SONIA VICKI SMITH (Richert) v. MERVIN BRYAN SMITH

C.A. No. 1516

Fiat issued February 9, 2009

Erratum February 19, 2009

Taxation of Solicitor's account
Before: Lian M. Schwann, Q.C.
Registrar, Court of Appeal

Tammi Hackl, for the Respondent

Larry Ayers, for the Appellant

Director of Maintenance Enforcement

Please make the following modification to the above noted fiat:

On page 4, the second to last paragraph reading:

> *'The Bill of Costs is therefore taxed and allowed at $4,013.25.'*

The final calculation of fees is in error. As noted, the addition was based on Column 2 fees as opposed to Column 1 as directed by the fiat.

The Bill of Costs is therefore taxed and allowed at $2,488.25.

C.A. 1516

SONIA VICKI SMITH (Richert) APPELLANT

- and -

MERVIN BRYAN SMITH RESPONDENT

Tammi Hackl, for the Respondent, by teleconference

Larry Ayers, for the Appellant, by teleconference

No one for the Director of Maintenance Enforcement

Taxation before Lian M. Schwann, Q.C.
Registrar, Court of Appeal
January 23, 2009

The appeal in this matter was dismissed with costs awarded "in the ordinary course". [see *Smith v. Smith*, 2008 SKCA 141, par. 43]. As the parties were unable to agree on costs, the draft Bill of Costs was taxed and this fiat represents my decision in relation thereto.

Before dealing with the substantive issues arising from taxation, I will touch on the position of the Director of Maintenance Enforcement (the "Director") in relation to its entitlement to costs. Although the Director was not named as a party in this appeal, counsel for the Director nevertheless filed a factum and participated fully in the appeal in the same manner as was done in the Court below. The appellant was unsuccessful on appeal, and as such it could be said that both respondents prevailed.

The Court's decision did not specify whether one or both of the responding parties were entitled to costs, only that costs should be dealt with "in the ordinary course". As it turned out, only counsel for Mervin Smith filed a Bill of Costs which formed the basis for the taxation proceedings. The Director was not served with the Respondent's (Mervin Smith's) draft bill of costs nor, apparently, was engaged in any discussion about costs. Their lack of involvement and participation in relation to costs was not raised at the time of taxation, and arguments proceeded in their absence. The Director has since advised in writing that he does not intend to pursue costs against the appellant and on the strength of that letter I will proceed to deal with costs between the two main parties to this appeal.

I turn now to the substantive issues which arose on taxation. The position of counsel for the Appellant is quite simple and straightforward: he takes issue with the appropriate column used for purposes of calculating fees arguing that it should be Column 1 not 2. In all other respects, he is in agreement with the Bill of Costs as proposed.

Mr. Ayers argues that as the total amount at stake between the parties is less than $50,000, Column 1 should apply instead of Column 2. His position is simply that the nub of the appeal concerns money and as such he fails to see how the eventual outcome alters the nature of the relief sought. Had he prevailed on appeal, he argues, the Court of Appeal could have exercised its discretion to order the return of money, consequently the nature of the appeal wasn't simply about principles of law or non-monetary relief.

He buttresses this argument by pointing out that the relief sought in Queen's Bench was no different than that sought on appeal.

Ms. Hackl, obviously, argues the opposite. Her position is that Column 2 of the Tariff of Costs applies to appeals where non-monetary relief is sought. One determines the form of relief, she argues, from the relief sought on appeal and the thrust of argument before the Court. In this case the appeal and outcome were limited to issues concerning the jurisdiction of the Director to vary an order in the absence of a corresponding application to vary.

Neither party referred me to case authority in support of their respective positions. I hesitate to add that despite my diligent research efforts I was unable to find any cases in this province or elsewhere considering this narrow point.

Section 52 of *The Court of Appeal Rules* allows the Court to make any order as to costs on appeal as considered appropriate. Thereafter, unless otherwise ordered, section 54(1)(a) provides that costs are to be taxed as between party and party by the Registrar in accordance with the fees in the appropriate column of Schedule I. No guidance is provided by the Rules with regard to the 'appropriateness' of the column other than the amount at stake between the parties. Subsection 54(1)(b) exists to fill the gap where money is not the issue before the Court. It provides:

54(1) Unless otherwise ordered:

.....

(b) Column 2 of Schedule I "A" applies to the taxation of costs ***where non-monetary relief is involved.***

As the application of section 54(1)(b) turns on the bolded words above, it is appropriate to begin the analysis by having regard to the relief sought in the Notice of Appeal. Here the appellant sought the following relief:

(a) an order declaring the enforcement of maintenance obligations of the respondent by the Director suspended and arrears expunged;
(b) an order declaring that an overpayment of $16,358.13 had been collected;
(c) an order declaring that the claimant pay the sum of $16,358.13 to the respondent;
(d) order for costs on a solicitor client basis against the Director of Maintenance Enforcement.

The wording of the Notice of Appeal is a fairly strong indicator of whether the nature of *relief sought* is monetary or non-monetary. Based strictly on the wording of the relief portion of this Notice of Appeal, it is clear that the appellant was looking not just for a declaration as to jurisdiction but also for the corresponding monetary relief associated with a successful outcome on the threshold issue. In other words, the appellant's appeal envisioned more than a mere declaration of jurisdictional powers of the Director; it also sought the corresponding monetary relief flowing from the interpretation and powers the appellant thought were conferred on the Director.

Having said all that, it is equally fair to say that the decision of this Court expressed by Wilkinson J.A. turned on the jurisdiction of the Director under *The Enforcement of Maintenance Orders Act, 1997*. Furthermore, the respondent's position having prevailed on appeal, the Court was not required nor did it rule on the monetary aspects of the case such as the request to discharge arrears. However, the mere fact the appeal turned on a question of jurisdiction does not mean the relief sought by the appellant wasn't monetary in nature; in fact if the appellant had been able to advance past the threshold jurisdictional issue, she would have urged this Court to make an order with a direct monetary bearing in her favour. The rule in section 54(1)(b) is not worded so as to limit it's application to situations where an appeal turns on a non-monetary point nor where non-monetary relief is the only form of relief sought.

It is worthy of note that the relief sought in the Court of Appeal was no different than that sought in the lower court. Summarized by this Court at paragraph 7 of the decision, Wilkinson J.A. described is thus:

> "She sought a judicial determination that the two eldest children had ceased to be "children within the meaning of the *Divorce Act*" when they turned 18 and that she had overpaid child support as a result. In addition, she sought an order that the arrears be rescinded and any overpayment reimbursed to her."

In summary, the fact this Court's decision turned on and ended at a jurisdictional point does not take away from the fact that portions of the appeal entailed monetary relief. Had the appellant prevailed in all that she was seeking, she would have benefited (through expugnment or otherwise) to the tune of $16,358.13, which relief is an amount appropriately falling under Column 1 of the Tariff of Costs. I therefore conclude that

fees should be assessed throughout on the basis of Column 1, not Column 2, and as such, have been taxed down for each of the items claimed.

Aside from the central issue, the Bill of Costs will be adjusted as follows:

Fees taxed on:

- $50.00 representing the fee entitled on a taxation (see item 14 of Tariff of Costs);

Disbursements taxed on:

- $15.00 representing the corresponding disbursement cost to issue the Bill of Costs;

Disbursements taxed off:

- $144.00 for fax charges (the claim for this disbursement was abandoned by Ms. Hackl)
- $101.30 of photocopying charges. Photocopying could have been undertaken at much less than $0.35 per page as requested. This disbursement will be allowed at $0.25 per page for a total disbursement cost of $253.25 for this item.

The Bill of Costs is therefore taxed and allowed at $4,013.25.

Because of the numerous changes to the Bill of Costs, and more importantly the fact the incorrect style of cause was used, counsel is directed to prepare a revised Bill of Costs with appropriate revisions, and then re-submit it to me for issuance.

DATED at the City of Regina, in the Province of Saskatchewan, this 9th day of February, 2009.

LIAN M. SCHWANN
Registrar Court of Appeal

Lian M. Schwann, Q.C., Registrar.