SUPREME COURT OF YUKON

Citation: *M.P.T.* v. *R.W.T.,* 2010 YKSC 06 Date: 20100129
Docket S.C. No.: 06-D3924
Registry: Whitehorse

BETWEEN:

M.P.T.

Plaintiff

AND:

R.W.T.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
M.P.T. Appearing on her own behalf
R.W.T. Appearing on his own behalf

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an appointment by R.W.T. for an assessment of special costs, which were awarded by me in my decision dated December 8, 2008, cited at *M.P.T* v. *R.W.T,* 2008 YKSC 94. My reasons for making that order are set out at para. 40, and they also have a bearing on the decision that I am making today.

[2] The appointment was originally filed by R.W.T. on December 7, 2009. It was duly served on M.P.T. and the original appointment date was December 21, 2009. I am informed that R.W.T. appeared on that day ready to proceed, but that M.P.T. sought an adjournment in order to retain counsel. M.P.T. informs me that she made an effort to retain counsel, but the lawyer that she spoke to was not able to attend with her today,

and therefore she is appearing on her own behalf, as is R.W.T. While I am somewhat sympathetic to that problem, at some point one has to say enough is enough, and we have to get on with this. If M.P.T. was genuinely interested in retaining counsel, I am confident that any lawyer retained by her could have contacted R.W.T., would have assisted her in filing any materials in response, and may well have been able to procure a further adjournment. But, none of that was done. No materials have been filed by M.P.T. in response to the appointment and I agree with R.W.T. that the time has come to get on with this.

[3] I said earlier that my previous reasons on the main application pertain to this appointment. There I noted M.P.T.'s lack of response to correspondence from R.W.T.'s counsel, and her inaction in dealing with Maintenance Enforcement, which resulted in R.W.T.'s wages being garnisheed on four occasions between September 29 and November 12, 2008. None of that would have been necessary had M.P.T. acted with due diligence and in a timely manner. So, I am proceeding with the appointment without further delay.

[4] The law in this area is relatively straightforward. I am going to quote from certain annotations in *British Columbia Annual Practice*, *2010*, at pp. 414-415, to save time:

> "Special costs are intended to 'resemble closely' the reasonable fees charged by a lawyer to his or her own client."

Lee v. *Richmond Hospital Society*, [2005] B.C.J. No. 384.

> "Special costs enable the court to indemnify a party, where appropriate, fully, or at least substantially, for the costs to which the party has been put."

Every Woman's Health Centre Society v. *Bridges,* [1990] B.C.J. No. 2859.

> "They are intended to provide indemnity for all legal expenses reasonably incurred."

Campbell River Woodworkers' and Builders' Supply (1966) Ltd. v. *British Columbia* (*Minister of Transportation and Highways*) (2004), 22 B.C.L.R. (4th) 210, at para's 13 and 17.

> "[Special costs] are the fees that a reasonable client would have to pay to a reasonably competent solicitor to do the work for which the costs are claimed."

Bradshaw Construction Ltd. v. *Bank of Nova Scotia*, [1991] B.C.J. No. 540.

[5] In support of this appointment, R.W.T. has provided letters from his counsel, Ms. Brobby. The first is dated September 28, 2008, and attaches a statement of account, which deals with professional services rendered from July 7, 2008 (which incidentally was the date on which the older child, B., moved in with R.W.T.) and goes to and including September 24, 2008. The next account is covered by a letter dated November 23, 2008, and deals with professional services from September 29, 2008 to and including November 23, 2008. The total amount of those accounts, for fees and disbursements (the disbursements are relatively minor charges, mostly for photocopying) is $6,251.17.

[6] Now, R.W.T. advises me that there was a further account from Ms. Brobby after the one dated November 23, 2008, which dealt with some issues regarding the finalizing of the terms of the order. However, that is not before me and it is not something that I can grant him any relief for, although I can take it into account.

[7] Another point to keep in mind is that when R.W.T. appeared on December 21, 2009, he was ready to proceed. However, an adjournment was granted at the request of M.P.T. and the presiding clerk awarded R.W.T. his costs for that appearance.

[8] I note from the statements of account that Ms. Brobby has been relatively thorough in setting out the actual number of minutes that she spent on the file for the various services that were provided. They range from as little as five minutes up to an hour and more. In that respect, her format for drafting these statements of account is somewhat different from what is otherwise commonly seen in the profession, where lawyers will charge for work done up to the nearest tenth of an hour, by rounding up. Whereas, Ms. Brobby seems to have been more specific in terms of billing on the basis of actual time spent, rather than rounding up to the nearest one-tenth of an hour.

[9] The main point raised by M.P.T. in response to this material is that she is not confident that all of the line items in each of the statements of account actually relate to the matter which I decided in December 2008, and that she would need further information and further particulars about some of these line items to satisfy herself in that regard. That would require R.W.T. to go back to his counsel and provide perhaps copies of notes, perhaps copies of correspondence, perhaps e-mails, and so on, which would be a waiver of his solicitor-client privilege. On that point, I was able to locate the case of *Denovan* v. *Lee*, (1991) 16 R.P.R. (2d) 292 (B.C.S.C.), and the annotation for that case in *British Columbia Annual Practice*, *2010*, at p. 427 says:

> "If parties entitled to special costs decide to pursue their special costs claims, they must disclose their lawyers' "work product", their instructions to the lawyers and the lawyers' opinions.

> Special costs claimants cannot claim solicitor-client privilege over *anything that might be relevant* to the assessing officer's determination of what costs should be allowed.
>
> "*All documents relevant* to the assessing officer's determination must be made available to the party liable to pay the costs so that that party can properly prepare for the assessment." (my emphasis)

[10] I note here that there was no prior request from M.P.T., or anyone on her behalf, for particular documents to be produced in order for her to satisfy herself that these accounts all related to the matter before the Court. That is a factor to take into account. Also, I take into account that M.P.T. was previously found by me to have been less than diligent and less than timely in her responses to R.W.T.'s counsel and in her dealings with Maintenance Enforcement. She has also failed to produce or file anything in response to the notice of appointment before me. So, notwithstanding that she has *prima facie* right to seek the production of documents to satisfy herself, as I have indicated, in my view there has been no demonstration of any good faith in that regard and that for me to do so would result in further delay and would be essentially a fishing expedition.

[11] Further, I am entitled in this situation, as the presiding judge, to assess the special costs which I have ordered, and in doing so I can assess the fee component of special costs simply by considering the pleadings, the filed affidavits and my own reasons for judgment: see *Law Society of British Columbia* v. *Hanson,* [2004] B.C.J. No. 1233. Thus, the further particulars sought by M.P.T. are not "relevant" to my assessment, in that they are not necessary for me to decide on the issue.

[12] Finally, I would note that in the case of *Property and Reversionary Investment Corporation* v. *Secretary of State for the Environment*, (1975) Costs L.R. (Core Vol.) 54 at pp. 58 and 61 (Q.B.), assessing costs is referred to as:

> "… an exercise in balanced judgment - not an arithmetic calculation." An assessment is a "value judgment, based on discretion and experience."

In my experience, both as a lawyer and as a judge, it is rare that a lawyer will include anything in a statement of account that does not specifically relate to the matter for which the file was opened. So, the suggestion by M.P.T. that some of these entries may not specifically relate to the matter before me is on thin ground to begin with.

[13] Rather, I am satisfied that I can infer that all of the entries in the statements of account were proper and necessary for Ms. Brobby's representation of R.W.T. in the very matter that I decided. The fact that she has recorded her entries down to the minute also indicates to me that there was a reasonable recording of the time and I am satisfied that the statements of account reflect the fees that a reasonable client would have to pay a reasonably competent solicitor to do the work for which the costs are claimed.

[14] I also take into account that R.W.T. has other fees that he has paid to Ms. Brobby, which he is not able to seek reimbursement for because the documentation is not properly before me, and the fact that he was awarded costs on the last appearance on this appointment, on December 21, 2009, which he may or may not seek to be reimbursed for.

[15] So in all of the circumstances, I am prepared to make an order for special costs in the total amount of $6,251.17, and I will ask the parties whether you want me to put a deadline on payment of those costs. R.W.T.?

[16] R.W.T.: Yeah, I would like a deadline. I don't think she can come up with the money right away, but maybe we could put into the payment, like she's doing with -- remember she had to pay the $300 extra for the money that I over-paid her through maintenance. Maybe we can do something like that. Maybe boost it up to $500 a month or something like that, until she pays it all back.

[17] THE COURT: M.P.T., what is your proposal?

[18] M.P.T.: I brought with me my financial statement, and what I can afford to pay would be the current rate of $300 per month. I've got $405.29 left on the previous order and the next payment is due on February 1st, and I can continue making those $300 payments until I'm in a better financial situation.

[19] THE COURT: Are you paying that directly to R.W.T. or through Maintenance Enforcement?

[20] M.P.T.: Direct.

[21] THE COURT: Okay. So you are saying that once that balance is paid off you can continue to make the $300 payments?

[22] M.P.T.: Yes.

[23] THE COURT: All right. Well, that is what I am going to order, that once you have paid off what you owe for the arrears that you continue to make payments to R.W.T. in the amount of $300 towards the eventual full re-payment of these special costs. That is part of my order, okay?

[24] R.W.T.: Yeah.

[25] THE COURT: Any other questions?

[26] R.W.T.: No.

[27] M.P.T.: So in March I would have to give him $150 and then in additional just to make up to the $300?

[28] THE COURT: Yes.

[29] M.P.T.: Okay.

[30] THE COURT: Okay, thank you.

[31] R.W.T.: Thank you, Your Honour.

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GOWER, J.