Court of King's Bench of Alberta

Citation: Star Energy Canada Inc v Builders Energy Services Ltd, 2023 ABKB 641

Date: 20231114
Docket: 0801 14092
Registry: Calgary

Between:

Star Energy Canada Inc.

Appellant

- and -

Builders Energy Services Ltd. doing business as Polege Oilfield Hauling, Builders Energy Services Ltd., Withers L.P., Brian Millar, ABC Ltd. and John Doe

Respondents

Decision of the
Honourable Mr. Justice O.P. Malik

I. Introduction

[1] Mr. Timothy Ulmer ("Ulmer") appeals an order of an Applications Judge ("AJ") granted on November 4, 2022 (the "Order") that enforced his undertaking (the "Undertaking") to pay Builders Energy Services Ltd.'s ("BES") costs in the sum of $22,500.00.

[2] Ulmer argues that the AJ erred and that he did not have the power to grant the Order because he was *functus officio*.

[3] This decision addresses two issues: first, the interplay between the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*") and the doctrine of *functus officio* and second, the enforceability of an undertaking given to the Court.

A. The Undertaking

[4] Ulmer was the director and shareholder of the Plaintiff, Star Energy Canada Inc. (the "Plaintiff"). In 2008, the Plaintiff commenced an Action against BES and others. In 2015, BES

filed an application for security for costs. BES agreed to forego the application in exchange for Ulmer promising to pay up to $22,500.00 of BES's costs that might, in future proceedings, be awarded against the Plaintiff. The Undertaking reads as follows:

> 1. I, Timothy Ulmer, the sole shareholder and director of the Plaintiff, Star Energy Canada Inc., personally undertake to be liable for all damages or indemnity, to a maximum of $22,500.00, which may be granted costs by this Honourable Court against the Plaintiff in the within action.
>
> 2. I acknowledge that I have obtained legal advice regarding this Undertaking, that it has been explained to me and I fully understand the nature and importance of it.

[5] The Undertaking is not dated but Ulmer signed it. There is no dispute about the validity of the Undertaking.

B. The Costs Award

[6] In 2021, BES brought an application to dismiss the Plaintiff's Action for delay. On June 21, 2021, the AJ dismissed the Action and awarded BES the costs of the application and of the Action (the "Costs Award"). BES prepared its Bill of Costs, but costs were not agreed to.

C. The Application Judge's Decision

[7] In September 2022, BES brought an application to enforce the Undertaking. The AJ heard the application and granted the Order.

[8] In his decision, the AJ noted, "we do not even have to deal with the issue of being functus", "the undertaking is very clear on its face", and the application did not require "a revisiting of the [Costs Award] granted at all". He found that as BES' costs had not previously been determined, "it [was] premature to start making costs awards against [Ulmer] at the [time the Costs Award was granted] when it [was] not necessarily clear that the [P]laintiff would not honour the costs application". He concluded:

> ...this isn't a case of the Court being functus in relation to the matter and if it is, the rules specifically contemplated that this type of costs award can be made. So I had some concerns about whether these costs should be assessed first. I do not hear any dispute about the amount of the costs owing by the plaintiff, being at least $22,500, so with that in mind I am not going to specifically fix the costs but I am going to direct that – and grant judgment against [Ulmer] for $22,500.

D. The Parties' Arguments

[9] Ulmer relies on ***O'Hara v Wawanesa Mutual Insurance Co***, [1990] AWLD 810 at para 3 where the Court of Appeal declined to vary a costs award, pronouncing, "...the formal judgment having been entered the Court is *functus officio*." Ulmer notes that in ***Fas Gas Oil Ltd v JH Automotive Ltd***, 2004 ABCA 120 at para 19, the Court confirmed that once it is *functus officio* it "has no power, even with the consent of all parties, to set aside or vary a judgment or order after

it has been drawn up, signed by or on behalf of the court and entered". Ulmer says that the exceptions to the doctrine of *functus officio* such as where (1) there is a clerical error in drawing up the order; or where (2) there has been an error in expressing the Court's manifest intention, do not apply here. Nor, Ulmer argues, are there any further applicable exceptions set out in the *Rules*. It is Ulmer's position that upon having granted the Costs Award, the AJ's jurisdiction was extinguished, and he was therefore *functus officio* in respect of the Order.

[10] BES says the authorities upon which Ulmer relies have been superseded by changes to the *Rules* which expressly permit costs to be spoken to after a final judgment or order has been entered. BES refers to the Court of Appeal's decision in ***Saskatchewan Power Corp v Alberta (Utilities Commission)***, 2015 ABCA 281, which, while citing ***Fas Gas***, recognizes at para 10 that rule 10.30 creates an exception to the *functus officio* doctrine "when the issue concerns costs".

[11] Rule 10.30(1)(c) states:

> 10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made...
> ...
>
> (c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

[12] Alternatively, BES relies on rule 9.14 as an available exception to the *functus officio* doctrine because the Order, which enforces the Undertaking, does not have the effect of varying the Costs Award.

[13] Rule 9.14 states:

> 9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if
>
> (a) doing so does not require the original judgment or order to be varied, and
>
> (b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.

E. Standard of Review

[14] An appeal from the decision of an Applications Judge is *de novo* and the standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30. In this case, where the application is an appeal from the decision of the Applications Judge based on the same record, the correctness standard still applies: ***Western Energy v Savanna Energy***, 2022 ABQB 259 aff'd 2023 ABCA 125 at para 22. Where the appeal involves the same record and arguments, I may frame my reasons with reference to the Applications Judge's decision where I agree with it: ***HOOPP Realty Inc v Emery Jamieson LLP***, 2020 ABCA 159 at para. 41.

II. Analysis

[15] I dismiss Ulmer's appeal on two grounds. First, I find that the *Rules* provide the requisite exception to the application of the *functus officio* doctrine. Second, I find, as the AJ concluded, that the doctrine of *functus officio* is not engaged because the AJ's exercise of his jurisdiction to enforce the Undertaking does not require him to revisit his initial jurisdiction in granting the Costs Award.

A. The Doctrine of *Functus Officio*

[16] The doctrine of *functus officio* derives from the common law and states that a Court may not reopen a final decision save for two exceptions: (1) to correct a slip; and (2) "where there has been an error in expressing the manifest intention of the court": ***Doucet-Boudreau v Nova Scotia***, 2003 SCC 62 at para 78, citing ***Chandler v Alberta Association of Architects***, [1989] 2 SCR 848 at 860. Three justifications have been given for the doctrine of *functus officio*: to mark the "definite endpoint" of proceedings; to mark a "stable base" from which to launch an appeal (***Doucet-Boudreau*** at para 79); and to circumscribe the decision-maker's jurisdiction: Anna SP Wong, "Doctrine of *Functus Officio*: The Changing Face of Finality's Old Guard" (2020) 98:3 Can Bar Rev 547 at 548.

[17] However, the application of the doctrine may be limited by statute or by rules of civil procedure: ***Doucet-Boudreau*** at para 81; Donald J Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (LexisNexis Canada, 2021) at 275-278; Linda Abrams & Kevin McGuinness, *Canadian Civil Procedure Law*, 2nd ed (LexisNexis Canada, 2010) at 1386-1389; see also ***Capital Carbon & Ribbon Co v West End Bakery***, [1949] 1 DLR 509 at paras 10-12 citing ***Wabi Iron Works Ltd & Patricia Syndicate***, [1924] 3 DLR 363 at 364 (where the court found that rules of practice may affect substantive law) . This exception is incorporated in section 28.1(1)(a) of the *Judicature Act*, RSA 2000 c J-2 (the "*Act*") which allows the Province to enact rules relating to practice and procedure that, pursuant to section 28.1(2) of the *Act*, may "*alter* or conform to the substantive law" (emphasis added).

[18] In Alberta, the *Rules* alter the application of the doctrine of *functus officio* in respect of the Court's determination of costs. In ***RC International Ltd v Brooks***, 2000 ABCA 270, the Court of Appeal dismissed an argument that the Court could not order costs following the entry of a formal judgment. The Court held that argument had been "put to rest" following the 1994 introduction of rules 600(3) and (4), which allowed for costs to be dealt with at any stage of the proceedings, even after the entry of final judgment: ***RC International***, at paras 1 and 15, citing ***Sprung Instant Structures Ltd v Ernst & Young Inc***, 1999 ABCA 15 at para 4. The Court also noted at para 14 that rule 330 allowed for further directions to be given to ensure the relief to which that party is entitled, so long as these did not vary the original judgment or order. Today, rule 10.30 has superseded rules 600(3) and (4) while rule 9.14 has superseded rule 330.

[19] The Court of Appeal has confirmed that rule 10.30 is an exception to the doctrine of *functus officio:* ***Saskatchewan Power*** at para 10 citing ***RC International***, ***Firemaster Oilfield Services Ltd v Safety Boss (Canada)***, 2002 ABCA 96, and ***Walton v Alberta (Securities Commission)***, 2014 ABCA 446. Rule 9.14 has also been described as an exception to the doctrine and has been

used to reapportion costs awards in the context of post-judgment payor bankruptcy: ***Richter v Chemerinski***, 2014 ABQB 322 at para 4; ***Yassa v Parker***, 2014 ABQB 305 at para 32.

[20] These decisions allow for the granting of a further costs award after a final judgment or order has been pronounced and constitute a *Rules*-based exception to the application of the *functus officio* doctrine. Rule 9.14 grants the court a general discretion to make any further or other order after a judgment or order has been entered to provide a remedy to which a party is entitled in connection with the judgment or order so long as doing so does not require the original judgment or order to be varied. Rule 10.30, which specifically addresses costs, allows a costs award to be made "after judgment or a final order has been entered". These are discretionary decisions the AJ was entitled to make.

[21] In deciding whether the AJ appropriately exercised his discretion to grant the Order, I must consider the foundational principles underlying the *Rules* which, amongst other things, encourage timely and effective resolution of a claim and honest communication, and provide an effective, efficient, and credible system of remedies and sanctions for enforcement of the *Rules*.

[22] I am satisfied that if, as Ulmer argues, the granting of the Order falls within the AJ's initial jurisdiction, then the *Rules* provide him with the discretion to enforce the Undertaking as an exception to the doctrine of *functus officio*. Enforcing the Undertaking simply recognizes Ulmer's unfulfilled promise and does not require any variation of the Costs Award. In my view, enforcing the Undertaking accords with the purpose of the *Rules*. It would be antithetical to a proper and fair administration of the *Rules* if Ulmer is permitted to avoid his promise, particularly where, in giving the promise, the Plaintiff presumably received a benefit by not having to face BES's security for costs application.

B. Enforcing the Undertaking

[23] In any event, I take the view that the doctrine of *functus officio* does not apply at all. In my view, the AJ's enforcement of the Undertaking is not related to a determination of costs but is an exercise of the Court's jurisdiction on an entirely separate matter, namely the enforcement of the Undertaking. In this respect, I agree with the AJ who concluded that the application to enforce the Undertaking did not require him to revisit the Costs Award.

[24] The parties agree that the Undertaking was given to the Court. An undertaking given to the Court is "equivalent to an injunction and, if violated may be the subject of an application to the court": ***London & Birmingham Railway v Grant Junction Canal Co***, [1835] 1 Ry. Ca. 224 cited in David Eady & A Smith, *Aldridge, Eady & Smith on Contempt*, 3rd ed (London: Sweet & Maxwell, 2005). An Undertaking given to the Court is a solemn promise. Unlike a solicitor's undertaking, an undertaking given to the Court may, as a last resort, be enforced with contempt proceedings, regardless of whether the undertaking has been incorporated into a court order: rule 10.52(3)(a)(vi), and see ***Taherkani v Este***, 2020 BCCA 226 at paras 30-31.

[25] Where an undertaking involves a promise to pay money to a party, the Court has no power to revoke or vary it: ***Westminster Bank Ltd v Zhang***, 1966 1 All ER at page 115. In such a scenario, not only does the person giving the undertaking owe an obligation to the Court to discharge the

undertaking, but they are contractually bound to perform their obligation to the other party. As the Court held in ***Westminster Bank*** at page 113:

> Where the giving of the undertaking to the court forms part of the bargain between the parties to litigation, the giver of the undertaking may assume not only an obligation to the court but also a contractual obligation to the other party to the bargain to observe or implement the undertaking... If the undertaking in such a case were an undertaking to make a payment, the contractual bargain might give rise to a debt recoverable at law, that is to say, to a cause of action which would survive against the legal personal representative of the giver of the undertaking after his death.

[26] It is not disputed that the Undertaking is valid and that Ulmer's promise to pay costs remains unfulfilled. The Undertaking is a promise Ulmer made for which the Plaintiff received a benefit. Until such time as the Undertaking is satisfied, he remains responsible to the Court for its performance. This is precisely what the Order achieved, and I see no reason to disturb the AJ's decision in that regard.

III. Disposition

[27] Ulmer's appeal is dismissed.

[28] BES is entitled to its costs of this appeal. If the parties cannot agree on the amount, they shall provide me with their submissions within 30 days, not exceeding 3 pages, and attaching a proposed Bill of Costs.

Heard on November 1, 2023.
Dated at the City of Calgary, Alberta, on November 14, 2023

O.P. Malik
J.C.K.B.A.

Appearances:

Matthew X. James
for the Appellant, Mr. Timothy Ulmer

Jo Colledge-Miller
for the Respondent, Builders Energy Services Ltd.