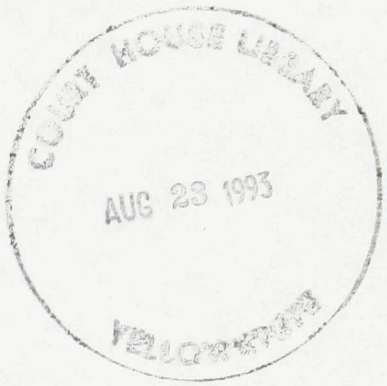
SC CV 93 023

6101-01682

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:



BURKHARDT JOHANN KOLDEWEY

- and -

MARIE ROBERTA KOLDEWEY

Costs of interlocutory proceedings fixed at $2,000.

Heard at Yellowknife on April 22nd 1993

Judgment filed: April 26th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Petitioner: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Ms. Glennis M. Munro

6101-01682

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BURKHARDT JOHANN KOLDEWEY

- and -

MARIE ROBERTA KOLDEWEY

REASONS FOR JUDGMENT

Costs on a solicitor-and-client basis are sought on behalf of the petitioner pursuant to the Court's order that the respondent shall pay the costs of both his application to sever the divorce from the property issues in this action and her application for interim injunctive and declaratory relief, his application having succeeded and hers having failed after a hearing of both applications together. The scale or amount of the costs to be paid was left for further argument which has now been heard.

Rule 541 of the **Rules of Court** states:

> 541. (1) Notwithstanding anything in Rules 542 to 551 the costs of all parties to any proceedings (including third parties), the amount thereof, the party by whom or the fund or estate or portion of an estate (if any) out of which they are to be paid, are in the discretion of the court, and the court may
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs,

(b) allow costs to be taxed to one or more parties on one scale, and to another or other parties on the same or another scale, or

(c) direct whether or not any costs are to be set off.

(2) Where no order is made, the costs follow the event.

(3) Costs may be dealt with at any stage of the proceedings prior to the entry of formal judgment.

3 There is no need to consider whether costs as between solicitor and client may be ordered against a party to proceedings outwith the sphere of equity since, in this instance, the relief sought by the respondent was purely equitable. Such costs are clearly within the Court's discretion in matters of equity: **Andrews v. Barnes** (1888), 3 Ch.D. 133 (C.A.); and see **Jones v. Coxeter** (1742), 2 Atk. 400, 26 E.R. 642.

4 As to the respondent's opposition to the petitioner's application to sever the divorce from the property issues, considering that she had agreed to the divorce in her pleadings and now only wished to delay it so as to enhance her bargaining position, or so it appears, with reference to the property issues, there being no reason to deny the divorce on any ground recognized by the **Divorce Act**, R.S.C. 1985 (2nd Supp.), c.3, that opposition was plainly obstructionist and contrary to the spirit of our **Rules of Court**, whose object is declared in Rule 5, as follows:

5. The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

5 It is stated in Orkin, **The Law of Costs** (2nd. ed.) at page 2-91, and the law in this jurisdiction is, that:

Costs on the solicitor-and-client scale should not be awarded unless special grounds exist to justify a departure from the usual scale.

An award of costs on the solicitor-and-client scale is an important means whereby harassment of another party in litigation may be more effectively discouraged: **Apotex Inc. v. Egis Pharmaceuticals** (1991), 4 O.R. (2d) 321 (Gen. Div.). The respondent's opposition to the divorce being severed from the property issues, so as to prevent the divorce being granted now, was completely without any merit and failed accordingly. As I have said, it was plainly obstructionist and contrary to the spirit of our **Rules of Court**. It was, in effect, abusive of the Court's process, so as to be tantamount to harassment of the petitioner. Costs on the solicitor-and-client scale, or some equivalent, are therefore indicated in respect of that matter.

Counsel for the respondent argued strenuously for an award of no more than party and party costs, making reference to matters more relevant to whether costs should have been awarded (a matter earlier decided in accordance with Rule 541 of the Rules of Court). In her submission, it was as a result of the petitioner informing the respondent that he had acquired German citizenship and was pursuing academic studies in the United States that the respondent had brought her application for injunctive and declaratory relief (initially *ex parte* and only then, by judicial direction, on short notice), believing from what the petitioner had told her that he was putting himself and the property in dispute beyond the reach of this Court for purposes of a proper division of that property. Without knowing more, it is inappropriate to comment on these allegations or on the nature of the legal advice to which they may have given rise. It is enough, I think, to refer to my reasons for judgment dismissing the respondent's application. Nothing has been shown

to justify the extraordinary nature of the relief which she then sought from the Court as described in those reasons.

8 The respondent also argued that the award of costs in the present interlocutory proceedings should be left on a party and party basis because of the lengthy delay since the divorce petition was issued. That may well be a relevant submission to be made to the Court when final judgment is before it for consideration. It is not relevant, in my respectful view, to the question of whether the respondent should be obliged to pay solicitor-and-client costs in the present interlocutory proceedings. Frequently, costs in such proceedings are left to be determined after trial; however, in this instance, I felt compelled to order that costs be awarded in these interlocutory proceedings now and "in any event of the cause" (in other words, without regard to the ultimate outcome at trial). I came to that conclusion because it was apparent to me that the respondent must be discouraged, through the mechanism of costs, from bringing vexatious applications of the kind which came under consideration here.

9 Prolongation of proceedings on grounds which are devoid of legal merit may attract costs on the solicitor-and-client scale: **Olson v. New Home Certification Program of Alberta** (1986), 44 Alta. L.R. (2d) 207 (Q.B.); and see **Bishop v. Kelly** (1987), 6 A.C.W.S. (3d) 379 (Ont. H.C.J.); **Apotex Inc. v. Egis Pharmaceuticals (supra); Alfy Holdings Ltd. v. Morrow** (1986), 35 A.C.W.S. (2d) 457 (B.C.C.A.); and **Petch v. Trianon Holdings Ltd.** (1990), 23 A.C.W.S. (3d) 282 (B.C.S.C.). Reference was made by counsel on both sides to **McIntyre Porcupine Mines Ltd. v. Hammond** (1975), 31 O.R. (2d) 452, 119 D.L.R. (3d) 139 (H.C.J.). It is noteworthy that costs as between solicitor and client

were awarded in that case, where the defendant (like the petitioner here) was put to the trouble of defending claims which were without any foundation in law.

Counsel for the respondent referred to **Jensen v. Canadian National Railways (No. 2)** [1943], 2 W.W.R. 588; and **Abramovic et al. v. Canadian Pacific Ltd.** (1989), 69 O.R. (2d) 487 (H.C.J.) for the proposition that no costs should be awarded where a novel point of law is raised but has been rejected. As I understand her submission, her failure to persuade the Court of the merits of such a novel point should be invariably viewed as less deserving of an award of solicitor-and-client costs than if the point had been well settled in law. Counsel invited the Court to follow a course which would not unduly discourage counsel in general from arguing novel points of law. In support of this contention, she also referred to **Poizer v. Ward**, [1947] 4 D.L.R. 317 (Man. C.A.), in which costs were denied to the successful party (who was regarded as representing the Crown) where it was a "test case" as to the meaning of legislation which was "far from clear". That case is clearly distinguishable, on its facts, from the matter before me.

I would have less difficulty in accepting the submissions made on this point if the supposedly novel points of law relied upon were less obviously without the slightest merit in principle, quite apart from any question of precedent or lack of it. Mere novelty is not enough to warrant a dispensation as to costs. See, for example, **Allman v. Commissioner of the Northwest Territories**, [1983] N.W.T.R. 231, 46 A.R. 61, 144 D.L.R. (3d) 467 (S.C.). It is, in my view, not possible (from the report cited) to assess the novelty or real nature of the point of law in **Jensen v. Canadian National Railways (No. 2) (supra)**. The legal complexity and the magnitude of the issues before the court in

Abramovic et al. v. Canadian Pacific Ltd. (supra) are however clearly evident from the reasons for judgment in that case. The relevant law in that case had been the subject matter of considerable litigation over the years.

12 In the present instance, counsel for the respondent disregarded not only a recent judgment of our Court of Appeal, namely **Royal Oak Mines, Inc. v. C.A.S.A.W. Local No. 4 et al.**, unreported, January 21st 1993 (CA 00393), which was completely dispositive of the issue on which she sought a contrary conclusion from this Court; but also the reasoned decision of the Appellate Division of the Supreme Court of Alberta in **McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District No. 1 et al.** (1980), 100 D.L.R. (3d) 498. At the very least, counsel for the respondent had a duty to bring the first of these two contrary decisions to this Court's attention, but failed to do so. The other decision was brought to the Court's attention by counsel for the petitioner. In the circumstances, I do not consider that the novelty of the points of law on which the respondent sought to rely can be regarded as a basis on which to absolve her from an award of significant costs.

13 It is to be borne in mind that the respondent insisted on being allowed to file written argument in support of her position on the novel point of law forming the basis for her claim to interlocutory declaratory relief. This put the petitioner in the position of having to respond with written argument to support his position on that point. Ultimately, I had no difficulty in finding the point to be without any legal merit; but I could not be absolutely sure of this until the written submissions had been filed. Who then should bear the cost of that exercise? In my judgment, the answer is clear: the respondent should

bear it in its entirety, since there was no valid argument to be made in support of the respondent's position. It was, quite simply, untenable in law.

Rather than making this award of costs on a solicitor-and-client basis, which in my view would be fully justified in this instance, I prefer however to make a lump sum award in the amount of $2,000, to be paid by the respondent to the petitioner within three months of this date. Should these costs not be set aside or varied, the petitioner may move the Court to take such steps as appear appropriate in the circumstances, in the event that they remain unpaid after the three months grace period has elapsed.

This award includes the costs of the last hearing as to the scale or amount of the costs of the interlocutory proceedings.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
April 26th 1993

Counsel for the Petitioner: Katherine R. Peterson, Q.C.

Counsel for the Respondent: Ms. Glennis M. Munro

6101-01682

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

BURKHARDT JOHANN KOLDEWEY

- and -

MARIE ROBERTA KOLDEWEY

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT