Federal Court  Cour fédérale

Date: 20120529

Docket: T-1073-06

Citation: 2012 FC 653

Ottawa, Ontario, May 29, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

HEELING SPORTS LIMITED

Applicant

and

LEBLANC IMPORT-EXPORT LTÉE/LTD

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by respondent Leblanc Import-Export Ltée/Ltd (respondent Leblanc), in accordance with Rules 369, 400 and 403 of the *Federal Courts Rules* (SOR/98-106) (Rules), for costs on a solicitor-and-client basis;

[2] In support of its motion, respondent Leblanc alleges the following facts:

> [TRANSLATION]
>
> (a) On June 28, 2006, applicant Heeling brought an action against respondent Leblanc for infringement of Canadian patent number 2,366,815.

(b) The action by applicant Heeling was frivolous and abusive and was intended to injure respondent Leblanc's business;

(c) Applicant Heeling unilaterally withdrew the action on October 4, 2011, after more than five years of costly legal proceedings and just two months before the trial;

(d) Applicant Heeling adopted, throughout the proceedings, an attitude that made the proceedings continue unnecessarily;

(e) Respondent Leblanc was therefore forced to incur significant and crippling legal fees for a company of its size, in contrast to applicant Heeling;

(f) Applicant Heeling adopted, in relation to the proceedings, an extremely reprehensible attitude with the aim of creating a presumption of dishonesty with respect to respondent Leblanc in its customers;

(g) The respondent lost the majority of its customers and, therefore, its primary income source;

(h) All behaviour by applicant Heeling accentuated the large economic disparity that exists between the parties;

(i) Respondent Leblanc always acted in good faith both during the litigation and beyond it even though it saw its business decline because of applicant Heeling's actions;

(j) A Court order will make it possible to save respondent Leblanc from the expense of litigation, punish the reprehensible conduct of applicant Heeling and finally restore balance between the parties.

[3] Applicant Heeling challenges this order application for the following reasons:

(a) Costs are awarded on a solicitor-and-client basis only in exceptional circumstances where a party has displayed reprehensible, scandalous or outrageous conduct; a claim's lack of merit does not give rise to an award of costs on a solicitor-and-client

basis (see *Young v Young*, [1993] 4 SCR 3 at paragraph 251; *Louis Vuitton Malletier S.A. v Lin*, [2007] FCJ No 1528 at paragraph 55 (*Louis Vuitton*));

(b) Costs are awarded on a solicitor-and-client basis in cases where there is misconduct by a party during the litigation, for example, if a party lies, avoids service, destroys evidence, refuses to submit documents despite Court orders, is in contempt of court or, lastly, has abused the process;

(c) Reprehensible conduct is defined in jurisprudence as being shocking, something that should be sanctioned, raises indignation (see *Microsoft Corp. v 9038-3746 Québec Inc*, [2007] FCJ No 896, 2007 FC 659 at paragraphs 18-20; *Louis Vuitton*, above, at paragraph 56);

(d) Filing a motion to which one is entitled cannot constitute such reprehensible conduct (see *Canada v Amway Corp.* (FCA), [1986] FCJ No 522;

(e) Costs depend on the action sought; they are not an award for damages or misconduct, contrary to what respondent Leblanc alleges;

(f) The motion by respondent Leblanc includes all disbursements, which is not permissible, with the exception of the disbursements for the expert witness;

(g) Costs should be awarded on the basis of Column III of Tariff B;

(h) The affidavits of Ms. Leblanc and Mr. Brouillette, which support the motion, contain contradictions;

(i) Applicant Heeling sent cost settlement offers;

(j) Several facts support an award of costs according to Column III, Tariff B, because the action did not raise complex legal issues (it did not require extraordinary work by counsel). The Court must consider the conduct of the parties to the litigation because some of the delays experienced were due to respondent Leblanc;

(k) In this case, the applicant's conduct cannot be characterized as vexatious because, by their own admission, the affiants acknowledged the merit of applicant Heeling's actions;

(l) The evidence in the record does not make it possible for the Court to award a lump sum amount or a costs order according to Column V of Tariff B.

Analysis

[4] Rules 400 to 422 of the *Federal Courts Rules* address costs. The power of the Court in awarding costs is broad and discretionary. The Court must take into account several factors before

ruling on a costs order. Subsection 400(3) stipulates certain elements that the Court must consider when exercising its discretion.

Factors in awarding costs	**Facteurs à prendre en compte**
400. (3) In exercising its discretion under subsection (1), the Court may consider	**400.** (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;
(*c*) the importance and complexity of the issues;	*c*) l'importance et la complexité des questions en litige;
(*d*) the apportionment of liability;	*d*) le partage de la responsabilité;
(*e*) any written offer to settle;	*e*) toute offre écrite de règlement;
(*f*) any offer to contribute made under rule 421;	*f*) toute offre de contribution faite en vertu de la règle 421;
(*g*) the amount of work;	*g*) la charge de travail;
(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;	*h*) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the	*i*) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement

duration of the proceeding;

(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(*k*) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292

la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande

to 299;	reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
(*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.

[5] First, it is important to note the basic principle that costs follow the event. In this case, applicant Heeling unilaterally withdrew its action on October 4, 2011, two months before the trial scheduled for December 5, 2011. Here, Rule 402 of the *Federal Courts Rules* specifies that a party against whom an action has been discontinued is entitled to costs forthwith. Applicant Heeling itself acknowledged that it is liable for costs to respondent Leblanc.

[6] The issues raised by the motion before us are as follows:

1. ***Is respondent Leblanc entitled to costs on a solicitor-and-client basis?***

2. ***If respondent Leblanc is not entitled to costs on a solicitor-and-client basis, how much should the Court award as costs in this case?***

Position of applicant Heeling

[7] Applicant Heeling argues that some of the delays in this case are due to respondent Leblanc, which initially chose to be self-represented and file motions that were dismissed by the Court. It also recalls that cost settlement offers were sent to respondent Leblanc.

[8] Applicant Heeling emphasizes that the case law has determined that orders for costs on a solicitor-and-client basis only occur in rare cases where the conduct of a party is particularly scandalous, even shocking, which is not the case here. It maintains that both counsel for respondent Leblanc and Ms. Leblanc recognized some validity in its action during their respective examination on affidavit; consequently, there is no basis for an order of costs on a solicitor-and-client basis. Respondent Leblanc would be entitled to costs based solely on Column III of Tariff B.

Position of respondent Leblanc

[9] Respondent Leblanc relies on the following elements to claim that it is entitled to costs on a solicitor-and-client basis.

[10] It contends that the action by applicant Heeling was vexatious, inappropriate and unnecessary. It also alleges that applicant Heeling was behind several postponements and delays, which prolonged the proceedings unnecessarily. It also recalls that applicant Heeling unilaterally withdrew its action two months before the beginning of the trial after continuing the proceedings for close to five years. Finally, it submits that the Court must also take into account the complexity of the case.

ANALYSIS

1. Is respondent Leblanc entitled to costs on a solicitor-and-client basis?

[11] According to Supreme Court jurisprudence, an order for costs on a solicitor-and-client basis is awarded only in exceptional circumstances (see *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] FCJ No 39, *Louis Vuitton*, above);

[12] The Court has broad discretion in awarding costs. It is settled law that an award of costs on a solicitor-and-client basis occurs only in exceptional situations. Here, respondent Leblanc claims that

there are at least two grounds for this, that is, the applicant's misconduct during the litigation and the purely vexatious or frivolous nature of its action seeking to damage the respondent.

[13] Upon reading the entries in the record, it seems that both parties caused certain delays; however, for respondent Leblanc, the delays can be largely explained by its initial decision to represent its own company rather than hiring a lawyer and its decision to change lawyers (see the decisions in the record under entries 15 to 42). For applicant Heeling, the summary of entries shows that motions were filed by respondent Leblanc to ensure compliance with the deadlines set out by the case manager or to counter deadline extension requests (see decisions 75, 81, 94, 95,100,112 and, in particular, the order by Prothonotary Morneau dated October 28, 2009, noting applicant Heeling's delay in filing a requisition for a pre-trial conference by more than 19 months).

[14] Regarding the vexatious nature of the action sought by applicant Heeling, it is clear that it withdrew its action unilaterally. Respondent Leblanc emphasizes Heeling's unilateral withdrawal two months before the trial to establish the frivolous and vexatious nature of the action. Counsel for Heeling replies that the decision to withdraw was made simply to avoid a long and costly trial.

[15] Respondent Leblanc also raises the demands letters that applicant Heeling sent its distributors and customers, and the resulting loss of a significant portion of its revenue (see Exhibits Dl1, DL2 and Dl4 to Dl16). Relying on the Supreme Court's decision in *S & S Industries Inc v Rowell*, [1966] SCR 419, it maintains that the Court must consider this conduct, which it characterizes as vexatious, to award the costs on a solicitor-and-client basis.

[16] That decision does not apply to the facts in this case because the alleged conduct by applicant Heeling was never the subject of a counterclaim by respondent Leblanc. Consequently, no judgment was rendered on the legitimacy of the tactics used by applicant Heeling.

[17] Respondent Leblanc also alleges the complexity of the case as grounds for its motion. It emphasizes that Heeling's Canadian patent relied on 10 American patents, which added a layer of complexity. Applicant Heeling replies that this case is quite simple: the patented invention is mechanical, not biochemical. The Court notes that there was still a certain element of complexity in the case given the ten American patents that applicant Heeling's Canadian patent relied on; what is more, the case manager identified seven issues and scheduled seven days of trial to dispose of this action.

[18] In this case, the Court finds that the evidence in the record does not make it possible to find that applicant Heeling's conduct was so outrageous that there is reason to order costs on a solicitor-and-client basis.

2. If respondent Leblanc is not entitled to costs on a solicitor-and-client basis, how much should the Court award as costs in this case?

Position of the parties

[19] Respondent Leblanc cites in the alternative *Dimplex North America Ltd v CFM Corp.*, [2006] FCJ No 1762, in which Justice Mosley found that, absence a clear case where the criteria set

out in subsection 400(3) of the *Federal Courts Rules* apply, the Court was entitled to, by considering certain circumstances, order the payment of a certain lump sum amount in addition to the costs set out under the Tariff.

[20] However, applicant Heeling claims that costs should be awarded as set out in Column III of Tariff B because that is the general rule. Furthermore, applicant Heeling points out that the Court does not have before it a situation that requires special consideration because the criteria set out in Rule 400(3) were not satisfied.

Analysis

[21] The Court nonetheless notes that the applicant's conduct unduly lengthened the proceedings, which was injurious to respondent Leblanc; furthermore, the case at hand contained a certain element of complexity. We should therefore take note of the principles stated by Justice Layden-Stevenson in *Aird v Country Park Village Property (Mainland) Ltd*, [2004] FCJ No 1153 at para 6:

> [6] Costs should be neither punitive nor extravagant. It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party: Apotex Inc. v. Wellcome Foundation Ltd. (1998), 159 F.T.R. 233 (F.C.T.D.), aff'd. (2001) 199 F.T.R. 320 (F.C.A.). As a general rule, costs should follow the event. Absent an abuse of process, a successful plaintiff should not be penalized simply because not all the points advanced by the plaintiff have found favour with the court: Sunrise Co. Ltd. v. The "Lake Winnipeg" (1988), 96 N.R. 310 (F.C.A.). Regarding the importance and complexity of the issues, it is the legal significance and complexity, including the number of issues, that are to be considered and not the factual subject matter: TRW Inc. v. Walbar of Canada Inc. (1992), 146 N.R. 57 (F.C.A.); Unilever PLC v. Procter &

> Gamble Inc. (1995), 184 N.R. 378 (F.C.A.); Porto Seguro Companhia De Seguros Gerais v. Belcan S.A. (2001) 214 F.T.R. 291 (F.C.T.D.).

[22] By applying the above-mentioned principles to the facts in this case (applicant Heeling withdrew its action after five years, there was some reprehensible conduct concerning the lengthening of the proceedings, the case was complex because Prothonotary Morneau identified seven issues and the trial was scheduled to be seven days long), the Court allows, in part, the alternate position of respondent Leblanc, and awards it costs based on Column V of Tariff B. The Court considers applicant Heeling's submissions that a self-representing party, which the respondent was initially in this case, is not entitled to costs and fees over the course of that period, and it therefore subtracts 34 units and awards only $73,498.15 of the $77,988.15 sought. The Court deducts $2,000.00, which respondent Leblanc was ordered to pay to applicant Heeling by order of Prothonotary Morneau on January 12, 2007. The Court also subtracts from the lump sum sought by the respondent the disbursements to which it is not entitled, that is, $748.47, and reduces the bonus sought. The result is a total award of $70,749.68.

ORDER

CONSEQUENTLY, THE COURT

1. **ORDERS** an award of costs totalling $70,749.68, inclusive of the costs of this motion and disbursements in favour of respondent Leblanc;

2. **ORDERS** that the amounts secured for costs be paid to respondent Leblanc in trust;

3. **ORDERS** applicant Heeling to pay the remaining assessed costs to respondent Leblanc, in trust, within thirty days hereof; and

4. **ORDERS** the $70,749.68 to bear interest at the legal rate as of this date.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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