Docket: 91-509(IT)G, 91-1816(IT)G
91-1946(IT)G, 2004-2787(IT)G

BETWEEN:

LINDA LECKIE MOREL,
GEOFFREY D. BELCHETZ,
ALLAN GARBER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on August 18, 2008, at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants: Howard W. Winkler

Counsel for the Respondent: John Shipley

ORDER

UPON motions by the respondent for an Order pursuant to Rule 110 of the *Tax Court of Canada Rules (General Procedure)*, requiring the appellants to re-attend the examination for discovery no later than August 31, 2008, to answer proper questions on discovery, comply with undertakings given and answer proper questions arising from the answers to those undertakings, as set out in Schedule "A" to each Notice of Motion herein; and for an Order for other relief;

AND UPON reading the materials filed, and hearing counsel for the parties;

AND THE costs of the motions heard on July 8, 2008 having been reserved to be dealt with following the hearing of these motions;

IT IS ORDERED THAT:

1. The appellants shall each reattend at their own expense to answer questions on examination for discovery in accordance with the Reasons for Order delivered herewith, including follow-up questions;

2. If the appellants intend to introduce a reconciliation of invoices for goods and services with the expenses claimed on the financial statements of the partnerships at the trial they shall produce a copy of it to the respondent at least 45 days before the commencement of the trial; and

3. The appellants collectively shall pay to the respondent the costs of the motions to strike out parts of the Replies heard on July 8, 2008, which are fixed at $1,500 in total, and the costs of the motions heard on August 18, 2008, which are fixed at $3,000 in total, in any event of the cause. These costs are to be paid within 30 days of the date of this order.

Signed at Ottawa, Canada, this 3rd day of September, 2008.

"E.A. Bowie"

Bowie J.

Citation: 2008 TCC 491
Date: 20080903
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BETWEEN:

LINDA LECKIE MOREL,
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Respondent.

REASONS FOR ORDER

Bowie J.

[1] The motion before me in each of these four appeals arises out of the examinations for discovery of the three appellants. The matters have a long and sorry history. Three of the four appeals were begun in 1991. The events in issue date back a quarter century. There have been numerous interlocutory motions, at least two of which have been the subject of appeals. The pleadings have recently been amended. Discovery of documents is ongoing, and oral discovery is not yet completed.

[2] Examinations for discovery of the appellants were conducted in May and June 2004. Some questions were not answered, and some undertakings were given. The Respondent has brought these motions to obtain answers to certain questions, and to obtain more complete answers to others. At one time there were objections by the appellants based on relevance, but between the time the motions were filed in May and the argument of them in August, the appellants have given answers to all the unanswered questions.

[3] The issues now remaining are whether the appellants have given adequate answers to the following questions:

Mr. Belchetz:	Q. 103
	Q. 476
Ms. Leckie-Morel	Q. 491
Mr. Garber:	Q. 342
	Q. 366
	Q. 619
	Q. 620

As to questions relating to the Minister's assumptions pleaded in the Replies to the Notices of Appeal, on examination of Mr. Garber:

Qq. 15, 17, 18, 21, 22, 23

[4] As to that later group, the parties agree that there are legitimate follow-up questions that the respondent is entitled to ask and have answered. The real issue in dispute is whether they should be asked and answered in writing, or if the appellants should be required to re-attend to answer the follow-up questions. Briefly, the position of the respondent's counsel is that the appellants' answers to date have been neither timely nor complete, that in many instances the answers have only been given since the original date fixed for these motions to be heard, which was July 8, 2008, and in many cases the answers were either not responsive, not complete, or required follow-up questions to be asked.

[5] Mr. Winkler's position is that the appellants have, at this stage, given all the information that they have, and that they should not be required to attend personally to be asked questions which, in his submission, could only give rise to additional undertakings. Mr. Shipley argues that the history of the discoveries to date makes it likely that to proceed with written questions and answers would simply lead to more inadequate answers.

[6] There is also an issue as to whether the respondent is entitled to further examine the appellants for discovery as a result of my Order of July 28, 2008

permitting amendments to the Notices of Appeal. Mr. Shipley argues that the question whether the appellants borrowed cash to pay for their partnership shares, or simply signed notes for the purchase price, is fundamental to the issue of whether the promoters defrauded the investors, as the Replies allege, and therefore, to the extent that the Appellants have changed their positions by these amendments, they should be required to submit to further discovery.

[7] I shall deal first with the questions that the respondent says have not been adequately answered.

Mr. Belchetz

Question 103 concerns the services provided for the professional fees referred to in paragraph 16 of the Notice of Appeal. Mr. Belchetz was not properly prepared to answer the question when he was examined in June 2004. The response given pursuant to an undertaking was vague. The Respondent is entitled to ask follow-up questions on this issue, and, specifically, is entitled to know the advice that the appellant received.

Question 476 asks for a copy of a reconciliation of the invoices for goods and services and the expenses claimed on the financial statements of the partnerships. It is not clear that any such document has been completed by the appellants. If any such reconciliation is to be used at trial the Respondent is entitled to see it beforehand. Otherwise, it is not a proper subject for discovery. If the Appellants are going to introduce any such reconciliation at trial, they are to give notice of that, and provide a copy of the reconciliation to the Respondent 45 days prior to the commencement of the trial.

Dr. Leckie-Morel

[8] Question 491 asks for the appellants' position as to the facts stated in four paragraphs of the Reasons given by Justice Chapnick when sentencing the promoters of the partnerships following conviction. The question, put as it was, is simply an invitation to make admissions which the respondent would use at trial, but to make them in the context of another proceeding and the culpability of another individual. I do not consider this to be an appropriate question when put as it was and the appellants are not bound to answer it. Having once put the question in that way, it is not now open to the respondent to pursue it piecemeal.

Mr. Garber

Question 342 required the appellant to make certain inquiries of the Toronto-Dominion Bank. Those inquiries apparently were made. The respondent is entitled to know if there has been a response to the inquiry and if so to be informed of it.

Question 366 is a question as to the financial capacity of O.C.G.C. to fund the purchase by investors of their partnership units. It is now pleaded by both parties that the units were not paid for with the proceeds of loans from O.C.G.C., but by promissory notes. The financial capacity of O.C.G.C. to fulfill its obligations in respect of partnership business is a separate issue and is addressed elsewhere in the respondent's Replies. There is no need for further pursuit of a more detailed answer to this question.

[9] Questions 619 and 620: These questions and the answers to them must be read together. These relate to the financing of the appellants' partnership units. By the time this motion was heard on August 18, three answers additional to the original answers had been delivered, the last of them less than a week before the hearing and more than a month after the date originally fixed for the motion to be heard. The question is now answered adequately.

questions relating to the Minister's assumptions:

[10] It is not seriously disputed that the respondent is entitled to follow-up questions in relation to questions 15, 17, 18, 21, 22, and 23. The real issue is whether the appellants should be required to attend personally to answer those follow-up questions, or if they should be asked and answered in writing.

further discovery in relation to the amendments to the pleadings

[11] Mr. Shipley asks for additional discovery of the appellants as a result of the amendments to the Notices of Appeal for which I gave leave on July 28, 2008. Those amendments are minor in nature, and do not add any significant factual issues to the appeals. They add an allegation, in the passive voice, as to "substantial start-up

costs", and they clarify that the appellants gave promissory notes to acquire their partnership units. These are not new matters. The respondent had already addressed the subject of financing the operations of the partnerships in the Replies to the Notices of Appeal, and had specifically alleged that the partnership units were acquired not for cash but for promissory notes. These matters have therefore been relevant from the time that pleadings were closed, and the respondent has no doubt already explored them fully on discovery. I will not order additional discovery on that issue as a result of the amendments.

written questions and answers or personal reattendance

[12] The appellants will be required to attend personally to answer the questions that remain to be answered. It is evident from the material before me that the use of written questions and answers is unlikely to bring the discovery process in this case to a timely end. Whether deliberately or not, many of the answers provided in writing to date have been either unresponsive or only partly responsive. Since these motions were filed, the appellants have furnished answers to many of the questions to which the motion sought to compel answers. If there is another round of written questions and answers, I would expect it to lead to considerable delay, and quite possibly to yet more motions. The appellants surely must know by now what the follow-up questions are going to be. With four lawyers working on the case, they should be able to anticipate the questions that will be asked and ensure that the three appellants are properly prepared to answer them. Of course, nothing prevents counsel for the respondent from directing the minds of counsel for the appellants to specific items in advance of the continuation of the examinations.

costs of the motions

[13] My Order of July 28 reserved the question of costs of the motions heard that day to be dealt with following the hearing of these motions.

[14] I was not convinced that the appellants' motions to amend the Notices of Appeal were either necessary or particularly useful. Nor was I convinced that the respondent's opposition to those motions was necessary or useful. The respondent's counsel took the position that the appellants were withdrawing an admission, and so needed to meet the evidentiary burden for doing so. But the amendment had the result of making the appellants' position as to the payment for the partnership units coincide with that of the respondent. I presume that both sides were trying to gain

some small tactical advantage. I do not believe that either of them succeeded in that. In my view they should each bear their own costs of those motions.

[15] The other motions heard in July were to strike out five paragraphs of each Reply, and a reference therein to "reasonable expectation of profit". The pleadings in the four appeals are, for practical purposes, identical. The respondent consented to the striking out of paragraphs 19 and 30 of the Garber Reply, and the analogous paragraphs in the other three appeals. In the result, only those paragraphs were struck out. The respondent, having been successful, should have her costs of the motions. That motions occupied about half a day. I fix the costs at $1,500 in total for the four motions.

[16] Turning to the August motions, Mr. Winkler argues that it was not necessary that the motions be heard as the appellants had, by the time the motions were heard on August 18, given answers to the questions to which they were directed. He did agree that there are follow-up questions that the appellants should answer, but takes the position that this has never been in issue and did not justify the motions proceeding to a hearing. I do not intend to detail each answer that the appellants supplied between May 30 when these motions were filed, and August 18 when they were heard. Questions 619 and 620 on the examination of Mr. Garber are illustrative. Undertakings were given, to which unresponsive answers were given in March 2007. Further answers were provided on April 25, 2008, and July 7, 2008. Only on August 13, 2008, five days before the motions were heard and more than a month after the originally scheduled hearing date, was a responsive answer provided. In the meantime, these motions had been adjourned from the July hearing date, scheduled in advance for all of these motions to be heard, due to a conflicting commitment made by counsel for the appellants. It was necessary for the respondent to bring the motions, and it was necessary that they proceed to a hearing. The appellants have had some limited success on these motions, but that is largely attributable to answers given after the motions were filed. The respondent is entitled to costs of the motions, which I fix at $3,000.

[17] This is an appropriate case in which to apply the practice that has prevailed in Ontario since the decision in *Axton v. Kent*,[1] and has since been codified there,[2] which is that costs of a contested interlocutory motion are made payable forthwith, in

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1 (1991) 2 O.R. (3d) 797 (Ont. Div. Ct.).

2 *Ontario Rules of Civil Procedure*, R. 57.03(1).

any event of the cause, unless the court is satisfied that a different order would be more just in the particular case. I agree with the Divisional Court that this is a salutary practice. It is likely to discourage interlocutory motions that are not absolutely necessary, and thereby promote the timely and economical disposition of cases. I see nothing in the present case that would make a different order more just. The costs therefore will be payable within 30 days of the date of this order.

Signed at Ottawa, Canada, this 3rd day of September, 2008.

"E.A. Bowie "

Bowie J.

CITATION:	2008 TCC 491
COURT FILE NO.:	91-509(IT)G, 91-1816(IT)G, 91-1946(IT)G, and 2004-2787(IT)G
STYLE OF CAUSE:	LINDA LECKIE MOREL, GEOFFREY D. BELCHETZ, ALLAN GARBER and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 18, 2008
REASONS FOR ORDER BY:	The Honourable Justice E.A. Bowie
DATE OF ORDER:	September 3, 2008

APPEARANCES:

Counsel for the Appellants:	Howard W. Winkler
Counsel for the Respondent:	John Shipley

COUNSEL OF RECORD:

For the Appellants:

Name:	Howard W. Winkler
Firm:	Aird & Berlis

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada