Date: 20060830

Docket: T-375-05

Citation: 2006 FC 1043

BETWEEN:

FIELDTURF (IP) INC.

Plaintiff/
Defendant by Counterclaim

and

LES INSTALLATIONS SPORTIVES DEFARGO INC.

Defendant/
Plaintiff by Counterclaim

and

FIELDTURF TARKETT INC.

"Petitioner"

REASONS FOR ORDER

PROTHONOTARY MORNEAU:

[1] At issue in this case is a series of objections—which essentially have the same objective—and which were raised by counsel for a deponent at his cross-examination on affidavit.

[2] It is important to describe the background to this dispute.

[3] To simplify things, it should be noted by way of illustration that in this docket and in dockets T-283-03, T-350-03, T-491-04 and T-1473-04 (collectively the Dockets), the defendant or defendants (hereinafter, collectively, the defendants) are all represented by the same counsel and secondly, that the only plaintiff in each docket is Fieldturf (IP) Inc. (hereinafter Fieldturf (IP)), which is also represented by the same counsel in each docket.

[4] All of the Dockets involve allegations by Fieldturf (IP) of patent infringement of several patents on artificial turf and, in turn, allegations by the defendants that these patents are invalid.

[5] According to the defendants, they discovered that Fieldturf (IP) had been dissolved and had assigned all its assets and all its rights in the Dockets and in the patents therein to Fieldturf Tarkett Inc.

[6] However, the defendants state that they were not served in any of the Dockets with a notice and affidavit regarding this assignment of rights within the relevant time period, as required under sections 117 and 118 of the *Federal Courts Rules* (the Rules). The defendants therefore filed a motion under section 118 in each of the Dockets to dismiss each action (the defendants' motion to dismiss).

[7] Fieldturf (IP) has filed a response in each of the Dockets to the defendants' motion to dismiss. Concurrently, Fieldturf Tarkett Inc. has filed a motion in each of the Dockets — using

the same counsel—for an order under subsection 117(2) of the Rules that it be substituted for Fieldturf (IP) in all the Dockets (the motion for substitution by Fieldturf Tarkett Inc.).

[8] The affidavit at issue was sworn by a lawyer, Mr. Levy, in the Fieldturf (IP) matter in response to the defendants' motion to dismiss. The same affidavit was also filed by Fieldturf Tarkett Inc. on its motion for substitution.

[9] The defendants' motion to dismiss and the motion for substitution will be heard together on September 7, 2006.

[10] In the meantime, the defendants proceeded to cross-examine Mr. Levy on his affidavit.

[11] These reasons and the accompanying order are given in this docket T-375-05, but will also apply, *mutatis mutandis*, to dockets T-283-03, T-350-03, T-491-04 and T-1473-04.

Analysis

[12] It is well established that a party cross-examining on an affidavit does not have the same latitude as on an examination for discovery of the opposing party.

[13] As stated in the following excerpts from *Imperial Chemical Industries Plc v. Apotex Inc.* (1988), 23 C.P.R. (3d) 362, at pages 366 and 368, the questions on a cross-examination on affidavit must be limited to the issue in respect of which the affidavit was filed, or to the credibility of the deponent:

> A party cross-examining his opponent's affidavit is not entitled to cover all matters that may be said to be in issue in the action. Rather, the range of inquiry is limited to the issue in respect of which the affidavit was filed or to the credibility of the witness. Moreover, the question must be a fair question in the sense of evincing a *bona fide* intention directed to these ends, rather than being something in the nature of a fishing expedition. See *Weight Watchers Int'l Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 196; *Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd.* (1983), 75 C.P.R. (2d) 160; and *Boots Co. PLC v. Apotex Inc.* (1983), 76 C.P.R. (2d) 265.
>
> . . .
>
> . . . if we were dealing with an examination for discovery, where the test of relevancy involves a consideration of what might reasonably be supposed to contain information likely to assist the party in advancing his own case and in damaging the case of his adversary. The same broad standard of relevancy is not an appropriate test of relevancy for cross-examination of an affidavit. In my opinion, the learned prothonotary erred in law in treating these questions as being properly relevant to the issue in respect of which the affidavit was filed or as going to the credibility of the witness. I consider that they are unfair and oppressive questions in the nature of a fishing expedition, and nothing more.
>
> (Emphasis added.)

[14] As emphasized by Fieldturf (IP) and Fieldturf Tarkett Inc., the dissolution of Fieldturf (IP) and the assignment of all its assets to Fieldturf Tarkett Inc. were raised in Mr. Levy's affidavit for the purpose and in the specific context of, first, opposing the defendants' motion to dismiss under section 118 and, second, obtaining an order under subsection 117(2) of the Rules that Fieldturf Tarkett Inc. be substituted for Fieldturf (IP).

[15] By way of context, I note that sections 117 and 118 read as follows:

117. (1) Subject to subsection (2), where an interest of a party in, or the liability of a party under, a proceeding is assigned or transmitted to, or devolves upon, another person, the other person may, after serving and filing a notice and affidavit setting out the basis for the assignment, transmission or devolution, carry on the proceeding.	**117.** (1) Sous réserve du paragraphe (2), en cas de cession, de transmission ou de dévolution de droits ou d'obligations d'une partie à une instance à une autre personne, cette dernière peut poursuivre l'instance après avoir signifié et déposé un avis et un affidavit énonçant les motifs de la cession, de la transmission ou de la dévolution.

(2) If a party to a proceeding objects to its continuance by a person referred to in subsection (1), the person seeking to continue the proceeding shall bring a motion for an order to be substituted for the original party.	(2) Si une partie à l'instance s'oppose à ce que la personne visée au paragraphe (1) poursuive l'instance, cette dernière est tenue de présenter une requête demandant à la Cour d'ordonner qu'elle soit substituée à la partie qui a cédé, transmis ou dévolu ses droits ou obligations.
(3) In an order given under subsection (2), the Court may give directions as to the further conduct of the proceeding.	(3) Dans l'ordonnance visée au paragraphe (2), la Cour peut donner des directives sur le déroulement futur de l'instance.
118. Where an interest of a party in, or the liability of a party under, a proceeding has been assigned or transmitted to, or devolves upon, a person and that person has not, within 30 days, served a notice and affidavit referred to in subsection 117(1) or obtained an order under subsection 117(2), any other party to the proceeding may bring a motion for default judgment or to have the proceeding dismissed.	**118.** Si la cession, la transmission ou la dévolution de droits ou d'obligations d'une partie à l'instance à une autre personne a eu lieu, mais que cette dernière n'a pas, dans les 30 jours, signifié l'avis et l'affidavit visés au paragraphe 117(1) ni obtenu l'ordonnance prévue au paragraphe 117(2), toute autre partie à l'instance peut, par voie de requête, demander un jugement par défaut ou demander le débouté.

[16] The reference in Mr. Levy's affidavit to the assignment of assets by Fieldturf (IP) to Fieldturf Tarkett Inc. appears to be prompting the defendants to rely on the right of redemption under article 1784 of the *Civil Code of Quebec* (C.C.Q.), in order to deter Fieldturf Tarkett Inc. from bringing a motion for substitution under subsection 117(2) of the Rules, and to have it question the relevance of doing so.

[17] Article 1784 of the C.C.Q. reads as follows. For purposes of context in reading this article, Fieldturf Tarkett Inc. must be viewed as the purchaser of the rights of action that Fieldturf (IP) had against the defendants pursuant to the Dockets.

> art. 1784. Where litigious rights are sold, the person from whom they are claimed is fully discharged by paying to the buyer the sale price, the costs related to the sale and interest on the price computed from the day on which the buyer paid it.

> This right of redemption may not be exercised where the sale is made to a creditor in payment of what is due to him, to a coheir or co-owner of the rights sold or to the possessor of the property subject to the right. Nor may it be exercised where a court has rendered a judgment affirming the rights sold or where the rights have been established and the case is ready for judgment.
>
> (Emphasis added.)

[18] The defendants had article 1784 in mind when they asked Mr. Levy a series of questions on his cross-examination that were all met with objections. All these questions had the same objective and, therefore, the outcome will be the same for all.

[19] It is clear from the outset that the objective of the defendants' questions was not to impugn the credibility of the deponent. The objective was specific and unique, and consisted in the following, as set out in paragraph 8 of the defendants' written representations:

> [TRANSLATION]
>
> In this context, all the questions asked and all the requests made during the cross-examination of Mr. Levy had only one objective: to establish the amount that Defargo should pay to exercise its right of redemption in opposition to Tarkett's motion.

[20] I intend to dismiss all the questions asked by the defendants at the cross-examination of Mr. Levy on his affidavit for the following two main reasons.

[21] First, the objective of the defendants' line of questions, i.e. to establish an amount for a possible right of redemption, is different, extraneous and therefore irrelevant to the issue in respect of which Mr. Levy's affidavit was filed, i.e. a reference to an assignment of assets for the

purpose of opposing the defendants' motion for dismissal and to obtain on motion an order substituting one entity for another.

[22] This conclusion alone is sufficient to dismiss the defendants' motion.

[23] Second, it also appears that, although article 1784 C.C.Q. does not mention it explicitly, there must be an aspect of speculation in the sale of litigious rights in order to exercise the right of redemption under article 1784 C.C.Q. In my view, the burden of establishing this aspect lies with the defendants and not with Fieldturf (IP) or Fieldturf Tarkett Inc. The Québec Superior Court in *2025225 Ontario Ltd. v. Compagnie d'assurances ING du Canada*, (S.C., 2005-12-21), SOQUIJ AZ-50348962, J.E. 2006-303, [2006] R.J.Q. 524, points out at paragraphs 30 and following that both the doctrine and the case law look for this aspect of speculation:

> [TRANSLATION]
>
> [30] The aspect of speculation in litigious rights is the basis of the debtor's right of redemption. In this way, the legislature intended to shield the assigned debtor from having its debt increased by giving him a special remedy of satisfying the claims of the assignee of the litigious rights.
>
> [31] Professor Pierre Gabriel Jobin [See Note 4 below] believes that the right of redemption is subject to certain conditions.
>
> [32] The first condition is that there must be a true sale of litigious rights. The professor writes:
>
> > The first condition of the right of redemption is that the transfer of litigious rights must be a real sale, because in order for the redemption to be exercised the debtor must pay the sale price to the buyer. This sale can occur by the assignment of debt by onerous title or even, it seems, by subrogation, even though these mechanisms are governed by the general rules of the law of obligations.

[33] The author then adds:

> On the other hand, the right of redemption does not apply to a giving in payment because normally the giving is a method of payment and not a mechanism for speculation—it is often in desperation that a creditor resorts to the giving in payment to collect its debt.

[34] Professor Jobin states the following about exceptions to article 1784 C.C.Q.:

> Third, the statute itself prohibits the right of redemption in certain circumstances, mainly where the sale of a litigious right is made to a coheir or co-owner of the right sold. In this context, the legislature considers that there is no speculation in buying the right but rather a partition between coheirs or co-owners.

[35] Accordingly, the speculative nature of the transaction is essential to the court's assessment of the right of redemption.

[36] The case law also recognizes that it is not possible to exercise the right of redemption when the transaction of the debt is not the subject of a form of speculation.

[37] In *Rénovation Langis inc. v. Cabessa*, [1996] A.Q. No. 1279 [See Note 5 below], my colleague Mr. Justice Verrier concluded that the assignment of the right in this case does not give rise to the right of redemption in article 1784 C.C.Q., because the parties did not engage in bargaining to buy the lawsuit. He concludes that the transaction does not involve any form of speculation, which would prevent the exercise of the right of redemption.

[38] In the most recent *Deutsche Bank A.G. Canada Branch v. Patrick Hariz* [2003] J.Q. No. 18777 [See Note 6 below], Mr. Justice Clément Gascon dealt with the issue of the application of the right of redemption, and stated the following:

> The basis of the provisions of the Civil Code of Québec concerning the assignment of litigious rights is simple: to prevent speculation on the outcome of lawsuits. The legislature does not want to encourage the sale of lawsuits, or favour those who profit from a situation to buy uncertain rights at a low price that could ultimately generate a large profit. It is the aspect of speculating on litigious rights that the legislature wants to address and discourage.

[39] The judge adds:

> On the one hand, apart from the fact that this case does not involve so-called litigious rights, the assignment of debt signed by BT Canada and the Bank does not disclose any form of speculation or bargaining in the purchase of a lawsuit, which

> is at the very heart of the provisions of the Civil Code of Québec concerning the assignment of litigious rights.

The doctrine points out that the purpose of these provisions is to prevent speculation:

> 530. — The buyer who recognizes the litigious nature of the right he is acquiring enters into an aleatory contract. The legislature does not object to that, except for the special prohibition set out in article 1485. However, nor does it favour this buyer of a lawsuit, who is speculating on rights that are in dispute, and who continues the litigation that the first parties have probably abandoned. Since the legislature's goal is to limit these transactions, it allows the debtor to apply the right of redemption of litigious rights against the acquirer.
>
> If the assignment is *gratuitous*, the assignee cannot be **disregarded**. The statute is intended to prevent speculation on litigious rights; giving away these rights does not have any of the characteristics of an act of speculation. . . . [See Note 7 below].

Author Michel Pourcelet states in his well-known work [See Note 8 below]:

> In certain cases where the idea of speculation did not enter into the purchase of the litigious right by the assignee, i.e., where the assignee acquired the right for a legitimate reason, the redemption cannot be exercised. Article 1582 does not apply to the scenarios set out in article 1584.

[40] Last, my colleague concludes in these terms:

> In this case, not only is there no evidence of speculation or bargaining to buy a lawsuit, but in addition, the only witness who testified at the hearing indicated that this assignment of debt was simply part of a transfer of all the debts of BT Canada to the Bank, following the merger of two entities, which involved assets whose value greatly exceeded the value of the debt relating to Mr. Hariz.

Note 4: La réforme du Code civil, Obligations, contrat nommé, Les Presses de l'Université Laval, pages 543, 544.

Note 5: REJB 1996-30611 (May 10, 1996).

Note 6: EYB 2003-51607 – S.C. (December 15, 2003).

Note 7: MIGNAULT, P.-B., Le Droit civil canadien, Volume 7., Montréal, Wilson & Lafleur, 1906, page 200.

> Note 8: POURCELET, Michel, La vente, 5th edition, Montréal, Les Éditions Thémis, 1987, page 244.
>
> ---
>
> (Emphasis added.)

[24] In this case, there is nothing in Mr. Levy's affidavit to suggest directly or indirectly that there was an aspect of speculation in the assignment between Fieldturf (IP) and Fieldturf Tarkett Inc. Moreover, none of the questions put to Mr. Levy suggested the possibility of speculation either directly or indirectly.

[25] Accordingly, the defendants' motion will be dismissed with costs. Both Fieldturf (IP) and Fieldturf Tarkett Inc. have requested costs at a higher level (on a solicitor-client basis and/or the maximum in column V, Tariff B) because, in their view, the entire exercise surrounding the cross-examination of Mr. Levy, including this motion, was clearly pointless.

[26] I do not intend to award costs at a higher level because, in my view, from the outset of the cross-examination, counsel for Mr. Levy made himself judge in his own cause regarding this finding of futility, and made that perfectly clear to counsel for the defendants.

[27] Accordingly, this motion is dismissed with costs under column III of Tariff B.

"Richard Morneau"
Prothonotary

Montréal, Quebec
August 30, 2006

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-375-05
STYLE OF CAUSE:	FIELDTURF (IP) INC. and LES INSTALLATIONS SPORTIVES DEFARGO INC. and FIELDTURF TARKETT INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 28, 2006
REASONS FOR ORDER:	PROTHONOTARY MORNEAU
DATED:	August 30, 2006

APPEARANCES:

David Assor	FOR THE PLAINTIFF
Pascal Lauzon	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Spiegel Sohmer Montréal, Quebec	FOR THE PLAINTIFF
BCF, s.e.n.c.r.l. Montréal, Quebec	FOR THE DEFENDANT

Date: 20060830

Docket: T-375-05

Montréal, Quebec, August 30, 2006

Present: Prothonotary Richard Morneau

BETWEEN:

FIELDTURF (IP) INC.

Plaintiff/
Defendant by counterclaim

and

LES INSTALLATIONS SPORTIVES DEFARGO INC.

Defendant/
Plaintiff by counterclaim

and

FIELDTURF TARKETT INC.

"Petitioner"

ORDER

This motion by the defendants is dismissed with costs under column III of Tariff B. Only one set of costs is awarded, although this order and the accompanying reasons also apply to dockets T-283-03, T-350-03, T-491-04 and T-1473-04.

The defendants shall serve and file their reply record on the motion for substitution brought by Fieldturf Tarkett Inc. on or before August 31, 2006.

"Richard Morneau"
Prothonotary

Certified true translation
Mary Jo Egan, LLB