

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY WERNER

Appellant

- and -

THE HAY RIVER MOBILE HOME PARK

Respondent

MEMORANDUM OF JUDGMENT

[1] This memorandum sets forth the Court's determination of the costs consequences of the Court's dismissal of the within appeal.

[2] The parties to the within proceeding have been engaged in this and related litigation in excess of eleven years. It is essentially a landlord-tenant dispute. There were a series of applications made to the rental officer pursuant to the *Residential Tenancies Act*. The latest of the rental officer's decisions was made on March 12, 2005. In that decision the rental officer ordered the Respondent to pay to the Appellant compensation in the amount of \$1,738.23. On March 29, 2005 the Appellant filed in this Court an appeal of the rental officer's decision. No grounds of appeal were given in the notice of appeal. On March 30, 2005 the Respondent responded by filing its own appeal of the rental officer's decision. No grounds of appeal were given in the Respondent's notice of appeal (file CV2005-0094).

[3] The Appellant's appeal was heard on February 15, 2011 and decision was reserved. In Reasons for Judgment filed February 24, 2011, the Appellant's appeal was dismissed as being without merit, and costs of \$2,000.00 inclusive of disbursements, were awarded against the Appellant. The Reasons for Judgment,

reported at 2011 NWTSC 08, ought to be read in conjunction with this Memorandum.

[4] In a separate Memorandum of Judgment on file CV 2005-0094, the Respondent's cross appeal was also dismissed as being without merit. No costs were awarded to either side.

[5] No formal judgment has yet been entered in the within proceeding, following upon the filing of the Reasons for Judgment. The successful Respondent now seeks to vary the “costs” portion of the Court's decision, on the basis of an offer to settle which was made to the Appellant and not accepted by the Appellant. The Respondent relies upon Part 13 of the *Rules of Court*, and also the Court's general discretion with respect to costs.

[6] In these circumstances, I find that I am not *functus officio*, and retain jurisdiction to entertain the present application regarding costs, notwithstanding that I made an initial determination on costs in the Reasons for Judgment filed February 24, 2011. See *Peltier v. Peltier* 2008 SKCA 151.

[7] Eleven days before the hearing of the appeals, the Respondent made an offer to settle. The offer was made in writing and was essentially this: “we'll pay the \$1,738.23 ordered by the rental officer, and drop our appeal, if you drop your appeal.” The written offer concluded with these words “In the event that this offer is not accepted and, subsequently, a judgement is issued which is more favorable to our client, it is our intention to make costs submissions to the court pursuant to Part 13 of the Rules of the Supreme Court of the Northwest Territories.” (Emphasis added).

[8] The reader of the offer would understand from those words that:

- a) if the offer was not accepted and if the Supreme Court reduced the compensation award of \$1,738.23, the Respondent would seek enhanced costs, and, impliedly,
- b) if the offer was not accepted and if the Supreme Court did not reduce the compensation award, the Respondent would not be seeking enhanced costs.

The offer was not accepted by the Appellant. The two appeals were heard. In the result, this Court did not vary the compensation award. Yet, the Respondent is applying for enhanced costs under Rule 201, making its application somewhat incongruous with its offer.

[9] The Respondent relies on Subrule 201(2):

201 (2) Where a defendant makes an offer to settle at least 10 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if

- (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the plaintiff; and
- (b) the plaintiff obtains a judgement on terms as favourable as or less favourable than the terms of the offer to settle.

[10] I find that Subrule 201(2) is not, strictly speaking, applicable to the present circumstances. The Appellant here (though in the position of a “plaintiff”, the term used in the sub-rule) did not “obtain a judgement” in this Court. The situation contemplated by sub-rule 201(2) would see the “plaintiff” awarded party-party costs to the date of the offer, whereas here this Appellant cannot reasonably be entitled to any costs of an appeal proceeding that was without merit and completely unsuccessful.

[11] In exercising my general discretion on the matter of costs, I now take into consideration the additional information provided to the Court on this application, i.e., the fact of the offer to settle of February 4, 2011 and its non-acceptance by the Appellant.

[12] This additional information re-enforces my earlier decision that the Respondent landlord ought to have its costs of the within unsuccessful appeal, notwithstanding that I have ordered no costs to either side on the Respondent landlord's unsuccessful cross-appeal on file CV 2005-0094. The vast majority of the extensive materials filed, and submissions made, related to the Appellant Werner's within appeal rather than the landlord's cross-appeal. The Respondent landlord's cross-appeal on file CV 2005-0094 dealt with two narrow discrete issues raised for the first time in the landlord's pre-hearing Brief, and which were not

addressed by the Appellant Werner, as noted in the Memorandum of Judgment on file CV 2005-0094.

[13] The Appellant Werner received a fair and thorough hearing by the rental officer on his application for compensation. He was successful in obtaining a compensation award. The rental officer made no reviewable errors. Mr. Werner's within appeal had no merit, as detailed in the Reasons for Judgement herein.

[14] Taking into account all of the circumstances, including the additional information, I exercise my discretion by confirming my earlier decision, i.e., that the unsuccessful Appellant will pay the Respondent's costs in the fixed amount of \$2,000.00, inclusive of disbursements.

[15] There will be no costs to either party with respect to the present application.

J. E. Richard,
J.S.C.

Dated at Yellowknife, NT,
this 12th day of May, 2011

Counsel for the Appellant: Hugh Latimer

Counsel for the Respondent: Michael Hansen

S-1-CV 2005 000 090

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REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J. E. RICHARD
