Federal Court  Cour fédérale

Date: 20210107

Docket: T-418-19

Citation: 2021 FC 26

Ottawa, Ontario, January 7, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KUEHNE + NAGEL INC.

Plaintiff

and

HARMAN INC.

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff has brought a motion for summary judgment in this action, allowing the Plaintiff's claim for unpaid seafreight and dismissing the Defendant's counterclaim. This Judgment and Reasons addresses the Plaintiff's motion, including a claim that costs should be assessed on a solicitor-client basis and, pursuant to Rule 404 of the *Federal Courts Rules,*

SOR/98-106, be paid personally by the Defendant's counsel, based on allegations of improper conduct in the course of this litigation.

[2] As explained in greater detail below, the Plaintiff's motion is granted, with the exception of its claim for punitive damages and the claim under Rule 404. The Plaintiff has established that there is no genuine issue for trial, on either the action or the counterclaim, and that summary judgment is therefore appropriate. The Plaintiff has also established the quantum of the principal and interest components of its claim. It has not established that punitive damages are warranted. With respect to costs, the Plaintiff's contractual relationship with the Defendant entitles it to recover its reasonable legal fees incurred in collecting amounts owed to it. My Judgment against the Defendant therefore includes the amount claimed by the Plaintiff for its legal fees, less components of those fees that relate to the Plaintiff's unsuccessful claim under Rule 404.

[3] With respect to the claim under Rule 404, the Plaintiff has established no basis on which the Defendant's counsel should be liable for the Plaintiff's costs. As the Defendant's counsel appeared at the hearing of this motion and prepared a responding motion record, principally for purposes of responding to the Rule 404 claim, costs related thereto are awarded to the Defendant's counsel, to be paid by the Plaintiff, on a partial indemnity basis in a lump sum amount fixed by the Court.

II. **Background**

A. *The Parties' Relationship*

[4] The Plaintiff in this matter, Kuehne + Nagel Inc., is a Canadian corporation that carries on business as an international freight forwarder. The Defendant, Harman Inc., is an importer and wholesaler of household décor. In June of 2015, the Defendant signed a credit application form in connection with freight forwarding services to be provided by the Plaintiff to the Defendant. The credit application included Credit Agreement Terms and incorporated by reference the Canadian International Freight Forwarders' Association Standard Terms and Conditions [CIFFA STCs].

[5] In each of 2016, 2017 and 2018, the parties concluded a Volume Incentive Program agreement [VIP] under which the Defendant was entitled to a rebate from the Plaintiff of an agreed amount per cubic meter [CBM] of cargo shipped on certain less-than-container load [LCL] shipments made in the relevant year. Under the VIP for 2018 [the 2018 VIP], the applicable rebate was USD$4.50 per CBM and was conditional on the Defendant committing to place all 2018 shipments covered by the VIP with the Plaintiff and shipping a minimum volume of cargo that year. Although the written 2018 VIP states this minimum to be 4,099 CBM, the Defendant has taken the position in this action that this figure was a mistake. The 2018 VIP applied only to LCL shipments from China to Canada.

[6] The Plaintiff provided freight forwarding services to the Defendant in 2018. However, the Defendant ceased paying the Plaintiff's invoices in August of 2018, because it had not been

paid volume incentive rebates for the first two quarters of the year. At that time, the Defendant's president emailed the Plaintiff a spreadsheet showing that the Defendant claimed USD$4889.86 in volume incentive rebates on 1186.22 CBM of cargo. The commercial relationship between the parties ended in November of 2018, with the last of the Plaintiff's invoicing issued in December 2018 and the unpaid invoices for the Plaintiff's services to the Defendant totalling USD$53,442.82 and CAD$150.00.

B. *Pleadings in this Action*

[7] The Plaintiff commenced this action for the unpaid invoices in March of 2019. The Defendant filed a Statement of Defense and Counterclaim in April of 2019. The Defendant did not dispute the Plaintiff's principal claim but alleged that the Defendant shipped 5,290 CBM of LCL cargo in 2018, entitling it to a volume incentive rebate of USD$23,805.00 that should be set-off against the Plaintiff's claim. The Defendant also took the alternative position that the minimum volume figure of 4099 CBM in the 2018 VIP was a mistake that did not reflect the intentions of the parties. The Defendant pleaded that the agreed minimum volume figure was the Defendant's actual volume of LCL shipments in 2017.

[8] In its Defense to the Counterclaim, the Plaintiff denied there was any mistake in the minimum volume figure of 4099 CBM in the 2018 VIP. The Plaintiff also pleaded that the Defendant shipped only 2272 CBM of LCL in 2018, an amount below both the 4099 CBM figure in the 2018 VIP and the Defendant's actual 2017 LCL volume of 3204 CBM. Further, the Plaintiff asserts that the Defendant's claim to set-off does not represent a basis to resist paying the amounts due in excess of the claimed set-off.

C. *Events Leading to this Motion for Summary Judgment*

(1) Production of Documents

[9] The pleadings closed in May of 2019. The Plaintiff provided the Defendant with an unsworn affidavit of documents on or about June 24, 2019, without productions attached. The parties were unable to agree on a schedule for documentary production. The Plaintiff delivered its productions in mid-August 2019 and brought a motion seeking production of the Defendant's documents, scheduled for September 10, 2019.

[10] On the eve of the motion, the Defendant provided the Plaintiff with an unsworn affidavit of documents and Schedule 1 productions, although advising that there would be further documents forthcoming related to an allegation, identified while assembling documents, that the Plaintiff had double charged for what the Defendant described as advanced commercial information charges [ACI]. Justice Zinn adjourned the motion and, by Order dated December 17, 2019, awarded costs of the motion, fixed at $750.00, in favour of the Plaintiff.

[11] One of the documents that the Defendant produced was a spreadsheet setting out shipping transactions with a total of 5290 CBM. After receiving this spreadsheet, the Plaintiff's counsel wrote to the Defendant's counsel, pointing out that many of the transactions listed in the spreadsheet fell outside the scope of the 2018 VIP.

(2) Amendment to the Defendant's Counterclaim

[12] On October 4, 2019, the Defendant's counsel sent the Plaintiff's counsel by email draft amendments to the Statement of Defense and Counterclaim and sought the Plaintiff's consent to the amendments. The Defendant proposed to add a counterclaim of $50,000.00 for breach of contract and/or unjust enrichment based on the allegation that the Plaintiff had double charged for ACI. The Plaintiff did not give its consent and the Defendant did not seek leave to make the amendment.

(3) Scheduling Examinations for Discovery

[13] The parties were also unable to agree on the scheduling of discovery examinations. The Plaintiff served Directions to Attend examinations in October, November and December of 2019, but these discoveries did not proceed, first due to the witness's unavailability, then due to illness, and finally due to an effort at settlement negotiations.

(4) Settlement

[14] Settlement negotiations between the parties broke down in mid-December when the Defendant insisted on a "non-derogation clause," to which the Plaintiff would not agree. Instead, the Plaintiff filed this motion for summary judgment early in 2020.

(5) Motion Materials

[15] The Plaintiff served and filed its materials for the summary judgment motion in February 2020. Due to the COVID-19 pandemic, the original deadline for responding materials was pushed into the summer of 2020. However, the Defendant did not deliver any responding

materials at that time. In September, at a case management conference, the Defendant requested additional time to prepare motion materials. Prothonotary Milczynski set a schedule for the motion that required responding materials to be served and filed by October 19, 2020. On October 19, the Defendant informed the Plaintiff that it would not file any motion materials and sent a letter explaining this intention to the Court.

[16] In November 2020, the Plaintiff filed a Supplementary Motion Record with additional submissions, advancing its Rule 404 claim for solicitor-client costs payable by the Defendant's counsel personally. The Plaintiff alleges that the following conduct by the Defendant's counsel (as articulated by the Plaintiff) supports the Rule 404 claim:

A. Counsel ignored the Plaintiff's repeated demands for documentary production over a period of weeks, responding only under threat of professional misconduct allegations;

B. Counsel knowingly or unwittingly advanced his client's false claims about the tremendous volume of documents that allegedly delayed production;

C. Counsel knowingly refused compliance with ongoing production obligations under the Rules by failing to produce such relevant documents as were already in his possession;

D. Counsel then produced the Defendant's scant affidavit documents on the eve of the motion, wasting all the time spent in preparation;

E. Counsel then refused to co-operate in scheduling examinations for discovery contrary to the Rules;

F. Counsel then co-operated with scheduling examinations but then cancelled the scheduled examinations on three further occasions;

G. Counsel co-operated in his client's bad-faith settlement negotiations;

H. Counsel repeatedly sought extended timelines for replying to this motion, including on teleconference with the Court, in spite of having no instructions to reply to this motion; and

I. Ultimately, the Defendant simply failed to appear on the motion.

[17] The Plaintiff's Supplementary Motion Record includes a Bill of Costs, calculated on a solicitor-client basis, claiming $21,020.67 inclusive of fees, disbursements and HST.

[18] Following receipt of the Plaintiff's Supplementary Motion Record, the Defendant's counsel, Devry Smith Frank LLP, filed a Responding Motion Record containing a Memorandum of Fact and Law, an affidavit and exhibits. This record responds only to the Rule 404 claim for solicitor-client costs payable by the Defendant's counsel. It contains no submissions regarding the substance of the summary judgment motion. The affidavit in the responding materials is sworn by the Defendant's solicitor of record, Nicholas Reinkeluers.

[19] The Defendant's counsel submit that the Plaintiff's Rule 404 claim is without merit, and indeed frivolous and vexatious. On that basis, the Defendant's counsel seek their costs of responding to the Rule 404, on a full indemnity basis, payable by the Plaintiff and/or the Plaintiff's counsel personally.

(6) Hearing of the Motion

[20] The motion was argued on December 10, 2020, via videoconference employing the Zoom platform. The Plaintiff's counsel presented argument in support of the summary judgment motion and, other than in relation to the costs component of the motion, the motion was unopposed by the Defendant. The position of the Defendant's counsel on the Rule 404 claim was advanced by another member of Mr. Reinkeluers' firm, to avoid the Rule 82 restrictions against a solicitor presenting argument based on their own affidavit. Mr. Reinkeluers appeared at the motion but made only brief submissions in opposition to the Plaintiff's claim for solicitor-client costs as against the Defendant.

III. **Issues**

[21] Broadly speaking, this motion raises the following issues for the Court's determination:

A. Is the Plaintiff entitled to summary judgment on its claim and the Defendant's counterclaim?

B. What is the appropriate disposition of costs?

IV. **Analysis**

A. *Is the Plaintiff entitled to summary judgement on its claim and the Defendant's counterclaim?*

(1) Whether there is a genuine issue for trial

[22] The burden is on a party seeking summary judgment to establish that there is no genuine issue for trial. However, the responding party must also "put their best foot forward" in their response (see *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 34).

[23] In the present matter, in part because the Defendant has offered no evidence or argument in response to the substance of the summary judgment motion, the Plaintiff easily meets its burden. The Plaintiff relies on the affidavit of its National Credit Manager, Susie Barbosa, to establish its claim. Ms. Barbosa's evidence establishes, with support from invoices, that the Defendant owes it seafreight totalling USD$53,442.82 plus CAD$150.00.

[24] With the benefit of the evidence and argument adduced by the Plaintiff on its motion, I am satisfied that the Defence and Counterclaim raise no genuine issue for trial. The Defence alleges that the minimum cargo volume of 4,099 CBM set out in the 2018 VIP is a mistake and was intended to be set at the actual 2017 LCL volume of 3204 CBM. However, there is no evidence to support this assertion. Moreover, the volume of cargo that falls within the scope of the 2018 VIP was below even the 3204 CBM figure. The terms of the 2018 VIP provide that the Defendant is entitled to a rebate only if it exceeded the minimum cargo volume. As such, the Counterclaim for that rebate must fail.

[25] Therefore, the defence of set-off contained in the Defence must also fail, as it is based on the rebate claim. In addition, the evidence establishes that the contractual relationship between the parties is governed by the CIFFA STCs, including a provision requiring the Defendant to pay all sums immediately when due without set-off. While the defence of set-off fails in any event, because there is no evidentiary support for a conclusion that any amounts are owing by the Plaintiff to the Defendant, the contractual prohibition against set-off is also relevant to the Plaintiff's arguments in support of its claim for punitive damages and solicitor-client costs (canvassed below).

(2) Principal Amount of Judgment

[26] The Plaintiff is therefore entitled to judgment for its principal claim of USD$53,442.82 plus CAD$150.00. Relying on the breach date rule explained by Justice Harrington in *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303 [*Agrimax*] at paras 19-23, the Plaintiff seeks to have the USD$53,442.82 figure converted to Canadian currency as of the date of the Defendant's breach in failing to pay the amounts due. The Plaintiff has selected November 15, 2018, the date on which it terminated its relationship with the Defendant, as the date of breach for purpose of the foreign currency conversion and the commencement of interest. I am satisfied that this is an appropriate date, as opposed to selecting various dates over the course of 2018 when individual invoices were due, particularly as this results in a conservative interest calculation.

[27] Employing the November 15, 2018 exchange rate of 1.3202 between the two currencies, the Plaintiff's USD$53,442.82 claim equals CAD$70,555.21. Adding the Canadian dollar claim component of CAD$150.00 produces a total principal claim component of CAD$70,705.21.

(3) Punitive Damages

[28] In its written materials in support of this motion, the Plaintiff also claims punitive damages of $25,000.00. It argues that: (a) without justification, the Defendant refused to pay amounts owing in excess of its claimed set-off; (b) the Defendant improperly raised set-off as an excuse for nonpayment contrary to the terms of the CIFFA STCs; and (c) the Defendant produced a document as part of its affidavit of documents that knowingly and deliberately misrepresented its 2018 VIP cargo volume. The Plaintiff asserts that the Defendant's conduct throughout the litigation has been high-handed, arbitrary and highly reprehensible, departing sufficiently from the ordinary standards of decent behaviour that the Court should award punitive damages.

[29] In support of its position, the Plaintiff relies on *Bauer Hockey Corp v Sport Maska Inc (Reebok-CCM Hockey)*, 2014 FCA 158, in which the Federal Court of Appeal explained that punitive damages are not limited to particular categories of claims and may be influenced by many factors including: (a) whether the misconduct was planned or deliberate; (b) the intent and motive of the defendant; (c) whether the conduct persisted over a lengthy period of time; (d) the defendant's subjective awareness that the conduct was wrong: and (e) whether the defendant profited from the conduct (at paras 19-21).

[30] I accept the Plaintiff's assertion that there appears to have been no merit to the various defence positions raised by the Defendant in this matter, and I agree that there are circumstances where persisting with unmeritorious litigation can give rise to punitive damages. However, I am

not convinced that the circumstances of this matter rise to that level. While one might infer that the Defendant was aware that its defence positions would not prevail, there is little direct evidence of this. Moreover, as the matter has proceeded to judgment in less than two years, it cannot be said that the Defendant's conduct persisted over a lengthy period of time. Nor has the Defendant profited from the conduct, given that the Plaintiff will receive prejudgment interest on its unpaid invoices.

[31] I therefore decline to award judgment for punitive damages.

(4) Interest

[32] In support of its interest calculation, the Plaintiff relies on paragraph 24 of *Agrimax*, which explains that pre-judgment interest in maritime cases is a function of damages, is at the Court's discretion and, if properly pleaded, runs from the date the debt was due. In that case, although noting that interest is often awarded at commercial rates, Justice Harrington considered it more appropriate, and just, to award both pre-judgment and post-judgment interest at the legal rate of 5%, as specified in the *Interest Act*, RSC 1985, c I-15. Section 3 of the *Interest Act* prescribes the rate of 5% per annum, whenever any interest is payable by agreement or by law and no rated is fixed.

[33] I am prepared to adopt the rate of 5% which, applied to the $70,705.21 principal figure to the date of Judgment on January 7, 2021, represents prejudgment interest of $7583.86. Post-judgment interest will also apply at the rate of 5% per annum.

B. *What is the appropriate disposition of costs?*

[34] The Plaintiff seeks costs on a solicitor-client basis against the Defendant and, under Rule 404, seeks to have certain components of those costs awarded against the Defendant's counsel personally. I will first address the claim for solicitor-client costs against the Defendant.

(1) Solicitor-Client Costs against Defendant

[35] In support of its claim for solicitor-client costs, the Plaintiff again raises the allegations that it asserted above in support of its claim for punitive damages, related to the Defendant taking unmeritorious positions in this litigation. The Plaintiff also raises allegations as to misconduct by the Defendant in its conduct of this litigation, related to the documentary production process and the scheduling of discovery examinations.

[36] I will return to the Plaintiff's misconduct allegations when addressing its Rule 404 claim. However, it is unnecessary for the Court to engage with the misconduct allegations, in the context of the Plaintiff's claim for an award of solicitor-client costs against the Defendant, as the Plaintiff has established a contractual basis for its claim. The Credit Agreement Terms provide that, in the event it becomes necessary for the Plaintiff to refer its account to counsel, all reasonable legal fees are to be paid by the Defendant. The Defendant has offered no evidence or argument disputing this contractual entitlement, and I agree with the Plaintiff's position that it is therefore entitled to receive its costs calculated on a solicitor-client basis.

[37] Turning to that calculation, I rely on an Amended Bill of Costs dated November 13, 2020, submitted by the Plaintiff with its written submissions in support of this motion, which details the legal fees and disbursements charged to the Plaintiff, with applicable HST, up to and including the anticipated appearance on the summary judgment motion in December 2020. The Bill of Costs identifies legal fees totaling $16,875.00, HST (on fees) of $2193.75, disbursements of $1778.62, and HST (on disbursements) of $173.30, for a total costs claim of $21,020.67.

[38] As previously noted, the Defendant's solicitor of record, Mr. Reinkeluers, made brief submissions on behalf of the Defendant at the hearing of the motion, in opposition to the Plaintiff's claim for solicitor-client costs as against the Defendant. The Defendant adopts the submissions advanced by Mr. Reinkeluers' colleague, on behalf of his firm in responding to the Rule 404 claim, to the effect that the allegations of misconduct in the conduct of the litigation are without merit. The Defendant also argues that the amount claimed by the Plaintiff for solicitor-client costs is excessive and, in particular, submits that a portion of the claim is *res judicata*, because it was already adjudicated on an interlocutory production motion earlier in this proceeding. I now turn to that latter submission, which has the potential to reduce the amount of the solicitor-client costs calculation.

[39] In August 2019, the Plaintiff filed a motion seeking to compel the Defendant to produce documents. The motion was scheduled to be heard on September 10, 2019, but was adjourned, because the Defendant produced its documents the day before. The Plaintiff sought its costs of the motion, asserting that the Plaintiff was required to bring the motion in order to advance the litigation because the Defendant had refused to comply with the production requirements of the

Rules. In support of its costs claim, the Plaintiff filed a Bill of Costs dated October 22, 2019, which detailed fees and disbursements, plus HST, totaling $4862.90, incurred in connection with the preparation of the motion record and preparation for the hearing of the production motion that had been adjourned.

[40] In the result, Justice Zinn issued an Order dated December 17, 2019, awarding the Plaintiff its costs of the motion, fixed at $750.00. The Defendant therefore takes the position that, in relation to $4862.90 of the Plaintiff's costs, incurred in connection with the production motion, the Plaintiff's costs claim is *res judicata*, as it has previously been asserted and adjudicated. Mr. Reinkeluers' affidavit attaches copies of the Plaintiff's written submissions to the Court in support of its costs claim on the production motion. While the Plaintiff does not characterize this as a solicitor-client costs claim, it does appear that the Plaintiff was seeking recovery of its full Bill of Costs totaling $4862.90.

[41] In response to the Defendant's *res judicata* argument, the Plaintiff submits that the judge who addresses a proceeding on its merits, and who therefore has the benefit of an understanding of the entire proceeding, retains the jurisdiction to award solicitor-clients costs related to the whole proceeding, notwithstanding that there have been previous interlocutory costs awards. The Plaintiff of course recognizes that it cannot receive double compensation and that its costs claim must in any event be reduced by the $750.00 awarded by Justice Zinn. Effectively, the Plaintiff argues that, in relation to the costs incurred in the production motion, it is entitled to a "top-up" on the $750.00 reward so as to receive costs at the solicitor-client level.

[42] Neither of the parties has cited authorities to guide the Court in addressing the *res judicata* argument. However, in *Turner-Lienaux v Campbell*, 2004 NSCA 41 [*Turner-Lienaux*], at paragraphs 33 to 48, the Nova Scotia Court of Appeal addresses an argument of this nature and cites applicable jurisprudence. In that case, the trial judge had awarded solicitor-client costs to the defendants. The subsequent taxation of costs was appealed to another judge of the Nova Scotia Supreme Court, who decided that the defendants should not be liable to pay the difference between the party-and-party costs awards that had been made on various interlocutory matters and the solicitor-client costs. That decision was appealed (and cross-appealed) to the Nova Scotia Court of Appeal, which noted that there were two lines of cases relevant to this issue (at para 44).

[43] In support of the potential availability of a “top-up,” the Court of Appeal identifies the following line of authority (at paras 35-39):

> 35 The appellant submits that since Justice Hood ruled that he should not "be put to any expense for his cost in defending the outrageous and scandalous allegations against him", and since she was aware of the numerous interlocutory applications and appeals, that implicit in her ruling is that she intended that the party and party costs should be increased to solicitor-client costs.
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> 36 The cases relied upon in support of this argument include three Ontario cases and one from the Federal Court: *Polish National Union of Canada Inc. - Mutual Benefit Society v. Palais Royale Ltd.* (1998), 163 D.L.R. (4th) 56 (Ont. C.A.); *131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, [1992] O.J. No. 3872 (Ont. Gen. Div.); *Benner & Associates Ltd. v. Northern Lights Distributing Inc.*, [1996] O.J. No. 3525 (Ont. Gen. Div.) and *Maison des Pâtes Pasta Bella Inc. v. Olivieri Foods Ltd.*, [1999] F.C.J. No. 213 (Fed. T.D.).
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> 37 The principle that emerges from these cases is generally that at the time of an interlocutory proceeding the Chambers judge in fixing or determining costs is acting in a procedural vacuum, isolated from the big picture. An award of solicitor-client costs is almost unheard of at that stage. The eventual outcome of the

proceeding is very uncertain and the Chambers judge has little insight as to the impact of the interlocutory order on the final determination. But after the trial, the trial judge has the entire context of the litigation, knows then which party has prevailed, whether the proceeding has been unduly prolonged, or whether there were unfounded scurrilous accusations by the unsuccessful party to such an extent that solicitor-client costs for the whole matter should be awarded. It is only then that the decision to fully indemnify the successful party can be made.

38 In the *Polish National Union of Canada Inc. - Mutual Benefit Society v. Palais Royale Ltd.* case, Morden, A.C.J.O. indicated in *obiter* that the top-up practice was acceptable where party-party costs had been ordered on an interlocutory matter, but not when the motions judge had ordered that there be no costs, or that the party ultimately successful after trial was not entitled to costs of the application. He said:

> 15 It was not open to the judge to award costs of a segment of the proceeding with respect to which there was an existing order providing, in effect, that the plaintiff was not entitled to those costs. This principle would not deprive a party who had been awarded costs of a motion on a party and party basis from having the costs provision "topped up" in an order at the end of the proceeding fixing costs of the proceeding on a solicitor and client basis.

39 In the *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* case, Blair, J., as he then was, endorsed the topping up practice, holding:

> 29 Costs were awarded to the defendants in certain interlocutory proceedings prior to trial and were presumably granted on a party-and-party basis. The plaintiff submits that the defendants should not now be entitled to recover costs on a different and higher scale.
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> 30 I do not agree. I see nothing to prevent the court from "topping up" a party's recovery in respect of the costs of such proceedings if, at the end of the trial, the judge is of the opinion - as I was - that the party is entitled to be reimbursed on the solicitor-and-client scale throughout. It is not a question of sitting on appeal from the interlocutory decision; it is simply a question of providing to the

> successful party the full indemnity that such an award envisions.

[44] The Court of Appeal described the second line of cases, holding that interlocutory costs awards are *res judicata*, as follows (at para 40):

> 40 The cases relied on by Ms. Turner-Lienaux and Smith's Field, the respondents on the cross appeal, include *Dickerson v. Radcliffe* (1900), 19 P.R. 223; *McDonald v. Crites* (1906), 7 O.W.R. 795 (Ont. Ch.); *Simone v. Toronto Sun Publishing Ltd.* (1979), 11 C.P.C. 340 (Ont. T.O.); *Van Bork v. Van Bork* (1994), 30 C.P.C. (3d) 116 (Ont. Gen. Div.) and, *Kabutey v. New- Form Manufacturing Co.*, [2000] O.J. No. 546 (Ont. S.C.J.). These cases generally stand for the proposition that the level of costs on interlocutory motions where a costs order has been made is *res judicata* and cannot be revisited by the trial judge or a judge subsequently presiding over a taxation. For example, in the *Simone v. Toronto Sun Publishing Ltd.* matter, Master Sedgwick stated:
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> > 5 The orders referred to above either awarded costs to the defendants in the cause - those orders of Master McBride dated January 17, 1977, of Master Davidson dated October 31, 1977, and of Mr. Justice Rutherford dated November 21, 1977; or awarded no costs - the order of Mr. Justice Steele dated February 2, 1977. In support of the defendants' objections, counsel submits that where the costs of an interlocutory motion had been disposed of the trial Judge has no power to alter the disposition of those costs. In support of this contention I have been referred to the following cases which I have read and considered: *McDonald v. Crites* (1906), 7 O.W.R. 795 and *Dickerson v. Radcliffe* (1900), 19 P.R. 223. The principle I take from these cases is that there is no power in the trial Judge to deal with the cost of an interlocutory motion if those costs have been awarded to one party or the other or if no order as to costs has been made. Mr. Justice Meredith said the following in the *Dickerson v. Radcliffe* case, at page 224: "It may be taken for granted that, if the order disposed of the costs one way or the other, there was no intention and no power, to alter such disposition of them. That is to say, the trial Judge

> could not deal with them as if hearing an appeal against the order. He could not, for instance, award costs to either party if the order provided that neither party should have the costs of it". The *McDonald v. Crites* case and the *Dickerson v. Radcliffe* case dealt with costs on a party and party scale. However, it does not seem to me that the above principle should be different notwithstanding that the costs are being taxed on a solicitor and client scale.

[45] In reconciling these two lines of authorities, the Nova Scotia Court of Appeal explained as follows (at para 44):

> 44 There appear to be sound principles underlying both lines of cases. I agree with Justice Goodfellow to the extent that any topping up, whether by way of a lump sum award or otherwise, is a matter for the trial judge not another judge hearing an appeal from a taxation. I would also agree that topping up should only occur as described by Morden, A.C.J.O. in the *Polish National Union of Canada Inc. - Mutual Benefit Society v. Palais Royale Ltd.* case. I would also agree with those cases that indicate that it would be inappropriate for a trial judge to change an award of costs made previously so that the first order is reversed. For example, if a defendant was awarded party and party costs on his motion to strike out a part of the statement of claim, and after trial the plaintiff was successful, the trial judge should not attempt to overrule the earlier order. Nor would it be appropriate for a trial judge to vary a costs order made by the Appeal Court. Presumably if the Appeal Court panel thought the appeal was a complete waste of time or was frivolous or vexatious, it would order solicitor-client costs on the interlocutory appeal.
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> [Emphasis in original.]

[46] In the result, *Turner-Lienaux* held that the Court below had not erred in refusing to allow a top-up upon costs that had been awarded in the introductory motions. In many, if not all, of the motions, solicitor-client costs had been claimed, but were denied by the Chambers judges. The

Court of Appeal was not prepared to "turn the clock back" to consider whether the burden of solicitor-client costs should be imposed on the defendants in connection with those motions, as those matters had not been addressed by the trial judge when awarding solicitor-client costs.

[47] It appears to me that principles similar to those canvassed in *Turner-Lienaux* have been applied in this Court. In *Maison des Pâtes Pasta Bella Inc v Olivieri Foods Ltd* (1999), 163 FTR 252 (FCTD) [*Maison des Pâtes*] at paras 9-12, Justice Muldoon followed *Polish National Union of Canada Inc - Mutual Benefit Society v Palais Royale Ltd* (1998), 163 DLR (4th) 56 (Ont CA) and other authorities from the first line of cases cited in *Turner-Lienaux*. In *Microsoft Corp v 9038-3746 Quebec Inc*, 2007 FC 659 [*Microsoft*] at paras 33-34, Justice Harrington followed *Maison des Pâtes*. However, Justice Harrington also noted that, in circumstances where specific amounts above the Tariff had been claimed on motions and such amounts had been awarded to reflect the Court's displeasure, those awards should not be reassessed at a later date.

[48] Applying these principles to the case at hand, I conclude that a top-up should be applied in connection with the production motion. This result would not represent in any way a reversal of Justice Zinn's decision to award the Plaintiff $750.00 in costs. Nor would it represent a reassessment of an amount that was awarded above the Tariff, of the sort identified in *Microsoft.*

[49] I appreciate that, in *Turner-Lienaux*, the Nova Scotia Court of Appeal upheld the decision not to top-up the costs awarded in interlocutory motions, where solicitor-client costs had been claimed in those motions and rejected by the Chambers judges. However, the Court of Appeal's decision turned in part on the fact the trial judge had not addressed, in the solicitor-client costs

award at trial, whether the burden of solicitor-client costs should be imposed on the defendants in connection with those motions.

[50] As the judge granting summary judgment and awarding solicitor-client costs, I have turned my mind to that question and consider it appropriate to apply a top-up to the costs of the production motion, because of the basis on which solicitor-client costs have been awarded. As previously noted, my award of solicitor-client costs turns not on findings of misconduct by the Defendant, but rather on the Plaintiff's contractual entitlement to reimbursement of its legal fees incurred in collecting amounts owed by the Defendant. I accept the Defendant's submission that the Plaintiff unsuccessfully sought the equivalent of solicitor-client costs on the production motion, but that claim was based on the misconduct allegations, not the contractual provisions. Of course, the principle of *res judicata* applies not only to points upon which a court was actually required by the parties to form an opinion and pronounced a judgement, but to every point which the parties might have brought forward at that time (see, e.g., *Maynard v Maynard*, [1951] SCR 346 (SCC) at para 32). However, the Plaintiff could not reasonably have been expected to assert the contractual claim for solicitor-client costs at an interlocutory stage in this proceeding.

[51] My Judgment will therefore award the Plaintiff costs based on the amounts set out in its Amended Bill of Costs dated November 13, 2020, subject to reduction by the $750.00 award granted by Justice Zinn and subject to adjustments resulting from the remaining issue on this motion, the claim under Rule 404, to which I now turn.

(2) Rule 404 Claim for Costs to be Paid Personally by the Defendant's Counsel

[52] Rule 404(1) provides as follows:

Liability of solicitor for costs	**Responsabilité de l'avocat**
404 (1) Where costs in a proceeding are incurred improperly or without reasonable cause or are wasted by undue delay or other misconduct or default, the Court may make an order against any solicitor whom it considers to be responsible, whether personally or through a servant or agent,	**404 (1)** Lorsque, dans une instance, des frais ont été engagés abusivement ou sans raison valable ou que des frais ont été occasionnés du fait d'un retard injustifié ou de quelque autre inconduite ou manquement, la Cour peut rendre l'une des ordonnances suivantes contre l'avocat qu'elle considère comme responsable, qu'il s'agisse de responsabilité personnelle ou de responsabilité du fait de ses préposés ou mandataires :
(a) directing the solicitor personally pay the costs of a party to the proceeding; or	**a)** une ordonnance enjoignant à l'avocat de payer luimême les dépens de toute partie à l'instance;
(b) disallowing the costs between the solicitor and the solicitor's client.	**b)** une ordonnance refusant d'accorder les dépens entre l'avocat et son client.

[53] The parties agree on the principles that should guide the Court in considering the Rule 404 claim. While not decided under the *Federal Courts Rules*, they agree that the governing authority is the decision of the Supreme Court of Canada in *Young v Young*, [1993] 4 SCR 3 [*Young*]. Both parties also rely on the more recent application of *Young* by the Ontario Court of Appeal in *Galganov v Russell (Township)*, 2012 ONCA 410 [*Galganov*], describing the governing principles as follows (at para 13):

> 13 The governing principles in awarding costs personally against a lawyer were set out by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at pp. 135-136:
>
> > The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. Any member of the legal

> profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.... [C]ourts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.
>
> [Emphasis in original.]

[54] *Galganov* describes a two-part test to determine the liability of a lawyer for costs (at paras 17-22). The first step is to inquire whether the lawyer's conduct caused costs to be incurred unnecessarily. The second step is to consider, as a matter of discretion and applying the extreme caution principle enunciated in *Young*, whether, in the circumstances, the imposition of costs against the lawyer personally is warranted.

[55] The Plaintiff's Rule 404 claim was the subject of a Supplementary Motion Record filed by the Plaintiff in the month before the hearing of the summary judgment motion, in support of its request for an order requiring full indemnity costs to be paid by the Defendant's counsel. That Motion Record includes the Amended Bill of Costs, totaling $21,020.67 inclusive of fees, disbursements and HST.

[56] However, at the hearing of the motion, the Plaintiff's counsel advised that it was not the Plaintiff's intention to seek a Rule 404 order in relation to the full amount of its solicitor-client costs claim. While the Plaintiff makes several allegations of misconduct on the part of the Defendant, it does not consider all those allegations to apply to the Defendant's counsel. Rather, there are particular stages in the litigation, which the Plaintiff asserts were delayed and made more costly by alleged misconduct by the Defendant's counsel. At the hearing, the Plaintiff's counsel identified the relevant portions of its Bill of Costs and quantified its Rule 404 claim based on 10 hours of legal fees plus $781.93 (inclusive of HST) in disbursements. At the applicable $375.00 hourly rate, this translates into a claim of $3750.00, plus HST of $487.50 and the $781.93 disbursements figure, for a total of $5019.43.

[57] I have identified in the "Background" section of these Reasons the nine categories of alleged misconduct that the Plaintiff levels at the Defendant's counsel. Broadly speaking, these break down into allegations related to four stages of this litigation: (a) the documentary production process; (b) the scheduling of discovery examinations; (c) settlement negotiations; and (d) this summary judgment motion. I will address the allegations in relation to each of these stages.

(a) *Documentary Production Process*

[58] First, the Plaintiff asserts that the Defendant's counsel ignored repeated demands for documentary production over a period of weeks, responding only under threat of professional misconduct allegations. In support of this assertion, Ms. Barbosa's affidavit attaches email correspondence from the Plaintiff's counsel to Defendant's counsel on May 27, 2019, June 5,

2019 and June 24, 2019, related to documentary production and other matters, and asserts that the Plaintiff's counsel received no response.

[59] In his affidavit, Mr. Reinkeluers denies that he ignored the Plaintiff's counsel's correspondence. He states that counsel exchanged a number of emails and other correspondence in or around mid-2019 regarding the issue of documentary production. However, the first correspondence between counsel attached to the affidavit is a letter dated August 7, 2019, which states that it is responding to an email dated August 6, 2019 from the Plaintiff's counsel. The first substantive paragraph of the Defendant's counsel's letter states as follows:

> As I have already repeatedly advised you, my client has extensive documents regarding this matter which are currently in the process of being compiled. During this process, my client discovered that your client was improperly "double dipping" by charging an advanced customs implementation ("ACI") fee to both my client and to its suppliers.

[60] The letter then advises that it is the Defendant's counsel's intention, in the interest of efficiency, to produce all the Defendant's relevant documents at once, when the documents relevant to the ACI issue have been assembled.

[61] The Plaintiff may be correct in asserting that the Defendant' counsel did not respond to its first few requests for documentary production. The evidence adduced by the Defendant's counsel does not establish otherwise. While the August 7, 2019 letter refers to the Defendant's counsel having repeatedly advised the Plaintiff's counsel of the extensive documents which are being compiled, it is not possible to conclude whether the timing or substance of that advice was

responsive to the Plaintiff's counsel's email correspondence of May 27, 2019, June 5, 2019 and June 24, 2019.

[62] However, while it goes without saying that solicitors should respond to correspondence from their litigation opponents and should do so as promptly as reasonably possible, the facts canvassed above do not begin to approach a circumstance where the *Young* principles would warrant awarding costs against counsel.

[63] Next, the Plaintiff alleges that the Defendant's counsel advanced the Defendant's false claims about compiling an extensive volume of documents, thereby delaying production. In support of this allegation, the Plaintiff notes that ultimately the Defendant produced an Affidavit of Documents with only ten documents in Schedule 1.

[64] In response, Mr. Reinkeluers deposes in his affidavit that, when he provided an unsworn Affidavit of Documents and Schedule 1 productions on September 9, 2019, prior to the scheduled hearing of the production motion, he explained to the Plaintiff's counsel in covering correspondence that the Affidavit of Documents did not include the Defendants' documents related to the ACI issue, which would require further production. Mr. Reinkeluers' affidavit attaches correspondence to this effect. It also attaches email correspondence dated October 28, 2019, which states that it is attaching a .ZIP file containing all documents currently obtained regarding the ACI issue, that the Defendant was still searching for documents related to this issue, and that the Defendant expected that further documents may be forthcoming.

[65] The evidence before the Court does not demonstrate how large a volume of documentation was contained in the .ZIP file produced on October 28, 2019. However, the Plaintiff has not established that the Defendant, let alone the Defendant's counsel, misrepresented its production efforts. Rather, the evidence supports the Defendant's position that it was still assembling documents when it made the relatively brief production in September 2019.

[66] One of the allegations upon which the Plaintiff focused significantly during oral submissions is the argument that that the Defendant's counsel demonstrated misconduct in knowingly refusing to comply with ongoing production obligations under the Rules, by failing to produce relevant documents that were already in their possession. The evidence establishes that, on August 7, 2019, the Defendant's counsel advised that their client was assembling documents relevant to the ACI at issue and intended to produce all relevant documents at once, rather than producing them in a piecemeal fashion as they are received. The Plaintiff asserts that, in taking this position, the Defendant's counsel was in breach of production obligations under the Rules and that, irrespective of client instructions, this represents professional misconduct worthy of sanction under Rule 404.

[67] In response, the Defendant's counsel argue that their position, that documents should be produced once they had all been assembled, rather than in a piecemeal fashion, was a reasonable one. More significantly, they assert that any complaint surrounding failure to meet production obligations must be levied at the Defendant, not its counsel, as a solicitor must act in accordance with its client's instructions in this regard. The Defendant's counsel also emphasize that the

Plaintiff is not entitled to disclosure of confidential communications between the Defendant and its counsel surrounding the manner in which documentary production would be approached.

[68] I agree with the Defendant's counsel's position on this point. In my view, whether a party may withhold production of documents until it has assembled all documents in its power possession or control, in a case where the other party resists that approach to production, is a question that will turn on the circumstances of each individual case. In the event counsel are unable to agree on the approach to production, that dispute can be resolved through case management or by motion. There is nothing in the circumstances of this case supporting a conclusion that the Defendant, let alone the Defendant's counsel, was taking a position on production that would warrant the sanction of solicitor-client costs.

[69] The Plaintiff notes that the Defendant produced its Affidavit of Documents, with ten documents attached, on the eve of the hearing of the Plaintiff's production motion. The Plaintiff argues this timing caused the Plaintiff's counsel to waste time preparing for the motion. I accept that, when one party brings a motion for compliance with the Rules, and the other party complies only at the last moment, that party may bear cost consequences. Indeed, in the case at hand, Justice Zinn ordered the Defendant to pay $750 in costs resulting from the adjourned production motion. However, there is no basis to conclude that the Defendant's counsel is to be blamed for the timing of the production.

[70] Finally, in connection with the production of documents, the Plaintiff asserts that the Defendant's counsel ignored the Plaintiff's specific concerns about the legitimacy of the

documentation supporting the Defendant's claim for a volume rebate. I understand this allegation to relate to the Plaintiff's concern that the document produced by the Defendant contained shipments that were outside of the terms of the 2018 VIP agreement.

[71] Correspondence attached to Ms. Barbosa's affidavit demonstrates that the Plaintiff's counsel wrote to the Defendant's counsel on October 3, 2019, seeking his position on this point. The Defendant's counsel responded that day, advising he would respond once he had a chance to discuss with his client. The Plaintiff's counsel renewed this inquiry October 23, 2019. While the Defendant's counsel replied on October 28, 2019 that he would provide a response in due course, Ms. Barbosa deposes in her affidavit that she is advised by the Plaintiff's counsel that he never received a response.

[72] In response to this allegation, the Defendant's counsel argues that there is no obligation in law requiring a lawyer to respond substantively to out-of-court inquiries from opposing counsel regarding the contents and legitimacy of the parties' productions. I have previously noted that solicitors should respond to correspondence from opposing counsel and do so as promptly as reasonably possible. However, the Plaintiff's complaint is not that its counsel received no response but rather that the Defendant's counsel did not engage substantively with the issue. I do not have the benefit of detailed submissions on this particular aspect of professional conduct, but the facts canvassed above again do not begin to approach a circumstance where the *Young* principles would warrant awarding costs against counsel.

(b) *Scheduling Discovery Examinations*

[73] The Plaintiff alleges that the Defendant's counsel first refused cooperation in scheduling discovery examinations and then afforded such cooperation but cancelled scheduled examinations on three occasions.

[74] In response to the allegation of lack of cooperation, the Defendant's counsel argue that they did not refuse cooperation. Rather, they took what they consider to be a legitimate position that examinations should not take place until after pleadings had been amended and documents exchanged regarding the ACI issue. The Plaintiff disagrees that this was a legitimate position, noting that pleadings were never amended to include allegations surrounding the ACI issue.

[75] While the Plaintiff is correct that pleadings were never amended, the evidence establishes that the Defendant's counsel provided the Plaintiff's counsel with a draft amended Counterclaim on October 4, 2019, seeking consent to the amendment. That consent was not forthcoming. The Defendant's counsel submits that, while their client intended to have the Counterclaim formally amended, the motion to do so was never brought because the parties soon became engaged in settlement negotiations. This submission is consistent with the timing of events in the last quarter of 2019. To the extent the Plaintiff is arguing that the proposed amendment of the Counterclaim was a tactic employed to delay scheduling discovery examinations, the evidence does not support that conclusion. There is certainly nothing unreasonable in proposing that discoveries not take place until after an intended amendment to the pleadings.

[76] The Plaintiff is also correct that there were three discovery dates scheduled and subsequently cancelled in late 2019. However, Mr. Reinkeluers' affidavit explains that the first

cancellation was due to the Defendant's representative being unavailable, the second due to that representative becoming ill, and the third because the parties had commenced settlement discussions that appeared likely to resolve the dispute. Again, the evidence demonstrates no questionable conduct by the Defendant's counsel.

(c) *Settlement Negotiations*

[77] The Plaintiff alleges that the Defendant undertook settlement negotiations in bad faith, with the cooperation of the Defendant's counsel. The Plaintiff bases this allegation on the fact that, in the final stages of the negotiation, the Defendant's counsel introduced a requirement for a so-called "non-disparagement clause," to which the Plaintiff would not agree.

[78] Mr. Reinkeluers' affidavit and correspondence attached thereto demonstrate that, in the final stages of the settlement negotiation in mid-December 2019, the Plaintiff's counsel took issue with the Defendant's counsel's request for a confidentiality clause, asserting that this was a last-minute addition to an agreement the chief terms of which had already been agreed. The Defendant's counsel's correspondence documents the Plaintiff's counsel's statement that the Plaintiff did not want to agree to a confidentiality clause, because it wanted to be able to tell others in the industry that the Defendant was a "deadbeat." As a result, the Defendant's counsel introduced a requirement for a non-disparagement clause. The Plaintiff's counsel subsequently advised that the Plaintiff was content with inclusion of a confidentiality clause but not with the proposed non-disparagement language. As a result, the settlement did not come to fruition.

[79] The evidence provides no support for the Plaintiff's allegation that either the Defendant or its counsel undertook settlement negotiations in bad faith. The late request for a non-disparagement clause appears to have been a direct and reasonable response to the suggestion conveyed by the Plaintiff's counsel that the Plaintiff intended to make disparaging comments about the Defendant.

(d) *Summary Judgment Motion*

[80] The Plaintiff alleges that the Defendant's counsel repeatedly sought extended timelines for replying to this motion, in spite of having no instructions to reply to the motion, and ultimately the Defendant failed to make any substantive appearance on the motion.

[81] The summary judgement motion was originally scheduled to be heard on June 8, 2020. However, this date was cancelled as a result of the Federal Court's practice directions in response to the COVID-19 pandemic. On September 28, 2020, counsel attended a case management conference, which resulted in the hearing being scheduled for December 10, 2020. The Defendant was ordered to provide its responding materials by October 19, 2020. Mr. Reinkeluers deposes in his affidavit that, shortly prior to this deadline, the Defendant made the decision not to deliver responding materials, and he communicated this decision to the Court by the deadline. The Court has no basis to doubt this evidence. I agree with the position advanced by the Defendant's counsel that making the decision not to deliver responding materials on this motion does not warrant that the imposition of solicitor-client costs against either the Defendant or its counsel.

[82] In conclusion, none of the allegations advanced by the Plaintiff support an award of solicitor-client costs against the Defendant's counsel under Rule 404.

(3) Costs Consequences of Unsuccessful Rule 404 Costs Claim

[83] The remaining question, arising from the Plaintiff's unsuccessful claim for solicitor-client costs under Rule 404, is how that unsuccessful claim should affect the costs awarded in this action and motion.

[84] As explained earlier in these Reasons, the Plaintiff will receive its costs of this action based on the amounts set out in its Amended Bill of Costs dated November 13, 2020, subject to a $750.00 reduction and adjustment resulting from the claim under Rule 404. That adjustment relates to the last item in the Plaintiff's Amended Bill of Costs, which claims $1200.00 in legal fees and $156.00 in HST (totalling $1356.00) associated with filing supplementary costs materials and attending the hearing of the summary judgement motion. The supplementary costs materials relate to the Rule 404 claim, on which the Plaintiff has not prevailed, and the bulk of the time spent arguing the motion also related to that claim. Therefore, the solicitor-client costs figure totaling $21,020.67 must be reduced by $750.00 and $1356.00, for a balance of $18,914.67.

[85] Also, the Defendant's counsel claim their costs of responding to the Rule 404 claim. They argue such costs should be awarded on a full indemnity basis, to be paid to the Defendant's law firm Devry Smith Frank LLP (or, in the alternative, to the Defendant) by the Plaintiff and/or the Plaintiff's counsel personally. In support of that position, the Defendant's counsel have filed

a Bill of Costs, calculating the legal fees attributable to responding to the Rule 404 claim as $13,775.00 in fees plus $1790.75 HST, for a total of $15,565.75. The Defendant's counsel advised at the hearing that, if costs were to be awarded to the Defendant's law firm as opposed to the Defendant, the HST figure wold not be applicable.

[86] The Plaintiff takes the position that, even if it does not succeed on the Rule 404 claim, it will still have met with divided success on this summary judgment motion such that, if any costs are to be awarded against it, they should be party-and-party costs based on Column III of Tariff B. The Plaintiff also argues that there is no basis for awarding such costs against the Plaintiff's counsel personally.

[87] There is nothing in the evidence before the Court suggesting that the Plaintiff's counsel pursued the Rule 404 claim without the benefit of client instructions, such as would warrant attributing that initiative to counsel rather than to the Plaintiff. However, in support of its position that the Plaintiff's counsel should personally bear these costs, the Defendant argues that there are certain lines that counsel should not cross, even pursuant to client instructions, and that the pursuit of this Rule 404 claim crossed such a line. The Defendant relies significantly on correspondence between counsel in November 2020, in which the Defendant's counsel advised that, if the Plaintiff did not withdraw the Rule 404 claim, the Defendant's counsel would be seeking costs of responding to that claim on a full indemnity basis. The Plaintiff's counsel responded that the claim would not be withdrawn. The Defendant's counsel rely on the following statement in the Plaintiff's counsel's response:

> I find your conduct reprehensible and unprofessional, and your client is clearly a rogue with no respect for the Court or the Rules

> who will spend another year avoiding enforcement once I get a judgement, so the order for the costs I obtain against you may be the only satisfaction my client ever gets in this matter.

[88] The Defendant's counsel argue that this statement demonstrates an inappropriate motivation for pursuing a Rule 404 claim, i.e. pursuing a claim against counsel personally because of concern about inability to enforce a judgment against the Defendant. They refer the Court to *Ip v Tsio*, 2017 ONSC 3752 [*Ip*], in which the successful defendant sought costs against the plaintiff's counsel, primarily on the basis that collecting the costs from the foreign plaintiff would be difficult, although also asserting carelessness and possible negligence on the part of the plaintiff's counsel. In rejecting that position, the Court held as follows (at para 9):

> 9 In this case however, counsel's conduct in no way rises to the level of impropriety that warrants an order requiring him to pay Mr. Tsoi's costs. The fact that Ms. Ip resides in Hong Kong and has no assets in Ontario is not persuasive. Our litigation process in Ontario has remedies to address impecunious or extra-jurisdictional litigants. Awarding costs against one such litigants' counsel, is not one of them. To do so would have a chilling effect on representation available to foreign litigants who are required to litigate claims in Ontario. This is not an intended or desired effect of Rule 57.07. Counsel's misstatements in the materials also do not rise to the level of sanction by the Court.

[89] I note that, while the Court in *Ip* rejected the effort to impose costs on the plaintiff's counsel, it also did not award the costs of that unsuccessful effort against the defendant's counsel.

[90] I agree with the principle expressed in *Ip*, and I would not rule out the possibility that an effort to impose costs on counsel, motivated principally by increasing the prospects of judgment recovery, could in certain circumstances warrant a costs award against the lawyers pursuing that

initiative, even on the instructions of their client. However, I do not find such circumstances to exits in the present case. While I have found little merit to the Plaintiff's allegations against the Defendant's counsel, the correspondence between counsel throughout the litigation makes it clear that either the Plaintiff or its counsel genuinely believed in the legitimacy of its allegations. Of course, that belief does not make those allegations any more meritorious or insulate the Plaintiff from a costs award for pursing unmeritorious allegations under Rule 404. However, in these circumstances, I do not regard the Plaintiff's counsel's reference to the increased prospects of judgment recovery to warrant imposing such costs on counsel personally.

[91] Turning to the appropriate quantum of costs, I do not consider the Plaintiff's assertion of the Rule 404 claim to be so scandalous or outrageous to warrant an award of costs on a solicitor-client or full indemnity basis. However, the claim is sufficiently lacking in merit that I do find an award of elevated costs to be appropriate. Guided roughly by Column V of Tariff B, applied to the requirement for the Defendant's counsel to prepare responding motion materials and for two members of the firm to attend a hearing of approximately four hours, I award lump sum costs fixed at $5000.00 all-inclusive. Those costs will be payable by the Plaintiff. I also agree with the Defendant's counsel's primary positon that these costs should be awarded to their firm. My Judgment will so reflect.

JUDGMENT IN T-418-19

THIS COURT'S JUDGMENT is that:

1. The Plaintiff is granted summary judgment against the Defendant in the principal amount of $70,705.21, plus pre-judgment interest of $7583.86.

2. The Defendant's counterclaim is dismissed.

3. The Defendant shall pay the Plaintiff's costs of this action on a solicitor-client basis in the all-inclusive amount of $18,914.67.

4. The Plaintiff shall pay the Defendant's counsel, Devry Smith Frank LLP, costs of responding to the Rule 404 claim in this motion, in the all-inclusive amount of $5000.00.

5. Post-judgment interest shall apply to the above amounts at the rate of 5% per annum.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-418-19
STYLE OF CAUSE:	KUEHNE & NAGEL V HARMAN INC.
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 10, 2020
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 7, 2021

APPEARANCES:

Gavin Magrath	FOR THE PLAINTIFF
Nicholas Reinkeluers	FOR THE DEFENDANT
Larry Keown	FOR THE DEFENDANT'S COUNSEL

SOLICITORS OF RECORD:

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Devry Smith Frank LLP Toronto, Ontario	FOR THE DEFENDANT
Devry Smith Frank LLP Toronto, Ontario	FOR THE DEFENDANT'S COUNSEL