Date: 19990506
Docket: 6101-02559

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CINDY LOUISE FAIR

Petitioner

-and-

PAUL EDMUND JONES

Respondent

MEMORANDUM OF JUDGMENT

[1] This memorandum addresses the issue of costs of these proceedings.

[2] The issues at trial were division of matrimonial property and child support. The petitioner claimed an unequal division and support for her two children. The respondent claimed an equal division and denied liability for support. After a 5 day trial, I issued a judgment ordering an equal division and dismissing the claim for support . Hence, the respondent succeeded on the issues at trial. In the ordinary course, and if this were ordinary litigation, costs would follow the event and the respondent, as the successful party, would be entitled to his party and party costs of the litigation.

[3] The issue of costs is complicated, however, by the fact that the parties had made offers to settle before the trial.

[4] Over a month prior to the start of the trial, the respondent made a written offer to settle. He proposed division of property on what he calculated to be less than one-half of the net family property value. In this case there were funds held in trust from the sale of the matrimonial home. The respondent's offer was predicated on there being $142,080.00 in trust. He offered to settle by the payment to him of $67,779.73. Any amount over and above the sum of $142,080.00 due to interest accrual would be divided equally. In my judgment I ordered that the sum of $66,563.80 be paid out to the respondent on a trust balance that I set at $141,317.00. Any accrued interest over and

above that would be divided equally. This payout was based on what I determined to be the result in cash of an equalization of net family property values for each spouse. Respondent's counsel did a mathematical calculation so as to compare the actual cash values between the offer and the judgment. The offer, if based on a trust balance of $141,317.00 (being the figure I used in my judgment), would have required a payment of $66,923.19. This is a mere $359.39 more than the cash judgment I awarded.

[5] On the issue of child support, the respondent offered to settle that on the basis of no support being payable.

[6] The offer also contained the following proposal with respect to costs:

> Each party bear their own costs, excepting only:
>
> (a) The award of costs as a consequence of this Offer to Settle pursuant to Rules 193 and 201 of the Rules of Court;
>
> (b) Any costs of an interim application(s) that were made in any event of the cause.

[7] At the hearing on costs, there was quite a debate over how to interpret this part of the offer. Petitioner's counsel argued that it was imprecise and, therefore, the petitioner was unable to make a reasonable assessment of the total scope of the offer. Certainly, in my opinion, an offer must be fixed, certain and understandable. Respondent's counsel interpreted these words as meaning, in effect, each party bears their own costs except that, if the offer is not accepted, the costs consequences of Rule 201 apply. It seems to me that even though the wording is awkward that is the only reasonable interpretation. The costs consequences of Rule 201 (which I will discuss shortly) are triggered only if the offer is not accepted. If the offer is accepted then what governs is the proposal in the offer that "each party bear their own costs". Also, if there were any costs awards made in any event of the cause (and there were none), they would be treated separately.

[8] The petitioner also delivered an offer to settle. This was made the day before the trial was due to start. The petitioner proposed a cash pay out to the respondent of $48,000.00 (inclusive of interest) and a release of all claims to child support. The offer was inclusive of all costs.

[9] Both offers were in writing and both stated on their face that they were made "pursuant to Rule 193". Rule 193 of the general rules of procedure of the Supreme

Court provides that a party to an action may serve on any other party an offer to settle any one or more of the claims between them. The offer is to be made in writing. If the offer is made at least 10 days before the commencement of the trial, then certain costs consequences are triggered if the offer is not accepted. Those costs consequences are set out in Rule 201:

> 201.(1) A Plaintiff who makes an offer to settle at least 10 days before the commencement of the hearing is entitled to party and party costs to the day on which the offer to settle was served and solicitor and client costs from that day where
>
> (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and
>
> (b) the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle.
>
> (2) Where a defendant makes an offer to settle at least 10 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if
>
> (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the plaintiff; and
>
> (b) the plaintiff obtains a judgment on terms as favourable as or less favourable than the terms of the offer to settle.

[10] This rule, which came into effect on April 1, 1996, is modelled on Rule 49.10 of the Ontario Rules of Civil Procedure. It is intended to be an incentive to the settlement of litigation. It contemplates predictability of outcome (in terms of the costs consequences of a failure to accept a settlement that one should have accepted) and general application (since the rule provides that the party who made the offer is entitled to solicitor and client costs if the result at trial is such that the offer should have been accepted by the other side). The rules maintain the over-riding principle that costs are in the discretion of the trial judge, but the clear intention of Rule 201 is that it would be applied unless there was good reason not to do so. There is a presumption in favour of the rule since to do otherwise would frustrate the incentive policy behind the rule: *Niagara Structural Steel Ltd. v. W. D. Laflamme Ltd.* (1987), 58 O.R. (2d) 773 (C.A.).

[11] In Ontario, the costs consequences rule applies to matrimonial litigation. The rationale is that a spouse who allows litigation to continue without making a reasonable settlement offer or fails to accept a reasonable offer should bear the costs of the trial: *Berdette v. Berdette* (1988), 66 O.R. (2d) 428, aff'd 47 O.A.C. 345.

[12] In this jurisdiction we also have, however, some rules on offers relating specifically to matrimonial litigation. Rule 18 of the Divorce Rules provides:

> 18. (1) At any time before the commencement of a trial or hearing, a party may serve a written offer to settle a claim for support of a spouse, support for the children of the marriage or division of property.
>
> (2) An offer may be accepted at any time before the Court makes an order disposing of the claim in respect of which the offer is made by serving a written notice of acceptance on the party who made the offer.
>
> (3) An offer may be revoked at any time before it is accepted by serving a written revocation on the party to whom the offer was made.
>
> (4) Where an offer is accepted, the Court may incorporate any of the terms of the offer into an order.
>
> (5) Where an offer is not accepted, no communication respecting the offer shall be made to the Court until the Court makes an order disposing of the claim in respect of which the offer has been made.
>
> (6) In exercising its discretion as to costs under Rule 33, the Court may take into account the terms of the offer, the date on which the offer was served, the date of acceptance if it was accepted, the success of the parties and the conduct of the parties during the litigation.

Rule 33, referred to in subrule (6) above, is the rule maintaining the general discretion with respect to costs.

[13] The Divorce Rules apply because these proceedings were commenced pursuant to the Divorce Act for a divorce and corollary relief. Pursuant to these rules a matrimonial property claim may be joined in a divorce petition, therefore the reference to division of property in subrule (1) above. The general rules of procedure, however, are still applicable by reason of subrule 3(2) of the Divorce Rules:

> (2) Subject to the Act and these rules, the rules of the Supreme Court apply to proceedings under the Act with such modifications as the circumstances require.

[14] There are no specific consequences stipulated in Rule 18. The trial judge is merely given a broad discretion to take various relevant factors into account including the terms of the offer, when it was made, and the success of the parties. "Success" in this context includes not only the result at trial but how that result compares to any offer that was made before trial. There is nothing, however, in Rule 18 to preclude the application of similar costs consequences to those mandated by Rule 201 of the general rules.

[15] I think there is good reason to maintain a wide discretion as to costs in matrimonial litigation. As has been noted in many cases, family law trials usually encompass a number of issues, for example, property division, spousal support, custody and child support, and usually these issues are intertwined. Therefore, it is often difficult to determine if a judgment is more or less favourable than an offer since it may be on some points but not on others: see, for example, *Heon v. Heon* (1989), 23 R.F.L.(3d) 408 (Ont. H.C.J.). Also, there are frequently other factors at work in family law cases that are not present in ordinary litigation. For example, there is a body of opinion that holds that costs should not be awarded in a custody case. As stated by Prof. J.G. McLeod in his annotation to *Heon* (at page 409): "A party should not be punished for a bona fide attempt to assert the best interests of the child." As another example, any economic imbalance as between the parties, the means of a party to pay costs, and the effect of a costs award on a party's ability to meet his or her obligations under a judgment may be factors relevant to the exercise of discretion in awarding or not awarding costs: *Andrews v. Andrews* (1980), 120 D.L.R. (3d) 252 (Ont. C.A.) , at page 259.

[16] This case did not involve the issue of custody. Both children are grown university students. The issues respecting the children were whether the respondent stood *in loco parentis* and did he have an obligation to pay child support. On these issues the respondent was successful.

[17] This is also not a case where economic inequality is a factor. There was a pool of funds from which the equalization payment was made and which was the source of the substantial payouts to both parties.

[18] There is a further distinction, however, between offers to settle in ordinary litigation and those specifically in matrimonial property cases. The offer to settle rules in the general rules are premised on the scenario whereby a plaintiff is claiming something from the defendant and the defendant denies liability. That is why Rule 201, in both of

its subrules, speaks in terms of the plaintiff obtaining a judgment on terms as favourable as or more or less favourable than the terms of an offer made (whether by the plaintiff or the defendant). The costs consequences rule has no application, therefore, where the plaintiff obtains nothing on a judgment. As described by the Ontario Court of Appeal in *S & A Strasser Ltd. v. Richmond Hill* (1990), 1 O.R. (3d) 243, the rule provides a bonus to a plaintiff for making an offer lower than the trial judgment by elevating costs to the solicitor and client level following the offer. There is also a corresponding bonus to a defendant who made an offer higher than the plaintiff's eventual recovery at trial by not having to pay costs after the offer was made and instead recover solicitor and client costs from the date of the offer. If the plaintiff recovers nothing then, of course, the defendant is entitled to party and party costs throughout. If a defendant makes an offer of something but the plaintiff recovers nothing at trial, then that is a relevant factor that may warrant an award of solicitor and client costs or at least higher costs than usual to the defendant. But that is an exercise of the court's discretion and not the result of the costs consequences rule.

[19] In matrimonial property cases, the parties are usually litigating over a pool of assets. The issues are (a) how much is that pool worth, and (b) how should it be divided. It would be a rare case where both parties did not each recover something. Therefore the question of whether an offer is as favourable as or more or less favourable than a judgment must be considered within the context of the positions taken by the parties and the results relating to those positions. It is not a question of the petitioner being in the position of a plaintiff who is technically the "successful" party by winning something. Both parties are likely to walk away with something so the mere fact that they each recover something does not decide success. The offers have to be evaluated in terms of trial results vis à vis positions advanced at trial. Was it reasonable to go to trial in light of the offers that were on the table? That is the question.

[20] Petitioner's counsel submitted that the costs consequences of Rule 201 should not apply because (a) this was the first case under new law, and (b) the petitioner made a reasonable attempt to settle the case by proposing her offer. I will deal with the second point first.

[21] In this case it is not the petitioner's offer that must be examined but the petitioner's position at trial. She sought an unequal division of property and child support. She was unsuccessful on both counts. The respondent's position at trial was that there be an equal division and no support. He succeeded on both counts. The calculation that went into the disbursement of funds was merely the way to effect that equal division. So, in essence, the actual dollar amounts are not as relevant as the fact that the judgment

accepted the respondent's legal position on both points. His offer, therefore, was materially at least as favourable as the judgment obtained by the petitioner at trial. This offer was made over a month before trial so there was ample time for the respondent to consider it. Her offer in response was significantly less favourable to the respondent than what he recovered at trial. It seems to me that the intent of Rule 201, that being to promote reasonable settlements, is clearly brought into play here. The respondent's offer was a realistic and reasonable attempt to settle this case without the necessity of a trial. He should receive credit for that and that can only be by way of costs.

[22] Petitioner's counsel argued that there should be no costs consequences because this was a first case under new law. The *Family Law Act*, S.N.W.T. 1997, c.18, came into force on November 1, 1998, just a few months prior to trial. As I said in my judgment, the Act may be new to this jurisdiction but it is virtually identical to Ontario legislation which has been in force for many years. There is a large body of case law on this type of legislation. So it is not as if the results of a case under this new Act are wholly unpredictable. Furthermore, as respondent's counsel submitted, the new legislation did not radically alter the law. Under the former legislation in this jurisdiction governing property division the law also leaned heavily in favour of equal division. On the child support issue, of course, there was no change in the law.

[23] In Ontario, costs consequences still apply even if it is a first case under a new statute (see *Schreter v. Gasinac* (1992), 89 D.L.R. (4th) 380) or the result was a departure from prior case law (see *Cronk v. Canadian General Insurance Co.* (1994), 19 O.R. (3d) 515, varied at 85 O.A.C. 54). I see no reason to deviate from the intention of the costs consequences rule simply because this was a first case.

[24] The costs rule in the Divorce Rules maintains wide discretion because of the myriad of ways in which issues arise and are resolved in family litigation. The costs consequences rule in the general rules sets out a general, and predictable, approach to the treatment of offers to settle. There is no good reason, in the circumstances of this case, not to apply those costs consequences as the factors to guide my discretion in this case. The issues in this case were discrete: property division and child support. The positions adopted by the respondent on those two issues throughout this litigation eventually succeeded at trial. The respondent offered to settle the case well before trial. The petitioner did not, as a result of the trial, end up in any more favourable position than what was offered. This is exactly the type of situation where the costs consequences of Rule 201 should be applied. Otherwise there would be no purpose to having a rule that tries to encourage settlement. That policy objective is no less important in family litigation. I also note that both parties must have contemplated that the costs

consequences rule would apply since both offers contained a reference to Rule 193.

[25] The respondent will have his costs on a party and party basis up to the date of the offer and solicitor and client costs thereafter. The party and party costs are to be based on Column 4 of the tariff under the "old" Rules of Court up to April 1, 1996, and Column 4 of the "new" Rules of Court for steps after that date. I am not going to fix costs. They (both party and party and solicitor and client costs) are to be taxed on notice to the petitioner. I think there may be points arising on the taxation that I am not well-positioned to consider and, as well, a solicitor and client bill is not the same in all respects as what the solicitor may actually bill to her own client. Therefore I think a taxation is the appropriate course. If the parties can agree on the quantum without taxation, then all the better.

[26] There is one exception to this order. In October 1997, the petitioner brought a motion respecting release of funds in an education trust. Having reviewed the material, and based on what I heard at trial, I think it was unreasonable for the respondent to withhold his consent and thus compel the petitioner to bring a motion. Notwithstanding that the issue was eventually resolved by a consent order (with the issue of costs reserved), it was an unnecessary step. The petitioner will therefore have her costs of that motion which I hereby fix in the sum of $1,200.00. Those costs are to be set-off against the total costs taxed in favour of the respondent.

[27] Dated this 6th day of May, 1999.

J. Z. Vertes
J.S.C.

To: Austin F. Marshall
Counsel for the Petitioner

Katherine R. Peterson, Q.C.
Counsel for the Respondent

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES