Federal Court Cour fédérale

Date: 20200512

Docket: T-1526-12

Citation: 2020 FC 610

Ottawa, Ontario, May 12, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

IAMGOLD CORPORATION
AND
NIOBEC INC

Plaintiffs

and

HAPAG-LLOYD AG, HAPAG-LLOYD (CANADA) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL M/V "OOCL MONTREAL"

Defendants

SUPPLEMENTARY JUDGMENT AND REASONS

I. Overview

[1] This Supplementary Judgment and Reasons addresses interest and costs of the within action, which involved the loss of three containers from the Plaintiffs' cargo of ferroniobium. These containers were stolen from the terminal in Antwerp, Belgium in the course of being

transported by the Defendant, Hapag-Lloyd AG [Hapag-Lloyd], from Montréal to Antwerp by ship, and then from Antwerp to Moerdijk, Netherlands by truck. Hapag-Lloyd admitted liability for purposes of resolving this action, but the parties disagreed on the limitation of liability that applied to the loss. Resolution of that issue turned on whether, under German law, loss of the cargo occurred during the ocean leg or the road leg of the multimodal carriage.

[2] That issue was addressed through a motion for summary trial, argued in Montréal on October 22-23, 2019. Each party filed evidence from an expert in German law, who gave brief evidence in chief, based on his report(s) filed with the Court, and was cross-examined by the opposing party's counsel. Each party then presented argument based on the expert evidence.

[3] On November 26, 2019, I released my decision (see *Iamgold Corporation v Hapag-Lloyd AG*, 2019 FC 1514, for the Judgment and Reasons), finding in favour of the Plaintiffs (i.e. that the loss of the cargo occurred on the road leg of the carriage and that the loss is therefore subject to the limitation of liability applicable to road carriage under German law) and granting judgment in the principal amount of $872,909.57 [the Judgment]. That decision also afforded the parties an opportunity to reach agreement on interest and costs or, failing that, to propose a process for adjudication of those issues.

[4] The parties did not reach agreement on interest and costs. Each party filed written submissions supported by affidavits, the Plaintiffs filed written submissions in reply to those of Hapag-Lloyd, and I heard oral argument by teleconference on April 30, 2020.

[5] For the Reasons explained below, I am awarding the Plaintiffs costs in the lump sum amount of $73,500.00, plus disbursements of $128,192.96, for a total of $201,692.96. I am also awarding pre-judgment interest and post-judgment interest at 5% per annum.

II. **Position of the Plaintiffs**

[6] The Plaintiffs urge the Court to award costs on a lump sum basis in the amount of $286,108.04, consisting of: (a) a lump sum of $125,000.00 for legal fees; (b) $16,250.00 Harmonized Sales Tax [HST] thereon; (c) disbursements of $128,192.96; and (d) $16,665.08 HST thereon. The Plaintiffs have filed affidavit evidence itemizing their legal fees and disbursements and identifying service upon the Defendants in October 21, 2013 of a formal offer to settle in the amount of $841,928.69 plus interest and costs.

[7] The Plaintiffs' legal fees total $156,000.00, and they claim a costs award based on approximately 50% of the fees incurred up until the date of the offer to settle and 85% thereafter, totalling $126,385.90. They claim the entirety of their disbursements ($128,192.96), of which $118,036.99 represents fees paid to the Plaintiffs' expert who testified at the summary trial.

[8] The Plaintiffs also filed a Draft Bill of Costs, calculating costs (exclusive of disbursements) according to Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106 [the Rules], for a total of $13,500.00. The Plaintiffs refer to this figure in support of their position that costs calculated under the Tariff would be inadequate and that a lump sum amount, based on a percentage of their legal fees, should be awarded.

[9] With respect to interest, the Plaintiffs claim 5% from the date of loss (August 12, 2011) to the date of the Judgment, plus post-judgment interest at the same rate. They rely on the 5% rate prescribed by s 3 of the *Interest Act*, RSC 1985, c I-15 [*Interest Act*], and argue in the alternative that this rate represents an appropriate commercial rate of interest. The Plaintiffs calculate pre-judgment interest based on that rate to total $361,893.76.

III. **Position of Hapag-Lloyd**

[10] Hapag-Lloyd objects to the Court awarding costs on a lump sum basis and argues the Court should award the $13,500.00 figure calculated by the Plaintiffs under Tariff B. It also claims certain aspects of the Plaintiffs' actual fees are unreasonable. With respect to disbursements, Hapag-Lloyd argues the hourly rate of the Plaintiffs' expert should be capped at the rate charged by its senior Canadian counsel and asserts the expert performed unnecessary and excessive work. Hapag-Lloyd also takes the position that the Plaintiffs are not entitled to reimbursement of HST in respect of fees or disbursements.

[11] For interest, Hapag-Lloyd submits the Court should employ a pre-judgment rate of 3% and a post-judgment rate of 3.95%. It supports this submission with evidence as to the prime lending rate of the Bank of Montreal over relevant time periods. Hapag-Lloyd also argues the Plaintiffs were not diligent in pursing their action and that the interest award should be reduced accordingly.

IV. **Analysis**

A. ***Suitability of a Lump Sum Costs Award***

[12] The Plaintiffs argue the current approach to costs in Federal Court and Federal Court of Appeal jurisprudence favours awarding costs as a lump sum, fixed as a percentage of the legal fees a party actually incurred. They rely on the relatively recent decisions of the Federal Court of Appeal in *Nova Chemicals Corporation v The Dow Chemical Company*, 2017 FCA 25 [*Nova Chemicals*] and of this Court in *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 [*Loblaws*], which employed such an approach.

[13] In contrast, Hapag-Lloyd refers the Court to *Barzelex Inc v Ebn Waleed (The)*, [1999] FCJ No 2002 (FC) [*Ebn Waleed*], in which Justice Hugessen addressed costs in a case involving an issue somewhat similar to the case at hand. That litigation turned on whether the defendant's liability was governed by a limitation under the Hague Visby Rules or under Turkish law, and this question was resolved in a summary manner based on the expert testimony of Turkish lawyers. Justice Hugessen concluded that, while the point at issue in the case was novel, it was not exceptionally difficult, and awarded costs based on Column III of Tariff B, although at the high end of the Column III range. Pursuant to Rule 420, the Court doubled the costs accrued following service of a relevant offer to settle.

[14] Hapag-Lloyd submits the case at bar is analogous to *Ebn Waleed* and Column III of Tariff B is a suitable basis for calculation of costs in the present matter. It also notes the

following guidance from *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 [*Eurocopter*], at paragraph 20 [underlining emphasis added]:

> [20] The importance and complexity of the case and the amount of work required (Rule 400(3)(*c*) and (*g*) of the Rules) often prove determinative of the scale of costs (see *Apotex Inc v Sanofi-Aventis*, 2012 FC 318 at paras 5-8, [2012] FCJ 435 [*Apotex*]). In fact, unless the Court orders otherwise, Rule 407 requires that costs be assessed at the mid-point of column III of the table to Tariff B along with certain additional fees and disbursements. Tariff B "represents a compromise between compensating the successful party and burdening the unsuccessful party" and "reflects the philosophy that party and party costs should bear a reasonable relationship to the actual costs of litigation, while preserving the discretion of the court and the assessment officer as that discretion is permitted under the Rules": *Wellcome Foundation Ltd*, above, at paras 5-7. The jurisprudence also establishes that "where an award of increased costs is warranted, the Court should first determine whether an award of costs that is reasonable is possible within the scope of Tariff B. Only where that would dictate an unreasonable or unsatisfactory result, should the Court consider awarding an amount in excess of the Tariff": *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403 at para 12.

[15] I agree with the Plaintiffs that recent jurisprudence favours recourse to a lump sum award. In *Nova Chemicals*, at paragraph 16, the Federal Court of Appeal referred to the practice of awarding lump sum costs, as a percentage of actual costs reasonably incurred, as well established in the jurisprudence, particularly when dealing with sophisticated parties. The Federal Court of Appeal has recently cited these passages from *Nova Chemicals* with approval in *Sports Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paragraph 50. In *Loblaws*, I relied on this jurisprudence in concluding it was appropriate to award lump sum costs, based on a percentage of the successful party's legal fees (at para 8).

[16] Hapag-Lloyd has not convinced me that the approach to costs taken in *Ebn Waleed* suggests the present case is inappropriate for a lump sum award. Indeed, Justice Hugessen expressed the view that the Court, as a matter of policy, should favour lump sum costs orders; he was prepared to issue such an order, albeit based on calculations under the Tariff (at para 11). Similarly, the Court in *Eurocopter* noted its discretion to award costs as a lump sum (at para 17) and to award costs that exceed calculations under the Tariff, where such calculations would represent an unreasonable or unsatisfactory result (at para 20).

[17] As noted by the Federal Court of Appeal in *Nova Chemicals* at paragraph 13, the Tariff amounts can be inadequate for achieving the objective of making a reasonable contribution to the costs of litigation. This does not mean that costs in excess of the Tariff can be justified simply on the basis that the successful party's actual fees are significantly higher than the Tariff amounts. Rather, the successful party must justify the costs award it seeks.

[18] The trend in recent case law has favoured awards based on a percentage of actual costs when dealing with sophisticated commercial parties (who tend to have the means to pay for the legal choices they make) and often results in awards between 25% and 50% of actual fees. However, there may be cases where a higher or lower percentage is warranted. The Court requires sufficient evidence of the nature and extent of the services provided to be satisfied that the actual fees incurred, and the percentage awarded, are reasonable in the context of the litigation, taking into account the criteria in Rule 400(3) (see *Nova Chemicals* at paras 13-16).

[19] To satisfy this burden, the Plaintiffs have filed evidence of their solicitors' time docket entries and resulting fees, totalling approximately $156,000.00. They argue an award under Column III of the Tariff, which they calculate at $13,500.00, would represent wholly inadequate compensation for those fees. I agree with this submission, subject to considering Hapag-Lloyd's argument that the $156,000.00 figure is itself unreasonable.

[20] Hapag-Lloyd notes that the Plaintiffs' solicitors' time entries indicate they retained Dr. Schwampe, their expert on German law who filed reports and testified at the summary trial, only in the fall of 2017. Between the commencement of the time entries in 2012 and such retention, the Plaintiffs devoted significant time to consulting one or more other experts, in particular a Professor Clarke, who appears to be an expert on Belgian law and the Convention on the Contract for the International Carriage of Goods by Road [CMR]. Although the loss in this case occurred in Belgium, Hapag-Lloyd notes it pleaded the application of German law in the Statement of Defence it filed in October 2012.

[21] I appreciate that, ultimately, both parties relied on German law at the trial of this matter, and Professor Clarke was not called as an expert. However, I agree with the Plaintiffs' submission that it is not unusual in the course of litigation for parties to explore avenues and experts that do not end up forming part of the case at trial. Hapag-Lloyd has not convinced me, in the context of this case, that activities pre-dating the retention of Dr. Schwampe were not undertaken reasonably in the pursuit of the Plaintiffs' action. I note in particular that the parties were eventually able to distill the issues in this matter, such that they could be resolved

efficiently through a summary trial. While both parties can be commended for this achievement, it is reasonable for that distillation process itself to have involved some level of effort.

[22] Hapag-Lloyd also notes over five timekeepers employed by the Plaintiffs' law firm involved in the file over the years. Hapag-Lloyd argues that transitions between lawyers would necessarily have resulted in inefficiencies and unnecessary costs. The Plaintiffs note these timekeepers were a combination of lawyers and students. While it appears the file transitioned between lawyers as associates left and joined the firm, Hapag-Lloyd has not identified any particular aspects of the work or fees reflected in the time entries that were unnecessary and/or caused by such transitions.

[23] In summary on this point, I find no basis to conclude that the Plaintiffs' solicitors' fees of $156,000.00 are unreasonable. It is appropriate to employ a lump sum costs award, calculated as a percentage of those fees, which represents more appropriate compensation than would the $13,500.00 figure that Hapag-Lloyd advocates. I therefore turn to the Rule 400(3) factors to determine an appropriate percentage to apply.

B. ***Determination of an Appropriate Percentage***

[24] As previously noted, lump sum costs awards applied to cases involving sophisticated commercial parties tend to range between 25% and 50% of actual legal fees, although some cases may warrant a higher or lower percentage. The Plaintiffs propose the Court award costs of 50% of their fees incurred up to the formal offer to settle and 85% of the fees incurred thereafter.

In support of that position, the Plaintiffs emphasize the following factors suggested by Rule 400(3):

(1) **Result of the proceeding, amounts claimed, and amounts recovered**

[25] The Plaintiffs correctly assert they were entirely successful in this proceeding. While the amount originally claimed in the Statement of Claim was $2,000,000.00, the position the Plaintiffs asserted through the summary trial process was based on entitlement to 8.33 International Monetary Fund Special Drawing Rights per kilogram of cargo lost. This was the amount ultimately recovered. This factor favours the Plaintiffs.

(2) **Importance of the case and complexity of the issues**

[26] The Plaintiffs assert this case involved novel issues of moderate importance and complexity. Hapag-Lloyd accepts that the previously undetermined issue of German law was novel but disagrees it was complex. I agree with Hapag-Lloyd that the sole issue addressed in the summary trial in this matter, while novel, was not complex. There is also no evidence that the issue was particularly important to the parties, outside the resolution of this one dispute. Moreover, it was adjudicated though a summary procedure. This factor favours Hapag-Lloyd.

(3) **Apportionment of liability**

[27] Hapag-Lloyd admitted liability for purposes of the summary trial. Therefore, I do not consider this factor significant to the costs award.

(4) **Any written offer to settle**

[28] The Plaintiffs refer to two written offers to settle that they extended to Hapag-Lloyd over the course of the litigation. The relevant offer for purposes of costs is the first, a formal offer to settle extended on October 21, 2013. The Plaintiffs offered to settle their claim for the amount of $841,928.69 plus interest and costs to be agreed. This amount is less than the amount awarded in the Judgment. I consider this a very significant factor in determining an appropriate costs award.

(5) **Amount of work**

[29] The Plaintiffs argue the amount of work involved in this case was extensive, because it required consulting with a number of experts on the CMR and German law in order to address a novel issue. The Plaintiffs also assert that the negotiation of the Agreed Statement of Facts employed in the summary trial took substantial effort. I have previously found the efforts involved in consulting experts to be legitimate. Rather than warranting an elevated percentage, I consider the appropriate approach is to apply the selected percentage to the entirety of the Plaintiffs' legal fees.

(6) **Conduct that tended to shorten or unnecessarily lengthen the proceeding**

[30] The Plaintiffs assert they took the lead in trying to shorten this proceeding by proposing a summary procedure, dealt with by way of an agreed statement of facts and expert evidence, without the need for a full trial. They also assert Hapag-Lloyd was unresponsive to requests to

agree to the proposed statement of facts for a significant period of time (between 2016 and 2019).

[31] Hapag-Lloyd denies this assertion and argues the Plaintiffs were responsible for delays in the resolution of this matter. Noting the Plaintiffs did not retain Dr. Schwampe until 2017, Hapag-Lloyd asserts the Plaintiffs failed to pursue their case with diligence.

[32] The only evidence before the Court as to the steps taken by the parties in this proceeding, and their timing, is the Plaintiffs' solicitors' time entries docket. Neither party filed evidence of correspondence between counsel, for example, in support of its position that the other unnecessarily delayed advancement of the proceeding. There is insufficient evidence to support either party's characterization of events. I find this factor does not favour either party.

(7) **Failure of a party to admit anything that should have been admitted**

[33] The Plaintiffs assert Hapag-Lloyd failed to admit it was liable for the loss of the cargo and subject to CMR limits, which necessitated this proceeding. However, Hapag-Lloyd admitted liability for purposes of the summary trial and agreed to the facts necessary to place before the Court the issue of which limitation regime governed the loss. I have already acknowledged this proceeding dealt with a novel issue. I do not find this factor to assist the Plaintiffs.

(8) Whether the expense required to have an expert witness give evidence was justified

[34] The Plaintiffs argue their expert witness expense was justified, because this case turned on expert evidence as to German law. I agree. However, the legal fees associated with preparing the expert evidence take this point into account. In my view, this factor does not warrant an elevated percentage. The claim for disbursements for Dr. Schwampe's expert fees will be addressed later in this analysis.

(9) Other Relevant Matters

[35] As further matters they considers relevant, the Plaintiffs argue it would be unfair to apply the Tariff, as they were forced to litigate this case to a summary trial, at which they were fully successful, notwithstanding prior efforts to settle the case for an amount less than the figure ultimately awarded. However, these points have already been referenced earlier in this analysis.

(10) Conclusion on the appropriate percentage

[36] Considering all the above, but for the moment excluding the effect of the Plaintiffs' offer to settle, I find the circumstances of this matter support a lump sum costs award in the 25% to 50% range contemplated by applicable jurisprudence, but at the bottom of that range. My award will include approximately 25% of the Plaintiffs' actual legal fees to the date of the offer to settle (October 21, 2013). However, for the fees incurred following that date, I find it appropriate to apply Rule 420(3), providing for costs at double that rate. My award will therefore include approximately 50% of the Plaintiffs' fees following the date of the offer.

[37] The document filed by the Plaintiffs setting out its legal fees calculates those fees to total $18,989.50 to October 21, 2013 and $137,519.00 thereafter. This portion of the costs award will therefore be based on approximately 25% of $18,989.50 plus 50% of $137,519.00, rounded to a total of $73,500.00. The issue of the Plaintiffs' claim for applicable HST will be addressed later in these Reasons.

C. ***Disbursements***

[38] The Plaintiffs claims disbursement totalling $128,192.96 plus applicable HST. Of that figure, $118,036.99 relates to expert fees (including travel expenses) charged by Dr. Schwampe, the Plaintiffs' expert on German law.

[39] Hapag-Lloyd challenges the reasonableness of the Plaintiffs' claim for Dr. Schwampe's fees and expenses. It argues his hourly rate of EUR 420, converted to CAD 631 (at the exchange rate of EUR 1 = CAD 1.50262878 employed by the Plaintiffs) should be capped at the CAD 550 rate of the Plaintiffs' most senior Canadian counsel. Based on exchange rate research it performed, Hapag-Lloyd also argues a more reasonable exchange rate would be EUR 1 = CAD 1.48. Finally, it argues that Dr. Schwampe's charge sheets show unnecessary and excessive work, and it submits the recovery for his bills should be reduced to $50,000.00 plus provable disbursements.

[40] With respect to the proposed hourly rate cap, Hapag-Lloyd relies on *Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 18, and the cases cited therein:

> [18] Apotex has contested that amounts claimed by several of Lilly's experts (which in some cases appear to exceed $1000.00 per hour) and in reply Lilly has conceded that it would be appropriate to limit expert fees at the amount charged by senior counsel for similar time involvement, as has been done in other cases (see, for example, *Teva Canada* at para 116; *ABB Technology AG v Hyundai Heavy Industries Co., Ltd.*, 2013 FC 1050 at para 10). I concur that this is appropriate and accordingly find that expert fees should be capped at the amount charged by senior counsel for similar time involvement.

[41] I accept the merits of this approach in cases where there is need to place a limit on expert fees charged at what could be considered excessive hourly rates. However, I agree with the Plaintiffs' submission that there is no principle of general application that expert hourly rates cannot exceed that of a party's most senior counsel. As the Plaintiffs submit, such a rule could have adverse consequences, as it could penalize parties who are content to assign work to more junior or otherwise less expensive counsel and motivate choices that increase the cost of litigation.

[42] In the present case, the Plaintiffs (and indeed the Defendants) necessarily retained as their expert witnesses experienced members of the German maritime law bar. As noted in the Trial Decision, Dr. Schwampe has been practicing law for 34 years, specializing in transport law and marine insurance law. He received a PhD in law in 1984, has taught transport law at the Law Faculty of the University of Hamburg since 2011, and was appointed as a Professor in 2013. His qualifications are considerable, he practices in a legal market in another jurisdiction, and his rate is only (approximately) 15% higher than the rate of the Plaintiffs' Canadian counsel. I do not find his hourly rate unreasonable.

[43] The difference resulting from applying the exchange rate proposed by Hapag-Lloyd would be very small. That rate is based on information published by the Bank of Canada for approximately January 1, 2018 and October 22, 2019. Hapag-Lloyd has not explained how it selected those particular dates. Moreover, I understand the Plaintiffs' evidence to identify the actual cost in Canadian dollars incurred in paying the foreign currency invoices. I find no basis to depart from those figures.

[44] Finally, I find no merit to Hapag-Lloyd's assertion that Dr. Schwampe performed unnecessary or excessive work. I agree with the Plaintiffs' submission that this is a bald assertion, unsupported by any detail as to aspects of Dr. Schwampe's work that could be characterized as unnecessary. I also note Hapag-Lloyd has not filed any evidence of its own experts' fees to support a conclusion that this litigation could have been addressed at less expense.

[45] In summary, I find the Plaintiffs' claim for disbursements totalling $128,192.96 to be reasonable and recoverable. I will now address their claim for HST applicable to both legal fees and disbursements.

D. ***Harmonized Sales Tax***

[46] The Plaintiffs claim HST (at the rate of 13% applicable in the Province of Ontario, where their counsel are based) upon the lump sum costs awarded in respect of their legal fees and upon the recoverable disbursements. Hapag-Lloyd has raised various arguments in support of their position that HST should not have been applied to the accounts for the disbursements to Dr.

Schwampe and that, in any event, no HST should be recoverable by the Plaintiffs through the present costs claim, because the Plaintiffs can recover the HST through input tax credits and are therefore not out of pocket for these amounts.

[47] I find merit to this latter argument. Hapag-Lloyd refers the Court to decisions of other courts that have accepted this argument in adjudicating costs claims. In the most recent of these authorities, *Sun Life Assurance Company of Canada v The Queen*, 2015 TCC 171, the Tax Court of Canada disallowed the applicant's costs claim for HST on fees and disbursements to the extent the HST was recoverable through input tax credits (at para 35).

[48] To similar effect, in *Perry v Heywood* (1997), 492 APR 183 (NLTD) [*Perry*], the Newfoundland Supreme Court, Trial Division analyzed in detail the successful party's entitlement to claim an input tax credit under the *Excise Tax Act*, RSC, 1985, c E-15. The Court disallowed that party's claim for HST and the related Goods and Services Tax [GST] applicable to its counsel fees and disbursements, on the basis that including these amounts in a costs award would represent a windfall for that party, if they could retrieve the amounts through input tax credits (at paras 89-99). The Court also distinguished authorities where, in making lump sum awards in lieu of taxed costs, allowances were made for GST on counsel fees. In those cases, there was no evidence as to the status of parties as registrants under the *Excise Tax Act*, nor was consideration given to the applicable provisions of that statute, underlying the entitlement to an input tax credit (at paras 98-99).

[49] In the case at hand, the availability of input tax credits has been raised. While there is no evidence before the Court as to the Plaintiffs' status as registrants under the *Excise Tax Act*, Hapag-Lloyd notes the Plaintiffs are Canadian companies (described in the Statement of Claim as incorporated under the laws of Canada with head offices in Toronto, Ontario). That information does not necessarily translate into a conclusion that the Plaintiffs are registrants. However, the Plaintiffs have not taken the position that they are unable to recover the HST through input tax credits. Rather, they rely on the particular provisions of Tariff B as a means of distinguishing the authorities upon which Hapag-Lloyd relies.

[50] Section 1 of Tariff B provides as follows [underlining emphasis added]:

Federal Courts Rules, SOR/98-106	***Règles des Cours fédérales, DORS/98-106***
TARIFF B	**TARIF B**
(Rules 400 and 407)	**(Règles 400 et 407)**
Counsel Fees and Disbursements Allowable on Assessment	***Honoraires des avocats et débours qui peuvent être acceptés aux fins de la taxation des frais***
Bill of costs	**Mémoire de frais**
1 (1) A party seeking an assessment of costs in accordance with this Tariff shall prepare and file a bill of costs.	**1 (1)** La partie qui demande la taxation des frais selon le présent tarif prépare et dépose un mémoire de frais.
Content of bill of costs	**Contenu**
(2) A bill of costs shall indicate the assessable service, the column and the number of units sought in accordance with the table to this Tariff and, where the service is based on a number of hours, shall indicate the number of hours claimed and be supported by evidence thereof.	**(2)** Le mémoire de frais indique, pour chaque service à taxer, la colonne applicable et le nombre d'unités demandé selon le tableau ainsi que, lorsque le service est taxable selon un nombre d'heures, le nombre d'heures réclamé, avec preuve à l'appui.

Disbursements	**Débours**
(3) A bill of costs shall include disbursements, including	**(3)** Le mémoire de frais comprend les débours, notamment :
(a) payments to witnesses under Tariff A; and	**(a)** les sommes versées aux témoins selon le tarif A;
(b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.	**(b)** les taxes sur les services, les taxes de vente, les taxes d'utilisation ou de consommation payées ou à payer sur les honoraires d'avocat et sur les débours acceptés selon le présent tarif.
Evidence of disbursements	**Preuve**
(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.	**(4)** À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

[51] The Plaintiffs note that s 1(3)(b) expressly provides that a bill of costs shall include disbursements including "any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements". Therefore, they submit, this Court's Rules expressly contemplate recovery of taxes such as HST, and authorities to the contrary from other courts, based on their own rules of practice, are inapplicable. The Plaintiffs find support for their position in *Englander v Telus Communications*, 2004 FC 276 [*Englander*], at paragraphs 13 to 18, in which an Assessment Officer of this Court reviewed authorities, including *Perry*, and held as follows:

> [18] The decisions in *V.A.H.* and *Perry supra* are essentially the same. Paragraph [86] of *Perry supra* notes the absence in the relevant scale for costs of provision for GST. I conclude from my reading of the *Excise Tax Act* that GST falls within the scope of our Tariff B 1(3)(b). My view, often expressed further to my approach in *Grace M. Carlile v. Her Majesty the Queen* (1997), 97 D.T.C. 5284 at 5287 (T.O.) and the sentiment of Lord Justice

> Russell in *Re Eastwood (deceased)* (1974), 3 All. E.R. 603 at 608, that assessment of costs is "rough justice, in the sense of being compounded of much sensible approximation", is that discretion may be applied to sort out a reasonable result for costs. Further, consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.,* [1994] F.C.J. No. 2012 (A.O.) at para. [10] that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", the application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. I am not sure whether a judge could take a step to effectively negate a rule of its own Court, particularly one expressed in very broad terms, ie. Tariff B 1(3)(b) which provides for "any...taxes paid or payable". I conclude that such a step would not be within the ambit of discretion available to me and therefore is beyond my jurisdiction irrespective of whether I think the Respondent here may benefit from a windfall. I allow GST on assessed fees and disbursements.

[52] The Plaintiffs also refer the Court to *Montreal (City) v Montreal Port Authority*, 2012 FC 221, which followed *Englander* and allowed a portion of the GST claimed by the applicant in its bill of costs (at para 20).

[53] Both authorities upon which the Plaintiffs rely are decisions of Assessment Officers. As expressly noted in *Englander,* the decision to allow recovery of HST, notwithstanding that it could represent a windfall to the party claiming costs, was based on the Assessment Officer's conclusion that he did not have the jurisdiction to depart from the application of s 1(3)(b) of Tariff B, as he interpreted it. The Assessment Officer was unsure whether such departure would be available to a judge of this Court.

[54] In the present case, the HST issue described above arose late in the process for adjudication of the Plaintiffs' costs claim, having been raised by Hapag-Lloyd only shortly

before the hearing. In the absence of more comprehensive argument on the point, I am reluctant to rule definitively on the interpretation of s 1(3)(b) of Tariff B expressed in *Englander*. However, it is clear from Rule 400(1) that a judge of this Court has full discretionary power over the amount of costs awarded in a proceeding. While such discretion is not unfettered, I am confident, particularly when awarding lump sum costs as requested by the Plaintiffs, that such discretion extends to disallowing a claim for an amount that could represent a windfall to the successful litigant.

[55] I therefore find little merit to the argument advanced by the Plaintiffs to support their claim for HST. My costs award will not take into account any amount in respect of HST on fees or disbursements.

E. ***Interest***

[56] The Plaintiffs claim both pre-judgment and post-judgment interest at a rate of 5% per annum. They invoke s 3 of the *Interest Act*, which provides for a rate of 5% whenever interest is payable by law and no rate is fixed by law, as well as jurisprudence stating that interest is a function of damages in admiralty cases (see e.g. *Universal Sales Limited v Edinburgh Assurance Co Ltd*, 2012 FC 1192 [*Universal Sales*] at para 8).

[57] Hapag-Lloyd agrees that pre-judgment interest is a function of damages in cases related to Canadian maritime law, but it argues the Court should employ a pre-judgment rate of 3% and a post-judgment rate of 3.95%. It supports its position with evidence of the Bank of Montreal prime rates between 2000 and 2019. Hapag-Lloyd calculates the average prime lending rate from

August 2011 (when the loss occurred) to November 2019 (when the Judgment was issued) as 3.13%.

[58] This Court, exercising its admiralty jurisdiction, undoubtedly has the authority to award interest as an integral part of the damages suffered by the Plaintiffs, in order to achieve full compensation for their loss (see *Bell Telephone Co of Canada v e Ship "Mar-Tirenno"* (1974), 52 DLR (3d) 702 [*Bell*] at 715). In *Bell*, the Court considered it fair to employ the actual commercial rate prevailing at the relevant time, and it ultimately relied on the prime bank lending rate (at 717-718).

[59] The Plaintiffs submit that the prime bank lending rate does not reflect the rate at which banks actually lend money in normal commercial circumstances and that unsecured loans would likely involve rates of 1-2% above the prime rate, i.e. in the range of the 5% claimed. However, there is no evidence before the Court as to the actual rates at which the Plaintiffs could have obtained unsecured financing during the relevant period (or the rates at which such financing would be generally available).

[60] Both parties rely on *Universal Sales* as a relatively recent authority demonstrating this Court's approach to the award of interest in an admiralty matter (at paras 10-17). In that case, Justice Harrington explained that the premise behind previous decisions of the Court to grant interest at a commercial rate, such as the bank prime lending rate or 1-2% above, was that the commercial rate was considerably higher than the legal rate. However, in *Universal Sales*, the prime rate had been below the legal rate. Noting other decisions in which he had awarded

interest at the legal rate of 5%, where commercial rates had been low (see *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303; *Société Telus Communications v Peracomo Inc*, 2011 FC 494, aff'd 2012 FCA 199), Justice Harrington again awarded interest at the legal rate of 5%. Guided by such precedents, I will employ the 5% rate, for both pre-judgment and post-judgment interest, in the case at hand.

[61] Finally, I note Hapag-Lloyd argues that the Plaintiffs have not pursed their claim with diligence and that the applicable interest rate, or the period over which interest is awarded, should be reduced to take into account the Plaintiffs' delays. However, as I have previously noted, the evidence before the Court does not support such a conclusion. Hapag-Lloyd has had the benefit of the funds, represented by the amount of the damages award in the Judgment, since the date of the loss, and the Plaintiffs have been without such funds.

[62] The Plaintiffs shall be entitled to pre-judgment interest on the $872,909.57 damages award, at the rate of 5% per annum from the date of loss to the date of the Judgment. Representing a period of 8.291667 years, this translates into a pre-judgment interest amount of $361,893.76.

V. **Conclusion**

[63] My Supplementary Judgment below awards costs in favour of the Plaintiffs in this proceeding in the total amount of $201,692.96, composed of the $73,500.00 lump sum derived above plus disbursements of $128,192.96. The Supplementary Judgment also awards pre-

judgment interest of $361,893.76, upon the damages award in the Judgment, and provides for post-judgment interest at a rate of 5% per annum.

SUPPLEMENTARY JUDGMENT IN T-1526-12

THIS COURT'S SUPPLEMENTARY JUDGMENT is that:

1. The Defendant, Hapag-Lloyd AG, shall pay to the Plaintiffs pre-judgment interest, on the $872,909.57 amount awarded in the Court's Judgment dated November 26, 2019 in this action, in the amount of $361,893.76 to the date of that Judgment. Such $872,909.57 amount also bears interest at the rate of 5.0% per annum from that date.

2. The Defendant, Hapag-Lloyd AG, shall pay to the Plaintiffs their costs of this action in the amount of $201,692.96 inclusive of disbursements. Such amount bears interest at the rate of 5.0% per annum from the date of this Supplementary Judgment.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1546-12
STYLE OF CAUSE:	IAMGOLD CORPORATION AND NIOBEC INC v HAPAG-LLOYD AG, HAPAG-LLOYD (CANADA) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL M/V "OOCL MONTREAL"
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 30, 2020
SUPPLEMENTARY JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	MAY 12, 2020

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