Federal Court  Cour fédérale

Date: 20200225

Docket: T-1645-19

Citation: 2020 FC 299

Ottawa, Ontario, February 25, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

FLUID ENERGY GROUP LTD.

Plaintiff

and

EXALTEXX INC., NOVAMEN INC. AND GLOBALQUIMICA PARTNERS LLC

Defendants

ORDER AS TO COSTS AND REASONS

I. Overview

[1] Following my order of January 20, 2020 in this matter, the parties filed written submissions on costs in accordance with the schedule set out in that order: *Fluid Energy Group Ltd v Exaltexx Inc*, 2020 FC 81 at para 135. Having reviewed those submissions, these are my reasons for ordering costs of Exaltexx's motion for injunctive relief payable by Fluid to Exaltexx in the total amount of $25,848.04, in any event of the cause.

II. Analysis

A. *Parties' Positions*

[2] Exaltexx submits that it was forced to bring its motion given the commercial harm it faced from Fluid's letters, that those letters were cavalier and exceptional, and that it was substantially successful on the motion. It therefore submits that it should be entitled to its costs, and that a lump sum award of increased costs should be made, payable forthwith in any event of the cause. Based on its total fees of $94,310.48, and applying a 30% calculation factor based on relevant factors under Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, Exaltexx seeks costs of $28,293.14, plus its disbursements of $2,270.42, for a total costs award of $30,563.56.

[3] Fluid argues that in light of the divided success on the motion, each party should bear its own costs. Alternatively, it argues that any costs should be assessed at the midpoint of Column III (which Exaltexx calculated at $2,835), and that Exaltexx filed inadequate evidence to support its lump sum costs claim. In any case, it submits that any award should not be payable forthwith.

B. *General Principles*

[4] The first principle in the adjudication of costs is the Court's "full discretionary power over the amount and allocation of costs": Rule 400(1); *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 10.

[5] Costs awards may serve a number of functions. Justice Grammond recently described (1) the "traditional goal" of costs in partially indemnifying the successful party by means of a

"reasonable contribution" to the costs of litigation; (2) the "policy" function of costs in driving litigation behaviours; and (3) issues regarding access to justice that may influence the decision to grant costs or the quantum thereof: *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paras 3-5, 9; *Nova Chemicals* at paras 13, 19. These functions are each worthy of consideration, in conjunction with the identified factors set out Rule 400(3). Each function and factor may have greater or lesser significance in a given case.

C. *Success and Divided Success*

[6] Consistent with the general principle that costs are awarded in favour of a successful party, Rule 400(3)(*a*) refers to consideration of "the result of the proceeding." Here, Exaltexx did not obtain the full injunction it sought. In particular, I declined to enjoin Fluid from contacting customers, and from alleging that Exaltexx was infringing Fluid's patents, as Exaltexx had not raised a serious issue on these questions given the lack of evidence filed. Fluid argues that as success was divided, no costs should be awarded.

[7] An order of no costs is a "common outcome" where success is divided, but is not "mandated by an immutable principle of law": *Mylan Pharmaceuticals ULC v Bristol-Myers Squibb Canada Co*, 2013 FCA 231 at para 6. As Justice Barnes noted in the decision affirmed in *Mylan*, a successful party will not generally be penalized because not all of its arguments found favour: *Bristol-Myers Squibb Canada Co v Mylan Pharmaceuticals ULC*, 2013 FC 48 at para 4, citing *Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138 at paras 8-9.

[8] Although Exaltexx did not obtain the full extent of its requested injunction, Fluid had not in fact sent any letters to customers at the time of the motion. I agree with Exaltexx that it did therefore obtain an order enjoining the particular conduct that triggered the motion.

[9] One cannot define with precision the extent to which success is divided where various issues are raised and won by various parties. On balance, I consider in these circumstances that Exaltexx was predominantly successful and an award of costs in its favour is appropriate.

[10] At the same time, I agree with Fluid that Exaltexx's lack of success on some issues—to the extent of being found not to have raised a serious issue—is relevant. These issues did add cost to the proceeding, although based on a review of the transcript, I do not accept Fluid's assertion that the cross-examination of Ms. Ayotte would not have happened but for these issues. I consider it appropriate to take Fluid's partial success into account in the quantum of the award: see, *e.g.*, *ADIR v Apotex*, 2008 FC 1070 at para 6.

[11] Fluid also notes that the disclosure issues raised by Exaltexx were resolved before the hearing by Fluid's agreement to disclose. I agree that this reduced the parties' costs and the number of issues, which is to be commended. However, the reduction in the parties' costs will already be reflected in any costs award, whether calculated as a percentage of Exaltexx's incurred costs (which would be lower as a result), or calculated based on the table in Tariff B (as the hearing was accordingly shorter). It need not be further reflected by a separate reduction in the costs award. Nor do I consider that it weighs materially in the question of "divided success":

Exaltexx was effectively successful on the issue, but this success was as a result of Fluid's early agreement, and was an informational issue incidental to the primary issues on the motion.

D. *Lump Sum Costs and Increased Costs*

[12] Rule 407 provides that, where costs are to be assessed by an assessment officer (who may be an officer of the Registry, a judge or a prothonotary), the assessment is to be based on Column III of Tariff B unless the Court orders otherwise: Rules 2 ("assessment officer"), 405, 407. Although Rule 407 deals with costs on an assessment, it has been described by the Federal Court of Appeal as setting out a general principle applicable to costs awards: *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at paras 11-12.

[13] At the same time, the *Rules* provide that a costs award may include a lump sum award in lieu of, or in addition to, assessed costs: Rule 400(4). As the Court of Appeal has noted, lump sum awards have found increasing favour with courts "for good reason," notably savings in time and expense associated with assessment, and may be appropriate in both simple and complex matters: *Nova Chemicals* at paras 11-12.

[14] A lump sum award of increased costs—costs that go above the highest column of Tariff B—may be appropriate where even the upper end of the Tariff bears "little relationship to the objective of making a reasonable contribution to the costs of the litigation": *Nova Chemicals* at para 13. Nonetheless, as Fluid points out, an increased costs award cannot be justified solely on the basis that actual fees are significantly higher than the Tariff, and the requesting party has a

burden to demonstrate why the circumstances warrant an increased award: *Nova Chemicals* at para 13, citing *Wihksne* at para 11.

[15] Justice Grammond noted that there is no "clearly-defined test or criteria" to justify an award of increased costs: *Whalen* at para 30. However, considerations such as the resources, sophistication and reasonable expectations of the respective parties; the nature and merits of the case; and the Rule 400(3) factors may be relevant in a given case: *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paras 50-51; *Whalen* at paras 30-31; *Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9 at paras 4-5; *Mariano v The Queen*, 2016 TCC 161 at paras 24, 43-46. Ultimately, the question is whether costs on an elevated scale will better achieve the purposes of costs awards: *Whalen* at para 30.

[16] Fluid argues that the Court of Appeal in *Sport Maska* awarded an increased lump sum only after noting both the commercial sophistication of the parties and the "entire lack of merit in the appellant's positions": *Sport Maska* at paras 48-51. While I agree that the merits, or lack thereof, of positions taken by the parties are relevant to the question of costs, I do not take the Court of Appeal to have established a rule that an "entire lack of merit" is a precondition to the granting of an increased lump sum costs award. Indeed, this would be inconsistent with *Nova Chemicals*, on which the Court in *Sport Maska* relied. In *Nova Chemicals*, increased costs based on a percentage of fees were awarded and affirmed without comment on the merits of the losing party's position: *Nova Chemicals* at paras 2, 9, 22, aff'g 2016 FC 91.

[17] In the present case, I am satisfied that an increased lump sum award is justified in these circumstances, based on the following considerations: (i) both parties are sophisticated commercial litigants, who I can reasonably assume to be cognizant of the risks and costs of litigation, to have the resources to both retain counsel and be able to pay an increased costs award without undue burden; (ii) even the upper end of the table in Tariff B bears little relationship to the objective of making a reasonable contribution to the costs of the litigation, representing only 5% of Exaltexx's incurred costs in the proceeding; (iii) where costs under Tariff B are inconsequential compared to actual costs and the issues at stake, limiting costs to those amounts may limit the effectiveness of the "policy" function of costs in driving litigation behaviours; (iv) awarding increased lump sum costs would not in my assessment adversely impact access to justice issues, either directly in this case or through having an undue deterrent effect on other similarly situated litigants; (v) the nature of the issues, including the conduct enjoined; (vi) the importance of the issues in the motion, particularly to Exaltexx; and (vii) the amount of work involved in the preparation of the motion, and the narrow timelines on which it was prepared and argued.

[18] In *Nova Chemicals*, the Court noted that lump sum awards tend to range between 25% and 50% of actual fees, although higher or lower percentages may be warranted: *Nova Chemicals* at para 17. Exaltexx's proposed 30% falls within this range. However, based on the divided success question discussed above, I consider that an award at the low end of the range is appropriate, and will therefore award costs based on 25% of fees rather than the 30% requested.

E. *Exaltexx's Evidence of its Costs*

[19] In support of its request for costs, Exaltexx attached a Schedule setting out both its actual costs and a draft bill of costs in accordance with Tariff B. Exaltexx did not file affidavit evidence or copies of invoices or dockets, but counsel indicated that the disbursements were within the knowledge of counsel and were "reasonably incurred," and offered to provide further documentary evidence if the Court required.

[20] Fluid argues that Exaltexx did not file evidence that would allow the Court to determine the reasonableness of its fees and thus justify a lump sum award, citing *Alcon Canada Inc v Cobalt Pharmaceuticals*, 2014 FC 525 at para 30. Fluid also noted that Exaltexx's fees for a half day motion "appears quite high," noting that for the period from January 1 to the hearing of the motion on January 9, Exaltexx's claimed fees amount to the equivalent of 12-hour days at $500 per hour.

[21] The Court of Appeal in *Nova Chemicals* at paragraphs 14-15, 18 and 20, made the following observations regarding the need for evidence in support of a claim for costs:

> As a matter of good practice, requests for lump sum awards should generally be accompanied by a Bill of Costs and an affidavit in respect of disbursements that are outside the knowledge of the solicitor. In most cases this will provide a proper starting point for the exercise of discretion.
>
> An award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air. However, I do not agree with Nova's submission that the evidentiary record before a trial judge asked to award a lump sum must provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer unfamiliar with the proceeding. To my mind, that would defeat the purpose of

> a lump sum, to save time and costs to the parties that would have otherwise resulted from the assessment process.
>
> **(1) Legal Fees**
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> […]
>
> When a party seeks a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff, as a matter of good practice the party should provide both a Bill of Costs and evidence demonstrating the fees actually incurred. As well, a sufficient description of the services provided in exchange for the fees should be given to establish that it is appropriate that the party be compensated for those services. What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.
>
> […]
>
> **(2) Disbursements**
>
> Disbursements must be, in the language of the Tariff, "reasonable". This requires that they be justified expenditures in relation to the issues at trial. Where disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required.
>
> [Emphasis added.]

[22] Counsel's statement regarding disbursements being within their knowledge is in keeping with the Court of Appeal's observations regarding disbursements. The provided breakdown of the disbursements allows the Court to conclude that they are reasonable, and Fluid does not challenge the disbursements in particular.

[23] With respect to fees, I note the Court of Appeal's observations both that the level of evidence necessary in the context of a request for lump sum costs from the hearing judge is not

that required on an assessment and that good practice suggests filing evidence of fees incurred and a description of the services provided to allow the Court to assess their reasonableness: *Nova Chemicals* at paras 15, 18.

[24] While a greater degree of breakdown would assist the exercise and is to be encouraged, I am satisfied based on the materials provided that the fees identified were incurred in respect of the motion, and were reasonable. Counsel for Exaltexx included notes indicating that fees related to the motion to strike the Statement of Claim were backed out of the identified fees, and the overall costs are not out of line with expectations for a significant injunction motion in patent litigation brought on tight time frames and with a number of necessary preliminary steps and a full hearing. As in *Nova Chemicals*, my knowledge of the case as it proceeded assists in the determination of costs: *Nova Chemicals* at para 22.

[25] I note too that the circumstances in *Alcon* were rather different, as there were concerns that fees might have covered time that was already the subject of a separate costs award, and the Court's costs award included a solicitor-client component and a Tariff component, which the Court was unable to calculate on the materials it had: *Alcon* at paras 25-30. In the present case, the fees put forward were all expressly related to the motion that was decided, and there is no need to differentiate between costs associated with different time periods.

[26] With respect to Fluid's observation that the quantum of Exaltexx's costs "appears quite high," I agree with Exaltexx that this assertion has limited weight in the absence of any indication from Fluid as to its own incurred costs: *Loblaws Inc v Columbia Insurance Company*,

2019 FC 1434 at para 35. I will adopt the language of Justice Southcott in *Loblaws*, that the parties brought the matter to hearing "efficiently and expeditiously, making me less inclined to engage in a microscopic analysis of how [Exaltexx] chose to employ legal resources to achieve its end of that objective." I also note that Fluid's calculation of 12-hour days at $500/hr makes assumptions about the number of counsel involved and hourly rates that may not be fair and that are again less persuasive in the absence of comparison from Fluid.

F. *Costs Forthwith*

[27] Exaltexx asks that costs be made payable forthwith. Fluid resists this request, noting that Rule 401(2) provides that costs of a motion shall be forthwith where "the Court is satisfied that a motion should not have been brought or opposed."

[28] I agree with Exaltexx that orders of costs forthwith may be made even if the motion does not fall within the "should not have been brought or opposed" language of Rule 401(2). However, the Rule does provide guidance, and ignoring its indication that costs forthwith on a motion is intended to be the exception rather than the rule would be inconsistent with the language and structure of the Rules on the issue.

[29] In the present case, I am not satisfied that the circumstances are appropriate for an order of costs forthwith. However, given that the issues on the injunction motion were discrete and do not determine the merits, I am satisfied that it is appropriate to award costs now, payable to Exaltexx in any event of the cause: *Laboratoires Servier v Apotex Inc*, 2007 FC 344 at paras 6-8.

G. *Final Note: Timing of Submissions and Determination on Costs*

[30] Fluid indicated in its submissions that at the conclusion of the matter, the Court suggested that costs of the motion be dealt with at the conclusion of the litigation and that Fluid agreed with that approach. This did not accord with the Court's recollection. I have reviewed the audio recording of the hearing on this point to ensure that there was no misunderstanding.

[31] At the conclusion of the hearing on the merits, the Court asked counsel whether they were in agreement that costs ought to follow the event of the motion. Counsel for Exaltexx indicated that he had submissions on the issue and when asked whether submissions should follow indicated that they should. It was to this that counsel for Fluid indicated agreement, and the Court therefore concluded "Submissions to follow." I am therefore satisfied that the process set out in my order of January 20, 2020 and resulting in this order is in keeping with the agreement of the parties at the hearing. I do not fault counsel for having an imperfect recollection of the brief submissions and agreement on costs at the end of a long hearing.

III. Conclusion

[32] Exaltexx shall have its costs, calculated as 25% of its total incurred costs of $94,310.48 ($23,577.62), plus its disbursements of $2,270.42, for a total of $25,848.04. These costs are payable in any event of the cause, but are not payable forthwith.

[33] For clarity, while counsel for the Defendants other than Exaltexx was present at the hearing, this was only in an observer's capacity, and no party sought or requested costs as against them.

ORDER IN T-1645-19

THIS COURT ORDERS that

1. Fluid Energy Group Ltd shall pay Exaltexx Inc costs of the motion in the inclusive amount of $25,848.04, in any event of the cause.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1645-19
STYLE OF CAUSE:	FLUID ENERGY GROUP LTD v EXALTEXX INC ET AL

COSTS SUBMISSIONS MADE IN WRITING CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS:	MCHAFFIE J.
DATED:	FEBRUARY 25, 2020

WRITTEN REPRESENTATIONS BY:

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