

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CLOSE UP INTERNATIONAL LTD. v. 1444943 ONTARIO LTD. (also known as VIDEO ARENA INC.), 1179468 ONTARIO LTD. (also known as RADUGA INC.), ALEXANDRE AVROUTINE and LIDIA YAKUBOVSKY

BEFORE: Master R. Dash

COUNSEL:

Nicholas Cartel, for the Plaintiff

Vadim Kats, for the defendants 1444943 Ont. Ltd., 1179468 Ont. Ltd. and Avroutine

Robert Levine, for the defendant Yakubovsky

Roderic Hinton, for the defendants Krugozor, Chyzhyk, Larin, Russian Kino and Sytnyk

Natalie Medovoy, for the defendants Russian House, Konev and Mankaouskas

Vernon Balaban, for the defendants 1562944 Ont. and Blizniuk

Shana Dale, for the defendants Belisa, Pinsky, 1614622 Ont, International Discount and Zaretsky

COSTS ADDENDUM

[1] This endorsement concerns the costs of ten similar motions brought by the plaintiff to add party plaintiffs and amend the statements of claim heard by me on September 18, 2006.¹ The motions were denied by endorsement released September 27, 2006, now reported at [2006] O.J. No. 3857.

[2] The defendants were successful in resisting each motion to amend based on all three grounds argued: untenable pleas by the added plaintiffs, abuse of process and failure to file the added plaintiffs' written consent. I also considered three additional attacks on portions of the amended pleading in the event that the amendments were otherwise allowed and the defendants were successful in two of those (lack of particularity and untenable plea against individual directors.) There is no reason why costs should not follow the event. Each of the solicitors for the various defendants are entitled to their respective costs.

¹ Although one action is referenced in the above style of cause the motion herein was one of 10 similar motions in 10 separate actions heard together. This costs endorsement applies to costs of motions to amend the statement of claim in each of the following actions: 05-CV-297953PD2, 05-CV-298322PD3, 05-CV-297955PD3, 05-CV-298319PD1, 05-CV-297957PD2, 05-CV-298321PD2, 05-CV-297961PD3, 05-CV-297964PD3, 05-CV-297962PD1 and 05-CV-297958PD1.

SCALE OF COSTS

[3] Mr. Kats, Mr. Levine and Ms. Dale seek costs on a substantial indemnity scale. Mr. Hinton, Ms. Medovoy and Mr. Balaban seek costs on a partial indemnity scale. There are two bases for the claim to costs on the substantial indemnity scale: the conduct of plaintiff's counsel and the determination that the motion was an abuse of process.

[4] Costs are normally payable on a partial indemnity scale. The court of appeal in *McBride Metal Fabricating Corp. v. H&W Sales Company Inc.* (2002), 59 O.R. (3d) 97 (C.A.) at paragraph 38-39 set out the basis for deviating from that general rule and awarding costs on a substantial indemnity scale (then referred to a costs on a solicitor-client scale):

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.

(a) Conduct of Counsel

[5] There are two aspects to the conduct of plaintiff's solicitor that give rise to complaint – one involves matters of process, the other civility. Firstly, Mr. Cartel brought motions to amend separately in each action. He initially refused to consider the suggestion raised by counsel for the various defendants, spearheaded by Mr. Kats, to hear all of the motions together to promote efficiency, save costs and avoid inconsistent verdicts, opposed adjournment of the separate motions and resisted a case conference to discuss the matter. Mr. Cartel's position was inconsistent with the most effective and cost-efficient manner of dealing with the amendments. It tended to unnecessarily lengthen these proceedings within the meaning of rule 57.01(1)(e). While this is a factor in the award of costs, and will increase the costs to which his client will be held accountable, they are matters of process and not that sort of reprehensible conduct that would warrant costs on a substantial indemnity basis.

[6] The second aspect of the behaviour of plaintiff's counsel is more troubling since it goes beyond issues of process and is concerned with civility toward opposing solicitors. Mr. Levine, solicitor for the defendant Yakubovsky, had written to Mr. Cartel and suggested that his motion to add the resident plaintiffs was an attempt to defeat motions for security for costs (a position ultimately accepted by the court). By letter of August 8, 2006 Mr. Cartel responded: "*It is obvious you do not understand the law of copyright or the relevance of corporate share transactions in this matter...I shall enlighten you during the motion and seek costs on a substantial indemnity basis given the nature of your conduct with Ms. Medovoy in the time frame preceding the initial motion.*" In his letter of August 10 to Mr. Kats respecting the proposed adjournment and Mr. Kats' concern respecting Mr. Cartel's correspondence to the Master, Mr. Cartel stated: "I have no concern

whatsoever of your opinion as to whether my correspondence to Master Dash is appropriate. *You have merely parroted the comments* of Mr. Levine in his letter *whose conduct in the past, similar to yours, is questionable...I remain amused at the antics of yourself* and Mr. Levine in this and previous matters as well as Ms. Medovoy” [emphasis mine].

[7] In *Sun Trust Co. v. Bond City Financing*, (1997) O.R. (3d) 758, [1997] O.J. No. 5009 (Div. Ct.) where a solicitor made serious allegation against opposing counsel in material used on a motion to remove a solicitor of record and in submissions made at the hearing, the court stated at p. 6:

The allegations impugn the integrity of Mr. Schwartz. They are without a reasonable foundation and they were made and pursued irresponsibly. They are worthy of censure in the form of solicitor and client costs.

[8] In *Baksh v. Sun Media* (2003), 63 O.R. (3d) 51, [2003] O.J. No. 68 (Master), where the defendants sought costs on the substantial indemnity scale based on the plaintiff's solicitor's negative and derogatory comments about opposing counsel in materials submitted on a motion, I stated as follows at paragraph 23:

Counsel who appear before Ontario courts are expected to comply with the Rules of Professional Conduct, and in my view should also adhere to the Principles of Civility [for Advocates published by the Advocates' Society], or risk sanctions by the court. In my view the plaintiff's unsubstantiated negative, offensive and prejudicial personal comments about opposing counsel infringe both the Rules and the Principles. Such comments have no place in our courts. I can only assume that such remarks were made to prejudice both the defendants and their solicitors in the eyes of the court... I agree with defendants' counsel that a proper reprimand for breaches of this nature in the circumstances of this case is an award of costs on a substantial indemnity scale.

[9] Rule 6.01(1) of the Rules of Professional Conduct provides that a lawyer shall be courteous and civil with all persons with whom he has dealings in his practice. The commentary under that rule provides that "a lawyer should avoid ill-considered or uninformed criticism of the ... conduct of other lawyers." Of particular relevance is rule 6.03(5) which prohibits the communication to another lawyer or any person "that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer."

[10] The Principles of Civility for Advocates provide further guidelines for the conduct of litigation by lawyers. Paragraph 27 provides that "Counsel should not attribute bad motives or improper conduct to opposing Counsel, except when relevant to the issues of the case and well-founded." Rule 28 advises that "Counsel should avoid disparaging personal remarks or acrimony toward opposing Counsel."

[11] The comments by plaintiff's counsel were discourteous and condescending as well as "abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer." They were personal disparaging comments about opposing counsel. The remarks to Mr. Levine were not only arrogant but an attempt to belittle him by denigrating his legal knowledge and they were copied by Mr. Cartel to three other lawyers. There is no place for such comments in communications between solicitors. They were unnecessary and did nothing to advance the positions of Mr. Cartel's clients. However, the disparaging comments made by counsel in *Baksh v.*

Sun Media about opposing solicitors were made to the court and in documents filed with the court in order to cause the master to view such solicitors in a negative light. Mr Cartel's comments were not contained in documents filed with the court or referred to by him on the motion before me. It is not the function of a judge or master to police counsel's unprofessional behaviour out of court. That is the function of the Law Society.² Therefore, despite the court's disapproval of counsel's conduct, I am of the view that taken by themselves such comments would not attract an award of costs on a substantial indemnity scale on the motion before me, although they are an aggravating factor.

(b) Abuse of Process

[12] Substantial indemnity costs are also sought on the basis that the motion to amend was an abuse of process. The plaintiff decided to bring motions to add resident plaintiffs only after orders for security for costs in several actions were made against the only non-resident plaintiff and motions for security in other actions were pending. I stated at paragraph 45 of my reasons:

I inescapably come to the conclusion that the plaintiff's purpose in seeking to add the Ontario Companies as plaintiffs is to avoid further orders for security for costs by having resident plaintiffs make a joint claim with that of the original non-resident plaintiff. In my view that is an improper purpose for adding parties and the motion to add the Ontario Companies will be denied on the further ground of abuse of process.

[13] Motions brought for an improper purpose that the court has found amount to an abuse of process have resulted in orders for costs on a substantial indemnity scale in *Hodgson v. Mascan Corp.*, [1985] O.J. No. 1348 (Div. Ct.), *Rona Inc. v. Sevenbridge Developments Ltd.*, [2002] O.J. No. 2260 (Master) and apparently (although not explicitly stated) in *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (O.C.G.D.) In fact it was recognized in *McBride Metal*, supra, at paragraph 39 that acts amounting to an abuse of process could warrant substantial indemnity costs as a form of chastisement:

Apart from the operation of rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor and client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

[14] In my view, abusing the processes of the court by improperly moving to add unnecessary parties for the purpose of avoiding orders for security for costs in the circumstances herein is conduct of such reprehensible nature as to warrant costs on a substantial indemnity scale. It is only by awarding costs on the higher scale that the court may sanction and show its disapprobation of the plaintiff's conduct. Costs will be awarded on a substantial indemnity scale to those solicitors requesting same and on a partial indemnity basis to the others.

QUANTUM OF COSTS

² My remarks should not be taken as suggesting that Mr. Cartel's behaviour amounts to professional misconduct. I make no such finding, nor would it be appropriate that I do so.

[15] In calculating the quantum of costs I have considered the success of the defendants as well as the various factors listed in rule 57.01(1). The motion was complex both factually and legally and the factual record and productions were extensive. Many points of law were raised and had to be argued. The plaintiff and the defendants (through a joint defendants' factum) addressed these issues in some detail and both sides prepared books of authority. The issues required extensive legal research, particularly by Mr. Kats. The cases produced by him were helpful in determining the issues. The motion was important to all parties as it could have substantial bearing on plaintiff's liability to pay or ability to set aside orders made for security for costs in nine separate actions. The conduct of plaintiff's counsel in initially refusing to consent to all motions being heard together and the deluge of correspondence from plaintiff's counsel to defendants' counsel and to the court served to unnecessarily increase costs. I have individually considered the experience and appropriate hourly rate and hours spent by each counsel, while bearing in mind that fixing of costs is not simply a mathematical exercise of multiplying hours by rates. The court must consider all the factors and fix costs in an amount that is fair and reasonable in the circumstances. Considering the amount of material and preparation by the plaintiff and the complexity of the issues, the plaintiff should not be surprised at the amount of work done by defendants' counsel to resist the motions. The amounts claimed by most of the defendants herein would not be beyond the reasonable expectations of the plaintiff, although the accounts of several of defendants' solicitors was clearly excessive given the nature of their roles on the motions.

[16] All defendants' counsel agree that Mr. Kats did the lion's share of the work arranging for the motions to be heard together, conducting legal research, preparing the joint factum and book of authorities and arguing the motion before me, although other counsel also contributed to the research, factum and argument. There were separate motions brought by the plaintiff in each action. Although there was a single joint factum, each solicitor incurred separate costs reviewing the moving party's materials, preparing for the motion and consulting with their clients. They each have separate interests to protect. All defendants' counsel agree that Mr. Kats costs should be fixed in a significantly higher amount. The costs awarded to other counsel reflect their supporting role.

[17] Two matters dealing with procedural and billing issues in specific actions must be addressed before costs can be fixed. Firstly, three of the counsel represented defendants resisting motions in more than one action. Ms. Dale and Mr. Levine have provided separate costs outlines and seek separate costs awards in each action. Ms. Dale had three different sets of clients in the three actions in which she is involved and of course she had to separately explain and take instructions from each. She has however provided duplicate bills in each action and charged the same half-day counsel fee on the motion to each. That of course is inappropriate. Mr. Levine represents the same client in two of the actions. He has charged all of his preparation and court time in his costs outline in one action and only the additional time in correspondence and communications in the second. Mr. Hinton represents two different sets of defendants in two actions and he has provided a single costs outline applicable to both. In my view the appropriate procedure is to fix the total costs payable for the work of each of these solicitors and then evenly divide the costs among the actions in which they were involved.

[18] Secondly, Ms. Medovoy and Mr. Levine attended several adjournments of the pleadings motions in actions 05-CV-297953PD2 and 05-CV-298322PD3 before they were scheduled to be

heard by me on August 14, 2006, including attendances before Master Abrams on June 13 and myself on June 23. No orders were made as to costs at the time. As they were successful on the motions, the costs of those adjournments will be allowed to the defendants where claimed as part of the costs of the motion. Several versions of the plaintiff's motion record were served on these solicitors over the course of this motion and that has increased their costs. There are no costs associated with the cancelled August 14 court appearance as no-one needed to attend. On the other hand, both of these actions included both a security for costs motion as well as the pleadings motion. Security for costs in those actions has yet to be dealt with, yet Ms. Medovoy and Mr. Levine include in their costs outlines preparation of the materials for the security for costs motion and for legal research thereon. That is not appropriate in fixing costs of the pleadings motions. Those charges should be dealt with when determining costs of the security for costs motions after they are heard. Some time docketed refers to both motions and that will be divided rateably.

[19] Mr. Cartel complains about the conduct of certain of defendants' solicitors, which he suggests go the issue of their costs. The complaints that some solicitors tried to compel discoveries before they were entitled, booked discovery dates and motion dates for security for costs and to compel discovery without consulting Mr. Cartel, served one motion on short notice, failed to serve affidavits of documents and refused to consider case management may have some validity but they have absolutely nothing to do with the motions heard by me to amend pleadings. Other matters do concern these motions. I find no fault with Mr. Kats attempting to address the court on the amendment motions to which his clients were not parties in the interest of adjourning to a common hearing date. There is a justifiable complaint about Mr. Levine and Ms. Medovoy not completing factums as ordered before the August 14 return date. If counsel had attended on August 14, costs sanctions may have been appropriate, but it was adjourned prior to the date of hearing and as a result their conduct did not increase costs. None of these matters of which Mr. Cartel complains are deserving of sanction by reduction of defendants' costs on the motions before me.

SPECIFIC COSTS OUTLINES

[20] Mr. Kats represents the defendants (other than Yakubovsky) in 05-CV-297955CM3. He claims costs on a substantial indemnity scale, which I have concluded is appropriate. He seeks costs of \$21,820.50 fees, \$1,309.23 GST and \$1,049 disbursements for a total of \$24,178.73. The costs claimed on a substantial indemnity scale are less than his actual full indemnity costs. The rate claimed for a lawyer in his seventh year on a substantial indemnity basis is however high and in my view \$250 per hour would be more reasonable. The hours spent are reasonable given the complexity of the issues and Mr. Kats' lead role on the motion. Although Mr. Cartel has suggested that Mr. Kats' behaviour may affect his costs (which I have rejected), he has not raised any particular issue with the hours or rates in Mr. Kats' bill or with the quantum claimed. There is no issue with the disbursements. In my view costs of \$21,000 inclusive of GST and disbursements is fair and reasonable in the circumstances.

[21] Mr. Levine represents the defendant Yakubovsky on motions in 05-CV-297953PD2 and 05-CV-297955PD3. He also claims costs on a substantial indemnity scale, which I have concluded is appropriate. He seeks costs of \$17,673.75 fees, \$1,060.43 GST and \$4,100.15 disbursements for a total of \$22,833.90 in the first named action plus \$1,132.56 for additional work specific to the

second action for a grand total of \$23,966.46. The substantial indemnity rate claimed of \$225 is more than reasonable for a solicitor with 28 years of experience. This is also less than his actual billing rate. As indicated the amount claimed for the security for costs motion is not appropriate and will be deducted. Mr. Levine has billed as disbursements payments for legal research or opinion to three separate lawyers totalling \$3,912.54. I have disallowed this disbursement since there is no mention of the need for or contents of this work in the submissions, Mr. Levine has billed for his own research time, the solicitors' bills are not included and I have no way of ascertaining whether they relate to the pleadings motions or to the security for costs motions or to the merits of the action itself. Correspondence with counsel of 17.75 hours together with correspondence and communications in the second action of 4.52 hours is excessive. Although clearly he made useful contributions, Mr. Levine did not take the lead on the motions. The bill as a whole is significantly excessive. In my view costs of \$9,000 divided as \$4,500 in each of the two files is fair and reasonable in the circumstances.

[22] Ms. Dale represents defendants in 05-CV-297961PD3, 05-CV-297964PD3 and 05-CV-298321PD2. She claims costs on a substantial indemnity scale, which I have concluded is appropriate. Her claimed partial indemnity rate of \$225 would be more appropriate as her substantial indemnity rate. She became involved in these motions later than other counsel. Her hours spent are reasonable. As indicated however she has prepared identical duplicative costs outlines in each of three actions seeking \$4,715.41 total of fees, GST and disbursements in each. In my view costs in the amount of \$4,715.41 is fair and reasonable in the circumstances, but in that total amount for all three actions combined. I would therefore fix costs of \$1,571.80 in each action.

[23] Ms. Medovoy represents the defendants in 05-CV-298322PD3. She claims costs on a partial indemnity scale. She has claimed fees of \$7,500, GST of \$450 and disbursements of \$686.93. Her hourly rate of \$150 is reasonable as are her hours spent, however I must back out the costs claimed on the security for costs motion which has yet to be heard, including a rateable share of costs on matters divided between both motions. In the result costs of \$4,879 are fair and reasonable in the circumstances.

[24] Mr. Hinton represented defendants in 05-CV-297962PD1 and 05-CV-298319PD1. He claims costs on a partial indemnity basis. He seeks total costs for both actions of \$2,820.66 inclusive of GST and disbursements which is fair and extremely reasonable. They will be divided as \$1,410.33 in each action.

[25] Mr. Balaban represents some of the defendants in 05-CV-297957PD2. He claims costs on a partial indemnity scale. He seeks fees of \$8,010 and disbursements of \$176.52 for a total of \$8,186.52. He has been practicing litigation since 1971 and the partial indemnity rate claimed of \$300 is not unreasonable. The costs outline however provides no breakdown of work or hours except by way of the following summary: "motion-including review of applicable law and issues of statutory application – 26.7 hours". There are no supporting dockets as ordered. The adjournment from Master Glustein's list was accomplished by telephone case conference without court attendance. While it may well be that work was done to justify 26.7 hours, it is not possible to grant such award in the absence of any semblance of detail. In my view the amount of work done by Mr.

Balaban would be less than that of Ms. Dale or Ms. Medovoy and I would fix costs of \$3750 as fair and reasonable in the circumstances.

ORDER

[26] The plaintiff shall pay costs of the motions to add plaintiffs and amend pleadings within 30 days as follows:

- (1) In action 05-CV-297955PD3:
 - a. to the defendants 1444943 Ont. Ltd., 1179468 Ont. Ltd. and Avroutine in the sum of \$21,000.00,
 - b. to the defendant Yakubovsky in the sum of \$4,500.00;
- (2) In action 05-CV-297953PD2 to the defendant Yakubovsky in the sum of \$4,500.00;
- (3) In action 05-CV-297961PD3 to the defendants in the sum of \$1,571.80;
- (4) In action 05-CV-297964PD3 to the defendants in the sum of \$1,571.80;
- (5) In action 05-CV-298321PD2 to the defendants in the sum of \$1,571.80;
- (6) In action 05-CV-298322PD3 to the defendants in the sum of \$4,879.00
- (7) In action 05-CV-297962PD1 to the defendants in the sum of \$1,410.33;
- (8) In action 05-CV-298319PD1 to the defendants in the sum of \$1,410.33;
- (9) In action 05-CV-297957PD2 to the defendants in the sum of \$3,750.00.

Master R. Dash

DATE: October 23, 2006