Court of Queen's Bench of Alberta

Citation: Kent v MacDonald, 2021 ABQB 953

Date: 20211130
Docket: 1203 05416
Registry: Edmonton

Between:

Edward Kent and Teresa Tomsky

Plaintiffs

- and -

Patrick MacDonald, Rhonda Mae McEachen and Lance White

Defendants

Memorandum of Decision
of the
Honourable Justice A. Loparco

I. Background

[1] In June 2010, Edward Kent and Teresa Tomsky (the Buyers) purchased a residential home from Patrick MacDonald and Rhonda McEachen (the Sellers). The Sellers retained Lance White, a structural engineer, to provide an opinion on the structural integrity of the home. The Buyers sued Mr. White and the Sellers for damages caused by defects in the home.

[2] On August 28, 2019, I found Mr. White and the Sellers jointly and severally liable for the Plaintiffs' damages through negligent misrepresentation and breach of contractual warranty, respectively. Damages were set at $113,064.71, with fault apportioned 75% to Mr. White, 25% to the Sellers: ***Kent v MacDonald***, 2019 ABQB 669 [***Trial Judgment***].

[3] I awarded the costs, disbursements and other charges set out in the Plaintiffs' Bill of Costs jointly and severally against the Defendants, apportioned in the same manner (subject to some exceptions) as the ***Trial Judgment***. I declined the Plaintiffs' request for double costs: ***Kent v MacDonald,*** 2020 ABQB 29 [***Trial Decision on Costs***].

[4] On appeal, Mr. White was held 100% liable: ***Kent v MacDonald***, 2021 ABCA 196 [***Appeal Decision***].

[5] Further to this, the Court of Appeal issued a subsequent decision on costs: ***Kent v MacDonald***, 2021 ABCA 274 [***Appeal Decision on Costs***].

[6] The Sellers set a date for an appearance before me on September 7, 2021 seeking to revisit the ***Trial Decision on Costs***. I advised counsel that my office may be *functus officio* and I asked for written submissions on the issue. The parties subsequently asked that I hold off on rendering a decision as it would be seeking clarification from the Court of Appeal on its ***Appeal Decision on Costs***.

[7] In a letter dated October 12, 2021, the Deputy Registrar of the Court of Appeal stated that the Court "will not be delivering a further costs decision in these matters."

[8] This is my decision on whether the Sellers are entitled to revisit the ***Trial Decision on Costs*** before me.

II. Brief Conclusion

[9] I conclude that this Court is *functus officio* with respect to this matter. Any arguments the Sellers had ought to have been fully advanced before the Court of Appeal in the interest of finality and efficiency.

[10] After issuing my ***Trial Decision on Costs*** decision, an Order was entered on the judgment roll pursuant to Rule 9.2(2)(c) on February 24, 2020. This terminated my dealings in the case. I did not retain any jurisdiction to re-visit costs.

[11] Moreover, the Court of Appeal expressly turned its mind to address the trial costs and entered its decision in this matter without retaining jurisdiction to revisit this issue or remitting the decision back to me.

[12] The exceptions to the *functus officio* doctrine, relied upon by the Sellers, are not applicable in this case.

III. Court of Appeal Ruling on Costs

[13] It is clear that the issue of costs of the Queen's Bench trial was squarely before the Court of Appeal (***Appeal Decision on Costs*** paras 2-3):

> 1 because only a portion of the judgment below was allowed, **how should the costs arising from the Court of Queen's Bench action be reallocated, if at all**?
>
> 2 on appeal, what costs should be awarded to Edward Kent and Teresa Tomsky in successfully defending the appeal of Mr White?
>
> 3 on appeal, what costs should be awarded to Mr MacDonald and Ms McEachen in their successful appeal against Mr Kent and Ms Tomsky?
>
> Under r 14.88(2) of the Alberta Rules of Court, AR 124/2010 as amended, Part 10 of the trial rules is applicable to appeals. Under r 10.31 of Part 10, the Court has **broad discretion to award costs as between parties**. We conclude this is an

> appropriate circumstance to address costs between these parties. [*emphasis added*].

[14] The Court of Appeal addressed the first issue- Costs in the Court of Queen's Bench - under heading I:

> [5] This Court does not interfere with the discretionary decision of the trial judge on costs, except that because Mr MacDonald and Ms McEachen were successful on appeal, they are relieved from payment of their 25% of the Queen's Bench costs to Mr Kent and Ms Tomsky. That leaves Mr White responsible for payment of those costs, it having been determined that the award below was joint and several, except with respect to the "review of opposite party documents" for which Mr White will only be responsible with respect to his documents.

[15] In their submissions before the Court of Appeal, the Buyers sought a *Bullock* or a *Sanderson* order in respect of the trial costs. The Sellers argue that they did not specifically address the trial costs in their submissions.

[16] In the ***Appeal Decision on Costs***, Mr White was ordered to pay the Plaintiffs $7,760 plus reasonable disbursements. The Sellers argued their costs should be doubled as a result of a common law *Calderbank* offer payable ultimately by Mr White further to a *Bullock* or a *Sanderson* order. The Court of Appeal declined to double the costs or order a *Bullock* or *Sanderson* order. In the result, the Buyers were ordered to pay the Sellers $6,475 plus reasonable disbursements, without contribution from Mr White.

[17] Despite the Appeal Decision on Costs, the Sellers submit that they are entitled to double costs arising from the trial based on an offer that was made in August 2020.

IV. Doctrine of *functus officio*

[18] The principle of *functus officio* is explained in ***Laird v (Alberta) Maintenance Enforcement***, ABQB 2020 508 at paras 38, , citing ***Doucet-Boudreau v Nova Scotia (Minister of Education),*** 2003 SCC 62 at para 79:

> ... It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal ... This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. ...[*Citation omitted*]

See also ***JRB's Welding Services Inc. v Family Division***, 2021 ABQB 52 at para 9.

[19] This general principle of law applies whether the judgment in question relates to the trial decision or the related costs decision, unless there is an exception that applies, authority is retained, or the matter is expressly remitted back to the trial judge.

[20] The jurisdiction of the Court is exhausted when a decision is drawn up and entered, except in two cases: where there has been a slip, or mistake, in drawing it up, or where there has been an error in expressing the manifest intention of the court: ***Paper Machinery Ltd. V J.O. Ross Engineering Corp.***, [1934] SCR 186.

[21] In ***Fas Gas Oil Ltd v JH Automotive Ltd***, 2004 ABCA 120, the Court stated (at para 19):

> **As a general rule a court has no power, even with the consent of all affected parties, to set aside or vary a final judgment or order after it has been drawn up, signed by or on behalf of the court and entered**. The court is *functus officio.* There are exceptions. A court has inherent jurisdiction at common law to vary a final judgment or order after it has been signed and entered in two situations: (1) where there has been a clerical mistake in drawing it up; and (2) where there has been error in expressing the manifest intention of the court [*emphasis added*].

[22] In ***R v Villeda***, 2010 ABCA 410 [***Villeda***], the Court notes the difference between the entry of a judgment and the giving of reasons. Adopting the Ontario Court of Appeal in ***R v Rhingo*** (1997), 1997 CanLII 418 (ON CA), 115 CCC (3d) 89, the decision notes that the Court is *functus officio* on the entry of the judgment, not at the time reasons are issued: ***Villeda*** at para 8.

V. Exceptions to the doctrine of *Functus Officio*

[23] The *Alberta Rules of Court*, Alta Reg 124/2010, contemplate several circumstances which may be considered a narrow exception to the rule of *functus officio*. I review them below for completeness, but I conclude that none of them are applicable in this matter.

[24] Rule 9.12 allows the Court to correct a mistake or error in a judgment arising from an accident, slip or omission. This is not relevant in this case, as the issue argued by the Sellers is not an error arising from an accident in drafting the entered decision.

[25] Rule 9.13 allows the Court to vary a judgment before the judgment is entered. This Rule does not apply as the Order has been entered.

[26] Rule 10.30(1)(c) allows the Court to make a costs award even *after* judgment or a final order has been entered on the substantive issues in dispute. Rule 10.30 allows courts to speak to costs after formal judgment on the substantive issues is entered. It does not create a route for courts to repeatedly revisit costs after a cost decision has been entered.

[27] The decisions that rely upon Rule 10.30 as an exception to the *functus* principle when it comes to costs, deal with facts in which the court had not made any determination on costs in the initial decision. Rule 10.30 allows the Court to assess costs and issue an award after a decision is made; it does not allow for costs to be revisited repeatedly or varied.

[28] In ***Woodbridge Homes Inc v Andrews***, 2019 ABQB 968, cited by the Sellers, Mandziuk J issued a Memorandum of Decision with respect to the substantive issues in a matter. An application was subsequently made to have costs addressed in light of an offer that was made without the Court's knowledge when the Trial Decision was rendered, and *prior* to entry of the judgment: at para 26.

[29] Mandziuk J relied on Rule 9.13 and the fact that formal judgment had not yet been entered to conclude that he was not *functus* in that case.

[30] In addition, he pointed to ***Saskatchewan Power Corporation v Alberta (Utilities Commission)***, 2015 ABCA 281 [***Saskatchewan Power***] and the Court's application of Rule 10.30(1)(c) that there is an exception to the *functus officio* doctrine where costs are involved.

[31] ***Saskatchewan Power*** also cited several cases in support of this point***: RC International Ltd v Brooks***, 2000 ABCA 270 [***RC International***]; ***Firemaster Oilfield Services Ltd v Safety Boss (Canada) Ltd***, 2002 ABCA 96 [***Firemaster***]; ***Walton v Alberta (Securities Commission),*** 2014 ABCA 446 [***Walton***]. All four of these cases deal with facts in which a formal judgment was entered on the substantive issues, but no decision was made with regards to costs. The Rule allowed the Court to make a costs award after entering formal judgment on the substantive issues.

[32] In ***Saskatchewan Power***, the appeals were dismissed. The reasons were dated June 3, 2015 and were silent on the issue of costs. The judgment roll was filed on July 7, 2015. Nonetheless, the Court noted Rule 10.30 to find that an exception to the *functus officio* doctrine exists when the issue concerns costs: at para 10.

[33] In ***RC International***, the decision considered the Court's power to order costs after entering formal judgment on the substantive issues only. The Court held that the Court is not *functus* with regards to costs, even after the formal judgment is entered.

[34] In ***Firemaster***, the Court reiterates that a judge is not rendered functus with regards to costs by entering a formal judgment on the issues.

[35] ***Walton*** uses somewhat ambiguous language in a brief statement that Rule 10.30 confirms that "costs can be spoken to any time": at para 4. Based on the context of that statement and the consistent application of this Rule, ***Walton*** should not be interpreted overly broadly. It does not suggest that costs may be spoken to repeatedly but merely that entering formal judgment does not render the judge *functus* with regards to costs.

[36] ***Walton*** deals with two successful appellants seeking costs for the appeal where no cost award was made in the entered judgment. The Court notes that because of Rule 14.88, the successful parties are presumptively entitled to costs. The issue in this case was about the scale of costs and refers to the ability of parties to request special direction with respect to costs under Rule 14.25(1).

[37] I conclude that the exceptions to the doctrine of functus officio do not apply in this case.

VI. Appellate Court jurisdiction on Costs

[38] In ***MacCabe v Westlock Roman Catholic Separate School District No. 110***, 2002 ABCA 307, the decision clearly states that the Court of Appeal has jurisdiction to directly reassess the costs at trial as a result of an appeal, or remit the issue back to the trial judge who would then be able to reassess costs: at para 3. The Court of Appeal had not spoken to costs at that point.

[39] In the present case, the Court of Appeal decided to directly vary the trial costs itself. The Court did *not* remit this back to me as the trial judge, and additionally declined to issue a further decision on costs in its letter on October 12, 2021.

VII. Conclusion

[40] Based on the facts in this case and the applicable authorities, this Court is *functus officio* with regards to reassessing trial costs.

[41] I entered a decision on this matter without retaining jurisdiction to revisit this matter. The Court of Appeal expressly turned its mind to address costs at trial and entered its decision in this

matter without retaining jurisdiction to revisit this issue or remitting the decision back to me—despite the authority to do so.

[42] The exceptions to the *functus* principle do not apply in this case.

Heard on the 7th day of September, 2021 with written arguments to follow.
Dated at the City of Edmonton, Alberta this 30th day of November 30, 2021.

A. Loparco
J.C.Q.B.A.

Appearances:

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