

CANADA / JUDGMENT

Breakey v. Breakey

2022 BCSC 1806

COURT

Supreme Court of British Columbia

DECIDED

31 August 2022

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2022 BCSC 1806 Breakey v. Breakey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Breakey v. Breakey,

2022 BCSC 1806

Date: 20220831

Docket: E47597

Registry: Kamloops

Between:

Shelly Lee Wolf Breakey

Claimant/Respondent

And

Daniel Aaron Breakey

Respondent/Appellant

Before: The Honourable Justice Blake

On appeal from: an order of a Master of the Supreme Court of British Columbia, dated May 24, 2022 (Breakey v. Breakey, Kamloops File No. E47597).

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant:

R. Lammers

Counsel for the Respondent:

S. T. Walter

Place and Date of Hearing:

Kamloops, B.C.

August 31, 2022

Place and Date of Judgment:

Kamloops, B.C.

August 31, 2022

I. INTRODUCTION

- [1] This is an appeal brought by Mr. Breakey from an order of Master Keim, sitting as a registrar, dated May 24, 2022.
- [2] At the heart of this appeal is the correct interpretation of Appendix B to the Supreme Court Family Rules, B.C. Reg. 169/2009 (the "Schedule"), and specifically the correct interpretation of Tariff Item 4 in that Schedule, which provides that for each half-day of attendance for "[p]reparation for and attendance at each contested application" the successful party is to be awarded \$1,000.
- [3] By way of brief background, the Schedule differs significantly from Appendix B to the Supreme Court Civil Rules, B.C. Reg. 168/2009. One manner in which it differs is while Appendix B provides for separate items for preparation for an application and for the hearing of an application, Tariff Item 4 as set out in the Schedule does not. It only provides one tariff item for both the preparation and attendance at a contested application, as set out above.
- [4] The appellant argues that Tariff Item 4 is clear, and its correct interpretation is that for each half-day of attendance at a contested application a successful party is to be awarded \$1,000. By way of example, his position is that if three applications are heard at the same time in the same half-day, the correct interpretation of Tariff Item 4 is, therefore, that a successful party is entitled to the \$3,000 (being \$1,000 multiplied by three applications).
- [5] The respondent argues that the correct interpretation of Tariff Item 4 is that, for each half-day of attendance, regardless of how many contested applications are heard during that half-day, only one award of Tariff Item 4 is appropriate (or \$1,000).
- [6] Both parties argue that the procedural impacts upon family litigation of this decision are significant. The appellant argues that, unless his interpretation prevails, family litigants will be forced to set down multiple applications on separate days, to ensure they preserve their

entitlement to a costs award for each application. The respondent argues that unless her interpretation prevails, family litigants will be encouraged to bifurcate or trifurcate their applications, and thereby expend further unnecessary personal resources and court resources, rather than be encouraged to streamline their litigation in an efficient manner.

II. MASTER KEIM'S DECISION OF MAY 24, 2022

- [7] By way of background, Master Keim, sitting as a registrar, assessed costs for three separate contested applications. There were four hearing dates for these three applications, all of which were heard before Justice Punnett:
- a) Application #1 was heard for a half-day on July 26, 2021;
 - b) Applications #1 and #2 were heard for a full day on September 3, 2021;
 - c) Applications #1, #2, and #3 were heard for a half-day on September 16, 2021; and finally,
 - d) Applications #1, #2, and #3 were heard for a half-day on December 6, 2021.
- [8] Justice Punnett rendered his written decision on those three applications on October 28, 2021. As already noted, a further court appearance occurred on December 6, 2021 for a half-day, at which the parties argued costs. Justice Punnett ordered on December 6, 2021, that "the respondent [Mr. Breakey] is entitled to his costs for all three applications."
- [9] The parties agree that for the hearing of the three applications, there were five half-day attendances at court. The parties also agree that if those attendances are considered as occurring consecutively, that is, if the attendances are considered for each of the three applications, there were actually 11 half-day attendances.
- [10] The appointment to assess costs pursuant to the order of Justice Punnett was heard before Master Keim on May 2, 2022, and she rendered her decision on May 24, 2022: *Breakey v. Breakey* (24 May 2022), Kamloops E47597 (B.C.S.C.) [Keim Reasons].
- [11] The issue of whether the appellant was entitled to costs under Tariff Item 4 for 11 half-days of attendance at court was argued before Master Keim. Her decision was that he was not, and she ordered he was entitled to five half-days of "preparation for and attendance at court."
- [12] In her reasons for judgment she addressed this argument:
- [10] The claimant submits that, as all three applications were heard at the same time, the respondent is only entitled to one set of costs for the actual court time. The claimant's rationale is that it would be unfair to assess costs for each specific application when the amount of the actual court time utilized for the three applications is equivalent to two full days. The claimant also submits that the July 26 appearance should not be included in the costs calculation as the parties attended and waited, but did not get on that day due to a lack of court time. In total, the claimant says that the respondent should be awarded \$4,000 for

Tariff Item 4.

- [11] The respondent argues that the tariff is clear on the face of it. There is no requirement that each application be heard on a different day for the tariff to apply. The respondent submits that he was required for all three applications to prepare material and attend court to make submissions on the relief sought on each specific application. The fact that the applications were ultimately scheduled to be heard at the same time does not detract from the work that went into preparing and attending for the different applications. In support, the respondent refers to *Kellosalmi v. Watts*, 2018 BCSC 2249, a decision in which Master McDiarmid was faced with assessing costs on multiple applications. Master McDiarmid said the following:
- [33] Mr. Justice Betton heard two applications that day. He heard the application of the respondents by counterclaim and he heard the application of the respondent.
- [34] There was thus the necessity to prepare for and attend at two applications.
- [35] Mr. Watts filed an application directed to all of the other parties on November 4, 2016. It was responded to by the respondents by counterclaim on Application Response filed November 4, 2016. The respondents by counterclaim are entitled to tariff item 4 doubled for the November 16, 2016 attendance before Mr. Justice Betton, whose order was pronounced after October 20, 2016. The respondents by counterclaim initiated a Notice of Application, which they filed October 21, 2016 (the day after their offer to settle). They are accordingly entitled to \$4,000 under tariff item 4 for the matters which were dealt with by Betton J. on November 16, 2016.
- [12] In *Kellosalmi*, Master McDiarmid awarded \$4,000 under Tariff Item 4 for a one-day appearance on two applications because one party had issued an offer to settle and had been awarded double costs. In other words, he awarded \$2,000 for one day in which two applications were heard, but then doubled the costs in keeping with the double costs order. If the respondent's rationale regarding Tariff Item 4 was correct, then Master McDiarmid would have awarded \$8,000 for the one day; \$4,000 for each application. He did not.
- [13] *Kellosalmi* is consistent with other costs awards dealing with multiple applications that were heard on the same day. In *DSW v. DAW*, 2014 BCSC 514, Master Young assessed the amount of costs following a complicated matter with multiple applications that proceeded in front of Justice Barrow. In that case, the parties ultimately ended up having a six-day oral hearing on a multitude of issues arising from several applications. The costs awarded for Tariff Item 4 at the six-day hearing were \$12,000 or \$2,000 per day as the tariff, regardless of the fact that several applications were before the court at the same time.
- [14] Therefore, I do not accept the respondent's submissions regarding Tariff Item 4. The parties attended for two and a half days. As it would be impossible to carve out exactly how much time was spent on which application, it only makes practical sense to assess the costs based on the time used regardless of how many applications were dealt with during that time.

III. STANDARD OF REVIEW

[13] The assessment of costs is discretionary and is highly fact-specific. The parties agree that the standard of review for an appeal from a registrar's order is one of correctness. The registrar must have erred in principle or have been "clearly wrong" for their decision to be overturned by this Court: *Peoples Trust Company v. Longlea Estates Ltd.*, 2005 BCSC 1332 at paras. 39-41; *Wright v. Sun Life Assurance Company of Canada*, 2015 BCCA 312 at para. 10.

IV. ANALYSIS

[14] The appellant takes the position that Master Keim, sitting as a registrar of this Court, exceeded her jurisdiction by:

- a) determining that competing applications in a family law case, heard at the same time, were not to be assessed as separate tariff amounts under the Supreme Court Family Rules, Schedule B, Tariff Item 4; and
- b) failing to assess costs separately for the three applications in favour of Mr. Beakey.

A. Jurisdiction of a Registrar

[15] The position of the appellant is that a master, sitting as a registrar, has no jurisdiction to deviate from the Schedule, and cannot apply any discretion in applying the Schedule. The parties agree that registrars are empowered by statute, and have no inherent jurisdiction: see *Waters v. Michie*, 2018 BCSC 1206 at para. 30 [Waters]. Registrars are empowered to assess the costs of family proceedings by s. 13(2) of the Supreme Court Act, R.S.B.C. 1996, c. 443, and Appendix B, s. 1(4) of the Supreme Court Family Rules which provides that "[a]fter the difficulty involved in a family law case has been determined, a registrar must assess the costs in accordance with the Schedule": *Waters* at para. 31.

[16] The appellant's position is that Master Keim was incorrect in her application of the Schedule and exceeded her jurisdiction. Simply put, he argues she deviated from the Schedule, and in doing so, exceeded her jurisdiction.

[17] After carefully reviewing Master Keim's decision, I do not agree she incorrectly exceeded her jurisdiction. Rather, she was tasked with determining whether the appellant had "prepared for and attended" at 11 half-days or five half-days. In fulfilling this task, she considered the arguments of counsel, the caselaw counsel provided, and applied her common sense to the facts before her. This is clearly within the jurisdiction of a registrar.

[18] There is no definition within the Schedule nor the Supreme Court Family Rules as to what is meant by either "preparation" or "attendance" as required by Tariff Item 4. To assess costs properly requires a consideration of both the wording of the tariff item set out in the Schedule and the relevant jurisprudence. In doing so, I do not find Master Keim exceeded her jurisdiction; rather, I accept she fulfilled her statutory responsibility.

[19] The correct interpretation and application of the Schedule, including Tariff Item 4, is within a registrar's jurisdiction to interpret and apply. I am satisfied that the starting point for any assessment of costs originates with the Supreme Court Family Rules. Master Keim, in her reasons, specifically referenced Rule 1-3 (Object of the Rules) and Rule 16 (Costs). There is no definition within the Rules as to the correct interpretation of Tariff Item 4 and no definition of the words "preparation" or "attendance." I am satisfied that the registrar has the jurisdiction to interpret and apply the Rules, including the Schedule, based on the applicable caselaw and an interpretation of what has, in fact, occurred in the matter they are tasked with assessing.

B. Was the Registrar Incorrect

[20] The appellant says that Master Keim was incorrect in her interpretation of Tariff Item 4. Specifically, he says that Tariff Item 4 was applied incorrectly by Master Keim.

[21] He argues that the word "each" in Tariff Item 4 of the Schedule is critical. He argues that the correct interpretation of Tariff Item 4 is the number of applications before the court (i.e. "each" of them) and the number of times that "each" application--counted separately--took place. His argument was summarized in his amended appellant's statement of argument as:

8. The word "each" contained in the Schedule is instructive. The determining factor is the number of applications before the Court (ie 'each' of them) and the number of times that 'each' application (counted separately) takes place. These are to be counted independent of one another.
9. In other words, because the phrase "each contested application" comes first, and the first phrase is referring to "each" (ie, separate application) the second phrase that follows must also therefore be referring to the calculation of that separate application half-day because it was quantified in the first phrase already.

[22] The appellant's position is that the registrar had no jurisdiction to determine that the costs for each of the three applications should be awarded concurrently with one another and, in doing so, Master Keim was incorrect. His position is that the correct costs order is \$11,000 for 11 half-days of attendance in all three applications. With respect, I do not agree.

[23] I have carefully reviewed the amended appellant's statement of argument and the cases he relies upon, namely Waters, which I have addressed above; Kellosalmi v. Watts, 2018 BCSC 2249 [Kellosalmi]; and D.S.W. v. D.A.W., 2014 BCSC 514 [D.S.W.]. The parties acknowledge there is no caselaw they have located which clearly addresses the specific issue before me on this appeal. Accordingly, I will briefly address each of the cases referred to by the appellant in turn.

[24] First, the appellant relies upon Kellosalmi as authority for the proposition that it is appropriate to award two "sets" of costs pursuant to Tariff Item 4 when the applications are heard at the same time: Kellosalmi at paras. 33- 35. However, a careful reading of Kellosalmi

makes clear it is not possible to determine whether Master McDiarmid, in fact, awarded costs in this manner. It is simply not clear in the reasons for judgment whether he awarded costs for two half-days X two applications X applied double costs or, as argued by the respondent, whether he awarded costs for two full days of applications X applied double costs. The case does not therefore stand for the proposition advanced by the appellant.

- [25] Accordingly, I cannot find that Master Keim was correct in her interpretation of the methodology applied in Kellosalmi: see Keim Reasons at para. 12.
- [26] However, I do accept that Kellosalmi stands for the clear proposition that "[t]he pre-requisite for entitlement is 'preparation for and attendance at' [each contested application] and the method of determination of the number of units is a determination of each half-day of attendance": at para. 27 [emphasis added]. This proposition is critical.
- [27] The appellant also argues that while Master Keim relied upon the decision of D.S.W., in which Master Young assessed costs for six hearing days at which two applications were heard (and so did not order 12 hearing dates), that decision was not one in which the issue currently before me was substantively dealt with. He also argues that the decision in D.S.W. was heard before Justice Crossin's decision in Waters and, in Kellosalmi, it was made clear that the decision in Waters clarified a registrar has no discretion to apportion costs pursuant to the tariff item: see Kellosalmi at para. 30.
- [28] I accept the appellant's argument that the lack of substantive analysis in D.S.W. impacts the weight I may place on it.
- [29] However, the caselaw establishes the registrar has the jurisdiction to determine what qualifies as an "attendance". For example, in the decision of McShane v. McShane, 2020 BCSC 346 [McShane] Master Keim determined there was no "attendance" when counsel attended to merely receive reasons for judgment, but there was an "attendance" when there were "still outstanding matters in contention": at para. 12. See also the decisions of Kellosalmi and D.S.W. cited by the appellant, and discussed above.
- [30] The issue is then whether Master Keim was incorrect in her interpretation of Tariff Item 4 and her application of that interpretation. As already set out, the parties acknowledged there is no other clear caselaw which specifically addresses this issue, and Kellosalmi and D.S.W. were both considered by Master Keim.
- [31] I am satisfied that D.S.W. was a determination by a registrar that only one block of attendance costs was ordered for the hearing of multiple applications. I am satisfied that Kellosalmi stands for the proposition that the pre-requisite for entitlement to Tariff Item 4 is a determination of each half-day of attendance. Finally, I am satisfied that McShane stands for the proposition that registrars are required to make determinations of which appearances are sufficient to qualify as an "attendance" for the purpose of an award under Tariff Item 4.

[32] Accordingly, I am satisfied that it was open to Master Keim to exercise her discretion, and to determine that only one block of attendance costs were appropriate to be ordered, notwithstanding multiple applications were heard at the same time.

V. conclusion

- [33] I am satisfied Master Keim's assessment of whether there were five or eleven half-day attendances sufficient to qualify for the purposes of Tariff Item 4 was within her jurisdiction, and that she exercised that authority correctly, in accordance with the existing caselaw. The exercise of assessing costs is discretionary and fact-specific, and I am not satisfied her interpretation of what qualifies as an "attendance" for the purpose of Tariff Item 4 was incorrect.
- [34] For clarity, I find that the presumptive interpretation of the language in Tariff Item 4 is that, to qualify for that tariff item as set out in the Schedule, a party must both prepare for and attend at a contested application and further, that attendance for multiple applications heard at the same time only qualifies as one attendance for each one half-day. To deviate from this presumption would require that the parties ask the judge ordering costs in the first instant to turn their mind to, and to clearly make a costs order, that a party's attendance at the same time to deal with multiple applications should be treated in a different manner.
- [35] Accordingly, the appeal is dismissed. The respondent is entitled to the costs of the appeal, and I thank counsel for their fulsome submissions on this matter.
- [36] I gave these reasons orally at the conclusion of the submissions. I have edited them without change to the substance or the result.

"Blake J."

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