Date: 20090911

Docket: T-724-08

Citation: 2009 FC 896

Ottawa, Ontario, September 11, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**MULTI FORMULATIONS LTD.,
IML FORMULATIONS LTD.,
PUMP FORMULATIONS LTD. and
MTOR FORMULATIONS LTD.**

Plaintiffs

and

**ALLMAX NUTRITION INC.,
HEALTHY BODY SERVICES INC.,
RON TORCH and MICHAEL KICHUK**

Defendants

AND BETWEEN:

**ALLMAX NUTRITION INC. and
HEALTHY BODY SERVICES INC.**

Plaintiffs by Counterclaim

and

**MULTI FORMULATIONS LTD.,
IML FORMULATIONS LTD.,
PUMP FORMULATIONS LTD.,
MTOR FORMULATIONS LTD.,
IOVATE HEALTH SCIENCES INTERNATIONAL INC.,
IOVATE HEALTH SCIENCES INC., TERRY BEGLEY
and PAUL TIMOTHY GARDINER**

Defendants by Counterclaim

REASONS FOR ORDER AND ORDER

[1] This is an appeal by the Plaintiffs from a decision of Prothonotary Kevin Aalto in which he declined to strike certain paragraphs from the Defendants' Defence and Counterclaim (Counterclaim). The Plaintiffs assert that the Prothonotary erred by refusing to strike allegations by which damages are claimed for the economic torts of inducing breach of contract and interference with economic relations. These causes of action are said to be outside of this Court's jurisdiction and, therefore, cannot be permitted to stand. The Plaintiffs also argue that the Prothonotary erred by refusing to strike allegations made against two of their corporate officers in their personal capacities. This is an argument based on the sufficiency of the pleadings not going to the Court's jurisdiction.

I. Background

[2] The background to this litigation and to this motion to strike is thoroughly canvassed by Prothonotary Aalto and need not be repeated here. Similarly, the legal principles that apply to a motion under Rule 221(1) are well-known and correctly cited in the decision under review. Suffice it to say that the burden on the party moving to strike a pleading is onerous and the discretion to do

so will only be exercised where the Court “is satisfied beyond doubt that the allegation cannot be supported and is certain to fail at trial because it contains a radical defect”: see *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2005 FC 1310 at para. 31, 44 C.P.R. (4th) 23, affirmed at 2006 FCA 60, 47 C.P.R. (4th) 328.

II. Issues

[3] (a) Standard of review;

(b) Striking the tort claims; and

(c) Striking the claims against corporate officers.

III. Analysis

A. *Standard of Review*

[4] The Plaintiffs argue that the standard of review applicable to an appeal from a Prothonotary’s decision refusing to strike a pleading is *de novo*. This is a discretion which they say has been held by the Court of Appeal to involve an issue vital to the resolution of a case and that no deference is owed on appeal. For this they rely upon *Merck & Co. v. Apotex Inc.,* 2003 FCA 488, [2004] 2 F.C.R. 459, *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, [1993] F.C.J. No. 103 (C.A.) (QL), and *Fieldturf Inc. v. Winnipeg Enterprises Corp.*, 2007 FCA 95, 58 C.P.R. (4th) 15.

[5] It should be first recognized that much of the analysis in *Merck,* above, about what may be vital to the resolution of a case was concerned with significant amendments to pleadings and not to

motions to strike. Although the Court found that the motion to amend raised a vital issue, it also observed that it would be imprudent to attempt any kind of formal categorization of cases and that the issue of what is vital should generally be resolved on a case by case basis: see paragraph 25.

[6] Similarly, the discretion exercised in *Canada v. Aqua-Gem Investments Ltd.,* above, involved a motion to strike an action in its entirety for want of prosecution. In determining whether this was an issue which was vital to the case the Court was naturally concerned by the potential outcome which, whatever it was, would be vital to one or the other of the parties.

[7] The decision in *Fieldturf Inc.,* above, also involved a potential for the dismissal of the action in its entirety on the basis of delay. This was a matter of sufficient consequence to the parties that it was found to constitute an issue vital to the case.

[8] It seems to me that the above cases raise very different considerations from those which arise from a decision like this one, which concerns a refusal to strike out isolated allegations in a pleading. Other considerations may well apply where the challenged allegations in a pleading would be fundamental to the prosecution of a claim or, more obviously, where important or central allegations are struck from a pleading. In this situation, however, I am not satisfied that the impugned pleadings are vital to the resolution of the action. Even in the absence of these allegations, the action would go forward with the Counterclaim and its principal allegations substantially intact. This is a distinction which I think was recognized in *Peter G. White Management Ltd. v. Canada,* 2007 FC 686, 158 A.C.W.S. (3d) 696, *Apotex Inc. v. AstraZeneca Canada Inc.,* 2009 FC 120,

[2009] F.C.J. No. 179 (QL), and *Horseman v. Horse Lake First Nation*, 2009 FC 368, [2009] F.C.J. No. 476 (QL) and which seems to me to be consistent with the approach recognized by the Court of Appeal in *Merck*, above, to examine such matters on a case by case basis. In the result, the standard of review which will be applied to the exercise of Prothonotary Aalto's discretion is whether it was clearly wrong and, for errors of law including jurisdiction, it is correctness.

B. *Striking the Tort Claims*

[9] I see no problem whatsoever in the Defendants' allegations concerning the commission of the nominate economic torts insofar as those pleadings may serve as a foundation for a claim brought under section 45 and section 36 of the *Competition Act*. To the extent that tortious conduct may help to establish a statutory cause of action and resulting damages it may be a matter which is necessarily incidental to this Court's jurisdiction as conferred by subsection 36(3) of the *Competition Act*. I would add that these allegations of tortious conduct, when linked to the assignment of the patents in issue, may represent the "something more" that is required to establish a breach of section 45 of the *Competition Act*: see *Eli Lily and Company v. Apotex Inc.*, 2005 FCA 361, [2006] 2 F.C.R. 477. This is not the stage to resolve such an arguable, albeit perhaps novel, point of law. These are also allegations which are relevant to the Defendants' assertion at paragraph 33 of the Counterclaim that the Plaintiffs are, as a consequence of their impugned conduct, disentitled to equitable relief. I also agree with the Prothonotary that these pleadings are adequate to permit the Plaintiffs to know and to plead to the case advanced against them.

[10] The problem with the Defendants' Counterclaim is that it does not restrict the tort allegations to the statutory claim for relief or raise them as a simple bar to the grant of equitable relief. This is clear from paragraph 38(d) of the Counterclaim by which the Defendants seek "damages for inducing breach of contract and tortious interference with economic relations". This is an impermissible pleading because the subject matter falls well outside of the jurisdiction of this Court as recognized in cases like *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2005 FCA 220, [2006] 1 F.C.R. 570, *Concept Omega Corp. v. Logiciels KLM Ltée* (1987), 21 C.P.R. (3d) 77, 12 F.T.R. 291 (F.C.T.D.), *Nike Canada Ltd. v. Jane Doe et. al.* (2001), 11 C.P.R. (4th) 69, 199 F.T.R. 55 (F.C.T.D.), *Gracey v. Canada Broadcasting Corporation*, [1991] 1 F.C. 739, [1990] F.C.J. No. 1155 (F.C.T.D.) (QL), and *Quebec Ready Mix Inc. v. Rocois Construction Inc.*, [1989] 1 S.C.R. 695, [1989] S.C.J. No. 29 (QL).

[11] I do not agree with the Prothonotary that, insofar as these allegations are brought to support a common law claim to damages, they are merely incidental to the enforcement of the patents. This type of conduct may, if proven, be a bar to the enforcement of a patent and it may run afoul of the *Competition Act*, but I can see no basis for this Court entertaining such matters as stand-alone causes of action which could support a separate claim to common law damages. Here I rely upon the decision in *Innotech Pty. Ltd. v. Phoenix Rotary Spike Harrows Ltd.* (1997), 74 C.P.R. (3d) 275, 215 N.R. 397 (F.C.A.) which involved a motion to strike pleadings in a patent infringement action.

Under consideration was an allegation of breach of a contract contained in both a defence and counterclaim. In holding that the counterclaim pleading should be struck, Justice Barry Strayer stated at paragraphs 4-5:

> With respect, it appears to us that although it is the same licence which is involved in both the statement of defence and the counterclaim, it is invoked for a different purpose in each pleading. In the statement of defence it is being used as a shield against a claim of infringement. In the counterclaim it is being used as a sword, a basis for obtaining remedies against the appellant for its enforcement. The counterclaim, when viewed by itself, would stand alone as an action for breach of contract and as such is not within the jurisdiction of this Court. Using the language of *Kellogg v. Kellogg* the main action is primarily for the enforcement of a patent. That claim can be decided on the basis of the statement of claim and the statement of defence, and incidental to that determination the license, its existence, terms, and validity may well have to be considered. But the counterclaim which must be viewed as a distinct action primarily involves a claim for an alleged breach of contract.
>
> It may well be, as counsel for the respondent ably demonstrated, that this result will lead to inconvenience. But that is not, of itself, a basis for this Court assuming jurisdiction.

Also see *Titan Linkabit Corp. v. S.E.E. See Electronic Engineering Inc.* (1992), 44 C.P.R. (3d) 469 at 473-474, 58 F.T.R. 1 (F.C.T.D.).

[12] I can see nothing in the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 (QL) decision which supports the Defendants' argument that Federal Court jurisdiction extends as far as they contend. *ITO-International Terminal Operators Ltd.*, above, was an admiralty case which engaged in pith and substance this Court's statutory jurisdiction and the consideration of provincial law was said to be incidentally necessary to resolve the issues presented by the parties. Similarly, the decision in *Areva NP GmbH v. Atomic*

Energy of Canada Ltd., 2006 FC 952, [2006] F.C.J. No. 1208 (QL) is distinguishable. Although that case involved breach of contract allegations, the record was insufficient to determine whether the contract was one which fell into the sphere of federal or provincial law. The Court concluded its analysis at paragraph 28 by saying that "[w]ithout the contract, and perhaps other evidence that goes to jurisdiction, the Statement of Claim must stand". I do not have the same problem here because the allegations of tortious liability made against the Plaintiffs fall indisputably into the realm of provincial common law.

[13] It follows from the above that paragraph 38(d) of the Defendants' Counterclaim must be struck out because it contains a claim which does not fall within the jurisdiction of this Court.

C. *Claims Against Corporate Officers*

[14] The Prothonotary found that the Defendants' pleadings against the Plaintiffs' corporate officers were sufficient to withstand a motion to strike under Rule 221(1) and I can identify no error in that finding. The law is very clear that the directing minds of a corporation can be personally liable were there has been a knowing, deliberate or wilful quality to the impugned conduct, where the conduct exhibits a separate identity or interest from the corporation, or where a tort is committed personally: see *Petrillo v. Allmax Nutrition Inc.*, 2006 FC 1199, 54 C.P.R. (4th) 319 and *Anger v. Berkshire Investment Group Inc.* (2001), 102 A.C.W.S. (3d) 1067, [2001] O.J. No. 379 (C.A.) (QL).

[15] Among other things it is alleged that the Plaintiffs' corporate officers embarked on a campaign of anti-competitive behaviour and conspired to violate section 45 of the *Competition Act*.

The pleaded particulars include an alleged strategy of anti-competitive litigation, the unlawful acquisition of patents through assignments, and interference with supplier and customer relationships.

[16] Paragraph 56 of the Counterclaim asserts that the two named officers “are the principal architects” of the asserted campaign of anti-competitive activity. These allegations are sufficiently particularized to support causes of action for personal liability under the *Competition Act* and the Prothonotary did not err in refusing to strike them from the Counterclaim. Even if these allegations were insufficiently pleaded this would be an appropriate situation to allow the Defendants to amend their Counterclaim in accordance with the principles expressed in *VISX Inc. v. Nidek Co.* (1998), 84 A.C.W.S. (3d) 662, 234 N.R. 94 (F.C.A.).

[17] Because success on this appeal was divided costs are awarded in the cause.

ORDER

THIS COURT ORDERS that this appeal is allowed in part with paragraph 38(d) to be struck from the Defendants' Counterclaim.

THIS COURT FURTHER ORDERS that the costs of this appeal be costs in the cause.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-724-08

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ALLMAX NUTRITION INC.,
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 1, 2009

REASONS FOR ORDER AND ORDER BY: BARNES J.

DATED: SEPTEMBER 11, 2009

APPEARANCES:

Linda Plumpton Sandeep Joshi	FOR THE PLAINTIFFS
Marguerite Ethier Naomi Loewith	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Torys LLP Toronto, Ontario	FOR THE PLAINTIFFS
Lenczner Slaght Royce Smith Griffin LLP Barristers & Solicitors Toronto, Ontario	FOR THE DEFENDANTS