
BETWEEN:

HOME JUICE COMPANY .....APPLICANT;

AND

ORANGE MAISON LIMITED .....RESPONDENT.

Ottawa
1967
June 20

Trade marks—Practice—Proceedings to strike out entry—Trade Marks Act, s. 58(3)—Exchequer Court Rule 36—Affidavits—Objections to relevancy and admissibility—When to be disposed of.

Objections to the relevancy or admissibility of affidavits filed in trade mark proceedings governed by Exchequer Court Rule 36 should not be dealt with before the hearing except at least in two cases (1) where special leave is sought under the Rule to admit evidence which is obviously inadmissible and (2) where necessary to permit the hearing to proceed in an orderly manner.

APPLICATION.

Christopher Robinson, Q.C. for applicant.

Gordon F. Henderson, Q.C. for respondent.

1967

HOME JUICE CO. v. ORANGE MAISON LTD.

JACKETT P. (orally):—This is an application by the applicants for an order that the respondent may not put before this Court for the hearing and determination of these proceedings a certain affidavit that has been filed on the ground that it contains irrelevant and inadmissible evidence.

The proceedings were instituted by notice of motion for an order striking out the registration made by the respondent in the Trade Mark Register of the trade mark "Orange Maison".

By virtue of section 58(3) of the *Trade Marks Act*, proceedings of this kind are to be heard and determined summarily on evidence adduced by affidavit unless otherwise directed, and it has been ordered that this application is to be heard on June 27 next.

Paragraph (6) of Rule 36 of the Rules of this Court provides for the respondent filing within a specified time "any affidavits which he proposes to put before the Court for the hearing and determination of the proceedings". Paragraph (3) of the same rule contains a similar provision with reference to the affidavits which the applicant proposes to "put before" the Court.

On May 25 last, I granted an application by the applicant to use, on the hearing, a copy of material filed by the respondent in the Trade Marks office in connection with another trade mark application on the view that it constituted an admissible form of evidence, but I expressly left the question of "relevancy, etc." to be decided at the hearing.

After the time for filing its affidavits had expired, the respondent applied *inter alia* for leave to file "expert evidence with respect to the meaning of the words Orange Maison". I rejected this application on the ground that, as I understand the rules of evidence, such evidence was clearly not admissible. As I understand the law, while the meaning of words having a special meaning in a particular trade, science, industry, or other particular element of society may be the subject matter of evidence in connection with a contention that the words have been used in a statute, contract or other context in that particular meaning, the meaning of words when used in the ordinary way as part of one of the official languages is a matter for the

Court with such aids to interpretation as are available to it and cannot be the subject matter of opinion evidence. Otherwise, the Court could be inundated with expert testimony on every question of interpretation that arises. I therefore dismissed the application to adduce such expert evidence.

The applicant, thereupon, proceeded with the present motion, which is designed to force the respondent to withdraw an affidavit filed under Rule 36(6) and to substitute an affidavit omitting certain portions of the present affidavit that, as the applicant argues with some force, are irrelevant to the issues before the Court and are therefore inadmissible.

I am faced with the fact that I have given leave for one piece of evidence to be used subject to consideration of its relevancy at the hearing and that I have refused leave to file other testimony at this point on the ground that it is inadmissible.

Affidavits may be filed within the time limited without special leave or after the time limited with leave.

If leave is sought and it then appears to the Court that the subject matter of the request for leave is clearly inadmissible then, in my view, it would not be a proper exercise of judicial discretion to grant the leave. It was on this view that I dismissed the application for the expert evidence affidavit.

Where the affidavits are filed in time, questions of relevancy or admissibility, like questions of cogency, should ordinarily be left to be dealt with on the hearing of the application. On this view, I dismiss the present application.

I am not to be taken as saying that there might not be such an abusive filing of irrelevant affidavits or other filing of material before the hearing as would call for an application in advance of the hearing to have the Court exercise a proper judicial discretion to put the matter in proper shape for the hearing.

What Rule 36 contemplates is the filing in advance of the hearing of the affidavits that the respective parties "propose" to "put before the Court" for the hearing. In my view, in the ordinary course of events each of the respective parties, having complied with this condition precedent

1967

HOME JUICE CO. v. ORANGE MAISON LTD.

Jackett P.

to using such affidavits as evidence, should tender at the hearing such of the affidavits that he has previously filed as he then decides to make part of his case at the hearing. At that time, the opposing party can make all proper objections to their being admitted and the Court can, after hearing anything that the parties may have to say, admit each affidavit, in whole or in part, or reject it. As a practical matter, the most efficient and economical way of deciding such questions is by having them so raised and decided at the hearing and, as a practical exercise of judicial discretion, the parties should not be permitted to raise them before the hearing. The two exceptions to that general rule that I contemplate at the moment are

(a) where a party has to obtain leave to admit evidence and it is obvious, in the view of the Court, that it is inadmissible, and

(b) where the Court can be convinced that, as a practical matter, the admissibility of the affidavits filed by one of the parties should be considered some time before the hearing so that the hearing can proceed in an orderly manner.

It is understood between the Court and counsel that the fact that I dismissed the application for leave to file an expert evidence affidavit will be placed on the record at the hearing, so that, in the event of an appeal from the determination of these proceedings, the respondent may make that fact a subject matter of an application for a new hearing, if he is so advised.

As this is the first time that the point has arisen, the costs will be costs in the cause.