Federal Court  Cour fédérale

Date: 20230330

Docket: T-1168-21

Citation: 2023 FC 448

Ottawa, Ontario, March 30, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DR. REDDY'S LABORATORIES LTD. and DR. REDDY'S LABORATORIES, INC.

Plaintiffs

and

JANSSEN INC., JANSSEN ONCOLOGY, INC. and BTG INTERNATIONAL LTD.

Defendants

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion by the Defendants, Janssen Inc., Janssen Oncology, Inc., and BTG International Ltd. [together, Janssen], to adjourn the trial of this action by the Plaintiffs, Dr. Reddy's Laboratories Ltd. and Dr. Reddy's Laboratories, Inc. [together, DRL] under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [Regulations]. In

this action, DRL claims against Janssen damages for lost sales of its abiraterone acetate pharmaceutical product.

[2] In this motion, Janssen seeks to adjourn the trial, currently scheduled to commence on June 5, 2023 for 10 days, pending the disposition of an appeal brought by Apotex Inc. [Apotex] in Court File A-60-23 [Appeal]. Apotex, who is a non-party in the within action, has commenced an appeal of an Order and Reasons in this action, dated February 14, 2023, issued under Rule 233 of the *Federal Courts Rules*, SOR/98-106 [Rules], requiring it to produce in this action documents relevant to whether and when Apotex competes with DRL in the but-for world [BFW] applicable to DRL's section 8 claim (see *Apotex Inc v Janssen Inc*, 2023 FC 216 [Production Order]).

[3] As explained in greater detail below, this motion is dismissed, because it is not in the interests of justice to adjourn the trial.

II. **Background**

[4] Janssen markets the prostate cancer drug abiraterone acetate in Canada as ZYTIGA and listed Canadian Patent No. 2,661,422 [the 422 Patent] on the Patent Register in respect of ZYTIGA.

[5] DRL, along with two other generic pharmaceutical companies (Apotex and Pharmascience Inc. [PMS]), sought to market a generic abiraterone acetate product, and each challenged the validity of the 422 Patent under the Regulations. In turn, Janssen commenced

actions under section 6 of the Regulations against each of DRL, Apotex, and PMS, seeking a declaration of infringement of the 422 Patent in each instance.

[6] On consent, the actions were heard together at a common trial. On January 6, 2021, Justice Phelan dismissed Janssen's actions and held the 422 Patent to be invalid (see *Janssen Inc v Apotex Inc*, 2021 FC 7). This decision was upheld on appeal (see *Janssen Inc v Apotex Inc*, 2022 FCA 184).

[7] Justice Phelan's dismissal of the section 6 actions crystallized causes of action for each of DRL, Apotex, and PMS against Janssen under section 8 of the Regulations. On July 23, 2021, DRL commenced the within action seeking section 8 damages. (Separately, in other Court files, Apotex and PMS are also seeking section 8 damages against Janssen.)

[8] In defending the within action, Janssen alleges that DRL would have faced competition from non-party generic manufactures in the BFW. In connection with that allegation, Janssen brought a motion, under Rules 233 and 238, to compel non-party production by, and discovery of, Apotex and PMS (along with comparable motions in the other section 8 actions, overall seeking Rule 233 and 238 relief against Apotex, PMS and DRL [Non-Parties]). The Non-Parties resisted Janssen's motions, asserting arguments including an allegation (advanced most strenuously by Apotex) that Janssen had used information obtained from Apotex's section 8 action to support its motion in the other section 8 actions, thereby breaching the implied undertaking rule. Janssen denied this allegation.

[9] On February 14, 2023, this Court issued the Production Order, finding that Janssen had not breached the implied undertaking rule, and granted Janssen's motion in part. Apotex and PMS were ordered to produce specific categories of documents the Court found relevant under Rule 233 for use in the within action (and the Court granted comparable relief in the other section 8 actions). Janssen's motion for oral discovery under Rule 238 was dismissed.

[10] On February 24, 2023, Apotex appealed the Production Order in this action and the section 8 action commenced by PMS. None of PMS, DRL or Janssen has appealed or cross-appealed. The Parties to the Appeal have agreed to the content of the Appeal Book, Apotex has served and filed its Memorandum of Fact and Law, and Apotex served and filed a motion to expedite the hearing of the Appeal, which the other parties support. In its motion to expedite the hearing of the appeal, the parties identified their mutual dates of availability for the hearing as April 25 or 27 or May 2, 3 or 4, 2023.

[11] As it did not seek a stay of the Production Order pending the appeal, Apotex produced responsive documents on March 6, 2023 [Productions]. In doing so, counsel for Apotex conveyed to Janssen's counsel that it was doing so under reserve of and without prejudice to its rights of appeal from the Production Order, including the right to have the produced material returned and/or destroyed should Apotex succeed on the Appeal.

[12] Based on the Appeal and the position that Apotex has taken surrounding the effect that its success on the Appeal would have on the Productions, Janssen now moves to adjourn the trial of this action until after the disposition of the Appeal.

III. **Issue**

[13] The sole issue to be decided on this motion is whether it is in the interests of justice to adjourn the trial of this action.

IV. **Analysis**

A. *General principles*

[14] This Court has broad discretion to adjourn one of its own proceedings. Paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] provides that the Federal Court may in its discretion stay any proceeding where it is in the interests of justice that the proceeding be stayed. Similarly, Rule 36(1) of the Rules provides that the Court may adjourn a hearing from time to time on such terms as the Court considers just. Apart from the powers that the Court derives from the Act and the Rules, it is also vested with the plenary authority to regulate its proceedings and control the integrity of its process (*Hutton v Sayat*, 2023 FCA 22 at para 7).

[15] In considering whether to stay its own proceeding or adjourn a hearing, the test under paragraph 50(1)(b) of the Act and Rule 36(1) is the same. The Court will assess whether, in all the circumstances, the interests of justice support the stay or the hearing being delayed (see, *e.g.*, *Viterra Inc v Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)*, 2021 FCA 41 at para 23; *Mylan Pharmaceuticals ULC v Astrazeneca Canada, Inc*, 2011 FCA 312 at paras 5, 14).

[16] Applicable jurisprudence has identified a number of factors as among those that the Court can consider in assessing the relevant circumstances:

A. The public interest in having proceedings move fairly and with due dispatch;

B. The general principle of applying the Rules to secure a just, expeditious and cost-effective determination of a proceeding;

C. The length of the stay being sought;

D. The reasons for seeking the stay;

E. The potential for wasting resources; and

F. The prejudice or inconvenience to the parties should the stay be granted or refused.

(see *ArcelorMittal Exploitation minière* Ca*nada S.E.N.C. v. Canada (Attorney General),* 2021 FC 998 [*ArcelorMittal*] at para 19)

[17] While the Court has broad discretion when deciding whether to adjourn a hearing, and the outcome of a motion seeking such relief ultimately depends on the interests of justice in the particular circumstances, the jurisprudence also underscores the importance of scheduling orders and explains that requesting an adjournment is not a trivial matter (see *Smith v Canada*, 2022 FCA 91 [*Smith*] at para 6, citing *UHA Research Society v Canada (Attorney General)*, 2014 FCA 134; *Mason v Canada (Attorney General),* 2015 FC 926 [*Mason*] at para 19; *Sawridge Band v Canada*, 2006 FC 1218 [*Sawridge Band*] at para 81, quoting *Tucker v Canada*, 2004 FC 1600 at para 6). This principle has also been addressed in at least two practice directions issued by the Court (in 1993 and 2013).

[18] I do not understand any of these general principles to be in dispute between the parties.

B. *Whether it is in the interests of justice to adjourn the trial of this action*

[19] As noted above, Janssen's request to adjourn the trial is based not just on the pending Appeal but on the position that Apotex has taken as to how success in the Appeal would affect the Productions. Apotex's arguments in the Appeal include the position that Janssen has breached the implied undertaking and that, if the Appeal is successful, the resulting relief should include compelling return or destruction of the Productions.

[20] Janssen explains that normally the Productions and the information contained therein would inform its trial strategy. It would use the Productions to identify witnesses to call at trial, to develop questions to ask of fact and expert witnesses, and to otherwise identify steps to meet its burden of proving that Apotex would compete with DRL in the BFW and therefore affect DRL's section 8 damages. However, Janssen further explains that, because of the spectre of the Appeal and the possibility that such use would violate the implied undertaking, it has refrained from using the Productions. Janssen argues that these circumstances undermine its ability to properly prepare its case and that it is prejudicial for it to have to proceed to trial with this uncertainty.

[21] Janssen also raises concern about potential prejudice to the Court if Janssen were to use the Productions either in trial preparation or at trial and, following a successful Appeal by Apotex, it was concluded that the Court had heard evidence and argument derived from tainted information. Janssen raises concern that the Court would then either have to segregate the tainted information or have to retry the case, wasting judicial resources in the process.

[22] Janssen questions the likelihood of the Federal Court of Appeal rendering a decision on the Appeal prior to trial. It submits that, even on the most expedited schedule for the Appeal that could provide a result prior to the commencement of trial, such result is unlikely to be available enough in advance of trial to permit Janssen to change course on strategic decisions it has made in its trial preparations.

[23] In opposing Janssen's motion, DRL relies on jurisprudence that describes a request to adjourn a scheduled trial as exceptional (see *Mason* at para 19; *Parrish & Heimbecker Ltd v Mapleglen (Ship)*, 2004 FC 1197 at para 4; *Superior Filter Recycling Inc v Canada*, 2006 FCA 248 at para 2). DRL also notes that Janssen has been unable to refer the Court to any authority in which a trial was adjourned because of a pending appeal on an interlocutory decision. To the contrary, DRL references *Jim Shot Both Sides v Canada*, 2021 FC 282 [*Jim Shot Both Sides*] at paragraph 23, in which Justice Zinn (although ultimately granting a requested adjournment for other reasons) held that the fact of a pending appeal was irrelevant to a request for adjournment of a scheduled hearing.

[24] Janssen responds that the present circumstances are different from a typical interlocutory appeal pending trial, because of the ethical obligations engaged by Apotex's allegation of breach of the implied undertaking. The nature of the implied undertaking is explained in the Production Order (at paras 25-26):

> 25. The Federal Court of Appeal explained the nature of the implied undertaking rule in its recent decision in *FibroGen, Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 [*FibroGen*], at paragraph 45:
>
> > 45. The implied undertaking rule applies to both documentary and oral information obtained on discovery: such evidence is not to be used except for the purpose of that litigation unless and

> until the undertaking is varied by court order (*Juman* at para. 4) or until the documents are admitted into evidence and become part of the public court record. Whether documents produced or answers given are privileged and confidential is irrelevant to the undertaking (*Juman* at para. 27).
>
> 26. This passage from *FibroGen* references the decision of the Supreme Court of Canada in *Juman v Doucette*, 2008 SCC 8 [*Juman*], which explained the rationale for the implied undertaking rule (at paras 24-27). Pre-trial discovery is an invasion of a private right to be "left alone with your thoughts and papers." While the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, the latter is nevertheless entitled to a measure of protection. Moreover, a litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery.

[25] Janssen submits, and I do not understand DRL to dispute, that there is an element of professional ethics in the implied undertaking rule, in that the obligation to comply with the undertaking applies not only to the party that has received evidence produced under litigation compulsion but also to its counsel. I understand that this element influences what Janssen explains is its decision not to make use of the Productions while the Appeal is pending.

[26] DRL argues that correspondence between Apotex's and Janssen's counsel as well as written representations filed by Apotex in the Appeal, both of which have been filed in the record in this motion, demonstrate that Apotex is not asserting that Janssen would breach the implied undertaking by using the Productions to prepare for trial. Rather, DRL interprets Apotex's concern as focused upon the use of the Productions at the trial itself, when they would potentially become part of the public record.

[27] In support of this position, DRL references Apotex's correspondence and filings including the following:

A. When Apotex's counsel sent the Productions to Janssen's counsel, they did so under cover of correspondence stating that Apotex was making production under reserve of and without prejudice to its rights of appeal, including the right to have the produced material returned and/or destroyed should Apotex succeed on appeal. DRL submits that Apotex's position communicated in this covering correspondence does not raise allegations of ethical breach or other relief beyond return or destruction of the Productions if it succeeds on the Appeal;

B. In its Memorandum of Fact and Law filed in support of the Appeal, Apotex references authorities cited in the Production Order and argues that the Court erred in failing to interpret and apply these authorities as supporting a conclusion that Janssen had breached the implied undertaking in bringing its Rule 233 motion. DRL submits that Apotex's arguments focus on DRL's past activities in presenting the Rule 233 motion, not on pre-trial use of the Productions pursuant to the Production Order;

C. In Apotex's written representations filed in support of its motion to expedite the Appeal, it notes the distinction between production of the documents to Janssen and Janssen's use of the documents at trial. Apotex explains that production itself was made on a Counsel's Eyes Only basis pursuant to an applicable protective order, significantly limiting their use and dissemination, but that it would have no control on how the documents are disseminated if they are tendered at trial. Apotex states that, if it obtains a favourable Appeal decision following use of the

Productions at trial, “the horse will be out of the barn.” DRL submits that these representations demonstrate that Apotex is not concerned about Janssen’s pretrial use of the Productions, only its use at trial;

D. Apotex’s written representations in support of its motion to expedite also state that, if the Appeal is expedited and is decided in its favour prior to the commencement of trial, and if the Productions are ordered returned and/or destroyed as a result, Apotex (and Janssen) will be restored to the position they would have been in if the Production Order had not been issued. DRL submits that, like its covering correspondence when providing the Productions, these representations demonstrate that Apotex is not seeking relief arising from allegations of ethical breach or other relief beyond return or destruction of the Productions if it succeeds on the Appeal.

[28] I do not disagree with DRL’s characterization of Apotex’s correspondence and filings. I see nothing in this material that expressly asserts the position that Janssen would be in breach of the implied undertaking by relying on the Production Order and using the Productions for pretrial preparations pending the outcome of the Appeal.

[29] However, Janssen convincingly submits that the Court should be reluctant to rely on DRL’s submissions as to the meaning and implications of Apotex’s positions. As it is not a party to this adjournment motion, the Court does not have the benefit of submissions by Apotex, made in the context of this motion, upon which either Janssen or the Court can rely in understanding what positions Apotex may or may not take in the Appeal. This is not a subject on which the

Court can or should make a ruling in this motion. Rather, Janssen and their counsel are entitled to assess the risk associated with the pending Appeal and make their own decisions on use of the Productions. I am therefore not prepared to accede to DRL's submission that Janssen's concern about the implications of pretrial use of the Productions represents a spectre about which it need not be concerned.

[30] However, I find far more compelling DRL's submission that this spectre is one of Janssen's own making, resulting from the timing of its Rule 233 motion. As DRL notes, and as was recognized in the Production Order (at para 86), while Janssen first approached Apotex seeking discovery in May 2022, it did not perfect its Rule 233 motion until November 2022.

[31] Janssen offers explanations for this timing, including that it first focused on obtaining production from the generic competitors other than the Non-Party section 8 claimants, that the Non-Parties took the position that the Rule 233 motion should not be entertained until after the outcome of a Rule 220 motion presented by DRL (see Production Order at paras 55, 78), and that the hearing of the Rule 220 motion was itself adjourned to a later date because it initially fell on the date of the public holiday recognizing the death of Queen Elizabeth II.

[32] I am not persuaded that any of these explanations particularly assists Janssen. I see no reason why it was required to delay its Rule 233 motion until after it had focused upon the generic competitors other than the Non-Party section 8 claimants or until after DRL's Rule 220 motion had been addressed.

[33] As reflected in the Production Order (at paras 86-89), one of the factors the Court considered in the Rule 233 motion was whether granting the motion would result in delay, cost or disruption of this proceeding. The Non-Parties relied on *Rovi Guides, Inc v Videotron GP*, 2019 FC 1220 [*Rovi*] (aff'd 2019 FCA 321) at paragraph 52, which held that delay by a party in seeking non-party production and discovery can be a sufficient reason to dismiss a motion. This Court agreed with the Non-Parties that, with less than four months remaining before the commencement of the trial in DRL's action, the timing of Janssen's motion was less than ideal. However, the Court held that the circumstances were not comparable to those in *Rovi*, in which counsel for the moving party acknowledged that, should its motion be granted even in part, the trial would necessarily have to be adjourned (see *Rovi* at para 53).

[34] The position taken by the Non-Parties and Apotex in particular, that Janssen's Rule 233 and 238 motions represented, or would result in, breach of the implied undertaking, was one of the principal issues argued at the hearing of those motions. As DRL submits, the Appeal that Janssen now faces was entirely foreseeable by Janssen. In my view, these circumstances, in which Janssen obtained (in part) its requested relief in its Rule 233 motion without any suggestion that the relief would delay the trial, but now seeks an adjournment of the trial based on a foreseeable appeal of that relief, militates strongly against the interests of justice favouring the adjournment.

[35] Turning specifically to the factors set out earlier in these Reasons, which were identified in *ArcelorMittal* (at para 19) as relevant to the assessment of the interests of justice, I note that many of these relate to the general public interest in the timely conclusion of litigation and

efficient use of trial facilities, including prejudice to the Court resulting from losing a scheduled hearing time (see *Sawridge Band* at para 81). There are good reasons for this. As noted by the Federal Court of Appeal in *Smith*:

> 6. In *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134, 2014 CarswellNat 1888 (WL Can) (*UHA Research*), Stratas J.A. provided a useful reminder of the importance of scheduling orders. As he pointed out, a scheduling order "is no different from any other order of the Court—it is an instrument of law, on its terms mandatory and effective" (*UHA Research* at para. 8). In other words, it is not a trivial matter and it will not be set aside "unless there are significant new developments, marked changes in circumstances, or compelling reasons of fairness", which is a "significant threshold" (*UHA Research* at paras. 9-10). Our colleague also underscored the prejudice which may result from a last-minute adjournment: the time allocated for the hearing will in all likelihood "go unused, resulting in a waste of the Court's resources", and when it travels, as is the case here, the Court's transportation and accommodation arrangements, often made long in advance, will most likely have to be altered at the expense of the public purse (*UHA Research* at para. 14).

[36] As previously noted, Janssen asserts potential prejudice to the Court and the public interest if the trial is not adjourned. It raises concern about using the Productions either in trial preparation or at trial and, following a successful Appeal by Apotex, a resulting conclusion that the Court had heard evidence and argument derived from tainted information. Janssen argues that the Court would then either have to segregate the tainted information or have to retry the case, wasting judicial resources in the process.

[37] I accept that the possibilities raised by Janssen exist. However, they are also speculative, as they depend on the decisions that Janssen will ultimately make as to whether, how, or to what extent it makes use of the Productions in pretrial preparations or at trial. Those decisions may in

turn depend on positions taken by Apotex as the Appeal advances. The possibilities raised by Janssen also depend on the timing of the decision by the Federal Court of Appeal and the substantive result in that decision and any relief granted therein. I am also conscious of the reasoning in *Jim Shot Both Sides* (at para 23) that the potential effect of an outstanding appeal should not affect this Court's decisions surrounding its own calendar, which I read as based at least in part on the speculative nature of the consequences of a pending appeal.

[38] In my view, the public interest factors favour denying the adjournment request.

[39] As for the length of the adjournment being sought, Janssen submits that may only need to be a matter of several months, which it characterizes as a brief delay, and its counsel represented that they would make themselves available for new trial dates in the fall of this year. DRL emphasizes that, at least at present, Janssen is requesting an indefinite adjournment, as no specific dates or timeframe have been identified that can be accommodated by the schedules of the parties, their counsel, and the Court. In this respect, DRL submits that these circumstances are distinguishable from those in A*rcelorMittal*, in which Justice McHaffie granted a motion for an adjournment of approximately nine weeks, which the Court described as neither indefinite nor long-term (at paras 21, 23). I agree. Particularly given the lack of certainty as to when this trial could be held if adjourned from the June 2023 dates, this factor favours denying the motion.

[40] Turning to prejudice, Janssen argues that any prejudice that DRL would suffer that can be compensated by prejudgment interest and costs. However, this argument considers prejudice only in purely pecuniary terms. I accept DRL's submissions that the Court should also consider

the prejudice inherent in forcing it to disrupt the plans it has developed for proceeding to the scheduled trial.

[41] The prejudice that the DRL would suffer as a result of an adjournment is similar to the prejudice to the public interest as explained above, although also specific to the particular stage this litigation has achieved and the relative imminence of trial. DRL has been preparing for a two-week trial, scheduled to begin on June 5, 2023, pursuant to a scheduling Order dating to October 6, 2021. The parties have been stewarding this matter pursuant to deadlines set through the Court's case management process, and the commencement of trial is now a little over two months away. As DRL submits, these circumstances are quite distinct from those in *ArcelorMittal*, in which Justice McHaffie explained that the application he was adjourning was still in its early stages, without affidavits having been filed, cross-examinations having taken place, or a hearing having been ordered (at para 24).

[42] Turning to Janssen's interests, the reasons for seeking the adjournment and the prejudice or inconvenience to it should the adjournment be refused are related factors. As explained earlier in these Reasons, Janssen seeks the adjournment based on its assertion that the Appeal undermines its ability to properly prepare its case and that it would be prejudiced if it was to proceed to trial under the present circumstances. As previously explained, I have rejected DRL's argument that Janssen's concerns about the consequences of Appeal are necessarily misplaced. As such, I accept that there is some potential prejudice to Janssen if the trial proceeds as scheduled.

[43] However, as with Janssen's arguments surrounding potential prejudice to the Court, there is also a speculative component to the asserted prejudice to Janssen. Whether and to what extent Janssen suffers prejudice may depend on the decisions that it ultimately makes surrounding use of the Productions, positions taken by Apotex as the Appeal advances, the timing of the decision in the Appeal, and the substantive result of the Appeal.

[44] Moreover, as DRL submits, it remains available to Janssen to issue subpoenas and thereby obtain Apotex documents to be tendered as evidence at trial. At the hearing of the Rule 233 motion, the Non-Parties argued that this was the typical approach to the introduction of non-party evidence at section 8 trials. Janssen emphasizes that, in granting the motion and issuing the Production Order, the Court accepted that the discretionary factor, surrounding the necessity and probative value of the documents sought, favoured ordering production. However, this was only one of the discretionary factors considered. As DRL emphasizes and as canvassed above, another such factor was the absence of a delay or disruption of the proceeding.

[45] Taking into account the factors and analysis set out above, I find that it is not in the interests of justice to grant the requested adjournment.

V. **Costs**

[46] As DRL has prevailed in opposing this motion, Janssen should pay costs. Taking into account the parties' brief oral submissions on the quantification of costs, my Order will award costs in the lump sum amount of $2000.00.

ORDER IN T-1168-21

THIS COURT ORDERS that:

1. The Defendants' motion is dismissed.

2. The Plaintiffs are awarded costs of this motion in the amount of $2000.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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