Federal Court Cour fédérale

Date: 20111108

Docket: T-1478-05

Citation: 2011 FC 1276

Ottawa, Ontario, November 8, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

CALOGERAS & MASTER SUPPLIES INC.

Plaintiff

and

CERES HELLENIC SHIPPING ENTERPRISES LTD. AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP LAURENT" AND THE SHIP "CAP LAURENT" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP ROMUALD" AND THE SHIP "CAP ROMUALD" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP GEORGES" AND THE SHIP "CAP GEORGES" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP LEON" AND THE SHIP "CAP LEON" AND ALL OWNERS AND OTHERS INTERESTED IN THE SHIP "CAP JEAN" AND THE SHIP "CAP JEAN" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP DIAMANT" AND THE SHIP "CAP DIAMANT" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP PIERRE" AND THE SHIP "CAP PIERRE"

Defendants

REASONS FOR ORDER AND ORDER AS TO COSTS

[1] In my Reasons for Judgment dated December 22, 2010, I indicated at paragraph 81 that I would deal with the costs (including the attorneys' fees and other costs claimed by Calogeras & Master Supplies Inc. ["Calogeras"] pursuant to paragraph 7(e) of its General Terms and Conditions ["GTC"])[1] in a distinct order, to give an opportunity to the parties to make specific submissions in that respect. I referred, among other things, to a recent decision of the Court of Appeal of the province of Quebec in *Groupe Van Houtte Inc (AL Van houtte ltée) v Développements industriels et commerciaux de Montréal Inc*, 2010 QCCA 1970, [2010] JQ no 11127 (QL) [*Van Houtte*] and to the fact that there necessarily was some duplication of services in the invoices of the three different law firms who represented the plaintiff since the institution of this action. Also, I noted that the services claimed by Calogeras did not all appear to relate to the claim set out in the new paragraph 12(b) of its Amended Statement of Claim (especially when read in the context of Exhibit TX-A, listing the only invoices that the plaintiff was able to establish had not been paid by the defendants, based on the admission by Mr. Lagonikas). The parties were also asked to deal with the issue of special fees relating to Calogeras' last-minute motion to file additional documents and an Amended Affidavit of Documents, as well as a motion to amend their Statement of Claim.

[2] That said, Calogeras having appealed the decision on the merits, and given that the determination of the impact of Rule 420 of the *Federal Courts Rules*, SOR/98-106 [the "*Rules*"]

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[1] Although they refer to 2002, the GTC were not put in place vis-à-vis Ceres Hellenic Shipping Enterprises Ltd. ["Ceres"] until 2003. However, before then, the terms on Calogeras' invoices also provided for the payment of attorney fees.

depended on the amount ultimately awarded to them, the Court had decided to wait until after the decision of the Court of Appeal to finally assess the costs.

[3] The defendants have now asked that the Court issue its order before the Court of Appeal hearing, as there may be a need to present a motion for additional security for costs.

[4] As mentioned, relying on clause 7(e) of the GTC (and before that, a similar clause in its invoices), Calogeras seeks to recover all the costs it paid on a solicitor-client basis since the beginning of this action. It has produced several invoices from three sets of counsel amounting to $200,786.41. It is not clear if it is also seeking to recover taxable costs in addition to the said amount for it refers in its written submissions to the fact that it was granted costs in a motion that amounted, according to the draft bill of costs, to $5,064.34.[2] Obviously, there can only be one set of costs granted to the plaintiff. If it is entitled to have its costs calculated on a solicitor-client basis, it cannot also recover, for the same taxable services, costs calculated on the basis of Tariff B.

[5] Despite the fact that the reference to the recent decision in *Van Houtte* above was meant to remind the plaintiff of its burden of establishing the reasonableness of the costs it seeks, little evidence, if any, was produced by Calogeras to establish this. With respect to the apparent and possible duplication of services, Calogeras simply annexed an e-mail from M[e] Boily stating that about $2,000.00 of fees might be deduced on that basis, while the current counsel simply adds in his written representations that 23 hours were spent to review the file and to prepare to complete the trial (essentially final argumentation as no expert evidence was produced).

[2] The only impact here is that if the defendants were ultimately successful, they would not have recovered any costs for this motion.

[6] The affidavit of Mr. Moutsios on which Calogeras relies simply lists the invoices received and indicates that two of these have not been paid.[3] According to the defendants, this is especially significant with respect to the last invoice of M[e] Boily. Mr. Moutsios makes no undertakings on behalf of Calogeras to pay these invoices given that the plaintiff, which has not been in business for some years[4] (and appears to have been kept alive as a corporation for the purposes of this action) had to be forced by judgment to pay the invoices of the counsel who instituted the action on its behalf and subsequently withdrew from the file after Calogeras failed to follow his recommendation to settle matter for the amount of $156,000.00, offered verbally as early as November 2005, and the relationship irrevocably deteriorated thereafter.

[7] In addition to vigorously contesting the reasonableness of the amounts claimed by the plaintiff, especially in light of the result obtained and the way the matter was dealt with throughout the proceedings, the defendants seek to recover their own costs as of November 15, 2007, the date on which they put in writing an offer to settle for $150,000.00 which remained open until the beginning of the trial.

[8] They also submit that, in any event, special costs are warranted, among other things, with respect to the two motions referred to in paragraph 1 above and with Calogeras' decision to change solicitors before completion of the trial in March 2010.

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[3] Effectively, as of today, it appears that Calogeras has only paid $129,028.07.
[4] And has no known assets except for the monies to be paid in this action.

[9] As noted in my Reasons for Judgment, it is trite law and not disputed by the plaintiff that its contractual right to costs on a solicitor-client basis is always subject to the Court's control and its discretion to grant less than they actually paid. However, in exercising this discretion the Court is not looking at the criteria normally applicable to determine whether solicitor-client costs are warranted. The issue here is not whether Calogeras has established that the defendants' behaviour was reprehensible. Their claim is based on a contractual provision.

[10] In keeping with its duty to carefully examine the costs claimed under clause 7(e) (or the invoices), the Court has considered all the arguments and case law presented by both sides. Because of the potential application of Rule 420, the Court had to evaluate not only the costs claimed as of the end of the trial, but also those that are payable as of November 15, 2007.

[11] In effect, the existence of a contract dealing with the legal cost of a recovery action does not preclude the application of Rule 420 which is meant to ensure that parties to any proceedings before this Court seriously consider offers of settlement made in accordance with paragraphs 420(3)(*a*) and (*b*) of the *Rules* or suffer the consequences of a failure to properly do so.[5]

[12] The need for Rule 420 is even more pressing when one "may" feel or believe that they have a blank cheque from their debtor with respect to legal costs. This is even more so in admiralty cases like this one where the plaintiff exercised a right *in rem* against the ships to which the services were

[5] Here, the issue is not whether Calogeras had an arguable case with respect to the interest claimed.

supplied, which resulted in the filing of a bank guarantee[6] costing the defendants about $1,200.00 USD per month (here Calogeras obtained the guarantee for an amount of $1.6 million on the basis of the claim described in its then-paragraph 12 of the Statement of Claim).[7]

[13] In my judgment, I granted the plaintiff's action for an amount of $99,171.16 with simple interest at 5% beginning March 1, 2010 until the date of payment.

[14] On July 5, 2010, Ceres made a payment pursuant to Rule 149 of $74,734.92.[8] This is the amount recognized as unpaid by Mr. Lagonikas in his affidavit and in respect of which the defendants waive their right to rely on time limitation.

[15] It is not disputed that Ceres' offer dated November 15, 2007 meets the requirements of paragraphs 420(3)(*a*) and (*b*) of the *Rules*.[9] Calogeras simply submits that it was reasonable at the time to refuse the said offer and that, in any event, it would not have covered the capital, interest and costs.

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[6] Although the *Rules* do not provide for the use of a protection and indemnity ("P&I") letter of undertaking, it is well understood in the maritime community that, unless one is not dealing with well known and established P&I clubs, such letters are customarily accepted and used. Thus, the insistence on the filing of cash or bank guarantees strictly provided for in the *Rules* is a way of exercising additional pressure on a defendant. Calogeras did not provide any explanation or comments with respect to Ceres' submission in that respect.

[7] As noted by Prothonotary Tabib in her decision dated June 12, 2006, the test applicable for setting bail is quite different and lower than the burden at trial (best arguable case) and the evidence before her was incomplete and quite different, including Calogeras' explanations as to why its documentation did not include interest.

[8] The parties were agreed that instead of filing this amount in court it would be kept in trust in an interest-bearing account by a third party chosen by them.

[9] A reminder of this offer was sent in 2009. Moreover, during the mediation it appears that Ceres verbally offered a higher amount ($250,000.00) which was rejected.

[16] As it was intended to cover the capital, interest and costs payable to the plaintiff, the Court must determine the costs that would have been payable at that time.

[17] The plaintiff argues that, as of November 15, 2007, it was already entitled to more than $100,000.00 in attorney fees. As a matter of fact, it appears that only the first invoice of the first counsel relates to the advancement of Calogeras' action, given that most of the account, totalling $3,806.81, appears to be dealing with the renegotiation of the basis of their legal fees and the preparation of the motion to cease to act. Although the $902.55 in disbursements in that invoice appears to include at least some disbursements related to the motion for the reduction of bail, [10] it is not clear to what they all relate exactly. The same is true of the disbursements in the last invoice, totalling $530.78 (October 5, 2005). That said, given the small amounts involved, the Court decided to give some benefit of the doubt to the plaintiff and deducted $300.00 from these disbursements to cover the disbursements that were likely incurred for the motion to cease to act.

[18] Thus, Calogeras paid $27,704.00 in legal fees to its first counsel with $1,656.00 ($523.00 + $1,133.00) in disbursements, plus GST and QST. It then paid $45,307.50 in legal fees to its second counsel (first invoice) with $684.73 in disbursements, plus GST and QST. With respect to the second account, only about $5,400.00 and $34.32 in disbursements[11] were incurred prior to November 15, 2007. Thus, Calogeras paid $78,411.50 in legal fees plus $2,375.05 in disbursements (plus GST and QST) prior to November 15, 2007.

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[10] See the Draft Bill of Costs at Tab 2, especially the costs of the stenographer.

[11] The amount of $263.40 (invoice dated April 18, 2007) for the cost of the stenographer) was already included in the previous account.

[19] From even a quick review of the first account of Me Boily, it is difficult to understand how this counsel evaluated the duplication of services from the transfer of the file at $2,000.00.[12] This would be equivalent to ten hours to bring himself up to speed. However, the Court notes that, at the beginning of December and early January, Me Boily was also taking care of Calogeras' claim against its first counsel with the *syndic du Barreau du Quebec*. Also, apart from a first entry for six hours to review the file that was actually received only on January 18, 2006 ($1,200.00), one wonders why the March 24, 2006 entry ($1,800.00) for reviewing the examinations for discovery to deal with objections is not part of acquiring knowledge of what went on during that said examination where the first counsel was acting and presumably knew very well why he objected to the questions asked. Those two entries alone are well above the amount of $2,000.00 estimated by Me Boily.

[20] This can also be compared, for example, to the cost of preparing Calogeras' draft bill of costs which, as mentioned earlier, amounted to $5,064.34 and to which the entries between June 21, 2006 and June 29, 2006 appear to be related. This simple exercise (which was, in any event, rather useless given that Calogeras was always seeking the legal costs on a solicitor-client basis) resulted in more than $1,000.00 in fees. Is it credible then, that only $2,000.00 should be deducted to take over a file where the quantum was still quite unclear and which certainly involved issues of maritime liens and Federal Court practices with regard to the setting of bail in respect of which Me Boily had little experience, if any, and had to do research.

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[12] A major portion, if not most of the third counsel's work, involves, in my view, some duplication or it renders work done by the second counsel useless as no expert evidence was presented during the second part of the trial (main reason for scheduling one) and written arguments on the events had already been filed.

[21] Finally, the Court must obviously consider, as was done in previous case law,[13] including *Van Houtte* above, whether the services rendered all relate to the claim that was ultimately granted. As mentioned, the only invoices that Calogeras was able to establish as unpaid were not identified until the weekend prior to the commencement of the trial and they were communicated for the first time on March 1, 2010. One should not be fooled by the argument that the amount granted in capital is similar to the one that was included in Calogeras' expert's report. The only evidence before the Court dealt with different services under different invoices (see paragraphs 47 and 51 of my Reasons for Judgment). It is also clear that obtaining security for the claim ultimately granted would have been easy and would likely not have required a lengthy debate to set the amount of the bail.

[22] Keeping in mind the above and applying the principles, including proportionality, summarized in *Van Houtte*, (see paragraphs 124-125), where the Court of Appeal of Quebec reduced the amount of $54,340.87 granted by the trial judge to $25,000.00 with respect to a judgment for $93,112.20, the Court is satisfied that the reasonable amount of attorney fees and disbursements payable to the plaintiff as of November 15, 2007 should be no more than $35,000.00 for fees and $2,375.05 for disbursements. This amount is, in my view, quite generous and, in fact, I would have granted no more than $60,000.00 for all the legal fees[14] up to judgment (the additional

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[13] The Court agrees with the defendants that the decision in *Idada v Canada*, 2010 FC 751, [2010] FCJ no 915 (QL) [*Idada*] is distinguishable on its facts. Furthermore, here, not only did the issue in respect of which plaintiff succeeded took very little time to prepare and present at trial, but as of November 15, 2007 when the parties had yet to really get ready for trial, the plaintiff waived its right to proceed to an examination for discovery and did not file any expert report until 2009. In *Idada*, the plaintiff was awarded, after trial, a total of $37,500.00 (all inclusive).

[14] For example and not limiting the factors that the Court actually considered for the post-November 2007 period, nothing should be paid for the preparation of the expert report, to amend the affidavits of documents, for the meeting with Prothonotary Tabib, or for last minute gathering of additional documentation including the presentation of the motion in that respect and the motion for security for costs, etc.

disbursements would have amounted to $2,290.21[15] and would not include any expert fees), if Rule 420 had not applied.

[23] Having regard to the amount ultimately granted and the costs payable as of the date of the relevant offer, the Court is satisfied that paragraph 420(2)(*a*) of the *Rules* applies. However, having regard to all the circumstances, the Court will exercise its discretion to reduce the multiplier from 2 (doubling) to 1.5 except for the services identified in paragraph 25 below.

[24] Moreover, the Court agrees that it would not be appropriate in this case to grant to the defendants a fee for a second counsel for taxable services before trial or for the second leg of the trial.[16] With respect to the first leg of the trial, given the confusion as to the exact basis of the claim, especially considering the inconsistencies and vagueness of the evidence in that respect at discovery and the new documentation produced at the last minute by the plaintiff, the Court is satisfied that a fee for a second counsel is warranted. It has been assessed at 50% of the units claimable for the first counsel before the multiplier of 1.5 is applied to calculate the fee of the first counsel.[17]

[25] In addressing the lump sum to be granted, the Court relied mostly on the high end of Column III (with respect to the items of Tariff B applicable here), except for the special meeting that took place between the parties, their experts and Prothonotary Tabib before trial (February 16,

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[15] This includes an amount of $268.75 paid by Calogeras to the registry with respect to the hearing of more than three days after Me Boily's last invoice and which is not included in Me Lévesque's invoice. There is no evidence before the Court that the amount of the filing fee of $150.00 included in the draft bill of costs prepared by Me Lévesque is not part of the Court fees already included in Me Boily's invoice, dated February 15, 2010 ("timbres de Cour").

[16] That is not to say that the services of the second counsel actually involved were not useful or appreciated by the Court, it simply reflects the fact that the party-to-party fees under Tariff B are not meant to indemnify the party with respect to costs actually paid by them.

[17] This means that no multiplier is granted for the second counsel.

2010) which was assessed on the basis of 4 units per hour (one counsel)[18] and a multiplier of 2[19] and $3,000.00 granted for the preparation of the defendants' response to Exhibit TX-A. Finally, the preparation with respect to the second leg of the trial (items 13a) and b)) should be assessed on the basis of the high end of Column IV applying a multiplier of 2 for this taxable service, which was the direct result of Calogeras' decision to change its counsel shortly before the end of the trial.

[26] The defendants will be entitled to their disbursements, including the cost of maintaining the bank guarantee after November 15, 2007.[20]

[27] However, the amount claimed for their expert is reduced[21] to $15,500.00.[22] This amount would have been granted as special costs in any event of the cause (this expression means whether or not Calogeras was successful in claiming contractual interest and even if Rule 420 did not apply) in the circumstances of this matter. The cost of printing, photocopies and faxes (other than long distance charges) will be reduced to $0.25 per page, colour printing to $0.50 per page and binders to $5.00 each. The travel costs for Mr. Lagonikas are reduced to the same amount claimed for Mr.

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[18] Using item 11 – high end of Column IV – as a guide.
[19] This meeting was totally useless to the Court and to the defendants for lack of preparation of those involved on behalf of the plaintiff, even if it did benefit the plaintiff who, as a result, prepared Exhibit TX-A after noting the discrepancies in his documentation: See paragraph 29 at page 13 of my Reasons for Judgment.
[20] $59,943.72 (this includes one third of the amount claimed for the period from September – December 2007. There is no evidence that the bank would have reimbursed the amount paid under item 11 for the period of September 16, 2007 to September 16, 2008, thus this amount of $521.94 is not included).
[21] It was not necessary for this expert to attend during the entire trial and his thoroughness was not as one would have expected, particularly in the examination of Calogeras' ledgers. The general advice and help provided to the defendants' counsel in the preparation of the case is not part of the taxable service of an expert.
[22] $10,000.00 for preparation of the report filed in court, $2,500.00 for preparation and attendance at trial, and $3,000.00 for the preparation of scenarios as required by the Court and attendance at the meeting with Prothonotary Tabib.

Psarros, as no explanation was given for the difference in cost and Mr. Lagonikas' airfare appears to be a business fare.

[28] To avoid the costs of taxation, further delay and dispute and using the above mentioned principles to guide itself, the Court assesses the overall costs payable to the defendants at a lump sum of $160,689.49 (inclusive of fees ($72,160.00)[23] and disbursements ($88,529.49)).[24]

[29] The Court notes that it is only because of proportionality and the application of Rule 420 that lower fees were granted to Ceres to account for the loss of time and efforts relating to the claim in capital (Exhibit TX-A versus paragraphs 12(a) or (b) of the Amended Statement of Claim), the meeting with Prothonotary Tabib and the motion for filing of additional documents and the preparation of evidence with respect to Exhibit TX-A. Had the taxable fees not been increased as a result of the application of Rule 420, the Court would have granted the defendants special costs at a higher level of compensation for these items.

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[23] The Court's calculation is based on the following: 266.5 units at a multiplier of 1.5 equals 399.75 (or 400) units, 34 units for the second counsel and 49 units with a multiplier of 2 for a rough total of 532 units with a unit value of $130.00 plus the amount of $3,000.00, for a total of $72,160.00.
[24] This includes: stenographer fees in the amount of $2,750.00; court fees in the amount of $439.75; travel for Mr. Psarros in the amount of $3,126.36; travel for Mr. Lagonikas in the amount of $3,457.27; and general disbursements in the amount of $3,312.39.

ORDER

THIS COURT ORDERS that:

1. The plaintiff shall be entitled to an amount of $37,375.00 for costs (inclusive of fees and disbursements);

2. The defendants shall be entitled to an amount of $160,690.00 for costs (inclusive of fees and disbursements);

3. If necessary, the defendants shall be entitled to set off any amount owed to them above the amount of the security for costs filed by the plaintiff against any amount due to Calogeras on the basis of this order or the judgment dated December 22, 2010.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1478-05
STYLE OF CAUSE:	CALOGERAS & MASTER SUPPLIES INC. v CERES HELLENIC SHIPPING ENTERPRISES LTD. AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP LAURENT" AND THE SHIP "CAP LAURENT" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP ROMUALD" AND THE SHIP "CAP ROMUALD" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP GEORGES" AND THE SHIP "CAP GEORGES" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP LEON" AND THE SHIP "CAP LEON" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP JEAN" AND THE SHIP "CAP JEAN" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP DIAMANT" AND THE SHIP "CAP DIAMANT" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP PIERRE" AND THE SHIP "CAP PIERRE"
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	MARCH 1, 2010 TO MARCH 4, 2010 JUNE 14, 2010 TO JUNE 15, 2010
REASONS FOR ORDER AND ORDER AS TO COSTS:	GAUTHIER J.
DATED:	NOVEMBER 8, 2011

APPEARANCES:

Jean-Paul Boily	FOR THE PLAINTIFF (March 1-4, 2010)
André A. Lévesque	FOR THE PLAINTIFF (June 14-15, 2010)

Jean-Marie Fontaine Mark Phillips	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Boily, Morency Quebec, Quebec	FOR THE PLAINTIFF (March 1-4, 2010)
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