Federal Court  Cour fédérale

Date: 20120713

Docket: T-486-12

Citation: 2012 FC 888

Ottawa, Ontario, July 13, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE GRIEF RECOVERY INSTITUTE, LLC;
THE GRIEF RECOVERY INSTITUTE
EDUCATIONAL FOUNDATION, INC.;
JOHN W. JAMES AND
RUSSELL P. FRIEDMAN

Plaintiffs

and

1668246 ONTARIO INC. AND ERIC CLINE,
COLLECTIVELY DOING BUSINESS AS THE
GRIEF RECOVERY INSTITUTE;
HEATHER BRASSIL; AND
MORNINGTON COMMUNICATIONS
CO-OPERATIVE LIMITED

Defendants

REASONS FOR ORDER AND ORDER

[1] The defendants Eric Cline, 1668246 Ontario Inc. and Heather Brassil appeal under Rule 51 of the *Federal Courts Rules*, SOR /98-106 ("the *Rules*") the Order of Prothonotary Lafrenière issued on June 25, 2012 granting the plaintiffs' request for special management of this action. The defendant Mornington Communications Cooperative Limited is not represented on this motion.

[2] This proceeding is an action in which the plaintiff's claim, among other things, copyright infringement and passing off. The pleadings, initiated on March 6, 2012 and including a counterclaim, have been filed and served within the time limits set out in the *Rules*. The parties are thus at the close of pleadings stage of the action where they must serve their affidavits of documents in accordance with Rule 223.

[3] On Friday, June 22, 2012 the plaintiffs filed a letter with the Federal Court Registry at Vancouver requesting that the present action be case managed under Rule 383. In the letter, the plaintiffs noted that the above named defendants had advised that they would not consent to the request at this stage of the proceeding on the basis that the request was premature. The plaintiffs submitted that case management is appropriate for these reasons:

> First, the Plaintiffs would like to obtain a trial date at the earliest availability of the Court. The Plaintiffs are of the position that they are suffering significant harm by the ongoing alleged activities of the Defendants, and delay in final resolution of this matter will continue to increase such harm. Given the current delays in obtaining trial dates, the Plaintiffs wish to request a trial date at this time, as allowed in case managed proceedings in accordance with the Federal Court Practice Notice of May 1, 2009, rather than wait to make such a request at the pre-trial conference to take place some time from now.
>
> The Plaintiffs will also be seeking to put in place a scheduling order to ensure that discoveries, discovery motions and other pre-trial motions proceed in a timely fashion, in particular towards the trial date that the plaintiff will be seeking as a part of case management. The Plaintiffs note in this regard that the Practice Notice of May 1, 2009 generally confirms the availability of case management in complex litigation such as IP matters with the purpose being to "facilitate, where possible, scheduling of trials within two years of the commencement of proceedings", and, further, that case management may be sought at any time and "preferably at the outset of a proceeding".
>
> Given the current delays in obtaining trial dates, the complex litigation issues involved, as well as the natures of the parties' respective businesses that involve a great deal of traveling which could result in delays in proceeding with discoveries, it

> is submitted that having have [sic] this matter case managed will ensure that all pre-trial matters progress on a schedule that will allow for trial of this matter to proceed as expediently as possible.

[4] On Monday, June 25, 2012 an Order was issued granting the plaintiffs' request for case management and fixing a deadline for submitting a joint timetable for completion of the next steps in the proceeding or to requisition a case management conference a fixed timetable.

[5] The Prothonotary noted that the named defendants did not consent on the ground that the request was premature. He wrote that he was "satisfied that case management will be of benefit to the orderly proceeding of the pre-trial steps in this action, to governing the scope of discoveries, to the management of motions that may assist in the narrowing of issues and focusing of pleadings, as well as to the just, most expeditious and least expensive determination of the action on its merits."

[6] The standard of review applicable to a prothonotary's discretionary decisions was established by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd,* [1993] 2 FC 425 (FCA) and endorsed with approval by the Supreme Court of Canada in *Z I Pompey Industrie v ECU-LINE N V*, [2003] 1 SCR 450, 2003 SCC 27 at paragraph 18. It was reformulated somewhat in *Merck & co v Apotex Inc*, 2003 FCA 488, 315 NR 175 as follows:

> Discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless:
> a) the questions 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 facts.

[7] The defendants do not suggest that the questions in the motion are vital to the final issue of the case. However, they submit that the Order under appeal should be set aside as clearly wrong because in exercising his discretion, the Prothonotary:

a. Was aware that the defendants did not consent to such an order being granted;
b. Failed to provide the defendants with an opportunity to be heard which constitutes a denial of natural justice;
c. Improperly treated the request for case management as an *ex parte* motion without any evidence been filed;
d. Erred in granting this order on the basis of Practice Notice No. 17 entitled "Streamlining Complex Litigation" when in fact, the present action is not complex litigation; and
e. Erred in law by automatically granting case management on request.

[8] As argued by the plaintiffs, all of the facts relied upon by the defendants including the timing of the pleadings are within the court file on this proceeding. They have not put forward any evidence or arguments to indicate that there was any misapprehension of the facts by the Prothonotary. It was open to him on those facts to form a reasonable assessment, as he did, that case management would be of benefit to the orderly proceeding of the pretrial steps in this action. I see no ground upon which I could find that the exercise of discretion by the Prothonotary was clearly wrong in the sense that it was based upon a misapprehension of the facts. That leaves the issue of whether the decision to issue the order was based upon a wrong principle.

[9] In support of their argument that they were denied natural justice the defendants cite *Canadian Transit Co v Canada (Public Service Staff Relations Board)*, [1989] 3 FC 611 (FCA) at paragraph 16:

> Probably no principle is more fundamental to administrative law at common law than that of *audi alteram partem*, a rule of natural justice that parties be given adequate notice and opportunity to be heard…

[10] This statement was made in the context of a discussion of the operation of a statute authorizing interference with property or civil rights and that was silent on the question of notice and hearing. Here, no rights were being disposed of. The defendants concede that they had notice of the request and had conveyed their opposition to the plaintiffs. Their concern, in essence, is that they did not have an opportunity to provide their reasons for opposing case management to the Prothonotary before the decision was made. It is not clear why they could not have addressed those concerns in a motion in writing under Rules 397 or 397 directed to the Prothonotary.

[11] For the proposition that granting case management on request is an error of law the defendants rely on the reasons of Prothonotary Hargrave in *Huang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 196 in which it was stated at paragraph 2:

> Special management is neither routine nor automatically granted on request. As Chief Justice Richard points out in *Information Commissioner (Canada) v. Canada (Minister of Environment)* (1999), 179 F.T.R. 25 there must be a substantial reason to remove the proceeding from the timetable set out in the Rules.

[12] Chief Justice Richard's obiter remark in the *Information Commissioner* decision and that of Prothonotary Hargrave in *Huang* reflect a view of special management that has been superceded by the more recent emphasis on the timely resolution of disputes. In the matter before Prothonotary Hargrave in *Huang*, the applicant had sought special management so as to expedite judicial review of an interlocutory ruling to adjourn a hearing. Prothonotary Hargrave was of the view that special circumstances should exist to warrant judicial intervention at the interlocutory stage as the matter

could be resolved by the Board through some other means. Absent such circumstances, there was no need for judicial review and, consequently, no need for special management.

[13] No authority is cited in support of the defendants' assertion that the moving party bears an evidentiary burden to establish the need for special management. Rule 384 provides that the Court may at any time order that a matter continue as a specially managed matter. The Rule does not require a motion to the Court in order for such an order to be made although that is normally the practice. Nor does the Rule require evidence. The Practice Notice indicates that the request may be submitted by letter.

[14] Case management orders are issued from time to time on the Court's own motion when it appears necessary from the court record and from the nature of the proceedings. See for example *Jolivet v Canada (Minister of Justice)*, 2011 FC 806 at para 32; and *Detorakis v Canada (Attorney General)*, 2009 FC 144 at para 12. To require that such decisions be made only on motion supported by evidence with the burden of proof on the moving party is inconsistent with the wording of Rule 384 and the Court's practice.

[15] The Prothonotary's decision in this matter is open to the criticism that he acted precipitously in issuing the Order before he received and considered the defendants' reasons for opposing the plaintiff's request. The Prothonotary could have waited for a few days to give the defendants an opportunity to submit their reasons in writing as they were apparently preparing to do when the Order issued. To that extent, I agree with the defendants that their was a breach of procedural fairness. But I do not accept that the Prothonotary was wrong in concluding that case management

was appropriate in this case nor do I accept the defendants' claim that the Order was issued automatically on request. This was a reasonable decision based on the grounds set out in the plaintiffs' letter. I also infer that it was based on the Prothonotary's review of the file that would have been before him and his experience with similar cases.

[16] If I have erred in that finding, I would exercise my discretion to order that the matter be specially managed. There are ample reasons for doing so disclosed by the record of the proceeding and the record of this motion. In reaching that conclusion I have considered the arguments the defendants have advanced to the contrary on the appeal motion.

[17] The defendants submit that this action is not complex litigation similar to pharmaceutical patent or Notice of Compliance proceedings which may involve thousands of pages of evidence, technical and scientific subject matter, extensive discoveries, and multiple experts. They suggest that case management may, in fact, slow down the proceedings as it will become necessary for the parties to conform to the Prothonotary's schedule. That will of course depend on the parties and the number of interlocutory issues that may need to be resolved. But having regular access to a case management judge familiar with the litigation can not be any slower than bringing motions for determination to a random selection of judges and prothonotaries under the normal procedure.

[18] As the plaintiffs point out, the May 2009 Practice Notice is not limited to patent litigation but covers a broad range of matters where case management will assist in streamlining procedures to facilitate the scheduling of trials within two years of commencement of the proceeding. The factual allegations in this proceeding are lengthy and raise numerous issues for discovery and

adjudication in relation to 117 literary works, five unregistered trademarks, the ownership of 10 domain names and the existence and enforceability of an alleged 20 year licensing arrangement between the plaintiffs and the defendants.

[19] The defendants contend that case management would be prejudicial to their interests at this early stage of the proceeding as they would be foreclosed from bringing a motion for summary judgment or summary trial. This argument is based on Rule 213 (1) which provides as follows:

> A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial had been fixed. [Underlining added]

[20] In response, the plaintiffs state that they also have no wish to dispose of their own rights to bring motions for summary adjudication. Accordingly, in the draft Scheduling Order sent to counsel for the defendants for review and comment they have proposed the following clause:

> In the event that either parties wishes to proceed with adjudication of the proceeding, either in whole or in respect of a specific issue or issue(s) in the proceeding, by way of summary judgment or summary trial pursuant to *Federal Courts Rules* 215 or 216, they may do so, notwithstanding Rule 213 (1) and the prior fixing of a time and place for trial, as long as such an application for the same is served and filed no later than _____[with a specific date to be set that would be after the close of the first round of discoveries and any motions/answers thereof].

[21] Subject to the approval of the Court, the proposed clause would appear to be a complete answer to the defendants' claim that they would suffer prejudice if this matter were to be specially managed. It is consistent with the general principle in Rule 3 that the Rules are to be "interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits". The question of prejudice set aside, it is difficult to understand how the defendants' interests were adversely affected by the Order.

[22] As argued by the plaintiffs, this is the type of proceeding that could very easily get bogged down in discoveries and procedural motions and it would be of assistance to the parties to have a judge familiar with this matter to streamline the various pre-trial steps and hearing pre-trial motions to allow this matter to proceed to trial expeditiously and least expensively. I am not persuaded by the defendants' argument that there should be some showing of delay by the parties prior to the issuance of such an order. The Practice Notice states that it should be made as early as possible.

[23] The appeal is dismissed.

[24] The plaintiffs seek solicitor and client costs on the ground that the pursuit of this motion was unnecessary, fruitless and wasteful. Rule 401 provides that the Court may award costs of a motion in an amount fixed by the Court and, where it is satisfied that the motion should not have been brought, it shall order that the costs be payable forthwith.

[25] I agree with the plaintiffs that this appeal should not have been brought. The Order for special management of this proceeding did not in any way adversely affect the defendants' substantive or procedural rights. A less costly resolution could have been sought by a motion in writing to the Prothonotary to reconsider his Order. Accordingly, I will exercise my discretion to impose costs against the named defendants in the amount of $2500 inclusive of disbursements payable forthwith and in any event of the cause.

ORDER

THIS COURT ORDERS that:

[1] The appeal of the Order of June 25, 2012 requiring special management of this action is dismissed; and

[2] The plaintiffs are awarded costs payable by the defendants Eric Cline, 1668246 Ontario Inc. and Heather Brassil in the fixed amount of $2500 inclusive of disbursements and payable within 30 days of this Order and in any event of the cause.

"Richard G. Mosley"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-486-12
STYLE OF CAUSE:	THE GRIEF RECOVERY INSTITUTE, LLC; THE GRIED RECOVERY INSTITUTE EDUCATIONAL FOUNDATION, INC.; JOHN W. JAMES AND RUSSELL P. FRIEDMAN and 1668246 ONTARIO INC. AND ERIC CLINE, COLLECTIVELY DOING BUSINESS AS THE GRIEF RECOVERY INSTITUTE; HEATHER BRASSIL; AND MORNINGTON COMMUNICATIONS CO-OPERATIVE LIMITED
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APPEARANCES:

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