level of the parties integrated living arrangement.

[30] At paragraph 10 of the Court's earlier decision, I commented as follows:

> [10] In contrast, Ms. Pettipas' evidence about her relationship with Mr. Bennett was clearly not true. It reflected strategic considerations on her part. In addition, she did not make disclosure of her income for the years the parties were together. She called witnesses to give evidence she knew was untrue. Those decisions on her part diminish her credibility.
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> . . . . .
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> [42] Other witnesses offered by Ms. Pettipas testified Mr. Bennett was not on site and did not contribute his labour to construction of the home. Their evidence, however, proved to be totally unreliable. For example, the affidavits of Sean Sutherland, Chris Josey, Rhonda Frank and Harold Crowell, being exhibits 6, 7, 9 and 10 contained similar

> statements to the effect that Cracean Bennett did not do much if any work to assist in the construction of 5 Willowdale Lane. When cross-examined, each of these witnesses admitted they had little if no knowledge of what Mr. Cracean Bennett did or did not do to assist in the construction of either of the homes. Clearly, these were witnesses called by Ms. Pettipas to give evidence to diminish Mr. Bennett's contribution to the home construction projects. Their having no basis to express such an opinion would have to be known by Ms. Pettipas and these witnesses. Their evidence does not assist Ms. Pettipas.
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> [43] In addition, it is concerning that Ms. Pettipas would ask these persons to testify to a fact that they were unaware of, and each of these witnesses would testify to knowing the answer to an important question which is the extent of each party's contribution to the construction of the homes.

[31] I am satisfied a costs award of $22,500 in favour of Mr. Bennett, inclusive of HST and disbursements, is warranted.

O'Neil, J.