



[2021] 3 F.C.R. D-21

PRACTICE

DISCOVERY

Examination for Discovery

Appeal from order of case management Judge holding that *Federal Courts Rules*, SOR/98-106, r. 237(3) not permitting Court to order that employee of company's subsidiary be examined for discovery as company's representative where company not agreeing to them acting as such — Judge declining to order that employee of McCain Alimentaire SAS (McCain France) be examined on behalf of McCain Foods Limited (McCain) — In underlying action, plaintiff alleging defendants infringed patent pertaining to process for treating vegetables — Plaintiff selecting Brian Ruff as its discovery representative pursuant to r. 237(1) — Defendants dissatisfied with Mr. Ruff's ability to answer questions — Then bringing motion under r. 237(3) seeking order that employee of McCain France, Fabrice DeSailly, one of inventors of patent in question, be examined in place of Mr. Ruff — Judge finding Mr. DeSailly not appropriate substitute for Mr. Ruff — Concluding that "representative" on examination for discovery having to be representative of company — Finding that Mr. DeSailly not representative of plaintiff but of McCain France, that r. 237(3) therefore not permitting Court to order that he replace Mr. Ruff as plaintiff's representative — Stating, moreover, inappropriate for Court to compel party to accept as its discovery representative someone who is not employee, thus not under its control — Whether Judge erring in concluding that r. 237(3) not permitting Court to order that employee of party's subsidiary be examined for discovery as party's representative — Judge not erring in concluding that Rule 237(3) not allowing Court to make order sought — Principles in *Anangel Splendour (Ship) v. Canada (Ship-Source Oil Pollution Fund)*, 2006 FCA 212 important — First principle therein, namely that "other person to be examined" mentioned in r. 237(3) must be same "representative of the corporation" referred to in r. 237(1) — Federal Court of Appeal in *Anangel Splendour* applied that principle to conclude that representatives of subrogators not parties to proceeding do not fall within scope of "representative of the corporation" for purposes of r. 237 — Question here how principle applying to different factual situation of employee of subsidiary — Answer lying in term "representative" in r. 237(1), read in context of rules governing examinations for discovery — R. 237(3) not permitting Court to order someone not "representative" of corporation, either through corporation's agreement to be represented by them or by virtue of their existing relationship with corporation, to be examined for discovery in substitution for corporation's selected individual — Where corporation not agreeing to have employee of affiliate represent them, that employee not their representative but only representative of non-party, affiliate — Here, plaintiff did not agree to have Mr. DeSailly represent them on discovery in this proceeding — Mr. DeSailly representative of McCain France, non-party — Also inappropriate for Court to impose on corporation a discovery representative who they have not agreed to be represented by, who, as non-employee, is not under their control — Parent company cannot be considered as effectively same as its subsidiary, subsidiary's employees to be representatives of parent, without effectively lifting "corporate veil" between companies — R. 225 providing that Court may order party to disclose in affidavit documents that are in power, possession, or control of subsidiary, parent, or sister company — No similar language appearing in r. 237(3) — Fact plaintiff tendered Mr. DeSailly to give evidence in different jurisdiction, with different rules governing discovery, cannot be taken to mean it has

agreed Mr. DeSailly is its representative for all purposes, including litigation in Federal Court — Whether Judge erred in not ordering plaintiff to identify, put forward another discovery representative — Judge not erring in making generalized order for another representative — Defendants sought order substituting Mr. DeSailly as plaintiff's representative — Not seeking order substituting anyone else as plaintiff's representative or general order requiring plaintiff to identify another witness — R. 359(b) requiring party to set out in its notice of motion "the relief sought" — Requirement to state relief sought in notice of motion giving responding party fair notice of case to be met on motion — Not just to permit defendants to now seek order not previously requested from Judge, on which plaintiff therefore had no adequate opportunity to respond — Finally, no basis here to find that Judge dismissed motion on grounds of prematurity — Motion for appeal dismissed.

MCCAIN FOODS LIMITED V. J.R. SIMPLOT COMPANY (T-1624-17, 2021 FC 890, McHaffie J., reasons for order dated August 27, 2021, 22 pp.)