Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 20011109

Docket: T-361-99

Neutral Citation: 2001 FCT 1227

01 332 044

BETWEEN:

MEDITERRANEAN SHIPPING COMPANY S.A. GENEVA

Plaintiff

and

SIPCO INC.

Defendant

REASONS FOR ORDER AND ORDER

BLAIS J.

[1] I have reviewed written submissions by both parties on costs.

[2] Rule 400 of the *Federal Court Rules, 1998*, reads:

400(1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400(1) La Cour a entière discrétion pour déterminer le montant des dépens, les répartir et désigner les personnes qui doivent les payer.

[3] Rule 400(3) constitutes the substance of Rule 400 in that it outlines the many factors to be taken into account by this Court when awarding costs:

400(3) In exercising its discretion under subsection (1), the Court may consider
(a) the result of the proceeding;
(b) the amounts claimed and the amounts recovered;
(c) the importance and complexity of the issues;
(d) the apportionment of liability;
(e) any written offer to settle;
[...]
(o) any other matter that it considers relevant.

400(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
a) le résultat de l'instance;
b) les sommes réclamées et les sommes recouvrées;
c) l'importance et la complexité des questions en litige;
d) le partage de la responsabilité;
e) toute offre écrite de règlement;
[...]
o) toute autre question qu'elle juge pertinente.

[4] At page 763 of D. Sgayias et al., *Federal Court Practice*, 2002 ed., (Toronto: Carswell, 2001), the notes under Rule 400 read as follows:

> Rule 400(3) is not restrictive: the Court may consider any other matter that it considers relevant: rule 400(3)(o).
>
> [...]
>
> Paragraph (e) of rule 400(3) indicates that the Court may consider any written offer to settle. It is open to the Court to take a written offer to settle into account whether or not that offer has triggered "double costs" under rules 419 and 420.

[5] Rule 420 of the *Federal Court Rules, 1998* reads:

Offer to settle

420. (1) Unless otherwise ordered by the Court, where a plaintiff makes a written offer to settle that is not revoked, and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and double such costs, excluding disbursements, after that date.

420. (1) Sauf ordonnance contraire de la Cour, le demandeur qui présente par écrit une offre de règlement qui n'est pas révoquée et qui obtient un jugement aussi avantageux ou plus avantageux que les conditions de l'offre a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens, à l'exclusion des débours.

[6] The plaintiff Mediterranean presented a written offer to settle to the defendant Sipco on June 5, 2001 in which it stated:

> The plaintiff hereby offers to settle both its actions and the counter-claim filed by your client on the basis of your client paying ours the sum of Canadian Dollars Forty Three Thousand One Hundred Eighty Nine and Eighty Eight (CDN $43, 189.88) (the amount claimed in paragraph 5 of the Claim). Our client is prepared to waive interest on the said amount and costs in respect of its claim and costs in respect of your client's counter-claim if the said amount of Canadian Dollars Forty Three Thousand One Hundred and Eighty Nine and Eighty Eight (CDN $43, 189.88) is paid to our client by your client.

[7] This offer was rejected. In consequence of the decision rendered on September 25, 2001 by Blais J., the plaintiff Mediterranean now finds itself in a position more favourable than it would have been had the offer to settle been accepted by the Defendant Sipco.

[8] In *Stuart* v. *Canada*, [1989] F.C.J. No. 119 (F.C.T.D.), Reed J. held:

> [T]he Court is expressly authorized to take account of offers of settlement when awarding costs.

[9] In regards to the offer to settle itself, there is applicable jurisprudence that sheds some light as to the triggering effect of the doubling of costs by virtue of the Rule 420. In *Apotex Inc.* v. *Syntex Pharmaceuticals Int. Ltd.*, [2001] F.C.J. No. 727, Stone, Noël and Evans JJ.A. held:

> [para 10] If the generous costs advantage afforded by Rule 420(1) is to be available to a plaintiff, the offer to settle must be clear and unequivocal in the sense it leaves the opposite party to decide only whether to accept it or reject it.

[10] In the present case, the offer to settle presented on behalf of the plaintiff Mediterranean was clear and unequivocal requiring but a response from the defendant Sipco.

[11] Also, in *Canadian Olympic Assn.* v. *Olymel, Société en commandite*, [2000] F.C.J. No. 1725 (F.C.T.D.), Lemieux J. held:

> [para 10] I am of the view that the ingredient of compromise (or incentive to accept) is an essential element of an offer to settle. [...]
>
> [para 11] The purpose of the offer to settle rule, as pointed out by Morden A.C.J.O. in Data General, supra, is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the Court at the end of a trial. He added the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early and careful consideration to the merits of the case.

[12] The offer to settle in the present case does demonstrate an ingredient of compromise as it allows for a slackening of interest and costs should it be accepted.

[13] And lastly, in *Feherguard Products Ltd.* v. *Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (F.C.T.D.), Stinson (Taxing Officer) stated that there is an automatic triggering effect of a valid offer to settle that does not require the Court's intervention:

> [para 9] [W]ritten settlement offers made on four separate occasions were never withdrawn. They meet the threshold of Rule 344.1 and, as Rule 344 does not require an Order triggering Rule 344.1, the Taxing Officer has the authority to permit doubling. If Rule 344.1 was not automatic or mandatory, there would have been express language to that effect. If I conclude otherwise, I should refer this issue to the Court for the appropriate direction rather than simply disallow the doubling outright.

> [para 10] [...] In any event, I think that an explicit and visible exercise of the Court's authority under Rule 344(1) is not necessary to trigger Rule 344.1.

[14] Therefore, should this Court determine that the offer to settle presented by the plaintiff Mediterranean to the defendant Sipco be clear and unequivocal and that the offer to settle contains an ingredient of compromise, the offer will have the automatic effect of triggering the doubling of costs as per the language of Rule 420.

[15] The defendant Sipco submits that Rule 420 is inapplicable in the present circumstances because the plaintiff Mediterranean provided it "late in the day in the overall life of this action" and that "the offer to settle was only provided after the defendant, plaintiff by counterclaim begun settlement discussions" (see page 2, paragraph 5 of the costs submissions of the defendant). The defendant Sipco relies upon two cases in order to strengthen its position: *Apotex Inc.* v. *Wellcome Ltd.*, [1998] F.C.J. No. 1736 (F.C.T.D.) and *Sanmammas Compania Maritima S.A.* v. *"Netuno" (The)*, [1995] F.C.J. No. 1442 (F.C.T.D.).

[16] The first case, *Apotex, supra* differs significantly from the present case since *Apotex, supra* was an extremely long and complicated case with examinations for discovery requiring more than thirty days to complete, over sixty interlocutory motions and the trial itself lasting sixty-four days including motions days. According to Wetston J., the offer to settle came late in the proceedings and was presented at the instigation of opposing party's proposals. It is evident that the Court would look

unfavourably upon an offer to settle that was presented late in the proceedings since so much effort had already been devoted to the case.

[17] Apotex, *supra* is therefore distinguishable from the present case by virtue of its scope. As for the offer to settle in *Apotex*, *supra* being at the instigation of opposing party's proposals, this aspect is also distinguishable from the present case. The defendant Sipco alleges that it initiated "settlement discussions" that led to the presentation of an offer to settle by the plaintiff Mediterranean. However, "settlement discussions" do not equate to "proposals". A "proposal" is defined in the *Oxford English Dictionary On-line* as "the action, or an act, of putting before the mind" whereas the term "discussion" is defined as "examination or investigation (of a matter) by arguments for and against; 'the ventilation of a question' or argument or debate with a view to elicit truth or establish a point". The offer to settle in the case at bar was not at the instigation of opposing party's "proposals" but rather the result of settlement "discussions" and therefore *Apotex*, *supra* is of very little help to the defendant Sipco in these circumstances.

[18] The second case the defendant Sipco relies upon is *Sanmammas*, *supra*. In this case, the plaintiffs made an offer to settle six days before the trial was to commence and in addition, the offer to settle turned out to be lower than the amounts awarded. Consequently, Tremblay-Lamer J. considered the doubling of costs to be excessive in

these particular circumstances. In the present case however, the offer to settle was made on June 5, 2001 and the trial began on June 26, 2001. This therefore means that the offer to settle was made by the plaintiff Mediterranean exactly twenty-one days before the beginning of the trial. The time-frames are simply incomparable and therefore *Sanmammas*, *supra* is also of little assistance to the defendant Sipco in this instance.

[19] In summary, it is my opinion that Rule 420 has a clear-cut application in the present matter and the offer to settle should be considered valid.

[20] The defendant Sipco however raised that point:

> While the plaintiff was successful in its claim and defence of the counterclaim, the Reasons for Judgment clearly indicate that the defendant, plaintiff by counterclaim, was the victim of a negligent act by the plaintiff.

[21] It is true that there was negligence but the defendant was unable to prove his damages. The defendant failed to provide valid reasons why the award of costs should be reduced in that regard.

ORDER

[22] Therefore, the plaintiff is entitled to its costs including the application of Rule 420, and the Taxing Officer should act accordingly.

Pierre Blais
Judge

OTTAWA, ONTARIO
November 9, 2001

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

REASONS FOR ORDER AND ORDER : BLAIS, J.

DATED: NOVEMBER 9, 2001

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