Date: 20080626

Docket: T-2289-03

Citation: 2008 FC 814

BETWEEN:

NETBORED INC.

Plaintiff

and

AVERY HOLDINGS INC.
SEAN EREN, SUSAN EREN
SUSAN KATZ, COREY KATZ AND
BINARY ENVIRONMENTS LTD.

Defendants

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] This action asserted allegations of copyright infringement, breach of confidentiality and breach of fiduciary and contractual relationships between an employer and former employee. The Defendants, Avery Holdings Inc., Susan Eren, Susan Katz and Corey Katz (the Avery Defendants) present ten bills of costs totalling $353,691.01 for assessment against the Plaintiff further to several Orders. Two of these Orders are of particular interest. The Order of the Honourable Mr. Justice Hughes dated October 14, 2005 vacated the Anton Piller order and set aside the interim injunction both issued December 15, 2003 and awarded costs to the Avery Defendants some of which were to be on a “full recovery basis” (Susan Eren, Susan Katz and Corey Katz) and

some to be on a Column IV basis (Avery Holdings Inc.) (the 2005 Hughes J. Order). The Order of Prothonotary Milczynski dated October 25, 2006, dismissed the action against the Avery Defendants and directed that an assessment officer set a schedule for assessment of costs if the parties could not agree on one between themselves, determine further to submissions from the parties whether the hearing of the assessment would be oral or in writing and determine the scale or level of costs apart from those already confirmed by the 2005 Hughes J. Order (the 2006 Milczynski P. Order). The 2006 Milczynski P. Order also directed that the Avery Defendants present their evidence in affidavit form, that the "plaintiff shall first cross-examine on any affidavit filed and nothing in this Order shall be completed until cross-examinations are completed, to include answers to undertakings and all reasonable questions relating thereto" and that there be a reference on damages.

[2] These reasons address two preliminary issues: (1) should the assessments of costs proceed or be delayed further; and (2) should they be heard orally? Circumstances sometimes arise requiring an Assessment Officer to determine issues other than those particular to setting the actual dollar amount for each item of costs in turn. An example would be entitlement to costs further to an order silent on costs. My practice is to receive the submissions on entitlement, reserve on the preliminary issue and then direct that the parties continue the hearing with submissions on the appropriate and actual dollar amounts to be allowed. If I determine that no entitlement exists, then I do not need to consider the submissions on amount. If I determine that entitlement does exist, I can make my findings on amount without the expense of reconvening the parties before me. As there may be only a few items with such preliminary issues in a bill of costs, this permits a single and uninterrupted

hearing. Generally, the two issues above should not require a decision as here preliminary to the actual assessment of the dollar amount of each item of costs in turn.

[3] However, there are circumstances, which I think should be very limited, when an Assessment Officer may issue findings by way of reasons and certificate of assessment on a preliminary issue of law or matter of practice. Such findings would not be confined as in the example above to isolated items in a bill of costs, but rather to issues or matters affecting the assessment of costs as a whole and for which considerations of time and costs would make it practical to divorce their determination from the detailed dissection of the dollar claims of the individual items of costs. This would afford the parties the opportunity to challenge such findings further to Rule 414 or some other basis or perhaps preclude considerable and additional costs if such preliminary findings are accepted. Examples have been *Furukawa v. Canada,* [2002] F.C.J. No. 189 (A.O.), affirmed by [2002] F.C.J. No. 434 and No. 439 (F.C.T.D.), affirmed on one point and reversed on another point by [2003] F.C.J. No. 551 (F.C.A.); *Halford v. Seed Hawk Inc.*, [2005] F.C.J. No. 600 (A.O.) and *Urbandale Realty Corp. v. Canada,* [2008] F.C.J. No. 910 (A.O.). For the reasons following, I think that the circumstances here warrant preliminary findings.

[4] On February 14, 2007, counsel for the Avery Defendants (Avery Defendants' counsel) requested an assessment of costs and a case conference to discuss scheduling. That same day, the Avery Defendants filed their costs materials in chief including a supporting affidavit sworn on December 21, 2006 by Susan Eren (the Eren affiant). The assessment officer resident in Toronto initially addressed scheduling matters. The matter of an oral hearing (the Plaintiff wanted an oral

hearing and the Avery Defendants wanted written submissions) remained outstanding. By the time the Avery Defendants' counsel wrote on May 24, 2007 to request directions on an issue that had arisen during the cross-examination of the Eren affiant, the assessment officer resident in Toronto was no longer available and it fell to me to address this court file.

[5] I convened case conferences on June 28 and August 24, 2007, which addressed scheduling matters such as completion of cross-examination, but not whether an oral hearing would be permitted. On November 7, 2007, the Avery Defendants' counsel wrote to confirm that the cross-examination and delivery of undertakings were complete and to request a case conference on further scheduling. On December 14, 2007, I convened a case conference during which counsel for the Plaintiff (Plaintiff's counsel) indicated that permitting an oral hearing of the issues of costs might be enough for his client to accept my assessment as a final disposition. I set a hearing date for March 14, 2008, in Toronto, set time limits for the submissions on that day and set a schedule for the service and filing of reply and rebuttal materials in advance of the hearing date; including January 11, 2008 as the latest date for service and filing by the Plaintiff of any motion (to be made returnable at the earliest sitting day permissible under the Rules) for directions.

[6] On February 8, 2008, Plaintiff's counsel wrote to request an adjournment on the basis that certain steps taken by the Avery Defendants had made the December 14, 2007 case conference a waste of time. Specifically, the Avery Defendants had commenced an action on October 15, 2007 alleging that the Plaintiff had made fraudulent conveyances and that parties additional to the Plaintiff were responsible for payment of the assessed costs here of the Avery Defendants.

Plaintiff's counsel noted that the allegation of fraudulent conveyance was opposite to the evidence of the Eren affiant during her cross-examination on September 24, 2007 that she did not have any evidence of fraudulent conveyance by the Plaintiff and that the lack of candour of the Eren affiant had caused other delay, i.e. swearing that she had paid some $30,000 to her former counsel to be part of the assessed costs here only to admit near the end of her cross-examination that the $30,000 had been forgiven. Plaintiff's counsel asserted that the new parties would require independent counsel and cross-examination to advance their respective positions. Counsel for the proposed new parties, Fiona Anne Ridley, Tyne and Wear Capital Inc. and Allan Crosier (the proposed Interveners), confirmed this latter assertion. The action filed on October 15, 2007 was done so in the Ontario Superior Court of Justice Commercial List (the Ontario action) by counsel other than the Avery Defendants' counsel and without the knowledge of the Avery Defendants' counsel. The Avery Defendants apparently waited (December 17, 2007) until after the case conference on December 14, 2007 to effect service of the Ontario action.

[7] On February 29, 2008, I convened a case conference with the three counsel. The submissions convinced me that the proposed Interveners had raised a matter serious enough to warrant adjournment of the assessments of costs scheduled for March 14, 2008. I noted on the record that I accepted without reservation the assertion by the Avery Defendants' counsel that his clients had hired another law firm and served the Ontario action on the Plaintiff and on the proposed Interveners without his knowledge. I also noted that his clients bore sole responsibility for this turn of events. I directed that counsel appear before me on March 14, 2008 to address scheduling.

[8] On March 14, 2008, counsel for the proposed Interveners (the proposed Interveners' counsel) argued for standing on the assessments of costs. The other parties and I indicated that standing limited to oral submissions might be acceptable. The Avery Defendants would not agree to cross-examination or the filing of evidence. I directed that the proposed Interveners must serve and file by April 4, 2008 any motion for this latter extent of standing and that to permit time for its disposition, the assessments of costs would be adjourned to May 27, 2008 with June 23, 2008 as an alternative date should additional time be required for resolution of the issue of standing.

[9] The proposed Interveners filed a motion for standing. While it was outstanding, Plaintiff's counsel resisted agreement to any schedule for service of the Plaintiff's materials on the basis of unnecessary duplication. That is, his cross-examination strategy was apparently based on the limited liability of the Plaintiff as a company, already found to be impecunious, as opposed to the proposed Interveners as individuals with unlimited liability. He intended to prepare the Plaintiff's materials after conferring with the proposed Interveners' counsel and following the latter's cross-examination of the Eren affiant. The Avery Defendants' counsel disagreed and submitted that their respective interests run in parallel and are not contingent on each other. He submitted that this was a delay tactic to compromise the scheduled assessment date and that the Plaintiff should be required to serve its materials particularly given that it had had the Avery Defendants' materials for over two months.

[10] On April 30, 2008, the Court dismissed the motion for standing with costs of $2,000 payable forthwith to the Avery Defendants (the 2008 Milczynski P. Order). Said Order noted that the Plaintiff could adequately defend a common interest with the proposed Interveners. On May 8,

2008, I convened a case conference. The proposed Interveners' counsel confirmed that a motion (the appeal motion) was being filed that day, to be returnable on June 23, 2008, to appeal the 2008 Milczynski P. Order. He agreed to attempt to secure an earlier hearing date. I adjourned the assessments to June 23, 2008 and directed that the Plaintiff serve and file its reply materials by June 18, 2008, or ten days from the date of disposition of the appeal motion whichever date is earlier and that the Avery Defendants serve and file any rebuttal materials by June 20, 2008.

[11] On June 11, 2008, the proposed Interveners filed a revised motion, returnable June 16, 2008, adding as a ground an assertion of a fraud on the Court on the part of the Avery Defendants. The Court took the matter under reserve on June 16, 2008. On June 17, 2008, Plaintiff's counsel wrote to request an adjournment of the June 23, 2008 hearing date. He had not yet served any reply materials. He had given notice to the Avery Defendants' counsel that he had instructions to bring a motion (the fraud motion), presently returnable August 11, 2008 and supported by the affidavit of Allan Crosier sworn June 9, 2008 (the Crosier affidavit) (my recollection from the June 20, 2008 case conference is that the Crosier affidavit is the one filed in support of the revised motion of the proposed Interveners), to vary the 2005 Hughes J. Order by vacating its award of costs to the Avery Defendants on grounds that the Eren affiant had committed a fraud both on the Court and on the Avery Defendants' counsel.

[12] The proposed Interveners' counsel wrote on June 17, 2008 also arguing for adjournment and indicated that his client would likely give him instructions to appeal should the revised motion be dismissed given that the Avery Defendants had already admitted certain of the facts underlying the

allegations of fraud. The Avery Defendants' counsel wrote on June 17, 2008 strongly opposing any adjournment. He submitted that the Plaintiff had had over five weeks to prepare its reply materials, that his clients are still prepared to proceed in writing as opposed to an oral hearing, that the Plaintiff's asserted adamant need for an oral hearing was a device for delay and that there was no prejudice for the Plaintiff in proceeding on June 23, 2008 as it could ask for costs thrown away if successful on the fraud motion. He also submitted that it would be premature to adjourn the June 23, 2008 date as the Court still might rule before then on the revised motion and that the proposed Interveners have shown a complete and utter disregard for the assessment process with particular regard to the fact that Allan Crosier is the principal of the Plaintiff. As well, they have deliberately attempted to delay the assessments without just cause.

[13] On June 18, 2008, the Court struck the Crosier affidavit from the record, dismissed the revised motion, denied the proposed Interveners any standing on the assessments and awarded costs of $3,000 payable forthwith to the Avery Defendants (the 2008 Mosley J. Order). The Court's decision expressed doubt on whether the record established fraud. It affirmed the finding in the 2008 Milczynski P. Order that the Plaintiff could adequately defend the interests of the proposed Interveners.

[14] I convened a case conference on June 20, 2008 at which I informed counsel that I would advance my views of the status of the assessments of costs and my intention, subject to what I might hear from counsel that day, to issue reasons and a certificate of assessment on the two preliminary issues noted above in paragraph 2.

[15] For the first issue (should the assessments proceed or be delayed further), I indicated that I cannot speculate on the possible success of any appeal of the 2008 Mosley J. Order. The Federal Court in two separate hearings has firmly rejected any role for the proposed Interveners and in the absence of a stay, it would be presumptuous of me to take into account the time required for an appeal. The proposed Interveners' counsel indicated before me that he has instructions to appeal. I had no hesitation in permitting him to appear on this case conference as I felt that his clients had limited standing to engage the appeal provisions of the *Federal Courts Act*. I indicated that I felt I should issue a decision now on this preliminary issue to permit his clients to decide what, if any, other relief to seek relative to my decision that the assessments would proceed.

[16] I indicated that the Plaintiff had had several months to digest the materials of the Avery Defendants. Rule 400(1) characterizes the Court's power to award costs as "discretionary" meaning there is no guarantee that the Plaintiff would receive costs thrown away. Paragraph 14 of the fraud motion asserts discovery in 2007 of the alleged fraud. Timeliness in bringing the fraud motion may be an issue. I do not speculate on the potential outcome of the fraud motion, but I do note case law such as *TMR Energy Ltd. v. State Property Fund of Ukraine* (2005), 250 D.L.R. (4th) 10 (F.C.A.) holding that the Rules do not permit indefinite attacks on judgments. The outstanding fraud motion does not operate as a stay of the assessments. The assessments of costs should proceed unless I think that the circumstances are so strong as to suggest to do so would be unreasonable, i.e. that success on the fraud motion is a given. I doubt that is so and I direct that the assessments of costs shall proceed.

[17] As for the second issue (should the assessments of costs be heard orally), I do not speculate on whether the Plaintiff or the proposed Interveners have used the scheduling of an oral hearing as a device for delay. I think that the Plaintiff's focus at this point will be on the fraud motion. If I had forced the assessments to proceed orally on June 23, 2008, I think that I would have put the Avery Defendants at risk of incurring further costs to respond to an appeal, not on the basis of my disposition of the individual items of costs, but on the basis that the Plaintiff had been denied fair opportunity to advance its position. I refused to do that. However, this decision on the preliminary issues means that the time has come for the Plaintiff to make some hard decisions, i.e. move to set aside this decision, move to stay it or simply perfect the assessment materials.

[18] One of the submissions by the Avery Defendants' counsel on an earlier case conference was that disposition by way of written submissions was to be preferred because it would ensure completeness in the record of the respective positions of the parties. The allegation of fraud might be advanced as a factor further to Rules 409 and 400(3)(o) (any other matter considered relevant) affecting my findings on the sufficiency of the evidence and one or both sides might challenge such findings on appeal. I think that requiring the parties to fully document their position in the record via written submissions is to be preferred at this point and therefore I withdraw permission for an oral hearing.

[19] I do not know whether the fraud motion may be heard by a judge other than Mr. Justice Hughes. I indicated to counsel my thinking on fixing dates for the service of materials on the

assumption that the fraud motion would proceed on August 11, 2008. After some discussion with counsel, I set this timetable:

(i) The Plaintiff shall serve and file reply materials by August 14, 2008.

(ii) Counsel for the Avery Defendants shall advise counsel for the Plaintiff within three days of service of the Plaintiff's materials whether he needs to cross-examine. If he does need to do so, the Plaintiff's affiant shall be made available to permit cross-examination by August 29, 2008 and the Plaintiff shall perfect its materials by service and filing of written submissions by September 12, 2008. If he does not need to do so, the Plaintiff shall perfect its materials by service and filing of written submissions by August 29, 2008.

(iii) The Avery Defendants shall serve and file rebuttal materials two weeks from service of the final written submissions of the Plaintiff (due either on August 29 or September 12, 2008)

(iv) Any issue of sur-reply or sur-rebuttal is to be deferred until after all of the above materials are in the record.

[20] A Certificate of Assessment will issue as follows:

I HEREBY CERTIFY that I reject the request of Fiona Anne Ridley, Tyne and Wear Capital Inc. and Allan Crosier (the proposed Interveners) to adjourn the assessments of the costs of the Defendants, Avery Holdings Inc., Susan Eren, Susan Katz and Corey Katz (the Avery Defendants) until after the disposition of an appeal by the proposed Interveners from the decision of the Federal Court dated June 18, 2008 denying them standing on the assessments of costs.

I HEREBY FURTHER CERTIFY that I reject the request of the Plaintiff to adjourn the assessments of the costs of the Avery Defendants until after the disposition of the Plaintiff's motion to vary the decision of the Federal Court dated October 14, 2005 by vacating its award of costs to the Avery Defendants.

I HEREBY FURTHER CERTIFY that I withdraw the permission given earlier to the Plaintiff for an oral hearing of the assessments of the costs of the Avery Defendants and that I direct that the assessments of costs proceed in writing further to the timetable issued today by separate mailings by the Registry to the parties.

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2289-03
STYLE OF CAUSE:	NETBORED INC. v. AVERY HOLDINGS INC. et al.
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	June 20, 2008
REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	June 26, 2008

APPEARANCES:

Joel Vale	for the Plaintiff
Antonio Turco	for the Defendants Avery Holdings Inc., Susan Eren, Susan Katz and Corey Katz (the Avery Defendants)
Arthur Birnbaum	for Fiona Anne Ridley, Tyne and Wear Capital Inc. and Allan Crosier (the proposed Interveners)

SOLICITORS OF RECORD:

Joel Vale Barrister & Solicitor North York, ON	for the Plaintiff
Blake, Cassels & Graydon LLP Toronto, ON	for the Avery Defendants
Arthur Birnbaum Barrister & Solicitor Toronto, ON	for the proposed Interveners