Date: 20090310

Docket: T-1427-06

Citation: 2009 FC 253

Toronto, Ontario, March 10, 2009

PRESENT: Madam Prothonotary Milczynski

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

Overview

[1] A stay does not terminate a proceeding and, in any event, such terminal result is not sought by the moving parties. Rather, a stay of this proceeding is sought to ensure the orderly disposition of all the issues in dispute between the parties and the different remedies that are available as between this Court and the Ontario courts. The basis for an order staying this proceeding is parallel proceedings arising from the same set of facts.

[2] In February 2006, Jazz Air LP ("Jazz") commenced an action in the Ontario Superior Court of Justice (06-CV-306679PD3) (the "Ontario Action") in respect of the actions of the Toronto Port Authority ("TPA") and City Centre Aviation Ltd., Regco Holdings Inc., Porter Airlines and Robert Deluce (collectively "Porter" or the "Porter Parties") regarding the Toronto City Centre Airport ("TCCA").

[3] Jazz alleges in the Ontario Action that the TPA and the Porter Parties have conspired to, in an attempt to compete unfairly, arbitrarily and in a discriminatory fashion and, contrary to the *Competition Act*, deny Jazz access to the TCCA.

[4] Weeks after launching the Ontario Action, Jazz filed an application for judicial review in this Court (T-431-06) (Application #1). Application #1 was eventually ordered converted into an action owing to the complex factual issues raised: *Jazz Air LP v. Toronto Port Authority*, 2006 FC 705 (*Jazz I*) aff'd 2006 FC 904 (*Jazz II*). On August 8, 2006, Application #1 was discontinued.

[5] On the same day Application #1 was discontinued, Jazz filed a fresh application for judicial review (Application #2). Again, after several procedural motions, Application #2 was ordered converted into an action: *Jazz Air LP v. Toronto Port Authority*, 2007 FC 624 (*Jazz III*), aff'd 2007 FCA 304).

[6] The nature of Application #2 (now the present action) has been canvassed in a number of this Court's reasons for order: *Jazz I*, paras 4-11; *Jazz Air LP v. Toronto Port Authority*, 2007 FC 114 at paras. 16-25 (*Jazz IV*). At base, in Application #2:

> Jazz seeks review of the TPA's decision to terminate Jazz's existing [commercial carrier operating agreement] CCOA, effective August 31, 2006. Application #1 was worded slightly differently. Jazz sought review of the TPA's decision threatening to terminate Jazz's access to the TCCA as of August 31, 2006. In each of Application #1 and #2, Jazz relies on the letter of Lisa Raitt dated February 28, 2006, in which she advised:
>
> > We wish to notify you that any and all agreements and other arrangements which may exist between the TPA and New Jazz (or any of its predecessors) will terminate on August 31, 2006 (or such earlier date on which they may conclude) unless a mutually agreeable CCOA has been entered into between New Jazz and TPA on or before that date.
>
> The same CCOA is the subject of both Application #1 and #2, and the complaints are the same - the number of slots, the limitations on routes that may be flown and whether to insist on the terms exceeds the authority of the TPA under the *Canada Marine Act*. This CCOA was first provided to Jazz in February of 2006, and the TPA's position was simply reiterated in its correspondence of July 26, 2006. Whatever conciliatory gesture or offer the TPA made that deviated from the terms of the proposed CCOA was simply a without prejudice offer to permit Jazz some access to the TCCA, pending the judicial determination of Application #1. The TPA was prepared to allow Jazz to fly from the TCCA post August 31, 2006, but only if it agreed to be bound by the terms of the proposed new CCOA in the interim and until such time as a new CCOA was agreed to and executed. This was communicated to Jazz in May and in June, 2006.

(See *Jazz IV* at paras. 19-20).

[7] The Porter Parties, joined by the TPA, seek a stay of this action in favour of the Ontario Action pursuant to section 50(1)(a) of the *Federal Courts Act*. These are my reasons why, in light of the similarities between the Ontario Action and this proceeding, the present action must be, to borrow an aviation term, grounded for the time being in favour of the Ontario action. This is not to deny Jazz its right to a hearing or drive it from the judgment seat, but to make best use of the parties' resources, ensure the efficient and cost-effective disposition of the broader claims, avoid inconsistent rulings, and, as discussed in more detail below, greatly narrow the issues in this proceeding if not resolve them entirely.

The Legal Framework for Evaluating a Stay Application

[8] Section 50(1)(a) of the *Federal Courts Act* gives the Court a discretionary power to stay proceedings "on the ground that the claim is being proceeded with in another court or jurisdiction".

[9] The jurisprudence concerning section 50(1)(a) has articulated a number of principles and factors that must be considered in evaluating a stay application. Central to the analysis is the recognition that a stay is a discretionary order that should only be granted in the clearest of cases: *Kent v. Universal Studios Canada Inc.* 2008 FC 906 at para. 16; *Advanced Emissions Technologies Ltd. v. Dufort Testing Services Ltd.*, 2006 FC 794 at para. 8.

[10] In *Kent*, Prothonotary Aalto found that a long line of cases have identified a two-pronged test that must be met by a party (typically a defendant) seeking a stay under section 50(1)(a):

1. that the continuation of the action will cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant; and

2. that the stay would not work an injustice to the plaintiff.

(See *Kent* at para. 15; see also *Advanced Emissions Technologies* at para. 9).

[11] In *White v. E.B.F. Manufacturing Ltd.*, 2001 FCT 713 at para. 5, Justice Dubé articulated a number of additional criteria that previous cases had pointed to in weighing a stay application:

1. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?

2. What are the possibilities of inconsistent findings in both courts?

3. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction;

4. Priority ought not necessarily be given to the first proceeding over the second one or, vice versa.

[12] The jurisprudence of this Court has also established that a stay application will be denied under section 50(1)(a) where three cumulative criteria have been met:

1. The parties in the parallel proceedings are not identical;

2. The jurisdiction of the two courts are different; and

3. The causes of action being asserted in each court are different.

(See *Advanced Emissions Technologies*, at para. 10).

The Ontario Action in Contrast to the Federal Court Action

[13] The central point of contention between Jazz and the Porter Parties in the present motion is their different characterizations of Jazz's Ontario Action in comparison to the action in this Court. For the Porter Parties, the two cases filed by Jazz are all but indistinguishable, and preference should be given to the Ontario Action because it is the broader of the two cases in terms of issues to be determined. For Jazz, the action in this Court is "narrow", and implicates a remedy that can only be granted by the Federal Court under section 18.1 of the *Federal Courts Act*.

[14] This is not a case where a defendant in one action is the plaintiff in another, and the litigants are seeking to have their actions advance in their preferred venue (see e.g. *Apotex Inc. v. AstraZeneca Canada Inc*, 2003 FCA 235; *Sobeys Group Inc. v. Tolix Holdings Inc.* (2003), 27 C.P.R. (4th) 94 (F.C.T.D.); *Safilo Canada Inc. v. Contour Optik Inc.*, (2005), 48 C.P.R. (4th) 339 (F.C.T.D.)). Rather, Jazz has commenced both the Ontario Action and this proceeding. The parties to both actions are identical.

[15] There is also no suggestion that the different jurisdictions of the Ontario Superior Court of Justice and Federal Court are relevant to this proceeding (see *Figgie International Inc. v. Citywide Machine Wholesale Inc.*, [1993] F.C.J. 662 at para. 9). Jazz makes much of the different remedies it is seeking in the Ontario Action and this Court; a point I will return to below. Suffice it to say that the locus of the present dispute does not favor one court or another.

[16] What is significant in the present motion is what Justice McTavish referenced in *Advanced Emissions Technologies*: the cause of action. The classic definition of a cause of action was stated by Diplock L.J. in *Letang v. Cooper*, [1964] 2 All E.R. 929 at p. 934 (H.L.):

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

(See also *Domco Industries Ltd. v Mannington Mills Inc*. (1990), 29 C.P.R. (3d) 481 at 496 (F.C.A.))

[17] I am of the view that the underlying "cause of action" in the Ontario Action and in the action in this Court is fundamentally the same. In both cases, the relationship between Jazz (and its predecessors) and the TPA is central to the dispute. Paragraph 5 of Jazz's Statement of Claim in this Court is instructive:

> This action relates to the unlawful actions culminating in a decision of the TPA communicated to Jazz on July 26, 2006, to terminate Jazz's existing CCOA and unilaterally impose arbitrary and discriminatory restrictions on Jazz, including restricting its number of return flights to five per as, as a condition of Jazz's access to and use of the facilities of the Toronto Island Airport. These actions, culminating in the TPA's July 26, 2006 decision, were contrary to the TPA's statutory jurisdiction and mandate under the *Canada Marine Act*. The TPA's course of action and decision terminating Jazz's existing CCOA and unduly restricting Jazz's access to and use of the facilities at the Toronto Island Airport are an unlawful exercise of the TPA's statutory obligation to operate the Toronto Island Airport in such a manner to facilitate fair and equitable access and so as not to give undue or unreasonable preference to any use of the port, and not to subject users of the port to an undue or unreasonable disadvantage or restrictions. They also contravene the TPA's statutory obligation to operate the Toronto Island airport in a manner that promotes Canada's competitiveness and satisfies the needs of the users of marine transportation and the community served by the port.

[18] From this paragraph, a number of factual issues are put into play before this Court. For example, Jazz is asking this Court to evaluate the "conduct" of the TPA, leading to the TPA's "decision" to terminate Jazz's CCOA. Jazz also asks this Court to evaluate the CCOA proposed by the TPA to determine whether it is arbitrary or discriminatory. This will no doubt require the Court to evaluate past and present CCOA's that govern operations at the TIA: *Jazz I*, para. 12; *Jazz IV*, para. 5.

[19] Indeed, paragraph 25 of Jazz's Statement of Claim in this Court confirms the breadth of the underlying factual issues that have been put in issue:

> Because the acts and decision to restrict Jazz's access to the Toronto Island Airport were stated by the TPA to be due to agreements the TPA has made with another commercial airline user of the Toronto Island Airport, the TPA has granted an undue and unreasonable preference to another use or other users of the port and unlawfully fettered the exercise of its statutory jurisdiction. [emphasis mine]

This paragraph implicates not only Jazz's relationships with the players operating the TCCA, but also the conduct of the TPA vis-à-vis other commercial carriers (the Porter Parties).

[20] A cursory reading of Jazz's Amended Amended Statement of Claim in the Ontario Action reveals that the facts and subject matter giving rise to the cause of action in that case is almost identical to the action pled in this Court. A few paragraphs are particularly illustrative:

> 31. In furtherance of their agreements and arrangements, the defendants agreed to take and did take actions with the intention of making it impossible for Jazz to continue to operate viably from the Island Airport. These actions include:
>
> …

> (d) the TPA determining; in the contest of and as result of these agreements and arrangements with Deluce or his controlled companies, to impose a restrictive CCOA on Jazz which would arbitrarily limits its access to and use of the Island Airport facilities and the routes from which Jazz can fly at the Island Airport.
>
> …
>
> 49. The proposed CCOA is significantly more restrictive than any airport operating agreement that Jazz has ever encountered. It restricts both access to and use of the airport facilities … The proposed CCOA also contains highly unusual, unreasonable and discriminatory commercial conditions.
>
> 57. The conduct of the TPA in reaching such an agreement with the other defendants to restrain competition at the Island Airport and restrict Jazz's ability to operate at the Island Airport is contrary to the TPA's duties and obligations as a public authority controlling and public facility, is unlawful, and is contrary to both the *Competition Act* and the *Canada Marine Act*. [emphasis mine]

[21] Jazz is essentially asking two courts to assess and decide on the nature of TPA's conduct, and the relationship between both the TPA and Jazz, and the TPA and the Porter Parties. Jazz has put the same factual basis for the dispute in two courts and asking each court to evaluate the same subject-matter. In each case:

(i) the parties are the same;

(ii) the parties are acting in the same capacity;

(iii) the subject-matter is the same complex commercial dispute;

(iv) the determination of the issues in each will require review of the terms of the CCOA, access to the TCCA, the conduct of the TPA, and the sixteen year relationship between Jazz and its predecessors and the TPA and

(v) in each of the proceedings: production, discovery and evidence will be overlapping if not outright duplicative.

The Different Relief Sought By Jazz

[22] Jazz's core argument in opposition to this stay motion is that the relief it seeks in this Court is distinct from the relief it seeks in the Ontario Action. In this Court, Jazz seeks declaratory relief against the TPA in relation to its alleged inequitable, arbitrary and discriminatory acts and decision with respect to the CCOA proposed to it by the TPA. Jazz seeks to quash the TPA's decisions regarding the CCOA and termination of access to the TCCA on the grounds that the decisions exceed the TPA's jurisdiction under the *Canada Marine Act*.

[23] In the Ontario Action, Jazz seeks damages against the TPA and the Porter Parties for alleged breaches of the *Competition Act*, as well as damages for alleged breaches of a duty of good faith and conspiring to enter into an unlawful agreement.

[24] In support of its argument, Jazz cites a number of cases that it claims stand for the proposition that courts should not grant stays even where two proceedings may overlap. However, in my respectful view, Jazz's authorities are not persuasive on the facts this case.

[25] In *White*, Justice Dubé declined to grant a stay for two reasons: (i) the parties in the parallel actions were not identical; and (ii) the territorial reach of a Federal Court injunction was far broader than the reach of the courts of Nova Scotia (at para. 11). Similarly, in *Radil Bros. Fishing Co. v.*

Canada (Department of Fisheries and Oceans), 2001 FCA 317, the actions brought by the plaintiff were against two separate parties.

[26] In *Compulife Software Inc. v. Compuoffice Software Inc.* [1997] F.C.J. No 1772 (QL), Justice Wetston declined to grant a stay in a trademark case because the remedy in provincial court was *in personam* whereas the remedy in Federal Court was *in rem*. Justice Wetston went on to find that allowing the Federal Court action to proceed would likely limit the issues in the action in provincial court (at paras. 16-17). This distinction between an *in rem* and *in personam* remedy in the context of intellectual property related issues is also at play in a number of the other authorities relied on by Jazz: *Prime Boilers Inc. v. Unilux Manufacturing Co. Inc.* (1987), 15 C.P.R. (3d) 508 (F.C.T.D.); *Micromar International Inc. v. Micro Furnace Ltd.*, [1988] F.C.J. No. 836 (F.C.T.D.) (QL); *Biologische Heilmittel Heel GmbH v. Acti-Form Ltd.*, [1995] F.C.J No. 1503 (F.C.T.D.) (QL).

[27] None of the cases relied on by Jazz supports denying a stay where identical parties are involved in actions in different courts concerning the same cause of action. Jazz is not seeking *in rem* as opposed to *in personam* relief in different courts. Nor are the different territorial jurisdictions of the Federal Court and Ontario Superior Court at all relevant to Jazz's lawsuits.

[28] What the two actions will require are two separate trial judges making finding of fact and conclusions of law in respect of the same subject matter and disputed facts. Judicial economy and

common sense take a dim view of such a circumstance: *WIC Premium Television v. General Instrument Corp.* [1999] F.C.J. No. 862 at para. 11 (F.C.T.D.) (QL); *Safilo* at para. 35)

The Prejudice to the Defendants, and the Lack Thereof to Jazz

[29] Notwithstanding the lack of persuasiveness in Jazz's argument as to the different remedies it is seeking, the burden in this motion to stay falls to the Porter Parties. As noted above, they must establish that they would suffer prejudice were this action to proceed, and that Jazz would suffer none were this action stayed.

[30] For the Porter Parties, the prejudice that would be suffered were this action to continue would be the risk of inconsistent findings as between the Ontario Superior Court and the Federal Court, as well as the potential waste of judicial resources. In support of this argument, they rely on *WIC Premium Television* and *Safilo*.

[31] Given my view that the causes of action in the Ontario Action and this proceeding are virtually identical, the risk of inconsistent findings and duplicative proceedings are particularly acute in this case. As three judicial officers of this Court have noted, this case is a complex commercial matter - avoiding inconsistent findings is a significant priority.

[32] Accepting that duplication must be avoided does not answer the question of which court should be preferred. The Porter Parties, relying on *WIC Premium Television*, argue that the proceeding that "may deal more comprehensively with all aspects of the action" should be given

preference (at para. 11). I agree that the Ontario Superior Court will likely deal more comprehensively with the claims advanced by Jazz, and that therefore the Ontario Action should be preferred. In fact, the factual findings in the Ontario Action may help to limit the issues that this Court will need to address should this action recommence (see *Compulife* at para. 17; *Kent* at para. 25).

[33] With respect to the potential prejudice to Jazz, the Porter Parties argue, and I agree that little if any prejudice would befall Jazz if this action is stayed. Jazz will have every opportunity to present its case in the Ontario Action. Furthermore, the Porter Parties and the TPA have undertaken not to re-litigate issues and be bound in this Court by any findings of fact or legal determinations made in the Ontario Action. The Porter Parties and the TPA have further undertaken (as represented at the hearing of the motion), that to the extent there are any issues remaining to be determined after the Ontario action, that they will seek consent to determine them by way of summary proceeding, relying on affidavit evidence and including the trial record and findings from the Ontario action. The only issues that the TPA has identified that may remain outstanding for the Federal Court are (1) a preliminary issue as to whether Jazz is time-barred; and (2) in the event Jazz is successful, the scope of the remedies it has sought.

[34] Such undertakings, particularly when they hold promise of narrowing the matters in dispute, have previously been found to mitigate potential prejudice (see *Apotex* at paras. 18, 25). This is not a situation where Jazz will be denied its day of court. Rather, granting the stay is a recognition that two courts ought not to be asked to do essentially the same task.

Conclusion

[35] Stays are to be granted only in the clearest of cases: *Advanced Emissions Technologies* at para. 8. In my view, the Porter Parties have satisfied the test necessary to grant a stay. Jazz now has two lawsuits based on identical disputed facts pending in two separate courts. The modest difference in remedy, when weighed against the complex factual underpinnings that will need to be assessed in order to reach conclusions in both actions, does not weigh against granting a stay.

ORDER

THIS COURT ORDERS that:

1. That the present action (T-1427-06) be stayed pending final disposition of Ontario Superior Court of Justice action number 06-CV-306679PD3.

2. In the event the parties cannot agree on costs, each may file written submissions, no longer than three pages in length within thirty days of the date of this Order.

"Martha Milczynski"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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