

Mark Leeb and 855473 Alberta Ltd.

APPELLANTS

- and -

NOV 0 - 2019

Nora Hignell

RESPONDENT

Mark Leeb for the Appellants
Rachel Haack for the Respondent

**Taxation before Melanie Baldwin, Q.C.
Registrar, Court of Appeal for Saskatchewan
November 4, 2019**

Background

[1] The appellants appealed a decision of the Court of Queen's Bench finding the appellants liable for negligence, negligent misrepresentation, breach of fiduciary obligation and breach of contract and ordering them to pay the respondent damages exceeding \$260,000. The notice of appeal was filed on January 7, 2019.

[2] The respondent filed a motion to perfect on August 14, 2019. As a result of that application, on August 28, 2019, Schwann J.A. ordered the appellants to order the trial transcript on or before September 30, 2019 and to file their appeal book and factum within 45 days after receiving the transcript. Schwann J.A. also ordered the appellants to pay fixed costs of \$500 to the respondent for the application.

[3] On October 1, 2019 the appellants abandoned the appeal. Rule 45 of *The Court of Appeal Rules* provides that, where an appellant abandons an appeal, the other parties are entitled to their taxable costs without order.

[4] The respondent took out an appointment for taxation of costs returnable before me on November 4, 2019. The appointment and a proposed bill of costs were served on the appellants on October 7, 2019. An affidavit of disbursements was served on the appellants on October 8, 2019. On November 4, 2019 Mr. Leeb and Ms. Haack appeared before me by telephone for the taxation hearing.

[5] This fiat is my decision on the taxation.

Proposed Bill of Costs

[6] The appellant filed a proposed bill of costs. The proposed bill of costs lists the following fees under column 3 of the Court of Appeal Tariff of Costs (the "Tariff"):

3	Fee to respondent on receipt of notice of appeal	\$ 150
4	Simple motion	\$ 500
12	Correspondence	\$ 300
13	Preparation of Bill of Costs	\$ 200

The fees claimed total \$1150.

[7] The proposed bill of costs also claims disbursements of \$237.75 composed of \$192.75 for process server fees, \$25 for a court filing fee and \$20 for a certified copy of pleadings.

Issues and Arguments

[8] At the outset of the taxation hearing, counsel for the respondent indicated that, in addition to the amounts claimed on the proposed bill of costs, the respondent would also be seeking the item 14 fee amount for the taxation hearing. Under column 3, that amount is \$100.

[9] The appellants did not raise any objections to specific fee items or disbursements claimed in the proposed bill of costs. Mr. Leeb, on behalf of the appellants, took the position that the costs payable to the respondent for the appeal should be minimal as the appeal was abandoned at an early stage.

[10] I raised the issue of whether Justice Schwann's specific costs order on the motion to perfect prevented the respondent from claiming the item 4 fee amount and the disbursements relating to that application as part of the taxation of appeal costs. Counsel for the respondent confirmed that it is not the respondent's intention to "double dip" and that the \$500 amount for the perfection motion should only be payable by/enforced against the appellants once. The respondent took the position that Schwann J.A. did not turn her mind to the disbursements incurred, particularly the disbursement for the process server, noting that there was no evidence before Schwann J.A. on disbursements. Counsel for the respondent argued that the disbursements were all necessarily incurred, that proper vouchers have been provided for them and that they are therefore properly included on the proposed bill of costs.

[11] I questioned the disbursement of \$20 for a certified copy of pleadings, noting that this is not a fee that is charged by the Court. I noted that there was a court fee of \$20 paid by the respondent to issue the order arising from the motion to perfect. Counsel for the respondent agreed that the \$20 disbursement claimed for a certified copy of pleadings should instead be for the issuance of the order. Finally, I noted that the respondent paid \$20 to issue the appointment for taxation and that this disbursement was properly claimed on the taxation of appeal costs.

Analysis

Addition of Fee Item and Disbursement for Taxation Hearing

[12] As noted above, the respondent seeks to amend the proposed bill of costs to add a claim for the \$100 fee item 14 amount for the taxation hearing. This fee item is properly claimed as the taxation hearing was necessary (there was no agreement by the parties on the amount of costs). In addition, the court file discloses that the respondent paid a \$20 fee for issuing the appointment for taxation of costs. This amount is also properly claimed by the respondent.

Fee Item and Disbursements Relating to Motion to Perfect

[13] On September 10, 2019, the respondent took out a formal order on the motion to perfect. The order includes the following provision:

... the Respondent shall have the costs of this application fixed at \$500.00.

The costs of the motion to perfect were fixed by a judge of the Court. The fixed costs can be enforced by the respondent against the appellants on the basis of the issued formal order. It is therefore not appropriate to include the \$500 ordered by Schwann J.A. in the taxation of appeal costs. The respondent's claim under fee item 4 will be taxed off.

[14] This leaves the disbursements associated with the motion to perfect (\$192.75 for the process server, \$25 to file the motion and \$20 to issue the formal order). The respondent's position that these disbursements were necessarily incurred and that they are supported by a proper voucher as contemplated in item 16 of the Tariff is unassailable. What is at issue is whether these necessary, supported disbursements were subsumed by the fixed award of costs made by Schwann J.A.

[15] The respondent argues that Schwann J. A. did not turn her mind to disbursements, specifically the process server disbursement, when she made the fixed cost award because there was no evidence relating to the process server cost before her. It is apparent from the endorsement on the court file that Schwann J.A. heard from the parties on the issue of costs. At that point, it was open to the respondent to raise the process server costs in order to ensure that they were considered by Schwann J.A. when she made her decision on costs.

[16] If the Court or a judge thinks that costs should be taxed, an order to this effect is made, leaving the determination of the amount of costs to the registrar (where the parties cannot agree). Where an order is made that does not provide for taxation but instead provides for a fixed amount of costs, as determined by the Court or a judge, it is reasonable to assume that the judge or the Court intended that the party liable for costs would pay the exact fixed amount to the party entitled to costs. In my May 23, 2017 decision in *Ayers v McDougall Gauley LLP et al.*, CACV2912, I concluded that, when a judge of the Court or the Court fixes costs, that fixed amount is intended to subsume all costs (fees and disbursements) of the application for which it was ordered. I am not inclined to deviate from this existing practice on this appeal. The disbursements relating to the motion to perfect (\$192.75 for the process server, \$25 to file the motion and \$20 to issue the formal order) will be taxed off.

Decision

[17] The fee items claimed on the proposed bill of costs are taxed and allowed under column 3 of the Tariff as follows:

3	Fee to respondent on receipt of notice of appeal	\$ 150
12	Correspondence	\$ 300
13	Preparation of Bill of Costs	\$ 200
14	Taxation Hearing	\$ 100

The fees allowed total \$750.

[18] The disbursements claimed on the proposed bill of costs and during the taxation hearing are taxed and allowed at \$20 (for issuing the appointment for taxation).

[19] The proposed bill of costs is therefore taxed and allowed at **\$770** (\$750 in fees + \$20 in disbursements). The appellant may, for enforcement purposes, prepare and file a certificate of taxation of costs in Form 11d in this amount for issuance.

DATED at Regina, Saskatchewan, this 4th day of November, 2019.



REGISTRAR – COURT OF APPEAL