
1938
 June 24.
 June 27.

BETWEEN:
 THERMIONICS LIMITED.....PLAINTIFF;
 AND
 D. L. KEPLERDEFENDANT.

Practice—Examination for discovery—Written interrogatories.

Held: That an examination for discovery is to be made orally and not by the delivery of written interrogatories.

MOTION by plaintiff to examine the defendant for discovery by delivery of written interrogatories.

The motion was argued before the Honourable Mr. Justice Angers, in Chambers.

M. B. Gordon for the motion

D. A. McIlraith, K.C., contra.

ANGERS J. (June 27, 1938) delivered the following judgment:—

This is an application on behalf of plaintiff for leave to examine the defendant on discovery by delivering interrogatories in writing. In support of the application there was read the affidavit of one of the solicitors for plaintiff, stating (*inter alia*):—

3. That the defendant resides in Calgary and the information which the plaintiff is entitled to obtain can be more readily obtained by means of written interrogatories than by an oral examination on discovery.

Counsel for the defendant objected to the granting of this application, alleging that this procedure is not permitted by the rules of this Court.

The rule governing the examination for discovery is Rule 129; it is worded as follows:—

After the defence is filed any party to an action, whether plaintiff or defendant (other than the Crown or the Attorney-General) and the assignor of any patent of invention, copyright, trade mark, industrial design, or any property, right or interest, who is not a party to any action relating to the same, may, at the instance of the plaintiff or defendant (as the case may be) and without order, be examined for the

purposes of discovery before the Registrar or before some other officer of the Court specially appointed for that purpose, or before a Judge, if so ordered by the Court or a Judge.

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In virtue of this section the examination for discovery is made orally.

It was submitted on behalf of plaintiff that under Order XXXI, Rule 1, of the Rules of the Supreme Court (England), the examination for discovery of a party is made by interrogatories in writing and that Rule 1 of Order XXXI applies; Rule 1 reads as follows:—

1. In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Counsel for plaintiff submitted that Rule 1 of Order XXXI of the English Rules applies in virtue of Rule 2 of the Rules of this Court, which reads thus:—

(1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:—

(a) If the cause of action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Supreme Court of Judicature in England; and

(b) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Supreme Court of Judicature in England.

The examination for discovery is otherwise provided for by the rules of this Court and is governed by Rule 129. Counsel for plaintiff further relied on Rule 300, which is in the following terms:—

The Court or a Judge may, under special circumstances depart from any limitation in these rules upon the inherent right or power of the Court or a Judge and, furthermore, may excuse any party from complying with any of the provisions of these rules.

I do not think that this rule has any application in the present case, no special circumstances having been established.

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THERMION- prescribed by Rule 129 should be followed.

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The application is accordingly dismissed with costs here-
by fixed at the sum of \$15.

Order accordingly.