Federal Court Cour fédérale

Date: 20170912

Docket: T-608-17

Citation: 2017 FC 826

Ottawa, Ontario, September 12, 2017

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

SEEDLINGS LIFE SCIENCE VENTURES, LLC

Plaintiff

and

PFIZER CANADA INC.

Defendant

ORDER AND REASONS

[1] Seedling Life Science Ventures LLC ("Seedlings") is a small corporation in the business of health care-related research and product development. It considers that Pfizer Canada Inc. ("Pfizer'), a large pharmaceutical company, infringes one of its patents and it has accordingly commenced this patent infringement action.

[2] Seedlings believes it has a strong case, but is concerned that the costs and risks inherent to complex patent litigation such as this may cause it to incur financial obligations and devote resources that could put other of its core business projects at financial risk. Prior to issuing its statement of claim, Seedlings sought out and entered into a Litigation Funding Agreement ("LFA") with Bentham IMF Capital Limited ("Bentham"), the Canadian subsidiary of IMF Bentham Ltd., a professional litigation funding enterprise from Australia that has subsidiaries and carries on business in several other countries.

[3] The LFA, to which Seedlings' Canadian and American counsel are also parties, provides that Bentham will fund Seedlings' legal fees and disbursement in this action, and that each of Seedlings, Bentham and the Canadian and American counsel for Seedlings will be entitled to financial returns from a successful outcome of the action, whether by judgement or settlement. The agreement provides that Seedlings remains in control of the litigation and of instructing counsel, but that Bentham may terminate the agreement if it ceases to be satisfied of the merits of the action or of its commercial viability. Bentham also has the right to be consulted on the issue of settlement. For these and other purposes, the LFA contemplates that Bentham will have access to all documents produced in the litigation, but be subject to the same confidentiality or implied undertaking obligations as Seedlings. Finally, the LFA is made conditional upon court approval. Specifically, the LFA provides that if this Court does not approve its terms, Bentham may, at its sole discretion, declare the LFA null and void.

[4] Seedlings and Bentham thus presented this motion to the Court seeking the "approval" of the LFA.

[5] What, however, does “approval” mean? Why is this Court’s approval even necessary or useful? Does this Court have the required jurisdiction to entertain the request for approval?

[6] There is no precedent in this Court for such a procedure. The moving parties’ notice of motion and written representations seem to draw their inspiration from the Ontario Superior Court of Justice’s practice and procedure in approving funding agreements in the context of class proceedings, as very recently adapted in one instance in the context of private commercial litigation (*Schenk v Valeant Pharmaceutical International Inc.*, 2015 ONSC 3215). Because the Ontario Superior Court is a court of general original jurisdiction, its jurisdiction to enquire into and approve the terms of funding agreements incidental to proceedings before it has not been questioned. However, the Federal Court’s jurisdiction is statutory and cannot be presumed. The Federal Court has jurisdiction to consider and apply provincial laws where they are ancillary to the disposition of the substantive issues that are properly before it. It also has plenary jurisdiction to control its own process. But it does not have jurisdiction to grant remedies and make final determinations of rights in disputes and matters over which it has not been expressly granted jurisdiction by statute and in accordance with the requirements set out in *ITO – International Terminal Operators Ltd v Miida Electronics Inc.*, [1986] 1 SCR 752.

[7] A clear understanding of what the moving parties are requesting the Court to determine, the purpose for which it is requested and how that purpose fits within the scope of the litigation before the Court is therefore essential to determining the Court’s jurisdiction. Having performed that analysis, as set out below, it becomes obvious that the remedy sought by Seedlings and Bentham is neither necessary nor ancillary to the present litigation, that the Court has no

jurisdiction, in the circumstances, to enquire into or make any determination as to the validity or propriety of the LFA and that the Court should decline to grant any relief on this motion.

[8] The primary reason for parties to seek prior court approval of the manner in which litigation is funded is to protect the funding party from the consequences of a subsequent finding that the agreement might be champertous.

[9] Laws regarding champerty and maintenance were developed in common law jurisdictions in medieval times as a measure to protect the administration of justice from abuse. At the time, the abuses took the form of high ranking or influential persons purchasing doubtful or fraudulent claims, expecting a more favourable outcome in court than the assignor. The Ontario Court of Appeal in the seminal case of *McIntyre Estate v Ontario (Attorney General)*, [2002] OJ No 3417, traces the history of the statutes and common law doctrines relating to champerty and maintenance from the first statute enacted in England in 1305, through the enactment of Ontario's *An Act Respecting Champerty*, RSO 1897, c. 327 (the "*Champerty Act*") and the subsequent abolition of the common law crimes and torts of champerty and maintenance in Canada in 1954 and in the United Kingdom in 1967. The Court of Appeal's analysis notes, however, that both in England and in Canada, the concepts remain alive to render contracts that constitute champerty or maintenance unenforceable as being contrary to public policy. Indeed, the *Champerty Act* remains in effect in Ontario, and provides that "All champertous agreements are forbidden and invalid".

[10] In essence, maintenance is directed against those who, for an improper motive and without justification or excuse, assist others in litigation in which the maintainer has no interest. Champerty is an egregious form of maintenance in which the maintainer shares in the profits of the litigation.

[11] Where a person agrees to fund the litigation of another in exchange for a share of the proceeds, the risk is that it may lose its investment, even if the litigation is successful, if the funding agreement is subsequently found to be invalid and unenforceable as champertous. That seems to have been the concern that drove the applicant in *McIntyre Estate* (above) to seek a declaration from the Ontario Superior Court of Justice that the contingency fee agreement entered into between the applicant and its lawyers to fund a wrongful death suit was not prohibited under the *Champerty Act*.

[12] It is interesting to note that the application for a declaration in respect of the contingency fee agreement was brought as a separate application from the wrongful death action, and named only the Attorney General of Ontario as a respondent. The defendant in the wrongful death suit was not named as respondents and did not participate in the application proceedings. Indeed, that defendant's motion for leave to intervene in the appeal of the application was dismissed on the basis that the determination of whether, as between the parties to the contingency fee agreement, their agreement is valid and enforceable is incidental to but distinct and independent from the underlying dispute (*McIntyre Estate v Ontario (Attorney General)*, [2001] OJ No 3206, at para 21). Such disputes are thus clearly a matter of contract and civil law that falls outside the jurisdiction of the Federal Court, even where the underlying dispute might otherwise be properly

brought before it. Seedlings and Bentham concede as much, and counsel expressly stated at the hearing that the "approval" sought would not be determinative of the rights of the parties to the LFA.

[13] Judicial approval of solicitors' fee structures and associated funding agreements has also been sought and considered in the context of class actions, for example, in *Dugal v Manulife Financial Corp.*, 2011 ONSC 1785, *Fehr v Sun Life Assurance Co. of Canada*, 2012 ONSC 2715, *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp.*, 2012 ONSC 2937 and *Musicians' Pension Fund of Canada (Trustees of) v Kinross Gold Corp.*, 2013 ONSC 4974. However, in these cases, the court held that judicial approval was mandated and governed by the provisions of the *Class Proceedings Act*, 1992, SO 1992, c. 6, which requires court approval of fee agreements or the judicial review of class counsel's fees and disbursements. The court's prior approval of third party funding agreements, whereby a portion of any recovery or settlement would be diverted from the class to pay the third party funder, is an extension of this practice.

[14] The prior vetting of third party funding agreements in class proceedings is not merely a matter of ensuring that the agreement is not contrary to public policy as champertous, but a matter of ensuring the protection of the interests of class members against unreasonable agreements, as well as protecting courts against potential abuses specific to class proceedings. Class action legislation is designed to foster access to justice by overcoming economic barriers to litigating mass wrongdoing, increasing judicial economy by permitting courts to adjudicate numerous claims fairly and efficiently, and ensuring means for wrongdoers to be brought to

account. Given the potentially significant returns available to third party funders in class proceedings, the Ontario Superior Court in *Fehr* acknowledged a legitimate concern that "if not regulated, third party funding might subvert the public policy purposes of class proceedings". The court concluded that, in class proceedings, third party funding agreements were required to be promptly disclosed to the court, and could not come into force without court approval (*Fehr*, paras 89 and 90).

[15] It is easy to see, in the context of a class proceeding, why the preservation of the class members' interests and the protection of the court from abuses of its process by unscrupulous funders would require the court's prior approval of LFAs. The Federal Court has, for matters falling within its jurisdiction, its own class proceeding rules, including provisions giving it oversight of agreements respecting solicitors' fees and disbursement (*Federal Courts Rules* SOR/98-106, at s. 334.1 and subsequent). The Federal Court's jurisdiction to consider, and even to give prior approval to an LFA in the context of class proceedings would hardly be in doubt as an exercise of the Court's plenary power to control its own process in matters falling within its jurisdiction. (See also, for example, *Manuge v Canada*, 2013 FC 341).

[16] The underlying proceeding, however, is not a class proceeding. There is no requirement in the *Federal Courts Rules* for the disclosure or the approval of counsel's fee structure or funding in any litigation other than class proceedings. There is no class whose interests might be affected by the terms of the LFA. Nor would the court's plenary jurisdiction to control its own process and guard against abuses of its process be triggered in the circumstances: The legal, procedural and policy imperatives underlying the practice or requirement developed in Ontario

and other provinces of submitting LFAs to prior court approval in class proceedings do not exist in the context of private litigation. There is no legal or logical basis to extend the requirement of pre-approval outside of class proceedings.

[17] Seedlings and Bentham have argued that because the concepts of champerty and maintenance exist, in part, to protect the courts against abuse of their process, the Federal Court's plenary powers to control its own process does give it jurisdiction to enquire into, detect and root out agreements that may be champertous and may constitute abuses of its process.

[18] To the extent the doctrine of champerty and maintenance remains relevant in Canadian common law, even as means of protecting the courts and vulnerable litigants against abuses, its purpose is not and was never intended to be achieved by conferring on the courts the discretion to inquire into and approve or disapprove of a plaintiff's funding arrangements as a condition precedent to instituting or pursuing litigation. It simply operates and achieves its purpose by rendering agreements tainted by maintenance and champerty unenforceable.

[19] The doctrine of maintenance and champerty does not seek to penalize or sanction the conduct of the rightful holder of litigious rights, but only the conduct of the maintainer. Even when it was a misdemeanor, maintenance was an offence of the maintainer, not of the person being maintained (*R v Goodman*, [1939] SCR 446). Indeed, the inquiry as to whether an agreement constitutes maintenance or champerty focusses on and is determined by the motives of the maintainer, not of the person being maintained.

[20] The sanction for champerty or maintenance, the unenforceability of the agreement, therefore directly addresses and is sufficient to discourage the reprehensible motive and conduct, by depriving the maintainer of the benefits of its conduct.

[21] Where the champertous agreement takes the form of the sale or assignment of a bare right of action and it is the maintainer who purports to bring suit and recover under the rights assigned, it is possible for the defendant to the action to raise the champertous nature of the assignment and its unenforceability as a defence, and thus achieve the public policy objectives of preventing champerty and maintenance by ensuring the maintainer's inability to pursue and recover under improperly assigned rights. There are reported cases where, as a matter of standing and title to sue, the Federal Court has properly exercised its jurisdiction to consider the validity of an assignment under the doctrine of champerty and maintenance: *Thomas Fuller Construction Co., (1958) Ltd. v Canada*, [1991] FCJ No 562, [1992] 1 FC 512, reversed at [1992] 3 FC 795 and *Wire Rope Industries Ltd. v Amsted Industries Inc.*, [1990] FCJ 512, 112 NR 73, 32 CPR (3d) 334. The Court has also been asked to determine whether the plaintiffs in an action already commended could validly assign their interest in the action to a third party: *Tacan v Canada*, 2003 FC 915. What gives the defendant the right to raise and the Federal Court the jurisdiction to determine whether the agreement is champertous in such cases is that the alleged champertous agreement goes to the foundation of the action: the plaintiff's entitlement and standing to assert the rights against the defendant. The determination of the validity of the assignment becomes necessary to the disposition of the action asserted by the plaintiff against the defendant.

[22] In the case before me, the action has been instituted and is proposed to be pursued by Seedlings itself, the original holder of the rights asserted. The manner in which Seedlings chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant (*McEwing v Canada (Attorney General)*, 2013 FC 525 at para 108 to 115). See also *Standal v British Columbia Forest Products Ltd.*, (1981) 57 CPR (2d) 243 and the cases cited therein, to the effect that unless a plaintiff has to rely on a champertous agreement to establish its title, the mere existence of a champertous agreement or maintenance is not a defence to the action and does not disqualify the plaintiff from pursuing an action otherwise properly vested in it.

[23] The Defendant has no legitimate interest in enquiring into the reasonability, legality or validity of Seedlings' financial arrangements, its counsel's fee structure or the manner in which Seedlings chooses to allocate the risks and potential returns of the litigation, because they do not affect or determine the validity of the rights asserted by Seedlings in this action (*McIntyre Estate*, 2001, above).

[24] Because of the manner in which the doctrine of maintenance and champerty operates and is applied, the motives of Seedlings in entering into the LFA and in pursuing what appears to be a meritorious claim are not at issue and have no reason to be impugned, by the Court or by the Defendant. To the extent there were any risks that the LFA might be found champertous, it would be as a reason of the improper motives of Bentham. Bentham's improper motives, if any, would not justify the dismissal of Seedlings' claim as an abuse of process, as it would visit the consequences of the maintainer's improper motives on the person being maintained.

[25] In its oral submissions at the hearing, counsel for Seedlings and Bentham has emphasized that in seeking the "approval" of the LFA, they were not seeking a determination of the validity and enforceability of the LFA as between them, but essentially, a declaration and recognition, in the presence of the Defendant, that the underlying litigation is not an abuse of process, that the funding arrangements between them do not demean the administration of justice and that the Defendant does not have the right to object to the Plaintiff's right to carry out the litigation under the terms of the LFA. My conclusion to the effect that the doctrine of maintenance and champerty does not confer upon this Court the authority to enquire into the legality of the LFA or on the Defendant the right to have the litigation pursued pursuant to it dismissed as an abuse of process might be seen as supporting the issuance of the declaration sought by the Plaintiff. This however would miss the point I endeavour to make, that in the circumstances of this case, where the Plaintiff is asserting its own rights against the Defendant, this Court has no jurisdiction to make any determination in respect of any funding agreement to which the Plaintiff is a party, whether of the Court's own motion, at the behest of the Plaintiff or on a motion of the Defendant. This has nothing to do with the terms of the LFA itself, but with the nature of the rights asserted in this litigation.

[26] Seedlings and Bentham have argued that the Court's approval of the LFA (including by way of a declaration that the litigation is not an abuse of process) is a matter of access to justice, as without it, the LFA stands to be inoperative and Seedlings may be unable to pursue a meritorious claim.

[27] That may be so, but only because Seedlings and Bentham have chosen to make their agreement contingent upon this Court's approval. The Federal Court's jurisdiction cannot be conferred by agreement between parties.

[28] As mentioned, there are no procedural requirements for the approval of a party's funding agreement outside of class proceedings and no substantive grounds upon which this Court might assume jurisdiction to enquire into or determine the validity of the LFA in the context of the action as instituted. To the extent Bentham requires the comfort of a court's prior determination of the enforceability or moral acceptability of the LFA before proceeding with it, that is strictly a matter of contract between subject and subject and properly within the jurisdiction of the courts of the provinces. As was the case in *McIntyre Estate*, 2002, the parties to the LFA were free to bring, before the appropriate provincial court, an application for a declaration as a matter distinct and separate from the present underlying action.

[29] Finally, I have considered whether there was any need or benefit to the Court recognizing the LFA for the purpose of ensuring that Seedlings will be able to share information obtained on discovery with Bentham without breaching the implied undertaking rule, or to give effect to Bentham's undertaking to be bound by the implied undertaking rule or confidentiality orders.

[30] There are, at present, no confidentiality or protective orders in place. It is premature to determine whether Bentham should be included in or bound by any such orders. Further, counsel for the Defendant conceded at the hearing that it is not unusual for such orders to extend to

permit disclosure to and bind entities or law firms that are not parties to the litigation, but whose advice and instructions are expected to be required.

[31] With respect to the implied undertaking rule, Seedlings and Bentham themselves took the position at the hearing that a waiver of the implied undertaking rule was not necessary in order for Seedlings to lawfully communicate the information obtained on discovery to Bentham for the purposes of the LFA. I agree.

[32] The implied undertaking rule prohibits a party who obtains documents or information through discovery from using these documents and information for any purpose other than for the litigation in which the documents and information were provided (*Canada v ICHI Canada Ltd.*, [1992] 1 FC 571). The rule does not operate to prevent disclosure to non-parties. Disclosure to non-parties, including experts, potential witnesses, consultants or others whose advice is relevant to the carriage of the litigation, or of litigation derived from and in the service of the original action, is permitted so long as it is not an "alien", "collateral", or "ulterior" purpose (*Sovani v Gray*, 2007 FCCA 439, *Abou-Elmaati v Canada (Attorney General)*, 2014 ONSC 6301, *Lithwick (In trust) v Hakim Optical Laboratory Ltd.*, 2007 CarswellOnt 7907).

[33] The LFA being, on its face, made for the express purpose of pursuing the litigation, use of the discovery information for the purpose of complying with the LFA would appear to be neither improper nor alien, collateral or ulterior to the litigation. To the extent Seedlings were, for the purposes of pursing this litigation, to share discovery information with Bentham, it would be incumbent upon it to ensure that Bentham is made aware that the information is covered by

the implied undertaking rule, and that Seedlings' obligations and restrictions to the use of the documents extend to Bentham. The undertaking, whether implied or expressed, given by recipients of discovery information is an undertaking given to the Court that can be enforced by the Court without the need for prior formalities. (*Casavant v Alberta Co-op Taxi Line Ltd.*, [1996] 188 AR 381, 41 Alta LR (3d) 425, *Winkler v Lehndorff Management Ltd.*, [1998] OJ No 4462).

[34] There is accordingly no need for the Court to waive the implied undertaking rule to enable Seedlings to share the information with Bentham if doing so is properly for the purpose of the conduct of the action, and there is no need for the Court to formally recognize or approve the LFA for Bentham's agreement to abide by the implied undertaking rule to be effective.

[35] While Seedlings and Bentham's motion ultimately fails, I decline to order costs in favour of Pfizer. Although it is a defendant to this action and was made a responding party to this motion, Pfizer does not have, and never has had, any legitimate interest in enquiring into the validity or propriety of the LFA. Without a direct interest in the outcome, Pfizer could have avoided spending any time or incurring any costs in opposing the motion. It would also have been an appropriate response for Pfizer to participate in the motion to make relevant observations to the Court on the issue of the Court's jurisdiction. Pfizer's response to the motion however went far beyond what was necessary or appropriate. It aggressively opposed all aspects of the motion on substantive and procedural grounds, cross-examined Seedlings' affiants, brought a motion to compel the production of the unredacted LFA, opposed the participation of Bentham or its counsel, and objected to the introduction of evidence on the record of this motion, even

where that evidence had been considered by the Court in the context of a related motion. Pfizer's conduct was not at all helpful to the determination of the issues before the Court, and rather tended to obscure the issues and lengthen the proceedings. Pfizer's conduct should not be recompensed with an award of costs.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed, without costs.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-608-17
STYLE OF CAUSE:	SEEDLINGS LIFE SCIENCE VENTURES, LLC v PFIZER CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 27, 2017
REASONS FOR ORDER AND ORDER:	TABIB P.
DATED:	SEPTEMBER 12, 2017

APPEARANCES:

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Mr. Peter Wilcox Ms. Stephanie Anderson Mr. Michael Shwartz	FOR THE DEFENDANT
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