

SUPREME COURT OF NOVA SCOTIA
Citation: *Sonapay Inc. v. Wilson*, 2020 NSSC 375

Date: 20201222
Docket: Hfx No. 477767
Registry: Halifax

Between:

Sonapay Inc.	Applicant
v.	
Clayton Wilson	First Respondent
-and-	
4 CCCC Merchant Services Inc.	Second Respondent
-and-	
EBJ Merchant Solutions	Third Respondent
-and-	
Marvin Hayes	Fourth Respondent
-and-	
Has Solutions Inc.	Fifth Respondent
-and-	
iiiPOS Inc.	Sixth Respondent

Costs Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	December 10, 2020, in Halifax, Nova Scotia
Counsel:	Richard M. Dunlop, for the Applicant Nancy F. Barteaux, Q.C., and Mary B. Rolf, for the Respondents/Moving Parties

By the Court:

Overview

[1] This is a decision on costs. The underlying litigation involved a claim by the applicant against former employees and associated companies alleging violation of a non-solicitation agreement, in addition to other alleged breaches of contract. After discoveries, the applicant filed a Notice of Discontinuance. The respondents seek a large costs award to provide a substantial contribution towards the legal costs they incurred to respond to the litigation, including six days of discoveries. They request a lump sum amount of \$75,000.00.

[2] When a party discontinues an application, it will require unique circumstances for the opposing party to receive a significant lump sum costs award. It is difficult to assess the appropriateness of advancing litigation where there has been no trial or attendant findings of fact. The respondents would have the Court hold that the litigation was frivolous and vexatious, calling for a substantial contribution towards costs. I am unprepared to reach such a conclusion on the basis of the materials provided, without the benefit of trial. This case does not call for such a costs award.

Background

[3] This motion for costs is brought jointly by the respondents, Clayton Wilson, 4CCCC Merchant Services Inc. (“4CCC”), EBJ Merchant Solutions (“EBJ”), Marvin Hayes (“Hayes”), HASA Solutions Inc. (“HASA”), and iiiPOS Inc. (“iiiPOS”), following the applicant’s discontinuance of its Application in Court.

[4] The respondents submit that they are entitled to costs per *Civil Procedure Rules* 9.06 and 77 in the amount of \$75,000.00.

[5] It is important to understand the parties, the business they are in, and the background to this matter.

[6] The applicant, Sonapay Inc. (“Sonapay”), is an independent sales organization (“ISO”) operating in the credit and debit card payment processing industry. The respondent iiiPOS provides service and support for restaurant

manager point of sale (“POS”) systems. iiiPOS’s business is ostensibly concentrated on the restaurant industry.

[7] The respondent HASA is incorporated but has no officers and does not carry on business. The respondent Hayes is President of Sales at iiiPOS. The respondent EBJ was set up by Hayes when he was doing business as a sales agent of Sonapay (then known as Payformance) under an Agency Relationship Agreement (“ARA”), in order to be paid sales commissions. The respondent Clayton Wilson (“Wilson”) is employed by iiiPOS as a salesperson selling POS systems. The respondent 4CCCC is a company Wilson set up when he was carrying on business as a sales agent of Sonapay under an ARA in order to be paid sales commissions.

[8] Hayes (through EBJ) and Wilson (through 4CCCC) were employed as independent contractors with the applicant. Mr. Hayes resigned his position on February 28, 2018.

[9] This matter originated as an Application in Court in June 2018. Pleadings were amended in August and September 2018. Sonapay’s pleadings allege many causes of action, including breach of contract, breach of contractual good faith, breach of the duty of honesty, wrongful solicitation of Sonapay’s clients and potential clients, and unfair competition with Sonapay using its confidential information.

[10] Production of documents took place between September 2018 and April 2019. iiiPOS/HASA and Hayes/EBJ prepared three productions of documents, and Wilson/4CCCC prepared four. Discovery examinations took place on September 17, 23, 24, 25, and 26, 2019, and October 10, 2019. The respondents made a Formal Offer to Settle on February 21, 2020, which was rejected in June 2020.

[11] The applicant subsequently discontinued the proceeding. On June 29, 2020, the applicant filed a Notice of Discontinuance with respect to Wilson, 4CCCC, HASA, and iiiPOS. On September 4, 2020, the applicant filed a Notice of Discontinuance with respect to EBJ and Hayes.

[12] It is of assistance to understand the nature of the businesses involved in this matter. POS and payment processing are closely related, but distinct types of technology. Payment processors facilitate the electronic transaction between the financial institutions involved in such transactions. When someone inserts the chip on a credit or debit card, the payment processor communicates between the

customer's credit card network or bank and the vendor's merchant account to process the electronic payment. Payment processing companies and ISOs such as the applicant generate revenue based on a percentage value of the volume of transactions processed.

[13] In contrast, POS systems involve a combination of hardware and software. It is essentially a computer system that networks a vendor's electronic payment system internally. POS systems require a payment processor in order to run a transaction. Depending on the type of POS software, there are also many options available to a vendor to digitize their business and capture data such as revenue and customer purchasing history, ensure that sales are automatically reflected in inventory tallies, and to offer electronic tipping options. POS providers generate revenue via sales, leasing, and support agreements. There is a cost to buy or lease the POS hardware, a cost to buy the POS software, and a cost to provide ongoing service and support to the POS system as a whole.

[14] The respondents maintain that POS services are not competitive with the applicant's payment processing services. It is on this basis that they argue the litigation was frivolous and vexatious at worst and completely unnecessary at the least.

[15] Hayes, through EBJ, and Wilson, through 4CCCC, were employed as independent contractors with the applicant. Hayes resigned his position on February 28, 2018. Following his resignation, Sonapay became concerned that he was associated with HASA and was violating his continuing obligations to Sonapay by soliciting its customers. On April 19, 2018, counsel for Sonapay sent a cease and desist letter to counsel for Hayes. The letter said:

Since the termination of the agency relationship agreement dated September 12, 2017, including all schedules and appendices thereto (the "Agency Relationship Agreement"), we understand that you are now associated with HASA Solutions Inc. ("HASA") and may be providing services in direct competition with Payformance.

Based on recent reports, we are concerned that you may be violating your continuing obligations to Payformance under the Agency Relationship Agreement. Specifically, we are investigating whether you have solicited Payformance customers or are using proprietary software in violation of your continuing obligations. If true, this activity must cease immediately.

As you are well aware, Payformance takes very seriously reports of possible breaches of agreements by its agents, as well as any indication that a competitive entity may have condoned or encouraged such action.

[16] On April 24, 2018, then counsel for Hayes, Eric Durnford Q.C. responded in a without prejudice letter saying:

In your letter, you surmise that Mr. Hayes may be violating what you claim to be obligations he owes to Payformance. This surmise is not accurate, including that he is now associated with HASA Solutions Inc.

[17] Counsel for Sonapay understood this to mean that Hayes was not associated with HASA. However, in fact, Hayes had been named as President of HASA by this time. This was later confirmed once the respondents disclosed documents in January 2019. (There has been no suggestion of lack of candour or knowledge and the court makes no comment about the statement made in the letter by then counsel.)

[18] As articulated in the affidavit of Mr. O’Leary (“O’Leary Affidavit”), filed November 7, 2018, O’Leary became concerned in the late winter/early spring of 2018 that Hayes and Wilson were involved with HASA, which Sonapay thought might be a competitor. In light of O’Leary’s concerns, he requested that Wilson meet with O’Leary on May 4, 2018, to explain and to allay any concerns that O’Leary had regarding HASA and Wilson’s involvement. The information before the Court indicates that Wilson did not allay such concerns, as he and his wife did not give explanations. Less than 24 hours after the meeting, Wilson sent an email from his clayton.wilson@hasasolutions.com email to Hayes’ former Sonapay email account. This email is some support for the allegation that Wilson was in fact involved with HASA.

[19] On May 10, 2018, counsel for Sonapay wrote to Wilson and Durnford, outlining in detail the basis for Sonapay’s concerns regarding their involvement with HASA. These concerns included the following:

- HASA Solutions was incorporated on March 5, 2018. The HASA website said that Hayes is the President of HASA.
- On May 5, 2018 – less than 24 hours after the May 4 meeting in which Wilson told Sonapay that he was not working with HASA, Wilson sent an email from his HASA email to Marvin Hayes at

Ignite Payperformance. The email sought advice from Hayes, the President of HASA, as to how to respond to a Sonapay customer.

[20] Counsel for the respondents did not respond to the May 10, 2018, letter.

[21] Litigation ensued.

[22] The respondents argue that no litigation should ever have been commenced, as Sonopay knew throughout the relevant time that the respondents were not in competition with them and that Sonopay had never suffered any damages. The respondents say they have incurred costs of \$109,174.37, including HST. The costs accrued by Mr. Wilson personally up to June 30, 2019, amount to \$5,658.00.

[23] The respondents argue that a lump sum award is necessary to provide them with a substantial contribution to costs.

Evidence, Position of the Parties and Findings

[24] The parties filed a plethora of affidavits on this motion, including five on behalf of the respondents/moving parties and four on behalf of the applicant/responding party. There was no cross-examination on affidavits. I have reviewed all of the affidavits filed on this motion and have referred to underlying affidavits in the application where counsel have made reference to those.

[25] The respondents rely on various affidavits, as well as discovery excerpts from Ryan O’Leary, (“O’Leary”) the President of Sonapay, to make out four facts they say are uncontroverted and support this costs motion.

[26] The respondents assert that the discovery evidence indicates that O’Leary knew full well the difference between processing services for credit and debit and POS hardware and software services, his company being involved exclusively in the former. Because O’Leary understood what the companies were engaged in and how they provided distinct services, the respondents say that from the outset the applicant knew the claim was without merit.

[27] The respondent relies on the affidavit of John Sawyer, (“Sawyer Affidavit”) the President of iiiPOS, which details the US company Shift4. Unlike the practice in the Canadian market, Shift4 offers both a POS Restaurant Manager service (POS) and payment processing services in one company. Sawyer states that he became aware that Shift4 was considering expansion into Canada, and pitched the idea to O’Leary of their companies joining forces to provide a ready-made

integrated solution when Shift4 entered the Canadian market. O'Leary did not wish to join forces. Sawyer advised O'Leary that he needed to ready his business for the potential expansion of Shift4 into the restaurant manager business. HASA was incorporated as a solution to the introduction of Shift4 into the market.

[28] The respondents say O'Leary knew what iiiPOS was preparing for. They say his discovery transcripts support a finding that this application was always frivolous and vexatious, because Shift4 has not yet come to the Canadian market, and Sonapay has incurred no losses. They say the effect on Sonapay of Shift4 coming to Canada was speculative. They further submit that Sonapay's clients could choose to stay with the company even if Shift4 entered the Canadian market. Based on the discovery evidence, it appears that the crux of the application related to two clients, the Murphy's Group and the Bertossi Group.

[29] In summary, the respondents rely on the applicant's refusal to admit several material facts for their submission that substantial costs are called for:

1. That iiiPOS is involved in POS systems, which is distinct from payment processing, and is not a competitor to Sonapay;
2. That Mr. Hayes and Mr. Wilson's employment in POS has not caused any losses to Sonapay's payment processing business;
3. That any future payment processing involved in the HASA Solution is entirely prospective and may never materialize;
4. That its damages are unquantified and non-existent.

[30] The respondents submit that it is not credible for Sonapay to allege that iiiPOS was a competitor, or that they viewed it as one. They say Sonapay had relationships with Murphy's Group and Bertossi and should have worked immediately to shore those up, but did not. They argue that the discovery evidence shows an unrelenting pursuit of litigation for no apparent reason.

[31] The respondents submit that their costs should be assessed as a lump sum, based on the applicant's conduct in the proceeding. Their position is that this application has been frivolous, vexatious, and unnecessary from inception. They say the litigation was filed hastily and without merit, and was advanced ineffectively. Consequently, they say a substantial costs award would do justice.

[32] The respondents acknowledge that it is difficult to find a precedent for such a costs claim, but maintain that it is neither right nor just to provide an amount based on Tariff F.

[33] Sonapay submits that the costs claimed by the respondents are grossly inflated and exaggerated, for the reasons that follow.

[34] Like most litigation, this proceeding resolved after the parties discovered each other's witnesses. The applicant says the process worked. Sonapay argues that the respondents' conduct in the proceeding caused Sonapay to reasonably pursue several issues, including the following:

1. If HASA was not a competitor to Sonapay, there was no reason to misrepresent Hayes' involvement in HASA, nor was there a reason for Wilson to advise Sonapay that he was not involved with HASA.
2. The representations made at the outset of this proceeding as to Hayes' involvement in HASA reasonably caused Sonapay to further question the information being provided by the respondents when it discovered through documentation disclosed on January 28, 2019, that Hayes became President of HASA on March 1, 2018. On February 28, 2018, Hayes advised Sonapay that he was going to work for Sysco Foods. He never went to work for Sysco.
3. If HASA was not a competitor to Sonapay:
 - (a) Why did HASA enter into agreements with Sonapay's customers that would, for all intents and purposes, require the customers to terminate their relationship with Sonapay to provide payment processing services?
 - (b) Why did HASA continue to represent to the public that once Shift4 was permitted to operate in Canada, HASA would be in a position to provide the payment processing services that Sonapay provides its customers?
 - (c) Why did the respondents refuse to disclose relevant documents to Sonapay in September 2018? Instead of taking part in a settlement conference in November 2018, the applicant was forced to bring a production motion, which was adjourned twice, before the respondents agreed to disclose the documents in January and April 2019.

[35] Following Mr. Hayes's resignation, Sonopay became concerned that he was associated with HASA Solutions Inc. ("HASA") and was violating his continuing obligations to Sonopay by soliciting its customers. Sonopay argues that it believed for good reason that there had been a violation of legal obligations, and that it tried to gather information before commencing litigation. Conflicting information was received. In addition, Sonopay agreed to an early judicial settlement conference, but could not proceed because of the lack of disclosure.

[36] The Sawyer Affidavit acknowledged that HASA would be in competition with Sonopay if Shift4 entered the Canadian market. Sonopay points to the January 4, 2019, letter in which HASA's counsel stated that the restrictive covenants were not enforceable and that the respondents "are not currently engaged in a business that is competitive with the business carried on by Sonopay." Sonopay did not know when Shift4 would enter the market. Sonopay says it was reasonable to seek disclosure and discoveries to obtain more information. Sonopay also refers to the Amended Notice of Contest and para 54:

iiiPOS Inc. has a strong customer base and is well known within the POS and Credit/Debit processing industry. Prior to Hayes and Wilson joining iiiPOS Inc. it already had a substantial number of customers, which Hayes and Wilson were hired to work with the HASA Solution.

[37] Sonopay says it cannot be said, based on the pleadings, that they should have known there was no competition; one would not conclude from the Notice of Contest that there was no competition. Instead, the respondents answered the application by suggesting there was a lack of consideration for the agency relationship agreement, that the restrictive covenants were not enforceable, and that there was no use of confidential information. Paragraph 54 of the Notice of Contest makes it difficult to say that Sonopay should have known there was no competition.

[38] Additionally, Sonopay says that information was not provided about the pre-application forms signed by the Murphy's Group in February.

[39] Sonopay says that they proceeded cautiously after the April 29, 2018 letter from respondents' counsel, but could not be expected to ignore it. It says the claims that HASA was not operating and was not off the shelf were in contrast to the fact it was receiving invoices and ostensibly paying the invoices for the legal action.

[40] Sonapay also objects to the suggestion that the litigation was filed hastily, citing the correspondence and inquiries prior to the commencement of the action to argue that care was taken before litigation was pursued.

[41] Although Hayes resigned and said he was leaving to join Sysco, Sonapay learned that he was going to HASA, but then was told HASA was not really operating. However, in marketing materials and websites HASA advertised itself to the broader public. The letter of April 29, 2018, indicated that Wilson was not associated with HASA, when in fact he was actually the president of the company. The meeting with Wilson seeking explanations was immediately followed by emails from Wilson sent from a HASA email account. A letter from Sonapay's counsel on May 10, 2018, raised the question of the email account, and nothing was provided in response. Thus, Sonapay took steps to obtain information before litigating, but received conflicting information, and so proceeded.

[42] Sonapay refers to the Sawyer Affidavit at paras. 27 and 53:

27. AHTPOS and iiiPOS do not compete with Sonapay. Though we have many of the same customers, we offer those customers different services. AHTPOS and iiiPOS are focused on POS systems, and Sonapay is focused on payment processing.

...

53. At this point, I developed the idea of an integrated POS and payment processing system that would use Restaurant Manager for POS and Shift4 for payment processing when it becomes available in Canada. This would provide restaurant vendors with one integrated solution for all their POS and payment processing needs, including software, hardware, and local support.

[43] Sonapay argues that the Sawyer Affidavit confirms that HASA will provide payment processing services – exactly the business Sonapay is in – once Shift4 comes to Canada. Sonapay says it had to explore whether, and when, Shift4 was coming to Canada.

[44] On January 4, 2019, counsel for the respondents wrote to counsel for Sonapay, stating that the respondents “are not currently engaged in business that is competitive with the business carried on by Sonapay.” There was solicitation by HASA in the marketplace, and of Sonapay's clients, but it depended on when Shift4 would enter the marketplace. Counsel for Sonapay poses the question: “Gee Dunlop, are you not going to discover on that?” “I think so.” In the face of the

information provided and the lack of responses to other inquiries, it seems reasonable to move to discoveries to seek answers.

[45] Considering this information, Sonapay asks, “Is this Application frivolous and vexatious or unreasonable?” They answer “I don’t think so.” The Court agrees. There were enough issues that would have caused legitimate concern about the business of HASA and the involvements of former employees of Sonapay to begin legal proceedings. In hindsight, Shift4 did not arrive in Canada in the time period likely expected by all of the litigants. As such, HASA did not start providing payment processing services. But that fact does not now make the litigation frivolous.

Issues

[46] The sole issue is the amount of costs which should be awarded to the respondents as a result of the applicant’s discontinuance.

Law and Analysis

[47] *Civil Procedure Rule* 9.06 deals with costs arising from a discontinuance:

9.06 (1) A party who files a notice of discontinuance, consent to judgment, or notice of withdrawal must, unless a judge orders otherwise, pay costs of the opposing party in an amount to be fixed under Rule 77 - Costs.

(2) A judge or adjudicator who assesses costs must consider the stage of the proceedings at which the notice or consent was filed, among the other factors under Rule 77 - Costs.

[48] The only factor which this Court must consider in exercising its discretion on costs is the stage of proceedings, under Rule 9.06(2). This litigation was discontinued after discoveries but before affidavits had to be filed on the application.

[49] Costs on discontinuance are typically set by Tariff F in Rule 77, which provides the following grid based on the “amount involved”, defined as the amount of a settlement without including disbursements:

Amount Involved	Amount of Costs
Up to \$25,000	Not more than \$3,000
\$25,001 - \$50,000	Not more than \$4,000
\$50,001 – \$100,000	Not more than \$5,000

[50] The Tariff further states that”

Where a proceeding is discontinued or settled and the amount involved exceeds \$100,000.00, costs shall not be more than the total of \$5,000.00 plus 2% of the amount in excess of \$100,000.

[51] The respondents say that, given that the applicants have not quantified their damages, and no settlement was executed, this grid does not do justice to the extensive correspondence, affidavits, document preparation, and six days of discovery which took place. Instead, they say the Court should award lump sum costs instead of tariff costs pursuant to Rule 77.08.

[52] Rule 77 addresses the court’s general powers over costs. Rule 77.02(1) states that “a presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.” Rule 77.06 establishes a presumption that costs will be awarded in accordance with the tariff. Rule 77.07 provides the court with discretion to add an amount to, or subtract an amount from, tariff costs. The presumptively applicable tariff here is Tariff F, which states, in part:

This Tariff F is to be applied if the costs cannot be settled and must be assessed by a taxing officer.

The “amount involved” for purposes of this Tariff F is the amount of a settlement without including disbursements.

When determining costs in a proceeding, which is settled or discontinued, a taxing officer may assess the amount involved and the costs based on the following

Amount Involved	Amount of Costs
Up to \$25,000	Not more than \$3,000
\$25,001 - \$50,000	Not more than \$4,000
\$50,001 - \$100,000	Not more than \$5,000

Where the proceeding is discontinued or settled and the amount involved exceeds \$100,000.00, costs shall not be more than the total of \$5,000.00 plus 2% of the amount in excess of \$100,000.00.

[53] The respondents say a lump sum award of costs is necessary to provide a “substantial contribution” to their costs in light of how the applicant conducted the

application. Given these claims, it is necessary to review the conduct of the litigation.

[54] Sonapay filed an Application in Court against the six respondents in June 2018, after making inquiries about the respondents' conduct and receiving some inaccurate information, such as Mr. Wilson's connection with HASA.

[55] A Motion for Directions was held before A.C.J. Smith (as she then was) on August 14, 2018, and she established dates for the completion of various steps in the litigation. Significantly, Sonapay agreed to a full-day settlement conference on November 7, 2018, after documents were disclosed on September 28, 2018, but before the following more time-consuming steps in the litigation process were taken, including:

- the respondents' submission of affidavits on December 14, 2018; and
- the completion of discoveries on or before February 28, 2019.

[56] Given Sonapay counsel's concern that there may be a dispute regarding disclosure, which would, among other things, result in the cancellation of the settlement conference, counsel advised respondents' counsel on September 7, 2018, of all of the documentation it considered to be relevant. The respondents advised that they would not disclose the documents requested.

[57] On October 15, 2018, counsel for Sonapay advised the Court that the November settlement conference would have to be cancelled in light of the respondents' failure to disclose relevant documents. On October 24, Sonapay filed a production motion, which was scheduled for November 20, 2018.

[58] Given the affidavits filed on the production motion and the need for each party to cross-examine, it was impossible to hear the production motion in the half-day allotted.

[59] On November 2, 2018, counsel for the respondents wrote to counsel for Sonapay seeking documents and requesting that Sonapay provide answers to interrogatories. Counsel for Sonapay responded on December 21, 2018, setting out the applicant's position on damages and responding to the interrogatories.

[60] On May 2, 2019, Sonapay agreed to hold its production motion in abeyance until after discovery, and suggested that the parties use the scheduled dates for the Application in Court from June 24-26, 2019, for discovery.

[61] The respondents brought a motion on June 25, 2019, with respect to whether John Burton could be called to give evidence on discovery. That motion was unsuccessful and the respondents were ordered to pay \$750.00 in costs.

[62] Following discoveries in September and October 2019, in November 2019 the parties agreed to a full-day judicial settlement conference on April 2, 2020. On March 19, 2020, Justice Coughlan wrote to the parties to advise that the settlement conference scheduled for April 2, 2020, was cancelled as a result of the COVID-19 pandemic.

[63] In addition to the way in which the litigation proceeded, some aspects of the evidence assist in determining how the Court should exercise its discretion.

[64] The respondents considered, based upon paragraph 14 of its November 16, 2018, brief that:

...Since Shift4 does not currently have a credit/debit solution in Canada and there is no obvious date upon which it will have that capability, it is quite possible that it will be some time after the restrictive covenants in the ARA's, (if valid), expire that iiiPOS will be able to affect current Sonapay customers with the HASA Solution for credit/debit.

[65] According to the Sawyer Affidavit, signing up a Sonapay customer for the HASA Solution:

...means that in the future when Shift4 has debit/credit card processing in Canada, they have the option of either processing their debit/credit cards through Shift4 as outlined above or staying with their current provider (such as Sonapay) in exchange for an increased cost for the POS system or added gateway and transactional fees from Shift4.

[66] Sonapay's concern was that as soon as Shift4 became available in Canada, all (or some) of the customers that currently use Sonapay that the Respondents have "signed up" for the HASA Solution will terminate their contract with Sonapay and use the HASA Solution.

[67] The respondents considered that although the solicitation of the service took place during the non-solicitation period, the fact that the service would not be available until after the non-solicitation period meant there was no breach of the non-solicitation provision. Additionally, because the loss suffered as a result of the breach of the non-solicitation provision would not take place until after the non-solicitation period, there was no loss.

[68] On January 28, 2019, the respondents provided the applicant with four volumes of documents. These documents called into question the April 24, 2018, representation that Hayes was not associated with HASA. That representation must also be considered in the context of Wilson's claim on May 4, 2018, that he was not involved with HASA.

[69] The respondents sent the applicant a "with prejudice" Offer to Settle on February 21, 2020, which included the following:

Although we are prepared to go forward if necessary and prove this at a hearing, we suggest that the following settlement will be more beneficial to all parties and will move the business relationship between our clients forward:

1. Sonapay shall pay Clayton Wilson for all outstanding monies owed for monthly residuals and shall buy out Mr. Wilson's book at 10 times the buyout, for a total payment to Mr. Wilson of \$19,082 in accordance with Mr. Wilson's calculations (see enclosed, and also found at Exhibit "A" of Clayton Wilson's Affidavit dated December 19, 2018).
2. The Applicant shall cover all legal costs, fees and disbursements incurred by the Respondents in contesting to this proceeding.
3. Sonapay will be approved as a supplier of AHTPOS and iiiPOS.
4. Sonapay will pay a 50% profit share rate on all accounts (both existing and new accounts).
5. Sonapay will provide all information and access to any and all files in order to facilitate necessary support-related business.
6. The parties will execute Minutes of Settlement and Consent Orders dismissing the Application in Court.

[70] Sonapay's counsel considered this formal offer to settle to be unreasonable because, among other things, it contemplated that the parties would become business partners, that there would be payment to Mr. Wilson when he had not made any claim, and Sonapay would be required to pay all costs.

[71] On June 3, 2020, Sonapay counsel wrote to respondents' counsel to reject the offer to settle, and set out Sonapay's position:

Thank you for your offer to settle of February 21, 2020 and your letter of March 27, 2020, with respect to the additional document disclosure which Sonapay provided on March 13, 2020. I have not received any response to undertakings that Mr. Hayes provided during the discovery.

I apologize for the delay in responding. I was hoping to address the issues raised in your correspondence with you in person at the settlement conference in April. However, in light of the cancellation of same and the unfolding COVID-19 situation, it seems clear that rescheduling an in-person settlement conference is likely to take many months.

Your offer to settle on the terms outlined in your February 21, 2020, letter is rejected. Your clients' actions gave Sonapay every reason to commence and continue its lawsuit:

- Sonapay either never received a response to its correspondence asking for explanations or was advised that Mr. Hayes was not associated with HASA, which clearly was not the case.
- Mr. Wilson was given the opportunity to provide an explanation during a May 4, 2018 meeting, but provided no explanation.
- The HASA contract continued (and continues) to give all indications to Sonapay's clients that HASA was going to continue in the payment processing business.
- Your clients' reluctance to disclose relevant documentation – particularly in the context of Mr. Durnford's April 24, 2018 letter, the lack of explanation provided by Mr. Wilson during the May 4, 2018 meeting, and the failure to respond to correspondence – further supported Sonapay's claims reflected in its lawsuit.

The offer in your February 21, 2020 letter that Sonapay and your clients would work together in some type of partnership makes no sense given that a short time period after this "with prejudice offer" was made Mr. Sawyer was extremely upset upon learning that a HASA client had contracted with Sonapay to be its payment processing services provider. Mr. Sawyer acted irrationally in response. Thankfully "cooler heads prevailed." It is unreasonable to expect Sonapay to enter into a relationship with HASA in this context.

As explained below, Sonapay believes that it has a strong case against Mr. Hayes, particularly given that Sonapay has now secured the contracts with all of the Murphy's Hospitality Group's locations. Your glib dismissal of Sonapay's loss of chance claims are unpersuasive.

Nevertheless, Sonapay will withdraw its Notice of Application against all of the Respondents, including Mr. Hayes, if each party agrees to absorb its own costs and appropriate mutual releases are provided. In the event that the Respondents do not agree with this proposal, please provide me with the outstanding undertakings from Mr. Hayes's discovery at your earliest convenience.

If this offer is not acceptable, I expect to receive instructions that Sonapay will only proceed against Mr. Hayes and EBJ Merchant Solutions.

As I indicated in previous correspondence I do believe that a settlement conference would be of value if this offer is not accepted.

[72] Given that the respondents were not agreeable to the June 3, 2020, offer, Sonapay filed a Notice of Discontinuance, on June 25, 2020, with respect to all of the respondents except Hayes and EBJ.

[73] Sonapay says it ultimately decided that proceeding against Hayes was not worth the cost and thus discontinued the application.

[74] I have difficulty with the respondents' claim that the litigation was frivolous and vexatious. Sonapay was asking pertinent questions, and receiving inaccurate information, or none at all. Shift4 was ostensibly coming to Canada; it was a matter of time. HASA was going to offer integrated POS and payment processing in Canada once Shift4 arrived. HASA was marketing itself to compete with Sonapay, with its former employees in tow, when and if Shift4 arrived. How could it be frivolous and vexatious to pursue answers in litigation in these circumstances? I do not have a basis to find that this litigation should not have been commenced, nor do I find that it was started in haste. Counsel for Sonapay sought answers to his client's concerns for months to no avail, and litigation followed.

[75] The respondents rely on *Armoyan v. Armoyan*, 2013 NSCA 136, and *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2015 NSSC 118, in support of their argument for a lump sum. However, neither of these cases involved a discontinuance. *Armoyan* concerned hotly contested family litigation where the conduct of one party was highly egregious. *HRM* concerned the conduct of the Nova Scotia Human Rights Commission on a judicial review where the Commission conceded only after the applicant had filed the Record and a brief.

[76] What the respondents fail to mention is that no Nova Scotia court has held that a party settling or withdrawing a proceeding should pay a “substantial contribution” to the opposing party. The “substantial contribution” standard is well-established as a measure of costs due to a successful party after a trial or hearing. It is quite another matter to expect a party, who having assessed the merits of their case after discovery and having decided not to proceed, to make a “substantial contribution” to the opposing party. It would be contrary to the purposes of costs to require a “substantial contribution” after a discontinuance. In *Salman v. Al-Sheikh Ali*, 2011 NSSC 30, Hood J. said, at para. 23:

The purpose of costs is to encourage settlement and a party that does not settle at an early stage runs the risk of incurring an award of costs. As Saunders, J. (as he then was) said in *Landymore v. Hardy*, [1992] N.S.J. No. 79 (N.S.S.C.T.D.):

Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel’s fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[77] In *Fulmer v. Pugsley*, 2013 NSSC 169, the Court was asked to assess costs after a settlement that occurred shortly before a scheduled three-day hearing of the application. The Court ordered the parties to bear their own costs. Some of the apt comments by the Court, equally applicable here, are as follows:

31 Settlement is to be encouraged. To treat the applicant in this case as if he had been successful after trial would fail to recognize the benefits that settlement achieved here; and, importantly, would offer little or no encouragement to settle for a future litigant in the respondents' position.

32 Settlements are achieved for a lot of reasons that may not be known to the opposing parties. The rationale of a party for deciding to settle is generally not available to the court. In this case there may be many reasons that caused the parties to act as they did. The evidence satisfies me that, at that very least, there were economic reasons for both parties that promoted the compromise that was achieved.

[78] While this was not a negotiated settlement, a discontinuance is analogous, in that the litigation has come to an end without coming before the court. A resolution short of trial is to be encouraged.

[79] For these reasons, I conclude that there are no grounds to apply a “substantial contribution” standard in this case. However, costs should be ordered. As counsel for Sonapay candidly admitted, after discovery the case was reassessed and Discontinuances filed.

[80] Given the circumstances, and the stage of proceedings some costs should be awarded to the respondents.

Conclusion

[81] The correspondence evidenced in this motion show what I would characterize as the usual course of litigation. There were motions for production adjourned and eventually not required; a discovery subpoena motion; discoveries; a judicial settlement conference scheduled but cancelled; and offers to settle. The litigation was neither hastily commenced nor frivolous or vexatious.

[82] The most a court has awarded on a matter where there was a concession and complaints were dismissed was \$10,000.00 in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2015 NSSC 118.

[83] Costs were undeniably incurred in defending this claim. Given the discontinuance, and given the six days of discoveries, I am satisfied that costs are called for. There is no basis on which to determine an amount involved, so a lump sum is appropriate. Given the processes involved and the stage of the litigation – post-discovery, with an anticipated judicial settlement conference – I conclude that \$8,000.00 in costs is appropriate and payable by Sonapay to the respondents. This amount is reduced by \$750.00 which is the costs owed by the respondents to Sonapay arising from the production motion. In total, \$7,250.00 is owed by Sonapay to the respondents.

Brothers, J.