IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

DEL THOMAS DUNFORD	)	***E. Birnboim***
	)	*on his own behalf*
(Petitioner) Respondent	)	
	)	***L. I. Z. Pinsky*** *and*
- and -	)	***J. A. Schofield***
	)	*for the Respondent*
JOANNE ELLEN DUNFORD	)	*D. T. Dunford*
	)	
(Respondent) Respondent	)	***No appearance***
	)	*for the Respondent*
- and -	)	*J. E. Dunford*
	)	
ELLIOT BIRNBOIM	)	*Chambers motion heard:*
	)	***February 16, 2017***
Appellant	)	
	)	*Decision pronounced:*
	)	***March 17, 2017***

MARC M. MONNIN JA

[1] The appellant, counsel for the respondent in the Court below, seeks an order extending the time to file his factum and appeal book in the appeal commenced to challenge an award of costs made against him personally.

[2] Two aspects of this motion and appeal are somewhat unusual. An order that is made as to costs only, as the order under appeal, is not subject to appeal except by leave of the judge making the order. However, that restriction does not apply to an order made personally against a lawyer (see sections 90(1) and 90(2) of *The Court of Queen's Bench Act*, CCSM c C280).

[3] Secondly, since one of the outcomes of a successful appeal by the appellant may be that costs would be awarded against his client, on the face of it, he is in a position of conflict with his client in pursuing the appeal. In the Court appealed from, he retained counsel to act for himself and his client. That counsel, who does not act for him on this motion, advised the Court that "an arrangement" had been arrived at whereby the appellant would be responsible for any costs awarded. On the hearing of this motion, on the record at my request, the appellant undertook to the Court to be responsible personally for any costs that may be awarded against his client, thereby removing the conflict.

[4] The parties separated over six years ago and a petition was filed in early 2011 with an answer filed shortly thereafter. Most matters had been settled between the parties save for an issue of costs which was decided against the petitioner by Thomson J on July 10, 2012 (see *Dunford v Dunford*, 2012 MBQB 204). He seized himself of all further interim proceedings. In doing so, he noted the following (at paras 43-47):

> I also have an awareness of the dynamics and intense conflict between the parties, and between their legal counsel.
>
> And in that regard, I would conclude that the recent conduct of this litigation on the issue of interim costs has ill-served the interests of the parties, though it is unclear to me whether they recognize that or, if they do, whether they care.
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> There has been in my view a grossly disproportionate expenditure of resources and energy relative to the issue at hand.
>
> Much more important to me has been the apparent misuse of precious court-time and judicial resources resulting from that recent conduct.

> The excessive and, frankly, selfish utilization of the court's process should not be permitted to occur; there must not be resignation that this is the foregone course of domestic litigation where there happens to be the coincidental alignment of personal animosity between counsel, the receipt by them of irrational instructions, and the possession by their clients of substantial financial means.

[5] The matter then came back before the same judge in 2016 for an order striking the answer filed by the respondent and that summary judgment be granted so as to permit the petitioner to proceed with his divorce. In his reasons for judgment (see *Dunford v Dunford*, 2016 MBQB 84), the motion judge has this to say about the proceedings before him (at para 3):

> The motion to which these reasons apply relates technically to a fresh round of litigation. Consistent with my previous experience with these parties, however, the discrete issue here is unnecessarily, even pointlessly, subject of conflict, and the recent conduct of the litigation is marked by a surprising inattentiveness to detail.

[6] By those reasons, the motion judge granted the petitioner's requests for summary judgment in part, granting the petitioner his divorce but allowing the respondent's claim for prospective spousal support to remain. The motion judge invited counsel to submit written submissions respecting costs.

[7] After reviewing them, he determined that it was appropriate to place the appellant on notice that he was giving consideration to an order of costs against him personally. An appearance was scheduled in order that the appellant might make further submissions if he chose which led to him

retaining counsel who appeared to make further submissions.

[8] In written reasons issued in October 2016 (see *Dunford v Dunford*, 2016 MBQB 196), the motion judge was of the view that an order of costs against the appellant personally was required as he had "failed to discharge his duties to the court, and he has caused costs to be incurred without reason" (at para 43). He ordered costs of $10,000 all-inclusive payable forthwith.

[9] The conduct which he ascribed to the appellant and for which he viewed that a censure was needed is found in his reasons, where he says (at para 33):

> In my previous reasons for decision on the motion I commented negatively concerning conduct of the respondent's case, as regards the following;
>
> - a pleading was filed containing allegations which are scandalous, frivolous and vexatious, which fail to disclose a reasonable defense and which contain no statements of fact in support;
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> - material was inserted into the respondent's motion brief which was not in evidence; and,
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> - in the face of an advance warning, an offensive affidavit was filed under the guise of reply, which affidavit I struck.

[10] As well, he considered that the appellant acknowledged during submissions that he had used the court proceeding as a form of "leverage" to attempt to obtain fresh concessions and/or additional relief for his client for which she was not, in this proceeding, entitled to make claim. He concluded

this was an "abuse of the court process" and that the appellant was the author.

[11] The appellant filed a notice of appeal seeking to set aside the order of costs against him personally and a notice of cross appeal was filed by the petitioner seeking solicitor and client costs.

[12] The appellant failed to perfect his appeal documents, namely, he did not file a factum and appeal book in accordance with the rules. He received notice from the registrar that the appeal would be deemed abandoned unless certain steps were taken. He was required to move for an extension of time pursuant to our Court's rules. The registrar, in his dealings with the parties, offered his assistance to avoid an attendance if the parties were willing to reach resolution of the motion. As this did not occur, the motion to extend time was set down for a hearing on February 16, 2017.

[13] The day before that motion was to be heard, counsel for the petitioner filed a notice of motion seeking to expunge documents from the purported appeal book on the grounds that it was material that had been struck by order of the motion judge. That motion was set down to be heard the week after the motion to extend time. At the hearing of February 16, 2017, I directed that both motions be heard together by me and proceeded to do so. The appellant participated by telephone conference.

[14] One final point. While no direct evidence of it was adduced in the material before me, there is a reference in the motion judge's decision (2016 MBQB 196 at para 22) that there was a pending complaint made against the appellant to the Law Society of Upper Canada apparently being held in

abeyance pending this decision on costs. While I have no details of the complaint, presumably it was with respect to his conduct in the proceedings before the motion judge. The appellant made reference to it in his submissions to the Court, but again, no further details were provided.

[15] I have gone on at length as to the background to this motion as I believe the information is germane to explain why I have reluctantly decided to grant the request by the appellant to extend the time for filing the factum and perfecting his appeal. I say reluctantly because, in my view, these proceedings have gone on far too long at too great expense and apparently at the instigation of counsel for both parties. Despite the admonition of Thomson J set out previously, it appears his comments have been unheeded. It now falls to this Court to deal with the situation which should never have come to this.

[16] The criteria upon which this Court deals with requests to extend time in this Court are set out in our jurisprudence quite clearly. The person seeking an extension must satisfy the Court that:

(a) an intention to appeal was present continuously from the time of the decision under appeal to the time of the motion;

(b) there was a reasonable explanation for the delay in filing the material;

(c) in the case of an appellant, there are arguable grounds of appeal; and

(d) where relevant, it is in the interests of justice that the matter

be allowed to proceed.

[17] The appellant has filed an affidavit in which he asserts that he had a continuous intention to appeal and he took steps which would suggest that that was the case, namely, the filing of a notice of appeal and the preparation of the factum and appeal book, although not within the appropriate time limits. That meets the first criterion.

[18] He explained the delay was caused by the fact that he was out of the country for a period of time, followed by obligations to his practice upon his return, by which time he had received the letter from the registrar giving him notice of the filing requirement. I note that, upon receiving the letter, the appellant proceeded to file his material to extend the time diligently and the matter was set down within a reasonable period of time. This is not a situation where there is an inordinate delay. I am satisfied that his explanation is reasonable.

[19] As to an arguable ground of appeal, the appellant recognizes that the decision to award costs against him personally is subject to a highly deferential standard. It will be his submission on the appeal that the motion judge erred when he considered his conduct as being an inappropriate attempt to leverage an outcome to which his client was not entitled. It will be his position that he acted diligently and in keeping with his obligations to his client. He argues that the reference in his motion brief to material that had been expunged was merely to material that had been served without leave contrary to the rule. In his submission, the references were in keeping with the ability of the Court to consider material which was required to

secure a just determination.

[20] An attempt to settle was viewed by the trial judge as being an attempt by the appellant to "avoid a reckoning before" him. The appellant submits that the motion judge failed to consider that the offer would have specifically benefitted the petitioner and should be considered in that light.

[21] I am satisfied that, without dealing with the merits of each ground specifically, the appellant has raised an arguable ground of appeal as to the appropriateness of ordering costs against him personally.

[22] Were it needed, I would also consider the interests of justice argument advanced by the appellant. In doing so, I do not equate his personal interest with the public interest. However, I recognize that, with pending disciplinary proceedings relating to the issue, the decision under appeal may extend beyond his own situation. The short delay in filing his material should not serve as a barrier to having a determination made of whether the conduct should have led to what was an exceptional awarding of costs.

[23] Therefore, for the reasons explained above, I have concluded that the motion to extend the time to file a factum and appeal book should be granted. The appellant has one week, from the receipt of these reasons, to file a proper factum and appeal book.

[24] It should be noted that the factum, as presented on the motion, fails to address the issue of the standard of review which is required of all factums filed in this Court.

[25] As to the petitioner's motion to strike the affidavit of the respondent, or portions thereof, included in the appeal book on the grounds that it was material struck by the motion judge and was not before him, the motion is dismissed. In my view, the material is required so that the panel has an opportunity to consider the manner in which it was used before the motion judge and whether reference to it warranted a finding of misconduct which formed part of the basis for the order against the appellant personally. It is not as if this material is being sought to be used for the purposes of overturning the order of summary judgment or relied upon for the truth of its contents.

[26] As the appellant has been successful on both motions, costs will be in his favour on a party-and-party basis irrespective of the outcome of the appeal.

Monnin JA