

CANADA / JUDGMENT

Small v. Small

2020 BCSC 1589

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1589 Small v. Small

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Small v. Small,

2020 BCSC 1589

Date: 20201028

Docket: E180585

Registry: Vancouver

Between:

Oxana Small aka Oxana Kirsanova

Claimant

And

Trevor Scott Small also known as Trevor Small

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment on Costs

Counsel for the Claimant:

M. Milau

Counsel for the Respondent:

J. Stein

Written Submissions Received:

October 1, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2020

INTRODUCTION

- [1] This judgment addresses the issue of costs following my trial judgment of May 7, 2020 (indexed at 2020 BCSC 707), and post-trial judgment of August 26, 2020 (indexed at 2020 BCSC 1253). The latter concerned the respondent's application to re-open the trial to address a variety of issues, including his imputed income.
- [2] In the trial judgment, at para. 301, I expressed the preliminary view that the parties should each bear their own trial costs in light of what appeared to be their divided success in the action. However, I granted leave for the parties to provide additional submissions on costs if they sought an alternative order. Both parties have now provided further submissions on costs.
- [3] The claimant says she is entitled to her costs as the substantially successful party in the litigation. She seeks an order that costs be fixed at \$50,000 plus \$3,000 in disbursements, payable from the respondent's share of the net proceeds of the family home. She says a lump sum order for costs is appropriate given that the respondent failed to accept an offer to settle, made on the third day of trial, that exceeded his recovery at trial. The claimant relies on Rule 16-1(14) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] in support of the court's authority to order costs on a lump sum basis.
- [4] The respondent says there was divided success in the action. However, he nevertheless seeks an order that the claimant pay his lump-sum costs in the amount of \$26,000 plus \$5,000 in disbursements, as well as reimbursement of 50% of the costs of a report prepared under s. 211 of the Family Law Act, S.B.C. 2011, c. 25. The respondent says such an order is justified by the claimant's litigation conduct, his success on discrete issues at trial, and as a consequence of his offers to settle which he says the claimant ought to have accepted. The respondent disputes that there was any offer to settle by the claimant that exceeded his recovery at trial.
- [5] Neither party argued that the respondent's post-trial application to re-open the trial should be treated as a discrete step in the litigation process for costs purposes. Accordingly, this judgment on trial costs covers all steps in the proceeding.

RELEVANT COSTS PRINCIPLES

Costs follow the event unless the Court orders otherwise

- [6] Rule 16-1(7) of the SCFR establishes the general rule that the costs of a family law case must be awarded to the successful party unless the court orders otherwise. The successful party is the party that achieved "substantial success" at the trial. In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, Bouck J. defined substantial success 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 looked at all the disputed matters globally.
- [7] Substantial success is to be measured in broad terms, and the court should not finally parse issues: *Stearman v. Powers*, 2017 BCCA 165 at para. 65.
- [8] 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 v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at 185.

Offers to settle

- [9] Rule 11-1 of the SCFR governs the costs rules that apply in a family action where a party has delivered a formal offer to settle. Pursuant to Rule 11-1(4), the court may consider an offer to settle in exercising its discretion in relation to costs. Where a formal offer has been delivered, Rule 11-1(5) provides that the court may do 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 family law 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 party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party'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.

- [10] The factors that a court must consider in making an order under Rule 11-1(5) are set out in Rule 11-1(6):
- (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;
 - (d) any other factor the court considers appropriate.
- [11] The costs implications of a formal offer to settle are only considered after the court has first determined costs pursuant to Rule 16-1(7): *H.K. v. W.K.*, 2018 BCSC 1447 at para. 16 [H.K.]. Double costs cannot be ordered if regular costs are not first awarded, but a party who was not substantially successful may recover costs under Rule 11-5(d) if that party made a formal offer that exceeded the result the opposing party achieved at trial: *H.K.* at para. 18.
- [12] In considering the relationship between the offer and the result at trial, the court should determine whether the declining party would have been financially better off, on a global basis, if they had accepted the offer as compared to their recovery at trial. Precise alignment between an offer to settle and final judgment is not required: *H.K.* at para. 68.

Costs of whole or part of family law case

- [13] Rule 16-1(14) of the SCFR provides that the court may award costs of a family case that relate to some particular application, step, or matter "in or related to the family law case". This subrule permits the court to apportion costs in appropriate cases: *Sandhu v. Sandhu*, 2011 BCSC 853 [Sandhu].
- [14] In *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 [Sutherland], the Court of Appeal set out the following three-step test for an apportionment of costs at para. 31:
- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
 - (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
 - (3) it must be shown that apportionment would effect a just result.
- [15] Applications for an apportionment of costs should only be brought in relatively rare cases, particularly in the area of family law where the issues between the parties are so often intertwined: *Sandhu* at para. 11.

ANALYSIS

Was the claimant the substantially successful party?

[16] The parties settled all parenting issues prior to trial, leaving issues of property and debt division, spousal support, and child support. There were a myriad of disputes between the parties in relation to these issues. I will summarize the issues of greatest importance to the parties, and the outcomes achieved:

- i. The division of proceeds from the sale of the former family home, referred to in the trial judgment as the "Magdalen Crescent Property". The respondent advanced an excluded property claim in the amount of \$778,459, and alternatively sought an unequal division of the proceeds of sale. The claimant was successful on this issue. I ordered equal division of the Magdalen Crescent Property sale proceeds (trial judgment, paras. 121-137).
- ii. The division of family debt. The respondent sought reimbursement of post-separation family expenses he incurred, or, alternatively, an order that shareholder loan debt to the respondent's company Global Brand Solutions Ltd. (GBS) be equally divided as of April 30, 2018 on the basis that the loans were incurred for family purposes. I ordered equal division of the GBS debt. Accordingly, the respondent was successful on this issue (trial judgment, paras. 138-151). Notably, the issue of the division of the Magdalen Crescent Properties sale proceeds and the issue of post-separation debt were intertwined. One of the reasons why I concluded that equal division of the sale proceeds would not be significantly unfair is that the claimant had to share the burden of post-separation debt that went to maintaining the property.
- iii. The valuation of the parties' condominium, referred to in the trial judgment as the "Foster Street Property". The respondent sought to adjust the purchase price agreed to by the parties pursuant to a without prejudice consent order, and also sought reimbursement of post-separation expenses. The claimant was successful on this issue (trial judgment, paras. 158-164).
- iv. The valuation of the parties' vehicles. On balance, the respondent was the successful party. The claimant was ordered to pay the respondent approximately \$10,000 in relation to their three vehicles (trial judgment, paras. 176-190).
- v. Determination of income. The claimant sought to impute income of \$163,000 to the respondent for support purposes while the respondent said his income should be \$80,000. I imputed income of \$100,000. Neither party achieved complete success on this issue (trial judgment, paras. 191-236).
- vi. Quantum of child support. As noted, I did not accept either party's position of the income to be imputed to the respondent for the purpose of determining support. Neither party achieved complete success on this issue (trial judgment, paras. 246-247).

vii. Retroactive s. 7 expenses. The respondent sought reimbursement for post-separation s. 7 expenses he incurred in the amount of approximately \$150,000. I did not make any order for retroactive s. 7 expenses. The claimant was therefore the successful party on this issue (trial judgment, paras. 252-261).

viii. Quantum and duration of spousal support. The claimant sought a lump sum award of spousal support in the amount of \$133,500, which the claimant said was the present value of eight more years of spousal support if an income of \$163,000 was imputed to the respondent. The respondent argued he should not have to pay spousal support, or alternatively that he should only have to pay \$268 per month with spousal support terminating in 2024. I ordered the respondent to pay monthly spousal support of \$850, terminating as of May 2026. Neither party achieved complete success on this issue (trial judgment, paras. 268-275).

ix. Reimbursement of pre-trial child and spousal support. The respondent was successful in securing the reimbursement of pre-trial child and spousal support, although in an amount less than he sought. The claimant argued there should be no reimbursement and therefore the respondent was the successful party on this issue (trial judgment, paras. 251, 276).

x. Family violence. The claimant sought a declaration that the respondent's conduct throughout the proceedings constituted family violence. Although parenting issues had been resolved prior to trial, she argued that such a finding would provide support for her claims for lump sum child and spousal support and security for costs. I declined to issue such a declaration, and therefore the respondent was successful on this issue (trial judgment, paras. 291-294).

xi. Lump sum spousal support and security for costs. The claimant was unsuccessful in arguing for a lump sum award of spousal support and an order for security for costs. The respondent was therefore the successful party on these issues (trial judgment, paras. 280-290).

[17] The clearest victory for the claimant in this action was the order for equal division of the sale proceeds of the Magdalen Crescent Property. This was clearly an issue of significant importance to the parties at trial. However, the issue of post-separation family debt was also significant. The respondent was successful in achieving equal division of shareholder loan debt to GBS incurred post-separation. In my estimation, the issue of post-separation debt consumed at least as much trial time as the issue of the Magdalen Crescent Property.

[18] The parties had mixed success on the remaining issues. My findings on the issues of imputed income and the amount and duration of child and spousal support fell somewhere in between the positions advanced by the parties. The claimant achieved success on the valuation issue related to the Foster Street Property while the respondent was successful in relation to the parties' vehicles. The respondent did not succeed in his claim for reimbursement of retroactive s. 7 expenses, but this was in part due to the fact that this claim overlapped with the order for equal division of the GBS shareholder loan debt. The claimant was wholly unsuccessful in her request for a declaration of family violence, and related orders for lump sum support and security for costs. The claimant's advancement of

the family violence issues, despite the fact that parenting issues had been resolved prior to trial, unnecessarily prolonged the trial.

- [19] On balance, and viewing the matter globally, I conclude that neither party achieved substantial success in this action. Rather, this is a case of divided success.

Should costs consequences flow from either party's failure to accept a formal offer to settle?

- [20] The parties exchanged a total of five formal offers to settle between July 10, 2019 and October 22, 2019. The claimant's offers were delivered on September 13 and October 22, 2019. The respondent's offers were delivered on July 10, October 10, and November 13, 2019.
- [21] The respondent says the claimant ought to have accepted his offers. He does not specify a particular offer that ought reasonably to have been accepted, nor does he provide an analysis of how the terms of his offers compared to the claimant's recovery at trial. In the absence of such particulars, he seeks a lump sum costs award of \$12,000 as a consequence of the claimant's failure to accept his offers.
- [22] In his formal offer of July 10, 2019, the respondent offered to reduce his excluded property claim from \$775,681 to \$600,000 for settlement purposes. His subsequent offers to settle included no further concessions on his excluded property claim. In light of that, I see no basis upon which it could be said that any of the respondent's offers ought reasonably to have been accepted by the claimant. In fact, the claimant succeeded at trial on this issue. Viewing the matters globally, it is also clear that the claimant's recovery at trial exceeded what she would have achieved in accepting the respondent's offer. I see no basis for a lump sum costs order in the respondent's favour on this basis.
- [23] The claimant says the respondent ought to have accepted her offer of October 22, 2019. She says this offer, viewed globally, would have given the respondent a benefit of \$57,000 as compared to the trial judgment. The claimant's offer included a term that the respondent would be entitled to \$144,000 in excluded property in relation to the Magdalen Crescent Property. In support of her request for lump sum costs in the amount of \$50,000, the claimant says the respondent should be required to pay double costs from the date of this offer.
- [24] The claimant has provided a comparative analysis of the terms of the October 22, 2019 settlement offer and the respondent's recovery at trial. However, her comparison overlooks certain terms of the offer that had a negative impact for the respondent, and miscalculates the effect of others. In particular:
- i. The offer to settle proposes to split the GBS shareholder loan debt as of May 1, 2017, rather than April 30, 2018 as was ordered at trial. The claimant's share of the GBS debt as of April 30, 2018 was approximately \$30,000 more than it was on May 1, 2017.

ii. The offer includes an excluded property claim on the part of the claimant in relation to Foster Street Property in the amount of \$24,000. The claimant did not maintain a claim for excluded property at trial.

iii. In relation to excluded property claims, the claimant's analysis assigns a "net benefit" of \$120,000 to the respondent in accepting the offer as compared to the "\$0" he received at trial. I presume the \$120,000 consists of a set-off between the parties' respective excluded property entitlement under the terms of the offer to settle - \$144,000 for the respondent and \$24,000 for the claimant. In any event, I do not agree with the claimant's method of calculation. The respondent did not receive "\$0" at trial in relation to the Magdalen Crescent Property, rather the property was subject to equal division. The respondent might therefore be said to be better off by \$60,000 if he accepted the offer but it is not correct to say he would be better off by \$120,000.

iv. The offer to settle proposed that the respondent pay \$1,452 per month in child support, as opposed to the \$960 per month he was ordered to pay at trial. This is a difference of close to \$6,000 per year.

[25] In my view, taking a global perspective, the respondent's recovery at trial was at least \$30,000 above the claimant's offer of October 22, 2019. On this basis alone, I would decline to make any order for costs to the plaintiff under Rule 11-1(5) of the SCFR.

[26] I further conclude it was not unreasonable for the respondent to refuse to accept an offer from the claimant that, in relation to the excluded property claim, required the respondent to reduce his previous offer by over \$450,000. There was no issue at trial that the respondent had, at one time, a claim for excluded property in relation to the Magdalen Crescent Property, although the parties differed on its value. The issue at trial was whether the respondent intended to gift his excluded property to the claimant when he purchased the house and put it in the parties' joint names. This was a question that turned on the inference to be drawn from the evidence as a whole.

[27] I accept that these were difficult circumstances in which to assess the likelihood of any particular outcome in relation to the respondent's excluded property claim. In my view it cannot be said that the claimant's offer of October 22, 2019, advanced mid-trial, was one the respondent reasonably ought to have accepted. As noted, I am also not persuaded that the respondent would have fared better in accepting the offer than he did at trial.

[28] As such, I would not exercise my discretion to depart from ordinary costs rules in these circumstances as a consequence of an unaccepted formal offer to settle by either party.

Should the respondent be entitled to a portion of his costs as a result of the claimant's litigation conduct?

[29] The respondent seeks lump sum costs in the amount of \$8,000 in relation to the claimant's litigation conduct. He says she set the tone of the litigation early by bringing a without notice application seeking orders to prevent the respondent from contacting the children, and thereafter waged "litigation war" against the respondent. Despite the parties settling all

parenting issues prior to trial, the claimant maintained allegations of family violence against the respondent and sought orders for lump sum support and security for costs. The respondent says the claimant has maligned his character at every opportunity. The respondent submits that such conduct warrants the sanction of the court in the form of an order for lump sum costs.

- [30] As I noted in the trial judgment, this case is one of high conflict. Both parties engaged in litigation tactics that may legitimately be criticized. I reviewed some of these tactics at paras. 93-104 of the trial judgment. Suffice to say the respondent shares responsibility for the hostilities that have been such a prevalent, and unfortunate, feature of this litigation. I am unable to conclude on the record that either party is more at fault than the other in their litigation conduct. As such, I decline to make any order for costs on this basis.

Should costs be apportioned?

- [31] The respondent seeks an order for lump sum costs in the amount of \$6,000 in relation to the claimant's unsuccessful requests for a declaration of family violence and related orders for security for costs and lump sum support. He says the claimant's request for such orders prolonged the trial and required him to mount a defence to 'irrelevant but high-stakes issues'. These issues are addressed at paras. 277-294 of the trial judgment.
- [32] In my view, the respondent has not met the test for an apportionment of costs as set out in Sutherland. I accept that family violence issues were discrete and they were issues upon which the respondent was ultimately successful at trial. However, there is no basis upon which I can identify the time attributable to these issues at trial. The respondent offers no basis. Nor am I persuaded that apportionment would effect a just result in this case. The respondent did succeed on discrete issues, but the claimant succeeded on other discrete issues. For example, she was wholly successful in defeating the respondent's excluded property claim in relation to the Magdalen Crescent Property, an issue which took up substantially more trial time than the family violence issues. It would not achieve a fair result to isolate the discrete issues identified by the respondent for costs purposes.
- [33] For these reasons, I decline to order an apportionment of costs in favour of the respondent.

CONCLUSION/COSTS ORDER

- [34] I conclude that success was divided in this action. There is no basis to depart from the usual rule that the parties shall bear their own costs.

"Horsman J."

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