Federal Court  Cour fédérale

Date: 20241023

Docket: T-1188-15

Citation: 2024 FC 1672

St. John's, Newfoundland and Labrador, October 23, 2024

PRESENT: Associate Judge Trent Horne

BETWEEN:

KRBL LIMITED

Plaintiff

and

P. K. OVERSEAS (P) LTD.,
ROFD IMPORT INC. (C.O.B. RAYAN OVERSEAS FOOD DISTRIBUTION),
TRUST EXPRESS INC. AND
TAKTRADE INTERNATIONAL COMMERCE INC.

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The plaintiff has brought a motion for an extension of time to serve and file submissions in response to a notice of status review.

[2] I am not satisfied that the plaintiff has met the test in *Hennelly*. The motion will be dismissed. The action will also be dismissed for delay.

II. Background

[3] This action for trademark infringement was commenced in July 2015. Discoveries have not been completed.

[4] From about May 2019 to early 2024 the action was stayed pending potential resolution of related proceedings in India.

[5] As of February 2023, Lomic Law was the plaintiff's solicitors of record. That firm brought a motion to be removed as solicitors of record, which was granted by order dated June 9, 2023. The order required the plaintiff to appoint a new solicitor of record by a fixed date. That date was missed by about 10 days, however the plaintiff did appoint Norton Rose Fulbright as its solicitors of record in July 2023.

[6] As the case management judge, I received correspondence from the parties and held case management conferences between about October and December 2023 with a view to moving this action towards adjudication if it could not be resolved out of Court.

[7] At about the time the action was starting to move forward in November 2023, the plaintiff appointed Shift Law as its solicitors of record.

[8] The defendant PK Overseas (P) Limited ("Defendant") wrote to the Court in January 2024 to advise that settlement negotiations in India did not result in a settlement. I issued

a direction on February 9, 2024 that set a hearing date of May 16, 2024 for motions arising from the examinations for discovery.

[9] The discovery motion was adjourned *sine die* to permit Shift Law to bring a motion to be removed as solicitors of record. That motion was brought, and an order issued, on June 17, 2024. Among other things, that order required the plaintiff to appoint new solicitors of record within 30 days of the date of the order. That deadline was missed.

[10] I issued the following direction on July 23, 2024:

> My order of June 17, 2024 obliged the plaintiff to appoint new solicitors of record within 30 days of the date of the order. A notice of change of solicitors has not been filed. The plaintiff shall write to the Court with a status update by no later than August 2, 2024. If no status update is provided, a notice of status review will be issued which will require the plaintiff to demonstrate why the proceeding should not be dismissed for delay.

[11] This direction was sent directly to the plaintiff. Abhishek Bansal, an assistant manager within the plaintiff's legal department, sent correspondence to the Court on August 2, 2024 advising of changes in staffing within the legal department. The letter also requested an extension of 30 days to appoint new counsel. The letter stated: "We are committed to appointing a new solicitor who will diligently pursue the matter and address the ongoing proceedings."

[12] No order or direction was issued in response to this letter. No extension of time was granted.

[13] Mr Bansal's correspondence was not forwarded to me immediately upon its submission to the Court. A notice of status review was issued on August 7, 2024. The notice stated:

> **IF THE PLAINTIFF FAILS TO SERVE AND FILE REPRESENTATIONS IN RESPONSE TO THIS NOTICE OF STATUS REVIEW within the allotted time, or such other period as the Court may fix, then the proceeding SHALL BE DISMISSED FOR DELAY, without further delay or notice.**
>
> [Emphasis in original.]

[14] The deadline for the plaintiff to respond to the notice of status review was August 22, 2024.

[15] On that deadline, Fogler, Rubinoff wrote to the Court and advised that they had been "contacted" by the plaintiff, and anticipated a retainer. The letter requested an indulgence of a further 14 days to respond to the notice of status review. No order or direction was issued in response to this letter.

[16] Fogler, Rubinof wrote to the Court again on September 10, 2024 advising that they had been retained. The letter stated that counsel was prepared to respond to the notice of status review, to provide a justification for the delay, and propose a timetable for completing the steps necessary to advance this proceeding in an expeditious manner.

[17] I issued the following direction on September 12, 2024:

> The Court is in receipt of correspondence from Fogler, Rubinoff dated August 22 and September 10, 2024 requesting an extension of time to respond to the notice of status review. The Court's Amended Consolidated General Practice Guidelines require that informal requests for interlocutory relief confirm that all parties

> either consent to the request or do not oppose the request. The request for an extension of time will be considered when the defendants' position is known.

[18] A week passed, and no communication was received on behalf of the plaintiff. As of September 19, 2024, the plaintiff remained out of compliance with the June 17, 2024 order to appoint a solicitor of record, and was past a fixed deadline to respond to the notice of status review. There was no indication as to when steps would be taken to remedy these shortcomings, if at all. Particularly for a party facing imminent dismissal of its action for delay, the plaintiff showed no sense of urgency in taking positive steps to respond to orders and directions of the Court.

[19] I issued a further direction on September 19, 2024. The direction noted the absence of communication from the plaintiff or Fogler, Rubinoff, and set a September 27, 2024 deadline for the plaintiff to serve and file a motion for an extension of time to respond to the notice of status review, or an informal request for interlocutory relief that complies with the Court's Amended Consolidated Practice Guidelines.

[20] Fogler, Rubinoff filed a notice of appointment of solicitor on September 19, 2024. It appears that the direction prompted the plaintiff to take a step that was overdue.

[21] The motion for an extension of time to file materials in response to the notice of status review was filed on September 26, 2024, over a month after the initial deadline for responding submissions.

III. Reply Evidence

[22] The plaintiff's motion is supported by a brief affidavit of a law clerk employed by Fogler, Rubinoff. The affidavit attaches, among other things, the September 10 and 19, 2024 letters from Fogler, Rubinoff described above.

[23] The Defendant opposes the motion, and served and filed a detailed responding motion record that describes the delays in prosecuting the action.

[24] This is a motion in writing, so the plaintiff was entitled to serve and file written representations in reply (subrule 369(3) of the *Federal Courts Rules*, SOR/98-106 ("Rules")). The plaintiff's reply materials also include an affidavit of Mr Bansal, the plaintiff's employee who communicated to the Court on August 2, 2024. Leave was not sought to serve and file reply evidence.

[25] The propriety of the reply evidence was the subject of correspondence to the Court. The Defendant wrote to the Court on October 11, 2024 pointing out the irregularity, and asked that the affidavit and any representations relying on it be disregarded. The plaintiff wrote to the Court on October 15, 2024 arguing that the affidavit contains evidence which replies to matters raised by the Defendant that had not been addressed in the motion record.

[26] I have disregarded the Bansal affidavit and any submissions that rely on it.

[27] A party does not have the ability to serve and file reply evidence on a motion as of right. It was incumbent on the plaintiff to ask for leave. Filing further evidence, then addressing its admissibility in subsequent correspondence, is improper.

[28] Even if I was to consider the plaintiff's October 15, 2024 letter as a motion for leave to serve and file reply evidence, it would not have been granted.

[29] If a motion for leave to file reply evidence on a motion is brought, the Court will consider the jurisprudence developed under Rule 312 concerning the admission of additional affidavits in applications, namely whether: the evidence will assist the court (in particular, its relevance and sufficient probative value); admitting the evidence will cause substantial or serious prejudice to the other side; and the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 13).

[30] The matters addressed in the Bansal affidavit were known to the plaintiff when the initial motion was filed. It was incumbent on the plaintiff to put its best foot forward when requesting the extension of time. The nature of the evidence and argument filed by the Defendant was plainly foreseeable. Receiving the Bansal affidavit and argument based on it would permit the plaintiff to split its case on the motion.

[31] In its written representations in reply, the plaintiff states that an inference can reasonably be drawn from my September 19, 2024 direction that if the plaintiff complied with the direction

by serving a motion for an extension of time by the deadline, the action would not be dismissed, and the plaintiff would be provided an opportunity to respond to the notice of status review. I see no basis for such an inference. The direction set a deadline for a formal motion or informal request for interlocutory relief. It set out the consequences for missing the deadline, but did not state or imply that any motion would be granted. The September 19, 2024 direction did not diminish the plaintiff's burden to serve and file a motion for an extension of time with evidence and argument to satisfy the applicable test.

IV. Test for an Extension of Time

[32] The test for an extension of time is well known. On such a motion, the moving party must demonstrate 1) that there was a continuing intention to pursue the application; 2) that the application has some merit; 3) that no prejudice arises from the delay; and 4) that a reasonable explanation for the delay exists (*Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at paras 32-33; *Canada (Attorney General) v Hennelly* [1999] FCJ No. 846 at para 3 ("*Hennelly*"); *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61).

[33] The *Hennelly* factors are not to be applied in a rigid fashion, and it is not always necessary that the party seeking the extension of time be able to satisfy all four factors. The overriding consideration is whether it is in the interests of justice that the extension of time be granted (*Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3; see also *Gutierrez v Canada*, 2024 FCA 93 at para 4).

[34] The written submissions in the moving motion record do not address the test for an extension of time.

V. Analysis

[35] This motion for an extension of time arises in the context of a status review. On a status review, the Court is required to consider two main questions: what are the reasons why the case has not moved forward faster and do they justify the delay that has occurred; and what steps is the plaintiff now proposing to move the matter forward (*Ladouceur v Banque de Montréal*, 2022 FC 440 at para 26; see also *Canada v Stoney Band*, 2005 FCA 15 at para 34 and *Soderstrom v Canada (Attorney General)*, 2011 FC 575 at para 14).

[36] The Court has broad discretion in determining the outcome of a status review pursuant to Rule 382.1. If a party provides a good excuse for the delay incurred, there will be less of a requirement for a robust action plan to move the matter forward (*Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2019 FC 927 at para 10). The converse is also true, that is, that a more robust timetable needs to be proposed where the excuses for the delay incurred are weak.

[37] The law is clear that proceedings should only be dismissed on status review in exceptional circumstances. Given the draconian effect of dismissing a claim for delay, the focus should be on the overall interests of justice in the case. The overarching concern should be whether the party in default recognizes its responsibility to move the action along and is taking steps to do so (*Roots v HMCS Annapolis (Ship)*, 2015 FC 1339 at para 28).

[38] The most material period of delay is between the June 17, 2024 order and September 26, 2024 when the plaintiff filed this motion for an extension of time.

[39] I am not satisfied that there is a reasonable explanation for this period of delay. The affidavit in support of the plaintiff's motion states, on information and belief from a lawyer at Fogler, Rubinoff, Blair Bowen, that he will require 30 days from the date of any court ordered extension of time to review the file and obtain instructions to adequately respond to the notice of status review. The affidavit does not explain why 30 days are needed to justify the delay and propose a timetable, particularly when Mr Bowen's September 10, 2024 letter stated that the plaintiff was prepared to respond to the notice of status review. I note that a response to a notice of status review requires representations, not a full motion record with evidence. Even with the retainer of new counsel, the proposed time to serve and file representations is unreasonable in the circumstances.

[40] There is no adequate explanation for the plaintiff's delay in retaining Fogler, Rubinoff, and missing the deadline in the June 17, 2024 order. There is no explanation provided for the delay between September 10, 2024 (when Fogler, Rubinoff was apparently retained) and when the notice of appointment of solicitor was filed on September 19, 2024. The duration of this delay is brief, but its importance is amplified when considered in light of the plaintiff's ongoing non-compliance with an order to appoint a solicitor of record during this period. There is also no explanation as to why Fogler, Rubinoff waited from being retained on September 10, 2024 to September 26, 2024 to file this brief (25 page) motion. Attaching Mr Bansal's August 2, 2024 correspondence to a law clerk's affidavit does not constitute direct evidence from the plaintiff to

explain the delay, and there is nothing from the plaintiff, directly or indirectly, to speak to events after August 2, 2024. I am not satisfied that the plaintiff has taken deadlines set by orders and directions of the Court seriously. Any forward momentum for this matter in September 2024 appears to have come from my directions, not the actions of the plaintiff.

[41] A consideration of the merits involves the merits of the status review. The plaintiff's motion record does not indicate what kind of action plan will be proposed. Mr Bansal said in his August 2, 2024 correspondence to the Court that the plaintiff needed 30 days to respond to the notice of status review, so it should be expected that a response could have been prepared before this motion was filed. Mr Bowen's letter of August 22, 2024 said that 14 days were needed. Again, that would have ended on a date before this motion was filed. His September 10, 2024 letter said "we are prepared to respond" to the notice of status review. But now, the plaintiff's motion says a further 30 days are needed, which would push the filing of a response well into November. No explanation has been provided as to why the projected date for completing a response to the notice of status review keeps getting extended. There is no demonstration of merit in the plaintiff's record, only a promise to do something later, without an explanation as to why it could not have been done already. This factor weighs significantly against the plaintiff.

[42] The brief supporting affidavit in the plaintiff's motion, and the lack of recent compliance with deadlines, does not demonstrate a continuing intention to pursue this action, at least within the deadlines set by the Rules and orders and directions of the Court. I am not satisfied that the plaintiff has demonstrated an intention to actually pursue this matter to a resolution, at least with any sense of purpose. Another factor, although minor in the overall context, is that Fogler,

Rubinoff is the plaintiff's fifth solicitor of record. Apparent difficulties in maintaining a solicitor-client relationship, with four law firms separately representing the plaintiff in about the past 18 months causing delays, casts a shadow on an intention to move this matter forward.

[43] The defendant has already been inherently prejudiced by the plaintiff's delays and non-compliance with orders and directions. The plaintiff will certainly be prejudiced if the motion is dismissed – if an extension is not granted, there will be no response to the notice of status review and the proceeding will be dismissed for delay. While prejudice is a factor to be weighed in the *Hennelly* analysis, it is not determinative. When considering prejudice, I also give regard to the fact that the notice of status review stated that failure to respond in time would, not may, result in the dismissal of the proceeding without notice. This should have prompted the plaintiff to act with alacrity. It did not. The plaintiff's conduct after the deadline passed shows a rather casual regard for deadlines in the litigation process.

[44] I recognize that the interests of justice remain the paramount consideration in granting an extension of time. But the interests of justice do not exist in a vacuum, and do not absolve parties of the duty to meet their burden of proof. Here, to exercise my discretion in the plaintiff's favour would require me to consider prejudice as an effectively determinative factor, and turn a blind eye to the lack of any kind of proposal, even a preliminary one, by the plaintiff to move this action forward with a sense of purpose. At the risk of repetition, the merits of any response to the notice of status review were not addressed in the plaintiff's motion. The rule of law is based on the fundamental principles of certainty and predictability. The exercise of a discretionary power must originate in the law. The exercise of such a power cannot be adequate or judicious, and in

the interests of justice, if it ignores the minimum requirements of the applicable law (*Clinique Sherbrooke Inc v Canada*, 2023 FC 1755 at para 37).

VI. Costs

[45] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[46] As the successful party on the motion, the Defendant will be awarded its costs, fixed at $1,000.00. This amount is based on the middle of Column III of the Tariff for a motion in writing.

[47] As for costs of the action, the Defendant is also the successful party and is entitled to its costs. In the event the parties cannot agree on an amount for costs, they will be assessed by an assessment officer.

JUDGMENT in T-1188-15

THIS COURT'S JUDGMENT is that:

1. The plaintiff's motion for an extension of time to respond to the notice of status review dated August 7, 2024 is dismissed.

2. This action is dismissed for delay.

3. Costs of the motion are payable by the plaintiff to the defendant PK Overseas (P) Limited, fixed at $1,000.00, payable forthwith.

4. Costs of the action are payable by the plaintiffs to the defendant PK Overseas (P) Limited in an amount to be agreed or assessed by an assessment officer.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1188-15
STYLE OF CAUSE:	KRBL LIMITED v P. K. OVERSEAS (P) LTD., ROFD IMPORT INC. (C.O.B. RAYAN OVERSEAS FOOD DISTRIBUTION), TRUST EXPRESS INC. AND TAKTRADE INTERNATIONAL COMMERCE INC.

MATTER CONSIDERED IN WRITING WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS:	HORNE A.J.
DATED:	OCTOBER 23, 2024

WRITTEN REPRESENTATIONS BY:

Blair W. M. Bowen	FOR THE PLAINTIFF
Michal Niemkiewicz	FOR THE DEFENDANT, P. K. OVERSEAS (P) LTD.

SOLICITORS OF RECORD:

Fogler, Rubinoff LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Smart & Biggar LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT, P. K. OVERSEAS (P) LTD.