Date: 20070928

Docket: T-1427-06

Citation: 2007 FC 976

Ottawa, Ontario, September 28, 2007

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

JAZZ AIR LP

Applicant

and

TORONTO PORT AUTHORITY

Respondent

and

CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC., and ROBERT J. DELUCE

Interveners

REASONS FOR ORDER AND ORDER

[1] On June 12 of this year I issued an Order in this file in which, while finding no error of law or fact on the part of the case management prothonotary, I set aside an Order which she had made dismissing the applicant's application for judicial review and substituted therefor an Order converting that application into an action. I stated that the respondent and the interveners should have their costs of the motion before the prothonotary and sought written submissions on that point.

[2] Those submissions have now been received.

[3] The respondent and the interveners each ask for costs on a solicitor and client basis. The respondent submits a bill of costs for a little less than $250,000; for its part the interveners' bill of costs is for over $160,000.

[4] The applicant submits that costs should not be awarded on a solicitor and client basis and that, at best the respondent and the interveners should receive only costs assessed on Column V of the Tariff. After making some necessary but relatively minor adjustments to the parties' calculations I estimate that a lump sum award on that basis would come out to approximately $28,000 for the respondent and $23,000 for the interveners. While I have no doubt that a lump sum award is appropriate in this case so as to save the parties the trouble and expense of a detailed costs assessment, I have concluded in the circumstances that first, the respondent and the interveners should receive identical costs awards, and second, that such awards should be on a solicitor and client basis.

[5] The first of those conclusions is based on the fact that both of them adopted similar positions in the motion before the prothonotary. What I view as the fortuitous circumstance that one set of lawyers seems to have spent more time and employed more bodies in achieving the same result does not seem to me to be a proper basis for making distinctions between them.

[6] As to the second conclusion, in arguing against a solicitor and client award the applicant places much emphasis on the fact that in my Reasons of June 12, 2007, I did not make a specific finding that the applicant's conduct had been “reprehensible, scandalous, or outrageous” (*TMR Energy Ltd. v. State Property Fund of Ukraine*, [2005] FCA 231. While that is true it is also irrelevant since I specifically reserved the question of costs until the present time. I also made it quite plain that I thought the costs award should be heavy, that it should penalize the applicant and reflect the abusive nature of its conduct and I quoted with approval (at paragraph 14) the prothonotary's comments at paragraph 38 of her Reasons which in my view describe conduct which manifestly meets the criteria for a solicitor and client award of costs.

[7] That said, I do not think that it serves any useful purpose to refer to the amounts awarded by other judges, or even by myself, in other cases and other circumstances. Each case is a matter for the exercise of individual judgment and discretion and as I said in another context in this very case, “a discretionary decision is one respecting a question on which by definition two equally reasonable people may, without error on the part of either one, reach diametrically opposed conclusions”.

[8] The primary purpose of the Order which I propose to make here is not to indemnify the respondent and the interveners for their actual disbursed costs, especially since I consider both of their claims in this regard to be well beyond what would be reasonable. Rather the purpose is dissuasive. The applicant and others who may be of like mind must know that conduct of the kind here indulged in has consequences.

[9] The applicant is an affiliate of a very large corporation with apparently very deep pockets and a dominant market position which is seeking to prevent a much smaller competitor from establishing itself in an important segment of the market. While that may be, I suppose, a legitimate business purpose the Court must make it clear that it will not allow its processes to be abused in pursuit of it. I would fix the amount of the costs to be paid by the applicant in a total of $100,000 to be divided equally between the respondent and the interveners.

ORDER

THIS COURT ORDERS that

The applicant shall pay to each of the respondent and the interveners costs in the sum of $50,000 payable forthwith and in any event of the cause.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1427-06
STYLE OF CAUSE:	JAZZ AIR LP v. TORONTO PORT AUTHORITY et al
REASONS FOR ORDER AND ORDER:	HUGESSEN J.
DATED:	SEPTEMBER 28, 2007

WRITTEN SUBMISSIONS BY:

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