Federal Court Cour fédérale

Date: 20131108

Docket: T-1802-12

Citation: 2013 FC 1137

Ottawa, Ontario, November 8, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

AVON PRODUCTS, INC.

Applicant
(Responding Party)

and

MOROCCANOIL ISRAEL LTD.

Respondent
(Moving Party)

REASONS FOR ORDER AND ORDER

[1] In this motion, the respondent, Moroccanoil Israel Ltd. [Moroccanoil or the respondent] appeals from the May 30, 2013 decision of Prothonotary Morneau in which he dismissed Moroccanoil's motion to strike 58 paragraphs (or partial paragraphs) of the affidavit of Dean Philip Michaud, filed by the applicant, Avon Products, Inc. [Avon]. Moroccanoil argues that the impugned paragraphs in Mr. Michaud's affidavit are inadmissible hearsay and therefore ought to have been ordered struck on an interlocutory basis.

[2] In the underlying application in which this matter arises, Avon seeks to expunge Moroccanoil's trade-mark, "Moroccanoil". Moroccanoil is the name under which the respondent sells a line of hair care products. In its expungement application, Avon alleges that the Moroccanoil trade-mark is invalid because it was not registrable at the date of registration and was not distinctive at the time that proceedings bringing into question its validity were commenced.

[3] The 58 impugned paragraphs in Mr. Michaud's affidavit contain hearsay evidence, detailing conversations Mr. Michaud had with individuals at a variety of businesses in Canada. The conversations concerned the sale by those businesses of other hair care products that contain the words "Moroccan", "Morocco" and "Oil" or "Argan Oil" and the date such products were first sold by the business in Canada. The parties agree that this evidence is relevant to the second basis for Avon's expungement application, namely, the claim that the "Moroccanoil" trade-mark lacked distinctiveness at the time proceedings challenging its validity were commenced.

Decision of the Prothonotary

[4] In the decision under appeal, Prothonotary Morneau first enunciated the test applicable to determine whether the impugned paragraphs should be struck, citing from *Armstrong v Canada (Attorney General)*, 2005 FC 1013, 141 ACWS (3d) 5 [*Armstrong*] and *Gravel v Telus Communications Inc*, 2010 FC 595 [*Gravel*], and held that the party seeking at an interlocutory stage to strike an affidavit filed in an application must establish that there are exceptional circumstances which warrant the order. The passages the Prothonotary cited from *Armstrong* and *Gravel* indicate that such circumstances will exist only when the interests of justice require the affidavit be struck. Examples given in the quotation from *Armstrong* as to when the interests of

justice might require that an affidavit be struck on an interlocutory basis include situations where a party would be materially prejudiced if the order is not made or where the failure to strike the affidavit might impair the orderly hearing of the application on the merits.

[5] After setting out the applicable law, Prothonotary Morneau then considered the facts before him and determined that Moroccanoil had not established the presence of exceptional circumstances sufficient to warrant striking the impugned paragraphs in Mr. Michaud's affidavit. He reasoned in this regard that the judge hearing the expungement application on the merits would be charged with determining whether the impugned paragraphs in the affidavit were admissible, and, if so, how much weight they should be afforded. He also found that Moroccanoil had not established that it would be unduly onerous for it to conduct its own verifications of the hearsay statements contained in the affidavit. The Prothonotary therefore concluded that it would not materially prejudice Moroccanoil if the decision on the admissibility of the impugned paragraphs in Mr. Michaud's affidavit were left to the judge hearing the application on the merits and accordingly dismissed Moroccanoil's motion.

[6] Prothonotary Morneau then went on to consider the issue of whether the impugned paragraphs might be admissible under the exception to the hearsay rule in *obiter dicta* (or comments included in his decision that do not form part of the reasons why the motion was dismissed). Here, once again, he commenced his analysis by first setting out the applicable legal principles, this time referring to the leading case of *R v Smith*, [1992] 2 SCR 915, 94 DLR (4th) 590 [*Smith*], and noted that to come within the exception to the rule against hearsay evidence must meet the twin criteria of necessity and reliability. The Prothonotary next reasoned that, had he been called upon to make the

determination, he would have concluded that these criteria were met in respect of the impugned paragraphs in Mr. Michaud's affidavit because there is no other reasonable way to get the evidence before the Court as the declarants are unwilling to sign affidavits. He also reasoned that the hearsay evidence was reliable as it was corroborated by the two sets of telephone calls that were made and, to a certain extent, by the documentary exhibits that Mr. Michaud attached to his affidavit (whose admissibility was not contested by Moroccanoil).

Test applicable on this appeal

[7] The parties concur that to succeed on this appeal, Moroccanoil must establish that Prothonotary Morneau's Order was clearly wrong as the Order is a discretionary one and is not vital to the outcome of the case. In this regard, it is, as the parties concurred, well-settled that to overturn a discretionary order made by a prothonotary, an appellant must either establish that the questions raised in the motion were vital to the final issue in the case or that the order is clearly wrong (*Merck & Co v Apotex Inc*, 2003 FCA 488 at para 17, 315 NR 175 [*Apotex*]; and *R v Aqua-Gem Investments Ltd* (1993), 149 NR 273, 61 FTR 44 at para 67). The test for determining if an order is clearly wrong requires that the appellant establish that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts (*Apotex* at para 19; *Gordon v R*, 2013 DTC 5112 at para 11, 229 ACWS (3d) 90).

Is the Prothonotary's decision clearly wrong?

[8] In terms of the central finding made by Prothonotary Morneau that Moroccanoil had not established the presence of exceptional circumstances sufficient to warrant striking the impugned paragraphs in Mr. Michaud's affidavit, Moroccanoil argues that the Prothonotary was mistaken as

to the applicable law. It argues that the requirement for there to exceptional circumstances before evidence in an application will be struck on an interlocutory basis applies only in judicial review matters, noting that *Armstrong* was a judicial review case. Moroccanoil further argues that Prothonotary Morneau failed to consider the issue of the prejudice it would suffer if the impugned paragraphs in the affidavit are not struck or, in the alternative, incorrectly assessed the prejudice it would suffer and argues that it should not be called upon to answer to inadmissible evidence regardless of how much time might be required for it to do so. It asserts in this regard that it is inherently prejudicial to be faced with the prospect of having a ruling on admissibility made by the judge hearing the expungement case on the merits because that would require it to potentially file its own inadmissible evidence to reply to that of Avon. It further submits that the Prothonotary erred in his application of the necessity and reliability criteria. It finally argues that the Prothonotary's refusal to deal with this issue will result in a lengthier and more complex hearing on the merits which ought to be avoided by deciding the admissibility issue in an interlocutory fashion. It submits that this case is on all fours with *Canadian Tire Corp v P S Partsource Inc*, 2001 FCA 8, 267 NR 135 [*Canadian Tire*] and *GlaxoSmithKline Inc v Apotex Inc*, 2003 FC 920, 27 CPR (4th) 49 [*GlaxoSmithKline*], where evidence, which Moroccanoil alleges is similar to that in question here, was ordered struck in an interlocutory motion.

[9] In my view, none of these arguments has merit.

[10] Insofar as concerns the assertion that Prothonotary Morneau applied the wrong principles, contrary to what Moroccanoil argues, the need for there to be exceptional circumstances before evidence filed in an application will be struck on an interlocutory basis apples to all applications and

not merely to judicial review applications, as indeed was held in by the Federal Court of Appeal in *Canadian Tire*. That case dealt with evidence filed in a trade-mark expungement proceeding. There, Justice Malone, writing for the Court of Appeal, stated:

> […] I would emphasize that motions to strike all or parts of affidavits are not to become routine at any level of this Court. This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue, where the hearsay can be clearly shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

[11] The requirement for there to be exceptional circumstances before an affidavit filed in a non-judicial review application will be struck on an interlocutory basis was also recognised in *GlaxoSmithKline*, where Justice Rouleau noted at para 4 of his reasons:

> It is an established principle that motions to strike affidavits should be granted only in exceptional circumstances. One of the exceptions to this general rule is where the affidavit in question is clearly irrelevant, which is precisely the issue before the Court in the present application.

[12] Thus, Prothonotary Morneau cannot be said to have applied an incorrect principle in determining that it was incumbent on Moroccanoil to establish the presence of exceptional circumstances in order to have the impugned evidence struck. The Prothonotary in addition cited the correct test from the applicable jurisprudence for what constitutes an exceptional circumstance.

[13] Nor, in my view, did the Prothonotary commit a reviewable error in his application of the applicable test to the facts of this case. As Avon correctly argues, this case is fundamentally different from *Canadian Tire* and *GlaxoSmithKline*.

[14] In the *GlaxoSmithKline*, Justice Rouleau found that the evidence in question was clearly irrelevant and thus could not be held to be admissible by the judge hearing the application on the merits (at para 5). Here, on the other hand, the impugned evidence is relevant to a key issue on the expungement application, as, indeed, Moroccanoil concedes.

[15] *Canadian Tire* is likewise distinguishable, and, moreover, does not stand for the proposition Moroccanoil advances, namely, that it will always be prejudicial to a party to have a ruling on the admissibility of evidence made by the judge hearing the application. In *Canadian Tire*, the Federal Court of Appeal affirmed that "the Court will usually not make an *a priori* ruling on admissibility unless the case is obvious" (at para 17). However, in that case, the Court found that it was obvious that the impugned paragraph of the affidavit was hearsay, and there was no suggestion that the necessity and reliability exception, as enunciated in *Smith* and *R v Khan*, [1990] 2 SCR 531, 113 NR 53 [*Khan*], applied. Indeed, in that case, the Prothonotary made no assessment of whether the exception to the hearsay rule applied, absolutely no evidence or argument was offered as to why it was necessary for the applicant to submit hearsay evidence and the evidence contained no details as to the source of the hearsay or of any other matter that might confirm its reliability (at para 14).

[16] Here, on the other hand, the Prothonotary assessed the admissibility of the evidence and concluded that he would find it admissible. His reasoning on this point cannot be said to be clearly erroneous as he set out the correct law and his assessment of necessity and reliability is reasonable, as is more fully detailed below.

[17] Insofar as concerns the necessity criterion for the admission of hearsay, a party seeking to have evidence admitted must establish that it is reasonably (as opposed to absolutely) necessary that the hearsay be admitted (*Khan* at para 31). In my view, there is a reasonable basis for the Prothonotary's determination that the necessity criterion would be met in this case as there is a solid argument that there is no other reasonable way for the evidence of the declarants to be brought before the Court in an expungement application, short of summonsing each of them to testify during the hearing on the merits, which in itself would be highly exceptional and require leave of the judge hearing the application under Rule 316 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. Moroccanoil can point to no authority that would suggest otherwise.

[18] Likewise, there is a reasonable basis for Prothonotary Morneau's assessment that the hearsay evidence in the 58 impugned paragraphs in Mr. Michaud's affidavit meets the reliability criterion. In this regard, the fact that many declarants twice provided the same evidence during the two sets of calls that Mr. Michaud made supports the reliability of the statements. Moreover, the documentary exhibits corroborate several of the hearsay statements contained in the affidavit and thus likewise support their reliability.

[19] I find no merit in Moroccanoil's suggestion that the hearsay evidence should be regarded as suspect because it was gathered at the direction of counsel for Avon or because counsel was present during two of the phone calls detailed in the affidavit. There is not a shred of evidence to suggest that counsel improperly tailored the responses or that Mr. Michaud did not follow a set procedure for making his calls. Moreover, evidence in any proceeding is always gathered and prepared under the direction of counsel, so the fact that Mr. Michaud was retained by counsel for Avon does not impact the reliability of his affidavit.

[20] Likewise, there is no merit in Moroccanoil's suggestion that some of the declarants were willing to sign affidavits and Avon neglected to obtain them. This submission is premised on what were obviously typographical errors in Mr. Michaud's affidavit, as should have been readily apparent to counsel for Moroccanoil.

[21] The other points that Moroccanoil raises regarding the alleged lack of reliability of the hearsay statements are similarly without merit, as Moroccanoil has misread Mr. Michaud's affidavit in the several instances where it alleges that the hearsay statements do not confirm the sale of the products in question. Similarly, the fact that each declarant did not consult a database before answering Mr. Michaud's questions does not necessarily render their statements less reliable. Thus, there was a reasonable basis for the Prothonotary's conclusion that the hearsay statements contained in Mr. Michaud's affidavit were reliable.

[22] Moroccanoil raises three other arguments in support of its appeal that I likewise find to be without merit. First, it submits that it should not be required to meet inadmissible evidence and

argues that it is fundamentally unfair that it be required to do so. This submission amounts to a claim that evidentiary issues must always be decided on an interlocutory basis. The case law, however, establishes that admissibility issues should normally be decided by the judge hearing the application on the merits unless exceptional circumstances pertain. Thus, it is to be anticipated that in most cases, a party will not have an advance ruling on evidence it wishes to contest. An exceptional case, according to *Canadian Tire* and *GlaxoSmithKline*, involves circumstances where the challenged evidence is clearly inadmissible. This cannot be said of the impugned paragraphs in Mr. Michaud's affidavit for the reasons already discussed.

[23] Second, Moroccanoil argues that its inability to cross-examine the declarants is fundamentally unfair and should not be countenanced. This is clearly wrong as the lack of ability to cross-examine a declarant does not ever affect the admissibility of the hearsay statements. In every case of hearsay, the declarant is not available for cross-examination, and that is why the evidence is hearsay. Its admissibility depends on establishing that the non-cross-examined evidence is both necessary and reliable, as discussed above. The inability to test the evidence through cross-examination, therefore, is a matter that goes to weight but not admissibility (*Smith* at para 40).

[24] Finally, I disagree that allowing this evidence to stand will result in a lengthier or less effective hearing. Delay is more likely to be caused by interlocutory motions and appeals, like the present, than by having the judge hearing the case on the merits rule on the admissibility of the impugned paragraphs in Mr. Michaud's affidavit, as in the normal course.

[25] Thus, it cannot be said that Prothonotary Morneau was clearly wrong. This appeal must accordingly be dismissed.

[26] Avon has requested its cost of this appeal, on an elevated basis, payable forthwith. Moroccanoil has requested that no order be made on costs and, accordingly, that they be in the cause. It underscores that this approach was adopted by the Prothonotary in the decision under appeal and argues that it ought be followed by me if I dismiss this appeal.

[27] Given the lack of authority directly on point, I cannot say that this appeal was so unmeritorious that it ought not have been brought and, therefore, do not believe that Avon should be awarded costs under Rule 401(1) of the Rules. Rather, I believe the approach of Prothtontary Morneaeau in respect of costs is the appropriate one and accordingly make no order as to costs, which shall therefore be in the cause.

ORDER

THIS COURT ORDERS that:

This motion seeking to appeal the May 30, 2013 Order of Prothonotary Morneau is dismissed.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1802-12

STYLE OF CAUSE: AVON PRODUCTS, INC. v MOROCCANOIL ISRAEL LTD.

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: AUGUST 27, 2013

REASONS FOR ORDER AND ORDER: GLEASON J.

DATED: NOVEMBER 8, 2013

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