CACV2420

MFI AG Services Ltd.

PROSPECTIVE APPELLANT

- and -

Lyndon Joseph Sotkowy and Warren James Sotkowy

PROSPECTIVE RESPONDENTS

- and -

Nicholas P. Robinson and Merchant Law Group LLP

PROSPECTIVE RESPONDENTS

Khurrum R. Awan for the Proposed Appellant
Kevin A. Clarke for the Proposed Respondents Lyndon Joseph Sotkowy and Warren James Sotkowy

Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
August 1, 2013

Background

MFI Ag Services Ltd. ("MFI") sought leave to appeal portions of an order of Chicoine J. issued on May 13, 2013 dismissing MFI's application to add Nicholas P. Robinson and Merchant Law Group LLP as parties in MFI's action in the Court of Queen's Bench for Saskatchewan and denying MFI leave to make certain amendments to its statement of claim. MFI's application for leave to appeal was heard by Jackson J.A. on June 12, 2013 and was dismissed "with costs in the usual way" by Jackson J.A. in written reasons dated June 19, 2013.

Counsel for Lyndon Joseph Sotkowy and Warren James Sotkowy ("the Sotkowys") took out an appointment for taxation returnable on August 1, 2013. Prior to and at the taxation hearing, counsel for MFI raised the issue of whether the taxation should proceed referring to Rules 553 and 554 of *The Queen's Bench Rules* and case law from the Court.

At the taxation hearing, counsel for the Sotkowys asked if I would ask Jackson J.A. about whether she could clarify for the parties what she intended by her order of "costs in the usual way." Counsel for MFI agreed with this course of action. The taxation hearing was adjourned after it was established that, in the event that the costs were to be taxable and payable forthwith, MFI took no issue with the amounts claimed in the proposed bill of costs.

Jackson J.A. asked for brief, written submissions from counsel and undertook to consider those submissions and provide a short endorsement. Submissions were filed on August 27, 2013. On September 17, 2013, Jackson J.A. made the following endorsement:

> On June 19, 2013, I made an order dismissing MFI's application for leave to appeal and ordered "costs in the usual way."
>
> Counsel for the Sotkowys then applied to the Registrar of the Court of Appeal to tax his clients' bill of costs. When some controversy arose between MFI and the Sotkowys over the Registrar's authority to tax the costs at this time, and to save further costs, counsel asked if they could ask me what I intended by my order.
>
> In order to save further costs, I initially thought that I could assist under the belief that I could "correct" or "clarify" an aspect of my decision. I would have no other authority to act in relation to my reasons than those in these circumstances.
>
> After much reflection and reviewing all of the authorities on point, I regret to inform counsel that I can be of no assistance without potentially causing problems for all of the counsel who appeared on the matter before me, or for the Court, in the event that the issue is raised either in this appeal, by one or more of the parties, or some other appeal on another occasion.

On September 17, 2013, counsel for the Sotkowys asked me to make a decision on the assessment of costs. I responded that same day that I was prepared to do so on the basis of the materials filed but asked counsel for MFI for his position. On September 18, 2013, counsel for MFI asked for the issue to be referred to a panel of the Court for determination. Later that same day, I advised counsel as follows:

> There is presently no *lis* that could be considered or determined by a panel of the Court.
>
> As I indicated to you at the assessment hearing, there is no authority for the registrar acting as assessor to refer a matter arising in the course of an assessment to a judge of the Court. The only way for this to happen is for the registrar acting as assessor to render a decision and for one of the parties to appeal that decision to a judge of the Court.
>
> Counsel asked me to approach Justice Jackson about whether she could clarify what she intended by her order. She has concluded that she cannot assist in this way.
>
> I will render a decision on the assessment on the basis of the material filed by the parties and the representations made at the assessment hearing.

This fiat represents my decision on the assessment.

Authority for Taxation

Jackson J.A.'s decision on MFI's application for leave dismissed the application with costs in the usual way. The phrase "with costs in the usual way" has legal meaning which falls to be determined by me as assessment officer after reviewing rules of court, case law and policy considerations which are relevant to the specific appointment before me.

Rule 54 of *The Court of Appeal Rules* provides for taxation of costs and indicates that Part Forty-Six of *The Queen's Bench Rules* applies, with any necessary modification, to a taxation of costs under Rule 54.

The Queen's Bench Rules (the "old rules") referred to in *The Court of Appeal Rules* have been replaced by the *Queen's Bench Rules* (the "new rules") which came into force on July 1, 2013. The provisions of the new rules relating to costs are now in Part 11 (not Part Forty-Six). The former Rule 553 is now found in Rule 11-8 and the former Rule 554 is now found in Rule 11-9. The content of these specific provisions has not changed. As such, I do not need to determine whether the old rules or the new rules apply to this taxation and I do not do so. For ease of reference, I will refer to the rule numbers associated with the old rules throughout this fiat.

Proposed Bill of Costs

The proposed Bill of Costs lists the following fees under Column 2 of the Court of Appeal Tariff of Costs:

1	Motion for Leave to Appeal	$1500
11	Preparing Formal Order	$ 200
12	Correspondence	$ 200
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75

The fees claimed total $2125.

The proposed Bill of Costs also claims disbursements amounting to $102.70 composed of $40 for the Court's fees for issuing the formal order ($20) and the appointment for taxation ($20) and $62.70 for photocopying, fax and courier charges. GST of $3.14 (on disbursements) is also claimed.

The total amount claimed in the proposed Bill of Costs is $2230.84. As indicated above, there is no dispute about this amount. The amount cannot and will not change as a result of any further litigation between the parties. The dispute between MFI and the Sotkowys focuses on whether costs are taxable and/or payable at this juncture.

Positions of the Parties

On the issue of whether costs are taxable and/or payable at this time, counsel for the Sotkowys argues that they are both. His argument can be summarized as follows:

- Pursuant to *Phipps v. Phipps*, 2013 SKCA 49, Rule 554 of *The Queen's Bench Rules* does not apply to appeals from the Court of Queen's Bench to the Court of Appeal.
- Changes to Rule 553 of *The Queen's Bench Rules* constituted a clear expression of intent by the Court of Queen's Bench that Rule 553 is not intended to fetter the Court of Appeal's assessment of costs on failed leave applications of interlocutory matters.
- All matters in the Court of Appeal are now concluded. The other proposed respondents would be entitled to have their costs both assessed and paid at this time. For consistency, the Sotkowys should also be entitled to have their costs assessed and paid at this time.
- An award of costs against a party seeking leave to amend a pleading is recognized as the primary way in which prejudice to the other party is avoided. The Sotkowys have been prejudiced by the additional delay and costs caused by MFI's failed application for leave to appeal. As such, under these circumstances "costs in the usual way" should mean costs taxable and payable forthwith.

Counsel for MFI argues that costs should not be assessed or payable at this time. His argument can be summarized as follows:

- An order of "costs in the usual way" means that costs are to be taxed as between party and party by the registrar in accordance with the tariff. It does not reasonably follow that costs are automatically assessed and payable forthwith.
- Rule 551 of *The Queen's Bench Rules* directs that Rules 553 and 554 of *The Queen's Bench Rules* apply unless the court ordered otherwise.
- Pursuant to Rule 553 of *The Queen's Bench Rules*, costs in interlocutory proceedings are not payable until final determination of the action or proceeding.
- *Phipps v. Phipps*, 2013 SKCA 49 stands for the proposition that Rule 554 does not bind the discretion of the Court with respect to costs. In other words, the Court has the discretion not to follow Rule 554 but, ordinarily, Rule 554 applies or is the primary guiding principle.
- The Court's normal and usual practice is described in *Ford v. Canadian National Railways*, [1937] 2 W.W.R. 216 – a single bill of costs is assessable and payable upon the final determination of the action in the Court of Queen's Bench and the final disposition of any related appeal or appeal period.
- Costs payable forthwith are made in exceptional circumstances.
- A party is not entitled to costs in an interlocutory application until the action is finally determined.
- There are policy reasons why costs should be payable only at the conclusion of litigation. The interests of efficiency and the administration of justice dictate a single assessment and payment of costs upon the final disposition of all matters that could potentially come before the Court of Appeal from the underlying action in the Court of Queen's Bench.

Decision

Assessment of Costs at this Time

As noted above, Jackson J.A. dismissed MFI's application for leave with costs in the usual way. There is no dispute between MFI and the Sotkowys that part of what "with costs in the usual way" means is that the unsuccessful party on the application (MFI) will be assessed costs payable to the successful party on the application which has taken out an appointment for taxation (the Sotkowys). Where the positions of the parties diverge is when those costs are taxable and payable.

As noted above, Rule 54 of *The Court of Appeal Rules* provides that Part Forty-Six of *The Queen's Bench Rules* applies to a taxation of costs in the Court of Appeal with any necessary modification. I therefore must consider the specific rules found in Part Forty-Six of *The Queen's Bench Rules* that may be relevant to the issue of whether I should assess costs at this time.

Rules 553 and 554 of *The Queen's Bench Rules* read as follows:

> **553(1)** The costs of an interlocutory motion or application:
>
> (a) shall follow the outcome of the motion or application;
> (b) shall be assessed on the same scale as the general costs of the action of proceeding; and
> (c) are not payable until final determination of the action or proceeding.
>
> **(2)** No *ex parte* order shall contain any directions as to costs.
>
> **554(1)** The costs of an appeal, and of the proceeding appealed from, shall follow the event of the appeal.
>
> **(2)** The costs of an appeal that does not finally dispose of the matter shall not be assessed or payable until the final determination of the action or proceeding in the court appealed from.

While there certainly are interlocutory motions heard and determined in the Court of Appeal (such as an application to lift a stay or an application to perfect), an application for leave to appeal does not fall within this description. The decision reached on an application for leave to appeal is a final decision. When, as here, an application for leave to appeal does not succeed, no notice of appeal is ever filed and the Court's file is closed. The costs associated with the hearing of an application for leave to appeal cannot be characterized as costs "of an interlocutory motion or application." This is the case even where the application for leave to appeal relates to an interlocutory decision from the Court of Queen's Bench.

If the drafters of *The Queen's Bench Rules* had intended Rule 553 to apply to an application for leave to appeal an interlocutory decision, they would have said so as they did in the former Rule 566(o):

> **566(o)** Where in any interlocutory proceedings, **or on appeal in interlocutory proceedings** costs are awarded to any party . . . such costs shall not be taxed and need not be paid until the final determination of the action or proceeding.
>
> **emphasis added**

When *The Queen's Bench Rules* relating to costs were amended in 2003, the language of this provision was changed to the existing wording found in Rule 553. Based on the existing wording of Rule 553, I conclude that Rule 553 is not applicable to the issue of whether I should assess the costs of this application for leave to appeal at this time.

As for Rule 554, the Court in *Phipps v. Phipps*, 2013 SKCA 49 concluded that Rule 554(1) "applies only in the context of an appeal brought before the Court of Queen's Bench *qua* appellate court against the decision of an inferior tribunal." What then of Rule 554(2)?

I am bound by the Court's decision in *Phipps*. If, as the Court has concluded, the "appeal" referred to in Rule 554(1) can only be an appeal brought to the Court of Queen's Bench, it would be illogical and contrary to the presumption of statutory interpretation that the same word within an enactment (in fact, in this case, within a provision) should be given the same meaning for me to conclude that the "appeal" referred to in Rule 554(2) is something different or more than that.

In any event, even if, as MFI argues, the *Phipps* decision implies that the directive in Rule 554(2) continues to ordinarily apply and if I was to assume that the "appeal" referred to in Rule 554(2) includes an application for leave to appeal to the Court of Appeal, I am not convinced that Rule 554(2) operates to preclude costs from being taxable and payable at this time in this case.

In *The Queen's Bench Rules of Saskatchewan: Annotated*, 3rd ed., the commentary following Rule 554 notes that it was derived from former Rule 549(9):

> **549(9)** On any appeal the scale of costs of the appeal, and if so stated in the judgment, also of the proceedings in the court below, shall be as directed by the judgment in appeal, or in default of direction shall be the same as that fixed under the order or judgment appealed from, and **unless ordered to be paid forthwith shall not be taxed until the final determination of the action or proceeding in the court appealed from**.
>
> **emphasis added**

Thus, under *The Queen's Bench Rules* pre-2003, the costs of any appeal were not to be taxed until the final determination of the action or proceeding in the court appealed from. The only noted exception to this rule was a situation where the court ordered the costs to be paid forthwith.

Since 2003, Rule 554(2) has contained a different exception to the rule that the costs of an appeal are not to be taxed until the final determination of the action or proceeding in the court appealed from. Today, the costs of an appeal that "finally disposes of the matter" may be assessed before the final determination of the action or proceeding in the court appealed from. This is presumably the case notwithstanding the fact that the costs are not ordered to be paid forthwith as this language was removed as part of the 2003 amendment.

As I understand the Sotkowys' position, they say that the dismissal of the application for leave to appeal did finally dispose of the matter. Their position is that the "matter" mentioned in Rule 554(2) should be understood to be the matter before the appellate court. In other words, the matter before Jackson J.A. was whether MFI should be granted leave to appeal certain aspects

of the order of Chicoine J. Jackson J.A. finally disposed of the matter by dismissing MFI's application.

On the other hand, I understand MFI to say that the appeal did not finally dispose of the matter and that the "matter" mentioned in Rule 554(2) should be understood to be the action in the Court of Queen's Bench (QBG No. 344 of 2012). That matter was not finally disposed of by the dismissal of the application for leave to appeal and will not be finally disposed of until all proceedings in the Court of Queen's Bench (and potentially in the appellate courts) relating to QBG No. 344 of 2012 are complete.

What is the "matter" that must be finally disposed of according to Rule 554(2)? Is it something different from the "action" or "proceeding" also referred to therein? It is an oft-cited presumption of statutory interpretation that, in an enactment, different words should be given different meanings. Following this presumption, "matter" must refer to something other than the "action" or "proceeding" in the court appealed from. Otherwise, why would the same words not have been used in both places?

If the presumption that different words should be given different meanings is applied, MFI's position cannot be correct. The matter which may or may not have been disposed of by the appeal cannot be one and the same as the underlying action in the Court's Queen's Bench. It must therefore be the matter that was before Jackson J.A. on the application for leave – whether MFI should be granted leave to appeal certain aspects of the order of Chicoine J. That matter was finally disposed of by Jackson J.A. in her decision of June 19, 2013.

This brings me, however, to another presumption of statutory interpretation – the presumption against tautology. It is presumed that every word in an enactment has a specific meaning or function. An interpretation that renders words pointless should be avoided.

If I interpret "matter" to mean the matter before the appellate court, does this render the remainder of Rule 554(2) essentially meaningless? If it does, I should avoid that interpretation.

It is difficult to conceive of many situations where an appeal would not finally dispose of the matter before the appellate court, however, that is not to say that this situation would never arise.

For example, in a case where a party was found not liable and so no damages were awarded at trial in the Court of Queen's Bench, the other party could appeal the trial court's findings on liability and damages to the Court of Appeal. If the appellant successfully argued before the Court of Appeal that the respondent was liable, the Court of Appeal could determine liability and assess and award damages itself pursuant to s. 12 of *The Court of Appeal Act, 2000*. It could also, however, determine liability only and remit the matter of damages to be determined by the Court of Queen's Bench. This would be a situation where it would be appropriate to delay the assessment of costs of the appeal until the matter of damages had been disposed of in the court appealed from (which would also amount to a final determination of the action or proceeding in the court appealed from) if only to determine which column of the tariff to use on the assessment.

The interpretation of "matter" to mean the matter before the appellate court therefore does not render the remainder of Rule 554(2) pointless or meaningless, although it does perhaps operate to invoke the exception to the rule more often than the rule itself. What it does do is to reconcile the two competing presumptions of statutory interpretation in a way that does the least violence to each.

I conclude that Jackson J.A. did finally dispose of the matter before her on MFI's application for leave to appeal within the meaning of Rule 554(2). Moreover, the Court's decision in *Phipps*, which is binding upon me, means that Rule 554 does not apply to an appeal to the Court of Appeal. As such, Rule 554 does not preclude me from assessing the costs of the appeal at this time.

Both the Sotkowys and MFI point to policy reasons and case law supporting their respective positions on the assessment and payment of costs. The Sotkowys argue that they were prejudiced and had costs thrown away as a result of MFI's application in the Court of Queen's Bench and that they have been further prejudiced by the delay and cost associated with MFI's unsuccessful application for leave to appeal. They point out that MFI was ordered by Chicoine J. to pay them $2500 in costs as a condition precedent of filing its amended statement of claim. This, the Sotkowys say, was to address the prejudice occasioned by MFI's application in the Court of Queen's Bench. As MFI's unsuccessful application for leave to appeal extended the prejudice and resulted in more thrown away costs for the Sotkowys, the costs of that application should also be taxable and payable now.

MFI cites the Court's decision in *Ford v. Canadian National Railway*, [1937] 2 W.W.R. 216 and Orkin as authority for the proposition that there should be only one taxation of costs in an action as to do otherwise might prevent a party with a just claim from pursuing it for financial reasons relating to the requirement of paying costs of an interlocutory proceeding. MFI also argues that the interests of efficiency and the administration of justice dictate a single assessment of costs after all proceedings in the Court of Queen's Bench and the appellate courts are concluded.

In my estimation, all of these policy considerations are important and relevant to my analysis. Specifically, I find that:

- A party should not be prevented from pursuing a just claim for financial reasons.

- The interests of efficiency and the administration of justice dictate that litigants should be encouraged to put their energy into coming to an expeditious, final determination of the dispute between them.

MFI should not be prevented from pursuing its action in the Court of Queen's Bench for financial reasons. The Sotkowys should not be prevented from defending that action for financial reasons. If the costs of MFI's unsuccessful application for leave to appeal are taxable and payable now, that may have financial implications for MFI. If the Sotkowys are not able to recoup their costs thrown away as a result of MFI's unsuccessful application for leave to appeal now, that may have financial implications for them. When I balance the application of this policy consideration between the two parties before me, I conclude that it does not favour the position of either of them.

These litigants should be encouraged to put their energy into coming to an expeditious, final determination of the dispute between them in QBG No. 344 of 2012. They should be discouraged from making unwarranted interlocutory forays. The application brought by MFI in the Court of Queen's Bench, its application for leave to appeal and this taxation could all be described in this way. I note that, but for MFI's unsuccessful application for leave to appeal, there would be no award of costs and no request for taxation by the Sotkowys. I therefore conclude that the application of this policy consideration favours the Sotkowys.

Having reviewed the relevant rules of court, case law and policy considerations, it is my view that "with costs in the usual way" means, in all of the circumstances of this case, with costs against MFI in favour of the Sotkowys that are both taxable and payable now.

Assessment

The proposed Bill of Costs will be taxed as follows:

Taxed on: $ nil

Taxed off: $ nil

The proposed Bill of Costs is therefore taxed and allowed at $2230.84 ($2125 in fees, $102.70 for disbursements and $3.14 GST). Counsel for the Sotkowys may prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance.

DATED at Regina, Saskatchewan, this 23rd day of September, 2013

REGISTRAR – COURT OF APPEAL