

Case Name:
Mealla v. Salba Corp.

**RE: Alfredo Javier Mealla and Adolfo Manuel Mealla,
Applicants, and
Salba Corp. N.A., Thelma Brown and Lawrence Brown, Defendants**

[2010] O.J. No. 3989

2010 ONSC 5212

Court File No. CV-09-8360-00CL

Ontario Superior Court of Justice

P.A. Cumming J.

September 22, 2010.

(20 paras.)

Counsel:

Ted Charney and Julian Roy, for the Applicants.

Geoff R. Hall and Brendan Brammall, for the Respondents.

COSTS ENDORSEMENT

P.A. CUMMING J.:--

Background

1 The Applicants bring an Application under s. 241(1) of the *Canada Business Corporations Act* ("CBCA") claiming that they are the beneficial owners of the shares in Salba Corp., N.A. ("Salba N.A."). The Respondent, Lawrence Brown, is a director of Salba N.A. and the Respondent, Thelma ("Trudy") Brown, the sister of her co-Respondent, is a director and nominally the registered owner of the 100 common shares that have been issued.

2 Salba N.A. is the registered owner of valuable trademarks associated with a particular chia seed grain known as "Salba", used as an ingredient in certain health food products and recognized as a food supplement with claimed unique nutritional and medical benefits.

3 The Applicants successfully moved before me for an interim order in the nature of interim injunctive relief under s. 241(3) of the *BCA* seeking to maintain the *status quo* until their oppression application is dealt with on its merits in respect of who rightfully should have title to the shares of Salba N.A.

4 The hearing took place over September 23, 25 and 30, 2009. My Reasons for Decision dated October 1, 2009 are reported at *Mealla v. Salba Corp. N.A.* [2009] O.J. No. 4057; 65 B.L.R. (4th) 132; 2009 CarswellOnt 5846.

5 The parties made written submissions as to costs but I was asked to hold any decision as to costs in abeyance until I heard further from the parties. I have now been requested to provide a decision as to costs.

General Principles as to Costs

6 Costs are in the discretion of the Court: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, *i.e.* within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.

7 Rule 57.01 (1) lists a broad range of factors for the court to consider, including the result achieved in the proceeding, the complexity of the proceeding, the importance of the issues and whether any step in the proceeding was improper, vexatious or unnecessary.

8 In exercising its discretion, a court must produce a result that is fair and reasonable in all the circumstances: *Boucher v. Public Accountants Council (Ontario)*, (2004), 71 O.R. (3d) 291 (C.A.).

9 The principles to be applied in the exercising of discretion in fixing costs are authoritatively set forth in *Andersen v. St. Jude Medical, Inc.*, [2006] O.J. No. 508 (Div. Ct.), 264 D.L.R.(4th) 557, 145 A.C.W.S. (3d) 786.

The Submissions as to Costs

10 The Applicants have provided a Bill of Costs in the total amount of \$135,777.06 on a substantial indemnity basis, inclusive of \$127,396.50 together with GST for fees plus an additional \$8,380.56 for disbursements. The total fees sought on a partial indemnity basis are \$87,625.00 which they have discounted further by \$22,420.00 for time spent on drafting and work pertaining to the Application proper as opposed to the motion for injunctive relief. Thus, they make a net claim in respect of the interim injunction motion on a partial indemnity basis of \$56,614.00 for fees and \$8,380.56 for disbursements. The Respondents submit that the quantum is excessive saying that while the Applicants' counsel claim costs on a discounted basis for some 207.2 hours, the time spent by counsel for the Respondents, in contrast, was only 94.6 hours.

11 The Respondents also say that they are impecunious and as such they ask that any award of costs be delayed until the trial so as to not impede their "access to justice" through pursuing an intended counterclaim. They say they have sought an expedited trial.

12 When interlocutory injunctive relief is sought, the normative approach is to award costs in the cause. That is, as stated by Sharpe J.A. in his text:

... it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the question of costs to the trial judge.

Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 1992) at &2.1330.

13 In my view, this is an exceptional case such as to warrant some departure from the norm. In my view, my discretion under Rule 57 is properly to be exercised so as to fix costs at this time and to require some portion thereof to be payable forthwith, so to achieve a just disposition in respect of costs.

14 The motion for interim injunctive relief was heard over three days. In my view, the Applicants' materials clearly demonstrated that there is a strong *prima facie* issue for trial as to possible oppression by the Respondents of the Applicants with respect to the true direct or indirect ownership of the majority of the shares of Salba N.A. See Reasons for Decision para. 45.

15 I emphasize that the proceedings were unnecessarily lengthened and made unduly complex for the Applicants because the individual Respondent, Lawrence Brown, who had possession and control of the file of deceased lawyer John Capo, failed to release the Capo file until the hearing was well underway, notwithstanding earlier written requests of counsel for the Applicants. The materials in the Capo file provide strong support for the position of the Applicants that the Respondents were:

... placed in nominal control of Salba N.A. to act only at the direction only of the Applicants and on the basis that the Respondents are bare trustees in respect of the intended beneficial owners of the shares of Salba N.A. Reasons for Decision para. 45.

Disposition

16 For the reasons given, I fix the costs of the Applicants with respect to their successful motion for interim injunctive relief on a partial indemnity basis at \$50,000.00 for fees, plus \$2,500.00 for GST, and \$8,380.56 for disbursements. I fix their costs with respect to their successful motion for interim injunctive relief on a substantial indemnity basis at \$80,000.00, plus \$4,000.00 for GST, and \$8,380.56 for disbursements.

17 I reiterate that, in my view, the individual Respondents should have turned over the Capo file to the Applicants in a timely way and that the materials in the Capo file are very relevant to and supportive of the Applicants' position. That is, there have been unnecessary time-wasted costs in respect of the motion by the Applicants for interim injunctive relief by reason of the lack of timely access by the Applicants to the Capo file. The individual Respondents should be obliged to pay these unnecessary time-wasted costs at this time. I fix these wasted costs at \$20,000.00. in fees plus \$1,000.00 GST.

18 For the reasons given, the individual Respondents are liable jointly and severally to pay costs of \$20,000.00 for fees plus \$1,000.00 GST to the Applicants forthwith.

19 For the reasons given, I fix the balance of the costs payable to follow the cause as determined by the trial judge. If the trial judge determines the cause raised by the Application in favour of the Applicants, the trial judge is to also fix the appropriate scale for costs in respect of the interim injunction motion, ie. either a substantial indemnity or partial indemnity basis for the balance of the fixed costs (ie. the balance of \$60,000.00 for fees plus \$3000.00 GST plus \$8,380.56 for disbursements on a substantial indemnity basis or the balance of \$30,000.00 for fees, plus \$1500.00 GST plus \$8,380.56 for disbursements on a partial indemnity basis).

20 An Order will issue in accordance with these reasons.

P.A. CUMMING J.

cp/e/qlafir/qlpxm