Federal Court Cour fédérale

Date: 20201221

Docket: T-1434-14

Citation: 2020 FC 1175

Ottawa, Ontario, December 21, 2020

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

PHARMASCIENCE INC.

Plaintiff

and

PFIZER CANADA ULC

Defendant

ORDER AND REASONS

I. Overview

[1] The plaintiff, Pharmascience Inc, seeks damages against the defendant, Pfizer Canada ULC, pursuant to s 8 of the *Patented Medicines (Notice of Compliance Regulations)*, SOR/93-133. Pharmascience alleges it lost sales of its pregabalin medication while it was kept off the market by virtue of Pfizer's application under the Regulations to prohibit Pharmascience's entry. The action is set down for trial before me in February 2021.

[2] In preparation for trial, Pfizer sought an Order requiring Pharmascience to produce further documents showing the amounts of rebates that it would have granted to retailers of its pregabalin product. Rebates significantly affect the amount of damages to which Pharmascience would be entitled if successful.

[3] In an Order dated August 5, 2020, Prothonotary Kevin Aalto denied Pfizer's request. Pfizer appeals that Order and asks me to overturn the Order and compel Pharmascience to disclose additional documentation on rebates.

[4] I can grant the relief Pfizer seeks only if I conclude that the Prothonotary erred in law or made a palpable and overriding error of fact. Pfizer maintains that the Prothonotary misstated the legal test applicable to the disclosure of relevant documents, misapplied the test for relevance, and overlooked Pharmascience's duty of disclosure.

[5] There are three issues:

1. Did the Prothonotary misstate the test for ordering a further and better affidavit of documents relating to rebates?
2. Did the Prothonotary misapply the test for relevance?
3. Did the Prothonotary fail to recognize Pharmascience's ongoing disclosure obligation?

[6] In my view, the Prothonotary did not misstate or misapply any legal test, and did not overlook Pharmascience's duty to disclose relevant documents. I must, therefore, dismiss Pfizer's appeal.

II. The Prothonotary's Decision

[7] Pfizer argued before the Prothonotary that Pharmascience's production of documents relating to rebates was inadequate. It sought an Order requiring Pharmascience to provide documentation for its actual and forecasted rebates on relevant products during the relevant time frame, as well as documents that were used as the source for the rebate information Pharmascience had already provided.

[8] In support of its motion, Pfizer tendered an affidavit from an accountant, Mr Daniel Ross, who opined that the documents Pfizer was seeking likely existed. Pfizer also asserted that the documents were relevant both to the calculation of rebates Pharmascience actually paid in the real world, and to the rebates Pharmascience would have paid in the but-for world.

[9] The Prothonotary acknowledged that the issue of rebates was an important factor in the calculation of damages, and confirmed that parties have an obligation to produce relevant documents. In particular, Pharmascience had a duty, from the outset of the proceeding, to produce documentation in its possession on rebates.

[10] The Prothonotary agreed with Pfizer that the kinds of documents it was seeking are often produced in s 8 cases such as *Pharmascience Inc v GlaxoSmithKline Inc*, 2007 FC 1261 [*GSK*]. There, Justice Leonard Mandamin found that documents relating to Pharmascience's variable costs, including rebates and allowances, were relevant and required to be produced. Justice Mandamin rejected Pharmascience's argument that GlaxoSmithKline had a burden to prove that

the documents in issue actually existed. He stated that requiring that level of proof would be "to overstate the test" (para 36).

[11] However, the Prothonotary distinguished the *GSK* case on two grounds. First, he noted that the timing of the request there was not, as here, mere months before trial, and there was no indication there that, as here, discoveries had taken place years before and the question of further production had not been pursued. Second, there was no indication in *GSK* that, as here, the documents were sought in order for the defendant's expert to verify the accuracy of documents already produced. The Prothonotary observed that the accountant, Mr Ross, did not have any direct evidence of the existence of the documents in issue and that Mr Ross was able to calculate rebates based on the documents already produced. Mr Ross wished to see further documentation in order to verify his calculations and to give him further comfort that they were accurate.

[12] In the end, the Prothonotary found that Pfizer was not entitled to further disclosure (with the exception of one document). However, he also held that the issue could be revisited after the exchange of expert reports in the event that a Pharmascience expert were to rely on a document that had not been not produced. He concluded that Pfizer had not met the test for a further and better affidavit of documents and, even if it had, he would not have ordered further production. I take the latter comment to be a reference to the circumstances described above – a late request after discoveries on the issue had long since closed.

A. *Issue One – Did the Prothonotary misstate the test for ordering a further and better affidavit of documents relating to rebates?*

[13] Pfizer argues that the Prothonotary erred by requiring proof of the existence of the documents sought. To succeed on its motion, Pfizer says, it merely had to show that the documents likely exist. According to Pfizer, therefore, the Prothonotary misstated the test and wrongly discounted Pfizer's evidence from Mr Ross that a multi-national, multi-product company like Pharmascience would, as a standard business practice, keep the kinds of documents it sought.

[14] To succeed on a motion for a further and better affidavit of documents, a party must show that the documents sought likely exist, that they may reasonably be expected to contain relevant evidence, and that they are in the power, possession, or control of the other party (*Apotex Inc v Sanofi-Aventis Canada Inc*, 2010 FC 77 at para 11).

[15] I cannot see any error in the Prothonotary's decision on this point. He acknowledged the evidence of Mr Ross who stated that the documents Pfizer was seeking were "the types of documents that a company such as [Pharmascience] should have." He recognized, therefore, that the documents in issue likely exist. While he went on to mention that Pfizer had not put forward direct evidence of the documents' existence, I read that comment simply as a statement of fact, not an expression of the burden on Pfizer.

[16] On my reading of his reasons, I find that the Prothonotary ruled against Pfizer because Mr Ross had testified that he did not need the documents in order to make the necessary

calculations. He wished to see them in order to verify the calculations he had already made and to provide him comfort that his conclusions were sound. In other words, the documents sought were of limited evidentiary value and unnecessary for Pfizer's expert to make his calculations. As mentioned, Pfizer characterized the Prothonotary's conclusion on this point as a misapplication of the test for relevance, an issue I discuss separately below.

[17] Further, the Prothonotary found that the timing of Pfizer's request militated against granting the order sought. Counsel for Pfizer had addressed the issue of rebates during discoveries but had not pursued the matter in a subsequent refusals motion or a timely request for further documents.

[18] Pfizer submits that the Prothonotary erred by exercising his discretion not to grant Pfizer's request. Pfizer also argues that the Prothonotary wrongly distinguished *GSK* because he had no information about the state of the proceedings at the time Justice Mandamin issued his Order in that case. Pfizer says that there is no discretion to deny a party its right to have disclosure of relevant documents, citing *Apotex Inc v Bayer Inc*, 2020 FCA 86 [*Bayer*], where the Federal Court of Appeal, in a different context, noted that "justice was not to be subordinated to expedition" (at para 43).

[19] However, in a more analogous context – a refusals motion – the Federal Court of Appeal has expressly stated that "merely showing a question is relevant does not mean that it must be answered" (*Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 177 at para 8 [*Hospira*]). There is "a second hurdle" which is "proportionality."

Proportionality involves the degree of "significance and connection to the case," as well as the overall circumstances, including "the burden required to obtain the information, the scope of the request and the availability of information from other sources" (paras 8 and 9). Judges must take account of the fact that a prothonotary is the person "best situated to analyse and apply the proportionality principle," especially where he or she has been involved in case management of the proceedings for a long period of time (para 10).

[20] I find that the comments of the Federal Court of Appeal in *Hospira* apply here. The Prothonotary has been involved in case managing this proceeding for years. He properly took account of the context and circumstances in which Pfizer's request was made, making particular reference to the nature and breadth of the evidence sought, the previous evidence-gathering processes of discovery and refusals motions, and the proximity of the pending trial. As he was required to do, the Prothonotary considered the proportionality of the request as well as its merits.

[21] I can find no reviewable error on the part of the Prothonotary. In particular, he did not misstate the test for a further and better affidavit of documents. Nor did he err in his finding that *GSK* appeared to involve a distinguishable set of circumstances.

B. *Issue Two – Did the Prothonotary misapply the test for relevance?*

[22] Pfizer also argues that the Prothonotary failed to properly consider the critical factor of relevance. Clearly, says Pfizer, the issue of rebates is central to the calculation of damages and any documents, especially source documents, that would enable either party to advance its case

would be relevant. The same is true for other documents requested – namely documents showing rebates on other Pharmascience products that would assist in calculating the rebates that would likely have applied in different scenarios (*eg* in a sole source market compared to a competitive market). The aggregated data supplied by Pharmascience is, according to Pfizer, inadequate because it does not permit confirmation that the data reflect actual sales or trade spend. Pfizer notes that Mr Ross already discovered a discrepancy in Pharmascience's data (since corrected). Without the source documents, Mr Ross said he would have reservations about the accuracy of his calculations. Again, I can see no error on the part of the Prothonotary.

[23] The Prothonotary clearly recognized that the issue of rebates was central to the calculation of s 8 damages. He noted that rebates are a "standard and important part of the assessment of damages in a section 8 case."

[24] Pfizer submits that the Prothonotary erred by finding that the documents sought would only be relevant if relied on by Pharmascience. That is, in my view, a mischaracterization of the Prothonotary's reasons. He stated that Pfizer's request could be revisited if it turned out that Pharmascience's experts relied on any documentation that had not yet been disclosed, and that Pharmascience could face serious cost consequences in that situation. This was not a finding on the issue of relevance – it was a point of fairness. In particular, there is no suggestion in his reasons that the Prothonotary considered source documents to be irrelevant.

[25] Pfizer also maintains that the Prothonotary failed to recognize that it was seeking, not just source documents, but also other relevant documentation showing forecasted and actual rebates

for comparator products during the period Pharmascience was out of the market and thereafter. It is clear, however, that the Prothonotary was aware that Pfizer was seeking a broad range of documentation, although he did not describe them in the way Pfizer did. He stated that Pfizer was seeking "a wide and extensive volume of documents including customer contracts, purchase orders, correspondence, monthly and annual financial statements, agreements and correspondence with customers of [Pharmascience], 'all' agreements and correspondence with customers and sales invoices and general ledger account details regarding Rebates." He also referred to source documents and other evidence showing forecasts and actual rebates. While his terminology was not Pfizer's, I am satisfied that the Prothonotary was aware of what Pfizer was seeking.

C. *Issue Three – Did the Prothonotary fail to recognize Pharmascience's ongoing disclosure obligation?*

[26] Finally, Pfizer submits that the Prothonotary failed to recognize Pharmascience's ongoing duty to disclose relevant documents. Pfizer notes that the duty to disclose is ongoing and can continue right up until trial or even beyond. Further, there is no discretion, Pfizer says, to relieve a party of that obligation (*Apotex Inc v Merck & Co*, 2003 FCA 438 at para 13). Moreover, Pfizer submits, a Case Management Judge cannot vary or dispense with a Rule except in special circumstances (*Bayer* above at para 40).

[27] I disagree with Pfizer's submissions. The Prothonotary recognized the ongoing requirement to provide disclosure of relevant materials, stating that he had "emphasized the obligation of parties to produce all relevant documentation in their power, possession or control

relating to an issue in the proceeding." In particular, he noted that Pharmascience "had an obligation to produce whatever documentation it had in its possession relating to the issue of Rebates at the outset of the litigation." Finally, the Prothonotary concluded his reasons with an undertaking to reconsider the issue of disclosure if Pharmascience's experts relied on any documentation or information that had not already been disclosed.

[28] I can see no indication that the Prothonotary overlooked Pharmascience's disclosure obligations.

III. Conclusion and Disposition

[29] The Prothonotary did not misstate the test for ordering a further and better affidavit of documents. Nor did he err in his application of the test for relevance, or fail to recognize the ongoing duty to disclose relevant documents. Accordingly, I must dismiss Pfizer's motion, with costs in any event of the cause.

ORDER IN T-1434-14

THIS COURT ORDERS that the motion is dismissed, with costs in any event of the cause.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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