Federal Court  Cour fédérale

Date: 20160315

Docket: T-944-15

Citation: 2016 FC 318

Toronto, Ontario, March 15, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

TEVA CANADA LIMITED

Plaintiff

and

JANSSEN INC. AND MILLENNIUM PHARMACEUTICALS, INC.

Defendants

AND BETWEEN:

MILLENNIUM PHARMACEUTICALS INC. AND JANSSEN INC.

Plaintiffs by Counterclaim

and

THE UNITED STATES OF AMERICA REPRESENTED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Patentee

and

TEVA CANADA LIMITED

Defendant by Counterclaim

ORDER AND REASONS

I. Background

[1] This appeal arises from a January 26, 2016 Order [the Order] by a Prothonotary of this Court, refusing to grant the Defendants' motion for bifurcation of both (i) the Plaintiff's damages action pursuant to section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [the Regulations] in respect of Teva's "Bortezomib for Injection product" and (ii) the Defendants' Counterclaim for the Plaintiff's alleged infringement of four patents, for which the Defendants seek damages and/or an accounting of the Plaintiff's profits.

[2] On December 14, 2015, the Defendants commenced a motion to bifurcate the proceedings between liability and quantification for both the section 8 action and the infringement counterclaim. The Defendants also requested that if the section 8 component was not bifurcated, then the counterclaim should not be either.

[3] The case management Prothonotary dismissed the bifurcation motion. She held that the Defendants failed to meet their burden to demonstrate that bifurcation would be more likely to result in the just, expeditious, and least expensive determinations of the issues at hand.

II. Analysis

[4] The Defendants contend that the Prothonotary erred in her analysis and thus that the decision should be re-determined *de novo* and reversed. With respect to a legal error, the Defendants contend that while the Prothonotary correctly identified the bifurcation test, she erred

in focusing exclusively on whether or not a trial on liability could put an end to the action. In other words, she wrongly concluded that bifurcation would be warranted only if all liability issues were to be off the table.

[5] I agree that the Prothonotary identified the correct legal test, which is "whether bifurcation is more likely than not to result in the just, expeditious and least expensive determination of the proceeding on its merits" *Apotex Inc v Pfizer Canada Inc,* 2014 FC 159 at para 43.

[6] In *Merck & Co, Inc v Brantford Chemicals Inc*, 2004 FC 1400 [*Merck*] at para 5, this Court set out a list of factors that may be considered to answer whether granting the motion is likely to produce a more just, expeditious, and cost-effective determination:

1. the complexity of issues to be tried;
2. whether the issues of liability are clearly separate from the issues of remedy;
3. whether the factual structure upon which the action is based is so extraordinary or exceptional that there is good reason to depart from normal practice requiring the single trial of all issues in dispute;
4. whether the trial judge will be better able to deal with the issues of the injuries of the plaintiff and the plaintiff's losses, by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages;
5. whether a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff may be more easily reached by trying the issues together;
6. whether the issues of liability and damages are so inextricably interwoven if bound together that they ought not to be severed;
7. whether, if the issues of liability and damages are severed, there are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be;
8. whether there is a clear advantage to all parties to have liability tried first;

9. whether there will be a substantial saving of costs;

10. whether it is certain that the splitting of the case will save time, or will lead to unnecessary delay;

11. whether, or to what degree in the event severance is ordered, the trial of the issue of liability may facilitate or lead to settlement of the issue of damages; and

12. whether it is likely that the trial on liability will put an end to the action.

[7] A similar set of factors was outlined in *Varco Canada Limited v Pason Systems Corp*, 2009 FC 538 at pp 4-5.

[8] After reviewing the Prothonotary's Order, I find that she acknowledged several of these factors and addressed them, including making the following findings (page numbers below refer to her Order):

i. The case is highly complex (p 2);

ii. The issues of liability and damage are linked and thus not easily severed (p 4);

iii. A decision relating to liability alone will not likely put an end to the action altogether (p 3);

iv. There is no clear advantage to all parties by trying the liability first (p 3);

v. There will not be substantial cost savings (p 4);

vi. Bifurcation will not save time; it will more likely lead to delays (p 4);

[9] These findings are all (i) a valid application of the *Merck* factors and (ii) entirely reasonable. I do not agree with the Defendants that the Prothonotary's Order is exclusively based on the first item listed above. To the contrary, the Plaintiff assessed many of the factors set out in the jurisprudence.

[10] As for any factual error. I agree with the Defendants that one could have arrived at the opposite conclusion. However, after weighting the various factors identified above, the Prothonotary chose not to bifurcate. To find fault with this process would amount to reweighing the evidence, subverting the high degree of deference owed to a discretionary decision of a Prothonotary, as held by the Federal Court of Appeal in cases such as *Turmel v Canada*, 2016 FCA 9 at paras 11-12, and most recently in *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 at para 26 in which it stated:

> "[A] prothonotary's decision ought to be disturbed by a judge only where it is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts".

[11] I cannot identify any fact that the Prothonotary misapprehended in reaching her decision. I therefore cannot agree with the Defendants assertions that the Prothonotary erred in her analysis of the "factual matrix."

[12] Finally, the Defendants contend that the Prothonotary erred in law in her application of subsections 8(1) and 8(5) of the Regulations. I see no evidence of any analysis of those provisions in the decision, or anything that could lead one to conclude that the Prothonotary made findings regarding liability under them. Rather, she simply addressed the merits of the bifurcation motion, as she was obliged to do.

III. Conclusion

[13] In conclusion, the Defendants have failed to demonstrate that the Prothonotary's findings were clearly wrong either in fact or law. I thus cannot find any basis to find that there was any

inappropriate exercise of her discretion, let alone anything nearing a clear case of its misuse. As a result, I decline to interfere with the Order.

[14] The motion is accordingly dismissed. Costs are awarded to the Plaintiff forthwith.

ORDER

THIS COURT ORDERS that:

1. This motion is dismissed.

2. Costs are awarded to the Plaintiff forthwith.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-944-15
STYLE OF CAUSE:	TEVA CANADA LIMITED v JANSSEN INC. AND MILLENNIUM PHARMACEUTICALS, INC., AND MILLENNIUM PHARMACEUTICALS INC. AND JANSSEN INC. v THE UNITED STATES OF AMERICA REPRESENTED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND TEVA CANADA LIMITED
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DATED:	MARCH 15, 2016

APPEARANCES:

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