

Federal Court



Cour fédérale

Date: 20200312

Docket: T-1203-18

Citation: 2020 FC 366

Ottawa, Ontario, March 12, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

SANDPIPER DISTRIBUTING INC.

Plaintiff/Defendant by Counterclaim

and

**ZACHARIAS RINGAS AND RINGAS ENTERPRISES INC.
(dba, OLD WORLD MERCHANTS)**

Defendants/Plaintiffs by Counterclaim

ORDER AND REASONS

I. Overview

[1] After 13 months of skirmishing in which this matter did not advance beyond the pleadings stage, Sandpiper Distributing Inc discontinued its action. Ordinarily, Rule 402 of the *Federal Courts Rules*, SOR/98-106, would entitle the Defendants [Ringas] to the costs of the action forthwith on a party-and-party basis, to be either assessed or awarded as a lump sum.

However, each party seeks a different order, based on the other side's conduct. Ringas asks for

recovery of 100% of its costs, while Sandpiper seeks its costs of the action notwithstanding the discontinuance.

[2] These are my reasons for (1) awarding Ringas costs of the discontinued main action in the inclusive amount of \$1,158.64, payable forthwith; (2) assessing the costs previously awarded to Sandpiper of its initial motion to strike in the inclusive amount of \$1,108.81; and (3) awarding Sandpiper costs of these motions in the cumulative amount of \$3,627.44, payable forthwith. For clarity, the costs award made in January 2019 by Prothonotary Tabib in the amount of \$2,500, payable to Sandpiper forthwith, remains unaffected and outstanding.

II. Litigation History

[3] Understanding each party's allegations regarding the conduct of the other side, and the scope of their respective claims for costs, requires some understanding of both the nature of the claim and the lengthy, but largely unproductive, history of this litigation.

A. *Nature of the Claim*

[4] Sandpiper's claim asserted trademark rights in the trademark EUROSCRUBBY and copyright in related designs. Sandpiper's principal, Donna King, and Mr. Ringas are former spouses who were both with Sandpiper until they separated in 2016. While the couple's separation agreement was not filed, the parties agree it granted Mr. Ringas the right to use the EUROSCRUBBY marks in the United Kingdom and Europe but not in Canada, where Sandpiper continues to assert its rights. Sandpiper's claim is, in essence, that Mr. Ringas infringed

Sandpiper's Canadian rights in the EUROSCRUBBY marks and designs by selling and shipping EUROSCRUBBY products from Canada to non-European countries, including the United States.

[5] Ringas defended the claim and commenced a counterclaim. In addition to denying infringement, Ringas made allegations regarding (i) Ms. King's payments to family members in the operation of Sandpiper, and his resulting separation from Ms. King; (ii) Ringas's use of a different trademark, SCRUB-WOW; and (iii) Ms. King's personal motivation for commencing the litigation. These allegations form much of the backdrop to the various steps in the litigation that bring us to these costs motions.

B. *Steps in the Litigation*

[6] Although this action has not yet proceeded to discovery, it has been the subject of a number of motions, appeals and orders of this Court. For the purposes of these motions, relevant steps include:

- Sandpiper's motion to strike portions of Ringas's Statement of Defence and Counterclaim that contain the allegations described above;
- Prothonotary Tabib's October 5, 2018 order granting the motion to strike [Striking Order] with costs to Sandpiper, which was made in the absence of a response from Ringas, since Ringas had obtained Sandpiper's consent to an extension of time to respond but had not filed a consent with the Court;

- Ringas's motion to set aside the Striking Order, which was ultimately abandoned after a case conference in February, 2019, and an associated motion to dismiss Sandpiper's motion to strike;
- Ringas's Fresh as Amended Statement of Defence and Counterclaim, which Sandpiper alleges does not comply with the Striking Order;
- Ringas's service of a Notice of Motion for Summary Judgment and a Direction to Attend purporting to require Ms. King to attend an examination to take evidence out of court for use at trial;
- Ringas's motion arising from its Direction to Attend, seeking a declaration that it was entitled to examine Sandpiper for discovery pursuant to Rule 236(2), and an order requiring Sandpiper to produce an affidavit of documents [Discovery Motion];
- Prothonotary Tabib's January 11, 2019 order dismissing Ringas's motion regarding discovery [Discovery Order], with costs in the amount of \$2,500 payable to Sandpiper forthwith in any event of the cause;
- Ringas's motion appealing the Discovery Order;
- Ringas's motion for leave to amend the Fresh as Amended Statement of Defence and Counterclaim, including to join Ms. King as a defendant by counterclaim; and
- Sandpiper's cross-motion to strike paragraphs of the Fresh as Amended Statement of Defence and Counterclaim.

[7] On July 29, 2019, Sandpiper discontinued its action. At the time of the discontinuance, Ringas’s motion appealing the Discovery Order was outstanding. After receiving submissions from the parties on the impact of the discontinuance, Justice Walker dismissed the appeal as moot, and declined to order costs of the appeal: *Sandpiper Distributing Inc v Ringas*, 2019 FC 1264 at paras 33, 44-47 [Appeal Dismissal Order].

[8] Also at the time of the discontinuance, the two pleadings motions—Ringas’s motion to amend and Sandpiper’s cross-motion to strike—had been adjourned at the parties’ request. Those motions remain relevant to the outstanding counterclaim; they are currently scheduled for hearing on April 1, 2020.

C. *The Three Costs Motions at Issue*

[9] On September 25, 2019, Ringas filed a motion seeking costs of the discontinued main action as a lump sum award representing 100% of their legal fees and disbursements. They also sought “interlocutory” orders prohibiting Sandpiper from assigning the EUROSCRUBBY trademark, and from selling any property or assets, without leave of the Court. A supporting affidavit from Mr. Ringas stated, among other things, that Ringas incurred \$114,736.98 in fees, plus \$5,219.40 in disbursements, to defend the action. The affidavit attached documentation regarding some of the disbursements, but Ringas filed no evidence of fees incurred beyond the statement regarding the total, no breakdown of fees incurred for steps in the litigation, and no Bill of Costs.

[10] On October 11, 2019, Sandpiper responded to Ringas's costs motion, and filed its own cross-motion for an order awarding costs of the action to Sandpiper. Based on the upper end of Column V of Tariff B of the *Federal Courts Rules*, Sandpiper seeks \$3,750 in fees and \$252.40 in disbursements in respect of the action, including the preparation of the claim and the conduct of case management conferences (CMCs). Sandpiper also seeks \$1,650 in fees plus \$231.25 in disbursements representing the costs of its initial motion leading to the Striking Order, and the payment of the \$2,500 in costs provided for in the Discovery Order, such that with taxes Sandpiper's total claim comes to \$9,473.52.

[11] On November 5, 2019, Ringas filed a further motion for the costs of the discontinued action. The second motion and supporting affidavit is largely repetitive of Ringas's original motion for costs, although (a) it does not seek the interlocutory orders sought in the original motion; and (b) the supporting affidavit filed with the motion includes additional evidence responding to issues raised in Sandpiper's cross-motion and in Sandpiper's response to Ringas's costs motion. The written representations filed with this further costs motion indicates that it is intended as a "cross-motion in reply" to Sandpiper's motion seeking costs.

[12] In response to concerns raised by Sandpiper regarding Ringas's "cross-motion in reply," Prothonotary Tabib issued a Direction on November 28, 2019. That Direction said that Sandpiper could file a responding record, which could include arguments regarding the alleged duplicative or abusive nature of the cross-motion and the propriety of the reply submissions. It also said that no further documents other than this responding record were to be filed on the costs motions. Sandpiper filed its responding record to the Ringas cross-motion on February 11, 2020.

Although Ringas complained at the hearing about the timing of this responding record, no adjournment to consider it was requested, and it was filed in compliance with Rule 365.

III. Issues

[13] I see the issues that need to be decided as being (i) whether I ought to grant the injunctive relief sought by Ringas; (ii) what costs of the discontinued main action should be payable as a result of the discontinuance and who should pay those costs; and (iii) what costs should be payable on these motions.

IV. The Request for Injunctive Relief

[14] Ringas seeks what they term “interlocutory” orders prohibiting Sandpiper from selling the EUROSCRUBBY trademark registration, or any other property or assets, without leave of the Court. For the reasons that follow, I dismiss this aspect of Ringas’s motion.

[15] I begin by noting that the requested orders do not appear to be “interlocutory,” in that they are not orders in place pending another anticipated hearing of the Court such as a trial of the matter. Rather, the orders would effectively freeze the assets of Sandpiper until it paid the requested costs award, making them a form of conditional final order.

[16] I therefore disagree with Ringas that the appropriate test for the requisite order is that set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. Among other things, it is unclear what the “serious issue to be tried” would be, since no further hearing on the

merits of the main action is contemplated. Ringas's allegation that Sandpiper's action was baseless is not a "serious issue to be tried" for the purpose of the costs of the discontinued main action, even if it remains an issue in the ongoing counterclaim. Nor is the order sought truly a Mareva injunction as Sandpiper submitted, given that a Mareva injunction similarly presupposes a later determination of an action.

[17] Rather, the order sought is effectively an order in aid of some form of post-judgment execution: *R v Consolidated Fastfrate Transport Inc* (1995), 24 OR (3d) 564 (CA), (*sub nom R v Fastfrate*, 1995 CanLII 1527 (ON CA)). In other words, it seeks assistance in enforcing the costs award arising from the discontinuance, which Rule 402 provides "may be enforced as if judgment for the amount of the costs had been given in favour of that party." Part 12 of the *Federal Courts Rules* contains a variety of provisions expressly dedicated to the enforcement of the Court's orders, including money orders. Ringas has neither referred to nor established the applicability of any of those provisions.

[18] In any event, the primary grounds on which Ringas seeks the asset-freezing order are (a) that Sandpiper has no assets other than the EUROSCRUBBY trademark; and (b) that given the conduct of Sandpiper and Ms. King in the proceeding, "it is highly unlikely that the Plaintiff and Donna King will honour any order from this Court in respect of payment of the Defendants' legal fees and disbursements." Neither of these grounds has merit on the evidence filed.

[19] With respect to the former, Ringas's only evidence is Mr. Ringas's statement that "[b]ased on my knowledge of the Plaintiff's business and its assets, the Plaintiff has only one

valuable asset—the trademark EUROSCRUBBY.” On its face, this assertion lacks detail that would allow the Court to rely on it, particularly given Mr. Ringas’s evidence that he left Sandpiper in 2016. I agree with Sandpiper that in these circumstances, the fact that Mr. Ringas was not cross-examined on this statement does not mean that the Court must accept it as establishing Sandpiper’s lack of assets or other means to pay an award of costs. This is particularly so in light of Ringas’s inconsistent request for an order restraining Sandpiper from selling its other “property and assets” in addition to the trademark, as well as Ringas’s submissions that Sandpiper is a “sophisticated commercial litigant that has means to pay for the legal choices it has made,” that the trademark is valuable, and that it makes a lot of money for Sandpiper.

[20] With respect to the latter, Mr. Ringas’s states that “I firmly believe that Donna King will not honour any order from this Court in respect of payment of the Defendants’ legal fees and disbursements.” No basis for this belief is provided by Mr. Ringas. Again, the fact that the statement of belief was not cross-examined on is ultimately irrelevant: even if Mr. Ringas believes it to be true, it does not provide this Court with a foundation on which to make an order of the nature sought. Regardless of the belief or the basis for it, no facts have been presented that would substantiate a conclusion that Sandpiper will not honour a costs award. While Ringas made submissions that Sandpiper’s conduct makes it unlikely that they will honour a costs award, nothing in the litigation history supports such a conclusion. I will address these allegations regarding Sandpiper’s conduct further below in addressing the costs issues.

[21] I make two final observations. First, it does not lie in the mouth of Ringas to allege that Sandpiper will not honour a costs award, and to seek extraordinary relief in consequence, when Ringas itself has not paid the \$2,500 costs award in the Discovery Order that has been payable forthwith since January 2019, and the appeal from which was dismissed in October 2019. Second, although the costs award sought is in respect of the main action, both parties remain party to the counterclaim, such that any unpaid costs award could and no doubt would be considered by the Court in the context of that ongoing proceeding.

[22] I therefore dismiss Ringas's motion for orders restraining Sandpiper from disposing of either the EUROSCRUBBY trademark or any other asset or property. I now turn to the main thrust of the parties' motions, their respective requests for costs.

V. Costs of the Action

[23] Both parties agree, as do I, that I should make a lump sum award of costs of the main action, rather than referring it for subsequent assessment: Rule 400(4). Both parties also agree that Rule 400 grants the Court full discretion to consider and award costs: *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 10.

[24] As noted, Ringas asks that costs be payable to it in an elevated lump sum amount representing full indemnity for their costs. Sandpiper asks that costs of the action be payable to it on an elevated basis under the Tariff. It also seeks quantification of the costs of the Striking Order, and payment of the costs ordered in the Discovery Order.

[25] There are thus two main issues to be determined: who should pay costs, and how much?

A. *Who is to Pay Costs of the Action?*

[26] Sandpiper discontinued the main action. Rule 402 provides that Ringas is therefore entitled to costs forthwith “[u]nless otherwise ordered by the Court.” This is consistent with the recognition in Rule 400(3)(a) that the “result of the proceeding” is a factor for consideration in an award of costs. Sandpiper asks that Ringas not be awarded costs pursuant to Rule 402 and, in its cross-motion, asks that Sandpiper be awarded costs instead. Sandpiper cites Ringas’s conduct in the proceeding as justifying such an “order otherwise,” and in particular Ringas’s:

- failure to comply with the Striking Motion in serving its Fresh as Amended Statement of Claim;
- failure to comply with the Discovery Order requirement to pay costs forthwith;
- allegations of bias on the part of Prothonotary Tabib;
- “repeated and unfounded” accusations of misconduct on the part of Sandpiper, Ms. King, and Sandpiper’s counsel;
- allegation that Sandpiper will not comply with an order as to costs, in order to support its request for a Mareva injunction;
- unreasonable positions on the issue of settlement.

[27] Given that there remains an outstanding further motion to strike portions of the Fresh as Amended Statement of Claim, I do not believe I should give weight on this motion to the allegation that this pleading does not comply with the Striking Order. Nor do I believe that I should consider the accusations regarding Sandpiper and Ms. King's improper motivation for commencing the claim, since (a) there was never an ability to establish those allegations in the main action given the discontinuance, and (b) those allegations remain to be determined in the counterclaim, either on the motion to strike or subsequently in the proceeding.

[28] On the issue of settlement discussions, each party alleges that the other's settlement conduct was unreasonable. Sandpiper alleges that Ringas's offers, many of which were short term and which were often for remarkably high dollar values, were unreasonable. Ringas alleges that Sandpiper inappropriately failed to engage on the issue of settlement despite early opportunities to do so in response to Ringas's overtures, and that Sandpiper ultimately achieved nothing, so was less successful than some of Ringas's offers during the course of the proceeding.

[29] None of the offers triggers Rule 420, as Ringas did not achieve a better result through the discontinuance than any offer that was still open for acceptance. Nonetheless, the Court may consider "any written offer to settle" in its assessment of costs even if it does not trigger Rule 420: Rule 400(3)(e).

[30] Having reviewed the exchanges of settlement offers between the parties, I am not satisfied that either party's conduct in the course of settlement discussions was such that it warrants sanction. The parties exchanged a wide variety of settlement offers over the course of

the litigation. By definition, since the action did not settle, none of those offers was acceptable to the other party. However, while no doubt frustrating to each party, I do not consider the parties' exchanges of offers show bad faith on either party's part, or other conduct that would justify either a reversal of the costs award or a heightened costs award.

[31] With respect to the \$2,500 costs award in the Discovery Order that were payable forthwith, I agree with Sandpiper that in the absence of an agreement or a stay pending appeal, that order was effective and should have been paid, even though the appeal was outstanding. In the circumstances, however, namely that the Discovery Order was appealed including with respect to costs, and that the dismissal of that appeal occurred after the discontinuance that triggered other costs consequences, I give limited weight to this issue in considering whether costs should be borne by Ringas as the successful party in the discontinuance.

[32] The other issues raised by Sandpiper have greater weight. Significantly, Ringas alleges that Prothonotary Tabib showed bias against them and that this was relevant to the assessment of costs. Ringas focuses its bias allegation on the conduct and outcome of the Discovery Motion, arguing that it was a "trial by ambush situation," and more broadly, that Sandpiper "with assistance of Madam Prothonotary Tabib successfully resisted and sabotaged" Ringas's summary judgment motion and its attempts to obtain evidence from Sandpiper.

[33] I entirely agree with the assessment of Justice Walker in her reasons for the Appeal Dismissal Order that "[t]he Defendants have levelled accusations of serious misconduct against Prothonotary Tabib without any evidentiary basis": Appeal Dismissal Order at para 39. Notably,

the accusations of bias arising out of the Discovery Motion and the Discovery Order are effectively the same as those raised before Justice Walker: Appeal Dismissal Order at paras 37-41. While Ringas apparently did not seek a finding from the Court regarding bias on the appeal, Justice Walker's finding regarding the nature of those bias allegations was clear.

[34] Although Ringas's initial submissions on costs were made before Justice Walker's Appeal Dismissal Order, counsel made clear at the hearing before me that Ringas maintained the allegations of bias even after that decision. I find that Ringas's continued and unsubstantiated bias allegations against a judicial officer is a material factor in assessing whether or not costs should be awarded in favour of Ringas, and if so, the quantum of those costs: *Jaffal v Davidson*, 2016 FCA 226 at paras 6-7. On the other hand, I note that the allegation of bias raised in the context of the appeal of the Discovery Order was already dealt with by Justice Walker, including as to the costs impacts, and that the bias allegations were not particularly central to Ringas's claim for costs or their submissions on either entitlement or quantum.

[35] The allegations leveled against Sandpiper's counsel are also inappropriate. While Ringas strenuously denied they had alleged misconduct by counsel, they repeated allegations that improper conduct by Sandpiper—bringing an action that was allegedly an abuse of process based on no evidence of infringement—was undertaken on the advice of counsel. This amounts to an allegation of misconduct. I make no determinations as to whether the Statement of Claim was improperly motivated, an issue that remains to be determined in the counterclaim. However, there was no evidence before me, nor any basis to make an inference, that the conduct of Sandpiper's counsel was in any way improper at any time.

[36] Ringas also denied alleging that Sandpiper “will not” comply with an order as to costs. This denial was based on an insistence that they only alleged that it was “highly unlikely” Sandpiper would comply with an order as to costs. This is a distinction without a difference. Ringas clearly alleged that Sandpiper could not be expected to honour an order of the Court as to costs based on their conduct, and made that allegation with little to no supporting evidence.

[37] Sandpiper has raised some meritorious grounds regarding Ringas’s conduct in the litigation, which I take into consideration with reference to Rule 400(3)(i), (k) and (o). Nonetheless, I am not satisfied on balance that I should exercise my discretion to award costs to Sandpiper rather than to Ringas. The fact remains that Sandpiper commenced litigation that Ringas had to incur costs to defend, and discontinued that litigation without a determination on its merits. I will therefore award costs of the discontinued main action to Ringas in accordance with Rule 402. However, I think it appropriate to consider these grounds raised by Sandpiper in assessing the quantum of costs and in assessing costs on the motions.

B. *How Much?*

[38] Ringas requests full indemnity for all of its costs incurred throughout this action. This raises questions about (1) whether costs are recoverable as a result of the discontinuance for all of the various steps in the action; (2) whether elevated costs are appropriate in the circumstances; and (3) the quantum of costs that should be awarded for the discontinuance. Sandpiper’s motion also raises a further issue of (4) the quantum of costs attributable to the initial motion to strike.

(1) Relevance of various steps in the action

[39] Prior orders of this Court have already addressed costs of certain steps in the proceeding. Those orders are not under appeal before me, and the fact of a discontinuance does not give me authority to revisit or alter those costs awards: *Ciba-Geigy Canada Ltd v Novopharm Ltd*, 1999 CanLII 9253 (FC) at para 32. It is therefore necessary to clarify what matters are and are not properly the subject of these motions.

(a) *Sandpiper's first claim in Court File No. T-933-18*

[40] Sandpiper first commenced an action against Ringas in Court File T-933-18 in May 2018. After correspondence from Ringas's counsel, Sandpiper discontinued that action and commenced this proceeding the same day. While Ringas referred to the commencement and discontinuance of the first action as part of Sandpiper's pattern of conduct, they confirmed that they were not seeking costs of the first discontinuance on this motion. I see nothing in the initial commencement of a claim, followed by an early discontinuance and commencement of a replacement claim, that inherently suggests misconduct on the part of Sandpiper. As no claim for costs of the first action is being made, and would not be appropriately made on this motion in any event, I will not consider the first claim further.

(b) *Sandpiper's initial motion to strike and the motion to set aside the Striking Order*

[41] Costs of Sandpiper's initial motion to strike portions of the Statement of Defence and Counterclaim were determined by Prothonotary Tabib in the Striking Order. Prothonotary Tabib

ordered that “[c]osts of this motion are awarded in favour of the Plaintiff.” There is a dispute as to whether that costs award remains in effect.

[42] As noted, Ringas brought a motion to set aside the Striking Order. After a case conference on February 4, 2019, Prothonotary Tabib ordered Ringas to elect whether they intended to move forward with that motion, or whether they would abandon the motion and proceed on the basis of the Fresh as Amended Statement of Defence and Counterclaim.

[43] The following day, counsel for Sandpiper wrote to counsel for Ringas stating that if Ringas abandoned the motion, Sandpiper “will not seek its costs pursuant to Rule 402 of the *Federal Courts Rules* in respect of the Defendants’ Motion to Set Aside the Order dated October 5, 2018.” The following day, Ringas advised the Court that they would abandon the motion to set aside, and would proceed with the Fresh as Amended Statement of Defence and Counterclaim.

[44] Ringas submitted before me that they understood the agreement between counsel to be that Sandpiper waived its claim for costs in respect of the motion to set aside *and* the costs awarded in the underlying Striking Order. Reference was made to discussions occurring during the February 4, 2019 CMC as setting the context for the agreement on costs.

[45] No evidence of the contents of the February 4, 2019 CMC was presented that would allow me to assess the nature of the agreement between the parties beyond the correspondence that was filed. That correspondence is clear that Sandpiper’s offer was that it would not seek its

costs pursuant to Rule 402 in respect of the motion to set aside. Nothing in either party's correspondence refers to the costs award made in the Striking Order, and Rule 402 deals only with the costs of an abandoned motion, not the costs of any underlying order that the motion may seek to set aside. I am therefore unwilling to impute to Sandpiper an agreement to waive the costs already awarded in the Striking Order.

[46] I therefore conclude that (a) the costs of the initial motion to strike, although not the quantum thereof, were already determined through the costs award of Prothonotary Tabib and remain in effect; and (b) the costs of the abandoned motion to set aside the Striking Order were the subject of an agreement between the parties that no costs would be sought.

[47] I note that the costs award of Prothonotary Tabib in the Striking Order was simply that costs were awarded to Sandpiper. I understand this to mean that they were payable to Sandpiper regardless of the ultimate outcome (*i.e.*, in any event of the cause), and the parties did not submit otherwise. However, the Striking Order did not award those costs payable forthwith. As the Striking Order pertained to both the action and the counterclaim, which remains outstanding, I consider it appropriate to assess the costs of the initial motion to strike, but to recognize that those costs remain payable at the final determination of the counterclaim.

[48] I also note that neither party made a particular claim for costs in connection with Ringas's "Motion to Dismiss the Plaintiff's Motion," which was brought at the same time as the motion to set aside the Striking Order. In my view, that motion, which sought an order dismissing Sandpiper's motion to strike, was not properly brought. The appropriate way to seek

to have a motion dismissed is to respond to the motion, not to bring a separate motion to dismiss the motion: *Greens At Tam O'Shanter Inc (The) v Canada*, 1999 CanLII 7512 (FC) at para 8; see also *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA), by analogy to motions to strike an originating notice of motion (now termed a notice of application). In any event, nothing appears to have happened in respect of this motion other than service of the notice of motion, and it is effectively subsumed in the motion to set aside the Striking Order, which was abandoned. I do not see any independent costs arising in respect of this motion.

(c) *Ringas's motion for summary judgment*

[49] Ringas served a Notice of Motion for Summary Judgment in December 2018. The February 4, 2019 Order of Prothonotary Tabib states that Ringas advised the Court at that day's CMC that they would not be proceeding with their summary judgment motion at that time, or at least until the determination of the motion to add Ms. King as a defendant to the counterclaim.

[50] The Notice of Motion for Summary Judgment was not filed on the costs motions. However, any aspects of the motion dealing with the main action were rendered moot, or effectively determined in Ringas's favour, by the discontinuance of the main action. To the extent that summary judgment or a summary trial is later sought in respect of the counterclaim, there will no doubt have to be either a new notice of motion or significant amendments to the existing notice of motion to reflect the current status. I am therefore satisfied that the costs of the Notice of Motion for Summary Judgment stand to be determined by me on these motions as part of the costs of the discontinued main action.

(d) *Ringas's Discovery Motion and appeal*

[51] Prothonotary Tabib's Discovery Order addresses the costs of Ringas's Discovery Motion. Prothonotary Tabib awarded costs in favour of Sandpiper in the lump sum amount of \$2,500, payable forthwith and in any event of the cause. Those costs have not been paid.

[52] In dismissing Ringas's appeal of the Discovery Order, Justice Walker awarded no costs on the appeal but did not interfere with the existing order as to costs made by Prothonotary Tabib. Ringas argues that since Justice Walker dismissed the appeal as moot because of the discontinuance, the underlying order, including its costs award, cannot be considered to remain in effect. I cannot accept this submission. The effect of Justice Walker's order dismissing the appeal is that the Discovery Order of Prothonotary Tabib remains undisturbed, including in particular the costs order. In addition to this being a general principle applicable to appeals, I am reinforced in this view by the fact that Justice Walker specifically declined to consider the moot appeal based solely on the unpaid award of costs: Appeal Dismissal Order at para 44.

[53] I therefore conclude that none of the costs of the Discovery Motion, the order regarding those costs in the Discovery Order (except as to their payment), and the costs of the appeal of the Discovery Order are before me as costs of the discontinuance.

(e) *Pleadings motions*

[54] Ringas's motion to amend its Fresh as Amended Statement of Defence and Counterclaim, and Sandpiper's cross-motion to strike portions of that pleading, remain outstanding. At least portions of these motions were not rendered moot by the discontinuance, as they are relevant to the ongoing counterclaim. They are scheduled to be heard in the near future and a process is apparently in place for the parties to advise the Court as to what, if any, aspects of the motions are being withdrawn in light of the discontinuance of the main action. The parties both recognized, and I agree, that since those motions are yet to be heard, I should not award costs in respect of them. Costs of these motions, including any aspects that may be abandoned in light of the discontinuance, are therefore reserved to the hearing of the motions.

(f) *Case management conferences*

[55] CMCs were held on December 11 and 20, 2018, and February 4 and March 7, 2019. None of these resulted in orders of costs. Of these, the CMC of March 7, 2019 appears to have related in part to the appeal of the Discovery Order (which might be considered included in the disposition of costs on that appeal); and in part to the ongoing pleadings motions (which have not been determined). I therefore consider it appropriate that costs of the March 7, 2019 CMC, if any, be deferred to the disposition of the pleadings motions.

(g) *What is left?*

[56] For the reasons above, I conclude that the costs of the first discontinued claim; the Striking Order (except as to quantum); the motion to set aside the Striking Order and related motion to dismiss the motion to strike; the Discovery Motion and Discovery Order; the appeal of the Discovery Order; the outstanding pleadings motions; and the March 7, 2019 CMC are not for determination by me on these motions as costs of the main action and its discontinuance.

[57] What remains are the costs of the main action other than the foregoing steps. Based on the record before me, this amounts to the costs of the initial pleadings (recognizing that the Statement of Defence and Counterclaim remains relevant to the ongoing counterclaim); the Notice of Motion for Summary Judgment; and the CMCs of December 11, 2018, December 20, 2018 and February 4, 2019.

[58] Ringas submits that I ought to take a more holistic approach to the question of costs of the action, rather than a piecemeal or step-by-step approach. Relying on general principles of equity and fairness, Ringas suggests that all of the costs that they were required to incur in the action arose from Sandpiper “starting the war,” which they were then called upon to defend. Ringas argues that since Sandpiper withdrew its claim, I ought to consider the costs of the proceeding more broadly, even if this might include costs associated with steps that are already covered by prior costs awards.

[59] I do not accept this submission, for two reasons. First, while there is a broad discretion to consider and award costs under Rule 400, that discretion does not encompass a general ability to reopen costs awards that have already been made: *Ciba-Geigy* at para 32. Taking into account costs associated with steps in the litigation that have already been the subject of costs awards would effectively do that, by considering legal costs that have already been taken into account by other judicial officers, and reaching a different outcome as to how they ought to be treated.

[60] Second, even where one party has commenced and lost litigation, steps within that litigation may be the subject of costs awards that are adverse to the successful party. This is neither unfair nor inequitable. To the contrary, it is common and recognizes the fact that the successful party may have taken steps during the action that increased the cost of the litigation and for which the other party ought to be compensated. From a policy perspective, such costs awards can influence litigation behaviours by all parties to litigation, regardless of who is ultimately successful. Put another way, simply being a defendant in an unsuccessful lawsuit—even a discontinued one or a frivolous one—does not give that defendant *carte blanche* to conduct the litigation in a manner that unduly increases costs through unsuccessful or unnecessary interlocutory steps.

[61] These principles are reflected by the different types of costs awards that are in the arsenal of the Court on interlocutory matters: costs may be awarded in the cause (the party that wins the main action is entitled to the costs), to a party in the cause (that party is entitled to costs but only if they win), or to a party in any event of the cause (that party is entitled to costs regardless of who wins the main action). They may also be reserved to the trial judge, or an award of “no

costs” may be made. The determination of which type of costs award is appropriate is made at the time of the interlocutory step, and is not a matter for second-guessing at the conclusion of the proceeding.

(2) Ringas’s request for elevated costs

[62] Ringas argues that it should be awarded costs on an elevated scale in light of Sandpiper’s conduct in the action. In particular, Ringas relies on allegations that Sandpiper:

- raised two separate baseless trademark and copyright infringement actions;
- brought those actions in the wrong jurisdiction and court, since they were designed to effectively renegotiate the parties’ separation agreement;
- engaged in frivolous and abusive conduct in the litigation;
- made inflammatory allegations of trademark and copyright infringement not supported by any evidence;
- opposed Ringas’s efforts for a speedy trial through a summary judgment motion;
- filed affidavits in the proceeding by a law clerk and not by witnesses with direct knowledge of the facts;
- ignored or rejected Ringas’s offers to settle without costs;
- conducted the litigation “aggressively”;

- is a sophisticated commercial litigant with the means to pay for the legal choices it has made.

[63] None of these grounds is persuasive.

[64] While Sandpiper did raise allegations of trademark and copyright infringement that were not proved in the action, this is the basis for the award of costs on discontinuance, and not of itself grounds for an elevated award. On its face, the Federal Court has jurisdiction over the subject matter of the intellectual property claims made, and those claims were not raised in an “inflammatory” or inappropriate manner. Ringas’s allegations that the claim was brought for the ulterior purpose of trying to “bleed Ringas dry” and/or to “blackmail” Ringas into renegotiating the separation agreement remain to be determined in the counterclaim. I do not propose to—and do not have the evidence to—assess those allegations on these motions.

[65] Nor is there any indication on the facts before me that Sandpiper conducted the litigation in an inappropriate, abusive or overly aggressive manner. While Ringas referred to the large number of motions in the action, Ringas brought most of those motions themselves, and they have been dealt with. The only motions brought by Sandpiper appear to be the initial motion to strike, which was decided by the Court including as to costs, and the later cross-motion to strike arising from Ringas’s Fresh as Amended Statement of Defence and Counterclaim, which remains outstanding. I cannot attribute any improper conduct to Sandpiper resisting Ringas’s motion to set aside the Striking Order (which was abandoned), its summary judgment motion (which ultimately turned into the Discovery Motion), its Discovery Motion (which was

unsuccessful), its motion appealing the Discovery Order (which was dismissed as moot), or its motion to amend (which is still outstanding).

[66] Ringas made much of the fact that Ms. King was never presented as a witness in the proceeding, which they allege would have allowed cross-examination that would have demonstrated that the claim had no merit. However, the action had not yet proceeded to the discovery stage at which evidence on the merits would be expected. This appears to have been largely due to the distractions of Ringas's motion to set aside the Striking Order, summary judgment motion, Discovery Motion, and motion to amend, which resulted in the matter still being at the pleadings stage when it was discontinued. The issues on these motions were of a procedural nature, such that filing evidence from a law clerk on non-controversial facts was acceptable: *AB Hassle v Apotex Inc*, 2008 FC 184 at para 46. In any event, if Ringas objected to the evidence presented on any of the motions, it should have done so on the motion so the matter could be addressed at that time.

[67] With respect to the settlement correspondence and exchanges, I repeat my observations above and note that I do not find Sandpiper's conduct in settlement discussions to merit any elevated costs award.

[68] In assessing the appropriateness of an elevated costs award, I also consider the factor in Rule 400(3)(b), the "amounts claimed and the amounts recovered." While the Statement of Claim specifies that it was not being proceeded with as a simplified action, it did confirm that the monetary relief sought did not exceed \$50,000.00. The reasonableness of Ringas incurring over

\$100,000 in legal fees to defend such a claim, and expecting to recover that amount upon discontinuance, must be considered in this light.

[69] With respect to Sandpiper being a sophisticated commercial litigant, Ringas correctly notes that this Court has recognized that elevated lump sum costs awards may be appropriate in some cases: *Eli Lilly and Company v Apotex Inc*, 2011 FC 1143 at para 36(b); *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paras 30-31. While there is no clearly-defined test or criteria for such an award, relevant factors include whether the parties are sophisticated commercial litigants with the means to pay; the nature and merits of the case; and the factors set out in Rule 400(3): *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paras 50-51; *Whalen* at paras 30-31.

[70] In the present case, Ringas has put forward conflicting evidence and submissions about whether Sandpiper is a sophisticated commercial litigant with the means to pay. Mr. Ringas stated his belief that the EUROSCRUBBY trademark was the company's only asset, while at the same time submitting that the trademark was valuable and generated considerable revenue. Ringas also alleges that Sandpiper is engaged in abusive litigation designed to advance a family law claim to renegotiate a separation agreement under the guise of an intellectual property claim; this is hardly conduct associated with "sophisticated commercial litigants." In any case, regardless of the degree of Sandpiper's commercial sophistication, I find that no other factors support the granting of elevated costs in this case, let alone the full indemnity sought by Ringas. I therefore decline to award elevated costs.

[71] Further, as noted at the outset, Ringas filed no bill of costs, and no breakdown of the fees it incurred for the various steps in the litigation. Mr. Ringas made a statement in his affidavit filed with Ringas's "cross-motion in reply" to the effect that he could not provide copies of his legal bills because they are "very detailed and disclose our discussions which are protected by the client-lawyer privilege." I do not accept this for two reasons. First, it is evidence that should have been filed on Ringas's first motion and was improperly introduced in reply to concerns raised by Sandpiper, without leave. Second, and in any event, the fact that detailed invoices might include matters protected by privilege does not excuse a party from filing adequate evidence of its costs. Various methods may be used for this purpose to avoid a waiver of privilege, including summarization and redaction as appropriate. It is simply insufficient in these circumstances to state a total amount covering a 13-month period and say that no other details can be given for reasons of privilege.

[72] Sandpiper therefore submits, quite correctly, that the Court has no way to assess what amounts Ringas actually incurred for the few steps that remain at issue, or whether those amounts were reasonable. Even if I were inclined to award elevated costs to Ringas, I do not have the evidence that would allow me to do so.

(3) Quantum of costs for the discontinuance

[73] There is merit to Sandpiper's submission that Ringas's failure to file a bill of costs or adequate supporting evidence should prevent it from obtaining any costs award at all, even under the Tariff. However, I am satisfied that I have enough information to assess costs in respect of the few remaining steps that are relevant, and that it would be unjust in the current circumstances

to deprive Ringas of its claim for costs of those steps for want of evidence. Other than its claim for full indemnity elevated costs, which I have rejected, Ringas made no argument for a higher attribution of fees under the Tariff. I conclude that fees ought to be calculated using Column III of Tariff B as a starting point: Rule 407; *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at paras 11-12.

[74] As set out above, the costs at issue are limited to costs of the initial pleadings, the Notice of Motion for Summary Judgment, and the CMCs of December 11, 2018, December 20, 2018 and February 4, 2019. In the absence of a bill of costs from Ringas, Sandpiper helpfully prepared a draft bill of costs that it submits reflects an appropriate claim for costs of the steps to be considered based on the middle of Column III. I accept that draft bill subject to the following adjustments:

- I would reduce to 3 units the amount attributable to the Statement of Defence and Counterclaim, since it remains relevant to the ongoing counterclaim. Remaining costs for the counterclaim may be claimed when the counterclaim is determined.
- I would add 1 unit in respect of the summary judgment motion. No motion materials other than the notice of motion were apparently prepared, but the motion—as it pertained to the main action—became academic upon the discontinuance and was a cost of the litigation recoverable.

[75] The remaining total is an initial entitlement to 8.8 units (3 in respect of the pleadings; 1 in respect of the summary judgment motion; and 4.8 in respect of the CMCs). However, I would reduce even this modest amount by half to reflect the inappropriate allegations of bias and

misconduct that continued to be made by Ringas on this motion. To this I would add the disbursements identified that relate specifically to these steps. Again, in the absence of any other argument from Ringas, I find that these are limited to the service and courier costs associated with the Statement of Defence and Counterclaim, in the amount of \$99.86, plus the \$300 filing fee for the Notice of Motion for Summary Judgment.

[76] I therefore award to Ringas its partial costs of the action and discontinuance, in the amount of \$660 plus \$399.86 in disbursements. With HST on the fees and taxable disbursements, I calculate this to total \$1,158.64. In accordance with Rule 402, these costs are payable forthwith.

(4) Quantum of costs for the motion to strike

[77] Sandpiper asks that I fix the costs of its initial motion to strike based on the Tariff. They suggest that they ought to be assessed at the top end of Column V in light of the conduct of Ringas. However, Prothonotary Tabib simply ordered costs of the motion to the Plaintiff without modifier as to their scale, which is understood to mean Column III and to constitute a determination to that effect: Rule 407; *Apotex Inc v Merck & Co*, 2006 FCA 324 at para 15. In addition, at the time the costs order was made, the various grounds of conduct now raised by Sandpiper had not arisen. I will therefore fix costs of the motion to strike at the middle of Column III. Based on the Bill of Costs filed by Sandpiper, this amounts to fees in the amount of \$750 (5 units), and disbursements of \$231.25, for a total of \$1,108.81 inclusive of HST.

VI. Costs of these Motions

[78] Having addressed the costs of the discontinued main action, we are left with the costs of these motions. Ringas asks that costs of the combined motions be fixed in its favour at \$2500, regardless of the outcome. Sandpiper submitted that costs ought to follow the event on Ringas's motion for costs and Sandpiper's cross-motion for costs, but seeks its costs at the top of Column V with respect to Ringas's second "cross-motion in reply," in any event, given the duplicative and improper nature of that motion.

[79] Neither party indicated that any offers to settle the motions would affect costs of the motions. In awarding costs on these motions, I consider the following to be particularly relevant:

- Ringas's request for "interlocutory orders" was unsuccessful and unfounded;
- Ringas was awarded some costs of the discontinuance, and was thus partially successful on that aspect of its motion, but the costs awarded were substantially lower than its claim for full indemnity for the entirety of the action;
- Sandpiper was unsuccessful on its motion to have costs of the action awarded to it despite the discontinuance, although some of the arguments raised were material to the determination of quantum;
- Ringas's claim for full indemnity for the entirety of the action included steps that had been clearly the subject of prior costs awards, or related to the ongoing counterclaim, and should not have been the subject of a claim for costs on the discontinuance;

- the quantum of Ringas’s claim was significantly out of proportion to the remaining steps in the litigation that were relevant to the costs of the discontinuance and the costs ultimately awarded;
- Ringas’s evidence and arguments in support of its motions addressed at length matters completely irrelevant to the Court’s assessment of costs—which in many cases had already been determined by the Court—including but not limited to why they considered the Striking Order to have been improperly made, why they sought to examine Donna King, why they considered the Discovery Order to be incorrect, and why they considered Prothonotary Tabib to have acted unfairly;
- Ringas’s evidence filed in support of its motions contained extensive and inappropriate legal argument, including on irrelevant issues;
- Ringas’s submissions on the motions included continuing their unsupported allegations of bias on the part of Prothonotary Tabib and improper conduct on the part of counsel for Sandpiper; and
- Ringas’s second motion for costs, which it referred to as a “cross-motion in reply,” was unnecessary, duplicative and inappropriate. While Ringas was entitled to respond to Sandpiper’s cross-motion for costs, it was not entitled to bring a further motion for the same relief, or to include what was effectively improper reply evidence filed without leave. This unnecessarily increased costs and required Sandpiper to respond again.

[80] Based on these factors, and exercising my discretion under Rules 400 and 401, I award costs of these motions as follows:

1. Costs of Ringas's motion for costs are awarded to Sandpiper in the amount of one-half of fees calculated in accordance with Column III of Tariff B on the basis of a single counsel, plus one-half disbursements. Using Sandpiper's Bill of Costs for this motion and apportioning to this motion half of the four-hour hearing and associated travel costs (from which I remove the taxi and meal costs that were only estimates), I calculate this to be 5.5 units (\$825), plus \$619.94 in disbursements. With HST on fees and copies, this totals \$1,591.18. As there are no further steps in the main action, these costs are payable forthwith.
2. There shall be no costs of Sandpiper's cross-motion for costs.
3. Costs of Ringas's second cross-motion for costs are awarded to Sandpiper at the top of Column V, without accounting for counsel fees for the hearing of the motion or travel, which I consider duplicative of costs of the other motions. Using Sandpiper's Bill of Costs for this motion, I calculate this to be 11 units (\$1,650), plus \$152.00 in disbursements, for a total of \$2,036.26 including HST. As there are no further steps in the main action, and on the basis of Rule 401(2), these costs are payable forthwith.

VII. Conclusion

[81] As can be gathered from the foregoing, these motions for costs became unnecessarily lengthy and complex for what was actually at stake, namely costs of a few small steps in the proceeding that had not been previously addressed through costs awards already issued by the Court. The result is that the costs of the motions are higher than the costs that were obtained, and that should have been sought, on the motions. This somewhat anomalous result I attribute largely

to Ringas's approach of requesting full recovery of its costs in the face of existing costs orders to the contrary, and raising issues irrelevant to the determination, requiring written and oral argument from both parties on these extraneous matters.

[82] The end result is that the following costs are or remain payable in this proceeding:

- Costs of Sandpiper's initial motion to strike, in the amount of \$1,108.81, are payable to Sandpiper. In accordance with Prothonotary Tabib's Striking Order, these costs are not payable forthwith, but will be payable to Sandpiper in any event of the cause.
- Costs of Ringas's Discovery Motion, as set out in the Discovery Order, remain payable to Sandpiper in the amount of \$2,500, and remain payable forthwith.
- Costs of the main action and its discontinuance are payable to Ringas in the amount of \$1,158.64, payable forthwith.
- Cumulative costs of these motions are payable to Sandpiper in the total amount of \$3,627.44, payable forthwith.

[83] Ringas argued at the hearing of these motions that Sandpiper seeking or obtaining cost awards in its favour meant that Ringas was being asked to pay for the "favour of being sued." I do not see it this way. Whether a party starts litigation or responds to it, how they conduct the litigation affects the costs each party incurs and is therefore relevant to the assessment of costs, both during and at the end of the litigation. Ringas's actions in this litigation, and on these motions, increased the costs of both parties well beyond what they need to have been. This is appropriately reflected in the resulting costs awards.

ORDER IN T-1203-18

THIS COURT ORDERS that

1. Ringas's motion for costs is granted in part, with costs of the discontinuance of the main action awarded to Ringas in the amount of \$1,158.64, payable forthwith, and dismissed in all other respects. Costs of the motion are payable to Sandpiper in the amount of \$1,591.18.
2. Sandpiper's motion for costs is dismissed, without costs.
3. Ringas's second motion for costs is dismissed, with costs to Sandpiper in the amount of \$2,036.26.
4. Costs of Sandpiper's initial motion to strike are assessed at \$1,108.81, and remain payable to Sandpiper in accordance with the order of Prothonotary Tabib dated October 5, 2018.
5. The costs provided for in the order of Prothonotary Tabib dated January 11, 2019 remain payable forthwith.

"Nicholas McHaffie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1203-18

STYLE OF CAUSE: SANDPIPER DISTRIBUTING INC v ZACHARIAS
RINGAS AND RINGAS ENTERPRISES INC
(DBA, OLD WORLD MERCHANTS)

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 13, 2020

ORDER AND REASONS: MCHAFFIE J.

DATED: MARCH 12, 2020

APPEARANCES:

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