

Date: 20141008
Docket: 14/27
Citation: *Anstey v. St. John's (City)*, 2014 NLCA 35

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

ROBERT B. ANSTEY

APPELLANT

AND:

CITY OF ST. JOHN'S

RESPONDENT

Coram: Green C.J.N.L., White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401G1733

Appeal Heard: September 15, 2014
Judgment Rendered: October 8, 2014

Reasons for Judgment by Green C.J.N.L.
Concurred in by White and Hoegg JJ.A.

Counsel for the Appellant: Self Represented
Counsel for the Respondent: Linda Bishop

Green, C.J.N.L.:

[1] The issue on this appeal is whether a judge of the Trial Division erred in the exercise of his discretion when he ordered money subject to a garnishee order to be paid into Court.

Background

[2] The appellant, Robert Anstey, acted as solicitor for the owners of six parcels of land in relation to their sale to, and in some cases expropriation by, the City of St. John's, the respondent on this appeal.

[3] The agreement reached between the owners and the City was that, as part of the total compensation payable to the owners, the City would be responsible for the payment of Mr. Anstey's "reasonable legal fees". Although normally such an arrangement would not be regarded as creating a direct legal obligation for the City to pay Mr. Anstey, but rather an obligation to indemnify or include in the money payable to the owners an amount equal to what the owners were obligated by their solicitor-client relationship to pay (and had paid) to Mr. Anstey, all participants in the transaction appeared to regard the obligation as an undertaking by the City to pay Mr. Anstey directly, even though no solicitor-client or any contractual relationship existed between them. This was confirmed by the City in its transaction-closing letter to Mr. Anstey. The transactions apparently closed on this basis. As well, Mr. Anstey appears to have relied on the City's undertaking to his detriment by not, as is customary, deducting from the purchase money the amount of his fees and disbursements before handing over the balance to his clients.

[4] Certain issues existed between the owners and the City with respect to back property taxes. As is required as part of a seller's obligation to make good title free from tax liens, Mr. Anstey requisitioned tax certificates from the City verifying taxes on all six properties had been paid. The City supplied certificates with respect to only two of the properties. It is unclear whether at that time Mr. Anstey realized that the certificates did not cover all properties. He says, however, that in response to his inquiries as to the total amount of taxes owing on all properties, he was given a figure by City representatives and that in reliance on that representation he paid that amount to the City on behalf of his clients. At the closing date, the City sent the purchase funds to Mr. Anstey to be held in trust pending satisfaction of certain closing conditions. One such condition related to provision of clear

tax certificates with respect to the purchased properties. Mr. Anstey sent the title deeds and related documentation, including the tax certificates he had received, to the City solicitor's office. He then proceeded to disburse the money to his client without withholding any money to satisfy any outstanding tax liabilities.

[5] At some point subsequent to the closing the City took the position that all tax certificates had not been provided and taxes remained owing in respect of at least some of the properties. The position at that point would appear to be thus: the sellers, who allegedly owed (and perhaps still owe) unpaid taxes on the properties, received the purchase money without having fully discharged their tax liability in compliance with the closing conditions; Mr. Anstey who, according to him, thought he had complied with the condition with respect to provision of clear tax certificates on all properties, had disbursed the funds without being paid and without, allegedly, in fact fully complying with the tax certificate trust condition; and the City, to the extent that taxes remained unpaid, retained the right to sue the sellers personally for the taxes (but not, of course, to proceed against the land) and to the extent that the closing trust conditions were not complied with, gained a right to claim against Mr. Anstey, on the basis of breach of undertaking, for non-compliance with those conditions.

[6] When Mr. Anstey sought payment of his fees and disbursements from the City, it took the position that it wanted his bill taxed. Mr. Anstey made the arrangements for this process. Both the City and the sellers were given notice and appeared on the taxation. The Master taxed and allowed the bill, including disbursements, HST and Master's fees at \$5,171.70. The City did not appeal the Master's ruling to the Supreme Court.

[7] When Mr. Anstey requested payment from the City as a result of the taxation, the City then took the position that all closing conditions relating to provision of tax certificates had not been complied with and that the transaction was therefore "not completed and as such legal fees are not yet due". (I note in passing that there is nothing in the Taxing Master's decision to indicate that the City had taken this position at the time of the taxation as a reason for not completing the taxation). The City refused to pay Mr. Anstey in accordance with the Master's taxation until the tax certificates were supplied. It also filed a complaint with the Law Society concerning Mr. Anstey's alleged failure to comply with trust conditions.

[8] Mr. Anstey took the position that he had paid outstanding taxes in the amounts the City had requested at the time of closing and that the assertion that taxes on other properties were owing arose only six months after the closing when funds had all been disbursed. In those circumstances, he says that the transaction was completed and the City should have recourse only to the sellers for payment of the taxes. Met with continuing refusal by the City to pay the amount taxed and allowed by the Master, Mr. Anstey filed the Masters Certificate as a judgment of the Supreme Court pursuant to s. 74(9) of the *Law Society Act*, 1999, SNL 1999, c. L-9.1. He again requested the City to pay him pursuant to what was now a superior court judgment. The City again refused, although it did not appeal the judgment to this Court. As a result of the City's refusal to satisfy the judgment, Mr. Anstey followed up with an instruction to the High Sheriff pursuant to s. 112(1) of the *Judgment Enforcement Act*, SNL 1996, c. J-1.1 to issue a garnishee order attaching the City's bank account at the Royal Bank of Canada. The garnishee complied with the order and remitted the money to the Sheriff.

The Stay Application

[9] Upon receiving notice of the garnishment, the City applied to the Trial Division, relying on certain rules of court (which in fact have no direct or specific application) and "the Court's inherent jurisdiction over its own procedure," for "a stay in the garnishee order pending conclusion of the real estate transaction and/or the complaint to the Law Society" and for "such further and other relief" as the Court considered appropriate. The City asserted that because the tax certificates had not been provided, registration of the Master's certificate as a judgment of the Court and the subsequent issuance of the garnishee order were "premature at best."

[10] In response, Mr. Anstey asserted that the transaction was "completed" and that he had been led to believe that all taxes on the properties had been paid. I pause here to note that the record on certain important points is incomplete. The original agreement whereby the City undertook to pay Mr. Anstey's fees, the City's closing letter which records the interrelation, if any, between the trust conditions and the reiteration of the City's undertaking to pay the fees, any written undertaking by Mr. Anstey to comply with the trust conditions, the wording of Mr. Anstey's request for tax certificates, the wording of the two tax certificates which Mr. Anstey received and the dates when the information relating to the existence of outstanding taxes on the other properties became known to Mr. Anstey were not before the applications judge. Any information before the judge on these matters came

from recollections by counsel for the City (who also happened to be involved in the real estate transaction) and Mr. Anstey. As the party with the burden of proof on the stay application and with the means to produce such evidence, the City must bear the consequences of any uncertainty that results from the absence of such information.

[11] When the matter came on for hearing, counsel for the City did not explicitly ask for a stay of enforcement but instead asked that the money forwarded to the Sheriff's office pursuant to the garnishee order be paid into court or continue to be held by the Sheriff without disbursement to Mr. Anstey until the real estate transaction was completed by provision of the requested tax certificates (Transcript, p. 12). At that point, Mr. Anstey interjected: "I hope I'm going to get a chance to reply to some of this." The judge's response was:

Mr. Anstey, there may be another time to argue this, but today is not the day on this garnishee, I'm going to order that the money be paid from the Sheriff's Office – [to the Court].

[Transcript, pp. 12-13]

[12] Mr. Anstey nevertheless persisted in his request to be heard. When he commenced to review some of the factual history, the judge interjected, prompting the following exchange:

THE COURT: Yes, but see, I think you need – see, right now I'm just dealing with a garnishee.

MR. ANSTEY: I realize that, my lord, but I –

THE COURT: I think the money should be paid into Court and then there should be a full hearing as to whether you're entitled to it or not.

MR. ANSTEY: I totally disagree, my lord.

THE COURT: But this is all I have before me now is an application that the garnishee be stayed and the money paid into the Court and that's my sense.

[Transcript, pp. 13-14]

[13] Nevertheless, although having expressed his view on the matter three times, namely, that the money should be paid into court, the judge then

allowed Mr. Anstey to explain that it was only after six months from the date of the closing that the City took the position that there was tax money still owing and that he paid out the purchase money without withholding taxes in the belief that they had all been paid. He further reiterated that in these circumstances the City should be looking to the sellers for payment of the taxes.

[14] Immediately upon the conclusion of Mr. Anstey's uninterrupted submissions, and without stating anything further by way of reasons, the judge simply stated:

Okay, it is ordered that the sum of \$5,171.70 now in possession of the Sheriff in relation to Robert B. Anstey shall be paid into this Court.

[Transcript, p. 19]

[15] There was no explicit order staying enforcement proceedings and no conditions expressed as to the circumstances when or under which the money could or should be paid out in the future.

Issues on Appeal

[16] Mr. Anstey's main ground of appeal is that the applications judge erred in his application of the applicable legal principles for the purpose of determining when it would be appropriate to grant a stay and to order payment into court. As a subsidiary and related point, he submits that the judge erred in his appreciation of the relevant facts and considerations.

[17] He also submits that the judge exhibited bias in his decision and failed to deal with costs as part of his disposition.

Standard of Appellate Review

[18] The standard of appellate review with respect to the merits of the judge's decision in a case such as this is a deferential one. The Court will only review the exercise of a discretionary decision to determine whether it has been exercised judicially within jurisdiction, according to proper legal principle, without palpable and overriding error in appreciation of the relevant facts and applicable considerations, and without having caused a manifest injustice: *Tremblett v. Tremblett*, 2013 NLCA 53, 340 Nfld. & P.E.I.R. 135 (see also *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA)).

[19] On the other hand, the standard of appellate review with respect to allegations of bias or reasonable apprehension of bias is correctness. In like manner, the standard of review with respect to issues of procedural fairness is also correctness. The hallmarks of a judicial decision are impartiality (lack of bias or appearance of bias) and procedural fairness. A judge must exercise his or her judicial powers in a manner that is consistent with these fundamental characteristics of a judicial decision.

Applicable Principles

[20] There are many diverse circumstances in which a court may order money to be paid into court, thereby making the funds *in custodia legis*. Payment into court is an administrative mechanism to be employed to achieve another judicial or legal objective. Thus, for example, payment into court may be ordered as an adjunct to an application for a stay of proceedings or a temporary stay of enforcement of an order, or pursuant to a warrant of attachment or an interpleader order, or to facilitate distribution of proceeds of sale of property pursuant to court ordered sale, or as a means of preserving property pending resolution of another legal issue.

[21] Although many differing circumstances are referred to in the rules of court, the court also has an inherent jurisdiction to order that funds be paid into court to await the outcome of pending litigation or to prevent fraud or abuse of court process: *Penney v. Canadian Imperial Bank of Commerce* (1996), 145 Nfld. & P.E.I.R. 355 (Nfld. S.C.T.D.) at paragraph 14.

[22] In each case, the objective of ordering payment into court is to maintain neutral control over the money paid in so as to facilitate the conclusion of some other juridical act in a fair and equitable manner. The only limitation on the exercise of the jurisdiction to order payment into court is that it has to purport to advance the objective, or be within the purpose, of the other contemplated legal act in relation to which the money was initially paid in.

[23] In this case, the City sought a stay of enforcement proceedings in its written application and then specifically asked in its oral submissions that the money be either paid into court or that the Sheriff be ordered not to disburse the money to Mr. Anstey. The order made was for payment into court. The judge did not expressly order a stay. It is nevertheless a fair inference from the way the judge approached the matter at the hearing that

he meant to do so. In any event, the practical effect of ordering payment into court was to stay immediate enforcement.

[24] The justification for payment-in comes from a conclusion that an order would facilitate or further the purpose of a stay of enforcement. It is necessary, therefore, to consider the appropriateness of payment into court in the context of whether a stay should have been granted. Without a stay, there would have been no justification for delaying completion of the garnishee process by payment into court or by some other means.

[25] In this case, the money ordered to be paid in related to money garnished by the Sheriff in the City's bank account. Garnishment is now regulated by Part VIII of the *Judgment Enforcement Act*. Section 111(d) provides that a garnishee order attaches to the garnished obligation when the garnishee order and other required documents are served on the garnishee. The money in this case has therefore been attached, but it was not distributed by the Sheriff to Mr. Anstey.

[26] The City retained the right, however, to issue a notice of objection to the garnishment to the Sheriff under s. 159, thereby triggering a determination of its claim that the garnishment should not have occurred. Once a notice of objection is lodged with the Sheriff, the judgment creditor may apply to court to dispute the objection. Thereafter, the Sheriff may only distribute the money received as a result of the enforcement proceedings when the court orders: *Judgment Enforcement Act*, s. 163. The City's objective in this case could have been achieved by invoking this procedure without payment of the money into court, but it chose not to avail of it. The City's reason for not doing so, advanced by counsel at the appeal hearing, was that it had not been served with notice of the garnishment at the time the garnishee order had been delivered to the City's banker.

[27] Alternatively, s. 149(1) also expressly recognizes the right of the City, as debtor, to apply to the court for a stay of enforcement "where it is considered: (a) just and equitable in the circumstances and (b) to be in the interests of the creditors as a whole." Subsection 149(2) further provides that the court may grant a stay "upon terms and conditions that it considers appropriate and may order that the debtor make payments to the Sheriff."

[28] Quite apart from s. 149, the court also has jurisdiction to order a stay of proceedings in the nature of execution, not pending appeal, under s. 97 of the *Judicature Act*, RSNL 1990, c. J-4 as well as under the inherent

jurisdiction of a superior court to control its own process, including its judgments and orders: *Tremblett*, paragraph 39. There, the Court expressed the view that specific provisions in the rules of court relating to applications for stays did not occupy the whole field of the Court's inherent jurisdiction but merely dealt with discrete individual aspects of it (paragraph 40).

[29] That said, although the City did not expressly ground its stay application on s. 149, and the judge did not refer to it, that is the basis on which the justification for a stay in this case must be considered. It has direct application to the circumstances presented by this case.

[30] The test for a stay under s. 149 is two-fold: whether (i) considering the interests of the creditors as a whole, (ii) the granting of a stay would be "just and equitable in the circumstances." In this case, the only creditor involved is Mr. Anstey. His interests must therefore be considered. The key question is how the question of whether it is "just and equitable" to grant a stay should be resolved.

[31] The "just and equitable" touchstone is not substantively different from that expressed in s. 97(2) of the *Judicature Act*, where the court "may make the order that may be just." As noted in *Tremblett*, at paragraph 56, the normal test for granting a stay of proceedings involves the application of a three-part test: (i) on a preliminary assessment of the merits, whether there is a serious issue to be dealt with; (ii) whether failure to grant the stay would result in irreparable harm to the applicant; and (iii) which of the parties would suffer the greater harm as a result of granting or refusing a stay. Without foreclosing the possibility of applying s. 149 in other appropriate circumstances, I see no reason why this test, modified to fit the circumstances which s. 149 addresses, should not be applied to an application under s. 149.

Analysis

(a) The appropriateness of payment into court

[32] Mr. Anstey is entitled to be paid for his services. The unappealed decision of the Taxing Master says so, and has valued his services, including disbursements, taxes and masters fees, at \$ 5,171.70. That amount was entered as a judgment in the Trial Division. That judgment was also not appealed. As was his right, Mr. Anstey sought enforcement of that judgment by issuing a garnishee order under the *Judgment Enforcement Act*.

[33] Although his clients, as the beneficiaries of his services, are the ones *prima facie* responsible to pay Mr. Anstey, it is accepted by all, including the City, that the City has assumed that responsibility and it appears that Mr. Anstey and the sellers have agreed that he will look to the City, instead of the sellers, for payment. This position is now confirmed by the entry of judgment against the City by the filing of the Taxing Master's certificate, which the City is not contesting. There is therefore no issue as to the liability of the City.

[34] The only outstanding question relates to the timing of payment. Even with respect to that issue, however, *prima facie* the City is obligated to pay forthwith because it is subject to an unappealed judgment for payment that is not in any way on its face conditional with respect to its enforcement. See *Tremblett*, paragraph 54. The "immediate payment principle", as it was called in *Tremblett*, applies unless the party seeking delay in enforcement can justify why the general principle should not prevail.

[35] Nevertheless, the City's position is that it should not have to pay until the transaction is "completed". It says the transaction was not completed because Mr. Anstey did not comply with the trust conditions upon which the transaction's closing funds were delivered to him, namely, the provision of clear tax certificates for all six properties. Mr. Anstey says, however, that he was led to believe that all taxes had been paid and that it was only some considerable time after the transaction's closing that the City asserted that taxes remained owing on some of the properties. If so, that might raise an estoppel against, or constitute a misrepresentation by, the City.

[36] Whether those circumstances would provide a justification for disbursing the funds to his client without providing the other tax certificates and whether he could be entitled to payment of his fees before the trust conditions were satisfied will nevertheless depend on a number of factors, including, what the precise terms of the agreement for payment of Mr. Anstey's fees were, what the specific terms of the closing conditions were, whether the undertaking in the closing letter was, by its terms, linked to satisfaction of those trust conditions, what specifically passed between Mr. Anstey and the City when information as to outstanding taxes was sought, when Mr. Anstey was first aware that four other tax certificates were required, amongst other things. None of this information was presented to the Court. It was not therefore possible for the applications judge to resolve the disputes between Mr. Anstey and the City.

[37] Perhaps this was what was on the mind of the applications judge when, during the course of the hearing, he expressed the view that the money should be paid into court following which “there should be a full hearing as to whether you’re entitled to it or not” (Transcript, p. 14). But that presupposes that there was a basis for saying that there was a serious issue as to entitlement. Indeed, there was nothing which the applications judge could have evaluated to determine whether there were grounds to stay the garnishee order save for a bold assertion from counsel for the City that she had filed a statement of claim against Mr. Anstey and his clients immediately before attending court on the morning of the hearing. In any event, the judge did not address the three-part test for granting a stay.

[38] Even if Mr. Anstey can be said to have disbursed the funds in breach of closing trust conditions (something which on the current record is not capable of being resolved) it does not necessarily follow that he should be denied payment of his fees until he rectifies the breach by complying with the conditions and providing additional tax certificates. It must not be forgotten that the fees were earned by providing professional services to his clients, the sellers. They have been certified by the Master as being fair, reasonable and payable. The City has merely assumed the obligation to pay those fees. Mr. Anstey was not providing the services to or for the City. It is customary for solicitors acting for a seller on a real estate transaction to deduct from the sale proceeds the amount of fees and disbursements earned to that point, regardless of whether, as between the solicitor and the purchaser’s solicitor, closing trust conditions remain outstanding and will be satisfied at a later date. Why, then, should the City’s obligation to pay Mr. Anstey be any different? The enforcement of closing trust conditions is a separate matter that may have to be satisfied by suit on the undertaking that arises if the seller’s solicitor accepts the conditions by not returning the funds and instead disburses them to the client, or alternatively by a possible complaint to the Law Society. In either circumstance, the seller’s solicitor would have already been paid his or her fees. The City has submitted nothing that would justify a different result here. In fact, to do otherwise would be to treat the relationship between the City and Mr. Anstey as one of solicitor and client, which it is not. The notion that Mr. Anstey has not “completed” the transaction, as a justification for not paying him, is thus based on a false premise.

[39] During the appeal hearing, reference was made to a statement made in the Taxing Master’s decision which purported to quote the City’s

undertaking, in its closing letter, to pay Mr. Anstey's fees and disbursements in the following terms: "The City will also pay legal fees for the closing of this transaction." I have already noted that the closing letter was not part of the record before the applications judge nor on this appeal. To the extent that the Court can rely on evidence apparently before the Taxing Master even though not on the record on appeal, it has to be recognized that the language quoted by the master is unclear as to its scope. All parties agree that it was only "reasonable" legal fees that were covered, even though that qualification was not expressed in the words quoted. Furthermore, and most importantly, the language begs the question as to when the "closing" was regarded as taking place. Was it meant to be when all trust conditions had been satisfied? If so that would mean that a transaction would not be regarded as effectively "closed" until possibly months after the "closing date". That would be a strained use of terminology and contrary to common practice respecting real estate transactions. Or was it meant to be when the transaction effectively became irrevocable by the exchange of deeds and other closing documents in return for the purchase money followed by the disbursement of the funds to the client and the acceptance, either expressly or by implication, of the trust conditions thereby creating an undertaking to comply with the imposed trust conditions in place of the right to unravel the transaction? If I had to choose between these two possibilities, I would favour the latter. But it is not necessary to do so because the ambiguity has to be resolved against the City as the party who had it within its power to provide, in support of its application, all the requisite documentation to establish the understanding between the parties on these points.

[40] Given these circumstances, is payment into court to facilitate a stay justified? That involves application of the test, as described above, for granting a stay under s. 149. The applications judge erred in principle in not addressing and applying the applicable test. His decision therefore cannot stand. Accordingly, it falls to this Court to exercise the discretion the judge should have properly exercised, according to the applicable principles.

[41] To do so, the City must first establish that there is a serious issue to be resolved with respect to the entitlement of Mr. Anstey to be paid forthwith for his services. The presumption of immediate payment would have to be displaced. The City placed none of the documentation from which it might be concluded that the presumption was displaced in these circumstances before the court. There is therefore nothing with which to connect a right to delay payment with the alleged failure to satisfy trust conditions. In these

circumstances, it is impossible to say there is a serious issue to be tried. In fact, I would go further and say that nothing was put on the record that would justify linking the obligation of the City to pay Mr. Anstey to an as yet undetermined obligation to satisfy certain trust conditions. It was simply unreasonable for the City to take the position it did.

[42] As to the second part of the test (whether the City will suffer irreparable harm if the stay is not granted), it is difficult to say that this is so. The City has not pointed to anything that demonstrates it will suffer irreparable harm. If the fees are paid to Mr. Anstey, it still remains open to the City to recover payment of the taxes from the taxpayer-sellers. It also has the remedy of suing Mr. Anstey on his alleged undertaking to supply further clear tax certificates. Furthermore, because there is no solicitor-client relationship between them, there is no duty of care in negligence owed by Mr. Anstey to the City for not supplying the tax certificates and which would justify not paying professional fees because a service was performed negligently. As well, the *Judgment Enforcement Act* contemplates, in s. 159, a means, without a court-ordered stay and without payment into court, whereby garnisheed monies can be prevented from being paid to the creditor until a dispute between them is resolved. Of course, the City did not avail of this procedure and perhaps could not have availed of it, given its asserted lack of immediate notice of the garnishment. It shows, however, that invocation of the Court's stay procedure was not integral to the protection of the City's interests.

[43] Counsel for the City suggested that in the circumstances it was appropriate to order a stay to provide the City with an opportunity to set off its obligation to pay Mr. Anstey against money Mr. Anstey may owe to the City for his alleged failure to comply with the closing conditions. In *Bank of Montreal v. H.O. House Limited* (1978), 15 Nfld. & P.E.I.R. 33 (NFCA) this Court recognized that a stay of immediate execution of a judgment debt could be granted where the debtor has a cross-claim in the nature of a counterclaim against the judgment creditor which for procedural reasons must be tried separately, so as to allow for the possibility of one to be netted against the other: see also *Tremblett*, paragraph 47. For this situation to obtain, however, the Court has to be satisfied that failure to grant a stay would cause "unnecessary hardship or loss": *Tremblett*, paragraph 47. It is in the circumstances of this case for the City to say that its inability to set off the \$5,171.70 it owes to Mr. Anstey against other amounts he may ultimately be found to owe the City would cause unnecessary hardship or

loss. The City has advanced no argument in support of such a position. In other words, it cannot be said there would be irreparable harm to the taxpayers of the City. Counsel for the City conceded as much on the appeal.

[44] With respect to the third part of the test (balance of convenience), it cannot be said that the City would suffer the greater harm if a stay were not granted. As noted, it could have achieved its objectives without one. On the other hand, Mr. Anstey, a person who has closed his legal practice and is trying to get in the remainder of his receivables, is being deprived of fees and disbursements which, had his client not reached agreement with the City for alternative payment, would have been paid long ago.

[45] I am therefore satisfied that the basis for a stay is not present. That being so, there is no justification for ordering payment of the garnished money into court. The applications judge's order must therefore be set aside.

[46] I would also add, in *obiter*, that had I upheld the order for payment-in, I would also have included in the order specific conditions defining the circumstances under which the money would subsequently be paid out. It is incumbent on a judge ordering payment of money into court to do this.

(b) Procedural fairness

[47] In light of my decision on the foregoing issue, it is not strictly necessary to deal with the allegation of judicial bias. Nevertheless I believe it is useful to make some comments on the way in which the hearing was handled by the applications judge.

[48] The first thing I would say is that there is no basis for suggesting that there was any actual bias on the part of the judge. Nothing was put forward by Mr. Anstey that could possibly lead to such an inference. I prefer therefore to deal with this issue as one raising the question as to whether Mr. Anstey was denied procedural fairness by the way in which the judge conducted the hearing. A discussion of relevant principles applicable in this area is found in this Court's recent decision in *Cabana v. Newfoundland and Labrador*, 2014 NLCA 34.

[49] The duty of a judge is to listen to the relevant arguments of both sides fairly before making up one's mind on the outcome. Here, the judge had, and presumably read, the material filed by both the City and Mr. Anstey outlining their respective positions. Most of what Mr. Anstey said in court

was already outlined in the detailed affidavit previously filed by him and to which various relevant documents were attached.

[50] Mr. Anstey asserts that based on the way the judge acted in court, and did not refer to many of the points made in his affidavit, the judge did not in fact read the affidavit. I do not accept this. At the commencement of the hearing the judge acknowledged having received Mr. Anstey's affidavit and commented upon the fact that it had been hand written instead of typed, as would be usual. This fact, coupled with the presumption that a judge will properly prepare for a hearing by reading the relevant material, is sufficient to dispel any inference that the judge had not considered Mr. Anstey's position in advance of the hearing.

[51] That said, a judge must, in the conduct of a hearing, also give the parties an opportunity to make further submissions, thereby hearing both sides before deciding the case. An application hearing is not a paper hearing. Oral advocacy is still a vital part of the process.

[52] A review of the transcript makes it clear that the judge had a fixed idea of what he thought should be done before he was prepared to hear from Mr. Anstey. On three occasions he made his view known that the money should be paid into court pending resolution of what he perceived as a dispute between the City and Mr. Anstey. Given the way he expressed himself, it is hard to regard this as anything other than the expression of a firm view. This is not a case of a judge musing out loud to let counsel know how his preliminary thinking was evolving or putting a proposition to counsel for the sake of argument to give counsel an opportunity to refute it.

[53] In the circumstances, the judge gave the impression of having a closed mind. This is also inferentially confirmed by his announcement of his decision immediately following his belated hearing of Mr. Anstey's submissions without any reasons as to why he regarded those submissions as ineffective or irrelevant. He merely repeated what he had said before hearing from Mr. Anstey, thereby giving the impression that he had disregarded those submissions completely. While a judge does not have to give reasons that deal with every point made by counsel, and his reasons may be garnered from the context, the context may also require some degree of acknowledgement at least that the points of argument have been heard and considered. In this case, the judge did not do this.

[54] I conclude, therefore, that the judge did not demonstrate the degree of impartiality and open mindedness that is to be expected of a judicial decision-maker. As much as actual justice, the appearance of justice is important in maintaining confidence in an impartial and fair court system.

(c) Costs

[55] Mr. Anstey also says that the applications judge erred in not addressing costs. He specifically sought solicitor-client costs.

[56] Inasmuch as the judge's order has been set aside, it is open to this Court to substitute an appropriate order as to costs. Since, as I have determined, Mr. Anstey should have been able successfully to have resisted the application, the resulting order would have been a final order as far as he was concerned, i.e. the order was not dependent on the result of another hearing, as it would have been had the stay and payment-in order been granted. Accordingly, costs should follow the event. Given his success in this Court, he should be entitled to his costs on the original application as well as on this appeal.

[57] This is not a case for awarding costs on a solicitor-client basis. I nevertheless agree that the City had no basis for refusing to comply with the judgment of the Supreme Court that was entered upon filing of the Taxing Master's certificate. Its stated reason for not paying, based on an allegation that the transaction was not completed, was unreasonable as it was based on an unreasonably held misconception of the nature of the relationship between Mr. Anstey and the City. Furthermore, Mr. Anstey should not have been faced with all of the delays and prevarications to which he was subjected by the positions which the City took. Nevertheless, the actions of the City in this respect do not approach the level of "reprehensible, scandalous or outrageous conduct" (*Young v. Young*, [1993] 4 S.C.R. 3, p. 134; *A.T.M. v. T.Y.*, 2013 NLCA 48, paragraph 11) or conduct "deserving of reproof or rebuke, bad faith, serious misconduct, flagrant acts meriting censure, acting on improper motives, serious dereliction of duty and gross neglect" (*Humby v. Newfoundland and Labrador Housing Corporation*, 2013 NLCA 7, 331 Nfld. & P.E.I.R. 201, paragraph 48), which are the standards normally applied to determine whether an award of solicitor-client costs is appropriate.

[58] Mr. Anstey has asked that instead of referring the determination of costs to taxation, the Court should settle the amount of costs and order that

they be paid as a lump sum forthwith. While the rules of court contemplate, as the normal procedure, that the quantum of costs will be determined by taxation, (rule 55.04 of the *Rules of the Supreme Court, 1986*), rule 55.02(1)(a) gives a broad discretion to the court to award a gross sum in lieu of or in addition to taxed costs. Previous decisions of this Court have held that an award of a gross sum may be appropriate in complicated cases of lengthy duration or involving evidentiary complexity, where it would take a taxing master considerable time to acquaint himself or herself with the information necessary for taxation and where, accordingly, it would be more expeditious for the presiding judge who is more familiar with the case to deal with the issue of costs: *Colt Engineering and Construction Ltd. v. Bond Architects & Engineers Ltd.* (1996), 140 Nfld. & P.E.I.R. 45 (NFCA), paragraphs 26-27. But the award of a gross sum is not limited to such circumstances. As noted by Cameron J. in *Abitibi-Price Inc. v. Voith Hydro Inc. et al* (1993), 115 Nfld. & P.E.I.R. 183 (Nfld. S.C.T.D.) at paragraph 7, the award of a gross sum will in the last analysis be governed by “[p]ractical considerations”.

[59] In that case she referred to Mark M. Orkin’s, *The Law of Costs*, 2d ed. (Aurora, Ontario: Canada Law Book, 1987), paragraph 202.5 to the effect that “the object of fixing costs by the court ... is to avoid the delay and added costs of an assessment...” Such a motivation for fixing costs would not be limited to complex or lengthy cases.

[60] As Cameron J. also noted in *Abitibi-Price*, at paragraph 9, the awarding of a gross sum does not involve “the traditional taxation of costs under another guise”. While the court may have regard to the scale of costs in the rules, it is not bound by that scale: *Colt Engineering*, paragraph 34. The Court may take a broad approach to calculating what would be an appropriate amount and may, in appropriate circumstances, award an amount that would be in excess of what might reasonably be expected on a taxation. This follows from rule 55.02(1)(a) which allows a gross sum to be awarded “in addition to” an appropriate amount of taxed costs. This may be so, for example, where the party ordered to pay the costs acted in a manner deserving of criticism but not approaching a level meriting an award of solicitor-client costs.

[61] The matter is also complicated somewhat by the fact that at the time of the original application and this appeal Mr. Anstey, a former solicitor, was no longer a member of the bar and technically should be regarded as a self-represented litigant. The traditional rule is that a self-represented litigant

is not entitled to counsel fees, whether calculated on a party and party or solicitor-client basis. It is not necessary to decide whether this is still an invariable rule, however, because as I have said, in awarding costs on a gross sum basis pursuant to rule 55.02(1)(a), the court does not engage in a precise calculation of the amount according to the scale of fees applicable on taxation. Furthermore, to the extent to which the conduct of the City is nevertheless deserving of disapproval, short of a justification for solicitor-client costs, that can be accomplished by factoring that into the calculation of a gross sum award. (See *Dawson v. Dawson*, 2013 BCCA 344, 47 B.C.L.R. (5th) 282.)

[62] Having considered the matter, I conclude that this is an appropriate case for the award of a gross sum in lieu of any other order for taxation of costs. The small amount of money at issue in this case and the delays that have already prevented Mr. Anstey from receiving the money to which he is entitled justify, from a practical point of view, fixing the costs now without requiring Mr. Anstey to engage in yet another hearing, by way of taxation, before receiving the costs which he is due.

[63] Approaching the matter in this way, and taking into account the draft bill of costs Mr. Anstey submitted for consideration by this Court, I would settle the issue of costs as follows: with respect to the application in the Trial Division, I would award an amount of \$1,000 and in this Court, I would award \$1,500.

[64] Mr. Anstey also asked for punitive damages in the amount of \$2,000. Such an award is designed to allow for the expression of the Court's displeasure at the actions of a party that amounts to malicious, oppressive and high-handed misconduct that offend the court's sense of decency (*Humby*, paragraph 49) and to deter him or her from acting in that way again.

[65] Punitive damages awards are very much the exception rather than the rule. Furthermore, they are generally awarded, at least in a contractual context, as an addition to compensatory damages and must be supported by an independent cause of action: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, paragraphs 82 and 149. While the tort of abuse of legal process may be regarded as an independent wrong for this purpose it has limited application because of the requirement that the legal process be involved for a collateral and improper purpose and involve an overt act or threat in furtherance of an illegitimate purpose. (See *Barton v. Potash*

Corporation of Saskatchewan Inc., 2013 SKCA 141, 427 Sask. R. 206, paragraphs 88 and 95-97).

[66] While the approach of the City in this case in seeking a stay of enforcement can be characterized as unnecessary or even unreasonable and may have delayed Mr. Anstey unnecessarily in recovery of the fees which the City undertook to pay, it cannot be described as malicious, oppressive or high-handed or undertaken for a collateral or improper purpose. Accordingly, this is not a case for the award of punitive damages.

Conclusion and Disposition

[67] I would allow the appeal, set aside the order for payment into court and order that the funds so paid in, together with interest as provided by the rules of court, be paid out to the appellant. I would order the appellant have costs against the City both here and in the court below which I would settle by awarding a gross sum of \$2,500, payable by the City forthwith.

J. D. Green C.J.N.L.

I concur: _____

C. W. White J.A.

I concur: _____

L. R. Hoegg J.A.