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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PAUL'S AIRCRAFT SERVICES LTD.

Plaintiff

- and -

KENN BOREK AIR LTD.

Defendant

Corrected judgment: A corrigendum was issued on December 10, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT AS TO COSTS

A) INTRODUCTION

[1] In this action, Paul's Aircraft Services Ltd (PAS) is suing Kenn Borek Air Ltd (KBA) over unpaid rent pursuant to an aircraft lease agreement. PAS filed an application seeking an order for summary judgment. On September 13, 2012, I dismissed that Application. *Paul's Aircraft Services Ltd.* v. *Kenn Borek Air Ltd.*, 2012 NWTSC 69. The parties were given an opportunity to present submissions as to costs of the motion, and they have done so. This Memorandum deals with that issue.

[2] KBA seeks solicitor client costs, and asks that they be payable forthwith. PAS's position is that costs should be limited to those provided for in the Tariff set out at Schedule A of the *Rules of the Supreme Court of the Northwest Territories* (the *Rules*); PAS also says that costs should be in the cause.

B) ANALYSIS

[3] Costs are a discretionary matter. Part 50 of the *Rules* sets out general parameters designed to guide the exercise of that discretion.

[4] Generally, the successful party in an action is entitled to costs on a party-and-party basis. Those costs, calculated in accordance with Schedule A of the *Rules*, are intended to provide partial financial indemnification to the successful party for its legal costs arising from the proceedings.

[5] Rule 649 provides that costs of interlocutory matter are, absent an order to the contrary, costs in the cause and are to be taxed on the same scale as the general costs of the action.

[6] In addition to the general parameters set out at Part 50, other provisions in the *Rules* deal with costs in particular contexts. Rule 180 applies specifically to summary judgment applications:

> 180. (1) Subject to subrule (2), where the applicant obtains no relief on an application for summary judgment, the Court may fix the respondent's costs on the application on a solicitor and client basis and order the applicant to pay the costs without delay.
>
> (2) The Court may decline to fix and order costs under subrule (1) where it is satisfied that the making of an application, although unsuccessful, was nevertheless reasonable.
>
> (3) Where it appears to the Court that a party to an application for summary judgment has acted in bad faith or primarily for the purpose of delay, the Court shall fix the costs of the application on a solicitor and client basis and order the party to pay them without delay.

[7] Generally speaking, awarding costs on a solicitor-client basis is not the norm. It is an exceptional measure, usually reserved for situations where one of the parties has displayed reprehensible conduct which is found to be deserving of the court's sanction. *Young* v. *Young*, [1992] 4 S.C.R. 3.

[8] Rule 180 is consistent with that general principle. Its purpose is to discourage speculative and frivolous applications. *Norn Estate* v. *Stanton Regional Hospital* [1998] N.W.T.J. No.121 (SC)

[9] KBA says that Rule 180 is engaged here because the evidence PAS provided in support of its motion was "incomplete and evasive", particularly in relation to the discussions that took place about waiver of the rent for February 2010. KBA argues that this shows that PAS acted in bad faith or unreasonably on this application.

[10] The affidavit filed by PAS in support of the motion was Paul Rosset's, PAS's principal. In that affidavit Mr. Rosset deposes that he had discussions with Sean Louttit, a KBA official, about waiving the rent for the month of February 2010, but that nothing was ever reduced to writing following this discussion.

[11] KBA's claim is that in that conversation, Mr. Rosset actually agreed to waive the February rent, and that Mr. Rosset's failure to say so in the affidavit shows a lack of transparency. KBA says that this conduct should be sanctioned by the Court.

[12] KBA correctly asserts that in a summary judgment application, the parties are obliged to ensure that a complete evidentiary record is presented to the judge hearing the motion. *Kila Enterprise Ltd.* v. *Northwest Territories Commissioner*, [2011] N.W.T.J. No.46 (S.C.), para. 9.

[13] But the completeness of the evidentiary record cannot be examined in a vacuum. It must be examined in light of the issues to be litigated, as revealed by the pleadings. Here, KBA's defence is that it owes nothing to PAS because of certain verbal agreements between the parties. PAS's position is that the parole evidence rule makes any such verbal agreements irrelevant, given the terms of the lease. That being so, I do not see the lack of details in Mr. Rosset's affidavit as an indication of bad faith on PAS's part.

[14] Given that conclusion, and there being no suggestion that PAS brought its application primarily to delay proceedings, Subrule 180(3) is not engaged.

[15] Subrules 180(1) and (2) provide that solicitor-client costs can also be ordered against an unsuccessful applicant on a summary judgment application if the application was unreasonably brought. That decision is a discretionary one. *Igloo Specialties Ltd.* v. *Royal Oak Mines Inc.*, [1998] N.W.T.J. No.96 (S.C.).

[16] The summary judgment application was based on the strict terms of the lease, and on PAS's interpretation of the effect of the parole evidence rule. In dismissing the application, I decided that this was an issue best left to be decided at trial. That is not the same as to say that the application was unreasonably brought.

[17] I do not consider this issue to be clear cut either way. The interpretation of the effect of the parole evidence rule has evolved over the years and this is not an issue that all courts have approached exactly the same way, as shown by the cases referred to by the parties on the application.

[18] On the whole, I am of the view that this application was not the type of unreasonable or dilatory application that Rule 180 was intended to deter. I do not think it should give rise to costs being assessed on a solicitor-client basis, or to an order for costs payable forthwith, against PAS.

[19] Having addressed KBA's claims about PAS's conduct of this matter, I think it is important for me to also address the submissions made by PAS calling into question KBA's conduct of the matter.

[20] PAS submits that KBA was late in filing its evidence in response to the motion, and appears to suggest that it did so to take advantage of Mr. Rosset's accidental death in July 2012.

[21] I find it difficult to see how KBA filing its affidavits after Mr. Rosset's death gave it any advantage on this application. The Statement of Defence filed by KBA many months before Mr. Rosset's death made it clear that KBA's defence was that Mr. Rosset had waived certain terms of the lease. At the time Mr. Rosset swore the affidavit in support of the motion, PAS was well aware of what KBA's defence to the action would be. The nature of the defence set out in the affidavits filed by KBA after Mr. Rosset's death is the same as what emerged from pleadings filed well before his death.

[22] PAS also suggests that KBA did not comply with filing requirements set out in a Practice Direction, "Obtaining Special Chambers Date", dated December 14, 2005.

[23] The Practice Direction sets out what counsel should do in order to obtain a Special Chambers date on an existing motion. One of the requirements set out

in that Practice Direction is that counsel complete their exchange of affidavits before seeking a Special Chambers date.

[24] Here, the Special Chambers date was not sought after the motion had already been filed. The parties determined from the outset that the matter would require a Special Chambers hearing, and secured a hearing date before the Notice of Motion was even filed. In those circumstances, the Practice Direction did not apply.

[25] It is, of course, desirable that affidavit materials for a Special Chambers hearing be filed in advance. Rule 391.1, one of the new Rules that came into effect on November 1, 2012, now sets out time lines to ensure that this takes place. But at the time this matter proceeded, there was no special requirement for advance filing of affidavits when a Notice of Motion was returnable directly to a Special Chambers date. The only filing requirement was the one applicable to motions generally, that affidavits be filed no more than 3 clear days before the return date of the motion (Rule 383). KBA complied with that Rule, and in fact, sent unfiled copies of the sworn affidavits to PAS's counsel a week in advance of the hearing.

[26] In any event, if PAS felt prejudiced in any way by the timing of the filing of KBA's evidence on this application, it could have sought an adjournment of the hearing. It did not do so.

[27] For those reasons, I find nothing reprehensible in KBA's conduct on the summary judgment application.

[28] Having concluded that there should not be an order for solicitor-client costs against either party with respect to the summary judgment application, the remaining issue is whether another type of costs order should be made. That issue could be resolved in a variety of ways: costs of the could be in the cause, as suggested by PAS; they could be granted to KBA in any event of the cause, because it succeeded in defeating the motion; or it could be that each party bears its costs of the motion. I have concluded that this is an issue best left in the discretion of the judge who will hear the trial.

[29] As the judge who heard the summary judgment application, I was in the best position to decide whether solicitor-client costs should be ordered pursuant to Rule 180. But the judge who will preside over the trial, hear the evidence, make findings

of fact, and decide the effect of the parole evidence rule on those facts, will in my view be in the best position to assess the issue of costs on the matter as a whole.

[30] Moreover, having costs decided at the conclusion of these proceedings will give the parties an opportunity to adjust their submissions to address the recent amendments to the *Rules of Court.* The amendments, among other things, made significant changes to Schedule A. This Court has recently decided that the new Tariff would generally apply to costs issues decided once it is in force. *WCB v. Mercer et al; and Mercer v. WCB*, 2012 NWTSC 78, at para.24. As counsel's written submissions on party-and-party costs were made on the basis of the old Rules, they should have an opportunity to address how these changes affect their respective positions.

C) CONCLUSION

[31] For those reasons,

1. I decline to make an order for solicitor-client costs against either party pursuant to Rule 180;

2. all other aspects of costs of the summary judgment application will be left to the discretion of the trial judge.

"L.A. Charbonneau"

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
7th day of December, 2012

Counsel for the Plaintiff: Lisa Semenchuk
Counsel for the Defendant: Naomi Nind

Corrigendum of the Memorandum of Judgment as to Costs

of

The Honourable Justice L.A. Charbonneau

1. Errors occurred in Paragraphs 22 and 23. The Practice Direction referred to in paragraph 22 has not been repealed. Paragraph 22 and 23 read:

> [22] PAS also suggests that KBA did not comply with filing requirements set out in a Practice Direction that was in force the time this matter proceeded. This Practice Direction, "Obtaining Special Chambers Date", has since been repealed following amendments to the Rules that came into effect on November 1, 2012.
>
> [23] The Practice Direction set out what counsel should do in order to obtain a Special Chambers date on an existing motion. One of the requirements set out in that Practice Direction was that counsel complete their exchange of affidavits before seeking a Special Chambers date.

Paragraphs 22 and 23 have been corrected to read:

> **[22] PAS also suggest that KBA did not comply with filing requirements set out in a Practice Direction, "Obtaining Special Chambers Date", dated December 14, 2005.**
>
> **[23] The Practice Direction sets out what counsel should do in order to obtain a Special Chambers date on an existing motion. One of the requirements set out in that Practice Direction is that counsel complete their exchange of affidavits before seeking a Special Chambers date.**

2. The citation has been amended to read:

> Citation: *Paul's Aircraft Services* v. *Kenn Borek Air Ltd*., 2012 NWTSC 85.cor1

S-1-CV-2011000096

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HONOURABLE JUSTICE L.A. CHARBONNEAU
