Federal Court  Cour fédérale

Date: 20200409

Docket: T-608-17

Citation: 2020 FC 505

Ottawa, Ontario, April 9, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SEEDLINGS LIFE SCIENCE VENTURES, LLC

Plaintiff/
Defendant by counterclaim

and

PFIZER CANADA ULC

Defendant/
Plaintiff by counterclaim

ORDER REGARDING COSTS AND REASONS

[1] The Defendant, Pfizer Canada ULC [Pfizer], was successful on all issues in an action for patent infringement brought by Seedlings Life Science Ventures, LLC [Seedlings]. In this Court's decision issued on January 2, 2020, the issue of costs was reserved: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 1. Pfizer now seeks costs in a lump sum amount, over and above the tariff amount, based on 40% of its legal fees plus disbursements. For

its part, Seedlings denies that costs on a lump sum basis are appropriate. It says that it should only be condemned to pay costs according to the Tariff set out in Schedule B to the *Federal Courts Rules,* SOR/98-106 [the *Rules*]. Furthermore, Seedlings submits that Pfizer's fees are unreasonable and that it has claimed disallowed or ineligible legal fees and disbursements. These are my reasons for awarding a lump sum of $2,629,062.00, inclusive of disbursements, on the basis of 25% of Pfizer's reasonably incurred legal fees plus its reasonable disbursements.

I. Basic Principles

[2] Pursuant to rule 400(1), the Court has full discretionary power over the amount and allocation of costs. Nevertheless, "absent other considerations, the judge should award costs to the successful party against the losing party" (*Whalen v Fort McMurray No 468 First Nation,* 2019 FC 1119 at paragraph 7 [*Whalen*]).

[3] Tariffs are the default mechanism for assessing costs as they enable a degree of consistency between similar cases and help to ensure that the amount awarded does not depend on whether a party has retained expensive or inexpensive counsel (*Whalen* at paragraph 8, citing *Yeti Coolers, LLC v Howsue Holdings Inc,* 2019 FC 571 at paragraph 5). However, recent jurisprudence has recognized that the application of tariffs usually results in costs awards that are "significantly lower than the prevailing party's actual outlays:" *Whalen* at paragraph 9; *Nova Chemicals Corp v Dow Chemical Co,* 2017 FCA 25 at paragraph 13 [*Dow*]. While this is not the only consideration, it can justify departing from the Tariff in favour of a lump sum award.

[4] Lump sum awards are appropriate in "complex litigation conducted by sophisticated parties" (*Dow* at paragraph 13; see also *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paragraph 50 [*Sport Maska*]). In *Whalen*, I noted that awarding costs on an elevated scale may be appropriate in situations where parties have the means to pay them and where it is "apparent that it will better achieve the purposes of costs awards" – in particular, giving parties an incentive to litigate efficiently by internalizing the costs of conducting legal proceedings (*Whalen* at paragraphs 4 and 30).

[5] Awarding a lump sum relieves the Court from a "granular analysis" of fees and helps ensure that the costs hearing does not become an exercise in accounting (*Dow* at paragraph 11). This may "further the objective of the *Federal Courts Rules* of securing 'the just, most expeditious and least expensive determination' of proceedings" (*Dow* at paragraph 11, emphasis mine). Nevertheless, the quantum of a lump sum award should not be simply "plucked from thin air" and is usually based on a percentage of the party's reasonably incurred legal fees (*Dow* at paragraphs 15–16). While a detailed accounting is to be avoided, the party seeking costs must provide enough information to satisfy the Court that the fees were reasonably incurred in the context of the litigation (*Dow* at paragraph 18).

[6] While lump sum awards tend to be between 25–50% of a party's actual fees, there may be cases where a higher or lower percentage is warranted (*Dow* at paragraph 17). The court's wide discretion to award costs is structured by the factors set out in rule 400(3), by case law, and by the objectives of costs awards (*Dow* at paragraph 19).

[7] A party seeking a costs award must also demonstrate that its disbursements were "justified expenditures in relation to the issues at trial" (*Dow* at paragraph 20).

II. Application

A. *Lump Sum Award*

[8] This is an appropriate case in which to award costs in a lump sum based on a percentage of Pfizer's reasonable legal fees plus reasonable disbursements. Both parties in this proceeding are highly sophisticated. Seedlings was backed by a third party litigation funder, which was the subject of an application for this Court's approval in *Seedlings Life Science Ventures, LLC v Pfizer Canada Inc,* 2017 FC 826. I have no doubt that Seedlings and its litigation funder have the ability to estimate their chances of success, to balance their expected gains and the costs consequences of losing and to make litigation choices accordingly. In other words, they are in a position to respond to the incentives that the costs regime aims to give to the parties.

B. *Reasonableness of Pfizer's Legal Fees*

[9] I now turn to the reasonableness of Pfizer's fees. Pfizer has provided evidence that it incurred legal fees in the amount of $4.7 million. Seedlings, however, submits that these fees are excessive, both because Pfizer has claimed disallowed and ineligible fees, and because Pfizer has not provided justification for its high fees.

(1) Disallowed and Ineligible Costs

[10] First, Seedlings submits that Pfizer has claimed disallowed and ineligible costs, including costs with respect to motions for which costs have already been awarded (in excess of $344,000), and fees for services rendered by students at law, law clerks and paralegals. Seedlings submits that these costs should be excluded from the base against which any percentage is applied, or that the applicable percentage should be further reduced.

[11] I agree with Seedlings that Pfizer cannot claim costs regarding motions that have already resulted in a costs award. As the Federal Court of Appeal wrote in *Exeter v Canada (Attorney General)*, 2013 FCA 134 at paragraph 14: "[a] judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application." I have reviewed the invoices of Pfizer's counsel and I am satisfied that they include an amount of approximately $344,000 in fees related to motions for which costs have already been awarded. Thus, I will reduce Pfizer's legal fees by that amount.

[12] Seedlings cited a case that holds that a successful party is not entitled to claim costs for the services of articling students, law clerks or paralegals (*Apotex Inc v H Lundbeck A/S*, 2013 FC 1188 at paragraph 31, which, in turn, cites *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 at paragraph 25). In these cases, however, costs were assessed according to the Tariff. The Tariff does not make any provision for such cost items. In contrast, when a lump sum is awarded, the base amount is the actual fees paid by the party. These fees are not regulated by the Tariff, but by the agreement between the party and its solicitors. Ultimately, they are a reflection of

market forces. It is for that reason that we only award a percentage of these fees. Thus, it is not appropriate to disallow expenses related to articling students, law clerks and paralegals, as long as they were actually incurred by the party.

(2) Justification of Level of Fees

[13] Seedlings's second line of attack challenges the reasonableness of Pfizer's legal fees. That challenge is based on a comparison between the fees incurred by each party. Pfizer incurred legal fees that were three times those actually incurred by Seedlings. Pursuant to its litigation funding agreement, not all of Seedlings's counsel's fees were billed. Nonetheless, Pfizer's legal fees were more than twice the fees Seedlings would have incurred had its counsel billed all of its fees. Seedlings argues that Pfizer did not overcome its burden of proof to show that its fees were reasonable in the circumstances. It suggests that Pfizer's fees for this case ought to have been "well under $3 million" (Seedlings's Submissions on Costs at paragraph 20).

[14] At the outset, I would like to note that we all wish legal services were more affordable. In deciding whether Pfizer's fees are reasonable, however, I am not called upon to approve the way in which the market sets lawyers' remuneration. I am simply assessing whether, given current market conditions, the amount of resources that Pfizer chose to devote to this case results from a defensible choice.

[15] In doing so, I must keep in mind that it is inherently difficult for a court to second-guess strategic litigation choices made by the parties. The court does not know each party's degree of tolerance of risk and may not have a full appreciation of the impact of its judgment on the

parties. And, of course, hindsight is always perfect. Indeed, it should not be for the losing party "to tell the winning party how they could have succeeded by doing or spending less:" *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2018 FC 1067 at paragraph 24.

[16] I do not accept the basic premise of Seedling's argument. There is no rule or expectation that the parties to a lawsuit should spend roughly equal amounts in legal fees. What is at stake may be different, or have a different value, for each party. Each party's tolerance of risk may be different. The presence of a litigation funder may affect those parameters in a manner not known to the court.

[17] I am unable to conclude that Pfizer's legal fees are unreasonable. One should keep in mind that Seedlings was suing Pfizer for an amount well in excess of $100 million. Pfizer stood a lot to lose. Thus, Pfizer cannot be faulted for spending close to $5 million in legal fees. While comparisons are inherently difficult, I also note that Pfizer's fees are of the same order of magnitude as those incurred in other patent cases such as *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 759, and *Apotex Inc v Shire LLC*, 2018 FC 1106 [*Shire*].

[18] However, Pfizer also seeks costs for its legal fees incurred in January 2020, after the judgment was issued, to be calculated "at the same rate" as its earlier legal fees. I decline to do so. As Pfizer has not provided evidence of its January fees, I have no basis upon which to calculate or estimate the costs it incurred during that month.

C. *Determination of an Appropriate Percentage*

[19] Based on the factors set out in rule 400(3), Pfizer seeks 40% of its actual fees plus disbursements, or in the alternative, 33% of its actual fees plus disbursements. Pfizer submits that this proceeding is most akin to *Dow*, in which the Court awarded 30% costs. However, Pfizer submits that the rule 400(3) factors—specifically, Seedlings's failure to bifurcate and its refusal to elect damages as its remedy—justify a costs award of 40%. Pfizer submits that the percentages it requests are within the range awarded in recent cases: *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2020 FC 68 (40%); *Loblaws Inc v Columbia Insurance Corporation*, 2019 FC 1434 [*Loblaws*] (25%); *Sport Maska* (33%); *Shire* (30%); *Nova Chemicals Corporation v The Dow Chemical Company*, 2016 FC 91, aff'd 2017 FCA 25 (30%); *Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 (33%); *H-D USA, LLC v Berrada*, 2015 FC 189 (33%); *Eli Lilly and Company v Apotex Inc*, 2011 FC 1143 (25%); and *Air Canada v Toronto Port Authority*, 2010 FC 1335 (50%).

[20] For its part, Seedlings argues that the cases cited by Pfizer fall outside the typical range and are distinguishable from the present case. Seedlings submits that *Dow* and *Shire* are not comparable to this proceeding. In *Dow*, the patent was more complex and there were 33 days of trial, over 180 days of "extensive and scientifically-complex testing" and written submissions at the end of the trial totalling over 700 pages. In *Shire*, there were discoveries of 8 inventors and 17 days of hearings.

[21] Instead, Seedling submits that the following cases are more analogous to the present case: 10% in *Bodum USA Inc v Trudeau Corp (1889) Inc*, 2013 FC 128; 20% in *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403; and 12.5% in *ABB Technology AG v Hyundai Heavy Industries Co*, 2013 FC 1050 [*ABB Technology*]. Seedlings submits that *ABB Technology* is most akin to the present case in terms of the complexity of the technology at issue, the duration of the trial and the scope of discovery. In that case, the patents at issue were for gas-insulated switchgear assemblies, the trial took 9 days, and there was extensive document productions which required the Defendant's counsel to travel to Korea. Seedlings therefore proposes that if the Court awards increased costs, 10% of Pfizer's actual fees is the most appropriate measure.

[22] In my view, the proper method for setting a percentage of fee recovery is to start at the lower end of the range suggested by the Federal Court of Appeal in *Dow*, namely, 25%, and assess whether factors listed in rule 400(3) warrant a higher figure. In this regard, the cases cited by Seedlings, in which a lesser percentage was awarded, are less current than the cases cited by Pfizer. This Court recently rejected the argument that lump sum awards in the 25% to 50% range are only available in "exceptional circumstances" (*Loblaws* at paragraph 14). Rather, based on the Federal Court of Appeal's judgments in *Dow* and *Sport Maska*, it held that "the practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established, particularly when dealing with sophisticated commercial parties, and such costs awards tend to range between 25% and 50% of actual legal fees, although there may be cases where a higher or lower percentage is warranted" (*Loblaws* at paragraph 15, emphasis mine).

[23] Caution must be exercised, however, when considering the complexity of the case. That complexity is already reflected in the legal fees that constitutes the base amount of the calculation. Increasing the percentage of recovery simply because the case is complex would result in disproportionate compensation for the most complex cases.

[24] In this case, I see no reason to depart from the 25% starting point. Neither party has demonstrated that a greater or lesser award is justified. Nor was the case overly complex: this was a 13-day trial and there were fewer than 11 days of discoveries.

[25] Pfizer cites Seedlings's failure to seek bifurcation and its refusal to elect damages as its remedy as reasons to make an award of 40% of its legal fees. While it is common for parties to seek bifurcation in intellectual property cases, they are not required to do so. Nor is it always the case that bifurcation will expedite a trial (*Bristol-Myers Squibb Co v Apotex Inc*, 2003 FCA 263, at paragraphs 9-10). Seedlings will already face the consequences of not bifurcating the trial and not electing damages, as the costs award will be based on an amount that includes the fees Pfizer spent defending the compensation aspects of the claim, with respect to both reasonable royalty and accounting of profits. Moreover, Seedlings will have to pay for the fees of the experts Pfizer retained to provide opinion evidence about compensation issues. It is not necessary to punish Seedlings further by raising the percentage of recovery.

[26] Based on the above factors, I would award Pfizer 25% of its reasonable legal fees. Subtracting the amounts related to motions, these fees amount to $4,367,556, 25% of which is $1,091,889.

D. *Reasonableness of Pfizer's Disbursements*

[27] Pfizer claims $1,675,359 in disbursements, nearly $1.5 million of which consists of experts' fees. Seedlings seeks to have the fees payable for two of Pfizer's experts, Mr. Sheehan and Dr. Meyer, reduced by 25% to account for their fees being higher than that of Pfizer's senior counsel and for items it argues are not eligible for reimbursement.

[28] Pfizer's experts' hourly rates—between $981 and $1015 per hour for Dr. Meyer and over $1000 per hour for Mr. Sheehan, all expressed in Canadian currency—were higher than that of Pfizer's senior counsel, which was $900 and decreased to $855 during the course of the proceeding. It is appropriate to cap the hourly rate of expert witnesses at the hourly rate of senior counsel as this Court has done in other patent cases (*Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 18; see also *Teva Canada Innovation v Apotex Inc*, 2014 FC 1070 at paragraph 116, and *ABB Technology* at paragraph 10).

[29] Seedlings seeks to have Dr. Meyer's total amount claimed reduced because (1) she inappropriately charged for the attendance of one of her "senior consultants" at trial (amounting to approximately $14,470), even though this consultant did not testify and did not provide any evidence; and (2) the Court rejected aspects of her evidence.

[30] Additionally, Seedlings seeks to have Mr. Sheehan's total amount claimed reduced to account for (1) the "significant" amount of time Mr. Sheehan spent observing parts of the trial

that were not relevant to his evidence (approximately two and a half days of trial); and (2) the aspects of his testimony that this Court did not accept.

[31] My rejection of certain aspects of Mr. Sheehan's and Dr. Meyer's testimony is not grounds to discount their fees. In my view, Seedlings has not shown that Pfizer's reliance on either expert was unreasonable or excessive. Again, litigation conduct should not be judged with the benefit of hindsight.

[32] In accordance with recent case law, however, I would discount Mr. Sheehan's and Dr. Meyer's hourly rates to bring them in line with that of Pfizer's senior counsel (roughly 10% less). I would reduce the fees Dr. Meyer charged for her assistant's attendance at trial as he did not testify. I would also reduce Mr. Sheehan's fees for those days he spent observing the trial that were not relevant to his evidence. Those reductions amount to $138,186, which brings Pfizer's recoverable disbursements to $1,537,173.

E. *Post-Judgment Interest*

[33] A successful party may claim post-judgment interest on costs. Section 36(4) of the *Federal Courts Act*, RSC 1985, c F-7, precludes the award of pre-judgment interest on costs awards. Nevertheless, section 37, which deals with post-judgment interest, contains no such prohibition. This reflects the fact that entitlement to costs derives from the judgment of the court, not from the underlying cause of action.

[34] In this context, Pfizer requests that post-judgment interest be calculated at a yearly rate of 5%. It invokes a number of judgments of this Court where similar awards were made, often with reference to sections 3 or 4 the *Interest Act*, RSC 1985, c I-15 (see, for example, *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1234 at paragraph 136, aff'd 2007 FCA 217; *Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 24).

[35] It is useful to clarify the relationship between the *Federal Courts Act* and the *Interest Act* with respect to post-judgment interest. Where the cause of action arises in a single province, section 37(1) of the *Federal Courts Act* provides for the application of the laws of that province regarding interest. Where it is not possible to link the cause of action to a single province, section 37(2) provides that the judgment "bears interest at the rate that [the] court considers reasonable in the circumstances." In this case, there is no doubt that Pfizer's products were sold across Canada.

[36] Sections 3 and 4 of the *Interest Act* read as follows:

3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.	**3.** Chaque fois que de l'intérêt est exigible par convention entre les parties ou en vertu de la loi, et qu'il n'est pas fixé de taux en vertu de cette convention ou par la loi, le taux de l'intérêt est de cinq pour cent par an.
4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week,	**4.** Sauf à l'égard des hypothèques sur immeubles ou biens réels, lorsque, aux termes d'un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou

month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.	pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage de cinq pour cent par an n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'énonce expressément le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage.

[37] Section 4 is not applicable to cases such as this one. The cause of action does not arise from a contract. Section 4 is aimed at capping contractual interest rates where the parties did not expressly state a yearly rate in the contract. The obvious purpose is to ensure that consumers or borrowers are properly informed, in a manner that is readily understandable, of the real interest rate provided by the contract.

[38] Section 3 is a broader provision. It provides for a default rate of interest where "no rate is fixed … by law." This provision, however, must be reconciled with section 37(2) of the *Federal Courts Act*. When confronted with two seemingly conflicting statutory provisions, one must attempt to give them meanings that dovetail and avoid an interpretation that would render one of them meaningless. When Parliament enacted the *Federal Courts Act*, it cannot have contemplated that the discretion it gave to judges of this Court to set a reasonable interest rate in the circumstances would be rendered nugatory by section 3 of the *Interest Act*. The better view is that section 37(2) is a process provided "by law" for setting the interest rate, thus displacing section 3 of the *Interest Act*. See, for example, *Kraft Canada Inc v Euro Excellence Inc*, 2004 FC 652 at paragraphs 70–71, [2004] 4 FCR 410; *Astrazeneca Canada Inc v. Apotex Inc*, 2011 FC

663 at paragraph 5 [*Astrazeneca*]; *Teva Canada Limited v. Janssen Inc*, 2018 FC 1175 at paragraph 61. Section 3 remains applicable in other circumstances.

[39] Therefore, the granting of post-judgment interest according to section 37(2) is a discretionary power. The exercise of that discretion must be guided by the compensatory nature of interest: *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at paragraph 36, [2002] 2 SCR 601. The purpose is to put the party entitled to the payment of a sum of money in the same situation as if the money had been paid immediately when it became due. In setting a reasonable rate, the Court may have regard to commercial rates: *Astrazeneca*, at paragraph 5. It may also take into consideration the rate that would have resulted from the application of provincial interest law: *Apotex Inc v Merck Canada Inc*, 2012 FC 1418 at paragraph 10.

[40] Given current economic circumstances, a 5% interest rate would overcompensate Pfizer. I take notice of the fact that the Ontario post-judgment interest rate is currently set at 3.0%. Given recent decreases in rates of interest, I conclude that a 2.5% interest rate is reasonable.

III. Conclusion

[41] I would award costs in the amount of $2,629,062, inclusive of disbursements, plus interest at a yearly rate of 2.5%.

ORDER in T-608-17

THIS COURT ORDERS that:

1. The plaintiff is condemned to pay costs in the amount of $2,629,062 to the defendant, inclusive of taxes and disbursements.

2. The plaintiff is condemned to pay post-judgment interest calculated on a simple basis at a rate of 2.5% *per annum* from the date of this order.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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