Date: 20080606

Docket: A-449-97

Citation: 2008 FCA 167

BETWEEN:

URBANDALE REALTY CORPORATION LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Appellant brought this appeal against the judgment (May 23, 1997) of the Federal Court, Trial Division, which had dismissed its appeal against the judgment (December 29, 1992) of the Tax Court of Canada dismissing its appeal against a reassessment for its 1986 taxation year. On February 10, 2000, the Court allowed this appeal with costs here and in the Trial Division.

[2] The Appellant under cover of a letter dated September 22, 2000 sent its account of costs to the Respondent for payment. Exchanges of correspondence between opposing counsel ensued. By letter dated March 20, 2001 to the Appellant, the Respondent asserted that the record did not justify solicitor-client costs and proposed settling costs at $7,806.00 and $7,450.60 for the trial and

appeal matters respectively, further to the tendering of a proper bill of costs. The record does not disclose a response on the part of the Appellant.

[3] On December 8, 2003, the Appellant filed written submissions and an affidavit supporting its bill of costs under cover of a letter requesting an appointment for assessment of costs. Counsel for the Appellant subsequently followed up with the Registry on this request. On February 6, 2004, I directed the Registry to place this note (the February 6, 2004 note) in the record for this court file and for Federal Court file T-533-93:

> … I examined the materials for assessment of costs submitted by StevenVictor [*sic*] for the Appellant (Plaintiff) and noted certain potential problems. As I would have directed that some of these problems be addressed by way of preliminary submissions in any event, I decided that it would preclude needless expenditures by his client and by the Crown if I called him directly to note my concerns. We spoke on February 5, 2004 and I raised the following:
>
> (a) While not fatal to the assessment process, the Federal Court of Appeal in an obiter comment several years ago noted that costs for the two Divisions (appeal and trial) should not be combined in a single bill of costs. Now that there are two separate and distinct courts, that separation should be even more carefully maintained, although it has not yet been an issue before me.
>
> (b) While I would keep an open mind to any new rationale that he might care to lead, I have dealt with the issue of jurisdiction of Assessment Officers faced with judgments for costs without modifiers specifying elevated scales of costs, such as here, and have held that I have no jurisdiction to usurp the Court's Rule 400(1) jurisdiction to allow an elevated scale of costs, i.e. solicitor-client costs or Column V party and party costs, beyond the "default" scale of Column III costs prescribed by Rule 407. In these matters, I noted the absence of an "otherwise" order of the Court under Rule 407. The references in Rules 400(1) and 407 do not include Assessment Officers.

> (c) By contrast, in the absence of "otherwise" orders as is the case in these matters, Assessment Officers would have the jurisdiction to address Rule 420 doubling.
>
> I noted that, if he wished to pursue the solicitor-client or Column V approach with an Assessment Officer, I would deal with that via preliminary submissions to avoid the expense of both sides addressing individual amounts in bills of costs possibly not sustainable under the restrictions in the Rules per my reading of the Judgment herein. I said that I had changed my view on given issues over the years and that I would be open to his arguments, but that including an Assessment Officer in the definition of "Court" is a difficult threshold to meet. However, if he wished to attempt to obtain directions from the Court permitting some sort of elevated scale of costs, he would have to proceed by way of a formal motion record. Mr. Victor indicated that he would consider his position before deciding what to do.

[4] On February 6, 2004, the Respondent filed reply affidavits under cover of a letter asserting that they were for an assessment of costs. On April 5, 2007, counsel for the Respondent requested an update on the status of the assessment of costs. That same day, I instructed the Registry to send to both sides a copy of the February 6, 2004 note and to advise counsel for the Respondent that I had checked my materials, but could find nothing to indicate that counsel for the Appellant had subsequently contacted the Registry to revive the assessment of costs.

[5] The record discloses correspondence (October 27, 2004, April 9, 2006 and May 17, 2007) from counsel for the Respondent to opposing counsel urging movement on costs, objecting to solicitor-client costs and requesting a proper bill of costs on a party and party basis. By letter dated September 4, 2007 to opposing counsel, counsel for the Respondent revoked any outstanding settlement offers on costs and put the Appellant on notice that it was statute-barred from attempting to collect costs. On February 4, 2008, the Appellant filed a motion for an order directing an

assessment officer to assess the Appellant's costs on a solicitor-client scale and in the alternative for an order directing assessment at double the maximum of Column V costs. The Respondent filed materials opposing the motion on four grounds: (a) the motion was statute-barred; (b) the motion was out of time further to Rule 403; (c) solicitor-client costs were not justified; and (d) increased Column V costs were not justified. The Court disposed of the motion further to (b). Paragraphs 6 to 14 following summarize the respective positions before the Court of the parties for (a) only.

I. The Respondent's Position on a Statutory Bar to Costs

[6] The Respondent argued that section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (*CLPA*) applies:

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. [Emphasis added]

A cause of action is a set of facts providing the basis for an action in court: see *Markevich v. Canada*, [2003] 1 S.C.R. 94 [*Markevich*]. Here, the issuance of the judgment awarding costs was the set of facts giving rise to the cause of action.

[7] The Respondent argued that *Markevich* held that the term "proceeding" could embrace the statutory tax collection powers of the Crown which are equivalent in purpose and effect to a court

action and that the Crown, having failed to exercise those powers within the six-year limitation in *CLPA*, s. 32, was statute-barred from collecting the tax debt. *Doel v. Kerr*, [1915] O.J. No. 75 (C.A.) [*Doel*] held that a step to enforce a judgment, i.e. an application to renew execution, not taken within the statute of limitations for bringing the action itself was barred by said statute.

[8] The Respondent argued further to *Markevich* and *Doel* that steps such as a motion under Rule 397 for reconsideration of judgment, a motion under Rule 403 for directions on costs (the motion) and a request under Rule 406 for an appointment to assess costs (the request) each constitute a proceeding in respect of a cause of action subject to the six-year limitation period in *CLPA*, s. 32. The *CLPA*, s. 30 permits the Minister of Finance (the Minister) to authorize, further to "a certificate of judgment against the Crown issued pursuant to the regulations", payment out of the Consolidated Revenue Fund to satisfy judgments for costs. The commentary for Rule 474 in Brian J. Saunders *et al*., *Federal Courts Practice 2008* (Toronto: Thomson Carswell, 2007) at 963 states that there is a provincial regulation for such certificates, but none for Federal Court and Federal Court of Appeal certificates. This commentary suggests that, as the provision in Rule 474 for issuance by the Registry of a certificate of judgment is essentially to the same effect as the regulation for provincial courts, the Minister would likely honour the Rule 474 certificate of judgment.

[9] The Respondent argued further to *Fegol v. Canada (Minister of National Revenue)*, 1998 CarswellNat 2407 (F.C.T.D.) that, as a Rule 474 certificate of judgment for costs cannot be issued until the award of costs has been quantified, the motion and the request are attempts to quantify

costs and are therefore proceedings in respect of the award of costs subject to the six-year limitation period in *CLPA*, s. 32. The earlier request for an appointment to assess costs is irrelevant because it was abandoned. The Appellant has never filed a bill of costs under Rule 406 compliant with the scale prescribed by Rule 407. The cause of action here, i.e. the award of costs, arises other than in a province: see *CLPA*, s. 28 and *Markevich*.

[10] The Respondent argued that if the *CLPA* does not govern the motion and the request, then the claim for costs should be barred by the equitable doctrine of laches. The unexplained delay here of almost eight years has prejudiced the Respondent. The Court held in *Maytag Corp. v. Whirlpool Corp.*, [2001] F.C.J. No. 1262 (F.C.A.) that matters of costs should be resolved while details of the case are still fresh. As *Kumar v. Canada*, [2006] F.C.J. No. 1122 (A.O.) held that the most recent tariff applies in assessments of costs, the delay is prejudicial for the Respondent because the Appellant benefits in 2008 from a scale of costs higher than that applicable in 2000.

II. The Appellant's Position on a Statutory Bar to Costs

[11] The Appellant argued that the motion and the request are not "proceedings" as that term is used in the *CLPA*, s. 32. Although the *CLPA* does not define the term "proceedings", it should be read having regard to the definition of that term in *Ontario's Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 1.03(1) (*Ontario Rules*) similarly defined in several other provinces as "an action or application." The Appellant acknowledged that *Markevich* held that other statutory procedures that resemble or are an alternative to court actions also are "proceedings" as that term is used in *CLPA*, s. 32, but argued that the motion and the request are not such alternatives to court actions and

instead are only single steps within a larger court action and its related appeal. That is, the motion and the request are not "proceedings" within the meaning of *CLPA*, s. 32. It is the larger court action, and its related appeal in which the motion and the request occurred, which are "proceedings" within said meaning having regard to the traditional definition of "proceeding" as a court action or application.

[12] The Appellant argued that the cause of action within the meaning of the *CLPA*, s. 32 was the reassessment of the Appellant's 1986 taxation year and not the award of costs made further to its successful litigation challenging said reassessment. The award of costs is not a cause of action as defined in *Markevich* at p. 112, i.e. a set of facts that provides the basis for an action in court, and it cannot be the subject of an independent action, application or other proceeding. That is, the Appellant cannot sue the Respondent for its costs in a separate lawsuit. Rather, the award of costs is the result of the successful litigation further to the actual cause of action, i.e. the reassessment.

[13] The Appellant argued alternatively that the request, made in December 2003 and accompanied by materials supporting the items of costs, occurred within the six-year limitation period. The record confirms that counsel for the Appellant followed up with the assessment officer on the request and eventually received directions which may have been misinterpreted. That does not mean in any way that the Appellant abandoned the request. The Respondent's position is disingenuous knowing full well that the Appellant had sought a timely appointment under Rule 406 to assess a bill of costs prepared further to Column V of the tariff as opposed to Column III. The mere attempt to seek higher costs does not remove the Appellant's entitlement to its costs.

The Respondent was aware that the health problems of the principal for the Appellant had made it difficult for counsel for the Appellant to obtain instructions.

[14] The Appellant argued that the Respondent's conduct is an estoppel to an assertion of the doctrine of laches, i.e. lack of timely responses to the Appellant's communications and request, absence of evidence of prejudice, not alerting the Appellant during the six years after judgment that the notion of prejudice might be asserted and waiting until September 2007 to suddenly change its position on entitlement to costs by asserting the existence of delay and prejudice. The record confirms the Appellant's efforts to advance the process of quantification of the award of costs and that the Respondent was aware by September 2000 of the Appellant's intention to seek solicitor-client costs, and alternatively by December 2003 to seek increased Column V costs.

III. Assessment

[15] On March 4, 2008, the Court ordered that the "appellant's motion for an order for directions to the assessment officer is dismissed with costs" and also issued Reasons for Order (the motion decision). Subsequently, counsel for the Appellant requested a date for an assessment of costs and indicated that, having regard to the motion decision, it no longer sought solicitor-client costs, but would continue to seek double the maximum of Column V costs including all disbursements and GST.

[16] The Respondent replied by relying on the motion materials filed for the hearing of the motion and argued that the issue of whether the Appellant is statute-barred from an assessment of

costs remains open for adjudication as the motion decision dismissed the request for solicitor-client costs as out of time and declined to deal with the request for Column V costs. I think that these submissions are generally correct, but that they require some clarification by reference to the motion decision.

[17] The motion decision comprised four paragraphs. The first paragraph summarized the history of the litigation and the motion. The second paragraph disposed of the motion as out of time further to the 30-day time limit in Rule 403 running from the date of judgment. The third paragraph, which asserted that even if an extension of time was granted, the Appellant was not even close to establishing a case for solicitor-client costs, was in my view simply *obiter* commentary. Similarly, the fourth paragraph addressing the alternative request for increased (Column V) costs was *obiter* commentary.

[18] The Appellant countered the Respondent's position by also relying on its motion materials that had been before the Court. The Appellant asserted that the Respondent had already made the argument that an assessment of costs is statute-barred, a position which the motion decision rejected with particular regard to its fourth paragraph which read:

> Finally, with respect to the alternative motion for costs on an increased scale, the only possible justification for an award of costs in excess of the normal tariff is that the appellant may have made one or more offers to settle that were not accepted. There are circumstances in which a written offer to settle may justify an increased award of costs under the *Federal Courts Rules*: see Rules 419 and 420. Generally, the party seeking such an increased award must establish that the judgment obtained was at least as favourable as the terms of the offer to settle. In my view, it is open to the

> assessment officer to consider the possible application of these provisions in any case even if no direction is made under Rule 403. I express no opinion as to whether or not there were any offers to settle in this case that would cause Rules 419 and 420 to apply.

I disagree. The motion materials on both sides clearly separated the submissions on the issue of a statute bar from the other three issues, i.e. out of time under Rule 403 to request directions, directions for solicitor-client costs and directions for Column V costs. The matter of a statute bar to an assessment of costs would have been part of the consideration of the issue of a statute bar to bringing the motion itself and certainly was not part of the considerations in the motion decision resulting in dismissal of the motion. The motion decision was silent on the issue of a statute bar to the motion, and I do not think that it could be said that an issue of entitlement to proceed with an assessment of costs was ever before the Court. Therefore, I conclude that this latter issue is not *res-judicata* and the Respondent may raise it before me. These reasons dispose of it as a preliminary objection.

[19] Any misunderstanding caused by the February 6, 2004 note was inadvertent. I did not set out there the rationale underlying my concern as I felt that the Appellant should have the opportunity to fully lay out its position on my jurisdiction for increased costs before any ruling. That sentiment still applies given notice from the Appellant that it will still pursue Column V costs before me.

[20] However, for the benefit of counsel, I will venture certain observations. Rule 405 provides that costs “shall be assessed by an assessment officer”. Rule 407 provides that unless “the Court

orders otherwise, party-and-party costs shall be assessed in accordance with column III."

The *Courts Administration Service Act* (*CAS Act*), s. 10 provides for staff for the purposes of the *CAS Act*. The coming into force of the *Federal Courts Act* on July 2, 2003 did not change the basic scheme of costs and associated principles coming forward and being immediately applicable on that date to matters in the Federal Court of Appeal and in the Federal Court as a function of transitional section 191 of the *CAS Act* providing that the Rules continue in force. Transitional sections 185(14) and 187(2) of the *CAS Act* provided respectively for my transfer to the Courts Administration Service providing registry services to these two Courts (as well as the Court Martial Appeal Court and the Tax Court of Canada) and for the continuing in force of my order of appointment as an assessment officer for costs in these two Courts. The *Federal Courts Act* s. 5(1) defines the constitution of the Federal Court of Appeal as the Chief Justice and 12 other judges. Rule 2 provides that "Court" means, as the circumstances require, the Federal Court of Appeal. Rule 2 also provides that an "assessment officer" means "an officer of the Registry designated by an order of the Court, a judge or a prothonotary, and includes, in respect of a reference, the referee presiding in the reference." I fall within the first option, i.e. an officer of the Registry designated by an order of the Court. An assessment officer is not part of the constitution of the Federal Court of Appeal defined in the *Federal Courts Act*, s. 5(1). It follows that the term "Court" defined in Rule 2 does not include me. I am not aware of jurisdiction for an assessment officer alternative to that for the Court in Rules 400(1) and 407 permitting me to effectively vary the Court's award of costs by allowing Column V costs in place of the default provision in Rule 407 for Column III costs.

[21] I agree with the Appellant that it had taken a step within six years from the date of judgment to quantify the award of costs via assessment. A bill of costs framed in a scale other than the default Column III scale in Rule 407 sometimes occurs, draws an objection of impropriety and is addressed by the assessment officer further to an analysis of jurisdiction and the underlying parameters of the award of costs. It does not mean that the assessing party has forfeited the right to assess costs. Persistence in advancing a bill of costs framed in a manner apparently inconsistent with the tariff and the award of costs may result in a lower amount of assessed costs further to Rules 409 and 400(3)(i) (conduct unnecessarily lengthening a proceeding) and (o) (any other relevant matter). Those same factors could be advanced before the assessment officer as the basis for a lower amount of assessed costs further to, for example, delays in proceeding to assessment notwithstanding the absence of a time limit in Rule 406 for requesting an appointment. Such circumstances could affect the exercise of discretion under Rule 408(3) which permits an assessment officer to "assess and allow, or refuse to allow, the costs of an assessment to either party." The assessment of costs will proceed.

[22] I venture some *obiter* commentary on the Respondent's *CLPA*, s. 32, position. Without the benefit of *Markevich, Doer* and the *Ontario Rules*, I likely would have addressed the issue of a statutory bar as follows. John Burke, *Jowitt's Dictionary of English Law*, 2d ed. (London: Sweet & Maxwell Limited, 1997) vol. 1, *s.v.* "cause of action" defines it as "the fact or combination of facts which give rise to a right to sue" and asserted that it "consists of two things, the wrongful act and the consequent damage." In a rough sense, the Appellant's position would assert the reassessment of taxes as the wrongful act and the associated payment of more taxes as the consequent damage.

The judgment, which could include as here an award of costs, disposing of said cause of action renders it *res judicata.* As the matter of costs is subsumed in the judgment and I presume that an award of costs is an explicit final disposition of entitlement to costs within the meaning of Rule 400(1), providing that the "Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid", the matter of entitlement to costs is *res judicata* and cannot be the subject of an independent proceeding or action for further adjudication other than by statutorily sanctioned process such as a formal appeal of the judgment for costs.

[23] I think that the definition in *Jowitt's* of "cause of action" contemplates an action or appeal but not the interlocutory process within each. The process of quantification of the award of costs in a judgment is incidental to the judgment and is therefore interlocutory. I simply do not think that the *CLPA*, s. 32 addresses such interlocutory process and therefore the Respondent can only raise delay in the context of arguing for reduced costs on assessment further to Rule 400(3) factors. I note that if the Respondent was a non-Crown litigant and therefore subject to execution, unlike the Crown not subject to execution further to the *CLPA*, s. 29, the Appellant might encounter difficulty in executing for assessed costs in the face of Rule 434(1)(a) requiring leave of the Court for issuance of a writ of execution if six or more years have elapsed since the date of judgment.

[24] These comments however do not directly address or resolve the Respondent's position. *Markevich* examined the tax collection powers of the Minister under the *Income Tax Act*, s. 223(2) and (3), which permit the Crown to register a certificate of the amount of tax asserted to be owing

without there first having been adjudication further to a hearing by filing it in the Federal Court and to take proceedings thereon to enforce it for payment as if it were a judgment of the Federal Court. The Court described this process as a statutory collection procedure and found that it was subject to the limitation in the *CLPA*, s. 32. The case note on page 96 stated that:

> …the ordinary meaning of the phrase "proceedings . . . in respect of a cause of action" in s. 32 encompasses the statutory collection procedures of the Minister. It would be incongruous to find that s. 32 was intended to apply to the court action but not to the statutory collection procedures that serve the identical purpose. The rationales that support the application of limitation provisions to Crown proceedings apply equally to both the court and non-court proceedings at issue here. To exclude s. 32's application to proceedings that are equivalent in purpose and effect to a court action would frustrate the object and aim of the provision. The legislative history of s. 32 also supports the inference that Parliament intended its application to extend beyond proceedings in court….

[25] I think that the Respondent's position is that the *CLPA*, s. 32 captures process in a variety of forms be it original proceeding such as an action or appeal, non-court proceeding such as the Crown's statutory collection procedures for tax debts and interlocutory proceeding such as a notice of motion for directions to the assessment officer or a regulatory provision such as in Rule 406 for a request for an assessment of costs. The *Ontario Rules*, which distinguish a notice of motion from originating process, are irrelevant for the Respondent's position because *Markevich* held that only a federal Act of Parliament can blunt the application of s. 32 to all Crown proceedings. *Markevich* on page 114 held that s. 32 "was meant to include administrative mechanisms that enable the Crown to achieve exactly the same result as it would through a formal action in court." *Markevich* does not mention interlocutory process. Interlocutory process such as a request for an assessment of costs is incidental to "the same result" and therefore cannot achieve "exactly the same result as…a formal

action in court." I would have concluded that the limitation period in the *CLPA*, s. 32 does not apply to an assessment of costs.

[26] A Certificate of Assessment will issue as follows:

> I HEREBY CERTIFY that I reject the Respondent's preliminary objection that the Appellant is prescribed by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32 from proceeding with assessment of its costs.

"Charles E. Stinson"
Assessment Officer

Vancouver, BC
June 6, 2008

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-449-97
STYLE OF CAUSE:	URBANDALE REALTY CORPORATION LIMITED v. HER MAJESTY THE QUEEN

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	June 6, 2008

WRITTEN REPRESENTATIONS:

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Michael Ezri	FOR THE RESPONDENT

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