Federal Court  Cour fédérale

Date: 20161128

Docket: T-2084-12

Citation: 2016 FC 1314

Ottawa, Ontario, November 28, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

UNITED AIR LINES, INC.

Plaintiff

and

JEREMY COOPERSTOCK

Defendant

ORDER

UPON MOTION by the Defendant for an order permitting the Defendant's expert witness, Dr. Martin Zeilinger [Zeilinger], to testify and be cross-examined on his expert report by videoconference from the United Kingdom;

AND UPON CONSIDERING THAT:

- This Court has discretion in addressing this issue. The "gap" rule (Rule 4) has no application as this situation is addressed in the Rules. The fact that the Court has

allowed the factors to be considered to develop organically is not a gap in the Rules.

- Rule 32 gives discretion to the Court to conduct a "hearing" by videoconference, amongst other forms of electronic communication.

- Rule 279 provides that unless otherwise ordered, an expert witness' evidence is not admissible unless the expert witness is available at the trial for cross-examination.

- Fundamental to the trial process is Rule 282(1), which provides that witnesses at a trial shall be examined orally and in open court unless the Court orders otherwise.

- The term "hearing" in Rule 32 is broad enough to include a trial, not just judicial review or motions (see also *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1453 at para 28, 282 FTR 238 [*Farzam*]).

- Consistent with Rule 3, in a modern court with a national jurisdiction, the use of modern communication methods which enhance the trial process are to be encouraged and adopted where appropriate, feasible and fair; however, this is not one of those instances where the advantages of using such modern communication methods outweigh the possible prejudice faced by a party.

FOR THE FOLLOWING REASONS, the motion should be denied:

1. The Defendant has known since at least February 26, 2016, when it was communicated to the parties that this trial was set down for December 5, 2016

(for four days), that in the normal course his expert witness would have to attend at the trial. Not until the trial management conference of November 3, 2016, did the Defendant raise with the Court or the Plaintiff that he planned to have Zeilinger testify by videoconference because the witness had moved to the United Kingdom and it was inconvenient for him to attend in Canada. It was not until November 17, 2016, that the Defendant brought this motion.

2. The basis for the motion is that the expert's teaching schedule would be disturbed if he was required to attend the trial in Montreal. The parties have proposed that the witness be examined and cross-examined for a total of four hours. There is no evidence that this length of testimony would require the expert to miss an entire week of his classes, given the ready availability of transportation and moderate travel time between Montreal and the United Kingdom. The Defendant has not put forward any grounds that would tend to show that the witness is unable to travel, such as disability, illness, or cost. This is a matter of convenience to a witness – not a solid ground for an exception to the requirement for a witness' personal appearance at a trial.

3. The Plaintiff has established that it faces substantial prejudice, in part because of the Defendant's failure to address the requisite technological and jurisdictional issues; but, even setting those deficiencies aside, I am satisfied that the Plaintiff's fundamental right to conduct a proper and thorough cross-examination would be adversely affected by allowing this accommodation for the Defendant.

4. There is a serious issue as to whether the Zeilinger expert opinion is proper expert evidence, or whether it is instead a) argument or b) opinion on the ultimate legal issue. If it is argument, the Defendant can make that argument in his submissions; if it is legal opinion, it is not properly admissible. The Plaintiff has filed a Motion to Strike the expert's report. The disagreement between the parties with respect to the appropriateness of this expert evidence emphasizes the need to ensure that the Plaintiff is able to conduct a thorough and effective cross-examination.

5. There is substantial interference with the right to conduct a proper cross-examination. It is neither feasible nor fair for the Plaintiff to have to provide the expert in advance with the documents upon which he will be cross-examined – whether they are in evidence earlier in the trial or arise separately to challenge his opinion. Furthermore, the conduct of cross-examination will be stilted by the interface of videoconferencing and the use of document-sharing technology may result in delays that, while not extensive, will impede the flow of cross-examination.

6. The Defendant had not addressed the requisite technological issues. His motion materials did not outline a plan or details as to how document exchange, viewing of documents and cross-examination thereon would work. The Plaintiff has correctly raised that the Defendant, in his motion materials, has not established that his proposal is fully technically feasible. Furthermore, past experience in discovery in this file has suggested significant problems with respect to the use of technology between these parties. It is the Defendant's burden to have addressed

these issues to the Court's satisfaction; contrary to the submissions of the Defendant, the Plaintiff does not have the onus of proving that the use of videoconference technology is not feasible. Moreover, even if the proposal were technically feasible, the overall balancing exercise is against granting this motion.

7. The Defendant has not addressed the jurisdictional issue of receiving evidence from a foreign jurisdiction. Rules 271-273 provide that in cases of taking evidence outside of Canada, the Court proceeds by way of commission and letter of request to the court where the witness will testify. In the Federal Court, if testimony is to be received from a foreign jurisdiction by way of videoconference or some other form of electronic communication, a witness must be placed under oath in accordance with our laws and with local laws; this will require the presence of a member of the legal system of the foreign jurisdiction (*Farzam* at para 49). The administration of an oath or declaration is not a mere nicety – it is critical to the court process that the witness be subject to enforcement, including sanctions, with respect to his testimony. It is the responsibility of the Defendant, not the Court, to address the form of oath-taking.

8. Having reviewed the Defendant's Reply, the Defendant's submissions are not consistent with the rules of Reply and are in fact indicative of "case splitting".

9. The general obligation of a party to have his witness present and available at trial, combined with the alleged importance of the expert evidence and the expected duration of the cross-examination, all indicate that it is in the interests of justice that this witness appear in-person.

THEREFORE, the Defendant's convenience has not overcome the prejudice to the Plaintiff or to the Court process.

IT IS ORDERED that this motion be dismissed with costs.

"Michael L. Phelan"
Judge