Citation: Klassen v Wowk-Litwin, 2024 MBCA 98
Date: 20241202
Docket: AF23-30-09920

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

B E T W E E N :

	)	***T. P. Beley***
	)	*for the Appellant*
WESLEY LYNDON KLASSEN	)	
	)	***C. B. Paul***
	)	*for the Respondent*
(Petitioner) Appellant	)	
	)	***Appeal under r 37.3 of the***
- and -	)	***MB, Court of Appeal***
	)	***Rules (Civil)***
MARIA LEE WOWK-LITWIN	)	
	)	*Judgment delivered:*
	)	***July 12, 2024***
(Respondent) Respondent	)	
	)	*Supplemental reasons*
	)	*delivered:*
	)	***December 2, 2024***

RIVOALEN CJM

[1] This decision addresses the issue of costs on appeal between the petitioner, Wesley Lyndon Klassen (Mr. Klassen), and the respondent, Maria Lee Wowk-Litwin (Dr. Wowk-Litwin), arising from this Court's decision in *Klassen v Wowk-Litwin*, 2024 MBCA 57. In that decision, this Court dismissed Mr. Klassen's appeal of the trial judge's decision regarding property issues arising from his common-law relationship with Dr. Wowk-Litwin. This Court also provided that the parties may submit written

submissions if they are unable to agree on the issue of costs. This decision addresses those written submissions.

Procedural History of the Appeal Hearing

[2] Briefly, I will review the procedural history of the appeal hearing as it is relevant for this decision on costs. The procedural history in this case is unusual.

[3] The appeal was initially set to be heard on March 13, 2024 (the March hearing). At the March hearing, counsel for Mr. Klassen, Mr. Beley, experienced an unexpected medical issue and requested an adjournment. This Court granted the adjournment request and instructed Mr. Beley to brief and prepare alternate counsel from his office to ensure that the appeal could proceed once a new date had been set. The hearing was adjourned to June 10, 2024 (the June hearing). This panel remained seized of the appeal.

[4] At the June hearing, Mr. Beley appeared before this Court but was unable to make oral submissions. Unfortunately, despite this Court's instructions at the March hearing, Mr. Beley did not have alternate counsel with him who was able to provide oral submissions on behalf of Mr. Klassen. In light of this and to ensure that the appeal would be decided by this Court without further delay, this Court suggested that it decide the appeal on the basis of the written materials filed, without an oral hearing, pursuant to r 37.3 of the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R [the *CA Rules*], with the consent of the parties. The parties consented to a paper appeal.

Parties' Submissions on the Question of Costs on Appeal

[5] Dr. Wowk-Litwin seeks double costs for the March hearing pursuant to r 49.10(1) of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*]. Dr. Wowk-Litwin argues that double costs are justified because she made a settlement offer prior to the trial of this matter that was less favorable to her than the judgment that she received at trial (the settlement offer). I am not aware of any offers to settle made by either party prior to the appeal. Dr. Wowk-Litwin also seeks solicitor and client throwaway costs for the June hearing.

[6] Mr. Klassen argues that double costs for the March hearing should not be awarded because he did not engage in any inappropriate or egregious behaviour. Regarding Dr. Wowk-Litwin's request for solicitor and client throwaway costs for the June hearing, Mr. Klassen argues that he should not be held responsible for his counsel's inability to provide oral submissions at the June hearing.

Analysis

Application of r 49.10 of the KB Rules in the Court of Appeal

[7] Dr. Wowk-Litwin asks this Court to apply r 49.10(1) of the *KB Rules* and order double costs against Mr. Klassen for the March hearing.

[8] Rule 49.10 permits a judge in the Court of King's Bench to consider the cost consequences of failure to accept a settlement offer for either the plaintiff or defendant and award higher costs against a party who did not accept a pre-trial settlement offer in specific circumstances. The Manitoba

Court of Appeal has only applied r 49.10 of the *KB Rules* once (see *Williams v Downey-Waterbury*, [1995] 6 WWR 156, 1995 CanLII 16140 (MBCA)).

[9] Rule 49.10 operates at the trial level with the purpose "to induce settlements and avoid trials and to provide predictability with respect to costs" (*Fletcher v Manitoba Public Insurance Co*, [1990] 3 SCR 191 at 227, 1990 CanLII 59 (SCC); see also *Rémillard v Rémillard*, 2015 MBCA 42 at para 55; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71).

[10] This Court is entitled to adopt and apply r 49.10 of the *KB Rules* pursuant to section 36(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*], because neither the *CA Act* nor the *CA Rules* contain a rule or section regarding the cost consequences of failure to accept a settlement offer.

[11] In my view, r 49.10 is not applicable in the circumstances of the present case. I will explain why.

[12] First, this Court is not obligated to apply r 49.10 of the *KB Rules*. As I mentioned above, section 36(1) of the *CA Act* permits the Court of Appeal to apply the *KB Rules*. It states:

King's Bench practice to apply where procedure not provided **36(1)** In all matters not expressly provided for in this Act or the rules, the practice and procedure of the Court of King's Bench, in so far as applicable, *may* be adopted and applied.	**Affaires non prévues par la loi ou les règles** **36(1)** La pratique et la procédure de la Cour du Banc du Roi *peuvent* être adoptées et appliquées dans toutes les affaires non expressément réglées par la présente loi ou par les règles, dans la mesure où elles sont applicables.

[emphasis added]

[13] While this Court can adopt and apply the *KB Rules* pursuant to section 36(1) of the *CA Act*, it is not required to do so (see *Green v University of Winnipeg*, 2018 MBCA 137 at para 26, citing *Manitoba Association of Optometrists v 3437613 Manitoba Ltd* (1998), 126 Man R (2d) 140 at para 6, 1998 CanLII 27973 (MBCA)). The Court ultimately retains discretion to decide costs for an appeal (see *CA Rules*, r 47(1)).

[14] Second, the question of costs on appeal in the present matter is complicated by the issue of costs at trial, which have not yet been resolved. The trial judge has not determined the applicability of r 49.10 for costs at trial, nor has she clarified whether the settlement offer satisfies the requirements of r 49.10(1). This assessment entails making findings of fact that the trial judge is best positioned to make. Further, the evidence required for that assessment is not before this Court. Dr. Wowk-Litwin stated in her written submission on costs that she intends to ask the trial judge to assess costs respecting the Court of King's Bench proceedings.

[15] In this case, based on the unusual circumstances, it would be inappropriate for this Court to weigh in on the validity of the settlement offer pursuant to r 49.10 before the trial judge has had the opportunity to consider the settlement offer in her determination of costs at trial. Any decision by this Court on the settlement offer with respect to costs for the appeal could impact the trial judge's decision on the application of r 49.10 for costs at trial; this could also impact any possible appeal of the trial judge's decision on costs at trial.

[16] Therefore, in the present matter, I would decline to adopt and apply r 49.10 of the *KB Rules* to the issue of costs on appeal. In my view, double costs are not appropriate here.

[17] Notwithstanding this, r 49.10 may apply to questions of costs in this Court in other cases. I leave that issue for another day.

Are Solicitor and Client Costs Appropriate for the June Hearing?

[18] Dr. Wowk-Litwin argues that this Court should order solicitor and client throwaway costs with respect to the second appearance—the June hearing. Generally, solicitor and client costs are only awarded when conduct is "reprehensible, scandalous or outrageous" (*Young v Young*, [1993] 4 SCR 3 at 134, 1993 CanLII 34 (SCC)). This Court has stated that solicitor and client costs should only be awarded in rare and exceptional circumstances (see *Ultracuts v Magicuts*, 2024 MBCA 45 at para 12, citing *Judges of the Provincial Court (Man) v Manitoba*, 2013 MBCA 74 at para 177).

[19] The conduct at the June hearing does not rise to the level required for solicitor and client costs. It was not reprehensible, scandalous or outrageous. I decline to order solicitor and client throwaway costs for the June hearing.

[20] Nevertheless, it is regrettable that Mr. Beley did not follow this Court's direction to prepare alternate counsel to make submissions on his behalf, should it be necessary.

Conclusion

[21] In my view, pursuant to the factors set out in r 47(2) of the *CA Rules*, an order for costs of one and a half times Tariff C, plus reasonable disbursements, in favour of Dr. Wowk-Litwin is appropriate. This order takes into consideration that Mr. Beley did not follow this Court's direction given when granting the adjournment that was required at the March hearing.

[22] The parties are encouraged to resolve the outstanding issue of costs at trial in the Court of King's Bench.

Rivoalen CJM

I agree: Pfuetzner JA

I agree: Edmond JA