Date: 20070823

Docket: A-500-06

Citation: 2007 FCA 269

CORAM: **NADON J.A.**
SHARLOW J.A.
MALONE J.A.

BETWEEN:

NOVOPHARM LIMITED

Appellant

and

JANSSEN-ORTHO INC. and
DAIICHI PHARMACEUTICAL CO., LTD.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 23, 2007.

REASONS FOR ORDER BY: NADON J.A.

CONCURRED IN BY: SHARLOW J.A.
MALONE J.A.

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REASONS FOR ORDER

NADON J.A.

[1] The appellant, Novopharm Limited, seeks an order, pursuant to Rule 397(1)*(b)*, for reconsideration of this Court's Judgment of June 7, 2007, which dismissed its appeal from the decision of Hughes J. dated October 17, 2006.

[2] The appellant argues that in dismissing its appeal, we overlooked or accidentally omitted to address three critical points which, if properly addressed, would have led us to allow its appeal.

These three points are set out in paragraphs 9, 10 and 11 of the appellant's Notice of Motion, which read as follows:

> 9. First, in finding, at paragraphs 20 and 21 of the Judgment, that there is a conflict in the evidence as to what degree of purity is required "for the substance to '[do] its job for instance as an antimicrobial agent' ", this Court overlooked the fact that the "conflict in the evidence" was in relation to a separate issue, and that the uncontradicted evidence was that ofloxacin, having a degree of purity of only 50%, was itself a very effective antimicrobial agent. Novopharm submits that if this had not been overlooked, the Court could not have found, as it did in paragraph 30, that the evidence did not establish that the levofloxacin produced by conventional prior art methods (which on uncontradicted evidence had a purity of 83%) met "an acceptable level of purity".
>
> 10. Second, in refusing to consider the evidence of Prof. Chong as to whether the 1985 Gerster poster rendered the claim obvious on the basis of the finding in paragraph 37 of the Judgment that the 1982 Gerster poster was "directed to flumequine itself whereas the 1985 paper is directed to a flumequine derivative", the Court overlooked the fact that the respondents themselves had argued that the processes in the 1982 and 1985 Gerster posters were "essentially identical", and relied on this fact to argue that the issue of obviousness in light of the 1982 and 1985 Gerster posters had to be resolved in the same manner. Novopharm submits that if the Court had not overlooked this, it could not have found, as it did in paragraph 36, that "[t]he evidence discloses no sound basis for concluding that a person of ordinary skill in the art with knowledge of the 1985 Gerster poster would have made the same connections as Dr. Hayakawa". As a result, Novopharm respectfully submits that but for the fact that this Court overlooked or accidentally omitted to consider the relevance of Dr. Chong's evidence, this Court would have found that, just as was the case with Dr. Hayakawa, a person skilled in the art using the Gerster 1985 poster as a model, would have been led directly and without difficulty to the claimed invention.
>
> 11. Third, in rejecting the argument that the claim must be obvious because the existence of levofloxacin is disclosed in the ofloxacin patent and is necessarily present in ofloxacin, on the basis that Novopharm did not propose that interpretation, the Court overlooked the fact that Novopharm had in fact proposed that very interpretation. Novopharm has never taken the position that the levofloxacin in ofloxacin is "different" from that claimed in claim 4. It was only to answer the Respondents' argument that claim 4 required that the ofloxacin be produced in some undefined level of purity that Novopharm argued that techniques were known to resolve enantiomers from racemates with a high level of purity. This in no way displaces Novopharm's basic contention, as restated in paragraph 13 of the Judgment, that claim 4 is obvious because the existence of ofloxacin is disclosed in the ofloxacin patent. Novopharm respectfully submits that, but for the fact that this Court overlooked or accidentally omitted to consider Novopharm's argument that claim 4 is obvious because the existence of ofloxacin is disclosed in the ofloxacin patent, the Court would have allowed the appeal.

[3] Rule 397(1)(b) provides:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397.** (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes
…	[…]
(b) **a matter that should have been dealt with has been overlooked or accidentally omitted**.	*b)* **une question qui aurait dû être traitée a été oubliée ou omise involontairement.**
[Emphasis added]	[Je souligne]

[4] I have carefully reviewed our decision and that of Hughes J. and, as a result, I am entirely satisfied that there is no matter that should have been dealt with in this appeal which was overlooked or accidentally omitted.

[5] In my view, what the appellant is truly seeking is not reconsideration pursuant to Rule 397(1)(b), but rather a reconsideration of the arguments on the merits presented to us both in its Memorandum of Fact and Law and during the course of the oral hearing. In other words, the appellant is arguing that in dismissing its appeal, we erred in respect of the three points which it now raises. That is made abundantly clear by paragraphs 9, 10 and 11 of its Notice of Motion.

[6] Consequently, the remedy which the appellant must pursue to correct the errors which it claims were made in our decision of June 7, 2007, is an application to the Supreme Court of Canada for leave to appeal.

[7] For these reasons, I would dismiss the appellant's motion with costs at the top end of Column V of Tariff B.

"M. Nadon"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-500-06
STYLE OF CAUSE:	NOVOPHARM LTD. v. JANSSEN-ORTH INC. et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	NADON J.A.
CONCURRED IN BY:	SHARLOW J.A. MALONE J.A.
DATED:	August 23, 2007

WRITTEN REPRESENTATIONS BY:

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