

Federal Court



Cour fédérale

Date: 20190329

Docket: T-1231-17

Citation: 2019 FC 385

Ottawa, Ontario, March 29, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

SPIN MASTER LTD.

**Plaintiff
(Defendant by Counterclaim)**

and

MATTEL CANADA INC.

**Defendant
(Plaintiff by Counterclaim)**

ORDER AND REASONS

[1] This Motion arises in the context of a patent infringement action, the trial of which is scheduled to commence on April 1, 2019.

[2] In the underlying action, the Plaintiff, Spin Master Ltd. (“Plaintiff” or “Spin Master”) alleges infringement of claims 8 to 11 of Canadian Patent No. 2,547,539 by the Defendant, Mattel Canada Inc. (“Defendant” or “Mattel”).

[3] If infringement is established, Spin Master seeks an accounting of Mattel's profits.

[4] On this Motion, Mattel seeks an Order preventing Spin Master from putting into evidence portions of the reply expert report dated February 28, 2019, of their accounting expert, Andrew Harington ("Harington Reply").

[5] Mr. Harington produced an expert report in-chief on November 30, 2018, addressing Mattel's profits. However, according to Mattel, the Harington in-chief report did not address issues relating to deductions on certain costs.

[6] The Harington Reply seeks to address three issues: (1) discounts; (2) samples; and, (3) marketing costs.

[7] The issues raised in the Harington Reply form the basis of Mattel's objections on the grounds that these issues could and should have been addressed in his report in-chief. In particular, Mattel objects to the portions of the Harington Reply that address samples and marketing costs.

[8] Mattel claims that Spin Master had all of the necessary information to address these issues at the time Mr. Harington prepared his report in-chief.

[9] Mattel argues that Spin Master is splitting its case and has thereby gained a tactical advantage.

Issue

[10] The only issue is if Spin Master can file and rely upon the Harrington Reply dated February 28, 2019.

Analysis

[11] In support of its Motion, Mattel relies upon *Teledyne Industries Inc v Lido Industrial Products Ltd*, [1982] 68 CPR (2d) 204 (FC) [*Teledyne*] for the proposition that, in a regular infringement action, a plaintiff claiming an accounting of profits must lead evidence of the calculation of profits in order to satisfy its legal burden. Mattel argues that profit includes a deduction of costs and since the Harrington report in-chief did not address this, Harrington cannot raise it in his Reply report.

[12] I do not read *Teledyne* to stand for the proposition that Mattel relies on it for. There is no definitive statement in this case that requires a plaintiff in an accounting for profits to lead evidence on a defendant's costs. Further, the paragraphs of *Teledyne* relied upon by the Mattel use the word "revenue" and not "profit". The distinction between these words and whether anything turns on it will largely be a matter for the accounting experts to address.

[13] Mattel also relies upon *R v Krause*, [1982] 2 SCR 466 for its statement at paragraph 15 that parties have the right to know the case they have to meet to prevent case splitting. Mattel argues that, if the Plaintiff is permitted to rely on the Harrington Reply, the Defendant will be deprived of knowing the full case it has to meet upon tendering its responding expert report, and

the Plaintiff will effectively be allowed to speak to an issue in reply that ought to have been raised in-chief.

[14] Here the “evidence” which is disputed relates to Mattel’s costs and the treatment of those costs by the experts. In the circumstances, since it is Mattel’s own evidence that is being analyzed, I fail to see how this constitutes case splitting or how it could prejudice the Defendant as, presumably, the Defendant was aware of its own costs. This is not a situation where the Plaintiff is relying upon information that was not already in the possession of the Defendant.

[15] The Harington Reply appears to be more of a critique of the assumptions of the Defendant’s expert. This is not unusual, and I do not believe that it can be equated with case splitting. I say this especially considering that the factual evidence upon which these assumptions are based is from Mattel’s own evidence and not the evidence of Spin Master.

[16] Obviously, the opinion evidence of Mr. Harington is open to be challenged by Mattel’s own expert and challenged through cross-examination. The relevance of the Harington Reply Report will be assessed and weighed in the context of the overall evidence. I do not see any reason to exclude the Report.

[17] The Motion is therefore dismissed.

ORDER in T-1231-17

IT IS ORDERED that:

1. The Plaintiff, Spin Master Ltd., is granted leave to file the Harington Reply Report dated February 28, 2019; and
2. Spin Master Ltd. shall have costs on this Motion in any event of the cause.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1231-17
STYLE OF CAUSE: SPIN MASTER LTD v MATTEL CANADA INC

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO,
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: MCDONALD J.

DATED: MARCH 29, 2019

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