SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Kyte v. Clarke*, 2014 NSSC 278

Date: 20140721
Docket: No. 1206-4363
Registry: Sydney

Between:

Sheila Kyte

Applicant

v.

Richard Clarke

Respondent

DECISION

COSTS

Judge:	The Honourable Justice M. Clare MacLellan
Heard:	September 24, 2012; October 11, 2012; May 8, 2013; and January 29, 2014, in Sydney, Nova Scotia
Written Release:	July 21, 2014
Counsel:	Sheila Kyte, Self-Represented Darlene MacRury, Counsel for Richard Clarke

[1] The Applicant, Sheila Kyte, seeks costs from the Respondent, Richard Clarke. The Applicant seeks costs in the amount of $1,850.48. She is self-represented and has provided an account of her expenditures and missed days from work that required her to be absent from her employment for a full day, although her Court appearance did not consume that time but she would have lost a full day for each pre-trial appearance. Ms. Kyte claims costs in the amount of $1,850.48.

[2] Mr. Clarke, through his counsel, argues that the parties had mixed success on the issues before the Court and that there is blameworthy conduct by both parties prolonging the proceeding and given the mixed success of both parties, each ought to bear their own costs. The Respondent indicates that he "incurred significant costs and expenses in these proceedings, as he had counsel and also had to obtain funds to pay the retroactive child support award".

[3] In the oral decision delivered in this case, I have set out in detail failure by Mr. Clarke to disclose in a timely manner his tax returns with all attachments and notice(s) of assessment, the actual number of rental properties he owned, and the rental income. In relation to the number of rental properties Mr. Clarke owned and the gross and net proceeds received from these properties; Mr. Clarke stated simply

on cross-examination that he did not believe Ms. Kyte was entitled to this information.

[4] Ms. Kyte, as well, protracted the hearing in her piecemeal manner of providing information on the children's college fund. She advised that securing the accurate accounting of the college fund was difficult for her as the RESP provider was not prompt to respond to her requests. Ms. Kyte also supplied inflated university budgets which consumed time attempting to achieve reasonable costs.

[5] Overall the trial was protracted and made more difficult by Mr. Clarke's failure to disclose fully and in a timely manner when he was obligated to do so under the 2010 Corollary Relief Order; and pre-trial; and mid-trial directions from the Court. In my decision I referenced the fact that Mr. Clarke's failure to disclose fully and in a timely manner resulted in this conclusion made in the decision at paragraph 9:

> The analysis of this case and the analysis of Mr. Clarke's income has been greatly hampered by the failure to disclose, which tragically is seen in too many child support cases. Failure to disclose is one of the primary causes for long delays in Court cases and the frustration in analysing these cases. The non-disclosure difficulty is not necessary. It's not necessary in most cases and it is not necessary in this case.

[6] Furthermore it is my finding that non cisclosure caused discourt to fester between the parties and resulted in an erosion of their ability to communicate on a basic level relating to their children.

[7] Mr. Clarke gave evidence on two (2) separate occasions with months in between the beginning and end of his testimony.

[8] I found at paragraph 17, Mr. Clarke told the Court on the two days he gave evidence that he maintained receipts for all his rental expenses. He advised that he maintained a separate bank account for his rental property transactions. He advised he has a professional complete his Income Tax Returns. Mr. Clarke advised he keeps all his properties well maintained. However, full disclosure of his rental income and expenses were never provided to the Court. The Court did not receive anything more substantial than Mr. Clarke's Income Tax Returns without attachments and only his assurances in that return as to the amount of rental income he received. This is so despite the Court's direction to Mr. Clarke to produce the rental information at a pre-trial held in August, 2012 and mid-way through his evidence. Mr. Clarke never did clarify the number of rental units he possessed.

[9] I found that Mr. Clarke simply made up his mind he would not disclose any material that he did not want to, even though he told the Court on a number of occasions that he had this material available to him. I found on a balance of probabilities on clear and cogent evidence that Mr. Clarke knew that disclosure was required of his professional income, of his rental income, and he refused to do so. He had ample opportunities for him to disclose.

[10] As well, I found that Mr. Clarke refused to have any meaningful negotiation with Ms. Kyte, making the recourse to Court necessary. At paragraph 29, I found: "In addition, I find that Mr. Clarke rebuked any meaningful dialogue with Ms. Kyte". In Exhibit #8, Ms. Kyte asked for tax information and for his input on vacations for their daughters. Her e-mail was sent on July 14, 2010. As contained in Exhibit #8, Ms. Kyte asks for information on vacations, advises when her vacation starts and her statement in relation to Income Tax Returns. Her entire letter is polite. She wrote:

> I trust that you have received my letter requesting a copy of your Income Tax Returns in the mail. Since I have had no response, am I to assume that you do not wish to comply? Just need to clarify.

[11] Mr. Clarke responds:

> As for the Income Tax, I have not filed yet. Want proof, I can give it to you. As I said before, do not contact me. There is no need. I know vacations and you. I can vomit when I see your face or name and that's pretty sad and never thought I

> would see that day, but I guess greed and jealousy can overcome a person. P.S. If you want my mortgages, truck payments, credit cards, once again leave me alone and if it means not seeing the girls, so be it, not seeing them anyway. Thanks. Rick.....I've always paid what we agreed to and never stole off you.

[12] Ms. MacRury, on behalf of Mr. Clarke, comments regarding the absence of success in Ms. Kyte's application for s. 7's, university expenses. Ms. Kyte did not collect monies specified for s. 7's because the parties had, in earlier days, the foresight to save monies up to the date of separation; and more importantly that Thea herself was a hard working child who made sufficient income so at her university budget, as re-written by the Court, could be met on funds available without a subsequent contribution by Mr. Clarke.

I find as follows:

(a) Ms. MacRury is correct; Ms. Kyte was unsuccessful in obtaining s.7 support for Thea's university.

(b) There was limited success by Ms. Kyte in the s. 7 application as it relates to drivers' education.

(c) Ms. Kyte was also successful in obtaining substantial retroactive s. 3 maintenance, which accrued in part by imputing Mr. Clarke's income based, in part, on rental income.

(d) The better part of three (3) days in Court was totally avoidable and if allocation of fault is necessary, I would allocate at least seventy (70%) percent of the blame for Mr. Clarke's failure to disclose and failure to negotiate.

THE LAW:

[13] *Civil Procedure Rule* 77.02 allows that costs are in the discretion of the Court:

> **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.
>
> **(2)** Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[14] Rule 77.03 provides direction as to the nature of the decision on costs that a court may make:

> **77.03 (1)** A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> **(2)** A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

> **(3)** Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> **(4)** A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
>
> > **(a)** in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
> >
> > **(b)** to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
> >
> > **(c)** to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
> >
> > **(d)** any other way the judge sees fit.

[15] Rule 77.06(1) provides for assessment of costs under tariff at the end of a proceeding:

> **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.

[16] Rule 77.07(2) sets out sections that may affect the determination of a cost award:

> **77.07(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:
>
> > **(a)** the amount claimed in relation to the amount recovered;
> >
> > **(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.

[14] Where the court awards costs to a party, the amount of party and party costs should be a substantial contribution to that party's reasonable expenses, but not amount to a complete indemnity.

[15] The list of cost principles have been conveniently summarized as an interpretation of the *Civil Procedure Rules* by Justice Beryl A. MacDonald in in **Fermin v. Yang**, [2009] N.S.J. No. 334, at paragraph 3. Twelve (12) principles emerge from *Civil Procedure Rule 77* and the case law. However, only some of these principles are applicable to self-represented parties:

> 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.
>
> …
>
> 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]."

…

[16] It is not new law that self-represented litigants are entitled to costs. I understand that any bar to cost recovery by a self represented party has been precluded by **Fong v. Chan** (1999), 181 DLR (4th) 614, at para. 19. In **Fong v. Chan**, paras. 26, 27 and 28, that Court held:

> **26** A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.
>
> **27** I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge, and as Ellen Macdonald J. observed in **Fellows**, **McNeil v. Kansa**, supra, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.
>
> **28** I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the **Chorley** case, supra, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would

> have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity. As the early *Chancery* rule recognized, a self-represented lay litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed. (Emphasis added)

[17] A successful self-represented applicant was awarded costs by Justice Beryl MacDonald in **Hatheway v. Duval**, [2012] N.S.J. No. 688. She found the cost and fees tariff is not a cost assessment tool available to a successful self-represented litigant (page 6). However, Justice MacDonald added that the courts are able to award costs on a basis of what appears fair and appropriate without reference to the tariffs. She stated:

> **9** The factors favoring a cost award in this case relate to the frequent appearances required by Ms. Hathaway caused solely by Mr. Duval's failure to file the documents requested. At the beginning of this matter Mr. Duval suggested he had a case to put before the court that would result in an order for child support in an amount considerably below the amount he would be required to pay under the table child support guideline. He in fact put no case forward because he did not compile the necessary documents to do so. This was entirely within his control. Ms. Hathaway as a result was required to leave her workplace more frequently than should have been necessary if Mr. Duval had been prepared to recognize much earlier that he was required to change the amount of child support based upon the income he earned.

> **10** Ms. Hathaway has provided information from her employer about time lost and her rate of pay. Taking this into consideration with the other factors I have discussed I award costs in the amount of $500.00 which, because they were incurred in order to collect child maintenance, will be collected by the Maintenance Enforcement Program.

[18] Hatheway is another illustration of the "opportunity cost" analysis called for by the Court of Appeal.

[19] I am satisfied when I reviewed Ms. Kyte's work during the hearing, that she expended considerable time and effort attempting to organize her documents in a manner appropriate for presentation to the Court. She was not always successful in her attempts; that is, not able to provide a clear picture. For instance, in relation to the R.E.S.P.and her car allowance in s. 7 university costs. She was overall able to prepare her case, including her discussion on capital gains and rental income in a manner which had to require substantial time and effort on her behalf.

[20] From August 12, 2011 until January 29, 2014, Ms. Kyte indicates for preparation and attendance in Court, which resulted in absence from work, including disbursements, her total costs were $l,850.48. As set out in **Hathaway v. Duval**, *supra.*, Ms. Kyte is not claiming costs for attending Court, but rather costs for work done by a lawyer preparing and conducting litigation. She has

incurred a cost by "foregoing remunerative activity". I find her request for total costs to be unreasonable.

[21] Ms. Kyte did devote her time and effort to preparation ordinarily done by her lawyer retained for litigation. If she has spent the same time and effort in the preparation of her case that she did preparing for defeating Mr. Clarke's case, she may well have been successful in obtaining the amount sought. I find she was capable of preparing her case properly but she did not. This failure also consumed court time needlessly.

[22] While Ms. Kyte was overall successful however, due to her failure to prepare her documents and provide these. I set her cost award at $500.00 to be paid by August 30, 2014.

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M. Clare MacLellan, J.