

Federal Court



Cour fédérale

Date: 20160107

Docket: T-467-11

Ottawa, Ontario, January 7, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

VENNGO INC.

Plaintiff

and

**CONCIERGE CONNECTION INC. C.O.B. AS
PERKOPOLIS, MORGAN C. MARLOWE
AND RICHARD THOMAS JOYNT**

Defendants

AND BETWEEN:

CONCIERGE CONNECTION INC.

Plaintiff by Counterclaim

and

VENNGO INC.

Defendant by Counterclaim

ORDER

UPON reading the written submissions filed on behalf of the parties with respect to costs of the proceedings pursuant to paragraph 3 of the Judgment issued on December 3, 2015;

AND UPON considering the merits of the action and counterclaim, as well as the success of the Defendants on all aspects of the action;

For the following reasons, I conclude that costs, inclusive of all fees and disbursements, should be paid by the Plaintiff to the Defendants in a lump sum amount of \$231,000.

The Plaintiff failed in all of its claims against the Defendants, and at trial effectively abandoned: (i) its case against the Defendant, Richard Joyner, (ii) its section 7(c) claim; and (iii) its section 7(a) claim. The claims under section 22, section 7(b) and section 19 of the *Trademarks Act* and the claim of breach of confidential information were also determined to be without merit. During the course of the trial, it became apparent that the sole cause of action that had some merit was under section 20 of the *Trademarks Act*.

While this is not a case that falls squarely within the parameters of the decision in *Air Canada v Toronto Port of Authority*, 2010 FC 1335, I find that a lump sum award in excess of the standard costs assessed in accordance with the middle of column III, Tariff B is warranted under Rule 400(4) of the *Federal Courts Rules*. As was stated by Madam Justice Gauthier in *Philips Morris Products S.A. v Marlboro Canada Limited*, 2015 FCA 9 at para 4: “when dealing with sophisticated commercial parties, it is not uncommon for such lump sums to be awarded based on a percentage of the actual costs incurred.”

In support of their costs submissions, the Defendants filed the affidavit of Manav Singhla sworn December 22, 2015. The affidavit sets out the amounts that were charged or will be charged to the Defendants for legal fees, disbursements and taxes in defending the action.

Although details of the fees, disbursements and taxes claimed by the Defendants are not set out in a Bill of Costs, they appear reasonable for both the work done by the predecessor firm of MacBeth and Johnson and by Miller Thomson LLP. I note, in particular, that the hourly rates charged by Miller Thomson are modest in respect of intellectual property litigation. Moreover, Ms. Singhla was not cross-examined on her affidavit and no evidence was submitted by the Plaintiff to contradict the fees, disbursements and taxes claimed or that that they were actually incurred by the Defendants. The Plaintiff unnecessarily and unreasonably complicated this proceeding by continuing to assert non-meritorious causes of action up to and during the trial.

In the circumstances, I am satisfied that the fees claimed were reasonably incurred by the Defendants. However, I am unable to determine whether all of the disbursements claimed by the Defendants are proper and reasonable. While the Defendants may have been entitled to additional costs for disbursements, the Plaintiff is correct in taking the position that the Defendants failed to provide supporting documents for the \$50,049.72 in disbursements claimed, other than making conclusory statements in the affidavit of Ms. Singhla.

I have also considered the Defendants' written offer to settle on October 23, 2015, which offered to settle for 75% of the Defendants' costs to that date and was rejected by the Plaintiff. Pursuant to Rule 420(2)(b) of the *Federal Court Rules*, the Defendants are entitled to double costs from the date of the offer to settle.

I agree with the comments of Justice Richard Mosley in *Dimplex North America Ltd. v. CFM Corp.*, 2006 FC 1403 (CanLII), 55 C.P.R. (4th) 202, that the assessment of costs on a lump sum basis is not an exact science. I therefore find that the Defendants are entitled to a lump sum

award of fees and disbursements roughly in the amount of 50% of the amounts claimed for fees, totalling \$206,000, and \$25,000 for disbursements, for a total of \$231,000.

I also considered the Defendants' counterclaim, which was not necessary to prove at trial, given the complete success on the merits of the main action.

THIS COURT ORDERS AND ADJUDGES that:

1. The Plaintiff shall pay costs of the proceedings in a lump sum amount of \$231,000 to the Defendants no later than 30 days from the date of this Order.

"Michael D. Manson"

Judge