

Federal Court



Cour fédérale

Date: 20180830

Docket: T-1043-12

Citation: 2018 FC 871

Ottawa, Ontario, August 30, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SAFE GAMING SYSTEM INC

Plaintiff

and

**ATLANTIC LOTTERY CORPORATION,
NOVA SCOTIA GAMING CORPORATION
and TECH LINK INTERNATIONAL
ENTERTAINMENT LIMITED**

Defendants

SUPPLEMENTARY JUDGMENT AND REASONS

[1] By Judgment issued May 25, 2018, the Defendants/Plaintiffs by Counterclaim were granted costs in this action. The parties were unable to agree on a quantum of costs, so as ordered by the Court, written submissions were filed by the parties including reply submissions.

[2] I have reviewed these submissions and considered the arguments made by the parties, including the Plaintiff's argument that the ordering of costs should be deferred as the matter is under appeal.

[3] The Defendants sought costs as follows:

- a) Lump sum costs (inclusive) of \$2,450,007.00 (comprising \$1,523,707.00 in fees and \$926,300.00 in disbursements), which represent 40% of actual fees and disbursements;
- b) In the alternative, lump sum costs of \$1,790,094.00, representing the top end of column V and double costs after May 12, 2016 (which was the date of the formal settlement offer);
- c) In the further alternative, column V and double costs after May 12, 2016 (date of the formal settlement offer) with directions to the assessor;
- d) That security of costs in the amount of \$600,000.00 that was ordered to be paid to the court be released to the Defendants;
- e) Costs in the amount of \$10,000.00 for the cost submissions; and
- f) Interest on costs at the post-judgment rate from the date of judgment.

[5] The Plaintiff's position is:

- a) Costs should not be assessed prior to the determination of the appeal;
- b) Alternatively, if the determination of costs is not stayed pending the appeal, costs should be assessed at the mid-range of column III. The Plaintiff submits some disbursements are

excessive or unreasonable and should thus be properly put in front of an assessor. In the Plaintiff's Draft Bill of Costs, fees are \$240,525.00 under column III;

- c) A lump sum amount should not be awarded, given the allegedly unreasonable and excessive nature of claimed costs and disbursements by the Defendants;
- d) In the further alternative, if a lump sum amount is awarded, a lump sum award of 40% is excessive. No more than 10% of the legal fees should be awarded, resulting in an award of \$381,000.00; and
- e) Costs should rationally be connected to the security posted of \$600,000.00.

[4] I have considered the arguments made by the parties including:

- a) The May 12, 2016 formal settlement offer by the Defendants to the Plaintiff of \$250,000.00 for both actions to be discontinued, as well as another informal settlement offer dated May 3, 2017;
- b) The complexity and length of the issues and claims. I considered the expertise level of the experts needed for claim construction of Claim 1 and Claim 6 (Claim 1 included the construction of 19 specific terms/phrases) as well as patent validity, infringement and damages;
- c) The unreasonableness of a few disbursements as argued by the Plaintiff concerning the Defendants' submissions;
- d) The security of costs argument regarding the correspondence between the costs award and to the amount posted as security for costs;
- e) The actual cost of this action to the Defendants as a factor of consideration (as noted, the fees and disbursements were over \$4,700,000.00);

- f) Conduct of the Plaintiff in not bifurcating the liability phase from the damages phase, which increased the cost and duration of the proceedings. As well as general conduct of the parties to lengthen or shorten the trial; and
- g) The Plaintiff's request to have an actual assessment and the request by the Defendants for special directions if an assessment is ordered;
- h) The parties' submissions regarding, if the Court calculates costs according to the Tariff, as to what column should costs be assessed under.

[6] As noted above, the Plaintiff has appealed the trial decision and the Defendants have cross-appealed. The Plaintiff submits that as the outcome of the appeal is uncertain, an assessment of costs should be deferred pending the appeal.

[7] I do not agree with the Plaintiff's argument that I should defer setting costs because of this matter being under appeal or to delay execution of a cost award until after the appeal decision. I will not defer the cost order or the execution of an award until a determination by the Court of Appeal.

[8] In making this decision, I considered my experience and familiarity with this matter. In addition, at the conclusion of the trial, I indicated that I would be awarding costs. I requested either: a) a joint submission of an amount by the parties or b) if an agreement could not be reached, then for written submissions as to costs. As the Court is countenanced with the latter of the two scenarios, it is in the interests of efficiency and judicial resources to not defer this decision.

[9] In addition, I agree with the arguments of the Defendants that the Plaintiff's reliance on *Smith & Nephew Inc v Glen Oak Inc*, [1995] FCJ No 1604 [*Smith*] is not persuasive. In *Smith*, Justice Noël (as he was then) declined to fix costs at an interlocutory stage in proceedings. *Smith* is not applicable as it dealt with an interlocutory matter and this is a final matter.

[10] In *Aic Ltd v Infinity Investment Counsel Ltd*, [1998] 148 FTR 240, Justice Rothstein (as he was then), noted that in paragraph 13 that *Smith* was “an unusual case based on its particular facts. I do not think it is a case of general application insofar as the awarding of costs is concerned, as the general practice is not to await the outcome of an appeal before costs are dealt with...” As *Smith* is not applicable in this matter, I will not defer setting costs.

[11] I took into regard the factors of Rule 400(3) of the *Federal Court Rules*, 1998, SOR/98-106 [FCR] in making my decision, including:

- a) the settlement offer dated, May 12, 2016 that I determined met all the requirements of Rule 420 of the FCR;
- b) the complexity of the issues;
- c) A reduction of claims by the Plaintiff from the original pleadings; and
- d) The complexity of the subject matter, which was established not only by the length of the trial but also by the recorded entries of the Court that was exhibited to the defendant's affidavit. This involved several motions and days of examinations. In addition, there were a number of expert and fact witnesses, as well as a number of counsel present, in order to facilitate the presentation of the evidence and argument in an efficient manner so that there was no time wasted.

e) In this case, the amount of costs argued in the Security of Costs motions (not before me) is not conclusive in determining costs awarded at the conclusion of this trial.

[12] The Defendants have prepared for my consideration a comprehensive bill of costs, as well as an affidavit with evidence and a description of the services, to support an award. In addition, I have reviewed the disbursements for reasonableness and justification as directed by the Plaintiff and answered by the Defendants in their reply.

[13] Counsel for the Defendants provided two draft bills of costs, representing calculated costs at the top end of column IV and the top end of column V respectively. The bill of costs, using the top of column IV, consists of \$582,000.00 in fees and disbursements, and taxes of \$1,026,020.63 to a total of \$1,608,020.63. Using the top of column V results in a calculation of \$751,125.00 in fees, disbursements, and taxes of \$1,038,969.38 for a total of \$1,790,094.38. Both bills of costs reflect double costs, under Rule 420 in contemplation of the May 12, 2016 formal settlement offer and applicable tax.

[14] Having considered all of the above, I will award a lump sum amount. I make this determination on the authority of *Nova Chemicals Corporation v The Dow Chemical Company*, 2017 FCA 25 [*Nova*]. In that case, Justice Rennie determined that a lump sum award of costs was appropriate in a similar fact situation as is before me.

[15] The calculus of the lump sum amount is not a precise accounting but a general range. I

am guided by Justice Rennie in *Nova* where he stated :

[11]... Lump sum awards have found increasing favour with courts, and for good reason. They save the parties time and money. Lump sum costs awards further the objective of the *Federal Courts Rules* of securing “the just, most expeditious and least expensive determination” of proceedings (Rule 3). When a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.

[16] Justice Rennie indicates that a range of 25% to 50% of the actual fees for lump sum awards is the norm and supported by Rule 400(4) of the FCR.

[17] After considering all the criteria under Rule 400(3) of the FCR and the arguments as presented by the parties, I am prepared to order a lump sum amount of \$1,175,000.00, which after all the noted considerations is in the range of 25% of the actual fees of \$4,700,000.00.

Though this award is at the low end of Justice Rennie’s formulation of the expected range after all factors are considered, it is an equitable amount.

[18] In addition, as requested by the Defendants, I will order that the security of costs already paid into Court be released to the Defendants forthwith. The parties' submissions indicate it was \$600,000.00. The amount of security of costs held by the Court will be set off from the lump sum award.

[19] The request for post-judgment interest is denied as the lump sum award is all inclusive.

SUPPLEMENTARY JUDGMENT in T-1043-12

THIS COURT'S JUDGMENT is that:

1. The Defendants are entitled to a lump sum award of \$1,175,000.00 that is inclusive of fees, disbursements, interest and taxes to be payable forthwith by the Plaintiff to the Defendants.
2. The security of costs paid by the Plaintiff into the Court is to be released and paid to the Defendants forthwith. The security of costs paid to the Defendants will set off by the amount of the lump sum payment ordered.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1043-12

STYLE OF CAUSE: SAFE GAMING SYSTEM INC. V ATLANTIC
LOTTERY CORPORATION ET AL

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: MAY 23-26, MAY 29-31, JUNE 1-2, JUNE 5-6 AND
JUNE 22, 2017

**SUPPLEMENTARY
JUDGMENT AND REASONS:** MCVEIGH J.

DATED: AUGUST 30, 2018

APPEARANCES:

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Nisha Anand
Colin Carruthers
Andrea Rico Wolf

FOR THE PLAINTIFF

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