

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGES INC.

Plaintiff

- and -

GILBERT JOHN MANTLA and DEBBIE JOAN FRANKI

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiff appeals, pursuant to Rule 693, the decision of the taxing officer to remove items from counsel's bill of costs on the basis that they were anticipatory costs as the services had not yet been performed, and anticipatory costs are not permitted pursuant to the *Rules of Court of the Supreme Court of the Northwest Territories*.

[2] The bill of costs was submitted on a foreclosure action which arose because of the Defendants' default on the mortgage issued by the Plaintiff. The Plaintiff argues that they are entitled to all of their solicitor/client costs pursuant to the terms of the mortgage and the Orders that were granted by this Court; and that there is nothing in the Rules that specifically prohibits the granting of anticipatory costs. As such, the costs which represent work that is required to complete the foreclosure process should not have been taxed off.

[3] The standard of review on an appeal from the decision of a taxing officer is that the taxation officer is owed a degree of deference. The decision of the taxing officer should not be interfered with unless there is an error of principle or the amount allowed was inordinately high or low: *Goodfellow v. Karl Mueller Construction Ltd.*, [1996] N.W.T.J. No 21. (S.C.); *Jorge et al. v. Williams & Co.*, 2002 NWTSC 29.

[4] Pursuant to Rule 694, the appeal is based upon the evidence which was before the taxing officer, although in some cases, additional evidence may be permitted to clarify the record. *Jorge et al., supra.*

[5] In this case, the Plaintiff has filed an affidavit of Margaret Marshall, the Office Manager for counsel for the Plaintiff. Her affidavit refers to the background of the taxation process as well as the usual practice of counsel for the Plaintiff. It also contains several exhibits. Two of the exhibits are Solicitor/Client Bills of Costs which were taxed on different files by other taxing officers. Two other exhibits refer to another foreclosure file and the decision on taxation by the same taxing officer as in this matter and the subsequent appeal decision (which was decided on another issue). While the materials are relevant to counsel for the Plaintiff's standard practice and what has been permitted by taxing officers over the past few years, it does not appear that any of these materials were before the taxing officer when she made her decision. As such, I have only considered those materials in Ms. Marshall's affidavit that were not before the taxing officer to the extent that they clarify the record and provide some background to counsel for the Plaintiff's standard practice in foreclosure matters.

[6] The history of these proceedings is straightforward. The Plaintiff filed a Statement of Claim on April 13, 2010 which stated that the Defendants agreed that in the event of default on the mortgage, the Plaintiff could:

Add to the Mortgage all costs and expenses incurred by the Plaintiff in that regard and in respect of any proceedings taken to realize the monies secured by the Mortgage, **including legal costs taxed as between solicitor and client...**
[Emphasis added]

[7] A copy of the mortgage is included as Exhibit "A" in the Affidavit of Default which was filed on January 27, 2012. Clause 23(f) of the additional terms and condition attached to and forming part of the mortgage states that in the event of foreclosure proceedings:

All of the expenses which we incur in enforcing any of our remedies are payable by you immediately when we require them. These expenses include our **legal fees on a solicitor and client basis...** [Emphasis added]

[8] The Defendants, despite being served, have not appeared at any of the previous two court appearances where an Order Nisi/Order for Sale and Order Confirming Sale and Vesting Order were granted to the Plaintiff.

[9] The Plaintiff obtained an Order Nisi/Order for Sale on March 2, 2012 which gave the Defendants 120 days to redeem their mortgage or the property would be

listed for sale. The Order Nisi/Order for Sale also stated that the Plaintiff was entitled to “its costs on a solicitor/client basis.”

[10] The Defendants did not redeem their mortgage and the property was listed for sale. An offer was received on the property and the Plaintiff obtained an Order Confirming Sale and Vesting Order on August 24, 2012 in which the offer to purchase the property was approved and distribution of the proceeds of the sale was ordered. In addition, the Order dealt with the Plaintiff’s costs as follows:

12. THAT the Plaintiff do recover from the Defendant costs of this action on a solicitor and client basis to be payable forthwith after taxation of them, to be added to the claim under the Mortgage and paid as set out above;
13. THAT the Plaintiff may tax its costs ex parte;

[11] Counsel for the Plaintiff submitted to the taxing officer a Memorandum of Solicitor/Client Costs dated December 8, 2012 containing \$14,915.00 in Fees, \$18,833.52 in Disbursements and \$1,280.22 in GST for a total of \$35,103.74.

[12] On December 19, 2012, the taxing officer taxed off three items totaling \$1,155.00 in Fees and reduced the total taxed costs to \$33,948.74. The items taxed off were:

12/08/12	Receive filed Memorandum of Solicitor/Client Costs; draft judgment materials; writ of execution; attend to filing of all; receive filed documents; complete Affidavit re: reporting on sale receipts/disbursements; file same; report to client	3.00 hours @ \$90.00 per hour	\$270.00
12/08/12	Review and complete documentation provided by assistant re: judgment, writ, registration with personal property registry, report to client	2.00 hours @ \$375 per hour	\$750
12/08/12	Complete supplemental claim to CMHC, report to client	1.50 hours @ \$90 per hour	\$135
		TOTAL	\$1155

[13] On the Memorandum of Solicitor/Client Costs, the notation made by the taxing officer stated “services have not been performed – making this anticipatory costs. No provision in the Rules allow for taxing this type of cost.”

[14] Pursuant to the terms of the mortgage, the Plaintiff is entitled to solicitor/client costs and the Orders issued by this Court reflect that. The issue is whether the Plaintiff can claim for services which have not yet been performed.

[15] Counsel for the Plaintiff argued that once the taxation on a foreclosure matter is completed, the Plaintiff must still complete a number of steps. They include applying for final judgment, filing a report on the conduct of the sale pursuant to Rule 586, filing the writ of execution, reporting to the client, and completing a supplemental claim to the Canadian Mortgage and Housing Corporation. Essentially, the items which were removed from the bill of costs by the taxing officer. The Plaintiff argues that these are required steps for which the Plaintiff incurs costs that should, pursuant to the terms of the mortgage, be reimbursed.

[16] There is nothing in the Rules which specifically permits or prohibits the awarding of costs for anticipatory services. However, in considering the language used in the Rules respecting costs, the references to compensation for services are in the past tense. For example, Rule 686 states:

- (1) A bill of costs shall contain a reasonable statement or description of the services rendered, showing the charge or charges for the services and a detailed statement of the disbursements.
- (2) The taxing officer may order further details of the services and charges in a bill of costs, including the work done, time spent, moneys collected and expended and any other information that the taxing officer requires for a complete understanding of the bill. [Emphasis added]

[17] In addition, Rules 653 and 654 refer to a solicitor's compensation for services "performed." The use of the past tense indicates that the Rules contemplate that solicitors are to be compensated based upon the work that they have done and not work which has yet to be completed.

[18] This issue has not frequently arisen in caselaw but there has been some support for the idea that taxation of costs is based upon services performed. In *Flexlume Sign Co. Ltd. v. Globe Securities Co.*, [1918] O.J. No 31 at para. 8, the court was considering a different issue, but stated the proposition that:

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...

See also *Uram v. Uram*, [1985] B.C.J. No. 2693 (S.C.) at para. 22.

[19] In the circumstances, there is nothing which suggests that the taxing officer made an error in principle in taxing off the three items as being anticipatory in nature. The wording of the Rules and caselaw supports the notion that taxation of costs should be for services which have actually been performed and not anticipatory costs. There may be other options for later recovering these costs which were referred to in argument by the Plaintiff's counsel. The option which is most appropriate will depend upon the circumstances of the foreclosure action and how counsel for the mortgagee chooses to conduct the file.

[20] For these reasons, the appeal is dismissed.

S.H. Smallwood
J.S.C.

Dated in Yellowknife, NT this
4th day of July, 2013

Counsel for the Plaintiff: Austin F. Marshall
No one appeared on behalf of the Defendants

S-1-CV-201000060

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

CIBC MORTGAGES INC.

Plaintiff

- and -

GILBERT JOHN MANTLA and
DEBBIE JOAN FRANKI

Defendants

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
