

Date: 20091030

Docket: T-1427-06

Citation: 2009 FC 1115

Toronto, Ontario, October 30, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JAZZ AIR LP

Plaintiff

and

**TORONTO PORT AUTHORITY,
CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC.
and ROBERT J. DELUCE**

Defendants

REASONS FOR ORDER AND ORDER AS TO COSTS

[1] This Order follows upon my Order in these proceedings dated October 14, 2009 in which I left the matter of costs arising out of the circumstances of a motion by Jazz Air LP by way of an appeal from Prothonotary Milczynski which motion has been adjourned *sine die*. In my Order I reserved as to costs and asked that the parties provide written submissions which now have been received and considered.

[2] In general these proceedings relate to leases for the use of premises and property located on Toronto Island. Jazz Air at one time uses such premises and property for purposes of providing passenger air transport services, it either ceased to do so or was terminated. Subsequently only the defendant Porter Airlines Inc. offers such services. Jazz Air commenced proceedings first in the Ontario Superior Court and, shortly thereafter in this Court in respect of these circumstances. The Defendants were essentially the same. The relief sought by Jazz Air in both proceedings is arguably similar however Jazz Air makes much of the differences in the relief sought in this Court.

[3] A hotly contested application was made to this Court by the Defendants to stay proceedings in this Court pending the disposition of the Ontario proceeding. By her Order dated March 10, 2009 Prothonotary Milczynski stayed the present proceedings pending final disposition of the Ontario proceedings. It should be noted that the Ontario proceedings also included a Counterclaim made by some of the same parties as are Defendants in this action.

[4] Prothonotary Milczynski made a further Order dated April 1, 2009 in which she addressed a matter overlooked in her earlier Order. In this latter Order she added a provision that the motion by Jazz Air to strike certain paragraphs from the Defence of the so called "Porter parties" and to strike the Counterclaim of those parties was dismissed without prejudice.

[5] Jazz Air appealed from the Order, as amended, of Prothonotary Milczynski requesting that her Order be set aside, that the motion to stay these proceedings be dismissed, requesting that the relevant paragraphs of the Defence of the "Porter parties" and their Counterclaim be struck out and

for costs. This motion by way of an appeal was filed in May 2009, Jazz Air applied for and received a direction that it could file a memorandum beyond 30 pages in length and the appeal was set to be heard in July 2009. That hearing was put over and was re-scheduled for a two-day hearing to commence October 14, 2009.

[6] About two business days before the October 14, 2009 hearing date, Jazz Air's lawyers advised the lawyers for the other parties that in intended to discontinue the Ontario proceedings. When the hearing commenced on October 14, Jazz Air's counsel advised this Court that no previous notice had been given to nor were there any previous discussions with the lawyers for the other parties as to this discontinuance. When asked why the notice of intent to discontinue was left so late and why it could not have been given several months earlier, Jazz Air's counsel had no explanation.

[7] In effect of a discontinuance filed in the Ontario proceedings could be that Jazz Air's action in that Court would terminate and be considered as finally determined. The Ontario Court Rules provide that unless certain steps are taken, the Counterclaim would terminate 30 days after the filing of the discontinuance of that action. At the hearing on October 14, 2009, counsel representing the parties who had counterclaimed in the Ontario action advised this Court that either the counterclaim in Ontario would in fact be allowed to be discontinued, or stayed in whole or in part. The effect of all of this would be that the Ontario action would be out of the way and this Federal Court action and counterclaim, without requiring an amendment to Prothonotary Milczynski's Order, would proceed.

[8] Further, at the hearing held on October 14, 2009 the Porter parties agreed, notwithstanding that they were successful before Prothonotary Milczynski in resisting a motion to strike some of their pleadings, they were to make certain amendments to those pleadings that would satisfy Jazz Air that it need not pursue its appeal in that regard.

[9] The matter of costs of the motion ultimately adjourned on October 14, 2009 was left open pending further submissions from the parties, which have now been received. Jazz Air submits that no costs be given. The so called “Porter parties” submit that their actual expenditures incurred respecting the motion were \$102,558.02 costs plus \$1,679.52 disbursements plus GST however they were seeking only \$60,000.00 costs plus disbursements of \$679.52 plus GST. The Defendant Toronto Port Authority states that the actual costs were \$64,880.00 plus \$1,042.47 however they were requesting \$20,000.00 costs plus \$1,042.47 disbursement plus GST.

[10] The basis for the claim for costs and disbursements by the Porter parties and Toronto Port Authority is that the costs and disbursements incurred by their clients would have been unnecessary had Jazz Air advised much earlier that it intended to discontinue the Ontario action. In effect the Porter parties and the Port Authority have “thrown away” these sums.

[11] Jazz Air responds in saying that it was at least partially successful in securing amendments to the pleadings and that, by discontinuing the Ontario action, it resolved the appeal in this Court and was, in effect, successful. I do not agree.

[12] It is clear that Jazz Air could easily have advised the other parties much earlier that the Ontario action would be discontinued. It has offered no explanation as to why this was not done. All parties would have been saved the considerable expense in preparing for their appeal.

[13] This is not the first time that the conduct of Jazz Air in these proceedings has been the subject of reprimand and remedy by way of costs. Justice Hugessen in his Reasons and Order in this action on September 28, 2007, cited as 2007 FC 976, wrote at paragraph 6 of his Reasons that Jazz Air should be penalized so as to reflect the abusive nature of its conduct. I adopt his approach to the matter as set out in paragraph 8 of his Reasons.

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.

[14] I find the conduct of Jazz Air to be abusive of the Court process and lacking in the normal courtesies that litigants represented by experienced, competent lawyers as is the case here, should come to expect. In fixing costs I am of the same mind as Justice Hugessen as he wrote in paragraph 7 of his Reasons that the fixing of costs in each case is a matter of the exercise of individual discretion and judgment.

[15] I find that the Porter parties and the Toronto Port Authority are entitled to a reasonable proportion of the costs expended and to the disbursements as itemized together with GST. Having said that, I find that the sum of \$102,558.00 in costs expended by the Porter parties, or even \$60,00.00 is excessive as is the sum of \$64,880.00 or even \$20,00.00 expended by the Toronto Port Authority to be excessive. I will award each of them half of what they requested together with all disbursements and GST. In the result, the Porter parties are awarded \$30,000.00 in costs plus \$1,679.52 in disbursements plus GST. The Toronto Port Authority is awarded \$10,000.00 in costs plus \$1042.47 in disbursements plus GST.

ORDER

THIS ORDER is further to the Order herein made October 14, 2009 and addresses the issue of costs;

FOR THE REASONS provided, the Court orders that:

1. City Centre Aviation Ltd., Regco Holdings Inc. and Porter Airlines Inc. are entitled to costs and disbursements payable forthwith by Jazz Air LP in the sum of \$31,679.52 plus GST;
2. Toronto Port Authority is entitled to costs and disbursements payable forthwith by Jazz Airlines LP in the sum of \$11,042.47 plus GST.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1427-06

STYLE OF CAUSE: JAZZ AIR LP v. TORONTO PORT AUTHORITY, CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC. and ROBERT J. DELUCE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 14, 2009

REASONS FOR ORDER AND ORDER AS TO COSTS: HUGHES J.

DATED: OCTOBER 30, 2009

APPEARANCES:

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