IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

**Citation:** Westcott v. Dumont, 2009 NSSC 102

**Date:** 20090330
**Docket:** 41933
**Registry**: Sydney, Nova Scotia

**Between:**

**Marilyn Westcott**

Applicant

and

**Jean Yves Dumont**

Respondent

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**ADDENDUM ON COSTS**

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| **Judge:** | The Honourable Justice Theresa M. Forgeron |
| **Written submissions on Costs Received:** | February 4, 24, and 27, 2009; March 6, 19, 2009 |
| **Oral Decision on Costs:** | March 26, 2009 |
| **Written Decision on Costs:** | April 3, 2009 |
| **Counsel:** | Ms. Candee McCarthy, Counsel for Jean Yves Dumont<br>Mr. Hugh McLeod, Counsel for Marilyn Westcott |

**Introduction**

[1] We adjourned until today's date for the decision on costs and for direction as to the form of the order.

**Costs**

[2] Each party seeks costs from the other. Mr. Dumont seeks costs because he states that he was the successful party. Ms. Westcott claims costs as well. She views herself as the successful party because of the oral offer to settle which was made during a settlement conference held some time ago. Each party points to the perceived rigidity and poor conduct on the part of the other as factors supporting his/her application for costs.

[3] I have reviewed the many written submissions received, the case law presented, and the rules. I have applied the civil burden of proof based on the balance of probabilities. Each party assumes the burden of proof in respect of his/her application for costs.

[4] In **Bennett v. Bennett** (1981) 45 N.S.R. 2d 683 (TD) Hallett J., as he then was, discussed the role of costs in family proceedings. His comments at paragraph 9 of that decision have been repeatedly followed as the authority on costs in family matters. Hallett J. states as follows:

> Costs are a discretionary matter. It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason. Reasons for depriving a party of costs are misconduct of the parties, miscarriage in the procedure, oppressive and vexatious conduct of the proceedings or where the questions involved are questions not previously decided by a court or arising out of the interpretation of new or ambiguous statute (Orkin's Law of Costs (1968)).

[5] Rule 92.02 (2) (a) makes it clear that the 1972 rules continue to apply in family matters. Rule 92.02(2) states as follows:

> (2) The *Nova Scotia Civil Procedure Rules* (1972) continue to apply to each of the following kinds of proceedings:
>
> (a) an action or other proceeding in the Family Division;
>
> ...

[6] Rule 70 contains no specific provision relating to costs, but rule 70.03(4) provides as follows:

> (4) Where any matter of practice or procedure is not governed by statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.

[7] Rule 57.27 (1) and (2) indicates as follows:

> (1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.
>
> (2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

[8] Rule 63.02(1) states as follows:

> (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
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> (a) award a gross sum in lieu of, or in addition to any taxed costs;
>
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]
>
> (c) direct whether or not any costs are to be set off.

[9] The calculation of costs is found in rule 63.04(1) which states:

> (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

[10] Before determining who was the successful party, it is necessary to address

the issue of the oral offer to settle. I accept that counsel for Ms. Westcott made an oral offer to settle the matter for $50,000 before a settlement conference on February 28, 2007. I have, however, placed no weight on this oral offer for the following reasons:

> a) An oral offer to settle does not comply with rule 41.A. This rule describes the process to be followed when making offers which will have costs ramifications. A written offer made within the context of the rules underscores the significance of the offer;
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> b) Ms. Westcott had ample time to reduce the oral offer to writing. The trial did not take place until many months after the settlement conference was held. Despite the time available, no written settlement offer was made. The specifics of the proposal were not detailed. A brief, verbal exchange during which a settlement proposal is made in the context of an ongoing, complex trial merits little consideration by the court or by the parties themselves; and
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> c) There is no Nova Scotia case law which supports the proposition that weight should be assigned to oral offers to settle. The only reported case which counsel was able to locate on point was **Gillis v. Budge** 1992 CarswellNS 638 (TD), as overturned on appeal on other points. In the **Gillis** case**,** Roscoe J., as she then was, stated in paragraph 6 that a verbal offer to settle made during a pre-trial conference was not an offer to settle in accordance with the rules.

[11] Ms. Westcott also suggests that I should consider the fact that this proceeding delayed the payout of the insurance proceeds when addressing costs.

She states her loss of interest on her share of the insurance proceeds exceeded Mr. Dumont's award from this court. I do not accept this proposition as an appropriate consideration in the determination of costs for the following reasons:

> a) Mr. Dumont was not the holder of the insurance proceeds. A defendant in another action, in the general division of this court, held the insurance proceeds. Prejudgement interest is a claim which Ms. Westcott may wish to broach from that defendant;
>
> b) Mr. Dumont did not have the use of the insurance proceeds and received no benefit from the trial delay; and
>
> c) I find that neither party was any more responsible than the other for the delay in having this matter brought to a conclusion.

[12] I therefore determine the following in respect of the applications for costs:

> a) each party was successful in his/her claim for unjust enrichment;
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> b) Mr. Dumont's claim exceeded Ms. Westcott's claim by $26,113;
>
> c) Mr. Dumont was unsuccessful in his claim for a resulting trust and for the restitutionary relief of a constructive trust;
>
> d) Ms. Westcott was unsuccessful in her attempt to have the court rule upon the issue of insurable interest; and
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> e) the conduct of both parties was more confrontational and difficult than one would expect which unnecessarily lengthened an already complicated trial and prevented realistic settlement discussions.

[13] In balancing these factors and all of the relevant considerations, and in reviewing the case law and the relevant rules, I exercise my discretion and award costs to Mr. Dumont in the amount of $5,000 together with disbursements which are not to exceed $1,500.00.

**Form of the Order**

[14] I will now deal with the form of the order. To reiterate what was stated in the decision, and in my subsequent correspondence to counsel, the order must reflect the decision which was rendered. There will be no mention of insurable interest in the form of the order. If counsel have reached agreement on that issue, or any other issue in respect of proceedings which are presently before the general division, then a consent order is to be drafted and taken out in the general division.

[15] Further, I did not make a ruling on ownership of real property. I did not determine an application under the *Quieting Titles Act* R.S. c.382,s.1. The order cannot create legal rights and obligations in respect of real property which extend beyond the parameters of the parties.

[16] Thank-you and the order should be prepared and forwarded to the court for issuance no later than next week.

Forgeron, J.