Court of Appeal Refuses Leave to Appeal Costs Award Which Overshadowed Amount in Issue

July 3, 2019

By Ken Prehogan

In *Knight v Knight*, 2019 ONCA 538, the Court of Appeal released Reasons for Decision refusing to grant leave to appeal from an award of costs of $490,000 plus HST following a 13-day trial arising out of "hard fought – and expensive – matrimonial litigation". This amount far overshadowed the amount in issue. More than half was for a disbursement for an accounting expert. The court stated:

The trial judge was cognizant that the costs award was high for a 13-day trial. However, the trial judge placed the blame entirely at the feet of the appellant, whose approach to the litigation he characterized as unreasonable: "[the appellant's] tactics coupled with his unacceptable offers to settle, leads me to conclude that his goal was to ensure that [the respondent] suffer a considerable financial defeat even if she enjoyed success at trial."

As for the disbursement for the respondent's accounting expert, the Court noted that much of the amount was for chasing disclosure, a significant problem for the respondent.

Section 133(b) of the *Courts of Justice Act* states that a discretionary order for costs may not be appealed without leave. Leave will not be granted unless there are strong grounds upon which the appellate court could find that the trial judge had erred in the exercise of his or her discretion. The appellate court should only set aside the costs order if the trial judge made an error in principle or if the costs award is plainly wrong.

Neither happened here. The appellant sought to have the Court of Appeal perform a line-by-line analysis which was not pursued at trial and which the Court of Appeal declined to do given that the trial judge's costs endorsement did not reveal an error in principle or an error in the exercise of his discretion. To the extent that the appellant based his appeal on the principle of proportionality, the Court accepted the trial judge's explanation that the costs award was necessary to defeat what he perceived to be the appellant's tactic of ensuring that the respondent would not benefit from her success in the litigation. The Court of Appeal refused to "second-guess" the quantum of the award.

This case is a caution for the unreasonably aggressive litigant, who should expect to pay an amount disproportionately high compared to the amount in issue and, needless to say, in addition to his or her own legal costs. Counsel are well-advised to make every effort to rein in clients who instruct them to conduct litigation outside the norms of acceptable conduct. In some cases, counsel would be well-advised to withdraw from the matter, rather than risk the possibility of a cost award against him or her personally, pursuant to Rule 57.07.

opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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