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IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

THE ST. VITAL SCHOOL DIVISION NO. 6	)	***R. D. McDonald*** *and*
	)	***E. B. Eva***
(Applicant) Appellant	)	*for the Applicant*
	)	
	)	***B. L. Gorlick*** ✓
- and -	)	*for the Respondent*
	)	
	)	*Chambers motion heard:*
JEFFREY OLIVER TRNKA	)	***January 31, 2002***
	)	
(Respondent) Respondent	)	*Decision pronounced:*
	)	***February 21, 2002***

SCOTT C.J.M.

1 The applicant requests a stay with respect to payment of solicitor/client costs awarded to the respondent (Trnka) in the amount of $30,000, pending ultimate resolution of the applicant's claim against Trnka in a related action in the amount of $3.912 million, plus interest and costs. The two actions arise out of a fire admittedly caused by Trnka that substantially destroyed the east wing of the Glenlawn Collegiate Institute (Glenlawn) in October 1993.

2 There is no need to review the well-known principles upon which a stay of proceedings, or an injunction, can be issued in such circumstances. See *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987]

1 S.C.R. 110. Both counsel agree that this court has a discretion to do what is right and equitable in the circumstances.

3 In these proceedings, the applicant (the school division) obtained an *ex parte* order in September 1996 pursuant to sec. 14(1) of *The Limitation of Actions Act*, C.C.S.M., L150, permitting commencement of an action against Trnka with respect to loss or damage to chattels or contents at Glenlawn. The school division had earlier commenced an action with respect to property damage. The total amount in issue then became $5.477 million, plus damages.

4 On January 21, 2000, Darichuk J., who had initially granted the *ex parte* extension order, set aside his earlier order and awarded solicitor/client costs to Trnka, concluding that the evidence presented to him in support of the initial order had been either "deliberately or recklessly untruthful" (para. 17). An appeal to this court was dismissed on October 12, 2001, with costs again awarded on a solicitor/client basis. Costs in both courts were subsequently taxed by agreement at $30,000 all inclusive.

5 Before me the school division argues that Trnka's culpability for setting the fire is beyond dispute, and that it has an overwhelming case on the merits. Irreparable harm will be suffered if the $30,000 cost award is paid to Trnka because he is admittedly impecunious, and the funds, if paid, will be irrevocably "lost." Extensive analysis was presented by supplementary written argument in an effort to demonstrate that Trnka's solicitors had in fact been paid approximately $23,000 by Trnka's insurer

(who subsequently denied liability to Trnka), and that the amount therefore "owing" to the solicitors out of the $30,000 solicitor/client cost award was in reality only about $7,000 or, based on another calculation, approximately $13,000.

6 While no right to set-off has yet been claimed against Trnka, counsel argues that there is ample precedent for setting off amounts owing in separate actions. See *Royal Bank v. Skeans*, [1917] 2 W.W.R. 942 (B.C.C.A.), *Bank of Hamilton v. Atkins*, [1924] 1 W.W.R. 1157 (B.C.C.A.), and *Mitchell et al. v. Stephens*, [1930] 1 D.L.R. 980 (Sask.C.A.). One instance when a plaintiff's judgment against a defendant will be set-off against the latter's judgment against the plaintiff is where one of the parties is insolvent. See *Inlay Hardwood Floor Co., Ltd. et al. v. Dierssen*, [1928] 2 D.L.R. 560 (B.C.C.A.).

7 More importantly, a proper right of set-off has priority over a solicitor's lien since "it is clear that a solicitor's lien is nothing more than an equitable right that stands no higher than the client's rights" (*White Resource Management Ltd. v. Durish*, [1998] 3 W.W.R. 204 (Alta.Q.B.) *per* Mason J. at para. 26).

8 Counsel for the applicant agreed that the circumstances before this court are unique, but argues that the balance of convenience favours preserving the status quo pending the eventual resolution of the property damage action. This is the best way to do what is "fair and equitable."

9 Not so, says Trnka. The very nature of the award of solicitor/client

costs, based as it was on misbehaviour by the applicant, militates against this court exercising its discretion in favour of ordering a stay. The services that gave rise to the amount of $30,000 solicitor/client costs in favour of Trnka have already been performed, and are not in issue in the property damage action.

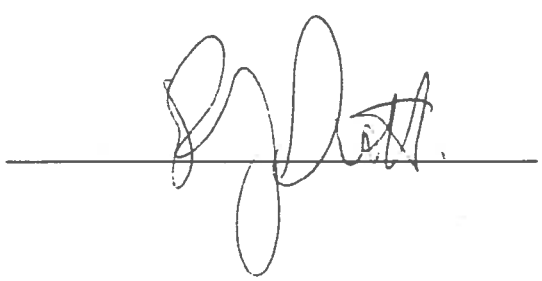
10 This is not a contest, counsel observes, between the exercise of a solicitor's lien and an equitable set-off. The applicant's attempt to minutely analyze Trnka's solicitor's bills of costs is misleading – since there are other legal services only partially reflected in the bills of costs already presented – and irrelevant since the fees have been "earned," as recognized by the agreed taxation of the solicitor/client costs.

11 While the two actions are factually related, there is no real connection between the existing proceedings and the award of costs; there is no precedent where a set-off has been allowed in one proceeding against a solicitor/client cost award in another concluded action. Reliance is placed by Trnka on the decision of *155569 Canada Ltd. v. 248524 Alberta Ltd.*, [1996] A.J. No. 236 (Q.L.) (C.A.). In that case the Alberta Court of Appeal declined to allow a set-off against an award of solicitor/client costs ordered to be paid forthwith in any event of the cause as a result of procedurally reprehensible conduct at trial. This was because to do so "would completely neutralize the award of costs made." See as well *155569 Canada Ltd. v. 248524 Alberta Ltd.*, [1996] A.J. No. 838 (Q.L.) (Q.B.). (There are many other decisions of the Alberta courts dealing with the acrimonious litigation between the two numbered corporations.)

12 In my opinion, it would not be fair, just or equitable to order the stay of proceedings requested by the applicant. This is not simply a case where a stay of a money judgment is sought pending appeal because there is concern about the financial ability of the party successful at trial to repay the amount of the judgment if required to do so. Here there is no question about Trnka's entitlement to the $30,000 solicitor/client costs. I do not agree with applicant's counsel that the decision of the Alberta Court of Appeal in *155569* can be distinguished on the basis that costs there were ordered to be paid "forthwith in any event of the cause." Firstly, that was not the foundation for the decision of the Alberta Court of Appeal; rather, it was that it would be wrong in principle not to pay the costs given the conduct of the party against whom the costs were ordered. Secondly, the taxed solicitor/client costs have been awarded in proceedings that are now complete (except for this application) and are payable now.

13 It would be ironic indeed if the costs awarded "as a reminder to other plaintiffs of the complete candor which must accompany such an application" ([2001] M.J. No. 435, para. 5), ended up instead being used to pay a judgment in favour of the same litigant whose misbehaviour resulted in the award of solicitor/client costs.

14 The application is accordingly dismissed, with costs.



C.J.M.