Federal Court of Appeal  Cour d'appel fédérale

Date: 20170112

Docket: A-199-16

Citation: 2017 FCA 8

CORAM: **SCOTT J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

TEARLAB CORPORATION

Appellant

and

I-MED PHARMA INC.

Respondent

and

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Respondent/Patentee

Heard at Montréal, Quebec, on January 9, 2017.

Judgment delivered at Montréal, Quebec, on January 12, 2017.

REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.

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Intervener

REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an appeal by TearLab Corporation (TearLab) against an order of the Federal Court rendered by Manson J. (the Judge) on May 31, 2016 (2016 FC 606) dismissing TearLab's motion for an interlocutory injunction to prevent the sale of the i-Pen by I-MED Pharma Inc. (I-MED), pending the determination at trial of TearLab's patent infringement claim.

[2] In January 2016, TearLab learned that I-MED was accepting pre-orders for its osmolarity measuring device—the i-Pen. Sales of the i-Pen were set to start in March 2016. TearLab filed a patent claim against I-MED on February 8, 2016 claiming infringement on its exclusive Canadian licence for Patent No. 2,494,540.

[3] In an order dated March 24, 2016 (2016 FC 350), Russell J. dismissed TearLab's motion for an interim injunction on the basis that it failed to present qualified witnesses and cogent evidence to satisfy the last two prongs of the tripartite test for granting injunctions, as determined in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-MacDonald*]. This was fatal to TearLab's claim that it would suffer irreparable harm as a result of the continued sale of the i-Pen. Conversely, Russell J. concluded that I-MED's persuasive evidence and expert witness demonstrated that the harm feared by TearLab was quantifiable. Therefore, it did not meet the second prong of the test. He also found that the balance of convenience favoured I-MED.

[4] The interlocutory injunction motion that followed was dismissed by the Judge for similar reasons. He determined that it would be reasonably possible to quantify the damages triggered by the alleged infringement as patent rights are economic in nature. The Judge found that TearLab could not claim it was susceptible to irreparable harm merely because of its difficulty or inability to quantify damages. In the absence of non-speculative and clear evidence, the Judge found that TearLab failed to meet the second prong of the *RJR-MacDonald* test and that the balance of convenience favoured I-MED.

[5] There is only one issue raised by this appeal: Did the Judge err in his application of the legal principles and assessment of the evidence when he denied TearLab's motion for an interlocutory injunction for failing to meet the last two prongs of the *RJR-MacDonald* test?

[6] When reviewing the lawfulness of a discretionary decision regarding a motion for an injunction, this Court cannot interfere with an order of the Federal Court relating to an issue of mixed fact and law, unless the motions judge has committed a palpable and overriding error (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943 (QL) at paragraphs 79, 83–84; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[7] TearLab brings forth three arguments in its appeal. It posits that: (i) the Judge applied an unattainable evidentiary threshold designed for injunctions in pharmaceutical patent cases without any regard for the nature of its patent and should have applied an alternative test favoured under English case law (*American Cyanamid Co. v. Ethicon Ltd.*, [1975] R.P.C. 92,

[1975] UKHL 1 [*Cyanamid*]) which looks at irreparable harm on the balance of probabilities; (ii) the potential for irreparable harm was demonstrated by its witnesses who provided evidence of its vulnerability to unquantifiable damages; and (iii) the Judge erred in relying solely on the *status quo* in his assessment of the balance of convenience.

[8] Despite the able representations of counsel for TearLab, I have not been convinced that the Judge committed a reviewable error of law, a misapprehension of the facts or an inappropriate weighing of the evidence warranting this Court's intervention. The Judge reached a conclusion available to him on the record that was before him.

[9] TearLab's submissions strongly rely on factual evidence supporting its position that it will suffer irreparable harm resulting from I-MED's alleged patent infringement since its damages are unquantifiable. TearLab is asking this Court to reweigh evidence previously considered by the Judge, namely his preference for the testimony of I-MED's expert witness to the effect that the damages could be quantified over TearLab's witnesses' opinion that they were unquantifiable.

[10] It is not this Court's role to decide *de novo* in an appeal for an interlocutory injunction (*Canada (Attorney General) v. Simon*, 2012 FCA 312 at paragraph 2, 441 N.R. 149 [*Simon*]). Rather, this Court owes deference to the motions judge's determinations in the absence of a fundamental error in its appreciation of the evidence.

[11] The Judge did not err in his application of the second prong of the test, which requires evidence from a party that the alleged harm cannot be compensated by an award of damages after the trial (*RJR-MacDonald*, at paragraph 64). He followed the applicable principles as set out in this Court's jurisprudence and applied them correctly. TearLab's attempt to rely on a 1975 House of Lord decision (*Cyanamid*), as well as outdated decisions of the Federal Court and of this Court, cannot displace the seminal decision of the Supreme Court of Canada in *RJR Mac-Donald* and *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110, 38 D.L.R. (4th 32), and the subsequent decisions of this Court (*Simon*; *Astrazeneca Canada Inc. v. Apotex Inc.*, 2011 FCA 211, 425 N.R. 133; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2016 FCA 163, [2016] F.C.J. No 581 (QL)). I have not been convinced that the Judge made a palpable and overriding error in reaching his conclusion that such harm could be more precisely quantified at a later date, as the calculation methods put forward by I-MED's expert witness provided a means to reasonably quantify damages after trial. Moreover, the Judge did not err in his application of the relevant case law of this Court, as TearLab failed to meet the evidentiary threshold to satisfy the *RJR-MacDonald* test.

[12] Contrary to TearLab's argument that the Judge confined his analysis of the balance of convenience to the *status quo*, I find that the Judge properly weighed the evidence before him and took into consideration the full context, including the activities of both parties before coming to the conclusion that the balance of convenience favoured I-MED.

[13] Consequently, I would dismiss this appeal with costs.

"A.F. Scott"

J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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