Federal Court  Cour fédérale

Date: 20181023

Docket: T-396-13

Citation: 2018 FC 1067

Ottawa, Ontario, October 23, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HOSPIRA HEALTHCARE CORPORATION

Plaintiff

and

THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH

Defendant

AND BETWEEN:

THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC., CILAG GmbH INTERNATIONAL and CILAG AG

Plaintiffs by Counterclaim

and

HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO. LTD., CELLTRION, INC. and PFIZER CANADA INC.

Defendants to the Counterclaim

ORDER AND REASONS
(re: costs)

[1] These are the reasons in respect of the Defendants' [Kennedy/Janssen] claim for costs on a lump sum basis at 50% of the fees plus disbursements being $2,555,883.10 and $918,145.54 respectively for a total of $3,481,778.64 including HST.

[2] The Plaintiffs (Defendants to the Counterclaim) [Hospira/Celltrion] dispute virtually every aspect of this matter – consistent with their overall approach to this litigation to challenge virtually every point, great or small. Hospira/Celltrion has also brought a motion to strike Kennedy/Janssen's motion for costs or striking affidavits in support of Kennedy/Janssen's motion, which will be dealt with in separate reasons dismissing the motion.

[3] Kennedy/Janssen offers a number of alternative bases for costs – 30% of fees; the high end of Column V of Tariff B; the high end of Column IV of Tariff B; and lastly that the matter be referred to an assessment officer.

[4] Kennedy/Janssen has provided affidavit evidence on the fees earned, the costs and disbursements incurred and a draft Bill of Costs. Hospira/Celltrion has provided little relevant evidence supporting its challenge other than some evidence regarding experts' costs that may be unreasonable in their view. It has not shown its own legal fees as a measure of "reasonable fees" and, further, its own disbursement records are incomplete.

[5] Rule 400(1) gives the Court full discretionary power over the amount and allocation of costs. The number of matters listed in Rule 400(3) are for potential consideration but are not exhaustive.

[6] The reasons for judgment in favour of Kennedy/Janssen (Liability Judgment) are sufficiently detailed that they need not be detailed here. Those reasons mention Hospira/Celltrion's approach of contesting every aspect of the case even when there was no reasonable prospect of success. Hospira/Celltrion showed no effort to narrow issues at trial or to hone in on the potentially best issues and arguments resulting in Kennedy/Janssen having to defend everything.

[7] With respect to the approach to costs in complex litigation involving sophisticated large corporations, I concur with Justice Hughes in his cost decision in *Air Canada v Toronto Port Authority*, 2010 FC 1335, 196 ACWS (3d) 640, to favour the indemnity (whole or partial) principle and his reasoning in paragraphs 14 and 15.

[8] There is a public interest served by lump sum awards based on the indemnity principle, particularly in cases like these. Such awards show the real cost of initiating litigation – which Hospira/Celltrion did. Such awards also show the consequences of bringing multiple proceedings, failing to behave reasonably and efficiently in the conduct of the litigation – that there are real consequences to the various steps available in the litigation process.

[9] I intend to follow the indemnity principle, the issue remains as to what level of indemnity – 50% as proposed, 30% as a proposed alternative or some other percentage.

[10] In setting the percentage, the Court will be guided by the applicable matters in Rule 400(1) as addressed in the following paragraphs.

[11] Kennedy/Janssen won on every major point in this litigation, both in terms of validity and infringement. In many instances, Hospira/Celltrion was not even close to advancing a possibly successful position.

[12] The amount for fees claimed is a percentage of the actual fees earned. Hospira/Celltrion contends that the amount is unreasonable but advances no argument or comparison to its own fees which would lay a foundation for that contention. From the Court's observation of how Kennedy/Janssen conducted the trial – with efficiency and effectiveness – there is no basis to suggest that the fees actually earned were excessive or unreasonable. Kennedy/Janssen put forward sufficient evidence of the fees without the necessity of submitting docket sheets or similar evidence.

[13] In selecting the appropriate percentage of actual fees, the Court is mindful that using the high end of Column V would give an award of $431,000 (approximately), an unfair discount off reasonable fees of approximately $5 million. While costs seldom are awarded on a full indemnity basis, it would be unsatisfactory to deprive Kennedy/Janssen's clients of the fruits of their victory by a paltry cost award and would be a windfall of cost savings for the losing side. The

disincentive to a losing party pursuing an unsustainable case would be eliminated where the cost award is so far removed from the reality of actual costs.

[14] Added to the above principles of success and actual fees must be added the value of the product at issue – some $700 million in sales of Remicade. Hospira/Celltrion argues that there is no such value or importance yet they were prepared to litigate to virtual exhaustion including some 20 motions and other interlocutory matters – actions inconsistent with a market for a product of little value.

[15] The absence of a decision on damages (the next proceeding) is not a bar to recovery of costs at this stage. Damages are one factor and not necessarily a controlling factor.

[16] To suggest that the case was not complex as implied by Hospira/Celltrion does not square with reality. The issues of a biologic, of bio similarity and the developments in the field of rheumatoid arthritis are detailed, technical and complex. There were, for example, 12 substantive issues dealing with validity and infringement.

[17] Drawing a parallel between this case and *SNF Inc v Ciba Speciality Chemicals Water Treatments Limited*, 2015 FC 997, 257 ACWS (3d) 436, is inappropriate and clearly distinguishable in terms of subject matter, complexity and the losing party's conduct of the litigation.

[18] The matter of offers of settlement are largely irrelevant. Hospira/Celltrion's contention that costs cannot be greater than double party and party costs, as if a party has made a Rule 420 offer to settle, is not supported in law. The awarding of costs is not restricted by Rule 420 offers and Hospira/Celltrion has not shown how any offer they may have made would impact a cost award (recognizing that quantum has not been determined).

[19] As indicated earlier, the amount of work by Kennedy/Janssen has been sufficiently established. A review of the Court file shows the numerous disputes as well as the lengthy trial which form the background of the amount of work expended.

[20] In terms of conduct of the parties, as mentioned previously, Hospira/Celltrion took an approach that unnecessarily lengthened the proceedings. Importantly, it took actions which disrupted proceedings and led to multiple motions. Hospira/Celltrion's pursuit of the inventors, particularly Dr. Maini, is an example of that approach. This process occupied considerable Court and counsel time. The process of obtaining letters of request to take evidence in the UK was lengthy but was eventually wasted. Having established all the circumstances allowing for the taking of that evidence, at the last minute, before leaving for the UK, Hospira/Celltrion announced that they no longer wanted his evidence.

[21] Hospira/Celltrion objects to the relevance of interlocutory proceedings in this cost award particularly where a cost award has been made in such proceeding. However, Kennedy/Janssen has backed out those amounts actually awarded from its calculations here. What is relevant is the comments of other Court members on the multiple discoveries and other motions. It was clear

that there were concerns that many of these motions were without merit. The concerns and frustrations of other members of the Court were evident (see Justice Kane's and Justice Boswell's comments as examples).

[22] It is fair to say that Hospira/Celltrion's conduct lengthened the proceedings and added additional time, work and expense. Several steps taken by Hospira/Celltrion were unnecessary, unreasonable and disproportionate.

[23] Hospira/Celltrion have dealt with this cost matter like a line by line accounting exercise dealing with the minutiae. A lump sum award approach is more broad and designed to reduce, if not eliminate, an "accounting" exercise. However, when dealing with disbursements, a more line by line approach is justified.

[24] I can find nothing unreasonable or excessive about the disbursements. It is not for the losing party to tell the winning party how they could have succeeded by doing or spending less. The fees for experts, the other expenses and disbursements were all in keeping with the nature of the litigation as it unfolded.

[25] In rendering a decision on costs of the liability phase, the parties may find the Court's reasoning of assistance in the planning for and conduct of the damages phase in terms of both the strategic and tactical decisions the clients and counsel must make and the potential consequences of their choices.

[26] For these reasons, Kennedy/Janssen's motion for costs at 50% of fees plus actual disbursements is granted.

ORDER in T-396-13

THIS COURT ORDERS that the Defendants' costs are fixed at $2,555.883 in fees and $918,145.54 for disbursements plus $7,750 in costs previously ordered and still owing from the Plaintiff. The award is $3,481,778.54 (including tax) which includes the costs of this motion.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-396-13
STYLE OF CAUSE:	HOSPIRA HEALTHCARE CORPORATION v THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH and THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC., CILAG GmbH INTERNATIONAL and CILAG AG v HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO. LTD., CELLTRION, INC. and PFIZER CANADA INC.

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PHELAN J.
DATED:	OCTOBER 23, 2018

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