Date: 20100719

Docket: T-916-09

Citation: 2010 FC 756

Toronto, Ontario, July 19, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

WOODSTREAM CORPORATION

Plaintiff

and

KOOLATRON CORPORATION

Defendant

AND BETWEEN:

KOOLATRON CORPORATION

Plaintiff by Counterclaim

and

WOODSTREAM CORPORATION

Defendant by Counterclaim

REASONS FOR ORDER AND ORDER

UPON MOTION by the Applicant, Koolatron Corporation (the defendant in the main action), for an order setting aside the Order of Prothonotary Morneau dated June 2, 2010, ordering that the documentary and oral discovery of the alleged infringement and validity of the patents at

issue in this case and the appropriate remedy be held separately before the determination of the quantum of any remedial award pursuant to Rule 107 of the *Federal Courts Rules*, S.O.R./98-106.

AND UPON considering the written representations filed by both parties as well as oral submissions.

AND UPON considering the standard of review applicable to discretionary decisions of prothonotaries as provided in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), slightly modified in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459.

AND UPON considering the totality of the evidence, the Court shall dismiss the appeal of the order of the Prothonotary for the following reasons:

[1] The Applicant failed to demonstrate that *de novo* review of the Prothonotary's order dated June 2, 2010 essentially bifurcating the liability issues from the issues of quantum of damages or profits and extent of any infringement is warranted.

[2] The standard of review set out in *Merck & Co. v. Apotex Inc.*, above at paragraph 19 provides that:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or

> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[3] The question of whether or not issues in a trial are to be determined separately is not an issue vital to the case, and the Prothonotary did not exercise his discretion based upon a wrong principle or misapprehension of the facts, so as to be clearly wrong.

[4] Rather, the Prothonotary correctly stated and applied the test formulated in *Illva Saronno S.p.A. v. Privilegiata Fabbrica Maraschino "Excelsior"*, [1999] 1 F.C. 146 (F.C.T.D.).

[5] More specifically, the Prothonotary addressed and considered the applicant's submissions and came to the conclusions - that there is no overlap between the issues of liability and damages where the legal defence of obviousness is raised, that the Applicant would not suffer any injustice or prejudice in ordering separate trials of the issues, and that ordering separate trial would lead to the least expensive determination of the proceedings. Despite the opposition raised by the Applicant, the Prothonotary concluded that a departure from the general principle was warranted in this case.

[6] I am satisfied that there are no reviewable errors here and the court's intervention is not warranted.

ORDER

THIS COURT ORDERS that the motion in appeal of the order of the Prothonotary dated June 2, 2010 be dismissed. Costs in the way of a lump sum of $ 1000.00 shall be payable forthwith by the Applicant to the Respondent.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	T-916-09
STYLE OF CAUSE:	WOODSTREAM CORPORATION v. KOOLATRON CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 19, 2010
REASONS FOR ORDER AND ORDER:	BEAUDRY J.
DATED:	JULY 19, 2010

APPEARANCES:

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Jayson Thomas	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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THOMAS LAW Toronto, Ontario	FOR THE DEFENDANT