Federal Court  Cour fédérale

Date: 20110510

Docket: T-1269-05

Citation: 2011 FC 540

Ottawa, Ontario, May 10, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HARMONY CONSULTING LTD.

Plaintiff

and

G.A. FOSS TRANSPORT LTD., GORDON A. FOSS, AND JOE CRISTELLO

Defendants

REASONS FOR ORDER AND ORDER

[1] By Reasons for Judgment and Judgment issued on March 18, 2011, the action undertaken by Harmony Consulting Ltd. (the "Plaintiff") against G.A. Foss Transport Ltd., Gordon A. Foss, and Joe Cristello (the "Defendants") for copyright infringement, including damages, an accounting of profits, punitive damages and solicitor-client costs, was dismissed with costs to the Defendants.

[2] By a Direction issued on March 23, 2011, the parties were invited to file written submissions on costs. By a further Direction dated April 6, 2011, the parties were asked to provide

draft bills of costs on the basis of Column 3 and Column 5 of Tariff B, *Federal Courts Rules*, SOR/98-106 (the "Rules"), as well as a draft solicitor-client bill of costs.

[3] According to its closing submissions at trial, the Plaintiff was seeking recovery of damages of approximately $1.4 million against all three Defendants, together with punitive damages and solicitor and client costs. In this regard, I refer to pages 1771, 1776, 1780, 1783, 1784, 1786, 1789 and 1794 of the trial transcript for January 27, 2010. Since the Plaintiff did not succeed in establishing liability against the Defendants, no damages were assessed.

[4] The Defendants, as the successful parties, seek to recover solicitor and client costs and in the alternative, costs beyond the range of Tariff B on a substantial indemnity basis. In their written and oral submissions, the Defendants addressed the grounds upon which they seek substantial indemnity by way of costs.

[5] The Plaintiff advanced the argument that costs awards in accordance with Tariff B is the norm and that a costs award on any other basis requires exceptional circumstances. In this regard, it relies on the decision in *Dimplex North American Ltd. v. CFM Corp.* (2006), 55 C.P.R. (4th) 202 (F.C.) where the Court said that, in deciding if an award of increased costs is justified, the Court should first determine if a reasonable award is possible within the scope of Tariff B. Only if reliance on the Tariff would yield an unreasonable or unsatisfactory result should the Court consider awarding costs beyond the Tariff.

[6] According to the bill of costs prepared by Counsel for the Defendants on the basis of Column III of the Tariff, legal fees would amount to $55,826.55. When calculated on the basis of Column V, the total is $99,393.45.

[7] The Plaintiff also calculated the costs according to Columns III and V of Tariff B. On the basis of Column III, the Plaintiff calculated a total of $20,995. On the basis of Column V, the total was $33,345.

[8] I have considered both the written and oral arguments of the parties. It is not necessary for me to address all of the arguments in reaching my conclusion on an appropriate award of costs. The arguments not addressed in these reasons are without merit, in my opinion, for example, the Plaintiff's argument that the Defendants abused the discovery process.

[9] I note that pursuant to Rule 400 of the Rules, the award of costs is wholly within the discretion of the Court. Rule 400(3) sets out a non-exhaustive list of factors that may be considered in awarding costs.

[10] In my opinion, the more important factors of Rule 400(3) for the purposes of the present task are paragraphs (a), (b), (e), (n.1) and (o) as follows:

(3) In exercising its discretion under subsection (1), the Court may consider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
(a) the result of the proceeding;	a) le résultat de l'instance;

(b) the amounts claimed and the amounts recovered;	b) les sommes réclamées et les sommes recouvrées;
…	…
(e) any written offer to settle;	e) toute offre écrite de règlement;
…	…
(n.1) whether the expense required to have an expert witness give evidence was justified given	n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :
(i) the nature of the litigation, its public significance and any need to clarify the law,	(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,
(ii) the number, complexity or technical nature of the issues in dispute, or	(ii) le nombre, la complexité ou la nature technique des questions en litige,
(iii) the amount in dispute in the proceeding; and	(iii) la somme en litige;
(o) any other matter that it considers relevant.	o) toute autre question qu'elle juge pertinente.

[11] The result of the proceeding resoundingly favoured the Defendants. The Plaintiff had advanced a large, seven-figure claim and it recovered nothing. A written offer to settle was made by the Defendants more than 14 days before the commencement of the trial, as set out in Rule 419(3) and was not accepted by the Plaintiff. The engagement of an expert witness by the Defendants was reasonable given the nature of the intellectual property, that is computer software, for which the Plaintiff alleged infringement.

[12] It is appropriate to address the fact that the settlement offer was not accepted. Rule 420(2) sets out the consequences of failure to accept an offer to settle as follows:

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,	(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante :
(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or	a) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;
(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.	b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

[13] I agree with the submissions of the Plaintiff that any double-costs consequence of its failure to accept the Defendants' settlement offer should apply only to the actual trial and not to the costs relative to the pre-trial steps and proceedings.

[14] The Defendants noted at paragraph 17 of their initial submissions, the various findings of misconduct of the Plaintiff that were addressed in the Reasons for Judgment as follows:

> 17. It is submitted that certain findings of the Court concerning Mr. Chari's evidence and actions are relevant to the issue of costs and in particular illustrate the requisite misconduct to permit a Court to order solicitor-and-client costs. In particular the Court:
>
> (a) found Mr. Chari to be an "unsatisfactory" and "evasive" witness [paras. 130, 131 and 217];
>
> (b) found that Mr. Chari "fabricated" invoice arrears [para. 97] and "fabricated" the justification for "attacking" the Foss computer system [para. 108];
>
> (c) found that the actions of Mr. Chari were precipitated by his disappointment in failing to conclude a merger with Foss [para. 109];
>
> (d) found that Mr. Chari attempted to "intimidate" the Defendants [para. 118];
>
> (e) found that the evidence "cast doubt on the authenticity of the documents at Tab 140", tendered by the Plaintiff at trial [para. 136]; and
>
> (f) made findings concerning certain matters that Mr. Chari's "assertion is not believable" [para. 57] and that the Plaintiff's position is "untenable" [para. 75].

[15] In my opinion, having regard to these factors, and having regard to the draft bills of costs provided by the parties, the legal fees recoverable under Columns III and V do not represent adequate costs recovery by the successful parties.

[16] The Defendants provided a bill of costs on a solicitor and client basis totaling $222,819.98 for fees including GST/HST, from the commencement of the action. The hourly rate for counsel varied from a starting figure in 2005 of $365 per hour to a rate of $525 per hour in 2011. The

Defendants also submitted a statement of their disbursements, totaling $30,726.28. The disbursements account includes $14,477.40 for the expert, Mr. Kevin Lo and the amount of $6,500 sought to be recovered on account of the services provided by Ms. Lydia Warth.

[17] The Plaintiff did not provide a *pro forma* solicitor and client bill but chose to suggest certain deductions from the account prepared by Counsel for the Defendants. The Plaintiff did not challenge the hourly rates charged by Counsel for the Defendants and did not disclose the hourly rate charged by its lawyer.

[18] Rather, the Plaintiff took issue with certain elements of the costs claimed by the Defendants, namely: the costs for drafting a Counterclaim that was not within the jurisdiction of this Court; costs for preparation and attendance for discovery examinations of both the Plaintiff's representative and the personal Defendants when those examinations were used for both these proceedings and in related proceedings before the Ontario Superior Court of Justice; costs for responses to undertakings arising from the discovery examinations of the personal Defendants; and deductions from the Defendants' solicitor and client costs for the preparation of written closing submissions.

[19] The Plaintiff argues that the Defendants should not recover costs for the preparation of its Counterclaim. It submitted that the Counterclaim was later withdrawn by the Defendants in response to the jurisdictional argument raised by the Plaintiff.

[20] In fact, according to both the Index of Recorded Entries and the main Court file the Counterclaim had never been filed. It appears that a Defence and Counterclaim were sent to

Counsel for the Plaintiff but the pleading was never filed. No motion was required to strike the Counterclaim, and the Defendants acknowledged that this Court does not have jurisdiction to hear its Counterclaim. As the Defendants submit, the amount of time spent preparing the Counterclaim was minimal. No deduction will be made for time spent preparing the Counterclaim.

[21] The Plaintiff argues in favour of reducing the costs relative to the discovery examinations, including follow-up with replies to undertakings, because these examinations and collateral work were used for both the proceedings in this Court and in an action for damages commenced in the Ontario Superior Court.

[22] I am not persuaded by the submissions of the Plaintiff. The discovery examinations were necessary for the conduct of the trial in this Court. It is economical that they may also be used in the proceedings in the Ontario Superior Court but I see no good reason to discount recovery for costs in respect of the discovery examinations at this time, when the trial in the Federal Court has been concluded. As noted by Counsel for the Defendants, there can be no double recovery on account of the discovery costs once the proceedings in the Ontario Superior Court are concluded.

[23] The Plaintiff seeks a reduction of costs for time spent by Counsel for the Defendants in preparing written submissions on the grounds that the Court had requested oral, not written, closing submissions.

[24] In my opinion, this time spent in beginning to prepare written submissions may be considered preparatory work for any oral submissions, in the sense of clarifying those submissions. I will not make a deduction in that regard.

[25] The total set out in the Defendants' solicitor and client bill of costs, for legal fees, is $222,819.98, including GST/HST. The total set out in the Plaintiff's solicitor and client bill of costs is $163,343.25. This amount is not based on the fees charged by Counsel for the Plaintiff but rather, is based upon the deductions suggested by that Counsel from the solicitor and client bill of costs prepared by Counsel for the Defendants.

[26] The Defendants' solicitor and client bill of costs is based upon the actual fees charged by that lawyer. Counsel for the Defendants filed a copy of the back-up computerized time sheets to substantiate the charges that were claimed.

[27] Although the Defendants have not presented specific bills of costs relative to the two individual Defendants, that is Mr. Gordon Foss and Mr. Joe Cristello, they have argued that such costs should be awarded since the Plaintiff's action against them was without merit.

[28] The Plaintiff, on the other hand, submitted that valid arguments were made in support of the claim against those Defendants and that solicitor and client costs should not be awarded to them individually.

[29] I have considered all the submissions made by both parties. I have also considered the decision in *Netbored Inc. v. Avery Holdings Inc.* (2005), 48 C.P.R. (4th) 241 (F.C.) where the Court found that no case had been established against the personal defendants and awarded solicitor and client costs, as well as disbursements, not otherwise paid by the corporate defendant, to those defendants.

[30] Although there is no breakdown here as to what costs were not paid by the corporate Defendant, I am satisfied that, having regard to Rules 400 and 403, there should be significant indemnification of all the Defendants. I agree with the written submissions of the Defendants in support of a substantial costs award for the individual Defendants, noting that those submissions refer to specific factual findings from the Reasons for Judgment. In other words, there was no evidence that the individual Defendants paid any costs. Recovery of the costs in that connection should be addressed in the overall sum to be awarded to the Defendants.

[31] Assessment of costs is not an exact science. In my opinion, the circumstances here justify a substantial award beyond that which can be obtained if only Tariff B is applied. At the same time, I am not satisfied that the test for full recovery of solicitor and client costs has been met, as discussed by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3. Nonetheless, the individual Defendants are entitled to full indemnification. If their costs have been paid by the corporate Defendant, that party should be compensated.

[32] Having regard to the Rules, the relevant jurisprudence and the circumstances of this action as discussed in the Reasons for Judgment, I am satisfied that an appropriate and fair award of costs

is 75 percent of the solicitor and client costs submitted by the Defendants. Accordingly, it is not necessary for me to deal specifically with the application of Rule 420(2). That factor will be taken into account with my disposition of the costs.

[33] The Plaintiff takes issue with the fees relating to the discovery examinations, for the same reasons set out above. The Plaintiff suggests that recovery for disbursements be limited to trial fees, expert witness fees, examiner's fees for discovery examinations, photocopies, trial transcript fees and fax charges. The Plaintiff does not challenge the fees charged by the expert, Mr. Lo, but submits that the Defendants should not be entitled to recover $6,500 for the attendance of Ms. Warth, as she was a fact witness, not an expert witness.

[34] I agree with the Plaintiff's objections to recovery of fees on the account of Ms. Warth. She was called as a fact witness and recovery in that regard is limited by section 3 of Tariff A of the Rules which provides as follows:

Witness fees	Indemnité de base
3. (1) Subject to subsection (2), a witness is entitled to be paid by the party who arranged for or subpoenaed his or her attendance $20 per day plus reasonable travel expenses, or the amount permitted in similar circumstances in the superior court of the province where the witness appears, whichever is the greater.	3. (1) Sous réserve du paragraphe (2), un témoin a le droit de recevoir de la partie qui le fait comparaître, notamment par subpoena, la somme de 20 $ par jour plus les frais de déplacement raisonnables, ou l'indemnité accordée dans des circonstances similaires pour une comparution devant la cour supérieure de la province où il comparaît si cette indemnité est plus élevée.
Expert witness	Témoin expert

(2) Where a witness, other than a party, is an expert witness, the daily rate referred to in subsection (1) shall be $100.	(2) Lorsqu'un témoin expert qui n'est pas une partie est appelé à témoigner par suite de la prestation de services professionnels ou techniques, il a le droit de recevoir au lieu des 20 $ prescrits au paragraphe (1) la somme de 100 $ par jour.
Additional costs to witness	Indemnité pour le manque à gagner
(3) A party may pay a witness, in lieu of the amount to which the witness is entitled under subsection (1) or (2), a greater amount equal to the expense or any loss incurred by the witness in attending a proceeding.	(3) Au lieu du montant prévu par les paragraphes (1) ou (2), un montant peut être versé au témoin en compensation des dépenses et du manque à gagner qui résultent, pour lui, de sa comparution.
Amount established by contract	Montant établi par contrat
(4) In lieu of the amounts to which an expert witness is entitled under subsections (1) and (2), a party may pay the expert witness a greater amount established by contract for his or her services in preparing to give evidence and giving evidence.	(4) Au lieu du montant prévu par les paragraphes (1) ou (2), une partie peut verser au témoin expert un montant supérieur fixé par contrat en compensation de ce qu'il a dû faire pour se préparer à déposer et pour déposer.

[35] The Defendants have not submitted any jurisprudence that would support their request for increased costs relative to the attendance of Ms. Warth. I have reviewed the provisions of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6 that were enacted pursuant to subsection 66(1) of the *Courts of Justice Act*, R.S.O. 1990, Chap. C-43.

[36] Rule 53.04(2) of the *Rules of Civil Procedure* refers to payment of attendance money calculated in accordance with Tariff A, for the attendance of a person as a witness at a trial in Ontario. Tariff A, Part II, section 21, authorizes the payment of attendance money of $50 per "each day of necessary attendance", together with a travel allowance of $3.00 per day where the witness lives in the city or town where the trial is held.

[37] There is no evidence that Ms. Warth lives outside Toronto. It is undisputed that her attendance at trial was required over two days, as appears in the trial transcript. Following the directions set out in section 3 of Tariff A of the Rules, I can award conduct money to Ms. Warth on the basis of the Ontario *Rules of Civil Procedure* since the trial took place in the province of Ontario and the attendance money payable under the Ontario *Rules of Civil Procedure* is higher than that which can be awarded under the Rules.

[38] It follows that the recoverable costs in connection with the attendance of Ms. Warth as a fact witness will be $106.00, calculated on the basis of Tariff A of the Ontario *Rules of Civil Procedure*. Pursuant to subsection 37(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and *Bethlehem Copper Corp. v. Minister of National Revenue*, [1977] 1 F.C. 577, the Defendants are entitled to post-judgment interest unless otherwise ordered. According to s. 127 of the *Courts of Justice Act*, the Attorney General of Ontario is responsible for setting interest rates. For 2011, that rate is 3 percent. The Defendants are entitled to post-judgment interest at that rate, upon these costs, including disbursements.

[39] The Defendants are entitled to recovery of costs on a substantial indemnity basis, that is at 75 percent of the total of $222,819.98 for fees including GST/HST, together with 100 percent of their disbursements in the amount of $24,226.28 plus $106.00 as attendance money relative to the attendance of Ms. Warth, all with post-judgment interest.

ORDER

THIS COURT ORDERS that the Defendants are entitled to recovery of costs on a substantial indemnity basis, that is at 75 percent of the total of $222,819.98 for fees including GST/HST**,** together with 100 percent of their disbursements in the amount of $24,226.28 plus $106.00 as attendance money relative to the attendance of Ms. Warth, all with post-judgment interest.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1269-05
STYLE OF CAUSE:	HARMONY CONSULTING LTD. and G.A. FOSS TRANSPORT LTD., GORDON A. FOSS, and JOE CRISTELLO
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	April 26, 2011
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	May 10, 2011

APPEARANCES:

Anthony Prenol	FOR THE PLAINTIFF
Christopher Staples	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Blake, Cassels & Graydon LLP Barristers and Solicitors Toronto, ON	FOR THE PLAINTIFF
Chaitons LLP Barristers and Solicitors Toronto, ON	FOR THE DEFENDANTS