Jorge, et al, v. *Williams & Co,* 2002 NWTSC 29

Date: 2002 04 12
Docket: S-1-CV 2000 000114

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MANUEL JORGE and MARTA SIMEK DE JORGE carrying on business as NORTHERN HOMES 3000 LTD., MANUAL JORGE and MARTA SIMEK DE JORGE carrying on business as ARCTIC FOCUS LTD., MANUEL JORGE, MARTA SIMEK DE JORGE, ENERGY WALL & BUILDING PRODUCTS LTD.

Appellants

- and -

WILLIAMS & COMPANY

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an appeal of the taxation of a solicitor-and-client bill of costs. In reality it is an appeal of the taxation of several bills to different clients but since the clients are inter-connected, and the same issue applies to all, the appeal proceeded as one appeal.

[2] The respondent law firm (now practising under the firm name of Field Atkinson Perraton) sought the taxation of eight separate accounts. The clients were either Mr. and Mrs. Jorge or companies set up by them. A cross-examination of Mr. Jack Williams, the lawyer doing the work for Mr. and Mrs. Jorge, was conducted by a lawyer then representing the appellants. At the taxation, however, the appellants were unrepresented. The accounts submitted and taxed were as follows:

File No.	Client Name	Amount Billed	Bill as Taxed

2256001	Northern Homes 3000 Ltd.	$ 6,036.97	$ 2,798.78
2881-196	Arctic Focus Ltd.	$ 903.11	$ 428.00
2921-197	Northern Homes 3000 Ltd.	$ 4,236.15	$ 2,811.42
2980-197	Mr. and Mrs. Jorge	$ 584.60	$ 271.62
3207-198	Energy Wall & Building	$ 2,409.05	$ 1,617.01
3208-198	Northern Homes 3000 Ltd.	$ 1,197.64	$ 797.62
3454-198	Energy Wall & Building	$ 549.26	$ 363.36
3456-198	Energy Wall & Building	$ 1,126.18	$ 745.03

[3] While the taxing officer issued one certificate for the total amount owing by the clients, these are still eight separate accounts as between distinct clients. There is no evidence of joint and several liability.

[4] The essential point that the appellants raise is that there was an agreement with Mr. Williams whereby his legal bills would be off-set by what he owed Mr. and Mrs. Jorge for building a cabin for him. There was evidence that a cabin had been built and that Mr. Williams had been billed for it. There was also evidence that at one point Mr. Williams had written his own cheque in the amount of an invoice to him which was applied by the firm to an account owing by one of the appellant companies. This was noted as a credit both by the firm on their ledgers and by the appellants on their invoice to Mr. Williams. There was, however, no evidence of a written agreement with respect to the payment of the building costs. There was before the taxing officer simply the appellants' assertion of a *quid pro quo* and Mr. Williams' denial of same on his cross-examination.

[5] One of the grounds of appeal was that the taxing officer failed to give reasons for her taxation. The lack of reasons makes any appeal that much more difficult. It is certainly preferable that there be some reasons, even if only in a summary form, since otherwise it is difficult to discern why the taxing officer did what she did. Here it appears that the taxing officer simply struck off all claims for interest on the accounts.

[6] In my opinion, the lack of reasons is not significant in this case. I say that because the appeal was not about what the taxing officer did; it was about something the taxing officer could not do. The appellants took no issue with the actual taxation of the accounts. They took issue with the fact that the taxing officer did not set-off what they say was owing by Mr. Williams to them.

[7] First, it is important to reiterate the standard of review on a taxation appeal. All the case law, from this jurisdiction and others, emphasizes that the taxing officer's decisions are entitled to a degree of deference. A reviewing court should not interfere with the decisions of a taxing officer on the basis of a mere difference of opinion. Rather, there must be an error of principle or the amount allowed must be inordinately high or low: *McLennan Ross* v. *Mercantile Bank* (1988), 59 Alta.L.R. (2d) 369 (C.A.); *Goodfellow* v. *Karl Mueller Construction Ltd.*, [1996] N.W.T.J.No.21 (S.C.).

[8] The appeal is not a hearing *de novo*, although in some cases additional evidence may be received so as to clarify the record. This is what happened here and, in my view, it was justified due to the absence of reasons from the taxing officer. Ordinarily, however, this would not be permitted since an appeal is limited to the evidence that was before the taxing officer: see Rule 694.

[9] The mere fact that the taxing officer did not issue reasons is not a reason to set aside the taxation in the circumstances of this case. Generally speaking, a taxing officer is not required to give extensive reasons for his or her decision; nor do those reasons have to be in writing: *Keen Industries Ltd.* v. *Mercantile Bank of Canada* (1987), 55 Alta.L.R.(2d) 290 (C.A.). The Supreme Court of Canada, in a much different context, recently held that the inadequacy or absence of reasons by a trial judge is not a freestanding ground of appeal in a criminal case. There must be a more functional approach whereby the appellant must show that the inadequacy or absence of reasons has occasioned prejudice to the exercise of the right to appeal: *R.* v. *Sheppard*, [2002] S.C.J.No.30 (at para.33). If that is the standard established on a criminal appeal, surely the standard on a civil taxation cannot be more strict.

[10] In this case there has been no prejudice shown because the appellants did not attack the actual taxation. They pointed to no error made by the taxing officer. Indeed, they took no opposition to the amounts of the accounts rendered by the firm. Their only attack was the taxing officer's failure to recognize the purported agreement with Mr. Williams. To do so, however, would have required the taxing officer to hear and interpret evidence and to reach conclusions on contract law, something which is beyond the purview of a taxation or the expertise of the taxing officer. As noted by M^{c}Fadyen J.A. in *M^{ac}Kimmie Matthews* v. *Hector*, [1998] A.J. No.952 (C.A.), at para.17:

> The taxation officer is limited to questions relating to a quantum alone and cannot resolve other issues which may arise between the parties. If another issue arises, as it did in this case, the taxation officer refers the question to the Court for resolution.

[11] There was no evidence of a written agreement setting out the terms claimed by the appellants. There were, however, several retainer agreements between the firm and the appellants. None of them refer to any arrangement with respect to setting-off what Mr. Williams owed to the appellants (although nowhere is it disputed that Mr. Williams, at least in his personal capacity, did owe money to the appellants for building a cabin).

[12] This is not to say that a solicitor and client could not make an agreement setting-off what one owes against what the other owes. Rule 656 speaks in fairly broad terms about a solicitor's ability to make an agreement with a client respecting the amount and manner of payment of fees. If there were such an agreement, then Rule 687 seems to contemplate that a taxing officer could review it and allow costs accordingly. But none of that would allow a taxing officer to conduct a trial to determine if there was an agreement and, if there was, how it should be interpreted or applied. Once such issues are raised then they should be referred to the court for determination pursuant to Rule 673.

[13] Since the actual amounts of the bills as taxed are not in contention, there is no reason to interfere with the taxation. The question of a set-off can still be addressed but in a more appropriate fashion.

[14] What the appellants are claiming, in both legal and practical terms, is a set-off. There are set-offs at law and set-offs in equity: *Holt* v. *Telford*, [1987] 2 S.C.R.193. The first requires that both obligations be liquidated amounts and that both debts be mutual cross-obligations. Here, arguably, there is no mutuality since the appellants are obligated to the firm while the obligations owing to them are from Mr. Williams personally. Set-offs in equity, however, do not require mutuality of obligations. There must, though, be some equitable ground for a set-off which goes to the root of the claim against the person claiming set-off. In other words, while the claim and cross-claim need not arise out of the same contract, they need to be clearly connected so that it would be manifestly unjust to enforce payment of the claim without taking into consideration the cross-claim.

[15] Here, considering that the claims of the firm and the cross-claims of the appellants arose in the same time frame, and some other points that the appellants wish to raise, there may be at least an arguable set-off in equity. The place to advance that, however, is not on a taxation. It is either in response to an action for fees owing or an application to enforce a taxed bill of costs. In an action for fees, judgment can only be entered by order of the court, not by default (Rule 667); and, an application to enforce payment of a taxed bill of costs must be on notice (Rule 692). So there may still be an opportunity,

in either situation, for the appellants to seek a determination of their right to a set-off. Of course, they could launch their own action for recovery of what they are owed. In any one of these methods the issues can be addressed in a coherent fashion and not the haphazard manner of placing all sorts of things before the taxing officer which the taxing officer had no jurisdiction to address.

[16] For these reasons, the appeals are dismissed. The amounts certified by the taxing officer are confirmed. Considering all the circumstances there will be no costs of the appeal.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT this
12th day of April 2002

Counsel for the Appellants: Garth L. Wallbridge
Counsel for the Respondent: Blair Barbour

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
