Date: 20070918

Dockets: T-1100-97

Citation: 2007 FC 929

Docket: T-1100-97

BETWEEN:

ELI LILLY AND COMPANY and
ELI LILLY CANADA INC.

Plaintiffs

and

APOTEX INC.

Defendants

AND BETWEEN

APOTEX INC.

Plaintiff by Counterclaim
(Third Party Claim)

and

ELI LILLY AND COMPANY and
ELI LILLY CANADA INC.

Defendants by Counterclaim

and

NOVOPHARM LTD.

Defendant by Counterclaim
(Third Party Claim)

AND

Docket: T-1697-01

BETWEEN:

ELI LILLY AND COMPANY and
ELI LILLY CANADA INC.

Plaintiffs

and

APOTEX INC. and
NOVOPHARM LIMITED

Defendants

REASONS FOR ORDERS

HARRINGTON J.

[1] These two related patent infringement actions are specially managed by Mr. Justice Hugessen and more so by Prothonotary Aronovitch. On 13 August 2007, she issued three orders which deal with examinations for discovery. Eli Lilly has appealed. It should not have.

[2] Eli Lilly's position is that in docket T-1697-01 Apotex and Novopharm are out of time to examine the inventors on discovery, and that in T-1100-97 Apotex is out of time to continue its examination of Eli Lilly and Company (Lilly U.S.A.) because the Prothonotary had set deadlines for those examinations; deadlines which were not respected. Apotex and Novopharm disagreed with Eli Lilly's interpretation of the orders in question.

[3] Prothonotary Aronovitch ordered that Apotex and Novopharm bring on formal motions to resolve the issue. They did. They submitted they were still within time, but if not they asked that time be extended.

[4] In T-1697-01, on the issue of examination of the inventors, she held that Apotex and Novopharm were not out of time, that they were not in breach of deadlines set by her previous orders. She ordered that the examination be conducted by 15 October. However, she awarded costs of the day to Eli Lilly as she thought that Apotex and Novopharm had not pursued the matter with appropriate vigor.

[5] In T-1100-97, Prothonotary Aronovitch again concluded that the time for the conduct of the examination for discovery of Lilly U.S.A. had not lapsed. However, she went on to say that if she was wrong, in the circumstances she found that Apotex had satisfied the test in *Canada (Attorney General) v. Hennelly*, 244 N.R. 399, [1999] F.C.J. No. 846 (Fed. C.A.), and ought to be granted an extension. Again she granted costs of the day to Eli Lilly.

CASE MANAGEMENT

[6] One of these actions began in 1997, the other in 2001. Prothonotary Aronovitch was appointed case manager in court docket number T-1100-97 in January 2001 and in T-1697-01 in October 2002. As case manager, the Prothonotary is called upon to deal with all matters that arise prior to trial. Rule 385 calls upon her to give any necessary directions, to fix delays for the completion of various steps in the proceedings and to fix and conduct such dispute resolution or pre-trial conferences as she considers necessary.

STANDARD OF REVIEW

[7] The three orders under appeal are discretionary in nature. No matter what her decisions might have been, they were not vital to the outcome of the cases. Therefore, her discretion should not be disturbed, and I should not exercise discretion *de novo*, unless the orders are clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459, 30 C.P.R. (4th) 40 (F.C.A.)). Eli Lilly submits that the Prothonotary misconstrued her earlier orders and thereby rendered her decisions based upon a wrong principle.

T-1697-01 – THE INVENTORS

[8] Eli Lilly's position is this. On 15 March 2004, the Prothonotary ordered that: "Examinations for discovery be completed within one hundred and twenty (120) days from service of the documents and particulars." The parties made arrangements to examine the inventors on discovery, but Eli Lilly had not listed their notebooks in its list of documents, and would not voluntarily produce them. On 3 March 2006, Prothonotary Aronovitch ordered Eli Lilly to produce the notebooks, which it did on 30 March 2006. The March 2006 order also provided that "new dates for the examination of Mr. Marzoni and Dr. Moder will be set upon the agreement of the parties. If parties are unable to agree, the matter will be decided at a case management conference convened, by either party, for that purpose."

[9] In a status review report filed in December 2006, Eli Lilly submitted that the March 2004 and March 2006 orders had to be read together. The agreement on the new dates to examine the inventors was restricted to 120 days after the notebooks were produced as documents, in other

words, Apotex and Novopharm had only until 28 July 2006. They did nothing within that timeframe and so lost such rights as they had.

[10] There is no basis for that interpretation. The first paragraph of the March 2004 order set a delay with respect to demands for particulars and the production of the documents listed in the various affidavits of documents. Thus, the reference to "the documents and particulars" in paragraph 2 of that order can only be read as pertaining to documents produced by Eli Lilly, and the reference to examinations for discovery has to be limited to, in this context, the examination of Eli Lilly, and not an examination of an inventor as an assignor under rule 237(4) of the *Federal Courts Rules*.

[11] The Prothonotary said it best:

> I find the Order of March 3, 2006, and paragraph 3 thereof, alone, governs the timing of the examination for discovery of the inventors, and that Apotex is not outside the scheduling orders of the Court.
>
> Paragraph 3 of the Order of March 3, 2006, compels the production of the lab notebooks, and sets the terms for the examination of the inventors in the following terms:
>
> > 3. **New dates** for the examination of Mr. Marzoni and Dr. Moder will be set upon the agreement of the parties. If parties are unable to agree, the matter will be decided at a case management conference convened, by either party, for that purpose.
>
> The Order does not stipulate a deadline other than one to be agreed upon by the parties. Indeed, only by the most strained technical, and in my view, untenable interpretation can it be argued that the Order of March 15, 2004 (the "Order"), and its 120 days limit for the completion of discoveries should apply as of the date of the provision of the lab notebooks. It is clear in all of the circumstances of this case that the Order is not applicable, and is overtaken by further orders, including that of March 3, 2006, which in my view, provides for the conduct of examinations without reference to the above parameters.

[12] Eli Lilly submits however that in some of her orders Prothonotary Aronovitch specifically mentioned that they superseded previous scheduling orders, in whole or in part, and other times she was silent. Silence must trump in the sense that a previous scheduling order remains in force unless specifically superseded.

[13] Scheduling orders are issued on a going forward basis. The prime questions are "Where are we now? Where are we going?" The case manager continually moves the case along, helping it over hurdles, always with the end in sight: a discontinuance or a trial. It would be intolerable if a case manager had to review all her previous scheduling orders to ascertain whether they could be read together. Most of these orders are in the moment. Most earlier orders lose their force as a result of intervening events or the passage of time. As intolerable as it would be for the case manager to have to review all previous orders, it would be even worse to have the case manager micromanaged in appeals to this Court if the case manager is a Prothonotary, or by the Court of Appeal if the case is being managed by a judge.

[14] Prothonotary Aronovitch's March 2004 order was the 14th order or direction she issued in this case, her order of March 2006 was her 37th and her orders of 13 August 2007, which are under appeal, her 86th and 87th. They are to be found on the 250th page of the Summary of Recorded Entries! Mr. Justice Hugessen has also issued various case management orders.

[15] Whether two orders are to be read together, or if one supersedes the other is a matter of construction. As stated by the Manitoba Court of Appeal in *Allen v. Manitoba (Judicial Council),*

[1993] 3 W.W.R. 749, 83 Man. R. (2d) 136, "…a court order should ordinarily be construed in the context of the application for it." There is nothing in the record to indicate that the Prothonotary got it wrong.

[16] Although I am basing myself on a standard of correctness, that is to say that I can show her no deference on a question of law, it may well be that the interpretation of scheduling orders should not be disturbed unless unreasonable. In *Voice Construction Ltd. v. Construction & General Workers' Union Local 92*, [2004] 1 S.C.R. 609, the Supreme Court held that the standard of judicial review in assessing an arbitrator's interpretation of a collective agreement was reasonableness *simpliciter*. Although an appeal to this Court from an order of a Prothonotary is of a different legal order, the fact remains that it is the case manager who knows what is going on in a case, and why. If lengthy reasons had to be given for each and every order, the process would grind to a halt.

[17] All that being said, if I am called upon to exercise my discretion *de novo*, I grant an extension, for the reasons set out with respect to T-1100-97.

T-1100-97 – CONTINUED DISCOVERY OF LILLY U.S.A.

[18] Eli Lilly takes the same approach to this examination for discovery. It submits two of Prothonotary Aronovitch's orders had to be read together, the result being that Apotex had only until the end of May 2006 to complete the examination for discovery. Since it did not, it is out of time.

[19] Apotex's discovery of Eli Lilly has gone on for some time, and has been the subject of controversy. The order of 13 August 2007 was not the first time Prothonotary Aronovitch had to deal with re-attendances in order that the discovery be finally completed. By way of an "Amended Scheduling Order" dated 28 June 2005, she required Apotex to bring on a motion to compel the re-attendance of Lilly U.S.A.'s representative(s). That order provided that if that motion were granted, Apotex "shall complete its continued discovery of the appropriate representative of Lilly U.S.A. within 60 days…" thereof. That order was only granted 28 March 2006, hence Eli Lilly's position that Apotex only had 60 days therefrom to complete the discovery i.e. until the end of May 2006.

[20] There was a great deal of activity in the docket between June 2005 and March 2006. The Prothonotary refers to some of the circumstances, but certainly not all.

[21] I am not prepared to say she erred in law in interpreting her two orders. Indeed, I do not think a strict literal textual approach can be taken in an analysis of scheduling orders. The June 2005 order was her 56th order or direction, her March 2006 order her 72nd, and her order under appeal her 103rd, to be found on the 245th page of the Summary of Recorded Entries.

[22] I think the question to be asked is whether her interpretation was reasonable and in the interest of justice. I do not think that this is such a strict matter of law that the Prothonotary's order must be reviewed on a standard of correctness. See *Voice Construction*, above.

EXTENSION OF TIME

[23] However, if the Prothonotary's decision is based on a wrong principle, so that I am called upon to exercise my discretion *de novo*, I must then review her alternative order that Apotex be granted an extension of the delays.

[24] Rule 8.(1) provides:

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.	**8.** (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

[25] Delays are fixed by Statute, by the *Federal Courts Rules* and by court orders. Delays are required in a myriad of circumstances. The Court may not extend a delay set out in a statute of limitations, except in those few cases in which it is specifically given discretion. Much of the business of this Court is taken up in judicial review pursuant to section 18.1 of the *Federal Courts Act*. An application for judicial review is brought within 30 days "or within any further time that a judge of the Federal Court may fix or allow…"

[26] The rules themselves set out a great number of delays, such as delays in which to serve a statement of claim, a statement of defence, affidavits of documents and so on. Other delays may be fixed by court order, such as delays in which to put up a representative for examination for discovery and to provide answers to undertakings or answers on objections which were overruled.

[27] Prothonotary Aronovitch referred to the four-part test in *Hennelly*, above, which is:

a. was there a continuing intention to pursue the application?

b. does the application have some merit?

c. will prejudice to the respondent arise from the delay? and

d. is there a reasonable explanation for the delay?

[28] That test, as the Court of Appeal itself noted, is dependant on the circumstances of the case. Certainly *Hennelly* does not detract from the general principle set out years earlier by the Court of Appeal in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 (Fed. C.A.), that the ultimate goal is to do justice between the parties.

[29] As Mr. Justice McDonald, speaking for the Court in *Hennelly*, said: "any determination of whether or not the applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case".

[30] It should be kept in mind that *Hennelly* was an application for an extension of time to file a judicial review application. The Court was not dealing with a delay allegedly fixed by an interlocutory scheduling order.

[31] The question in *Hennelly* was whether the Attorney General of Canada had a continuing intention to pursue his application for judicial review. It is conceded in these cases that both Apotex and Novopharm continue to pursue their defence of the actions. Indeed, if anything, the cases have been hyperactive. Eli Lilly's position is, however, that both had to demonstrate a continuing intention to pursue the discovery of the inventors, or the continued discovery of Lilly U.S.A., as the case may be. That intention had to be demonstrated within the delays fixed by Prothonotary Aronovitch in her earlier orders. However, neither Apotex nor Novopharm was aware that she imposed a delay. As a matter of fact, neither did she, and neither do I. I find that Apotex and

Novopharm have demonstrated a continuing intention to pursue all avenues in their defence, including discovery.

[32] The motions have merit. Apotex had exercised its right to examine Lilly U.S.A., and the Prothonotary has accepted that that discovery was not complete. Both Apotex and Novopharm have the right to examine the inventors. It is not for Eli Lilly to suggest that the discoveries are a waste of time, or that the discovery of an inventor has little value. The rules give that right. That is merit enough.

[33] Eli Lilly suffers no prejudice. Trial dates have not been fixed and the discoveries are to be completed before the next case management conference. Eli Lilly says it assumed from the silence of the defendants that they had not intended to pursue the matter, and that delays are always prejudicial. There is no evidence that Eli Lilly's prosecution of these actions has been delayed for a single minute. What Eli Lilly assumed, or did not assume, is of no interest. Delay is made good by an award of interest.

[34] There certainly is a reasonable explanation for the delay. Apotex and Novopharm had reason to believe there were no delays that had expired.

[35] I conclude with the words of Mr. Justice Pigeon in *Hamel v. Brunelle*, [1997] 1 S.C.R. 147: "…procedure [must] be the servant of justice not its mistress."

[36] For these reasons, the three appeals are dismissed with costs.

"Sean Harrington"

Judge

Ottawa, Ontario
September 18, 2007

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1100-97
STYLE OF CAUSE:	Eli Lilly and Company and Eli Lilly Canada Inc. v. Apotex Inc. Apotex Inc. v. Eli Lilly and Company and Eli Lilly Canada Inc. and Novopharm Ltd.
AND DOCKET:	T-1697-01
STYLE OF CAUSE:	Eli Lilly and Company and Eli Lilly Canada Inc. v. Apotex Inc. and Novopharm Limited
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 6, 2007
REASONS FOR ORDER:	HARRINGTON J.
DATED:	September 18, 2007

APPEARANCES:

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