

Federal Court



Cour fédérale

Date: 20101013

Docket: T-514-10

Ottawa, Ontario, October 13, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

and

**NAGIB TAJDIN, ALNAZ JIWA,
JOHN DOE AND DOE CO. AND
ALL OTHER PERSONS OR ENTITIES UNKNOWN TO
THE PLAINTIFF WHO ARE REPRODUCING, PUBLISHING,
PROMOTING AND/OR AUTHORIZING THE REPRODUCTION
AND PROMOTION OF THE INFRINGING MATERIALS**

Defendants

ORDER

UPON motion dated October 1, 2010 on behalf of the plaintiff seeking to set aside the Order of Prothonotary Tabib dated September 24, 2010 which sets out a series of steps including a 15 minute examination for discovery of the plaintiff;

AND UPON reviewing the motion records and Rules 3, 51, 385 and 422 of the *Federal Court Rules* and more particularly Rule 385(1)(a):

Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

- (a) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;

...

AND UPON hearing submissions from both parties in Ottawa on October 12, 2010;

AND UPON considering that the appropriate test setting out the standard of review to be applied to discretionary orders of prothonotaries was established by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.* (C.A.), [1993] 2 FC 425, 149 NR 273. This test was later affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450 and was subsequently reformulated in the following terms by the Federal Court of Appeal in *Merck & Co., Inc. v Apotex Inc.*, 2003 FCA 488, [2004] 2 FCR 459 at paragraph 19:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

- (a) the questions raised 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 the facts.

AND UPON recognizing that the order is not vital to the current proceedings;

AND UPON noting that Madam Justice Heneghan issued a Direction – and not an Order - dated August 4, 2010 which addresses a different procedural matter;

AND UPON finding that Prothonotary Tabib clearly applied the correct legal principles whereby a motion for summary judgment does not suspend the discovery rights of the defendants and no authority to the contrary was cited before the Court (Rule 385 and see *Trans-Canada Medical Management Inc. v Varenbut*, [2003] OJ No 4702);

AND UPON finding no reason to conclude that Prothonotary Tabib’s Order is clearly wrong or based on misapprehension of the facts in the case at bar (*Sawridge Band v. Canada* 2006 FCA 228, [2006] FCJ No 956);

AND UPON reviewing counsel’s submissions as to costs;

THIS COURT ORDERS that the plaintiff’s motion be dismissed with costs. Costs in the form of a \$300.00 lump sum are payable to the defendant (Mr. Nagib Tajdin) by the plaintiff.

“Richard Boivin”

Judge