Court of King's Bench of Alberta

Citation: Pet Planet Franchise Corp v 1676000 Alberta Ltd, 2025 ABKB 134

Date: 20250312
Docket: 2201 10865
Registry: Calgary

Between:

Pet Planet Franchise Corp. and Petslink Distribution Ltd.

Plaintiffs

- and -

1676000 Alberta Ltd., 2007513 Alberta Ltd.
doing business as Maple Leaf Pets and Troy Wolfe

Defendants

Ruling on Costs
of the
Honourable Justice R.A. Neufeld

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[1] In September 2022, Pet Planet Franchise Corp ("Pet Planet") applied for an injunction to restrain 1676000 Alberta Ltd, 2007513 Alberta Ltd (the "Defendant Companies"), and Troy Wolfe from operating pet supply stores in competition with Pet Planet. Mr. Wolfe is the principal owner of both Defendant Companies and is a defendant and plaintiff by counterclaim in his personal capacity, but he has not sought costs. The Defendant Companies were franchisees of the Pet Planet organization. An injunction application was scheduled to be heard on February 21, 2023, but was adjourned after the Defendant Companies filed eight affidavits in opposition.

Background

[2] On March 27 and 28, 2023, the Defendant Companies conducted questioning of Ms. Laura English, the Affiant of an affidavit sworn in support of the injunction application. During that questioning, counsel for Pet Planet objected to 47 questions and declined to provide answers to 41 undertakings sought by the Defendant Companies. An application to compel answers to undertakings and objected questions was scheduled to be heard by Justice Jones on June 14, 2023. However, after receiving several thousand pages of materials filed by both parties (in roughly equal proportions), Justice Jones advised the parties that the application could not be heard in the time scheduled and would need to be adjourned.

[3] The application was heard by me on September 14 and 15, 2023. The day before the hearing, the Defendant Companies filed a new four volume 3365-page affidavit in response to the injunction application.

[4] On November 15, 2023, after reviewing the evidence and other material filed by the parties and hearing two days of argument, I rendered a decision in which I found that most of the undertakings and questions that were objected to were not relevant to the injunction application. As a result, only 11 of the 88 requests, some of which were consented to by Pet Planet, were ordered to be answered.

[5] After my decision was made, it appears that very little happened. Pet Planet took no further steps in the action and sold its business in June 2024. The Defendant Companies took no further steps in the litigation either and closed their business at around the same time.

Position of the Defendant Companies

[6] The Defendant Companies now seek costs to recover at least a portion of their legal fees and disbursements. The legal fees from November 2022 to January 2024 were $252,477. With GST and disbursements included the total was $277,122.

[7] The Defendant Companies further submit that under Schedule C, Column 5, the recoverable fees and disbursements would be $31,385 for fees, $10,721 for taxable disbursements, and $806 for non-taxable disbursements. The total entitlement amounting to $45,017.99, which includes $2,105.33 for GST.

[8] The exact amount of costs being claimed is not specified. Rather, the Defendant Companies argue that the Court should make an award of costs in the range of 40 to 50%, as per ***McAllister v Calgary (City)***, 2021 ABCA 25. The Defendant Companies submit that Schedule C costs would not provide fair compensation for the costs incurred in defending an injunction application designed to put them out of business. The Defendant Companies further state that enhanced costs are warranted given the factors set out in rule 10.33 of the *Alberta Rules of Court*, Alta Reg 124/2010 because the claim against them was very serious and complex, and it was not prosecuted efficiently and in the end was abandoned. Although item 7(3) of Schedule C contemplates that the fees portion of the cost claim for an abandoned application should be discounted by 50%, in this case the Defendant Companies argue that they successfully defeated the claim because the injunction application did not proceed.

Position of Pet Planet

[9] Pet Planet argues that the 50% discount contained in item 7(3) of Schedule C applies in this case, citing ***HZ v Unger***, 2013 ABQB 638. In that case Application's Judge Schlosser held that the threshold for applying item 7(3) is only that the application be *bona fide*. Pet Planet emphasizes that the injunction application here was not frivolous or vexatious.

[10] Pet Planet further argues that there was no relative success by either party as the injunction application was abandoned. In support of their position on costs, Pet Planet further argues that:

a) the matter may have been important to the parties at one time but ceased to be important when they ceased operating their businesses;

b) the matter ought not to have been complex as it centred on the interpretation and enforceability of a non-competition covenant and was made complex only because of the voluminous affidavits and other irrelevant materials filed by the Defendant Companies;

c) that if Schedule C costs were awarded, the damages component of the claim was for less than $60,000 and therefore Column 1 applies; and

d) the quantum sought by the Defendant Companies for legal fees is not justified, pointing to a lack of detail, and the inclusion of questionable line items in their Bill of Costs.

[11] Pet Planet asserts that the appropriate method to assess legal fees in the circumstances is through review from an assessment officer.

Costs Entitlement and Scale

[12] The award of costs is fundamentally a matter of discretion for the Court. Nonetheless, this discretion must be exercised judicially, with due regard for case precedent and the *Rules of Court*: ***Stewart Estate v TAQA North Ltd***, 2016 ABCA 144 at para 26.

[13] In any case involving a cost application, the first question to be determined is entitlement. Ordinarily, that is a straightforward exercise. However, where results are mixed, the factor of "success" may take a backseat to other considerations, such as the conduct of the parties, the complexity of the issues before the Court, and the relative importance of the matter to the parties.

[14] In this case, it was Pet Planet who initiated the litigation by way of a Statement of Claim, followed by an application for an interim injunction that would have effectively determined the result of the action as the monetary claim made by Pet Planet was modest at $60,000. By initiating the action, Pet Planet forced the Defendant Companies to defend the injunctive relief sought, and they clearly did so with vigour. In an affidavit sworn by Ms. English on September 27, 2024, in the context of a potential application for security for costs, it was stated that if the action went to trial, Pet Planet would have sought partial indemnity costs of two times Column 5 based on projected legal fees of approximately $285,000.

[15] It is therefore clear that both parties considered the stakes of this action to be high and were willing (and in the Defendant Companies' case forced) to expend a great deal of money on legal fees. More importantly, Pet Planet itself considered the action to be of sufficient importance and complexity to warrant two times Column 5, not Column 1 costs as they now propose.

[16] As Pet Planet initiated and then abandoned the action, the Defendant Companies can be found to be successful in defending against the action and injunction application for the purpose of costs.

[17] It does not follow however that the Defendant Companies are entitled to costs in respect of unsuccessful interlocutory applications along the way. In this case, the Defendant Companies chose to question Ms. English on issues that were simply not relevant to the injunction application. Those issues included the way Pet Planet dealt with noncompliance by other franchisees in Canada, and representations made to prospective Pet Planet franchisees prior to the Defendant Companies entering agreements with Pet Planet. This broadening of issues not only led to the refusal of undertakings and an extensive record in respect of the undertakings issue but also found its way into the extensive affidavit filed the day before the undertakings hearing.

[18] In dismissing most of the undertakings application, I ordered that costs of the application would be determined by the Court when the injunction application was heard. Given the injunction application did not proceed, it now falls to me to consider costs in respect of the undertakings application along with other steps taken in the proceeding.

Assessment

[19] In deciding this unusual application, it is necessary to return to basic principles.

[20] The purpose of party and party costs is to indemnify a successful party for its costs, thereby discouraging actions that have no merit while promoting access to justice: ***McAllister*** at para 35. Recent Alberta jurisprudence reemphasizes that the 40 to 50% indemnity range represents a reasonable starting point, but that parties should provide a Bill of Costs based on Schedule C to guide this assessment: ***Barkwell v McDonald***, 2023 ABCA 87 at para 58. Where a Bill of Costs has not been provided as a barometer for reasonableness, and if costs are set as a proportion of legal fees, a detailed analysis of the reasonableness of those fees must be conducted by either the Court or an assessment officer. This can be an onerous exercise, causing more delay and costs.

[21] Fortunately, the *Rules of Court* provide the option of awarding lump-sum costs: r 10.31(1)(b)(ii). This is useful when the Court has confidence that a lump-sum award would provide reasonable party and party indemnification without engendering another round of arguments based on a line-by-line item review of legal accounts and disbursements for a Bill of Costs. This is one such case.

[22] As discussed earlier, the Defendant Companies incurred liability for legal fees and disbursements in excess of $275,000 to defend Pet Planet's application for an injunction. Pet Planet then sold its business and abandoned its injunction application. This made the application moot but left behind a trail of legal bills.

[23] In the circumstances I will award an all-inclusive amount of costs for fees and disbursements of $75,000. This is slightly over 25% of the fees and disbursements actually billed to the Defendant Companies. This award is justified in light of a number of factors including:

a) some of the steps taken by Pet Planet added unnecessary costs, such as not appearing for an adjournment application resulting in the first injunction application being struck and a new one being filed;

b) Pet Planet failing to meet procedural deadlines on at least one occasion;

c) the Defendant Companies' efforts to significantly broaden the scope of evidence to be presented at the injunction application, including bringing an application to compel answers to undertakings that was for the most part unsuccessful and unproductive;

d) it roughly corresponds to what would have been recoverable under two times Column 2 while obviating the need for further appearances before an assessment officer; and

e) it is also a meaningful award for small businesses who incurred such high costs in fending off an aggressive franchisor.

[24] These costs will be paid within 30 days.

Heard by written costs submissions of the Defendant Companies received December 4, 2024 and for the Plaintiffs received on December 18, 2024.
Dated at the City of Calgary, Alberta this 12th day of March, 2025.

R.A. Neufeld
J.C.K.B.A.

Appearances:

Trevor McDonald
for the Plaintiffs

Stephen Panunto
for the Defendant Companies 167600 Alberta Ltd. and 2007513 Alberta Ltd.