

CITATION: Lucas v. Swift, 2022 ONSC 2230
COURT FILE NO.: FS-21-00000039-0000 (Guelph)
DATE: 2022-04-11

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
KEVIN ROSS LUCAS) *James M. Peluch*, for the Applicant
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Applicant)
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- and -)
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)
JOANNE DENISE SWIFT) *Erika MacLeod*, for the Respondent
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Respondent)
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Heard in Guelph by video-
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Price J.

Costs Endorsement

OVERVIEW

[1] The Respondent (“Ms. Swift”) moved for temporary spousal support and for partition and sale of the jointly owned property in Belwood Ontario. Mr. Lucas opposed the motion and brought a cross-motion for dismissal of Ms. Swift’s motion, further financial disclosure from her, and an adjournment to conduct questioning.

[2] The Court proceeded with Ms. Swift’s motion, ordered the partition and sale of the home, and found that Ms. Swift was entitled to interim spousal support

in the amount she claimed. The parties were unable to agree on the costs of the motion. This endorsement addresses that issue.

PARTIES' POSITIONS

Ms. Swift's Position

[3] Ms. Swift seeks her costs on a full recovery basis in the amount of \$12,737.93, inclusive of disbursements and HST, based in part on a severable Offer to Settle dated February 24, 2022, by which she offered to accept an order for sale of the home and spousal support of \$1,242.00 per month, and the fact that she was awarded support at the high end of the *Spousal Support Advisory Guidelines*, in the amount of \$1,656.00 per month, based on Ms. Swift's medical disability (Post Traumatic Stress Disorder) and how it developed (she attributes it to having been assaulted by Mr. Lucas, for which there is at least an arguable case).

Mr. Lucas's Position

[4] Mr. Lucas opposes Ms. Swift's claim for costs and asks that there be no order for costs on the ground that success was divided, in that the Court made an order for mutual productions and questioning.

ANALYSIS AND EVIDENCE

1. General principles to be applied

[5] A successful party is presumed to be entitled to his or her costs, pursuant to Rule 24(1) of the *Family Law Rules*. The preferable approach in family law cases is to allow costs on a full recovery basis, provided the successful party acted reasonably and the costs claimed are proportional to the issues and results

and were within the range that the opposing party should have expected if unsuccessful in the motions.¹

[6] Costs Orders are designed to achieve three principal purposes, (a) to indemnify successful litigants; (b) to sanction unreasonable conduct of the litigation; and (c) to encourage settlement.²

[7] In *Berta v. Berta*, (2015), the Court of Appeal stated:

In *Biant v. Sagoo* (2001), 20 R.F.L. (5th) 284 (Ont. S.C.), the court considered the costs award scheme under the rules and commented, at para. 20:

[T]he preferable approach in family law cases is to have costs recovery generally approach full recovery, so long as the successful party has behaved reasonably and the costs claimed are proportional to the issues and the result. There remains, I believe a discretion under Rule 24(1) to award the amount of costs that appears just in all the circumstances, while giving effect to the rules' preeminent presumption, and subject always to the rules that require full recovery or that require or suggest a reduction or an apportionment.

This court has repeatedly endorsed the *Biant* court's approach to the determination of costs in family law disputes: see for example, *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 263, 15 R.F.L. (7th) 35, at para. 4; *Sordi v Sordi*, 2011 ONCA 665, 134 R.F.L. (7th) 197, at para. 21; *M. (A.C.) v. M. (D.)*, 23003), 67 O.R. (3d) 181 (C.A.), at para. 40.³

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

¹ *Family Law Rules*, O Reg. 114/99, Rule 224(1); *Sims-Howarth v. Bilcliffe*, *Sims-Howarth v. Bilcliffe*, 2000 ONSC 22584 (CanLII), para. 11; *Biant v. Sagoo* 2001 ONSC 28137 (CanLII), para. 1

² *Paranavitana v. Nanayakkara*, 2010 ONSC 2257 (CanLII)

³ *Berta v. Berta*, 2015 ONCA 918 (CanLII), at paras. 92-93.

2. Applying the principles to the facts of the present case

a) Entitlement to costs

[9] Subrule 24(1) of the *Family Law Rules*, Ont. Reg. 114/99, articulates the fundamental “presumption that a successful party is entitled to the costs of a motion . . .” Ms. Swift was successful in her motion and is presumptively entitled to her costs.

[10] Mr. Lucas opposed the motion and brought a cross-motion which he served four business days before the scheduled hearing, seeking a dismissal of Ms. Swift’s motion, an Order permitting him to re-enter the home, an Order that Ms. Swift produce an up-dated financial statement, her complete medical records from all professionals, her complete application for all short term disability benefits and/or ODSP, and an order that Ms. Swift pay occupation rent from August 1, 2022, to the date she vacates the property, and reimburse Mr. Lucas the sum of \$31,746.56 for payment made on Ms. Swift’s behalf for the preservation of the jointly owned home.

[11] Of this considerable range of remedies, the Court ordered mutual productions. This was a procedural order intended to move the case forward and to enable the parties to address the issues of how the net proceeds of sale of the home should be distributed, and whether the temporary order for spousal support should be made permanent or should be adjusted based on more up-to-date financial disclosure, especially from Mr. Lucas as to his income since 2020. On the substantive issues in dispute at the motion, Ms. Swift was successful.

3. The amount of costs to be paid

a) Factors to be considered

[12] Rule 24(11) of the *Family Law Rules* lists the factors which the court should consider in quantifying costs:

24. (12) In setting the amount of costs, the court shall consider,
- (a) The reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
 - i. Each party's behaviour;
 - ii. The time spent by each party,
 - iii. Any written offers to settle, including offers that do not meet the requirements of rule 18,
 - iv. Any legal fees, including the number of lawyers and their rates,
 - v. Any expert witness fees, including the number of experts and their rates,
 - vi. Any other expenses properly paid or payable; and
 - (b) Any other relevant matter.

[13] I will consider each of these factors in relation to Ms. Swift's claim for the costs of the parties' motions.

b) Importance and Complexity

[14] Ms. Swift's motion for sale of the home and temporary spousal support, on its face, was relatively straight-forward. It was made unnecessarily complex by Mr. Lucas' motion to dismiss or delay her motion, and claiming remedies of his own.

[15] The issues were of importance to the parties. The parties have been litigating for almost two years and Ms. Swift suffers from health issues. Mr.

Lucas, instead of adopting an approach that might have resolved the issues in an expeditious way, sought to delay their resolution by making a cross-motion calculated to derail the hearing of Ms. Swift's motion, both by enlarging the time required to hear the motion beyond the one hour limit allowed for short motions, and by delaying the return to the motion by seeking further productions and questioning that, owing to Ms. Swift's disability, were not likely to affect the outcome in a substantial way.

c) Reasonableness of Each Party's Behaviour

[16] In the normal course, costs are awarded to a successful litigant on a partial indemnity scale, representing approximately 60% of the successful litigant's total legal fees and disbursements; however, the court has the discretion to order costs to be paid on a substantial indemnity scale (partial indemnity costs x 1.5 = 90%)⁴ or, especially in cases where there has been unreasonable conduct, on a full recovery basis.⁵

[17] Mr. Lucas' failure to accept Ms. Swift's reasonable and severable Offer to Settle dated February 24, 2022, entitles Ms. Swift to her costs, at least from that day forward, on a full recovery basis.

[18] Rule 18(14) of the *Family Law Rules* states:

18(14) 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.

.....

⁴ *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 1, as authorized by *Family Law Rules*, Rule 1(7)

⁵ *Feinstein v. Freedman*, 2014 ONCA 446 at para. 21; 131843 *Canada Inc. v. Double "R" Toronto Ltd.* (1992) 7 C.P.C. (3d) 15 (Ont. Gen. Div., per Blair J., as he then was) at p. 17, approved in *Murano v. Bank of Montreal*, 1998 CanLII 5633, (1998) 41 O.R. (3d) 222 (C.A.) at p. 244

2. The offer does not expire and is not withdrawn before the hearing starts.
3. The offer is not accepted.
4. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

[19] Ms. Swift served her Offer to Settle almost a month before the motions were heard. She did not withdraw the Offer before the hearing commenced. It was a severable Offer, in which she offered to accept spousal support in the amount of \$1,242.00 per month beginning March 1, 2022. She obtained a more favourable Order, awarding her spousal support \$414.00 per month greater than she would have accepted. She met all of the conditions as set out in Rule 18(14) and, accordingly, is entitled to her costs, at least from the date of the Offer onward, on a full recovery basis.

[20] Severable offers to settle enable the court to award full recovery costs of some or all of the costs if the party is successful on a severable term of their offer. See *Leybourne v. Powell* 2018 ONSC 6274, at para. 9.

[21] Mr. Lucas did not serve any Offer to Settle at all. In the circumstances of the present case, this amounted to unreasonable conduct. See *Crump v Crump* 2018 ONSC 3191; *Laing v Malmoud* 2011 ONSC 6737.

d) The lawyer's rates

[22] Ms. Swift claims an hourly rate for Ms. MacLeod of \$195.00 on a partial indemnity scale, and \$292.50 on a substantial indemnity scale, for her lawyer, Erica MacLeod. Ms. MacLeod has 8 years of experience, having been called to the Bar in 2014, and charges an actual rate of \$325.00 per hour.

[23] Ms. MacLeod delegated tasks to her staff, where possible, to reduce legal fees. She was assisted by Jennifer Eensild, a lawyer with 3 years

experience, Bernadetta Wells, a Law Clerk with 5.5 years experience, and Francesca Honsinger, a Legal Assistant with 2 years experience.

[24] The "Information for the Profession" bulletin, from the Costs Sub-Committee of the Rules Committee ("the Costs Bulletin")⁶, suggests maximum hourly rates (on a partial indemnity scale) of \$225.00 for lawyers, such as Ms. MacLeod and Ms. Eensild, who have less than 10 years of experience, and \$80.00 for Law Clerks.

[25] The Costs Bulletin, published in 2005, is now dated. It is therefore appropriate to make an adjustment to the rates suggested in the Costs Bulletin based on inflation. Smith J. took this approach in *First Capital (Canholdings) Corp. v. North American Property Group*.⁷

[26] The maximum partial indemnity rate of \$225.00 in 2005 is the equivalent of \$312.49 in 2022, when the motions were argued, according to the Bank of Canada's online Inflation Calculator. The current equivalent of the \$80.00 maximum partial indemnity hourly rate for Law Clerks is \$111.11.

[27] Given Ms. MacLeod's 8 years of experience, I attribute a partial indemnity hourly rate of \$300.00 to her. Given Ms. Eensild's 3 year of experience, I attribute a partial indemnity rate of \$250.00 to her. I attribute \$100.00 per hour as a partial indemnity hourly rate to Ms. Wells and \$75.00 per hour to Ms. Honsinger. Their current hourly rates on a substantial indemnity scale (1.5 times the partial indemnity rate) are \$450.00 and \$375.00, \$150.00,

⁶ "Information for the Profession" bulletin ("the Costs Bulletin") from the Costs Sub-Committee of the Rules Committee (that the Costs Sub-Committee of the Rules Committee issued to replace the Costs Grid, which it repealed in 2005). The Costs Bulletin has advisory status only and not statutory authority, as it was not included in the Regulation that repealed the Costs Grid.

⁷ *First Capital (Canholdings) Corp. v. North American Property Group*, 2012 ONSC 1359 (CanLII), 2012 ONSC 1359 (S.C.J.)

and \$122.50, respectively. Their full recovery rates, as per Rule 1 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, incorporated by rule 1(7) of the *Family Law rules*, O. Reg. 114/99. Their full recovery rates, adding a further 10%, would be \$495.00, \$412.50, and \$165.00, and \$123.75.

[28] Ms. Swift's lawyers' actual hourly rates are, for the most part, less than the above, at \$325.00, rather than \$495.00 for Ms. MacLeod, \$275.00, rather than \$412.50, for Ms. Eensild, \$200.00, rather than \$165.00 for Ms. Wells, and \$100.00 for Ms. Honsinger, rather than \$123.79.

[29] Aitken J., in *Geographic Resources*, allowed the Defendants/Respondents' costs of an appeal from a Master's order on a partial indemnity scale in the amount their lawyer had charged.⁸ She rejected the Plaintiffs/Appellants' argument that the Respondents should be awarded less than they had been charged because the parties had agreed that costs would be paid on a partial indemnity scale. Aitken J. began by considering the Costs Bulletin. She considered adjusting the Costs Subcommittee's hourly rates for inflation, as Smith J. did in *First Capital (Canholdings) Corp. v. North American Property Group*, but the unadjusted rates of the lawyers in her case were only slightly less than the actual fees they charged, so she used their unadjusted rates.⁹

[30] Although *Geographic Resources* was a civil action, the approach that Aitken J. took in that case applies equally in the family law context. The court adjusts the hourly rate, based on the Costs Bulletin, or the resulting fees, to reflect unique features of the case, including the complexity of the proceeding, the importance of the issues, and the other factors set out in Rule 24. If an

⁸ *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041 (CanLII),

⁹ *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041 (CanLII)

excessive amount of time was spent, or too many lawyers worked on the file, the court reduces the resulting amount of fees accordingly.

[31] Aitken J. makes it clear that the starting point in arriving at an appropriate hourly rate when fixing costs is the Costs Bulletin, not the actual hourly rate the lawyer charged her client. The actual rate charged is irrelevant, except as a limiting factor, in preventing the costs awarded from exceeding the actual fees charged, in keeping with the principle of indemnification.¹⁰ The Costs Subcommittee's rates apply to all lawyers and all cases, so everyone of the same level of experience starts at the same place.

[32] In *Mantella v. Mantella*, (2006), Corbett J. noted that an award of costs is designed to indemnify, and that the amount should therefore not exceed the amount charged to the client.¹¹ The Divisional Court, in *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, adopted Corbett J.'s analysis in *Mantella*, holding that it was not trumped by earlier jurisprudence from the Court of Appeal.¹² Using this approach, I am allowing \$325.00 for Ms. MacLeod's time, \$275.00 for Ms. Eensild, \$165.00 for Ms. Wells, and \$100.00 for Ms. Honsinger.

e) Time reasonably spent

[33] Ms. Swift's lawyers spent a reasonable amount of time preparing for her motion. Ms. McLeod spent 29 hours, Ms. Eensild spent .2 hours, Ms. Wells spent 6.8 hours, and Ms. Honsinger, collectively, spent 1.4 hours. Their time was spent drafting the Notice of Motion and Affidavit, with attendant

¹⁰ The principle that costs should not exceed the amount charged was articulated by Corbett J. in *Mantella v. Mantella*, 2006 CanLII 17337 (ON SC), (2006), 27 R.F.L. (6th) 76 (S.C.J.), subsequently approved by Aitken J., sitting as a Divisional Court judge in *Geographic Resources*.

¹¹ *Mantella v. Mantella*, 2006 CanLII 17337 (ON SC), (2006), 27 R.F.L. (6th) 76 (S.C.J.)

¹² *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041 (CanLII)

correspondence, reviewing Mr. Lucas' affidavit, drafting a Statement of Law and Offer to Settle, preparing, and attending to argue the motion.

[34] Applying the hourly rates allowed to the time spent, I allow \$9,425.00 for Ms. MacLeod (29 hours x \$325.00) for Ms. MacLeod, \$55.00 for Ms. Eensild (.2 hours x \$275.00), \$1,122.00 for Ms. Wells (6.8 hours x \$165.00), and \$140.00 for Ms. Honsinger (1.4 hours x \$100.00), for a total of \$10,742.00 for fees, or \$12,138.46, inclusive of HST.

[35] Mr. Lucas has submitted his own Bill of Costs, which discloses costs of \$13,407.45, inclusive of HST, on a full recovery basis. I note that this is a greater amount than the amount being awarded to Ms. Swift.

f) Proportionality

[36] I have considered the proportionality of the costs that I am awarding Ms. Swift.

[37] Ms. MacLeod did not "over-lawyer" the motion. The time she spent was reasonably necessary to address Mr. Lucas' response and to make her own argument on the issues. The costs claimed are proportional to the amounts at stake in the motion, which comprises both the realization of the parties' respective claims to the equity in their jointly owned home and the temporary spousal support claimed by Ms. Swift.

g) What is fair and reasonable

[38] I have examined the overall award with a view to determining whether it is 'fair and reasonable' for the kind of matter involved. In making this

determination, I take into account the reasonable expectation of the parties concerning the amount of costs.¹³

[39] Mr. Lucas has submitted a Bill of Costs in which he sets out his legal team's full indemnity rates. Applying those rates to the time they spent produces a greater amount than is being awarded to Ms. Swift. That amount reflects the amount Mr. Lucas must pay his own lawyer, and helps the Court assess what his reasonable expectation was as to the costs he would face if unsuccessful. On this reasoning, I find that the amounts being awarded to Ms. Swift are within the range of what Mr. Lucas should have expected to pay if unsuccessful.

[40] There is an element of behaviour modification to a costs order serving to encourage a change in attitude from a "litigate with impunity" mindset.¹⁴ I adopt the observations of Curtis J. in *Mooney*, in this regard:

Parties to litigation must understand that court proceedings are expensive, time-consuming and stressful for all concerned. They are not designed to give individual litigants a forum for carrying on in whatever manner they may choose, oblivious to the impact of that conduct on the other side and, perhaps most importantly for the purposes of this case, oblivious to the mounting costs of the litigation: *Heuss v. Sarkos*, 2004, Ont. Ct., *supra*, para. 20.

Matrimonial litigation is an occasion for sober consideration and thoughtfulness rather than intemperate behaviour: *Heuss v. Sarkos*, 2004, Ont. Ct., *supra*, para. 20.

One of the purposes of costs is to change behaviour. The justice system is a precious public resource. Access to the justice system by individuals must be balanced with the need to ensure that the resource is available for all those who need it. This is one of the purposes of Rule 2.

...

Unless courts discourage this behaviour, it will continue and increase. Orders for costs are one way to discourage this behaviour.¹⁵

¹³ Referring to: *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.) (released June 22, 2004); *Moon v. Sher*, [2002] O.J. No. 4651 (C.A.) (released November 16, 2004); and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, [2005] O.J. No. 160 (C.A.) (released January 24, 2005)

¹⁴ *Parsons v. Parsons*, 2002 CanLII 45521 (ON SC), at para. 14, Campbell J.

h) Other relevant factors

[41] Ms. Swift is entitled to her costs of the motion in the amount allowed, based on her success in the motions and Mr. Lucas' conduct in seeking the delay the resolution of the issues. Additionally, the amount allowed may encourage the parties to make meaningful efforts to settle their dispute at this stage of the proceeding, rather than deferring it until trial.

CONCLUSION AND ORDER

[42] For the foregoing reasons, it is ordered that:

1. Mr. Lucas shall pay to Ms. Swift her costs of the motions, fixed in the amount of \$12,138.46, consisting of \$10,742.00, on a full recovery basis, for fees, and \$1,396.46 for HST.
2. These costs shall be payable forthwith, with 2% post-judgment interest from today's date.



(Signature of Judge)

Price J.

Release: April 11, 2022

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B E T W E E N:

KEVIN ROSS LUCAS

Applicant

- and -

JOANNE DENISE SWIFT

Respondent

COSTS ENDORSEMENT

Price J.

Released: April 11, 2022