Court of Appeal for Saskatchewan
Docket: CACV3524 **Date: 2021-09-14**

James Douglas Tyacke	Appellant (Respondent)
and	
Carla Carine Tyacke	Respondent (Petitioner)

Before: Amy Groothuis, Registrar (on August 25, 2021)

Fiat

I. Introduction

[1] Mr. James Douglas Tyacke appealed the judgment of Justice Goebel dated October 25th, 2019 following a trial pertaining to the division of family property and the award of spousal support. Ms. Carla Carine Tyacke cross-appealed from the same judgment. The notice of appeal and the notice of cross-appeal were both filed in November, 2019.

[2] On August 25, 2020, Ms. Tyacke applied by way of notice of motion pursuant to Rule 15(1) of *The Court of Appeal Rules* [Rules], seeking to lift the stay of proceedings imposed by that rule [stay application]. The stay application first came before Tholl J.A. on September 22, 2020. As part of the stay application, Ms. Tyacke also sought four other grounds of relief, which were described by Tholl J.A. in his fiat dated September 22, 2020 as such:

(a) An order transferring the four quarter sections of farmland to Ms. Tyacke no later than October 31, 2020;

(b) An order requiring the equalization payment of $215,413.50 be paid within 45 days;

(c) An order requiring Mr. Tyacke to pay Ms. Tyacke rent of $84,659.14 for jointly owned farmland for 2019 and 2020, within 45 days; and,

(d) An order adding 101289887 Saskatchewan Ltd. as a party to the proceedings.

[3] While Tholl J.A. ordered that the Mr. Tyacke perfect his appeal by no later than October 15, 2020, he was not satisfied that proper service had been made on the corporation and he adjourned the stay application to November 12, 2020 with the costs of the application to be determined by the Chambers judge hearing the matter on that day.

[4] On November 12, 2020, the stay application came before Richards C.J.S., who concluded in a fiat dated November 18, 2020 that Ms. Tyacke's motion must be dismissed, with Mr. Tyacke entitled to his costs "in the usual way". The fiat also awarded Mr. Tyacke costs fixed in the amount of $300 for the September 22, 2020 appearance before Tholl J.A.

[5] The appeal and cross appeal were heard on February 8, 2021, and the Court of Appeal's decision, written by Schwann J.A., was released on May 20, 2021 [decision]. Both the appeal and the cross-appeal were each allowed in part. At paragraph 136, Schwann J.A. held that given the mixed results, there was no order as to costs.

[6] A formal judgment was taken out and filed with the Court on July 8, 2021, and on July 29, 2021 counsel for Mr. Tyacke took out a Notice of Appointment for Taxation of Costs returnable before me on August 25, 2021 at 2:00 p.m., supported by a proposed bill of costs.

II. Proposed Bill of Costs

[7] Mr. Tyacke claims the following fees under Column III of the Court of Appeal Tariff of Costs [Tariff]:

5.	Complex Motion (a) opposed -	$2,000.00
11.	Preparing Formal Judgment	$ 300.00
13.	Preparation of Bill of Costs	$ 200.00
14.	Taxation of Bill of Costs	$ 100.00

[8] The proposed fees total $2,600.00. Mr. Tyacke did not claim disbursements or taxes.

III. Issues

[9] Counsel for Ms. Tyacke raises three issues with the proposed bill of costs:

(a) Whether the costs of the stay application heard before Richards C.J.S. are payable at all, given the language of the Court's decision disposing of the appeal and cross-appeal;

(b) If costs are payable, whether the stay application was a complex or simple motion; and

(c) If costs are payable, whether Mr. Tyacke can claim item #11, preparing formal judgment, as no judgment or order was ever taken out by the appellant following the fiats of Tholl J.A. and Richards C.J.S.

[10] At the taxation hearing, counsel for Ms. Tyacke agreed that if costs on the motion are payable, that Column III of the Tariff is the appropriate column, and further agreed that items #13 (preparation of bill of costs) and #14 (taxation of bill of costs) are properly claimed.

IV. Analysis

[11] I will examine each of the three issues raised by Ms. Tyacke's counsel in turn.

A. Are costs payable at all?

[12] In his fiat dated November 18, 2020, Richards C.J.S. wrote:

> [19] I conclude that Ms. Tyacke's application must be dismissed. Mr. Tyacke is entitled to costs in the usual way. I fix costs for the proceedings before Tholl J.A. at $300 and order that they too be paid by Ms. Tyacke.

[13] The Court's decision on the appeal and cross-appeal concluded, with Schwann J.A. writing:

> [136] Given the mixed results in this matter, there will be no order as to costs.

[14] Based on the above wording, counsel for Ms. Tyacke urges me to conclude that because Schwann J.A. made "no order as to costs", this means that Richards C.J.S.'s order that Mr. Tyacke was entitled to costs "in the usual way" for the stay application was "overtaken" and thus of no effect. More specifically, counsel argued that Ms. Tyacke's stay application was an intermediary step, which did not finally dispose of the appeal, and that because there was no finality following the September 22 and November 18, 2020 fiats, we must instead look to and be guided by the Court's ultimate disposition on how costs are to be treated.

[15] Curiously, counsel for Ms. Tyacke agreed that the $300.00 ordered payable by Richards C.J.S. for the appearance before Tholl J.A. was payable and was *not* "overtaken" by the Court's decision on costs related to the appeal and cross-appeal. I have considered counsels' submissions and the case law cited by Mr. Shramko. As I will explain, I cannot agree with Mr. Shramko's position that the Court's decision somehow removes Mr. Tyacke's entitlement to the costs arising from Ms. Tyacke's stay application (and related relief), and I conclude that Mr. Tyacke is entitled to his taxable costs ordered by Chief Justice Richards in the November 18, 2020 fiat.

[16] Rule 54(1) states:

> 54(1) Unless otherwise ordered:
>
> (a) the costs of an appeal or application shall be taxed as between party and party by the registrar in accordance with the fees set out in the appropriate column of the 'TARIFF OF COSTS IN THE COURT OF APPEAL', which is attached as Schedule I to these Rules; …

[17] This language results in a default outcome that the costs of an application are taxed in accordance with the Tariff, unless otherwise ordered. Moreover, it is established law that the

phrase "costs in the usual way" means costs that are both taxable and payable forthwith: *MFI AG Services Ltd. v. Sotkowy*, 2014 SKCA 69 [*MFI AG Services*].

[18] In his fiat dated September 22, 2020, Tholl J.A. ordered that "costs of this adjournment are reserved to the Chambers judge hearing the matter on November 12, 2020". That is an example of "unless otherwise ordered", which displaces the default of party and party costs following an application, calculated in accordance with the Tariff. Similarly, Richards C.J.S. ordered that the costs arising from the September 22, 2020 appearance were set at $300.00 – which again displaces the default result that the costs are taxed in accordance with the Tariff.

[19] Writing for the Court, Justice Schwann ordered that each party bear their own costs, which by necessary implication related only to the appeal and cross-appeal. This is evident because the hearing and disposition of the appeal and cross-appeal were the only live issues before the Court. Ms. Tyacke's application for a stay (and related relief) had been fully and finally disposed of once Chief Justice Richards issued his fiat on November 18, 2020. The only way the terms of the decision could be discharged or varied would be if Ms. Tyacke applied to the Court pursuant to section 20(3) of *The Court of Appeal Act*, which she did not. As such, the November 18, 2020 decision stands on its own and is enforceable on its own.

[20] Counsel for Ms. Tyacke referred me to a number of cases in support of his position, all of which I considered, including *Eagle Eye Investments Inc. v CPC Networks Corp.*, January 8, 2013, Baldwin (CACV2207). Registrar Baldwin, as she then was, was faced with an appointment for taxation of costs where two applications were heard before the Chambers judge on the same date; one application was disposed of at the conclusion of the Chambers hearing and was silent on costs, and one application resulted in a reserved decision that ordered "significant costs". The question was whether the application dismissed from the bench and which was silent as to costs resulted in any entitlement to costs. Instructively, Registrar Baldwin wrote:

> I should also note that I do not consider the fact that the same Chambers judge heard another application involving these parties on the same hearing date and ordered costs on that application to be relevant to this inquiry. These were two separate applications and the Chambers judge dealt with them in separate decisions. Absent some specific indication from the Chambers judge that the costs award was intended to apply to both applications, there is no basis upon which this could be inferred.
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> [underlining added]

[21] In Orkin's, *The Law of Costs*, loose-leaf (Rel No. 4, July 2021) 2d ed, vol 2 (Toronto: Thomson Reuters, 2017) [Orkin] the author notes at paragraph 6:25, "objections to the award or scale of costs should be made to the judge or judicial officer awarding them and not to the assessment officer", citing to *Nippa v. C.H. Lewis (Lucan) Ltd.* (1988), 8 A.C.W.S. (3d) 102 (Ont. Assessment Officer) at paragraph 23. The same reasoning applies here: sitting in Chambers, Richards C.J.S. heard and disposed of an application, and quite separately the Court heard and disposed of the appeal and cross-appeal – dealt with in separate decisions. There is no basis upon which to conclude that the Court intended the order as to costs to also deal with a prior application that was earlier heard and disposed of. As a result, Mr. Tyacke is entitled to his costs calculated in accordance with the Tariff, for the stay application heard and determined by Richards C.J.S.

B. Was the stay application a complex or simple motion?

[22] Having concluded that Mr. Tyacke is entitled to his costs, the next issue to determine is whether Ms. Tyacke's motion was complex or simple.

[23] Registrar Baldwin (as she then was) previously held that an application to lift a stay was a simple, rather than a complex, motion: *Denise Theresa Fehr v Julius Andrew Turta,* November 20, 2014, Baldwin (CACV2578) and *Marguerite Kirk and Paul Kirk v Gerald Kirk, Celeste Barnes and Dale Linn, QC in his capacity as Interim Administrator of the Estate of Anastasia Kirk,* December 12, 2017, Baldwin (CACV3022).

[24] I agree that on its own, a motion brought to lift a stay of proceedings will generally be considered a simple motion, rather than a complex motion. However, on the facts of the matter now before me, the relief sought by Ms. Tyacke was considerably more complex than simply seeking to lift the stay of proceedings. For ease, I reproduce the relief sought by the respondent, in addition to lifting the stay:

(a) An order transferring the four quarter sections of farmland to Ms. Tyacke no later than October 31, 2020;

(b) An order requiring the equalization payment of $215,413.50 be paid within 45 days;

(c) An order requiring Mr. Tyacke to pay Ms. Tyacke rent of $84,659.14 for jointly owned farmland for 2019 and 2020, within 45 days; and,

(d) An order adding 101289887 Saskatchewan Ltd. as a party to the proceedings.

[25] As only one example of the complexity of the stay application, I look to the requested relief that Mr. Tyacke pay Ms. Tyacke rent in the amount of $84,659.14. Ms. Tyacke relied on the Court's jurisdiction pursuant to s. 10 of *The Court of Appeal Act* in support of her request for immediate payment of that rental amount, but did not cite any case law to support her position. In response, the brief of law filed on Mr. Tyacke's behalf made the following argument:

> 16. The Appellant submits that an allocation of post-trial and post-judgment funds is neither necessary nor incidental to the appeal itself. The trial judge did not have the power to make an order regarding distribution of income or assets between the trial and the date of judgment, and would have been aware of the passage of time. No such award was made. With regard to a distribution of post-judgment resources, the Appellant submits that this is a request to have the Court of Appeal try an issue that was not contemplated by the trial judge and for which there is no legal basis and no evidence properly before the Court.

[26] I include the above simply to demonstrate the complexity and novelty of the issues that formed part of the stay application – simply put this was a complex motion. As a result, Mr. Tyacke is entitled to his taxable costs of $2,000.00 and I tax on that amount.

C. Item #11 – Preparing Formal Judgment or Order

[27] Counsel for Mr. Tyacke acknowledged no formal order was taken out for the November 18, 2020 fiat. Counsel indicated that a draft formal order was prepared, and would be filed following the taxation hearing, but conceded that step had not yet been taken. I asked whether the Registrar has the authority to tax on an amount for a step not taken; counsel submitted the Registrar has such authority but was unable to point me to a decision or Rule that was directly in support. Counsel for Ms. Tyacke submits that costs for a step not taken cannot be awarded.

[28] I agree that I do not have authority to tax on an amount for a step not taken. Orkin provides at paragraph 6:31:

> It is a basic if obvious principle that on a party-and-party taxation the assessment officer can allow only those items which were in fact done. The classic statement of this proposition is by Meredith C.J.C.P., in *Flexlume Sign Co. Ltd. v. Globe Securities Co.*:
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> > In all taxations of costs it should be borne in mind that allowances are to be made only for services actually performed, fees actually earned, and outlays actually incurred, all within the limitations which the tariff contains; that nothing is to be allowed for imaginary services, or services which might have been but were not performed.
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> > (*Flexlume Sign Co. Ltd. v. Globe Securities Co.* (1918), 47 D.L.R. 22 (Ont. S.C. App. Div.), at p. 23.)

[29] No formal judgment or order was taken out following Richards C.J.S.' November 18, 2020 fiat. I therefore tax off $300.00 from the proposed bill of costs for item #11.

V. Decision

[30] The fees are therefore taxed and allowed as follows:

5.	Complex Motion (a) opposed -	$2,000.00
13.	Preparation of Bill of Costs	$ 200.00
14.	Taxation of Bill of Costs	$ 100.00
	Total:	$2,300.00

[31] The proposed bill of costs is therefore taxed and allowed at $2,300.00.

[32] For enforcement purposes, the appellant may wish to prepare and file a certificate of taxation of costs in Form 11d in this amount for issuance.

Counsel: Heather Sherdahl for James Douglas Tyacke
Alex Shramko for Carla Carine Tyacke