**CITATION:** Ellis v. Ellis, 2024 ONSC 1766
**COURT FILE NO.:** FC-22-58209-0000
**DATE:** 2024/03/25

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Jennifer Elizabeth Ellis, Applicant

**AND:**

Brian Keith Ellis, Respondent

**BEFORE:** The Honourable Justice D. Piccoli

**COUNSEL:** Anamaria Pasc, Counsel for the Applicant

Sean Cowan, Counsel for the Respondent



## COSTS ENDORSEMENT

[1] The court heard a long motion, as both parties had motions before the court, on January 9, 2024, and released its decision on January 23, 2024. It invited submissions on costs if the parties were unable to resolve the issue. Costs submissions were made, and the following is my decision as it pertains to costs. This endorsement should be read together with my decision of January 23, 2024, for a full appreciation of the context.

[2] The Applicant seeks costs in the amount of $27,240.33 as it relates to the long motion and $2,994.78 as it relates to the two Form 14B motions, and an appearance before Justice Madsen on November 24, 2023. Costs of the 14B motions and that appearance were reserved to the judge hearing the long motion. In total, the Applicant seeks $30,235.11. She asserts that the Respondent failed to comply with court orders, that he acted unreasonably and in bad faith, and as such he should pay her costs on a substantial indemnity basis; namely 80% of the legal fees and disbursements she has incurred. The Applicant further requests that 50% of the costs order be enforceable by the Family Responsibility Office ("FRO").

[3] The Respondent asserts that the parties had divided success. Further, on the Form 14B motions, the Respondent asserts that the Applicant acted unreasonably as it relates to timelines and

scheduling. He does not ask for costs in his submissions; it is unclear, but it appears that the Respondent's position is that each party bear their own costs. He maintains that the Applicant was not fully successful; for example, the court did not strike the Respondent's pleadings nor did the court order a Certificate of Pending Litigation against the St. George property. As it relates to the settled issues, the Respondent asserts that the parties agreed to a lower amount of child and spousal support than the Applicant's first offer to settle of September 21, 2023. He also points to the fact that the court made an order that the Applicant produced some disclosure.

[4] For the reasons that follow, the court orders that the Respondent pay to the Applicant the sum of $25,000 in costs, payable forthwith. The court further orders that 50% of the costs order or $12,500 be enforceable by FRO.

**The Law on Costs**

[5] It is trite law that costs provisions set out in the *Family Law Rules*, O. Reg. 114/99, are intended to foster four important principles: (1) to partially indemnify successful litigants for the cost of litigation, (2) to encourage settlement, (3) to discourage and sanction inappropriate behavior by litigants, and (4) to ensure that cases are dealt with justly under subrule 2(2) of the *Family Law Rules*. See *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40, at para. 8; *Mattina v. Mattina*, 2018 ONCA 867, at para. 10.

[6] The *Family Law Rules* emphasize the importance of reasonableness and proportionality in the court's approach to the setting of costs: *Mattina*, at para. 10; *Beaver v. Hill*, 2018 ONCA 840, 143 O.R. (3d) 519, at para. 4.

[7] The overall objective in a costs assessment is to determine an amount of costs that is fair and reasonable for the unsuccessful party to pay to the successful party in all the circumstances: *Delellis v. Delellis*, 2005 CanLII 36447 (Ont. S.C.), at para. 9.

[8] Determining the fair and reasonable amount is not a mechanical exercise; it is more than adding up the lawyers' dockets: *Jackson v. Mayerle*, 2016 ONSC 1556, 130 O.R. (3d) 683, at para. 17.

[9] Under r. 24 of the *Family Law Rules*, the starting point is that the successful party is entitled to costs: *Sims-Howarth v. Bilcliffe* (2000), 6 R.F.L. (5th) 430 (Ont. S.C.J.), at paras. 1-2.

[10] A successful party who has behaved unreasonably during a case may be deprived of costs: r. 24(4). In deciding whether a party has been behaved reasonably or unreasonably, the court shall examine the party's behaviour in relation to the issues from the time they arose; the reasonableness of any offer the party made; and any offer the party withdrew or failed to accept: r. 24(5).

[11] If success is divided, the court may apportion costs as appropriate: r. 24(6).

[12] Rule 18 governs offers to settle and the costs consequences flowing therefrom.

[13] Rule 18(14) provides as follows:

> 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.
> 2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
> 3. The offer does not expire and is not withdrawn before the hearing starts.
> 4. The offer is not accepted.
> 5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

[14] Rule 18(15) provides that the party who seeks the benefit of Rule 18(14) has the onus of proving that the order of the court is as favourable as, or more favourable than, his or her offer to settle.

[15] Rule 18(16) provides that even if an offer to settle does not meet the formal requirements of Rule 18(14), the court may take account of such offers in determining costs. See also Rule 24(12).

[16] While there is no obligation to serve an offer to settle, the failure to do so has been held to be unreasonable: *Beaver*, at para. 15; *Klinkhammer v. Dolan and Tulk*, 2009 ONCJ 774, at paras. 5 and 11.

[17] Under Rule 24(12) a court must consider the following factors:

(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 expenses properly paid or payable; and

(b) any other relevant matter.

[18] This court also relies upon the thorough review of the caselaw pertaining to "bad faith" in the context of costs considerations as provided by Justice Pazaratz in *Chomos v. Hamilton,* 2016 ONSC 6232, 82 R.F.L. (7th) 395 at paras. 42-47:

> 42. … Pursuant to Rule 24(8) if a party has acted in bad faith, the court shall decide costs on a full recovery basis and order the party to pay them immediately.
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> 43. But Rule 24(8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. *S.(C.) v. S.(C.)*, 2007 CanLII 20279 (ON SC), [2007] O.J. No. 2164; *Piskor v. Piskor*, 2004 CanLII 5023 (ON SC), [2004] O.J. No. 796 (SCJ); *Cozzi v. Smith*, 2015 ONSC 3626 (CanLII), 2015 ONSC 3626 (SCJ).
>
> 44. In *S.(C) v. S.(C)* Perkins J. defined bad faith as follows:
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> > In order to come within the meaning of bad faith in sub rule 24(8), behaviour must be shown to be carried out with intent to inflict financial or emotional harm on the other party or other persons affected by the behaviour, to conceal information relevant to the issues or to deceive the other party or the court. A misguided but genuine intent to achieve

> the ostensible goal of the activity, without proof of intent to inflict harm, to conceal relevant information or to deceive, saves the activity from being found to be in bad faith. The requisite intent to harm, conceal or deceive does not have to be the person's sole or primary intent, but rather only a significant part of the person's intent. At some point, a party could be found to be acting in bad faith when their litigation conduct has run the costs up so high that they must be taken to know their behaviour is causing the other party major financial harm without justification.

45. Bad faith is not synonymous with bad judgment or negligence. Rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation: *Children's Aid Society of the Region of Peel v. F.(K.J.)*, 2009 ONCJ 252 (CanLII), [2009] O.J. No. 2348 (OCJ); *Biddle v. Biddle*, 2005 CanLII 7660 (ON SC), 2005 CanLII 7660 (SCJ); *Leonardo v. Meloche*, 2003 CanLII 74500 (ON SC), 2003 CanLII 74500 (SCJ); [2003] O.J. No. 1969 (SCJ); *Hendry v. Martins*, [2001] O.J. No. 1098 (SCJ).

46. There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. The court can determine that there shall be full indemnity for only the piece of the litigation where bad faith was demonstrated. *Stewart v. McKeown*, 2012 ONCJ 644 (CanLII), 2012 ONCJ 644 (OCJ); *F.D.M. v. K.O.W.*, 2015 ONCJ 94 (CanLII) (OCJ).

47. To establish bad faith the court must find some element of malice or intent to harm. *Harrison v. Harrison*, 2015 ONSC 2002 (CanLII).

**Costs Pertaining to Cases that Settle**

[19] Determining costs in respect of settled matters is notoriously difficult. Courts are divided on whether it is appropriate.

[20] In *Beaudoin v. Stevens*, 2023 ONSC 5265, at para. 19, the decision of *Beardsley v. Horvath*, 2022 ONSC 3430, was summarized it as follows (citations omitted):

[19] In the decision of *Beardsley v. Horvath*, Summers J. set out a comprehensive analysis of the law regarding costs of settled cases. She notes the following in paras. 10-12:

(i) The caselaw has developed since the decision in *Blank v. Micallef*, where the court held that costs of a settled case should not be awarded absent compelling circumstances.

(ii) Citing the cases of *Scipione v. Del Sordo*, *Ball v. Ball*, and *A.C. v. G.K.*, Justice Summers identifies some general principles that have emerged:

i. It is not uncommon for the court to receive last minute settlements which resolve all issues other than costs.

ii. Parties are always encouraged to settle; even at the last moments of a motion or trial – if signing minutes of settlement will jeopardize a litigant's ability to seek costs, it will create a disincentive for settlement.

iii. There is a presumption that a successful party is entitled to costs (Rule 24(10)); a party's behaviour may be a relevant factor. If a court can assess success and reasonableness, costs may be awarded even when there has been a settlement. This is often the case where there is an extensive record with supporting documentation.

iv. If a party brings a motion asking to change almost everything, and, at the last minute, signs a consent which changes almost nothing, it may not be difficult for a judge to determine success.

v. "Success" is assessed by comparing the terms of the order made against the relief requested in the pleadings and, where applicable, against the terms of an offer to settle.

vi. When a case is determined by a settlement rather than a judicial decision, a court often does not have the information and evidence required to assess who was "successful" or the degree of that success. Sometimes the issues are so numerous and the results so different from either party's offer that "success" cannot be measured. For example, in *Page v. Desabrais*, at para. 42, a multi-issue case, the court compared the offers of the parties throughout the proceeding and found it "simply impossible...to declare one party more successful than the other."

vii. Sometimes, however, a court is able to assess what represents "success" after a settlement is reached. In *Kearley v. Renfro*, cited above, the only issue before

> the court on a motion was the residency of three children; the mother agreed on the day scheduled for the motion and settlement conference that the children would go into their father's care immediately. The court found that the father was substantially successful and awarded him costs.



[21] In this long motion, the court made findings that the Respondent failed to comply with two court orders, failed to meet his obligations under Rule 13 of the *Family Law* Rules, and that his failure to produce disclosure impacted the proper determination of child and spousal support as well as the division of property. As such Rule 13(17) is also applicable to the case before me.

[22] Rule 13(17) of the *Family Law Rules* states:

> If a party has not served or filed a document in accordance with the requirements of this rule or an Act or regulation, the court may on motion order the party to serve or file the document and, if the court makes that order, it shall also order the party to pay costs. [Emphasis added]

**Analysis**

[23] The Applicant made two Offers to Settle. The first is dated September 21, 2023, before she brought her motion, and the other is dated December 11, 2023. It is clear that the Applicant tried to resolve the issues in a reasonable and diligent fashion and in a manner that would reduce both parties' legal costs. The same cannot be said for the Respondent as his only Offer to Settle is dated January 5th, 2024, and only related to certain issues in the outstanding motions.

[24] Both parties wisely made their offers severable. The Respondent's offer, as it relates to child and spousal support, was a mirror of the Applicant's December 2023 Offer to Settle on those issues.

[25] While the Applicant did not meet the first Notice of Motion or Offer to Settle, it is important to note that both were put forward before the Respondent had provided essential disclosure. As can be seen from the affidavit material, she did her best to ascertain the Respondent's income. Once the Respondent produced his Agent Earning Report on December 1, 2023, although it was court ordered to be produced by September 5, 2023, the Applicant quickly changed her Offer to Settle on the support issues. These changes were exactly what the Respondent offered in January

2024 and what the parties agreed to; namely, $3,400.00 per month in child support and $5,199.00 per month in spousal support.

[26] Even once the Applicant accepted portions of the Respondents offer as it related to child and spousal support, he attempted to insert terms that were not part of his offer and was opposed to adding FRO clauses in the order.

[27] The court finds that the Respondent's behavior as it relates to his failure to comply with court orders and disclosure was unreasonable. Both parties acknowledged that the Agent Earnings Report was an important document. The Applicant asserts that it is not a difficult report to produce, but rather the Respondent was attempting to conceal his income. The court agrees.

[28] Further, even at the hearing of the long motion, the Respondent refused to provide the court with the timeline as to when the business valuations would be complete or when basic disclosure, such as his 2022 income tax return, would be produced. He did not produce any evidence from the third parties as it relates to the delay or proposed completion. Although his behaviour was unreasonable, reflected bad judgement and or negligence, at this time I cannot find that it crossed the threshold to bad faith (See Baker and Baker 2023 ONSC 4860) based on the aforementioned caselaw; it did not involve conscious wrongdoing because of dishonest purpose or moral obliquity.

[29] Despite not rising to the level of bad faith, courts cannot tolerate blatant failure to follow court orders, as well as the failure to produce basic and court ordered disclosure. This matter has become unduly complicated by the actions, or inactions, of the Respondent. This behaviour cannot come at the expense of the Applicant.

[30] However, my costs assessment must also take into consideration that the Applicant was not successful as it relates to the certificate of pending litigation or striking pleadings.

[31] The court is not prepared to order substantial indemnity costs as it relates the form of 14B motions and the attendance before Justice Madsen.

[32] The court agrees that that at least 50% of the work done relates to the issues of child and spousal support and as such, 50% of the costs order should be enforceable through FRO.

[33] As it relates to the settlement of issues in this case, it is not difficult to ascertain that the Applicant was successful on the settled issues. This is clear as once the Applicant received the Agent Earnings Report she readily made an offer on the support issues that resulted in the agreement reached by the parties. Prior to that, as can be seen from the affidavit material and the dockets, the Applicant spent considerable time and resources trying to ascertain the Respondent's income. The Court accepts that due to the Respondent's refusal to provide his Agent Earnings Report and his year-to-date commission sales, it was difficult for the Applicant to ascertain the appropriate amount of support both for an Offer to Settle and for her Notice of Motion.

[34] Overall, once the Applicant received the Agent Earnings Report, she acted reasonably in amending her Notice of Motion, on December 14, 2023, to reduce the amounts in her Notice of Motion. For example, she reduced the amount she was seeking for child support from $5,068.00 to $3,622.00 per month, and spousal support from $8,100.00 $5,531.00 per month.

[35] The court cannot consider the Applicants submissions that the Respondent has yet to comply with my order as there is no evidence before the court as it relates that issue.

[36] The time spent by counsel for the Applicant was reasonable and was in fact 20 hours less than the time spent by counsel for the Respondent. There were many difficult issues dealt with by both counsel. The Applicant properly utilized a  senior law clerk and researcher.

[37] The Respondents own bill of costs show his total fees for the long motion at $35,402.90; this is more than the Applicant's bill of costs.

[38] The court accepts that the Applicant had to commence this litigation because the Respondent was refusing to produce disclosure. This proceeding to date has been an extremely expensive process for the parties, and they are urged to refocus their efforts on resolution.

[39] It saddens the court that these parties have spent such a significant amount of money on legal fees and a resolution is not yet in sight.

**Order**

[40] This court orders that:

a. The Respondent shall pay to the Applicant the sum of $25,000 in costs forthwith;

b. 50% of the costs order namely $12,500.00 is to be enforced by the FRO.

Date: March 25, 2024

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D. Piccoli J.