

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lynda Elizabeth Mitchell, Applicant

AND:

Joseph William Mitchell, Respondent

BEFORE: M. Kraft, J.

COUNSEL: *Nicola Savin/Bailey Duller*, for the Applicant

Adam Jaffer/Barry Nussbaum, for the Respondent

HEARD: In writing

Costs Endorsement

M. KRAFT, J.

[1] This is the costs endorsement arising from a Settlement Conference that took place before me on March 29, 2023.

[2] On March 29, 2023, I released an Endorsement confirming that prior to the Settlement Conference, the parties had reached a consent regarding the payment of interim spousal support by the respondent to the applicant; the payment by the respondent to the applicant of 50% of the net rent he receives from the Watson property; the payment of the proceeds of sale from the sale of the respondent's guns by Gagnon Sports, to be paid into the trust account of the respondent's counsel; the process for the sale of the Watson Street property and payment of the expenses in connection with that property pending sale; the timing for when the respondent is to serve and file an updated sworn financial statement; the timing within which the respondent is to comply with the outstanding disclosure orders of Sharma, J., February 18, 2022 and Nakonechny, J., dated December 16, 2022 within 45 days; and the respondent providing additional financial disclosure within 45 days.

[3] At the Settlement Conference ("SC"), the applicant sought costs in the sum of \$10,000 in accordance with Rule 17(18) given that the respondent was not prepared for the SC; he had not made the required financial disclosure and otherwise had not contributed to the March 29, 2022 conference and prior conferences that had been adjourned in this matter. The applicant had served a Bill of Costs on the respondent's counsel an hour before the conference and, as a result, I set a date on which the parties would exchange written costs submissions so the respondent could respond.

[4] On March 30, 2023, the applicant served a new Bill of Costs on the respondent, seeking costs in the sum of \$34,558.33, representing 60% of her costs incurred since the Sharma, J. order was made, the disclosure order with which the respondent continues to be in breach. The respondent does not take issue with the applicant's entitlement to costs pursuant to Rule 17(18) of the *Family Law Rules*, O.Reg. 114/99 ("FLRs") but, rather, takes issue with the quantum and reasonableness of the costs sought. It is the respondent's position that the new Bill of Costs the applicant served on him on March 30, 2023, contains billings related to her motion to strike his pleadings, correspondence, emails and other matters not related to the outstanding disclosure or the adjourned SC dates.

Legislative Framework

[5] Rule 17(18) of the *Family Law Rules* provides

Costs

(18) Costs shall not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, in which case the judge shall, despite subrule 24 (10),

- (a) order the party to pay the costs of the conference immediately;
- (b) decide the amount of the costs; and
- (c) give any directions that are needed. O. Reg. 114/99, r. 17 (18); O. Reg. 235/16, s. 3; O. Reg. 298/18, s. 12 (4); O. Reg. 535/18, s. 5 (4).

[6] The purposes of a Settlement Conference are set out in Rule 17(5) and include

- (a) exploring the chances of settling the case;
- (b) settling or narrowing the issues in dispute;
- (c) ensuring disclosure of the relevant evidence;
- (c.1) settling or narrowing any issues relating to any expert evidence or reports on which the parties intend to rely at trial;
- (d) noting admissions that may simplify the case;
- (e) if possible, obtaining a view of how the court might decide the case;
- (f) considering any other matter that may help in a quick and just conclusion of the case;
- (g) if the case is not settled, identifying the witnesses and other evidence to be presented at trial, estimating the time needed for trial and scheduling the case for trial;
- (h) organizing a trial management conference, or holding one if appropriate; and
- (i) in the case of a motion to change a final order or agreement under rule 15, determining the most appropriate process for reaching a quick and just conclusion

of the motion. O. Reg. 114/99, r. 17 (5); O. Reg. 6/10, s. 7 (3); O. Reg. 781/21, s. 7 (3).

[7] In this case, the respondent was not prepared for the SC and otherwise contributed to the Conference being unproductive as follows:

- a. He came to the SC admittedly in breach of two disclosure orders made on consent, the order of Sharma, J., date February 18, 2022 and the order of Nakonechny, J., dated December 16, 2022, one of which was made over a year ago;
- b. The respondent's failure to comply with the disclosure orders has caused the applicant to incur additional expenses to pursue this disclosure and prepare her own analysis of the respondent's income, which is his obligation to do under the *FLRs*;
- c. The respondent did not serve or file an updated sworn financial statement, an updated certificate of financial disclosure, a Net Family Property statement, expert reports or an Offer to Settle for the March 29th, 2023 SC, as required by the *FLRs*;
- d. The respondent's failure to provide basic financial disclosure in accordance with the consent court orders and the *FLRs* deprived the applicant of the opportunity to have a judge explore settlement, or narrow the issues in this case, as set out as two of the purposes of a SC. Further, the applicant has been denied the opportunity to advance the case to a Trial Management Conference;
- e. The respondent's previously sworn financial statements, filed, have omitted properties and assets in which he has an interest. He did not report his rental income from three of his four income properties on his income tax return. He took the position that his gun collection of over 550 weapons has no value, despite the fact that the collection is currently listed for sale;
- f. The respondent makes excuses for his delay and failure to comply with disclosure orders based on his age, lack of computer skills and lack of representation. The respondent was represented by counsel from January 2022 to September 2022. During this time, the applicant made requests of the respondent for disclosure and gave notice of her intention to bring a motion to strike his pleadings. He was without counsel for a few weeks in September 2022 and sought an adjournment of the first SC date, to which the applicant agreed on consent, provided costs would be reserved and the respondent would make an outstanding payment to the Arbitrator so the applicant could obtain the costs order. At that time, the Arbitrator had withheld the award because the respondent had not paid his 50% share of the fees in accordance with the Arbitration Agreement. In October, 2022, the applicant sought to return her motion to strike but the respondent's lawyer provided a solicitor's undertaking to produce an updated sworn financial statement and comply with the outstanding disclosure order by November 30, 2022. Notwithstanding that these terms were made into a court order; the respondent did not produce the disclosure. The applicant agreed to adjourn the December 2022 SC date again on the respondent's agreement that more disclosure would be received by March 2023. On February 17, 2023 the respondent provided disclosure as well as on March 7,

2023, but the disclosure produced was duplicative and not responsive to the valuation issues that were outstanding and did not relate to his income;

- g. The applicant was forced to bring a motion to dispense with the respondent's consent to accept an offer to purchase a jointly owned income property, which was above the list price, even though the respondent had agreed to sell the income property. The applicant was completed successful on her motion, but she did not recover all of her costs. The applicant did not receive compensation for dealing with the parties' tenants when the respondent unilaterally cut off their water and the applicant was forced to bring two counsel up to speed on the case, both of which the respondent retained on the eve of the SC and both of whom sought adjournments of the SC on the representation that the respondent would comply with his outstanding disclosure requirements, which he did not do; and
- h. The applicant was forced to incur fees to obtain the safe receipts from the police confirming that the respondent had signed for and received over \$150,000 in cash in October 2021, which he failed to include in his sworn financial statement. The respondent did not produce information about an application he brought to have his weapons collection released to a licensed firearms dealing in September 2022. The applicant attended at court herself and confirmed that the respondent had been granted the order he sought.

[8] While it is correct that the respondent did consent to an order resolving a new timeline within which he will produce the outstanding disclosure and new disclosure sought by the applicant; he agreed to a non-dissipation order in relation to the proceeds of sale from his gun collection and cash; and he agreed to a process for the sale of 6 Watson Street and the payment of spousal support and sharing of rental income prior to the return of this SC, the applicant submits that the respondent only agreed to the terms of this consent order because of the extensive efforts she and her counsel made to gather evidence at her sole expense.

Legislative framework

[9] Subject to the provisions of an Act or the rules of court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[10] Pursuant to r. 24(10)(a) of the *FLRs*, the court is directed to decide the costs of a step in the case promptly after dealing with the step, in a summary manner.

[11] Modern family costs rules are designed to foster four fundamental purposes: to indemnify successful litigants for the cost of litigation, to encourage settlements, to discourage and sanction inappropriate behaviour by litigants: and to ensure that cases are dealt with justly: *Mattina v. Mattina*, 2018 ONCA 867, 299 A.C.W.S. (3d) 770, at para. 10. The touchstone considerations of costs awards are proportionality and reasonableness: *Beaver v. Hill*, 2018 ONCA 840, 17 R.F.L. (8th) 147, at para. 12.

[12] Rule 17(18) permits the court to make costs at a SC if a party did not provide disclosure or comply with the FLRs making the SC unproductive. I find that the respondent has behaved unreasonably in this matter. The applicant has been put to excessive legal fees because of the

respondent's refusal to comply with his financial disclosure obligations and court ordered disclosure.

[13] In *Sims-Howarth v Bilcliffe*, 2000 CanLII 22584 (ON SC), [2000] O.J. No. 330 (S.C.J.), Aston J. held that the two traditional scales of costs are no longer an appropriate way to quantify costs under the *FLRs*. He stated that, having determined that one party is liable to pay costs, the court must fix the amount at some figure between a nominal sum and full recovery, having regard to the factors set out in Rule 24, without any assumptions about categories of costs. This characterization of costs under the *FLRs* was approved of by the Ontario Court of Appeal in *C.A.M. v D.M.*, 2003 CanLII 18880 (ON CA), [2003] O.J. No. 3707 (C.A.), at para. 42.

[14] The *FLRs* do not explicitly provide for costs on either a partial or substantial indemnity scale. Rule 24(8) refers to "costs on a full recovery basis," where a party has acted in bad faith. Absent bad faith, the court need not find "special circumstances" before ordering costs on a full recovery basis: *Sordi v. Sordi*, 2011 ONCA 665 (CanLII), 283 O.A.C. 287. The Court has a range of costs awards open to it, from nominal to full recovery.

[15] There is no general approach in family law of "close to full recovery costs": *Beaver*, at para. 11. Rather, full recovery is only warranted in certain circumstances, such as bad faith under r. 24(8), or beating an offer to settle under r. 18(14): *Beaver*, at para. 13.

[16] Costs must always be proportional to what is at stake in the case, and to the unsuccessful party's reasonable expectation as to what costs he/she may face, if he/she is unsuccessful. In appropriate circumstances, unreasonable behavior will result in a higher award of costs.

[17] The issue is whether the applicant should receive her costs back to the original order of Sharma, J. when the respondent's breach began on February 18, 2022, or whether she is entitled only to costs related to the March 29, 2023 SC and prior SC dates that were adjourned on the respondent's consent to provide his outstanding disclosure which he did not do. The applicant incurred a total of \$57,597.23 of legal fees from February 18, 2022 to the March 29, 2023 SC. She seeks 60% of her fees, totaling \$34,558.33.

[18] I have reviewed the applicant's Bill of Costs and find that the fees charged, and the hours spent on this matter by the applicant's counsel was reasonable and proportionate to the issues involved in the case. Some of the dockets related to issues not directly related to the SC or prior SC that were adjourned, such as post-separation adjustment charts (May 17, 2022); appraisals of the gun collection and house (August 9, 2022); and matters related to the tenants (October 18, 2022 and October 26, 2022). However, the majority of the docket entries relate to the respondent's failure to provide disclosure in accordance with the *FLRs* and the court ordered disclosure which are directly related to rule 17(18).

Conclusion and Order

[19] In light of the respondent's lack of preparedness for the SC; the ongoing breach by the respondent of disclosure orders and the *FLRs* in general and particularly, since Sharma, J. made the first disclosure order, the reasonableness and proportionality of the work performed by the applicant's counsel; and the fact that the respondent should have expected to pay costs given his failure to provide the required disclosure, an order that the respondent pay the applicant costs, fixed in the sum of \$18,000 is appropriate.

[20] Within 10 days from the release of this Endorsement, the respondent shall pay the applicant costs in the sum of \$18,000, inclusive of HST and disbursements, on account of the SC on March 29, 2022, and his failure to provide disclosure and comply with the court orders, resulting in the adjournment of several other SC dates. The costs award shall be considered a support order, subject to enforcement by the Director of the Family Responsibility Office.

April 5, 2023



M. Kraft, J.