

CANADA / JUDGMENT

O'Connor v. Mills

2024 BCSC 804

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 804 O'Connor v. Mills

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O'Connor v. Mills,

2024 BCSC 804

Date: 20240513

Docket: E191117

Registry: Vancouver

Between:

Nicola Elizabeth O'Connor

Claimant

And

Michael John Mills

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment Re Costs

Counsel for the Claimant:

S. Beebe

Counsel for the Respondent:

A. Winters

J. Harrigan

Claimant's Written Submissions Received:

January 31, 2024

Respondent's Written Submissions Received:

February 27, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 13, 2024

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- [1] This matter proceeded before me on a preliminary trial motion, a lengthy trial and a supplementary post-trial hearing for clarification of the orders made at trial. The three separate reasons for judgment are all reported and indexed at:

- a) November 30, 2022, 2022 BCSC 2236;
 - b) February 9, 2023, 2023 BCSC 1886 (the "Trial Reasons"); and
 - c) December 14, 2023, 2024 BCSC 20.
- [2] The claimant submits that costs should be awarded to her in this family law proceeding on the basis that she achieved substantial success.
- [3] The claimant further submits that if a finding of substantial success is made, costs should be assessed at scale C on the basis that this case was one of greater than ordinary difficulty.
- [4] The claimant also seeks double costs for a portion of the action pursuant to Supreme Court Family Rule 11-1(5) [Rules] on the basis that the respondent reasonably should have accepted an offer to settle made to him in December 2021 which the claimant submits exceeded the trial award and which would have placed the respondent in a significantly better position today by saving him significant trial related expenses.

Substantial Success

- [5] Rule 16-1(7) of the Rules provides that the costs of a family law proceeding are to be awarded to the successful party unless otherwise ordered. This is a matter of judicial discretion.
- [6] The usual rule is that costs should follow the event: *Gold v. Gold*, [1993] B.C.J. No. 1792, 1993 CanLII 1248 (B.C.C.A.), para. 19. This is very well established law.
- [7] I was referred by counsel for the claimant to the decision in *S.A.M v. J.A.M.*, 2017 BCSC 2348, which I accept very succinctly summarizes the principles applicable to costs awards in family cases at paragraph 7, as follows:
- a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7) of the Rules;
 - b) The first step is to determine which party, if any, was substantially successful, using the seminal test from *Fotheringham v. Fotheringham*, 2001 BCSC 1321:
- [46] Based on the above interpretation of Rules 57(9), 57(15) and *Gold*, a decision to award or not award costs after a trial might follow a four step inquiry:
1. First by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded", overall and therefore won the event.

4. Fourth, where one party "substantially succeeded", a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs
- c) The "successful party" is the party who has achieved substantial success at the trial or hearing on a flexible test, in consideration of the panoply of claims available in family matters: *Fotheringham*; *Marquez v. Zapiola*, 2014 BCCA 35;
- d) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues: *Gold*;
- e) The party who asks the court to "order otherwise" bears the onus of persuading the court why it should do so: *S.D.W. v. C.W.W.*, 2006 BCSC 162;
- f) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs: *S.D.W. v. C.W.W.*; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194.
- [8] As set out in the second step of the *Fotheringham* analysis, success at trial is not, I accept, determined by merely counting the number of issues on which each party succeeded.
- [9] Rather, the quality and complexity of the issues must be considered: *Gadhri v. Dhanoa*, 2022 BCSC 225, para. 5.
- [10] Where there is divided success on the total number of issues but one party succeeds on the primary issue in the matter, viewed holistically, the global balance tilts toward one party over the other: *Wallace v. Pichichero*, 2021 BCSC 2347.
- [11] At paragraph 16 of *Wallace*, Justice Branch articulated this point very succinctly. Justice Branch stated that "[s]ubstantial success is not determined by tallying the number of issues and evaluating success on each issue, or by comparing dollar amounts. It is determined by evaluating success on the issues of substance."
- [12] Ideally, family law matters are resolved outside of court through alternative dispute resolution in some format. This is consistent with Rule 1-3 of the Rules which provides, in part:
 - (1) The object of these Supreme Court Family Rules is to
 - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
 - (i) .
 - (ii) minimize conflict and promote cooperation between the parties, and
 - (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

(2)Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to

(a) .

(b)the importance of the issues in dispute, and

(c)the complexity of the family law case.

[13] Relying on the four-step analysis from *Fotheringham*, the claimant submits that she was substantially successful after the conclusion of this lengthy family law trial which exclusively pertained to financial issues and involved the court receiving the testimony of two of the parties' adult children (my factual conclusions on all witnesses are set out in the Trial Reasons but the necessity of the involvement of the adult children cannot, in my conclusion, be overlooked in the *Fotheringham* analysis.

Matters in Dispute

[14] Family law proceedings between these parties were first initiated by the claimant. The claimant filed a notice of family claim on October 22, 2015, in which she sought child and spousal support and registered a certificate of pending litigation ("CPL") against the most significant family asset, the real property which I defined as the "Monck Park Property" in the Trial Reasons.

[15] However, the claimant subsequently abandoned her claims and discharged the CPL on the respondent's express request (which might be better characterized as a demand). I addressed my concerns arising from this and the further unilateral sale of the Monck Park Property by the respondent in the Trial Reasons.

[16] On April 29, 2019, the claimant filed a "new" notice of family claim which initiated the current proceedings which resulted in the Trial Reasons.

[17] The respondent filed a response to family claim on June 10, 2019, and was actively engaged in the litigation process thereafter.

[18] On December 13, 2019, the claimant obtained a s. 91 restraining order by order of Associate Judge (then Master) Keighley. The claimant also obtained an order for specific document disclosure, albeit not to the full extent that was being sought. The claimant's application for spousal support was dismissed with liberty to reapply with additional materials. Costs were ordered in the cause.

[19] The parties unsuccessfully attempted mediation in the spring of 2021 with an accredited family law mediator.

[20] On August 24, 2022, the respondent brought an application to set aside the s. 91 restraining order to permit the distribution of up to \$1,000,000.00 to him from a certain designated account (which account need not be specified in the reasons for confidentiality but it is

clearly identified previously on the record). This application was successfully opposed by the claimant. Costs were ordered in the cause - though I note that counsel neglected to actually document this through a signed and filed order as is the obviously preferred practice of the Court.

- [21] The parties again attempted mediation in November 2022 with an accredited family law mediator.
- [22] The matter came on for trial on November 28, 2022. The issues for trial were set out in the Trial Reasons but can be summarized as follows:
- a) Divorce (which was uncontested by either party);
 - b) Determination of Guideline income of the respondent, which was sought to be imputed retroactively and prospectively;
 - c) Determination of Guideline income of the claimant;
 - d) Retroactive child support for the sole remaining "child of the marriage" that remained as of the date of separation;
 - e) Determination of quantum of spousal support both retroactively and prospectively (entitlement having been appropriately conceded); and
 - f) Division of property, including as detailed in the Trial Reasons, determination of family property, unequal division of family property and division of excluded property.
- [23] As will be apparent from the foregoing summary, this was a complex family law matter with what I can best judicially describe as having many moving parts. As a result of these moving parts, it took longer than anyone, including the Court, anticipated. This is not an endorsement in any way of providing inaccurate time estimates to Supreme Court Scheduling as same presents various challenges, particularly for visiting justices. However, for the purposes of determining costs in this particular case, I think it must be noted that I do not consider any of the counsel or the parties to have intentionally delayed or filibustered. It was simply more complicated than was contemplated, I believe, at first instance.
- [24] Returning to the trial, the primary issue in contention, I think both parties will accept, is subparagraph 22(f) above - namely division of property and/or excluded property. But for this issue, I anticipate that the other matters could have been resolved at one of the two mediations which, as noted, occurred with accredited (and reputable) family law mediators.
- [25] In this regard, I shall not reiterate my conclusions reached in the Trial Reasons, but it is apparent from even a cursory review of same that there were competing claims in this regard which were compounded by a failure to obtain admissible expert evidence, the dissipation of alleged family property and the ultimate loss of the Monck Park Property to fire.

- [26] As set out below, the claimant submits that she was substantially successful on the primary issues and on the balance of issues overall.

Weight and Importance of Those Matters

- [27] This step of the discretionary costs analysis provides for an assessment of the weight and importance of the matters in dispute according to the parties themselves. This is not necessarily the most "expensive" or difficult legal issue. Rather, it requires this Court to determine which matters are most important to the parties.
- [28] The claimant submits she was entirely successful on the penultimate issue of whether the Monck Park Trust Funds (as I defined in the Trial Reasons as the "MPTF") should be divided between the parties or solely retained by the respondent. This is an over simplification of a complex analysis but that analysis is set forth in the Trial Reasons.
- [29] The claimant further submits that she was also substantially successful on the second principal disputed issue of "imputing the respondent a Guideline income significantly above a level that would be commensurate with his income in the recent past and his personal circumstances".
- [30] The claimant concedes that the respondent was wholly successful in proving the value of his excluded property claim under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] against the Bellevue Property which was successfully traced into the Monck Park Property. It is apparent from a review of the Trial Reasons that this issue and corresponding sub-issues, by necessity, absorbed a considerable amount of trial time.
- [31] The claimant also concedes that the parties had mixed success on other corollary issues as identified, which issues consumed far less trial time.

Success on the Issue of Property Division

- [32] As I have just articulated above, the respondent was successful in proving the value of his excluded property claim under s. 85 of the FLA against the Bellevue Property which was further successfully traced into the Monck Park Property.
- [33] The claimant was, however, successful on the penultimate issue in the case, being the question of whether the inherited value should be shared between the parties. This is correct. The Court accepted the claimant's position in this regard - but it must be noted for cost purposes that the Court did divide the excluded property disproportionately in favour of the respondent as articulated in the Trial Reasons.

Guideline Income Determination

- [34] The respondent strenuously opposed the claimant's effort to impute him with a Guideline income greater than his reported earnings.

- [35] The respondent was unsuccessful in opposing those efforts and this is an issue wherein the Court, as set forth in the Trial Reasons, made certain credibility findings which were ultimately adverse to the respondent.
- [36] I recognize the respondent did moderate his position somewhat between opening arguments and closing arguments on the Guideline income issue. However, he did so with the benefit of knowing the evidence had been tendered and/or obtained at trial. In my conclusion, this moderation of position does not negate the fact that the claimant was substantially successful on this issue when viewed holistically.
- [37] In reaching this conclusion, I absolutely do not want to be regarded as discouraging a reassessment of litigation strategy and making concessions where appropriate. This is entirely consistent with the purpose and intent of the Supreme Court Family Rules. However, in the specific factual matrix of this case, the concessions made on this issue were made too late to negate my conclusion that the claimant was substantially successful on this issue.

Global Determination of Substantial Success

- [38] The claimant submits that viewed holistically, she was substantially successful. Although some of the remaining issues were uncontested or of mixed success, they are relatively minor in comparison to the principal issues and should not shift an overall finding of substantial success.
- [39] As alluded to above, the crux of the claimant's submission on the issue of costs was that she was substantially successful on the two primary issues at trial, that she was successful on an overall majority of issues, and that she was, in any event, more than 75% successful overall.
- [40] For the reasons set out herein I accept, with the below caution, the proposition that the claimant was substantially successful in this action.
- [41] In the claimant's written submissions on the issue of costs dated January 31, 2024, the claimant's counsel provides a chart summarizing the disputed issues and the parties' trial positions.
- [42] There are certain flaws in this chart. I have thus not reproduced it herein, but it remains available for the record for the purposes of the appeal.
- [43] However, and most importantly, the flaws in that chart do not undermine my conclusion that the claimant was substantially successful on the two primary issues as I have articulated above.
- [44] This success is ameliorated somewhat, however, to the respondent's benefit by having proven at first instance that substantially all of the "family pot" was presumptively his excluded property as defined by s. 85 of the FLA.

[45] The remaining issues were truly peripheral to the primary concerns and I do not consider it necessary to parse through them individually. I rather make the conclusion, which I do not think is challenged by either party, that there was divided success and that none of these issues can "tip the scales" in favour of either party as it relates to costs. They were simply unresolved, in my observation, because of the focus of both parties on the primary issues.

Consideration of Whether the Court Should Otherwise Order

[46] The claimant further submits that she should be awarded her costs in this family matter and that there is no reason why it should be ordered otherwise.

[47] The factors to be considered in determining whether the court should otherwise order include those set forth in *Gold*:

- a) Hardship;
 - b) Earning capacity;
 - c) The purpose of the particular award;
 - d) The conduct of the parties in the litigation; and
 - e) The importance of not upsetting the balance achieved by the award itself.
- [48] There are various other authorities which confirm and endorse these factors but *Gold* but remains the "gold standard" for the consideration of the exercise of judicial discretion in this regard.

Hardship

[49] Financial hardship is insufficient on its own to depart from the usual rule, nor is sympathy a sound basis for departing from the usual rules: *S.D.W. v. C.W.W.* at para. 29. To invoke the court's discretion to depart from the rule, financial hardship must be "of such magnitude that it would be significantly unfair when considered in the context of the successful party's right to recover costs": *R.(K.A.M.) v. G.(W.H.)*, 2014 BCSC 783 at para. 19.

[50] As an example of difficult personal circumstances that were insufficient to justify a hardship finding, a party was unemployed, dependent on his parents and owned no significant assets other than his interest in the former family home. The Court still awarded costs of trial against him, noting he had the capacity to restore his former earning power even if it would take some years to do so: *Bird v. Kohl*, 2012 BCSC 1424, at para. 34.

[51] To justify departing from the usual rule regarding costs, a party must provide sufficient and credible evidence to establish that any financial hardship they would experience due to a costs award would be of a "magnitude that is considered severe or extreme": *T.A.O. v. D.J.M.*, 2022 BCSC 636 at para. 55.

- [52] In this case, I accept that ultimately the claimant's share of the MPTF shall exceed the respondent's. This is because there were multiple claims advanced, some of which had a retroactive component. This was not in any way lost on me when I drafted the Trial Reasons. I ran the calculations on multiple occasions.
- [53] In my view, this is a neutral factor having regard to my findings of fact of the conduct of the parties at trial, including the conduct of the respondent in disposing of the Monck Park Property and his difficulties in maintaining remunerative employment/self-employment post separation. I will add a caveat to the latter part of that paragraph that, as I sought to articulate in the Trial Reasons, not all of the respondent's employment/self-employment issues are self-induced. I completely accept that. However, the respondent cannot rely on his lack of insight to address these issues proactively as a basis for saying an award of costs would be a hardship.

Earning capacity

- [54] The Court imputed the respondent a Guideline income of \$100,000 per year as set out in the Trial Reasons.
- [55] The claimant's income was determined to be somewhat less but was based upon actual income received as opposed to the imputation of income. This cannot be overlooked by the Court in making a discretionary decision.
- [56] I thus also consider this to be a neutral factor in assessing costs.

The purpose of the particular award

- [57] The overall purpose of the trial award redistributes funds presumptively held solely in the respondent's name in the claimant's favour. The basis for this is articulated in the Trial Reasons.
- [58] In doing so, the Court was required to wrestle with the tensions that existed in ss. 95 and 96 of the FLA as they existed at the time these proceedings were commenced.
- [59] This was thus a legally challenging claim for the claimant to pursue which required the necessary preparation. The claim was further complicated by the destruction of the Monck Park Property and the subsequent unilateral sale of the bare land by the respondent after the claimant acceded to removing her CPL.
- [60] In these circumstances, I conclude this is a factor that weighs in favour of awarding costs to the claimant.

The conduct of the parties in the litigation

- [61] This trial took, as I have indicated, far longer than anticipated. I made the requisite credibility findings necessary to underpin my conclusions reached in the Trial Reasons. However, I cannot conclude for the purposes of costs that either party engaged in conduct during the course of the litigation which is relevant to costs save and except for the respondent's conduct in unilaterally selling the Monck Park Property bare land.
- [62] However, I have already factored this issue into my overall analysis both in the Trial Reasons and as set forth above. To do so again would, I conclude, be overly punitive to the respondent and an inappropriate exercise of judicial discretion.
- [63] I thus conclude that this is yet another neutral factor in the assessment of costs.

Balance of the award

- [64] The claimant submits that the above factors, on balance, weigh in favour of making a costs award in her favour.
- [65] As will be clear, although there was substantial success, most of the Gold factors are neutral when one considers them within this factual particular matrix.
- [66] However, I do accept the claimant's argument that this case focused on fairness and unfairness. It also turned, to some extent, on a lacuna in the FLA which has since been remedied, to some degree, by subsequent amendments to the legislation.
- [67] Balancing these considerations, and upon considerable reflection, I do ultimately accept the claimant's position that a global consideration of the factors weighs in favour of awarding her costs in this action. For the reasons I shall articulate below, I am further satisfied that the costs award would not upset the overall balance and fairness of the orders which flow from the Trial Reasons.
- [68] To summarize the foregoing, I find that the claimant was substantially successful as that term is contemplated in the Rules and corresponding caselaw. The issues remaining are at what scale the costs should be determined at under the Tariff and if there should be an adjustment based upon a formal offer to settle made pursuant to the Rules.

Greater than ordinary difficulty

- [69] The claimant submits that she should receive increased costs on the basis that this matter was one of greater than ordinary difficulty.
- [70] Counsel for the claimant referred me to cases where it has been found that conduct or legal complexity amount to more than an ordinary difficulty:
- a) those where procedure or process lengthened the trial: *Xu v. Leung*, 2001 BCCA 163, para. 16;

- b) where a business owner at an informational advantage failed to provide information in a cooperative manner, resulting in unnecessary accounting fees: *Dhalla v. Dhalla*, 2002 BCSC 984, paras. 17-18; or
 - c) where other conduct increased the difficulty of the case: *McPhail v. McPhail*, 2001 BCCA 250.
- [71] Other case law on costs being assessed as more than ordinary difficulty point to the complexity of the legal issues. This occurred in *Hopson v. Hannon*, 2022 BCSC 1013 at para. 63.
- [72] In *Hopson*, the husband sought to persuade the court that he was entitled to an exclusion over pre-relationship property that he was found to have gifted to his spouse during the relationship. When awarding costs at greater than ordinary difficulty, Madam Justice Warren considered the following factors (para. 63):
- [W]hether a difficult issue of law, fact, or construction is involved; whether the issue is of interest to a class or body of persons, or is of general interest; whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied; deceit; disregard for court orders, procedure or process that lengthened the trial and made it more difficult; misleading the court by failing to provide full and proper disclosure; and failure to provide information in a cooperative manner or other conduct that increased the difficulty of the case: *Kopp v. Kopp*, 2012 BCCA 140 at paras. 86 and 90.
- [73] In this case, there were similarly complex issues regarding determination of family property, excluded property and division of same, whether equally or unequally, with limited jurisprudence on point. I fully accept the claimant's position in this regard. The post-trial amendments to the FLA buttress this conclusion in my view.
- [74] The case itself, however, was not that complicated factually. The parties were effectively in a dispute over the MPTF with a few corollary issues proverbially tagging along the side. The amount of the MPTF was not contradicted and the respondent's considerable efforts in pursuing the insurance claim upon the destruction of the residence were to both parties' benefit.
- [75] Both parties also could have presented their case in a somewhat more efficient manner but the practical reality is that the trial simply took longer than anticipated. That fact is taken into consideration in the Tariff but does not reach the threshold of "more than ordinary difficulty".
- [76] As such, I am not satisfied that this is a situation where I should appropriately exercise my discretion to award costs under the Rules on the basis that the matter falls within that special category of being above ordinary difficulty.
- [77] Costs thus shall be awarded on the basis of the matter being of ordinary difficulty.

Offers to Settle

[78] The claimant further seeks an award for double costs for the steps taken from the first date she made an offer to settle this matter on September 13, 2021.

[79] It is trite that the court may consider an offer to settle when exercising discretion in relation to costs, pursuant to Rule 11-1(4).

[80] As a result of there being an offer to settle, pursuant to Rule 11-1(5) of the Rules, the court has discretion to order one or more of the following:

- a) Deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the case after the date of delivery or service of the offer to settle;
- b) Award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- c) Award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
- d) If the offer was made by a respondent and the judgment awarded to the claimant was no greater than the amount of the offer to settle award, the respondent's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

[81] An award of costs simpliciter is a prerequisite for an award of double costs: *Paul v. Pumple*, 2013 BCSC 1844 at para. 22. I have made such an award above.

[82] Where substantial success is found, the unsuccessful party bears the onus of persuading the court to exercise its discretion to depart from the usual rule because there are strong policy reasons for costs to follow the event: *Judge v. Judge*, 2015 BCSC 2240, para. 12

[83] Pursuant to Rule 11-1(6), the court may consider the following factors when reviewing an offer to settle on determination of an award of double costs:

- a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- b) the relationship between the terms of settlement offered and the final judgment of the court;
- c) the relative financial circumstances of the parties; and
- d) any other factor the court considers appropriate.

[84] The following principles of law apply to consideration under Rule 11-1(5):

- a) Double costs ought to be the rule rather than the exception where an accurate, timely offer to settle potentially destructive litigation was made: *Kraft v. Kraft*, 2018 BCSC 1184, paras. 36; 44 ("timely" means "offer made well before trial"); 45 (offer more favourable to offeree than trial result); appeal on this point dismissed, 2019 BCCA 204, para. 3;
 - b) The underlying legislative policy behind the Rules respecting offers to settle, "is to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer": *E.(A.) (litigation Guardina of) v. J. (D.W.)*, 2009 BCSC 505 at para. 61;
 - c) Costs considerations are meant to guide counsel and litigants in the choices and strategies they pursue in litigation: *Karpodinis v. Kantas*, 2006 BCCA 400 at para. 4;
 - d) The consideration is not whether the offer was reasonable, but rather whether it was unreasonable to refuse it: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30. The court may take into account the subjective reasons the offeree refused the offer, and whether those reasons were objectively reasonable: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 97;
 - e) The consideration of whether an offer ought reasonably to have been accepted is to be assessed at the time the offer is open for acceptance: *T.A.O.*;
 - f) In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, the Court of Appeal provided a list of non-exhaustive factors to consider in evaluating the reasonableness of non-acceptance, including the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided.
- [85] In *Dodgshon v. Marier*, 2023 BCSC 1648, Madam Justice Burke of this Court awarded double costs to the claimant wife on a finding of substantial success and service of a timely, accurate offer to settle.
- [86] When awarding double costs in that proceeding, the Court found the respondent ought reasonably to have accepted the claimant's cost offer because the offer (paras. 21-24):
- a) addressed the issues ultimately resolved at trial, in detail;
 - b) set out the factual background of those issues;
 - c) noted contributions by each party to the assets and debts;
 - d) set out caselaw in support of the claimant's claims;
 - e) was delivered to the respondent's email address for service; and
 - f) was open for acceptance for a reasonable amount of time, being the two months prior to trial.

[87] In this matter, the claimant:

- a) made her first formal offer to settle on September 13, 2021;
- b) made her second (quite similar) formal offer on December 22, 2021 ("Second Offer"); and
- c) made her third (and final) formal offer to settle on November 14, 2022 ("Third Offer").

[88] There is a detailed calculation of her ultimate award arising from the Trial Reasons included in the claimant's written submissions.

[89] I am not going to reproduce the offers into the record in light of my knowledge that the matter is under appeal. They are clearly accessible from the evidentiary record.

[90] Rather, the conclusion which I must inevitably draw is that the Third Offer was less than the amount awarded to the claimant in the order arising from the Trial Reasons. The claimant concedes this point but then seeks to bring into consideration speculated or approximated litigation costs that could have been avoided. This is not a factor in the test in my view.

[91] Settlement, whether through without prejudice communication, mediation or formal offers to settle, is very strongly encouraged by this Court. Failure to be reasonable and objective when presented with a formal offer to settle under the Rules can have monetary consequences. That is intentional and articulated more eloquently than me by other members of the judiciary in the above caselaw.

[92] In these circumstances, however, the Court will not exercise its discretion as provided for under the Rules to award double costs, even for a portion of the litigation. The operative offer at the time of the trial was the Third Offer and the respondent was more successful than that offer. That is dispositive of the issue and the claimant's creative work-around argument.

Costs of this hearing

[93] Costs are always awardable in the discretion of the trial judge.

[94] Given the foregoing review of the law on costs in family matter, I think it trite to state that Rule 16-1(7) of the Rules states the general principle that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[95] The standard of "success" required for the award of the costs of an action under Rule 16-1(7) is "substantial success". The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246, described the substantial success standard:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [96] The claimant was the substantially successful party at trial and she thus also is presumptively entitled to her costs of the application even though she did not succeed in obtaining increased costs or double costs. It would be redundant for me at this juncture to restate the law and the application of which, while perhaps slightly more nuanced in terms of determining substantial success on this narrow issue of costs, does not vary from my primary conclusion that the claimant ought to be entitled to her costs of the proceedings as the substantially successful party in accordance with the Rules except where there is a specific court order to the contrary. Specifically, and for the benefit of the record, I have concluded there is no reason of which I am aware for me to exercise my discretion in a manner contrary to the law which I have described above to deny the claimant her costs; provided they are assessed as ordinary costs.
- [97] I am, however, going to exercise my discretion pursuant to Rule 16-1(14) to fix the costs of the "costs application" at \$750.00, inclusive of disbursements, on the basis that it will be to the overall benefit to the parties to have that issue resolved having regard to how the costs issue has been addressed given the location of counsel and the primary location of where counsel presides.
- [98] I recognize I did not receive submissions directly from counsel on this point. However, having regard to my primary conclusion regarding substantial success as detailed above and the much more significant dispute about the MPTF as noted above, I consider exercising my discretion in accordance with the Rules to be appropriate and in accordance with the Rules generally in the circumstances.

Summary

[99] In summary, the claimant is entitled to her costs of this action, except where previously disallowed by court order herein, pursuant to Rule 16-1 on the basis that the matter is of ordinary difficulty in accordance with Rule 16-1(2)(b)(i).

[100] The claimant's application for costs on the basis of the action being of more than ordinary difficulty is dismissed.

[101] The claimant's application for double costs pursuant to Rule 11-1(5)(b) is dismissed.

[102] The assessment of costs of the claimant shall include, in accordance with paragraph 97 of these reasons for judgment, costs of the costs hearing which are fixed at \$750.00 pursuant to Rule 16-1(14).

"Hardwick J."

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