

Federal Court



Cour fédérale

Date: 20230208

Docket: T-1662-17

Citation: 2023 FC 184

Ottawa, Ontario, February 8, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

CROCS CANADA, INC. AND CROCS INC.

**Plaintiffs
(Defendants by Counterclaim)**

and

DOUBLE DIAMOND DISTRIBUTION LTD

**Defendant
(Plaintiff by Counterclaim)**

COSTS ORDER AND REASONS

I. Overview

[1] Crocs Canada, Inc. and Crocs Inc. [collectively, Crocs or Plaintiffs] were the successful parties in this industrial design dispute, and thus entitled to their costs: *Crocs Canada, Inc. v Double Diamond Distribution Ltd*, 2022 FC 1443 [*Crocs FC 2022*] at para 143. Crocs were awarded an accounting of the Defendant's profits in the amount of \$649,779.17, together with

pre-judgment interest only up to March 20, 2022 in the amount of \$44,321.69, as well as post judgment interest on outstanding amounts owed at the rate of 5% per year (at para 141).

[2] Because the parties were unable to agree on the quantum of costs, they provided the Court with their submissions as directed in *Crocs FC 2022*, above at para 144.

[3] The Plaintiffs seek lump sum costs in the amount of \$264,672.20, which comprises 30% of asserted total recoverable fees (that is, 30% of \$527,910.24 = \$158,373.07) and 100% of claimed disbursements (\$106,299.13). The Plaintiffs' Bill of Costs that accompanied their costs submissions also includes calculations for 20% and 25% of total recoverable fees, as well as the Tariff B Calculation of Legal Fees (using mid column IV) totalling \$68,920 [Tariff B Fees].

[4] With the exception of \$1,440 (for discoveries-related travel and expert report preparation), the Defendant does not dispute Crocs' Tariff B Fees. The Defendant does dispute, however, Crocs' assertion that it is entitled to fees in the amount of \$158,373.07.

[5] For the reasons that follow, I award the Plaintiffs lump sum costs in the amount of \$232,861.15, on the basis of 25% of the Plaintiffs' reasonably incurred legal fees and their reasonable disbursements.

II. Applicable Costs Principles

[6] The Court has full discretion over the award and amount of costs: subsection 400(1) of the *Federal Courts Rules*, SOR/98-106 [Rules].

[7] Factors that the Court can take into account in exercising its discretion include the result of the proceeding, the amounts claimed and recovered, the complexity of the issues, the amount of work, whether a party's conduct tended to lengthen (or shorten) the proceeding, whether any step in the proceeding was improper, vexatious or unnecessary, and any other matter the Court considers relevant: subsection 400(3) of the *Rules*.

[8] Chief Justice Crampton canvassed general costs principles in *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 [*Allergan*] at paras 19-36. They include:

- Indemnifying the successful party(ies);
- Sanctioning behaviour that increases the duration and expense of the proceeding, or is unreasonable or vexatious;
- Broad discretion of the Court over the amount and allocation of costs, *per the Rules*, subsection 400(1);
- Fixing costs with reference to Tariff B (the default level being the mid-point of Column III) or in a lump sum amount, further to the *Rules*, subsection 400(4) and section 407;
- Determining a lump sum amount by beginning at the mid-point of 25%-50% range for a complex drug patent proceeding, or at the lower end of this range for other cases and assessing the Rule 400(3) factors to determine if a higher amount is warranted (per *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 22); and
- Assessing disbursements in full, provided they are reasonable.

[9] In addition, lump sum awards may be appropriate for simple or complex matters where precise costs calculations would be complicated and burdensome: *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Nova FCA 2017*] at para 12 (appeal dismissed on different grounds: 2022 SCC 43). Awarding lump sum costs avoids granular analyses that devolve into an accounting exercise: *Nova FCA 2017*, above at paras 11 and 15.

[10] While Chief Justice Crampton noted the trend in case law to set the percentage of fee recovery between 25% and 50%, a lower or higher percentage may be warranted in the circumstances of the particular case: *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 15.

[11] Reasonable expenses are those justified in the context of the action; the decision to incur an expense must be prudent and reasonable in the circumstances at the time: *Janssen Inc. v Teva Canada Ltd.*, 2022 FC 269 [*Janssen*] at para 10.

[12] The overarching consideration in making an award of costs is fairness and reasonableness and involves striking a balance between compensating the successful party and not burdening the unsuccessful party unduly: *Janssen*, above at para 8.

III. Analysis

1. Applicable Rule 400(3) Considerations

[13] Bearing the foregoing principles in mind, I find that a lump sum award above Crocs' Tariff B Fees is appropriate in the circumstances of this matter. As noted, the Plaintiffs were entirely successful in their action against the Defendant. The legal issues were not complex, in my view. I find, however, that the Defendant's conduct, as outlined below, contributed to the amount of work undertaken by the Plaintiffs, the length of the proceeding overall (although not to the length of the trial which lasted no longer than the originally scheduled time), and resulted in otherwise unnecessary steps.

[14] The Plaintiffs submit that the Defendant’s conduct over the course of the proceeding affected them adversely. This conduct included, among other incidents, failing to identify a corporate representative and provide dates of availability for discovery; choosing not to continue with the action during the Court’s Covid-related suspension period without explanation, and failing to comply with deadlines set in the April 30, 2019 and March 12, 2021 Court Orders, resulting in motions by the Plaintiffs to address the Defendant’s non-compliance.

[15] The Defendant argues that an affidavit is required to support the Plaintiffs’ arguments concerning the Defendant’s conduct because “the Court was not the Pretrial Court from the start of this Action and is not intimately familiar of the contentions of the parties as to actions taken and why since the inception of this Action.” The Defendant has not cited any case law in support of this proposition.

[16] In my view, the Defendant’s argument is untenable for the simple reason that Case Management Judge [CMJ] Tabib has provided ample support for the Plaintiffs’ contentions through the findings in her Orders and Direction. No affidavit is required for the Court to consider its own record in connection with the exercise of its discretion concerning the award of costs in this matter.

[17] In that regard, I note the following findings of CMJ Tabib in the Orders and Direction indicated:

Finding	Order/Direction
“...the failure of the Defendant to provide the name and availability of its Rule 237(1)	September 6, 2018 Order

representative within the allotted time as Ordered ...constitutes a failure to attend an oral examination...”	
“Costs are awarded to the Plaintiffs at an elevated scale... payable forthwith.”	September 6, 2018 Order
“The Court takes note ... that the Defendant has withheld its consent to proceeding with the litigation during the Suspension Period[...] and] has chosen not to provide any context or justification for its refusal to consent...”	April 17, 2020 Direction
“The record before the Court shows a pattern of late, incomplete, or deficient compliance with the Rules and Orders of the Court, that either betrays the Defendant’s disregard or cavalier attitude to the Court’s process and authority or a deliberate conduct designed to delay, obfuscate and drive up the cost of litigation for the Plaintiffs. Whatever the case may be, the Defendant’s conduct can no longer be tolerated.”	July 21, 2021 Order
“The Defendant chose to force the Plaintiffs’ motion and it then chose not to comply with the timelines and procedures for responding to it. It must bear the consequences of its choice.”	July 21, 2021 Order
“The Defendant was required by Order dated March 12, 2021 to provide answers to written follow-up discovery questions. The Defendant’s lapidary email response, offering one self-serving and unsatisfactory document as its sole answer, does not begin to constitute compliance with the Order of the Court or the <i>Federal Courts Rules</i> .”	July 21, 2021 Order
“The Defendant did not comply with the undertaking given to the Court. As per its now typical pattern of evasion and pretend compliance [with the Court’s orders]...”	July 21, 2021 Order
“This motion was made necessary solely as a result of the Defendant’s unjustified obstinacy.”	July 21, 2021 Order

[18] Because it did not appeal these Orders, the Defendant cannot expect the Court to not take them, and the Direction or indeed any part of the record, into account in considering the Defendant's conduct in the context of the Plaintiffs' claimed costs. More to the point, no affidavit is required to explain CMJ Tabib's plain language descriptions of the Defendant's conduct. The Court agrees entirely with CMJ Tabib that the Defendant must bear the consequences of its choices in the conduct of the litigation.

[19] In addition to the foregoing, it is a fact that the expert report that the Defendant submitted in advance of trial in support of its invalidity counterclaim was withdrawn during trial, without explanation, resulting in unnecessary review and preparation by the Plaintiffs, and by the Court I add.

2. Legal Fees

[20] Given the above considerations, I find that the Tariff B Fees are wholly inadequate to compensate the Plaintiffs for their costs of this matter: *Beijing Judian Restaurant Co. Ltd. v Meng*, 2022 FC 1789 at para 24. I find instead that a recovery of 25% of their recoverable legal fees (i.e. $\$527,910.24 \times .25 = \$131,977.56$) strikes an equitable balance between compensating the successful party and not burdening the unsuccessful party unduly.

[21] In so finding, I take into account the costs the Plaintiffs were awarded as a result of the Defendant's behaviour leading up to the trial of this matter (*Guest Tek Interactive Entertainment Ltd. v Nomadix, Inc.*, 2021 FC 848 at para 58), the complexity of the legal issues, the length of the trial, and the profits and interest awarded the Plaintiffs as a result of their success. Further, I

am not persuaded that the Plaintiffs' legal fees are unreasonable or excessive for a junior partner and a junior associate who had carriage of the litigation on behalf of their clients: *Patterned Concrete Mississauga Inc. v Bomanite Toronto Ltd.*, 2021 FC 792 at para 21.

3. Disbursements

[22] I find that the Plaintiffs are entitled to reasonable disbursements in the amount of \$100,883.59 (i.e. \$106,299.13 - \$5,415.54).

[23] Contrary to the Defendant's submissions, I am not prepared to find that the Plaintiffs' claimed expert fees of \$87,493.87 are unreasonable. Two reports were prepared for the infringement and validity issues in this action; the Court found both reports relevant: *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at para 54.

[24] While the Defendant disputes the expert fees in this case because of potential overlap with, and duplication because of, related litigation between the parties in the United States of America, I agree with the Plaintiffs that the Defendant's contention is speculative, given that the instant action was based on a Canadian industrial design, and Canadian industrial design laws and jurisprudence.

[25] In my view, the fees for the only expert opinions advanced and relied on in the trial of this matter are justified and recoverable.

[26] I find, however, that the following expenses, totalling \$5,415.54, are in the nature of unreasonable overhead, given the parties' mutual consent to electronic service essentially from the outset of the litigation:

- Copying – Internal: \$3,442.75;
- Telephone: \$112.89;
- Fax: \$7.50
- Scanning: \$50.50;
- Binding: \$130.95; and
- Legal Research Fees: \$1,670.95

[27] The above disbursements are described in the Plaintiffs' Bill of Costs as those that "are tracked internally and invoiced... there are no separate invoices or receipts." In my view, this information is insufficient to determine whether these disbursements in particular involve something more than simply apportioning general overhead charges.

[28] For example, regarding the legal research fees, while this type of disbursement has been allowed previously, a more recent assessment decision of this Court disallowed the claim where, in the circumstances, "it is difficult to establish ... whether the amount claimed ... was part of the general office overhead, such as monthly service usage fees, and the invoices provided did not speak to the relevance, reasonableness and necessity of the searches": *Hristova v CMA CGM (Canada) Inc.*, 2021 FC 1331 at para 27. The Plaintiffs here have not provided any invoices, nor any additional information that could support the relevance, reasonableness and necessity of the legal research fees.

[29] Recognizing that a certain amount of copying is inevitable over the course of an action that spans 5 years, I am not convinced that external copying charges of \$2,022.18, that include covers, tabs and binding, and are supported by invoices, are unreasonable.

[30] Having considered the parties' submissions and the Plaintiffs' detailed Bill of Costs, I am not persuaded that any other claimed expenses were incurred unreasonably.

IV. Conclusion

[31] For the above reasons, I find that the Plaintiffs are entitled to a lump sum award of costs in the amount of \$232,861.15, inclusive of reasonable legal fees and disbursements, payable by the Defendant.

[32] The post judgment interest of 5% per year awarded in *Crocs FC 2022* at para 142 applies to this Costs Order.

ORDER in T-1662-17

THIS COURT'S ORDER is that:

1. The Defendant shall pay to the Plaintiffs lump sum costs in the amount of \$232,861.15, inclusive of reasonable legal fees and disbursements, and applicable interest.
2. Post judgment interest at the rate of 5% per year applies on all amounts owed by the Defendant to the Plaintiffs pursuant to this Costs Order.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1662-17

STYLE OF CAUSE: CROCS CANADA INC. AND CROCS INC. v DOUBLE
DIAMOND DISTRIBUTION LTD

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: MARCH 14-18, 2022 AND MARCH 21, 2022

**COSTS ORDER AND
REASONS:** FUHRER J.

DATED: FEBRUARY 8, 2023

APPEARANCES:

Alexander Gloor
Erin Creber
Jenny Thistle

FOR THE PLAINTIFFS
(DEFENDANTS BY COUNTERCLAIM)

Tom C. Stepper

FOR THE DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

SOLICITORS OF RECORD:

Alexander Gloor
Erin Creber
Jenny Thistle
Gowling WLG (Canada) LLP
Ottawa, Ontario

FOR THE PLAINTIFFS
(DEFENDANTS BY COUNTERCLAIM)

Tom C. Stepper
Professional Corporation
Calgary, Alberta

FOR THE DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)