

CANADA / JUDGMENT

Caricline Ventures Ltd. v. ZZTY Holdings Ltd.

2002 FCT 566

COURT

Federal Court

DECIDED

15 May 2002

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Caricline Ventures Ltd. v. ZZTY Holdings Ltd. Court (s) Database Federal Court Decisions Date 2002-05-15 Neutral citation 2002 FCT 566 File numbers T-1608-97 Decision Content Date: 20020515 Docket: T-1608-97 Neutral citation: 2002 FCT 566 Halifax, Nova Scotia, this 15th day of May, 2002 PRESENT: THE HONOURABLE MR. JUSTICE JOHN A. O'KEEFE BETWEEN: CARICLINE VENTURES LTD. Plaintiff/Applicant

- and - ZZTY HOLDINGS LIMITED and AZIM ZONE INC. Defendants/Respondents Docket: T-1609-97 AND BETWEEN: CARICLINE VENTURES LTD. Plaintiff/Applicant
- and - FAR SIDE CLOTHING LTD. and FAR SIDE SKATEBOARDS & SNOWBOARDS LTD. Defendants/Respondents REASONS FOR ORDER AND ORDER O'KEEFE J.

[1] This is a motion in writing pursuant to Rules 369 and 403 of the Federal Court Rules, 1998.

[2] The plaintiff has requested: Directions to the assessment officer that the plaintiff is entitled to:

1. An assessment of costs at the high end of column IV of the table to Tariff B of the Rules;
2. Second counsel fees in respect of the trial of these actions, including in respect of a motion made during trial with respect to waiver of privilege;
3. Fees for the preparation and filing of written argument in respect of the trial of these actions and in respect of the motion with respect to waiver of privilege;
4. Fees for first and second counsel for travel from Vancouver, British Columbia to Edmonton, Alberta in respect of the trial of these actions;
5. Fees for one counsel to travel from Vancouver, British Columbia to Edmonton, Alberta in May, 1999 to conduct examinations for discovery of Hafis Devji and Azim Devji;
6. Fees for one counsel to travel from Vancouver, British Columbia to Edmonton, Alberta in January, 2000 to conduct the continuation of the examination for discovery of Hafis Devji;

7. Fees for one counsel to travel from Vancouver, British Columbia to Toronto, Ontario in January, 2000 to conduct the continuation of the examination for discovery of Azim Devji;
 8. Costs of this motion.
- [3] My decision in this matter is currently under appeal. My entire order is under appeal, including my order with respect to costs. I am of the view that normally it would be improper for me to further deal with the issue of costs when that very issue is under appeal. However, I do not believe that such is the case when I am requested to give directions with my order as to costs pursuant to Rule 403 of the Federal Court Rules, 1998. Rule 403 specifically directs that a party may apply to the same judge that signed the judgment to request that directions be given to the assessment officer. Rule 403 reads as follows:
403. (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,
- (a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or
 - (b) in a motion for judgment under subsection 394(2).
- (2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs.
- (3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.
403. (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400:
- a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivant le prononcé du jugement;
 - b) soit par voie de requête au moment de la présentation de la requête pour jugement selon le paragraphe 394(2).
- (2) La requête visée à l'alinéa (1)a) peut être présentée que le jugement comporte ou non une ordonnance sur les dépens.
- (3) La requête visée à l'alinéa (1)a) est présentée au juge ou au protonotaire qui a signé le jugement. Accordingly, I am of the view that any application made to me within the confines of Rule 403 can be dealt with.
- [4] The jurisprudence with respect to directions issued pursuant to Rule 403 of the Federal Court Rules, 1998 establishes that the rule permits giving directions with respect to the order issued but not the alteration or variation of the order awarding costs (see Nordholm I/S v. Canada (1996), 107 F.T.R. 317 and Stuart v. Canada (1989), 27 F.T.R. 65). These decisions were made under the former rules but the provisions are substantially the same.

- [5] Rule 407 of the Federal Court Rules, 1998 reads:
407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.
407. Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.
- [6] In my order, I ruled that the plaintiff "shall have its costs". I did not order "otherwise" as set out by Rule 407 of the Federal Court Rules, 1998.
- [7] It seems to me that by making the order, I decided that the assessment shall be in accordance with column III of the table to Tariff B.
- [8] MacKay J. of this Court has provided some guidance with respect to the issuance of directions to an assessment officer to increase the level of costs. In *Wellcome Foundation Ltd. et al. v. Apotex Inc.* (1992) 40 C.P.R. (3d) 376 at pages 379 to 380 he stated: . . . In the exercise of discretion in relation to directions to a taxing officer, my colleagues have recognized certain general principles. Included among these are that parties cannot expect to recover all their costs under the tariff relating to party-and-party costs and that exorbitant increases over the tariff items should not be countenanced for the court should not interfere lightly with the rules relating to sums intended to be allowed on a party-and-party basis: *Diversified Products Corp. v. Tye-Sil Corp.* (1988), 23 C.P.R. (3d) 313 at pp. 324-5, 21 C.I.P.R. 49, 12 A.C.W.S. (3d) 404 (F.C.T.D.), per Cullen J.: *Stiga Aktiebolag v. S.L.M. Canada Inc.* (1991), 34 C.P.R. (3d) 258 at p. 261, 43 F.T.R. 221 (T.D.), per Dubé J. While patent cases by their nature may be somewhat complex, general tariffs are set and there is no provision that patent cases should be accorded a treatment different from other types of cases: *Reliance Electric Industrial Co. v. Northern Telecom Ltd.* (1990), 30 C.P.R. (3d) 469 at p. 470, 19 A.C.W.S. (3d) 649 (F.C.T.D.), per Reed J., and per Dubé J. in *Stiga Aktiebolag*, supra, at p. 261. Finally, the view expressed by Teitelbaum J. in *A/S Ornen v. The Ship "Duteous"*, Court File No. 189-91, dated April 8, 1987 (unreported, but summarized in 4 A.C.W.S. (3d) 91, though expressed in the context of the former tariff, has been endorsed by Cullen J. in *Diversified Products*, supra, at p. 324 and by Dubé J. in *Stiga Aktiebolag*, supra, at p. 261, namely: "Only rarely and only under the most exceptional circumstances should the court allow extra costs to the attorneys conducting a trial."
- [9] The plaintiff submits that the following factors from Rule 400(3) should be considered when I exercise my discretion in relation to costs:
1. the result of the proceeding;
 2. the importance and complexity of the issues;
 3. the amount of work;
 4. any conduct of a party that tended to shorten or to unnecessarily lengthen the proceeding.

[10] Accordingly, I would deal with the request of the plaintiff as follows:

1. I would deny the request for a direction for an assessment at the high end of column IV of the table to Tariff B. To make this direction would in fact be altering my order which I am unable to do. In any event this case was no more complex than the average trade-mark case.
2. I would grant a direction for second counsel fees as requested by the plaintiff. Although the case was no more complex than the average case, there were a considerable number of issues to be dealt with at the trial and there were many documentary exhibits. The presence of second counsel caused the trial to proceed faster, especially in dealing with the documentary exhibits.
3. Written argument was presented and accepted by the Court both at trial and on the motion. It is not necessary to issue a direction on this item. I had already granted costs in the cause for the motion respecting waiver of privilege.
4. I would grant a direction that the assessment officer allow for the fees for travel mentioned. The defendants wished the trial to be in Edmonton, Alberta, so this meant that the plaintiff and its representatives would have to travel from Vancouver, British Columbia to Edmonton, Alberta.

[11] As success was divided, there shall be no order as to costs on the motion. ORDER

[12] IT IS ORDERED that:

1. The plaintiff's (applicant's) motion for a direction that the plaintiff (applicant) is entitled to an assessment of costs at the high end of column IV of the table to Tariff B of the Federal Court Rules, 1998 is denied.
2. The assessment officer is directed that the plaintiff (applicant) is entitled to second counsel fees in respect of the trial of these actions, including in respect of a motion made during trial with respect to waiver of privilege.
3. No direction will issue to the assessment officer with respect to fees for the preparation and filing of written argument in respect of the trial of these actions and in respect of the motion with respect to waiver of privilege as a direction is not necessary.
4. The assessment officer is directed that the plaintiff (applicant) is entitled to:
 - (a) Fees for first and second counsel for travel from Vancouver, British Columbia to Edmonton, Alberta in respect of the trial of these actions;
 - (b) Fees for one counsel to travel from Vancouver, British Columbia to Edmonton, Alberta in May, 1999 to conduct examinations for discovery of Hafis Devji and Azim Devji;
 - (c) Fees for one counsel to travel from Vancouver, British Columbia to Edmonton, Alberta in January, 2000 to conduct the continuation of the examination for discovery of Hafis Devji;

- (d) Fees for one counsel to travel from Vancouver, British Columbia to Toronto, Ontario in January, 2000 to conduct the continuation of the examination for discovery of Azim Devji.
5. There shall be no order as to costs on the motion. "John A. O'Keefe" J.F.C.C. Halifax, Nova Scotia May 15, 2002 FEDERAL COURT OF CANADA TRIAL DIVISION NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1608-97 and T-1609-97 STYLE OF CAUSE: CARICLINE VENTURES LTD.
- and - ZZTY HOLDINGS LIMITED and AZIM ZONE INC. AND BETWEEN: CARICLINE VENTURES LTD.
 - and - FARISIDE CLOTHING LTD. and FARISIDE SKATEBOARDS & SNOWBOARDS LTD. MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES REASONS FOR ORDER AND ORDER OF O'KEEFE J. DATED: Wednesday, May 15, 2002 APPEARANCES: Written Representations Keith E. W. Mitchell and J. Kevin Wright Made By FOR PLAINTIFF Written Representations Carmen Plante and Melodi Ulku Made By FOR DEFENDANTS SOLICITORS OF RECORD: Davis and Company 2800 Park Place 666 Burrard Street Vancouver, British Columbia V6C 2Z7 FOR PLAINTIFF Bishop & McKenzie 10104 - 103rd Avenue, Suite 2500 Edmonton, Alberta T5J 1V3 FOR DEFENDANTS FEDERAL COURT OF CANADA TRIAL DIVISION Date: 20020515 Docket: T-1608-97 BETWEEN: CARICLINE VENTURES LTD. Plaintiff
 - and - ZZTY HOLDINGS LIMITED and AZIM ZONE INC. Defendants Docket: T-1609-97 AND BETWEEN: CARICLINE VENTURES LTD. Plaintiff
 - and - FARISIDE CLOTHING LTD. and FARISIDE SKATEBOARDS & SNOWBOARDS LTD. Defendants REASONS FOR ORDER AND ORDER

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Prepared on 29 October 2026 · Esheria