

Date: 20080326

Docket: T-161-05

Citation: 2008 FC 384

Ottawa, Ontario, March 26, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

CROCS CANADA INC. and CROCS, INC.

Plaintiffs

and

HOLEY SOLES HOLDINGS LTD.

Defendant

REASONS FOR ORDER AND ORDER

[1] On February 14 of this year I gave an order dismissing the motion for summary judgment which had been brought by the defendant and heard in Toronto on January 31 and February 1. I indicated that I thought that costs should be awarded approaching a solicitor and client scale and invited written submissions from both parties within time limits which I specified. Those submissions have now been received. Plaintiffs have also served and filed reply submissions although they did not seek prior leave and the initial Order of February 14 did not provide for such reply; accordingly I have disregarded those further submissions.

[2] It was and is my view that in a case such as this where a defendant moves for summary judgment it is appropriate to order costs on a higher scale because of the disproportionate risk which such a motion places on the plaintiffs in comparison to the defendant. If the motion succeeds the plaintiffs are out of court and the defendant has the benefit of a final judgment dismissing the action, normally including costs. On the other hand, if the action survives the motion it is unfair that the defendant should only have been exposed to costs of a motion on the ordinary scale of Column III of the Tariff. But, as in every question regarding costs, every case must be decided on its own merits and the Court is called upon to exercise its discretion judicially and with regard to the circumstances and the conduct of the parties. That, of course, includes the fact that I felt the motion to have little merit; it also includes the nature of the costs claim now made by plaintiffs and which I analyse below.

[3] Plaintiffs' counsel is not modest in his assessment of the value of the services he has rendered to his client. He seeks a costs order for fees in the amount of \$170,000 together with disbursements in the amount of \$7,666.55. This latter figure is not disputed and will be taken into account in fixing any lump sum award.

[4] I find the plaintiffs' claim to be exorbitant, unexplained and very largely unjustified. The amount of fees claimed is said to be less than what was actually charged to the client; that, of course, is a matter between counsel and his client but is, in my view, irrelevant to the determination which I am called upon to make which has to be grounded in my understanding of what is fair and reasonable, not on inflated amounts which a client with deep pockets may be prepared to pay. This

claim is very far from that standard. It is not the Court's role to drive the cost of litigation, already too high, into the stratosphere.

[5] There is serious lack of detail, double counting and omission in plaintiffs' claim for fees. There is a claimed amount of \$40,000 at item 8 of the Bill of Costs for two counsel and one clerk for "preparation" for the hearing. This amount corresponds to what is found at Column V in Tariff B for which a maximum of \$1320.00 could be awarded (or double that amount for two counsel.) In addition, five separate items related to "preparation" for the hearing are being requested and have been billed as follows:

- \$8,000 for the consideration of the Defendant's motion;
- \$9,000 for the preparation of two affidavits;
- \$30,000 for reviewing transcripts and the supplemental motion record;
- \$30,000 for reviewing the Defendant's memorandum of fact and law and amended version and;
- \$14,000 for two counsel to attend the hearing.

[6] Making the assessment even more difficult is the fact that plaintiffs do not give an hourly rate for any of the lawyers who are said to have worked on the file or the number of hours allegedly worked by any of them. This leaves me with nothing to go on other than counsel's own claim, whose defects I have already commented on, and my own "rough and ready" estimate of what might be had on an assessment under the Tariff.

[7] I have accordingly attempted such a rough estimate on my own. The hearing lasted only one and a half days and the issues, although important, were not complicated. I have arrived at a figure of approximately \$33,000. In my view a fee award of this amount would be too generous in the

circumstances, especially in the light of the lack of any detail or rational justification for the amounts claimed. I would reduce it by \$10,000 to arrive at a figure for fees of \$23,000. That would produce a total costs award in a round figure of \$31,000 inclusive of all fees, taxes and disbursements.

[8] Finally, it is my view that the defendant's summary judgment motion should not have been brought and that costs should therefore be made payable forthwith and in any event of the cause.

ORDER

THIS COURT ORDERS that the defendant shall pay plaintiffs' costs on the dismissal of the summary judgment motion forthwith and in any event of the cause, such costs being hereby fixed and assessed in a total amount of \$31,000 inclusive of all fees, disbursements and taxes.

“James K. Hugessen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-161-05

STYLE OF CAUSE: FOAM CREATIONS INC. and CROCS, INC.
v. HOLEY SOLES HOLDINGS LTD.

**REASONS FOR ORDER
AND ORDER:** HUGESSEN J.

DATED: MARCH 26, 2008

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