Federal Court  Cour fédérale

Date: 20210923

Dockets: T-1741-13
T-1569-15
T-1728-15

Citation: 2021 FC 986

Ottawa, Ontario, September 23, 2021

PRESENT: The Honourable Justice Fuhrer

Docket: T-1741-13

BETWEEN:

PACKERS PLUS ENERGY SERVICES INC.

Plaintiff
Defendant by Counterclaim

and

ESSENTIAL ENERGY SERVICES LTD. AND
TRYTON TOOL SERVICES LIMITED PARTNERSHIP

Defendant
Plaintiffs by Counterclaim

Docket: T-1569-15

AND BETWEEN:

RAPID COMPLETIONS LLC AND
PACKERS PLUS ENERGY SERVICES INC.

Plaintiff

and

BAKER HUGHES CANADA COMPANY

Defendant

Docket: T-1728-15

AND BETWEEN:

PACKERS PLUS ENERGY SERVICES INC.
AND RAPID COMPLETIONS LLC

Plaintiffs
Defendants by Counterclaim

and

WEATHERFORD INTERNATIONAL PLC.
WEATHERFORD CANADA LTD. WEATHERFORD CANADA PARTNERSHIP AND HARVEST OPERATIONS CORP.

Defendants
Plaintiffs by Counterclaim

ORDER AND REASONS

I. Overview

[1] The Plaintiffs, Packers Plus Energy Services Inc. and Rapid Completions LLC, challenge the elevated costs awarded to the Defendants (shortened, Essential Energy, Baker Hughes and Weatherford) following the Defendants' success on the patent validity trial. The Case Management Judge, Prothonotary Aalto ordered elevated costs for steps taken in connection with the infringement and damages issues, including during the period when the validity trial decision was under reserve. The Plaintiffs move to appeal the Case Management Judge's costs order.

[2] I am not persuaded that Prothonotary Aalto made a jurisdictional error in awarding elevated costs nor that he erred in assessing the lump sum award at 66% of actual legal fees. For the more detailed reasons that follow, I dismiss the Plaintiffs' motion and appeal, with costs.

II. Background

[3] The Defendants in these matters were the successful parties in the Plaintiffs' patent infringement action (dismissed) and their counterclaim for patent invalidity (granted) regarding patent number 2,412,072 ['072 Patent]: *Packers Plus Energy Services Inc. v Essential Energy Services Ltd.*, 2017 FC 1111 [*Packers Plus*]. Earlier consolidation and bifurcation of the three matters resulted in the Phase One trial on the validity issue, with the infringement and damages issues reserved for Phase Two.

[4] The Federal Court of Appeal dismissed the Plaintiffs' appeal of the *Packers Plus* decision (2019 FCA 96), and on December 19, 2019, the Supreme Court of Canada dismissed their application for leave to appeal (Docket 38694).

[5] As the successful parties of the Phase One trial, the Defendants filed motions for the determination of their costs under Rules 400 and 403 of the *Federal Courts Rules*, SOR/98-106 [*FCR*]. These costs motions were filed within thirty days of the release of the confidential draft version of the *Packers Plus* decision to the parties. The Defendants sought procedural directions regarding costs from the Trial Judge, Justice O'Reilly.

[6] The Trial Judge's resulting order dated May 17, 2018 [Directions Order] provided, in part, that the judicial officer most involved in the outstanding infringement and damages issues and "best-placed to decide the costs issues is Prothonotary Aalto," and further, that the steps the Defendants could take to avoid the disclosure of confidential information were "[t]o be determined by Prothonotary Aalto." In arriving at these determinations, Justice O'Reilly noted the Plaintiffs' contention that "the Case Management Judge, Prothonotary Kevin Aalto is better placed to deal with cost issues arising from the outstanding issues (infringement and damages) that were outside the scope of the original action."

[7] Following the Supreme Court's dismissal of the Plaintiffs' leave application, Justice O'Reilly dealt with the Defendants' motion for increased costs on the Phase One trial. In his costs order dated January 17, 2020 (2020 FC 68) [Phase One Costs Order], Justice O'Reilly awarded each Defendant 40% of their taxable costs, plus disbursements and applicable adjustments. In arriving at this award, Justice O'Reilly made several noteworthy determinations.

[8] First, the Defendants were entitled to separate costs awards. Second, Packer's choice to pursue each of Defendants separately complicated the proceedings and increased the costs incurred. Third, a lump sum award was more appropriate given complexities of case. Fourth, 40% was a more appropriate ratio (than the 50% they sought) given that Defendants were successful, that they did not seek a disproportionate amount of fees, and their counsel took steps to minimize duplication. No party appealed the Phase One Costs Order.

[9] Several months later, the Defendants filed motions to move forward with the determination of their Phase Two costs which were heard together on November 4, 2020.

III. Challenged Phase Two Costs Order

[10] On May 19, 2021, Prothonotary Aalto issued an order awarding the Defendants elevated costs for steps taken in connection with Phase Two [Phase Two Costs Order]. Responding to the Plaintiffs' contention that the Defendants should have brought separate Rule 403 motions within 30 days of the Phase One Costs Order, Prothonotary Aalto held that this would be an unnecessary step because it would be duplicative of the Defendants' motions already brought under Rule 403. Further, the Plaintiffs were on notice since then that the Defendants were seeking elevated costs in respect of Phase Two.

[11] Noting the Court's discretion under Rule 400, Prothonotary Aalto next summarized the factors that in his view supported the elevated costs he awarded to the Defendants, including intensive case management, complex issues, the need for expert evidence, the high amount of potential damages, the Plaintiffs' aggressive litigation strategies on a tight schedule, the ultimate mootness of Phase Two, and the inadequacies of Tariff amounts. Prothonotary Aalto found that the Plaintiffs were the authors of the "thrown away" Phase Two costs, and thus, bear the consequences of choosing to proceed with unnecessary multiple proceedings.

[12] Summarizing the more salient costs principles for lump sum awards set forth in Chief Justice Crampton's recent decision in *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186, Prothonotary Aalto awarded each set of Defendants a lump sum amounting to 66% of actual fees

plus reasonable disbursements, and as well as their costs of the motion. In doing so, Prothonotary Aalto stated that, in his view, the 80% sought by the Defendants amounted to a punitive award, and further, that the pursuit of an aggressive strategy, in itself, did not justify punitive costs. Experts' fees incurred by the Defendants were reduced to 75% of the amounts claimed.

IV. Issues and Standard of Review

[13] There are essentially two issues for this Court's determination: (i) the awarding of elevated costs (i.e. in the absence of separate Rule 403 motions, the Prothonotary exceeded jurisdiction); and (ii) the assessment of the lump sum at 66%. In my view, both issues are subject to the "palpable and overriding error" standard of review.

[14] The standard of review applicable to a Rule 51 motion appealing a Prothonotary's decision is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63, 65, 79 and 83.

[15] The Federal Court of Appeal more recently reminds us that the *Housen* standard is the following: "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness": *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48.

[16] The Supreme Court has signalled that it no longer recognizes jurisdictional questions as subject to the correctness standard*: Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 65.

[17] The "palpable and overriding error" standard of review is highly deferential. Further, palpable means an obvious error, while an overriding error is one that affects the decision-maker's conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64.

V. Analysis

[18] As a preliminary matter, the Plaintiffs' counsel advised the Court at the outset of the hearing before me that their motion as against the Weatherford Defendants (Court File No. T-1728-15 only) was abandoned. The Plaintiffs subsequently filed a Notice of Abandonment, on consent without costs.

[19] Otherwise, as explained in greater detail below, I am not persuaded that Prothonotary Aalto made any palpable and overriding error regarding either issue warranting the Court's interference with the Phase Two Costs Order.

A. *Awarding Elevated Costs*

[20] I disagree with the Plaintiffs' contention that the Defendants should have brought separate Rule 403 motions within 30 days of the Phase One Costs Order, as argued before

Prothonotary Aalto and on this appeal, and further that they should have requested an extension of time for doing so. I am satisfied that Prothonotary Aalto made no palpable and overriding error in finding that bringing separate Rule 403 motions was unnecessary and would have been duplicative.

[21] The *FCR* Rule 403 is premised on the issuance or "pronouncement" of a judgment. "Paragraph 403(1)(a) provides for a motion for directions after judgment has been pronounced": *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417 [*Consorzio*] at para 3. Such a motion must be brought before the judge or prothonotary who signed the judgment: *FCR* Rule 403(3).

[22] All three sets of Defendants brought Rule 403 motions within thirty days of the release of Justice O'Reilly's confidential draft judgment. Their motions expressly sought either increased or 100% of infringement and damages phase (i.e. Phase Two) costs. Based on jurisprudence, this was the correct approach. At the time, the Defendants knew only that the confidential draft judgment found in their favour regarding validity, rendering the infringement and damages claims essentially moot. They did not know that the Plaintiffs would appeal to the Federal Court of Appeal, and then seek leave to appeal further to the Supreme Court of Canada, nor that Phase One and Phase Two costs would be determined by the Trial Judge and Case Management Judge, respectively. Nor could they predict the length of time of the remaining steps in the litigation.

[23] In my view, the Defendants' approach, that is to bring a comprehensive Rule 403 motion at the earliest time following the release of the confidential draft version of the *Packers Plus*

decision, is consistent with longstanding jurisprudence. A motion under the *FCR* Rule 403 must be brought within 30 days of the judgment, even if the judgment is under appeal, with an extension of time available only in special circumstances: *Maytag Corp. v Whirlpool Corp., 2001 FCA* 250 at para 16; *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2020 FC 660 at para 12. Because the Defendants proceeded in this manner, I disagree with the Plaintiffs that they were somehow prejudiced or were surprised that the Defendants were seeking elevated costs in respect of Phase Two.

[24] I further disagree with the Plaintiffs' submission that Justice O'Reilly's Directions Order did not contemplate Prothonotary Aalto would deal with the issue of Phase Two costs, and that the Defendants' request for relief in terms of the Phase Two costs in their Rule 403 motions merged with the Phase One Costs Order.

[25] First, Justice O'Reilly specifically acknowledged in his Directions Order the Plaintiffs' contention that Prothonotary Aalto was better placed to deal with costs issues arising from the outstanding issues (infringement and damages) that were outside the scope of the original action. Second, on this basis, Justice O'Reilly denied the Defendants' request that the Trial Judge be seized of the costs related to the outstanding infringement and damages issues, stating specifically that, "the judicial officer most involved in those proceedings and best-placed to decide the cost issues is Prothonotary Aalto." Third, Justice O'Reilly also indicated that Prothonotary Aalto would determine (i.e. "[t]o be determined by Prothonotary Aalto") what steps the Defendants could take to avoid the disclosure of privileged information related to the outstanding infringement and damages issues.

[26] Contrary to the Plaintiffs' submissions at the hearing before me, I find that there is nothing unclear about what Justice O'Reilly intended by these statements in his Directions Order, that is Prothonotary Aalto would decide the costs issues related to Phase Two, including elevated costs. Although an unusual outcome, I agree with Prothonotary Aalto that the Directions Order effectively bifurcated the Defendants' costs motions. In my view, however, the *FCR* Rule 107(1) does not preclude this outcome, and indeed, provides that the "Court may, at any time, order the trial of an issue or that **issues in a proceeding** be determined separately" [emphasis added].

[27] In addition, the Plaintiffs did not argue before Justice O'Reilly that Prothonotary Aalto did not have jurisdiction. If the Plaintiffs disagreed with or were unclear about the Directions Order, they should have sought clarification at the time it issued or appealed it. Otherwise, to challenge what the Directions Order meant in the context of the instant motion appealing Prothonotary Aalto's Phase Two Costs Order could be viewed as an impermissible collateral attack on Justice O'Reilly's Directions Order: *R v Wilson*, [1983] 2 S.C.R. 594 at pages 599-600; *Strickland v Canada (Attorney General),* 2013 FC 475 at para 43.

[28] To the contrary, the Plaintiffs contended before Justice O'Reilly that Prothonotary Aalto was better placed to deal with costs issues arising from the outstanding infringement and damages issues. In my view, such contention is tantamount to consent to the Case Management Judge dealing with the Phase Two costs issues, including elevated costs: *FCR* Rule 50(5). Further, the Case Management Judge was not prohibited from doing so by reason of the *FCR* Rules 50(1)(c) and 50(1)(k) mentioned in the *FCR* Rule 50(5).

[29] The Plaintiffs' also objected to the Defendants' filing of further or refined Rule 400 motions (seeking elevated Phase Two costs at 80%, instead of 100%) to move forward with the determination of the Phase Two costs, subsequent to the issuance of the Phase One Costs Order, but without specific mention of Rule 403. In my view, this is a complaint about form over substance in the circumstances.

B. *Lump Sum at 66%*

[30] I am not persuaded that the Case Management Judge erred in his assessment of the Phase Two costs at 66% of actual legal fees. Although this percentage is higher than what may be considered usual, in my view it does not amount to palpable and overriding error. The calculation of lump sum awards is "not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party's actual legal fees": *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Nova*] at para 21.

[31] I find the Phase Two Costs Order demonstrates the considerable attention Prothonotary Aalto gave to the *FCR* Rule 400(3) factors that in his view, and I agree, supported the elevated lump sum award of 66%, as summarized above in paragraph 11: *1395804 Ontario Ltd. (Blacklock's Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 7. Although the Plaintiffs dispute the extent of the role they played in moving forward with Phase Two preparation while the judgment for the Phase One trial was under reserve, they are the authors of the litigation strategy they pursued involving multiple, complex proceedings.

[32] As Justice O'Reilly specifically noted in his Phase One Costs Order, "[Packers] could have limited its costs exposure by proceeding only against the first defendant, Essential Energy Services Ltd., and pursuing the other defendants later if successful[; i]ts approach complicated the proceedings and increased the costs incurred": 2020 FC 68 at p 4. In my view, these observations of Justice O'Reilly apply equally to Phase Two as to Phase One. Although the Defendant Essential Energy concedes that the Plaintiff Packers did not violate the *Federal Courts Rules* or any Court order with its strategy, just because Packers could do so (i.e. proceed with Phase Two while Justice O'Reilly's judgment on the Phase One trial was under reserve), does not mean it should have done so.

[33] I thus find that Prothonotary Aalto based the award of 66% of legal fees on the unique circumstances of these matters. While the Plaintiffs submit that there was nothing unique here that justifies the elevated costs award, I disagree. The Plaintiffs ignored the accepted conventions of bifurcating a trial, particularly that preparation for the infringement and damages issues should be deferred, thus saving the costs and time of discovery and experts on those issues. I further find the Plaintiffs insisted that Phase Two preparations continue in exchange for agreeing to consolidation and bifurcation in respect of the validity issue.

[34] Although the Plaintiffs later agreed to defer some discovery on Phase Two issues during the pendency of the Phase One trial judgment, it was not enough to make any significant difference in my view. Rather, I find the evidence before me on this motion points to the Plaintiffs vigorously resisting the Defendants' efforts to adjourn the Phase Two trials, and to Prothonotary Aalto proposing compromises, such as moving the trial dates a couple of months

and postponing discoveries until after the release of the *Packers Plus* decision. As a consequence, I agree with Prothonotary Aalto that the Plaintiffs were the "author of all of the costs thrown away" for Phase Two preparations.

[35] Accordingly, I am not persuaded that Prothonotary Aalto made any palpable and overriding error by exercising his discretion under the *FCR* Rule 400(3) to consider the relevant factors in awarding elevated costs at 66%, including the result of the proceeding (entirely in favour of the Defendants), the amount of work, and unnecessary steps taken during the proceeding (the Plaintiffs' insistence on Phase Two preparations).

[36] Further, I am not persuaded that 66% of actual costs is a punitive amount, contrary to the Plaintiffs' submission, or more to the point, that this was not considered by Prothonotary Aalto. Rather, Prothonotary Aalto found that the 80% sought by the Defendants would have been punitive. As the Federal Court of Appeal has noted, "increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees[; h]owever, there may be cases where a **higher** or lower percentage is warranted": *Nova*, above at para 17 [emphasis added].

VI. Conclusion

[37] Based on the foregoing analysis, I am satisfied that Prothothotary Aalto did not commit palpable and overriding error in considering and awarding elevated costs in connection with Phase Two of these matters nor that he erred in assessing the lump sum award at 66% of actual legal fees. I therefore dismiss the Plaintiffs' Rule 51 motion appealing the Phase Two Costs Order of Prothonotary Aalto.

VII. Costs

[38] I further find that the Essential Energy Defendants and the Defendant Baker Hughes are entitled to their separate costs of this motion, payable by the Plaintiffs.

[39] The parties made brief costs submissions at the hearing of the Plaintiffs' Rule 51 motion. They all requested, however, an opportunity to make costs submissions after the Court ruled on the motion.

[40] If the parties therefore cannot come to an agreement on the amount of costs, they will have until October 25, 2021, to serve and file brief written submissions on costs, not exceeding three pages, for the Court to determine the quantum of costs to be awarded to the Essential Energy Defendants and the Defendant Baker Hughes in the circumstances.

ORDER in T-1741-13 and T-1569-15

THIS COURT ORDERS that:

1. The Plaintiffs' motion and appeal are dismissed.
2. The Defendants Essential Energy Services Ltd. and Tryton Tool Services Limited Partnership, and the Defendant Baker Hughes Canada Company, are entitled to their separate costs of this motion, payable by the Plaintiffs, Packers Plus Energy Services Inc. and Rapid Completions LLC.
3. If the parties cannot come to an agreement on the amount of costs, they will have until October 25, 2021, to serve and file brief written submissions on costs, not exceeding three pages, for the Court to determine the quantum of costs to be awarded to the Defendants Essential Energy Services Ltd. and Tryton Tool Services Limited Partnership, and the Defendant Baker Hughes Canada Company.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1741-13, T-1569-15 AND T-1728-15
DOCKET:	T-1741-13
STYLE OF CAUSE:	PACKERS PLUS ENERGY SERVICES INC. v ESSENTIAL ENERGY SERVICES LTD. AND, TRYTON TOOL SERVICES LIMITED PARTNERSHIP
AND DOCKET:	T-1569-15
STYLE OF CAUSE:	RAPID COMPLETIONS LLC AND PACKERS PLUS ENERGY SERVICES INC. v BAKER HUGHES CANADA COMPANY
AND DOCKET:	T-1728-15
STYLE OF CAUSE:	PACKERS PLUS ENERGY SERVICES INC. AND RAPID COMPLETIONS LLC v WEATHERFORD INTERNATIONAL PLC. WEATHERFORD CANADA LTD. WEATHERFORD CANADA PARTNERSHIP AND HARVEST OPERATIONS CORP.
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 7, 2021
ORDER AND REASONS:	FUHRER J.
DATED:	SEPTEMBER 23, 2021

APPEARANCES:

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