SUPREME COURT OF YUKON

Citation: *MacNeil v Hedmann*, 2014 YKSC 29

Date: 20140612
S.C. No.: 09-D4165
Registry: Whitehorse

Between:

Cynthia Lynn MacNeil

Plaintiff

And

David George Clinton Hedmann

Defendant

Before: Mr. Justice E. W. Stach

Appearances:
Debbie P. Hoffman — Counsel for the Plaintiff
Mr. Hedmann — Appearing on his own behalf

REASONS ON COSTS

[1] I have had the opportunity to consider the written submissions of the parties on the costs issue. Their respective submissions differ markedly from one another, just as their positions on the major issues of fact and law at trial stood in such stark contrast. Together, they provide an accurate reflection of this lengthy trial between the parties, hard-fought from beginning to end.

[2] The plaintiff, Cynthia MacNeil, emerged from trial as the decidedly successful party. As I see it, there is no reason here to depart from the usual rule that costs should follow the event. It remains for me, then, to determine the appropriate measure of those costs. Once done, it is my intention to fix and certify the costs, inclusive of disbursements, in a lump sum in order to eliminate the time and expense of further assessment.

offers to settle

[3] Each of the parties made one or more offers to settle this dispute. The offers to settle made by David Hedmann, however, are distantly off the mark when compared to the result of the trial before me. The single offer of Cynthia MacNeil on the other hand fails to make any reference to costs, and was made at a time when the appeal following the first trial was still pending. By its own terms that offer had long since expired, well before the second trial began.

[4] In my judgment none of the offers to settle should factor into my decision-making respecting costs.

special costs

[5] In her written submissions Cynthia MacNeil advances a claim for special costs premised on alleged misconduct on the part of David Hedmann, both prior to and during trial. Her allegations of pre-trial misconduct are, in fact, the subject of comment in my trial reasons.[1] Although I am probably entitled to consider such conduct again in my disposition of costs, I am reluctant now to fasten on it as a punitive factor in a costs award in circumstances where I found it did not merit an award of damages in the first instance.

[6] As to the allegations of misconduct premised upon David Hedmann's repeated applications for adjournment both before and during the trial, costs, for the most part, have already been awarded against him on that ground. As frustrating as these repeated applications may have been for the plaintiff, I am disinclined to double up on those costs or to parlay the cumulative requests for adjournment into a punitive award of special costs.

[7] David Hedmann proved himself to be a difficult, uncompromising and persistent adversary but, without more, those traits alone cannot support a claim for special costs. An

[1] See paragraph 130 of my Reasons at Trial.

award of special costs goes beyond indemnity and enters the realm of punishment. Such costs are usually reserved for cases where the court seeks to disassociate itself from misconduct.[2] Like Veale J. in *Ross v. Ross Mining Ltd.,*[3] I find that, taken together, David Hedmann's conduct in the present case arguably approaches the category of "deserving of rebuke" but I remain unsatisfied that it clearly crosses the line. And, although I concluded that there was ultimately no merit to David Hedmann's defence or counterclaim, his resistance to the claims of the plaintiff in the main action is neither outrageous nor extraordinary having regard for the uncertain state of the law in the Yukon at the time, and the widely disparate view of the 'facts' held by the parties.

[8] I decline on these grounds to make an award of special costs.

scale B or scale C

[9] I have no difficulty in concluding that an award of costs at Scale C is appropriate here. The major issues in this proceeding focused on the making and validity of a prenuptial contract entered into prior to the marriage, and its surviving validity in the face of a subsequent document signed by the parties near the date of their separation. Those issues have elsewhere been described as "complex" and as involving questions of fact, and questions about the formalities and conditions of a binding variation agreement.[4] Still another layer of complexity was added to this matrix by an additional issue, whether the subsequent (allegedly amending) document was secured through undue influence.

[10] Nor is the complexity of this trial limited only to complex issues of fact. Section 2(1) of the Yukon's *Family Property and Support Act*, broadly speaking, accords primacy to validly made marriage contracts. Previously undetermined in the case law of the Yukon, however, was the interplay between such contractual primacy and other provisions in the Act dealing with

[2] 380876 *British Columbia Ltd. V. Ron Perrick,* 2009 BCSC 1209 per M. J. Allan J. at para. 14.
[3] 2012 Y.K.S.C. 18 at para 33
[4] See the Oral Reasons for Judgment of the Court of Appeal for Yukon recorded in *Hedmann v MacNeil* 2012 Y.K.C.A. 11 per Harris J. A. at para 7.

family homes in the Yukon, family and non-family assets, contributions by spouses etc. These legal issues required painstaking examination of the Act as a whole and a search for any helpful precedent in other jurisdictions within Canada. Moreover, the issues of law which surfaced in this trial are likely to be of wider interest to many other family law litigants in the Yukon where a marriage contract is part of the mix, and most certainly in all such cases where child support and spousal support are not a factor.

[11] The length of trial is also a factor in this calculus. Here, the evidence-taking portion of the trial, including applications made at trial, took up three weeks of trial time. Written submissions from each of the parties then followed and, eventually, there were also written submissions on the costs issue. Taken together with my previous comments about the complexity of trial issues, the number of pre-trial applications made, and the fact that the matter was hard-fought from the beginning of trial through to the submissions of the parties on costs, I have absolutely no doubt that this is a matter of 'more than ordinary difficulty' or that costs must be awarded at the level of Scale C. I so order.

[12] I have examined the number of units claimed on behalf of Cynthia MacNeil for each of various steps taken by counsel during the course of this litigation. (306 units) I find that they were necessary and reasonable. Based on a level C award for costs and including tax and disbursements, I calculate the total award for costs on this basis would be $56,203.51;

306 x 170 =	$52,202.00 (fees)
	2,601.00 (tax)
	1,582.51 (disbursements)
Total	$56,203.51

[13] I shall now consider Cynthia MacNeil's claim for increased costs under s.2(e) of Appendix B.

Increased costs

[14] In *Ross v Ross Mining Ltd.*[5] Veale J. sets out the factors that must be met to support an award for increased costs. Also of note are his views that, unlike *special costs*, the focus of *increased costs* is not on punishment, but on indemnification, and that sections 2(e) and (f) of Appendix B provide an alternative to *special costs* on a lower threshold, short of requiring conduct deserving of rebuke.

[15] It is difficult, even in ordinary circumstances, to get cases to trial and through a trial process without encountering some delay. Matters are expedited, of course, where the litigants and counsel, notwithstanding their differences, take reasonable positions and cooperate with one another with a view to getting their issues decided. The converse is true and the litigation expense mounts considerably where one or more of the parties is unduly combative or resorts to every conceivable ploy to cause delay, or determines by various means to render the litigation burdensomely expensive for his or her adversary.

[16] As the trial unfolded and as I look back at the court record in this case, I recognize a number of signs of undue combativeness on the part of David Hedmann. Counsel for Cynthia MacNeil referred to a number of such examples in her written cost submissions. More to the point I am persuaded that although some or all of that conduct springs from the inherently combative nature of David Hedmann, some of its manifestations in this case have effectively increased the litigation expense for Cynthia MacNeil, probably deliberately so.

[17] In reaching that conclusion I have attempted to take due account of the fact that David Hedmann is a self-represented lay litigant; but he is also a man of considerable intellect who has availed himself of the assistance of counsel from time to time in respect of this case.

[5] Supra note 3 at paras. 42 and 45

[18] On balance, I find that much of the conduct complained of constitutes an 'unusual circumstance', and because its net effect is to increase the litigation costs of Cynthia MacNeil, it would be unjust in my opinion if that were not reflected in the costs order ultimately made in this case.

[19] Similarly, I find that the unusually complex factual matrix underlying this case – combined with the somewhat abstruse points of law respecting the application of Yukon's *Family Property and Support Act* heretofore undetermined - are unusual circumstances, and inadequately compensated even under Scale C. The trial decision moreover, is likely to be of consequence to other family law litigants in the Yukon. Taken together with my comments about the litigation conduct of David Hedmann and their effect, the usual costs awarded under Scale C are grossly inadequate. If left wholly uncompensated, it would create an injustice.

[20] On these grounds, I direct that increased costs be awarded in this case. It remains for me to fix the quantum of increased costs.

[21] It is quite impossible to state with any degree of precision the extent to which this amalgam of unusual circumstances has increased the litigation costs of the plaintiff beyond the norm. While I am tempted to apply increased costs of 1.5 times for each of the 306 units claimed here, I have concluded that doing so may inadequately take into account another guiding principle, namely that costs ultimately awarded should bear a reasonable relationship to the amount in issue. In the result I direct that 1/3 of the 306 units (102 units) be assessed at 1.5 times the Scale C level. The amount I set out in paragraph 12 must be adjusted upwards accordingly. Once done a certificate in the adjusted amount shall issue.

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Justice E. W. Stach

Released: June 12, 2014