Federal Court  Cour fédérale

Date: 20140226

Docket: T-1310-09

Citation: 2014 FC 178

Toronto, Ontario, February 26, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD.

Plaintiffs
(Defendants by Counterclaim)

and

JANSSEN INC.

Defendant
(Plaintiff by Counterclaim)

REASONS FOR ORDER AND ORDER

[1] The Defendant (Plaintiff by Counterclaim) Janssen Inc. has brought by way of this motion, an appeal from an Order made by the Case Management Judge, Prothonotary Aalto, dated February 13, 2014, wherein he Ordered that the hearing of the trial respecting an injunction should proceed the week of May 12, 2014, and Ordered a number of other matters as a consequence. Janssen seeks

to set aside the fixing of the trial date in respect of the injunction and some of the consequential matters, all as set out in paragraphs 1, 2, 3, 4, 5 and 9 of the Case Management Judge's Order.

[2] It is trite law in this Court that an Order of a Prothonotary; particularly, that of one acting as a Case Management Judge, will not be set aside in the absence of an error in law or a fundamental misapprehension of material facts. An Order given by a Case Management Judge in the exercise of managing a case, particularly a case such as this which has been going on for close to five years, and where the parties have demonstrated that they are extremely difficult to manage, should be afforded great respect.

[3] In December and January last, I heard the trial of the infringement and validity issues in this action and, on January 17, 2014, I gave Judgment in the following terms:

> 1. *It is declared that, as between the parties and their privies, claims 143 and 222 of Canadian Letters Patent Number 2,365,281 are valid and have been infringed by the Defendant Janssen Inc. by its promoting, offering for sale, and selling in Canada its product known as STELARA;*
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> 2. *Either party, or both, may apply to the Office of the Chief Justice for the fixing of a second trial in respect of the remaining issues in this action; and*

3. *Save where as otherwise previously expressly Ordered by this Court, each party should bear its own costs.*

[4] In my Reasons, 2014 FC 55, I commented on the case management process and the failure of the parties in that respect at paragraphs 186 and 187:

> *186 I come to the issue of costs. As I expressed to Counsel during the trial, I am extremely disappointed that they did not take advantage of the Case Management and Trial Management process so as to narrow the issues, make appropriate agreements as to facts, and otherwise get this matter ready for trial; focusing on the important issues. The case has been instituted some four years ago, yet even up to and during the trial, Counsel was going back and forth as to issues and factual concessions. Expert reports were served that never were made part of the record. Letters rogatory were issued, yet never used. Other witnesses, whose names were mentioned from time to time, were never called. Discovery of the parties and named inventors were prolonged and numerous tedious motions were brought to compel yet further discovery. Scant portions of the discovery transcripts were deemed read in at trial; most of which could have been dealt with by an agreement as to facts. In all, the parties have not made full or proper use of the pre-trial process and management procedures, notwithstanding abundant applications to the Court about this or that point. We expect better.*
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> *187 Therefore, each party will bear its own costs, except where there has been a particular Order of this Court awarding costs. Where costs have been left to the Trial Judge or in the cause, there will be no costs.*

[5] The issue that was before the Case Management Judge and now under appeal, arose as a result of a proposed motion by the Plaintiffs for a limited interlocutory injunction and a request, by correspondence, by Janssen that injunctive issues be stayed pending the outcome of its appeal from my decision as to infringement and validity to the Federal Court of Appeal. In a letter to the Chief Administrator of this Court dated January 24, 2014, Janssen's Counsel had requested that the matter

of fixing a trial date of the further issues be referred to the Case Management Judge, Prothonotary Aalto *"... who has much familiarity with the issues in the case and conduct of the action to date"*. Counsel subsequently appeared before Prothonotary Aalto and were given a full opportunity to make their arguments. The result was the Order now appealed by Janssen.

[6] The thrust of Janssen's argument before me was that the Order under appeal was an improper unilateral variation of an earlier Order made by the same Case Management Judge of September 26, 2011, which was not appealed, in which it was Ordered, *inter alia*:

> 1. *The issues of validity and infringement of Canadian Patent No. 2,365,281 (the 281 Patent) shall be determined at the trial presently scheduled to commence on October 22, 2012.*
>
> 2. *In the event that any asserted claim of the 281 Patent is found to be valid and infringed, then the issue of the Plaintiff's (collectively Abbott) rights to elect as between profits and damages, Abbott's entitlement of injunctive relief, the extent of infringement, and the quantum of any damages or profits, as the case may be, shall be determine at a second trial (the "Reference"), on a date as may be agreed upon or ordered by the Court.*

[7] I do not read this Order, as Janssen's Counsel seems to read it, as requiring that the second trial take place only at a time when all the remaining issues are placed before the Court. That Order

does not preclude a trial as to some of those remaining issues to be held at a time before a trial as to some or all of the remaining issues. This is a matter for the exercise of discretion of the Case Management Judge. As Justice Pelletier in *MicroFibres, Inc v Annabel Canada Inc*, 2001 FCT 1032, at paragraphs 3 and 4, and in *Montana Band v Canada*, 2002 FCA 331, at paragraph 7 said; a Case Management Judge is entitled to Order severance of issues on his or her own motion; and Orders of such kind, particularly those made by such a person intimately familiar with the history and complexity of the matters, should only be interfered with in the clearest of cases.

[8] Counsel for Janssen relies on Rule 399 to argue that Prothonotary Aalto could not vary his earlier Order except on a motion by one of the parties and then, only in limited circumstances. As I have said, I do not take the view that the earlier Order has been varied as it does not preclude the fixing of separate trial dates for one or more of the remaining issues. In any event as Justice Pelletier (as he then was) said at paragraphs 14 and 15 in *MicroFibres, supra*. Rule 385 gives a Case Management Judge authority by his or her motion, without the constraints of *res judicata,* to make or vary an earlier case management Order, in view of the circumstances of the case before him or her at the time, which best serves to bring the matter to a fair trial.

[9] I find no basis in the circumstances of this case for interfering with the Order under appeal.

[10] The Plaintiffs are seeking solicitor-client or substantial costs on this motion. They argue that this appeal was unnecessary and appeals of this kind should be discouraged. As I have said in my Reasons in the earlier trial, there has been a history of a lack of respect for the case management process. I did not ascribe particular blame to either party.

[11] In this case, I will award costs of the motion before me to the Plaintiffs as there must be some message that the parties must respect the case management process. Given the submissions of the parties I fix those costs (including disbursements and taxes) at $5000.00.

ORDER

FOR THE REASONS PROVIDED:

THIS COURT ORDERS that:

1. The motion is dismissed; and

2. The Plaintiffs are entitled to costs fixed in the sum of $5000.00 (including disbursements and taxes).

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1310-09
STYLE OF CAUSE:	ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD. v JANSSEN INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 25, 2014
REASONS FOR ORDER AND ORDER:	HUGHES J.
DATED:	FEBRUARY 26, 2014

APPEARANCES:

Steven Mason	FOR THE PLAINTIFFS (RESPONDING PARTY)
Marguirite Ethier Alexandra Wilbee	FOR THE DEFENDANT (MOVING PARTY)

SOLICITORS OF RECORD:

McCarthy Tetrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Lenczner Slaght Royce Smith Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT