

CITATION: Chan v. Chan, 2014 ONSC 666
COURT FILE NO.: FC 12-39822
DATE: 20140128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Teresa Chan)
) Roselyn T. Pecus, for the Applicant
Applicant)
)
- and -)
)
Chieh Gin Chan) Respondent Unrepresented
)
Respondent)
)
)
)

COSTS ENDORSEMENT

MC GEE J.

[1] This trial of an issue was heard on November 29, 2013 with reasons delivered on December 4, 2013. The applicant wife was the successful party. She seeks costs of \$19,920.67 within submissions dated December 19, 2013. The respondent husband's submissions are dated January 9, 2014, to which the wife replied on January 13, 2014.

[2] The husband resists any payment of costs, proposing that he has acted reasonably throughout.

The Law

[3] As ably set out in the applicant's submissions, costs in Family Law are governed by Rules 24 and 18. Rule 24(1) provides that a successful party is presumed to be entitled to costs and the courts have a broad discretion to award costs.

[4] Modern costs rules are designed to foster three fundamental purposes: *Fong v. Chan*, 1999 CanLII 2052, 46 O.R. (3d) 330, 128 O.A.C. 2, 181 D.L.R. (4th) 614, [1999] O.J. No. 4600, 1999 CarswellOnt 3955 (Ont. C.A.) at paragraph [24], and *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40, [2009] O.J. No. 1905, 2009 CarswellOnt 2475 (Ont. C.A.):

- a) to indemnify successful litigants for the cost of litigation;
- b) to encourage settlement; and
- c) to discourage and sanction inappropriate behaviour by litigants.

[5] Subrule 2(2) of the Family Law Rules adds a fourth fundamental purpose for costs: to ensure that the primary objective of the rules is met – that cases are dealt with justly.

[6] As stated in the recent decision of Justice Curtis: *Sabo v. Sabo*, 2013 CarswellOnt 14067,

The traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser, rather than leaving each party's expenses where they fall, they act as a disincentive to those who might be tempted to harass others with meritless claims. In addition, because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position.

[7] Offers to settle are a significant factor in the determination of costs. Whether are not represented by counsel, parties have a positive obligation to behave in ways which enable the court to move cases forward to resolution (rule 2). Offers to settle play an important role in saving time and expense by promoting settlements, focusing parties and often narrowing issues in dispute: *Laing v. Mahmoud*, 2011 ONSC 6737.

[8] To determine whether a party has been successful, the court should take into account how the order compares to any settlement offers that were made: *Lawson v. Lawson*, 2008 CanLII 23496,

[9] The costs consequences of offers to settle are set out in subrule 18(14) as follows:

(14) Costs consequences of failure to accept offer. — A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.
2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
3. The offer does not expire and is not withdrawn before the hearing starts.
4. The offer is not accepted.
5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

[10] The court has a discretion to take into account any written offer to settle, the date it was made and its terms, even if subrule 18(14) does not apply to the offer to settle, when exercising its discretion over costs (subrule 18(16)). Otherwise stated, subrule 18(16) invites consideration of any and all offers to settle: *Osmar v. Osmar*, 2000 CanLII 20380 as they often demonstrate whether a party has acted reasonably. Family law litigants are responsible for and accountable for the positions they take in the litigation: *Heuss v. Sarkos*, 2004 ONCJ 141.

[11] The unreasonable conduct of an unsuccessful litigant is a factor in both the awarding of costs and in fixing the amount of costs. The court should express disapproval of a litigant who proceeds to court without adequate evidence to prove their claims, and should send the message that the successful party should have redress by awarding costs on a full recovery basis.

[12] Rule 24(8) provides that if a party has acted in bad faith the court shall decide costs on a full recovery basis and shall order the party to pay them immediately. However, a finding of bad faith is not a condition precedent to full recovery of costs by the other side under the Family Law Rules: *Osmar v. Osmar*, supra. A full recovery of costs can be ordered absent a finding of bad faith.

[13] For example, a full recovery of costs can be ordered if a party has acted unreasonably. In deciding whether a party has acted reasonably or unreasonably in a case, the court may examine the reasonableness of any offer the party made (clause 24(5)(b)) and see *Juliette Vanessa M. v. Floyd Dale P.*, 2011 ONCJ 616.

[14] Finally, determining the amount of costs is not simply a mechanical exercise. Costs must be proportional to the amount in issue and the outcome: *Boucher et al. v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579. The over-riding principle is reasonableness. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case.

[15] The factors to consider in determining the amount of costs in family law matters are (subrule 24(11)):

- a) the importance, complexity or difficulty of the issues;
- b) the reasonableness or unreasonableness of each party's behaviour in the case;
- c) the lawyer's rates;
- d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;
- e) expenses properly paid or payable; and
- f) any other relevant matter.

Analysis

[16] As the successful litigant, Ms. Chan is presumptively entitled to costs. Her counsel submits that costs should be assessed on a full recovery basis for two reasons: Mr. Chan acted in bad faith, and Ms. Chan served an offer which qualifies her for a full recovery within the operation of Rule 18(14.)

[17] The applicant's submissions can be easily summarized with respect to bad faith. All of Mr. Chan's conduct supports a date of separation in April of 2011 (Application statement that the parties were married 30 years, continued cohabitation and merging of financial resources, filing

of Income Tax Returns as married, no steps taken by either party to bring marriage to an end) until he later appreciated the operation of a net family property statement. Thereafter, he claimed a May 28, 2008 date of separation in order to minimize his net family property and thus, reduce his equalization payment.

[18] Mr. Chan's oft repeated view that his former spouse was engaged in a "self-serving declaration of valuation date for the specific purpose of gaining favourable equalization" is thus a projection of his own ends.

[19] Mr. Chan asserts in his submissions that he acted on what he believed to be the truth. He proposes that there is little difference on the value of his savings between the dates of May 2008 and April 2011. That evidence was not before me during the Trial and I can make no such finding.

[20] The applicant's submissions for a full recovery of costs per Rule 18(14) are self-evident. Ms. Chan served an Offer dated November 1, 2013 that provided for acceptance of an April 11, 2011 date of separation without costs until November 6th and a full recovery of costs thereafter. The Offer was made more than 7 days before trial and was available for acceptance up until the moment that trial commenced.

[21] Mr. Chan made no written Offer that qualifies for consideration under Rule 18(14) within this trial of an issue. He relates in his submissions certain settlement discussions at conferences which cannot be considered as they are not in writing. Attached to his submissions are certain written Offers, but each speaks to a global offer of settlement. As this proceeding was a limited trial of an issue on the date of separation, and the outcome in the cause is yet unknown, a global offer cannot be considered for this determination of costs. Moreover, his offer of October 28, 2013 is specifically predicated on a May 28, 2008 date of separation.

[22] I find that a full recovery in these facts is appropriate and warranted per the operation of Rule 18(14.) A finding of bad faith is therefore unnecessary to explore for the period from the date of delivery of the Offer. Prior to that date, I find that the respondent's behaviour was

unreasonable per Rule 24(5) and (8.) My reasons are set out below as they also support the amount of costs sought by the applicant.

[23] Full recovery is sought in the amount of \$19,920.67 inclusive of disbursements, HST and the costs of preparing costs submissions. I have taken into account the factors set out in subrule 24(11), as follows:

- a) The importance, complexity or difficulty of the issues: although the case was important to the parties, it was neither complicated nor difficult. There was simply no evidence that supported the respondent's date of separation but for his own assertions. Nothing changed after May 28, 2008. On his own evidence he took no steps after May 28, 2008 to end the marriage, or crystallize family property. But for the applicant hiring counsel in April of 2011, the marriage would have continued.
- b) The reasonableness or unreasonableness of each party's behaviour in the case: I find that the husband was unreasonable in his insistence on an earlier date of separation¹ and his manner of characterizing the wife's lack of contributions to the family.
- c) The lawyer's rates; the rates claimed by the wife's lawyer were reasonable for her level of experience, and the expertise required to prepare for and conduct this trial; and,
- d) The time properly spent on the case: a full day was required and the high level of organization brought by wife's counsel ensured an effective hearing. The costs were proportionate to the inquiry. The trial was necessary before any further steps could be taken in the litigation.

¹ Particularly as he now states in his January 9, 2014 Costs Submissions that there is little difference in his net family property between the disputes dates. Evidence will be required to assess this statement.

Decision

[24] Rule 18(14) provides for a full recovery after November 1, 2013, and Rule 24(5) and (8) is sufficient to a full recovery prior to November 1, 2013. In reviewing all the factors and exercising my discretion, I order that the applicant wife shall have her costs on a full recovery basis amount in the rounded amount of \$19,920. Costs are payable within 30 days.

McGee J.

Justice H.A. McGee

Released: January 28, 2014