

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Family Division**

**[Unreported]**

**Suit No: FL 0070 of 2009**

**BETWEEN**

**VALERIE ANNE MACKENZIE**

**- APPLICANT/WIFE**

**AND**

**JOHN DAVID STRAGHAN MACKENZIE**

**- RESPONDENT/HUSBAND**

**DALNEY LIMITED**

**- INTERVENER**

*Before The Honourable Madam Justice Maureen Crane-Scott, Judge of the High Court*

**[In Chambers]**

**2015: March 4; April 8**

**Mr. Randall Belgrave, Q.C. for the Applicant/Wife; Mrs. Beverley Walrond, Q.C. for the Respondent/Husband and Mrs. Marguerite Woodstock-Riley, Q.C. for the Intervener.**

## DECISION ON COSTS

- [1.]        **Background:** On March 4<sup>th</sup>, 2015 I heard oral arguments for and against an application by Dalney Limited (the Intervener) in “substantive property settlement proceedings” between the Applicant/Wife and the Respondent/Husband) seeking an award of costs incurred in connection with its application filed on 19<sup>th</sup> October, 2010 pursuant to section 71 of the *Family Law Act, Cap. 214* of the Laws of Barbados.
- [2.]        By way of background to the costs hearing, it will be recalled that the Intervener’s application of 19<sup>th</sup> October, 2010 was heard before me on June 14, 15 and 17, 2011. In a written decision, I found in favour of the Intervener and deferred the outstanding issue of the Intervener’s costs for arguments.
- [3.]        Subsequently, written submissions on costs were filed on June 16 and 18, 2014 on behalf of the Applicant/Wife and the Intervener respectively.
- [4.]        **Intervener’s Submissions on Costs:** At the costs hearing on March 4<sup>th</sup>, 2015, Counsel for the Intervener, Mrs. Woodstock-Riley, Q.C. referred the Court to sections 94 and 71 of the *Family Law Act* and to Rules 2 and 125 of the *Family Law Rules, 1982*. She adverted in particular to Rule 125(1)(e) and (f) and submitted that the Applicant/Wife’s conduct in pursuing a completely unmeritorious claim against Dalney Limited had increased the costs of the litigation and put the company to expense and in the circumstances, an order for costs in the Intervener’s favour was fully justified.

[5.] Mrs. Woodstock-Riley asked the Court to consider the following facts and circumstances in coming to its decision on costs:

- a) The fact that prior to the commencement of the Intervener's application, the Respondent/Husband had made full disclosure by providing the Applicant/Wife and her attorney-at-law with the annual financial statements and other documentation relating to Dalney Limited spanning a 30 year period;
- b) Additionally, the fact that prior to the filing of the Intervener's application on October 19<sup>th</sup>, 2010, the Applicant/Wife had by letter dated 7<sup>th</sup> September, 2010 addressed to her attorney-at-law by the Intervener's attorney-at-law, been put on notice that costs associated with the Intervener's being forced to apply to the Court to protect its interests would be sought if her claim against Dalney Limited was not withdrawn;
- c) The fact that from as far back as September 7<sup>th</sup>, 2010, the Applicant/Wife had been provided with a report of an audit of Dalney Limited's financial records prepared by an independent third party, PriceWaterhouseCoopers clearly confirming that no income had been injected into Dalney Limited by the Respondent/Husband during the period of the marriage;

[6.] Mrs. Woodstock-Riley submitted in addition that the facts clearly established that the Applicant/Wife's claims against Dalney Limited were entirely without merit. She submitted that it was an

uncontroverted fact that Dalney Limited had been set up before the Respondent/Husband had ever met the Applicant/Wife. The facts had also clearly established that company had been incorporated on October 4<sup>th</sup>, 1979 prior to the marriage between the Respondent/Husband and the Applicant/Wife which took place some 6 years later on November 30<sup>th</sup>, 1985.

[7.] Mrs. Woodstock-Riley also drew the Court's attention to what she said was the significant volume of legal work which had to be undertaken in filing and preparing for the Intervener's application which had also included 3 full days of hearing in June 2011.

[8.] Mrs. Woodstock-Riley also informed the Court that the Intervener had attempted to settle the issue of costs with the Applicant/Wife's attorney-at-law without resort to a costs hearing, but without success.

[9.] Mrs. Woodstock-Riley submitted that Courts tended to discourage unnecessary and rancorous litigation, particularly in family matters. She invited the Court to examine the approach to costs discussed in the Family Division in the case of *Proverbs v. Proverbs* 61 WIR 91 @ paras [71] to [78] in which the Barbados Court of Appeal endorsed settlement of claims by parties as "a healthy process to be encouraged".

[10.] *Applicant/Wife's Submissions on Costs*: Counsel for the Applicant/Wife, Mr. Randall Belgrave Q.C. referred to section 94(1) of the *Family Law Act* and submitted that the general principle was that each party should bear their own costs irrespective of the outcome of the proceedings. While conceding that the Court had power under

section 94(2) to make a costs order against one or other party, he submitted that the power ought generally to be exercised only where a party to the proceedings had done something wrong. He adverted to Rule 125 of the Rules governing the significant factors to be taken into account where a Court is proposing to make an order for costs under section 94(2) of the Act.

[11.] Mr. Belgrave suggested that the substantive proceedings filed by the Applicant/Wife involved a routine property settlement application under the *Family Law Act*. He submitted that it had been the Intervenor (with the support of the Respondent/Husband) who had elected to institute intervener proceedings. The application, he said, had resulted in the Applicant/Wife's substantive property settlement application being held in abeyance pending the Court's determination of the issues raised in the Intervener's application. He contended that the net effect of the Intervener's application had caused the Applicant/Wife to incur additional costs. In his view, the Applicant/Wife's property settlement application could also have been determined at the same time when the Intervenor's application was heard.

[12.] In closing, Mr. Belgrave submitted that no exceptional circumstances had been established on the application. He also contended that the Applicant/Wife's conduct had not been so egregious as to warrant a departure from the general rule in section 94(1) that each party should bear their own costs.

[13.] Respondent/Husband's Submissions on Costs: Counsel for the Respondent/Husband, Mrs. Beverley Walrond Q.C. broadly adopted

Mrs. Woodstock-Riley's submissions in favour of an award of costs against the Applicant/Wife.

[14.] She submitted that to her knowledge, full disclosure of the relevant documents concerning Dalney Limited had been sent to the Applicant/Wife and her legal representative long before Counsel for the Intervener had even been brought into the case. Mrs. Walrond urged the Court to find that circumstances existed in this case which would justify an award of costs to the Intervener.

[15.] Following their submissions, the Court then invited Counsel for the respective parties to specifically address the several matters identified in section 125(1) of the *Family Law Rules* to be taken into account where a court is proposing to make an order for costs under section 94(2) of the Act.

[16.] In relation to subparagraph (a), Counsel for all 3 parties were agreed that in examining the financial circumstances of the Applicant/Wife against whom the costs order was sought, it was permissible for the Court to take into account and draw inferences about the financial circumstances of the Applicant/Wife and her ability to pay costs from the various documents on the Court file.

[17.] In particular, Counsel all agreed that account could be taken of the existence of a Consent Order made before **Worrell J.** on May 21<sup>st</sup>, 2012, embodying an Agreement between the Applicant/Wife and the Respondent/Husband dated May 18<sup>th</sup>, 2012. The Court was also informed that the Order established that the Applicant/Wife had received from the Respondent/Husband a financial settlement including substantial cash payments and valuable shares.

[18.] The Court's attention was also drawn to the fact that an application filed by the Applicant/Wife on February 29, 2012 for interim spousal maintenance had either been withdrawn or rendered unnecessary in view of the substantial financial settlement which the Applicant/Wife had obtained under the Consent Order of May 21st, 2012.

[19.] With regard to paragraphs (c) and (d) of Rule 125(1) of the *Family Law Rules*, Counsel for all parties expressed the view that the procedure laid out in the Rules requiring the Court, *inter alia*, (c) to obtain of an assessment of the costs order and (d) to obtain a report from an appropriate officer of the court as to the proper amount of costs incurred was cumbersome and in the words of Counsel for the Applicant/Wife "messy."

[20.] Notwithstanding paragraphs (c) and (d) of Rule 125(1), Counsel for all the parties submitted that if the Court were inclined to make a costs order under section 94(2) of the Act, it should itself fix the amount of costs to be awarded to the Intervener without resort to the Registrar.

[21.] Mrs. Woodstock-Riley referred the Court to invoices which had been placed before the Court and which provided evidence of the amount paid to PriceWaterhouseCoopers for the audit report prepared on Dalney Limited. She also referred to two draft Bills/Invoices which she had placed before the Court and to her claim for 55 hours which, according to her, she would have spent in connection with the Applicant/Wife's claims and the application brought on behalf of

Dalney Limited. She advised the Court that her hourly rate was \$800 an hour.

[22.] She cited the local case of *Towner v Towner*, in which the absence of documentary evidence of the costs incurred and likely to be incurred in connection with the proceedings had not been fatal to the application for costs and pointed out that the Court had itself fixed the costs.

[23.] Counsel for the Applicant/Wife, Mr. Belgrave informed the Court that while he had no difficulty with Mrs. Woodstock-Riley's hourly rate of \$800.00, her claim to have spent a total of 55 hours performing legal work for the Intervener was, in his view, unreasonable.

[24.] Exercise of the Court's discretion: The Court has considered the Intervenor's application for costs, together with the respective submissions both for and against an award of costs against the Applicant/Wife. The Court has also considered the pleadings, orders and other documents on the Court file, together with the notes of evidence and the written and oral submissions made at the hearing of the Intervenor's application on June 14, 15 and 17, 2011.

[25.] In the exercise of the discretion conferred by section 94(2) of the Act, I am of the opinion that the circumstances in this case are such as to justify the making of an order for costs against the Applicant/Wife in favour of the Intervener for the reasons which now follow.

[26.] As is evident from the pleadings, the Applicant/Wife's application for property settlement filed on February 9<sup>th</sup>, 2010

proceeded initially on the Applicant/Wife's assumption that she was entitled to an interest, *inter alia*, in: "(ii) any and all the assets and income of Dalney Limited...; and (iii) further and/or alternatively, any and all shares in the said Dalney Limited held by the Respondent/Husband upon trust."

[27.] The Court has accepted (as clearly appears at paragraph [26] of the Respondent/Husband's affidavit of May 10<sup>th</sup>, 2010) that immediately prior to the filing of the Intervenor's application on October 19<sup>th</sup>, 2010, full disclosure of the annual financial records of Dalney Limited together with the PriceWaterhouseCoopers audit report had been made to the Applicant/Wife from which it ought to have become obvious to her that Dalney Limited could not have been, as she had originally assumed, "*so structured as to shield same from any claim by [her] to a share or interest therein.*"

[28.] Additionally, the Court is satisfied that the Applicant/Wife would also have been aware of the Respondent/Husband's assertion at paragraphs [27] through [30] of his said affidavit, that Dalney Limited had been incorporated in 1979 by himself and his first wife, Dr. Anne Mackenzie as an investment vehicle to make provision for the couple's two children, Susan and Harry.

[29.] The Court is therefore satisfied that whatever her initial suspicions or assumptions regarding Dalney Limited may have been prior to filing her application for substantive relief on February 10<sup>th</sup>, 2010, by the time the Intervenor's application was eventually filed on October 19<sup>th</sup>, 2010, the Applicant/Wife had been provided with sufficient information by way of disclosure to satisfy her that her

claims to be entitled (as she had originally assumed) to “*any and all the assets and income of Dalney Limited... and further and/or alternatively to, any and all shares in the said Dalney Limited held by the Respondent/Husband upon trust*” were unsustainable.

[30.] Additionally, as Mrs Woodstock-Riley’s pre-action communication addressed to Counsel for the Applicant/Wife of September 7<sup>th</sup>, 2010 clearly establishes, the Applicant/Wife would also have received a copy of a letter from PriceWaterhouseCoopers which clearly confirmed (following an independent audit of Dalney Limited’s accounts) that no dividends had been paid to the Respondent/Husband during the 30 year period between Dalney Limited’s incorporation in 1979 and the date of the report.

[31.] The Disclosure which was made to the Applicant/Wife of the Price Waterhouse Coopers reports would, in the Court’s view, also have provided her with the answer to the question which she posed at paragraph 44 of her Affidavit-in-Reply filed on September 10, 2010 as follows: “*What needs to be provided is documentation of what was paid INTO Dalney Ltd, and how that company grew from assets of \$380,000.00 in 1985 to assets of approximately 9 million during the 22 years of our marriage, during which time the Respondent/Husband controlled and managed it, and was a preference shareholder.*”

[32.] It is clear from the information before the Court that despite having been in receipt of disclosures from the Respondent/Husband, including the independent verification from PricewaterhouseCoopers which would, quite early in the proceedings, have pointed to the futility her claim to a share or interest in Dalney Limited, the

Applicant/Wife persisted in her claims. Undoubtedly, her stance put the Intervener and the Respondent/Husband through a full trial of the issues.

[33.] The Court file reveals that before filing its application on 19th October, 2010 pursuant to section 71 of the *Family Law Act*, the Intervener sought and obtained leave before **Cornelius J.** on September 27<sup>th</sup>, 2010 to intervene in the substantive proceedings between the Applicant/Wife and the Respondent/Husband.

[34.] The Intervener's application was heard before me on June 14, 15 and 17, 2011. After the 3 day hearing in which the various deponents were extensively cross-examined in relation to their affidavits, this Court ultimately found in favour of the Intervener. [*See Valerie Anne Mackenzie v. John David Straghan Mackenzie [Unreported] Barbados High Court Suit No: FL 0070/2009- Decision of 21 February, 2011.*]

[35.] As clearly appears from paragraphs [25] to [38] of its decision, this Court found no merit in any of the Applicant/Wife's claims relating to Dalney Limited. More specifically, the Court declared that the shares, assets and income of Dalney Limited were neither "*matrimonial property*", nor a "*financial resource*" of the Respondent/Husband for the purposes of a determination under section 56 and 57 of the *Family Law Act*.

[36.] This Court also found no merit in the Applicant/Wife's assertion that the Respondent/Husband held a "*controlling preference share*" in Dalney Limited and further declared that the Respondent/Husband had no right to any share or interest in Dalney

Limited other than a preference share with a redemption value of \$1.00.

[37.] Taking all of the foregoing facts and circumstances into account, the Court, in exercise of the discretion conferred by section 94(2) of the *Family Law Act* declares that the circumstances of this case are such as to justify the making of an order against the Applicant/Wife for the costs incurred in connection with the Intervener's application filed on 19th October, 2010.

[38.] In accordance with Rule 125 of the *Family Law Rules*, the Court has satisfied itself that the Applicant/Wife's financial circumstances are such that she is able to pay the order for costs to Dalney Limited, she having been the beneficiary in May 2012 of a substantial property settlement from the Respondent/Husband details of which are contained in an Agreement dated May 18<sup>th</sup>, 2012 embodied in the Consent Order of May 21<sup>st</sup>, 2012.

[39.] For the avoidance of doubt, the Court also examined the reasonableness of Mrs. Woodstock-Riley's Bill of Costs and fixed the order for costs in accordance with paragraphs (a), (c), (d), (e) and (f) of Rule 125 of the *Family Law Rules*.

[40.] The Court found that the various items of work undertaken for and on behalf of the Intervener and which are itemized in Mrs. Woodstock-Riley's draft Bill of Costs were in line with what would be expected on an application of this type and were not unreasonably incurred.

[41.] The Court was also satisfied that in this case, a considerable amount of legal work had to be undertaken including researching the

relevant case law and preparing the various affidavits and documents which formed the basis of the Intervener's case at the substantive hearing in June 2011. The quality of as well as the comprehensive nature of the Intervener's written submissions both at the trial and at this costs hearing also speak for themselves.

[42.] **Disposal:** In the circumstances, the Court's order is that the Applicant/Wife shall pay the Intervener's costs of the application certified for one Counsel and fixed in the amount of \$57,475.00 as follows:

Attorney-at-law fees	-	\$38,000.00
VAT (17.5 %)	-	\$ 6,650.00
Disbursements	-	\$ 385.00
PriceWaterhouseCoopers reports	-	<u>\$12,440.00</u>
Total award	-	<u>\$57,475.00</u>

Maureen Crane-Scott  
Judge of the High Court