Federal Court Cour fédérale

Date: 20161011

Dockets: T-1741-08
T-1946-09

Citation: 2016 FC 1130

Ottawa, Ontario, October 11, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

EXCALIBRE OIL TOOLS LTD., EXCALIBRE DOWNHOLE TOOLS LTD., KUDU INDUSTRIES INC., CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD., AND LOGAN COMPLETION SYSTEMS INC.

Plaintiffs

and

ADVANTAGE PRODUCTS INC., LYNNE P. TESSIER, JAMES L. WEBER AND JOHN P. DOYLE

Defendants

Docket: T-1946-09

AND BETWEEN:

ADVANTAGE PRODUCTS INC., LYNNE P. TESSIER, JAMES L. WEBER AND JOHN P. DOYLE

Plaintiffs

and

EXCALIBRE OIL TOOLS LTD., EXCALIBRE DOWNHOLE TOOLS LTD., KUDU INDUSTRIES INC., CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD., AND LOGAN COMPLETION SYSTEMS INC.

Defendants

ORDER AND REASONS

[1] This Order is made in the context of the trial of an action for patent infringement. The Defendants in Court action T-1741-08 [the API parties]:

a) seek an Order under Rule 289 of the *Federal Courts Rules*, SOR/98-106, ordering that the Plaintiffs [the Excalibre parties] include, as part of their read-in evidence under Rule 288, additional portions of the transcripts relating to questions and answers given by James Weber and Lynn Tessier during examinations for discovery of the Defendants;

b) object to the Plaintiffs' proposal to read-in questions and answers given by Lynn Tessier at pages 80 to 82 of the discovery transcript, or in the alternative, that additional read-ins on page 82 of that transcript be added.

I. Qualifying Answers

[2] Rule 288 permits a party to rely on answers given during examination for discovery of an adverse party as evidence at trial. Rule 289 provides that the Court may order additional portions of the examination for discovery to be included if they should not be omitted. Rule 290 permits a

party to use all or part of an examination for discovery of a person unable to testify at trial because of illness and for other limited reasons:

Use of Examination for Discovery at Trial	**Utilisation de l'interrogatoire préalable lors de l'instruction**
Reading in examination at trial	*Extrait des dépositions*
288 A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.	**288** Une partie peut, à l'instruction, présenter en preuve tout extrait des dépositions recueillies à l'interrogatoire préalable d'une partie adverse ou d'une personne interrogée pour le compte de celle-ci, que la partie adverse ou cette personne ait déjà témoigné ou non.
Qualifying answers	*Extraits pertinents*
289 The Court may order a party who uses part of an examination for discovery as its own evidence to introduce into evidence any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted.	**289** Lorsqu'une partie présente en preuve des extraits des dépositions recueillies à l'interrogatoire préalable, la Cour peut lui ordonner de produire tout autre extrait de ces dépositions qui, à son avis, est pertinent et ne devrait pas être omis.
Unavailability of deponent	*Non-disponibilité d'un déposant*
290 The Court may permit a party to use all or part of an examination for discovery of a person, other than a person examined under rule 238, as evidence at trial if (a) the person is unable to testify at the trial because of his or her illness, infirmity or death or because the person cannot be compelled to attend;	**290** La Cour peut, à l'instruction, autoriser une partie à présenter en preuve tout ou partie d'une déposition recueillie à l'interrogatoire préalable, à l'exception de celle d'une personne interrogée aux termes de la règle 238, si les conditions suivantes sont réunies : a) l'auteur de la déposition n'est pas en mesure de

and (b) his or her evidence cannot be obtained on commission.	témoigner à l'instruction en raison d'une maladie, d'une infirmité ou de son décès, ou il ne peut être contraint à comparaître; b) sa déposition ne peut être recueillie par voie de commission rogatoire.

[3] There are 4 read-ins of the Excalibre parties in issue, two relating to the examination of James Weber on December 20, 2010, and two relating to the discovery of Lynn Tessier on January 6, 2011. None of the questions and answers objected to are based on lack of relevance:

i. Tab B – 122:2-15, with 123:27-124:22 allegedly providing context;

ii. Tab B – 132:13-27, with 132:4-12 allegedly providing context;

iii. Tab D – 80:15-82:11, with 82:2-17 allegedly providing context;

iv. Tab D – 182:16-183:19, with 182:7-15 allegedly providing context (listed as "item #7").

[4] Only one set of questions and answers is objected to on the basis of hearsay (TAB D-80:15-82:11). With respect to the remaining three sets of questions and answers sought to be read-in by the Plaintiffs, the Defendants seek to qualify the read-ins with additional questions and answers, on the basis that the additions clarify the read-ins for contextual relevance and value to the Court. The Plaintiffs object to these additions on the basis that clarifying or explaining does not mean that other questions and answers, where a witness has given a different answer to the same question, must be read-in to clarify or explain the original answer (*Canada (Minister of Citizenship and Immigration) v Fast*, 2002 FCT 542 at p 1-2 (FCTD); *MediaTube Corp et al v Bell Canada (Mediatube)*, 2016 FC 1066 at paras 5-8 [*MediaTube*]).

[5] Justice Locke's decision in *MediaTube*, above, is in respect of the propriety of allowing corrections to answers to qualify read-ins, and is distinguishable.

[6] Here, the issues relate to whether the passages read-in by the Plaintiffs lack necessary context or subject matter, other than the one passage objected to as hearsay.

[7] I am of the view that Justice Gibson, as he then was, articulated the appropriate test for allowing qualifying or clarifying read-ins, as set out in *Almecon Industries Ltd v Anchortek Ltd*, 2001 FCT 1404 (FCTD) at paragraphs 112-113:

> **112** I understand that it is not uncommon in trials such as that giving rise to these reasons, that counsel have difficulty reaching agreement as to the scope of read-ins from discoveries. In this particular case, counsel for the defendants urged that I should accept certain additions to read-ins proposed to be entered as evidence on behalf of the plaintiff. He referred me to *Foote et al v. Royal Columbian Hospital et al* where Chief Justice McEachern wrote at page 98:
>
>> In my view it is appropriate for the Court, on its own motion, or on the request of any party, to put into evidence any other parts reasonably connected to portions of an examination already put into evidence. In determining whether parts of the examination are connected, the Court may consider continuity of thought or subject-matter, the purpose of introducing the evidence in the first instance, and fairness in the sense that the evidence should, so far as possible, represent the complete answer of the witness on the subject-matter of the inquiry so far as the witness has expressed it in the answers he has given on his examination for discovery. In this way the Court strives to ensure that the evidence of the witness on each subject-matter is complete, but the Court must, of course, be careful also to ensure that answers are not admitted into evidence which, upon a consideration of the course of the trial, ought to be adduced, if at all, by viva voce evidence.

> **113** I accepted into evidence the additional elements of the examinations for discovery proposed on behalf of the defendants. At pages 838 and 839 of volume 9 of the transcript, I am recorded as having ruled as follows, once again with editorial changes only:
>
> > [Counsel for the plaintiff] has taken me to a set of rules, one of which is to make sense out of nonsense or to explain, another to include anything that changes or contradicts or qualifies, anything that completes an answer in circumstances where completion would not be unfair; and I, for my own purposes, would lump those all under one expression, which is "contextualisation". Anything that doesn't contextualise, that is not connected, should not come in. But anything that puts what a party proposes to introduce into context, whether by way of explanation, amplification, contradiction, qualification, whatever term you want to use -- all of which I include within "contextualisation" -- should come in, particularly in circumstances where that contextualisation better enables the presiding judge to assign appropriate weight.

[8] This view is, for the most part, consistent with the decision of this Court in *Weatherford Canada Ltd v Corlac Inc*, 2009 FC 449 at paragraphs 2-3:

> **2** The basic principle of Rule 289 is not disputed -- to ensure that the answers to questions fairly reflect the true response given. Justice Pelletier (as he then was) in *Canada (Minister of Citizenship and Immigration v. Fast*), 2002 FCT 542, summarized the approach to the issue succinctly -- whether the additional material showed either that the witness did not understand the particular question or that the portion being read in was misleading in the sense of suggesting that the witness, at that point, was saying one thing when in fact he/she was saying another.
>
> **3** Justice Gibson, in *Almecon Industries Ltd. v. Anchortek Ltd.* (2002), 17 C.P.R. (4th) 74, gave a slightly broader meaning to the Rule and referred to contextualization. I do not take from that decision anything more than that the question and answer must be seen in the context.

[9] Bearing in mind the guiding principles above, I find that:

i. the qualifying read-ins at 123:27-124:22 should not be allowed, as they are a distinct set of questions that do not clarify or add context to the questions asked and annexed as the Plaintiffs' read-ins;

ii. the qualifying read-in at 132:4-12 should be allowed, as it is a connected thought that clarifies the read-ins and provides necessary context;

iii. the read-ins at 80:15-82:1, other than lines 80:21-27 and 81:1 which are hearsay and should be excluded, were properly put to the witness at trial; the qualifying read-ins at 82:2-17 are not allowed, because they are both hearsay and not required for context;

iv. the qualifying read-in at 182:7-15 are allowed, as they provide context and help clarify the associated read-ins.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The qualifying read-ins at 123:27-124:22 should not be allowed, as they are a distinct set of questions that do not clarify or add context to the questions asked and annexed as Excalibre's read-ins;
2. The qualifying read-in at 132:4-12 should be allowed, as it is a connected thought, clarifies the read-ins and provides necessary context;
3. The read-ins at 80:15-82:1, other than lines 80:21-27 and 81:1 which are hearsay and should be excluded, were properly put to the witness at trial; the qualifying read-ins at 82:2-17 are not allowed, because they are both hearsay and not required for context;
4. The qualifying read-in at 182:7-15 are allowed, as they provide context and help clarify the associated read-ins.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1741-08
STYLE OF CAUSE:	EXCALIBRE OIL TOOLS LTD, EXCALIBRE DOWNHOLE TOOLS LTD, KUDU INDUSTRIES INC, CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD AND LOGAN COMPLETION SYSTEMS INC v ADVANTAGE PRODUCTS INC, LYNNE P. TESSIER, JAMES L. WEBER AND JOHN P. DOYLE
AND DOCKET:	T-1946-09
STYLE OF CAUSE:	ADVANTAGE PRODUCTS INC, LYNNE P. TESSIER, JAMES L. WEBER AND JOHN P. DOYLE v EXCALIBRE OIL TOOLS LTD, EXCALIBRE DOWNHOLE TOOLS LTD, KUDU INDUSTRIES INC, CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD AND LOGAN COMPLETION SYSTEMS INC
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 12, 2016
ORDER AND REASONS:	MANSON J.
DATED:	OCTOBER 11, 2016

APPEARANCES:

Mr. Doak Horne Mr. Shaun Cody	FOR THE PLAINTIFFS
Mr. Christopher Kvas Mr. William Regan Mr. Dominic Venturo	FOR THE DEFENDANTS

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