Camillus Eng. Consultants Ltd. v. Village of Ft. Simpson, 2005 NWTSC 25

Date: 2005 02 28
Appeal Action No. S0001-CV-2004-000398
Action No. S0001-CV-2001-000164

BETWEEN:

CAMILLUS ENGINEERING CONSULTANTS LTD.

Appellant (Plaintiff)

-and-

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Respondent (Defendant)

AND BETWEEN:

Appeal Action No. S0001-CV-2004-000399
Action No. S0001-CV-2001-000196

CAMILLUS ENGINEERING CONSULTANTS LTD.

Appellant (Plaintiff)

-and-

THE VILLAGE OF FORT SIMPSON, BRUCE LECLAIRE,
NORMAND PREVOST, and THE COMMISSION OF THE
NORTHWEST TERRITORIES

Respondents (Defendants)

Appeal Action No. S0001-CV-2004-000400
Action No. S0001-CV-2003-000077

AND BETWEEN:

THE MUNICIPAL CORPORATION OF THE
VILLAGE OF FORT SIMPSON

Respondent (Applicant)

-and-

CAMILLUS ENGINEERING CONSULTANTS LTD.

Appellant (Respondent)

-and-

KIWI ELECTRIC LTD., J.S.L. MECHANICAL INSTALLATIONS LTD.,VECTOR ELECTRIC AND CONTROLS INC., FOOTHILLS INDUSTRIAL SYSTEMS LTD., DELOITTE & TOUCHE INC. in their capacity as Court Appointed Receiver (Alberta Court of Queen's Bench) of Foothills Industrial Systems Ltd., REG BELLEFONTAINE, carrying on business under the trade name and style of "RIGHTWAY COATINGS", THE GUARANTEE COMPANY OF NORTH AMERICA, CANADA CUSTOMS AND REVENUE AGENCY, and BANK OF MONTREAL

Respondents

MEMORANDUM OF JUDGMENT

[1] Camillus Engineering Consultants Ltd., a party in these three separate actions, appeals the taxation of two costs orders made in each action in favour of The Village of Fort Simpson.

[2] The parties agree on the applicable standard of review. A taxing officer's decisions are entitled to 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. The appeal is not a hearing *de novo*, although additional evidence may be reviewed so as to clarify the record.

Facts:

[3] These three actions are but parts of a large dispute arising out of the construction of a water treatment plant in Fort Simpson. Eight different actions have been commenced in this jurisdiction. The litigation has been going on for over 4 years. Numerous parties are named and numerous issues are involved.

[4] As part of its litigation strategy the respondent Village decided to seek an order in each of these actions for security for costs and an order setting the lien fund so as to remove certain liens from title to the land in question. Problems were encountered in fixing dates for these applications. Part of the problem was that the solicitors on record for Camillus had ceased to act. The respondent then brought a formal motion to fix dates for its applications (as well as for a pending application filed by Camillus staying the court proceedings in favour of arbitration). The respondent's motion to fix dates was returnable in Chambers on July 9, 2004.

[5] On July 9th, counsel for the respondent, and counsel for two other parties, appeared but no one appeared on behalf of Camillus. Respondent's counsel explained what steps were taken to give notice to Camillus and the presiding judge in Chambers deemed those steps to be good and sufficient service. He then went on to fix dates for the hearing as requested. The presiding judge also ordered costs to the respondent, payable by Camillus forthwith, in each of the three actions.

[6] I raise the service issue only because, after July 9th, Camillus' representative claimed that there had been no notice of the hearing date. Any issue about service of that notice is irrelevant now, of course, because Camillus did not appeal the order made that day. This appeal is limited to the taxation of the costs awarded.

[7] The taxation of the respondent's costs, as a result of the July 9th hearing, proceeded on November 3, 2004. The bill of costs, for each action, was taxed in the sum of $1,668.15. Fees were assessed on the tariff of party-and-party costs, as provided in the Rules of Court, under Column 6. The disbursements included the cost of respondent's counsel, who is based in Calgary, to travel to Yellowknife for the hearing. Those disbursements were divided evenly among the three actions. These bills of costs are the subject of the first appeal launched by Camillus (which the parties referred to as the "party-and-party taxation appeal").

[8] In August, 2004, the president of Camillus wrote to respondent's counsel giving notice that Camillus intended to move to set aside the July 9 orders. A motion to that effect was filed, in each action, by Camillus. That motion was heard in Chambers on October 29, 2004. Camillus was represented by its president in person. Respondent's counsel once again came to Yellowknife for the hearing. The presiding judge found the applications to be frivolous and an abuse of the court's process. The application in each action was dismissed. The judge ordered Camillus to pay the respondent's costs on a solicitor-and-client basis, including travel disbursements, one bill for the three actions.

[9] The taxation proceeded on December 3, 2004. Counsel, newly retained by Camillus, appeared at the taxation to request an adjournment. That request was refused. The taxing officer then proceeded to tax the respondent's solicitor-and-client bill. She struck a few items out and eventually, on December 10, 2004, taxed the account in the total sum of $14,448.24 ($12,382.50 in fees and the balance on disbursements and tax). This bill is the subject of the second appeal herein (which the parties referred to as the "solicitor-and-client taxation appeal").

[10] The parties raised numerous issues with respect to these appeals. I will address them in the context of each appeal.

The Party-and-Party Taxation Appeal:

(a) Notices of Appeal Out of Time:

[11] The respondent argued, as a preliminary point, that the Notices of Appeal for the November 3rd taxation were filed out of time and therefore they must be dismissed. Rule 693(1) provides that an appeal from a taxation must be brought no later than 15 days after receiving notice of a certification on taxation. In this case, in compliance with the directions of the presiding judge given in Chambers on July 9th, service of the taxed bills of costs was deemed effective as of November 22, 2004. The appeal period, therefore, expired on December 7. The Notices of Appeal were not filed until December 13. Further, respondent's counsel noted that no motion seeking an extension of time has been filed and that no evidence has been provided of an intention, exhibited before the expiry of the appeal period, to appeal.

[12] In response the appellant submitted that it did not receive actual notice of the taxed bills of costs until November 29th. But, this was contained as part of the reply brief filed on behalf of the appellant by its counsel. No properly admissible evidence was placed before me to substantiate this assertion.

[13] In any event, and notwithstanding the deficiencies in the procedure adopted by the appellant, I have decided to extend the time to appeal. Rule 713 allows any time limit in the Rules to be enlarged unless expressly provided otherwise. Considering the brief time that elapsed after the expiry of the appeal period in this case, and the fact that both parties were prepared to argue the appeals on their merits, I conclude that it would be in the interests of justice to extend the time to appeal.

(b) Standing to Appeal:

[14] The respondent also argued, as a preliminary point, that the appellant had no standing, or status, to appeal the taxation in at least one or two of these actions because of orders for security for costs that have not been complied with by the appellant. On December 14, 2004, another judge of this court issued orders requiring the appellant to post security for costs in action number CV-2001/164 and action number CV-2001/196. No security has been posted within the time provided and, therefore, all further steps in the proceedings are stayed and the actions stand dismissed. These provisions are mandatory in any order for security for costs, by

virtue of Rule 635(1), unless the order expressly provides otherwise. The one order that was placed before me, the one entered in action 164, contains these provisions with a time limit of one month from the date of granting of the order to furnish the security required.

[15] In my opinion, two factors militate against the strict application of the stay contained in the security for costs orders. First, the taxations took place prior to the orders being made. Second, the reference to “steps” in Rule 635(1) should be interpreted as steps that advance the action to trial (much like how the word is interpreted when used in Rule 327(1) (b) regarding delays in prosecution). These taxations, and these appeals, are almost akin to separate and discrete proceedings apart from the main action (much like a taxation and appeal therefrom after a trial has concluded). Therefore, I rule that the appellant, notwithstanding the provisions of any order for security for costs, has the requisite status to pursue these appeals.

(c) No Notice of Taxation:

[16] Appellant’s counsel submitted that Rule 671 mandates that notice of the taxation be served on the opposite party. No notice was given to the appellant respecting the taxation nor was it served with the proposed bills of costs. Therefore, argued counsel, the taxation is a nullity.

[17] Among the materials filed as the record for this appeal is a letter written by the local agent for respondent’s counsel to the taxing officer. That letter alerted the taxing officer to the fact that no one had appeared on behalf of Camillus at the July 9th Chambers hearing and therefore the respondent did not intend to proceed with the taxation on notice to Camillus. The letter continued as follows: “If you (referring to the taxing officer) feel that notice should be given, please provide us with a time for the taxation to take place and we will notify (Camillus) accordingly.” The taxing officer proceeded to tax the bills without notice to the appellant.

[18] Rule 677 provides that where a party against whom costs are to be taxed has not appeared in the proceeding, costs may be taxed on an *ex parte* basis. The word “proceeding” can only mean that proceeding where the costs were ordered. In this instance, that proceeding was the July 9th Chambers hearing. Thus the taxing officer had a discretion as to whether to proceed *ex parte* or to require that notice be given. I

cannot say, in this instance, that the taxing officer erred in principle in the exercise of that discretion. This ground of appeal fails .

(d) Travel Disbursements:

[19] The appellant submitted that the taxing officer erred in allowing the costs related to respondent's counsel travelling from Calgary to Yellowknife for the July 9th Chambers hearing. The presiding judge did not expressly say, as he did on October 29th, that travel expenses are to be included as costs. The appellant noted that a direction from the presiding judge is a requirement to allow recovery for these expenses.

[20] There have been numerous cases that have addressed this question of expenses for non -resident counsel: *Dennis v. The Commissioner of the Northwest Territories*, [1990] N.W.T.R. 97 (S.C.); *Shearing et al v. Fullowka et al*, [1998] N.W.T.J. No. 157 (S.C.); *Seeton et al v. Commercial Union Assurance et al*, [1999] N.W.T.J. No. 75 (S.C.); *MacNeil v. McLeod-Norris*, [2005] N.W.T.J. No. 8 (S.C.).

[21] Rule 648 (4) provides as follows:

> (4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable under subrule (3) only where, in the opinion of the Court,
>
> > (a) the expertise required to perform the particular service was not available from those solicitors resident in the territories; or
> >
> > (b) conflicts of interest prevented solicitors resident in the Territories from acting in the matter.

[22] This subrule makes reference to subrule (3). That subrule speaks specifically of travel expenses for counsel for attendance at pre-trial examinations. Notwithstanding that specific reference, the case law has recognized that the criteria set out in subrule (4) apply to all types of proceedings (including motions, trials and appeals). The governing principle is that some special circumstance must justify the retention of non-resident counsel if recovery for the additional costs occasioned thereby is sought from the other side. A litigant is entitled to retain whomever he or she wants but, in the absence of that special circumstance, the client is responsible for putting counsel at the place of the proceeding.

[23] In his letter of October 19th to the taxing officer, the agent for respondent's counsel made a point of justifying the disbursements for travel expenses. He noted the nature of the litigation, the need for expertise on the part of counsel, and the fact that respondent's counsel (Mr. Goodfellow) is a recognized expert in the field. On the hearing before me counsel reviewed the complexity of the litigation and the reasons why it was appropriate and necessary for him to attend the July 9th Chambers hearing in person.

[24] If I were the judge at first instance I may have ordered that these expenses be included as costs. This litigation could very well fit within the parameters of Rule 648(4). However, the difficulty I have is that this allowance was not directed by the judge who made the costs order. I am sure if it had been brought to his attention he would have given it careful consideration. But I am not he so I cannot presume what the result would have been if he had put his mind to it. And this is important because subrule (4) specifically requires that the "Court" be of the opinion that non-resident counsel was necessary.

[25] The Rules of Court define "Court" as the Supreme Court or a judge thereof. The term does not include an officer of the court, such as the clerk acting as a taxing officer. The Rules provide explicitly for the powers of the taxing officer but nowhere does it equate the taxing officer with "the Court" generally.

[26] In my opinion, if travel expenses of non-resident counsel are to be recovered as costs then that must be a specific direction by the judge who orders the costs. If such a claim is put forward at a taxation before a taxing officer, then the taxing officer should refer the issue to the Court, i.e., the judge who made the costs order, for direction. Therefore I have concluded that the taxing officer exceeded her jurisdiction in allowing these expenses. For these reasons, I allow the appeal to the extent that the disbursement items relating to air fare, hotel and meals, on each of the bills of costs, plus tax applied to those disbursements, are taxed off.

[27] I had considered whether I could or should exercise my own judgment with respect to these expenses. The difficulty is that I am acting in an appellate capacity here and Rule 695(1) limits my powers on an appeal from taxation to the exercise of the powers of a taxing officer and the review of any discretion by the taxing officer. The allowance of travel expenses under Rule 648(4) is neither of those. It is a matter

that should have been raised before the presiding judge who made the costs order in the first place.

(e) Appropriateness of Fee Items:

[28] The appellant raised issues respecting the appropriateness of the specific fee items allowed on the bills of costs.

[29] Counsel argued that Item 36(a), "simple opposed application", should have been reduced. It indeed ended up as being unopposed, due to respondent's failure to appear, but it was still an "opposed" application because it was one that had to be brought due to "opposition" from the respondent. It was not until counsel appeared in Chambers that he realized it was unopposed. The same preparation had to be put into it. Therefore this item was appropriate.

[30] The respondent complained about other fee items. I do not find merit in those arguments. In my opinion, the fee items were appropriate and applicable to these costs orders.

(f) Conclusion on Party-and-Party Bills:

[31] The appeal is allowed in part. Each bill of costs will be reduced by the sum of $394.85 (being the proportionate share of disbursements and tax on disbursements). This results in each bill of costs being confirmed in the sum of $1,273.30.

The Solicitor-and-Client Taxation Appeal:

(a) Refusal of Adjournment Request:

[32] On the date set for the taxation of the respondent's bill of costs, counsel, newly retained by Camillus, appeared and requested an adjournment. That request was denied.

[33] The decision to grant or deny an adjournment is a discretionary matter. Nothing has been submitted to me to demonstrate that the taxing officer exercised her discretion in an unprincipled manner. I see no merit in this ground of appeal.

[34] In any event, it appears that counsel stayed at the taxation and made some representations. This is evident from the correspondence sent by the taxing officer to Camillus' counsel, after the taxation, explaining what she did as a result of "concerns raised by you", obviously meaning concerns raised by counsel at the taxation.

(b) Standard to Assess Solicitor-and-Client Costs:

[35] The primary argument made by the appellant is that the taxing officer erred by simply accepting the fees charged by the solicitor to the client as the basis for the taxed costs. In other words, notwithstanding what the client is charged, the taxing officer's responsibility is to assess the bill on a standard of reasonableness. Appellant's counsel described the guiding principle in a taxation of solicitor-and-client costs, as between parties, as fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill, not the cost of the most experienced and highly qualified lawyer for that type of work: see *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), at paras. 27-28, affirmed on the costs issue at (1992), 73 B.C.L.R. (2d) 212 (C.A.), at 233. Appellant's counsel suggested that, on this basis, a reasonable fee for the October 29th Chambers hearing would be $1,000.00.

[36] The taxing officer was presented with a draft bill of costs itemizing by date and time spent each action taken by respondent's counsel relating to the October 29th Chambers hearing. It goes from July 17, 2004, when the appellant apparently first contacted Mr. Goodfellow's local agent regarding the July 9 orders, and ends on November 8, 2004, with a review of the accounts so as to calculate solicitor-and-client costs and preparation of the account. There is a total of 46.9 hours. Most of these hours were charged out at the rate of $300.00 per hour but a few were charged at a lesser rate since the total for fees was $12,382.50. The bill was prepared by examining time records for work done for the Village in relation to all the litigation files and then extracting those items related to the October 29 motion.

[37] Also before the taxing officer was a copy of the retainer agreement between the Village of Fort Simpson and Mr. Goodfellow. This is dated October 30, 2000, and provides for fees to be charged at $300.00 per hour on the basis of time actually spent (with a minimum of 1/5 of an hour). The fee is a flat fee chargeable by the number of hours spent on providing legal services regardless of result.

[38] Respondent's counsel took the position that, since Camillus had been ordered to pay solicitor-and-client costs, it, and the taxing officer, were bound by the terms of the retainer agreement. In my opinion, this is not a fully accurate statement of the law.

[39] There is no doubt that a solicitor and his or her client may make an agreement as to the amount and manner of payment for services provided by the solicitor. But such agreements may still be subject to an assessment by the court or a taxing officer. Rule 687(2) provides that a taxing officer shall allow costs payable under an agreement to the extent that they are fair and reasonable. In most instances one would expect that the terms of an agreement as to fees would be deemed reasonable. In the absence of an agreement, or some tariff, the solicitor's remuneration is fixed on a *quantum meruit* taking into consideration factors such as those outlined in Rule 653.

[40] There is, however, a distinction between solicitor-and-client costs as between party and party and solicitor-and-client costs as between a solicitor and the client. The two are not identical.

[41] The leading text on the subject, Orkin's *The Law of Costs* (2nd ed., 2004), offers numerous examples from the case law distinguishing between the two forms of solicitor-and-client costs (at section 103). The commonly accepted view is that solicitor-and-client costs as between party and party are intended to be complete indemnification for all costs (fees and disbursements) reasonably necessary for the proper presentation of the case. If the client instructs the solicitor to take certain steps which are not necessary for the case itself then the client is responsible for payment, not the opposite party. Hence, solicitor-and-client costs may approach complete indemnification for what the client actually pays but it does not necessarily do so. This is why there are cases that have distinguished on opposite party taxations between solicitor-and-client costs and solicitor-and-own-client costs: see, for example, *Guarantee Co. of North America v. Beasse* (1993), 139 A.R. 241 (Q.B.). The latter provides complete indemnification. The difference between the two is the extent and necessity of the cost. There is still a reasonableness standard applied to the assessment process for solicitor-and-client costs.

[42] The crux of the dispute here, of course, is the fact that the fee charged was $300.00 per hour. There was no evidence presented to me, nor apparently to the taxing officer, as to the usual "going rate" for a lawyer of Mr. Goodfellow's experience. I have stated before that Mr. Goodfellow is an acknowledged specialist in

the field of construction contract litigation. So, in my opinion, an hourly fee of $300.00 for his services is not in and of itself unreasonable. In addition, when one is considering this point, I think it is necessary to consider the complexity and difficulty of the case overall and the need for special expertise. I am satisfied that the respondent's decision to retain someone of Mr. Goodfellow's experience was a reasonable one. Furthermore, I think it is highly relevant that we are dealing here with a client that presumably has its own resources and expertise so as to make an informed decision as to whom it should retain.

[43] What are left for examination are the specific items the respondent sought to include in the bill of costs. Were those steps necessary for the proper presentation of the case?

[44] The taxing officer disallowed a few items from the draft bill. I see no reason to interfere with her decisions on those points. There are, however, two other points that I need to address.

[45] In my opinion, the proper starting point on this assessment is the filing and service of the appellant's motion which led to the October 29th Chambers hearing. While there may have been communications with the appellant prior to that, it is the filing of the formal motion that is the starting point of this "case".

[46] This accords with the view expressed in one of the leading cases on this point, *Magee v. Ottawa Board of Trustees* (1962), 32 D.L.R. (2d) 162 (Ont. H.C.J.), where McRuer C.J.H.C. said (at p. 166) that "solicitor-and-client costs awarded against an opposite party in an action are restricted to those costs incurred after the action was commenced." Or, as sometimes said, costs are "limited to the four corners of the proceeding": see *Holloway v. Holloway* (2001), 6 C.P.C. (5th) 34 (Nfld. C.A.), at para. 91. That "proceeding" for purposes of this costs order was the October 29th Chambers hearing.

[47] Disallowance of the items claimed prior to September 10, 2004, when the filed motion was first received, results in a deduction of $706.20 ($660.00 in fees and $46.20 in tax).

[48] The second point has to do with the claim for two items called "review of files to determine solicitor/client costs". A total of $1,400.00 in fees was charged for 8

hours of time spent on these items. Obviously someone else did the work since the hourly rate charged is $175.00, not Mr. Goodfellow's $300.00 per hour rate.

[49] While I recognize that some time would be needed to extract the time and fees to be allocated specifically to this bill, it seems to me, in this age of computerized record-keeping, that it should be done in far less time and at far less expense. I do not find these items reasonable since they are, in my opinion, inordinately high. For that reason I reduce the charges for these items to $600.00.

[50] Reduction for these two items results in a taxing off of a further $856.00 ($800.00 in fees and $56.00 in tax).

(c) Conclusion on Solicitor-and-Client Bill:

[51] The taxed solicitor-and client bill of costs will be reduced by $1,562.20 ($706.20 plus $856.00) to leave a final total of $12,886.04. In all other respects, the appeal is dismissed.

Costs:

[52] The appellant achieved some success on these appeals but, in the total context, it was relatively minor. The respondent will therefore recover costs for these appeals which I hereby fix in the total sum of $2,000.00 (all inclusive).

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT this 28th day of February, 2005.

Counsel for the Appellant: Robert A. Kasting
(Camillus Engineering Consultants Ltd.)

Counsel for the Respondent: W. Donald Goodfellow, Q.C.
(Village of Fort Simpson)