Date: 20071129

Docket: -T-117-05

Citation No. 2007 FC 1261

Ottawa, Ontario, November 29, 2007

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PHARMASCIENCE INC.

Plaintiff

and

GLAXOSMITHKLINE INC., GLAXOSMITHKLINE PLC,SMITHKLINE BEECHAM CORPORATION, THE WELLCOME FOUNDATION LIMITED, AND DOE CO. AND ALL OTHER ENTITIES UNKNOWN TO THE PLAINTIFF WHICH ARE PART OF THE GLAXOSMITHKLINE GROUP OF COMPANIES

Defendants

REASONS FOR ORDER AND ORDER

[1] The Plaintiff ("Pharmascience") applies for an order setting aside part of the September 5, 2007 Order of Madam Prothonotary Martha Milczynski requiring the Plaintiff to produce an accurate or complete affidavit of documents (the "Production Order"). The challenged portions of the Production Order are three subparagraphs, (b)(v), (c)(iii) and (c)iv), of Schedule "A" of Prothonotary Milczynski's Production Order. The challenged portions specify the information to be contained in the affidavit of documents to be served by the Plaintiff. Prothonotary Milczynski made the Production

Order as a result of an application by the Defendents ("Glaxosmithkline") for the Plaintiff to provide a further affidavit of documents.

[2] Pharmascience submits that Prothonotary Milczynski erred in making the Production Order based on a wrong principle and misapprehension of the facts, in particular:

a. the evidence adduced by Glaxosmithkline does not show the documents listed in the three subparagraphs, (b)(v), (c)(iii) and (c)iv), of Schedule "A" existed;

b. certain documents listed in the challenged subparagraphs are irrelevant to the proceedings; and

c. there is no evidence that the documents in the challenged subparagraphs were in the possession of Pharmascience.

[3] Pharmascience further submits that it had already complied with its disclosure obligations and that the Production Order was overly broad.

[4] Glaxosmithkline submits that Prothonotary Milczynski considered all relevant factual and legal issues and properly made the Production Order to produce an accurate and complete affidavit of documents.

History of the Proceedings

[5] The steps in the main action that are relevant to this application are set out in the following paragraphs.

[6] Pharamscience, by way of Statement of Claim, dated January 21, 2005, sought:

a. damages caused to Pharmascience by reason of Glaxosmithkline's initiation of prohibition proceedings pursuant to section 8 of the Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133, as amended (the "NOC Regulations");

b. an accounting of profits realized by Glaxosmithkline in respect of the lost sales and lost market share sustained by Pharmascience, and

c. disgorgement of Glaxosmithkline's revenues, or alternatively, profits received on their carvedilol drug product attributable to the higher prices charged by Glaxosmithkline, as realized by Glaxosmithkline in respect of sales that would have been made by Pharmascience, but for the commencement and prosecution by Glaxosmithkline of proceedings under the NOC Regulations.

[7] Glaxosmithkline filed a Statement of Defence on May 16, 2005.

[8] By Order of the Chief Justice dated May 20, 2005, Prothonotary Milczynski was designated as the case management prothonotary.

[9] On June 30, 2005, Pharmascience delivered an Affidavit of Documents listing 25 documents in relation to its various claims in this action.

[10] On April 11, 2007, Pharmascience filed a motion to compel Glaxosmithkline to produce an accurate or complete affidavit of documents. On May 3, 2007, Glaxosmithkline also filed a motion to compel Pharmascience to produce an accurate or complete affidavit of documents on the basis that relevant documents in the power, possession or control of Pharmascience exist and have not been produced.

[11] Pharmascience filed a Reply to the Statement of Defence July 11, 2005.

[12] On July 11, 2005, Glaxosmithkline filed a bifurcation motion which was dismissed by Prothonotary Milczynski on November 15, 2005, and upheld by Justice Elizabeth Heneghan on December 22, 2005.

[13] On August 9, 2007, Prothonotary Milczynski heard both motions from both parties for a further affidavit of documents. On September 5, 2007, upon review of the motion records filed on behalf of the parties and hearing the submissions of the parties, Prothonotary Milczynski ordered both Pharmscience and Glaxosmithkline to produce additional documents as per their respective requests.

[14] Pharmascience is now appealing, in part, Prothonotary Milczynski's September 5, 2007 Production Order compelling it to produce additional documents. Pharmascience

submits that the Production Order was made upon a wrong principle and misapprehension of facts.

Analysis

[15] Rule 223(2) (a) and (e) of the *Federal Courts Rules*, S.O.R./98-106 as am., provides:

223. (2) An affidavit of documents shall be in Form 223 and shall contain (a) separate lists and description of all relevant documents that (i) are in the possession, power or control of the party and for which no privilege is claimed, (ii) are or were in the possession, power or control of the party and for which privilege is claimed, (iii) were but no longer in the possession, power or control of the party and for which no privilege is claimed, and (iv) the party believes are in the possession, power or control of a person who is not party to the action; (c) a statement that the party is not aware of any relevant document, other that those that are listed in the affidavit or are or were in the possession, power or control or another party to the actions; (d) the identity of each person referred to in subparagraph (a)(iv), including the person's name and address, if known; (e) a statement that the party is	223 (2) L'affidavit de documents est établi selon la formule 223 et contient : a) des listes séparées et des descriptions de tous les documents pertinents : (i) qui sont en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels aucun privilège de non-divulgation n'est revendiqué, (ii) qui sont ou étaient en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels un privilège de non-divulgation est revendiqué, (iii) qui étaient mais ne sont plus en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels aucun privilège de non-divulgation n'est revendiqué, (iv) que la partie croit être en la possession, sous l'autorité ou sous la garde d'une personne qui n'est pas partie à l'action; b) un exposé des motifs de chaque revendication de privilège de non-divulgation à l'égard d'un document; c) un énoncé expliquant comment un document a cessé d'être en la possession, sous l'autorité ou sous la garde de la

not aware of any relevant document, other than those that are listed in the affidavit or are or were in the possession, power or control of another party to the action;	partie et indiquant où le document se trouve actuellement, dans la mesure où il lui est possible de le déterminer; d) les renseignements permettant d'identifier toute personne visée au sous-alinéa a)(iv), y compris ses nom et adresse s'ils sont connus; e) une déclaration attestant que la partie n'a pas connaissance de l'existence de documents pertinents autres que ceux qui sont énumérés dans l'affidavit ou ceux qui sont ou étaient en la possession, sous l'autorité ou sous la garde d'une autre partie à l'action;

Accordingly, documents identified in an affidavit of documents must be documents that are relevant, and in the possession, power of control of the party producing the affidavit of documents.

[16] Justice Pierre Blais noted in *Eli Lilly and Co. v. Apotex Inc.*, 2007 FC 477 at para. 10, that the threshold for relevance in the discovery process is low. Justice Blais relied on the Federal Court of Appeal decision in *Apotex Inc. v. R.* (2005), 41 C.P.R. (4th) 97, where the Court approved of the concept set out in *Boxer and Boxer Holdings Ltd. v. Ressor, et al.* (1983), 43 B.C.L.R. 352 (B.C.S.C.), that the parties in the discovery process have a right to access documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage their opponent's case.

[17] Rule 227 of the *Federal Courts Rules* provides:

227. On motion, where the court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that (a) the deponent of the affidavit be cross examined; (b) an accurate or complete affidavit be served and filed; (c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or (d) that party on behalf of whom the affidavit was made pay costs.	227. La Cour peut, sur requête, si elle est convaincue qu'un affidavit de documents est inexact ou insuffisant, examiner tout document susceptible d'être pertinent et ordonner : a) que l'auteur de l'affidavit soit contre-interrogé; b) qu'un affidavit exact ou complet soit signifié et déposé; c) que les actes de procédure de la partie pour le compte de laquelle l'affidavit a été établi soient radiés en totalité ou en partie; d) que la partie pour le compte de laquelle l'aff l'affidavit a été établi paie les dépens.

Accordingly, the court must be satisfied that the affidavit of documents is inaccurate or deficient, that is, having regard to Rule 223 (2)(a)(i), that documents in the possession of a party has not been disclosed.

[18] The burden of proof rests on the party seeking further production. Specifically, the party seeking further production must offer persuasive evidence that the documents are available, but have not been produced, (*Rhodia UK Ltd. v. Jarvis Imports* (2000) Ltd., [2005] F.C.J. No. 2003 at para. 5).

[19] In *Havana House Cigar & Tobacco Merchants Ltd. v. Naeini*, [1998] F.C.J. No. 309 at paras. 19-23, aff'd [1998] F.C.J. No. 451, this Court affirmed Prothonotary John Hargrave's observation, in that case, that it was only fair that parties have a full set of

documents in preparing for examination for discovery; that cross-examination on an affidavit of documents may be ordered where it is shown that there are gaps in the documents that have been produced; and that parties are not required to wait until examination for discovery to pursue missing documents.

Standard of Review

[20] Justice Mark MacGuigan of the Federal Court of Appeal set out the standard of review of discretionary orders by prothonotaries in *Canada v. Aqua-Gem Investments Ltd.*, [1993] F.C.J. No. 103. Essentially, such orders should not be disturbed unless based on a wrong principle or misapprehension of the facts or raise questions vital to the final issue of the case. The test was reformulated in *Merck & Co. Inc. v. Apotex Inc*., [2004] 2 F.C.R. 459, by the Federal Court of Appeal, where Justice Robert Décary stated:

> "…the test should be slightly reformulated to read: discretionary orders of prothonotaries ought not to be disturbed unless (a) the questions raised are vital to the final issue of the case, or (b) the orders are clearly wrong as based upon wrong principle or misapprehension of the facts."

[21] The case management prothonotary's Production Order relating as it does to an interim step in the proceedings, the completion of an accurate or complete affidavit of documents, does not bring into issue any question vital to the final issue of the case. In

Canadian Private Copying Collective v. Z.E.I. Media Plus Inc., 2006 FC 1546 at para. 33, Justice Yves de Montigny concluded that a prothonotary's order for a more complete and accurate affidavit of documents is not vital to the final outcome of a case.

[22] The material before Prothonotary Milczynski in making the Production Order would include:

a. the pleadings of the parties;

b. the affidavits and documents of the parties filed in the various motions before her;

c. the affidavits of documents of the parties;

d. the cross-examination of the affiants who swore the affidavits of discovery; and

e. the materials filed by the parties on the cross motions for production of further affidavits of documents.

[23] The issue here is whether Prothonotary Milczynski made the Production Order based on a wrong principle or a misapprehension of the facts.

Relevance

[24] Pharmascience submits that Prothonotary Milczynski erred in making the production order to the extent it related to financial statements, rebates allowances or discounts because it was made on a wrong principle and a misapprehension of the facts.

[25] Pharmascience's claim for damages states in part:

> The plaintiff claims against the defendants:
>
> (a) Damages caused to Pharmascience Inc. ("Phamascience") by reason of the defendants, GlaxoSmithKline Inc. and SmithKline Beecham Corporation, initiation of prohibition proceedings pursuant to the Patented Medicines (Notice of compliance Regulations ("Patent Regulations") including:
>
> (i) lost sales during the period Pharmascience was excluded from the Carvedilol market;
>
> (ii) lost sales and loss of permanent market share caused by the early entry of other generic competitors on the market; and
>
> (iii) expenses incurred in defending the proceeding in Court File T-1871-01 to the extent not recovered in that proceeding;

[26] The Pharmascience claim of "lost sales" relates to the proof of a negative inferred from circumstances as they were and as they could have been. It involves broader evidence than, say, disgorgement of defendants' revenues or, alternatively, profits received, which Pharmascience also claims. A consequence of such a claim is the broadening of the extent of evidence, in terms of financial information, required to prove, or disprove, the claim.

[27] The first document request, b(v) of Schedule "A", which Pharamscience takes issue with reads:

> b(v) Documents detailing sales terms, sales discounts or allowances or rebates (such as customer contracts, purchase orders, correspondence or credit notes) relating to PMS-Carvedilol, including the production of general ledger account details for sales discounts, allowances and rebates (emphasis added).

The documents required specifically relate to PMS-Carvedilol and the inclusion is within that stipulation. The general ledger account details necessarily relate specifically to the drug in question. Accordingly, this provision lists documents of the type that would be relevant.

[28] The second document request, c(iii) of Schedule "A", which Pharmascience takes issue with reads:

> c(iii) Phamascience's monthly and annual financial statements for the time period prior to and during the claim period to assist in identifying potential variable costs to be considered in respect of PMS' claim (emphasis added);

The financial statements specifically relate to PMS', that is Pharmascience's, claim. Again, this provision lists documents of the type that would be relevant.

[29] The third document request, c(iv) of Schedule "A", which Pharmascience takes issue with reads:

> c(iv) Documents on all other variable costs, for example, sales commission, freight, sales rebates and allowances:
>
> (1) Documents detailing customer rebates or allowances, for example, volume discounts evidenced in any agreements or correspondence with customers, descriptions of the basis and calculation of the rebate, the general ledger account detail for rebates and allowances, a sample of the supporting cheques and any related correspondence;
>
> (2) Product discounts, for example, where the customer purchases one PMS-Carvedilol tablet but receives two or more tablets for that price. This would include documents on all agreements and correspondence with customers, sales invoices and general ledger account details which indicate how the rebate was treated for accounting purposes;
>
> (3) Volume or product discounts on other products based on the sales volume of PMS-Carvedilol, including production of accounting documents related to both the PMS-Carvedilol and other

> product sales, and the accounting documents to support the related discounts given; and
>
> (4) Extracts of the sales rebate, allowances and discounts accounts in the general ledger, on at least an annual basis, with supporting documentation for entries to these accounts (emphasis added).

[30] The leadoff words in sub-clause c(iv), "on all other variable costs" relate back to the preceding sub-sections, c(i) to c(iii), that have relevance to the Pharmascience claim. The word "other" in sub-section c(iv) necessarily relates to the same subject matter as the proceeding sub-sections c(i) to c(iii), that is, "other" variable costs relevant to the Pharmascience claim.

[31] The other variable costs in subsection c(iv)(2) and (3) make specific reference to the drug in question, PMS Caredilol. The clauses c(iv)(1) and (4) are not stand alone clauses. These sub-clauses are constrained in their meaning by the leadoff words in sub-clause c(iv) and logically relate to the Pharmascience claim.

[32] In result, the disputed sub-clauses in Prothonotary Milczynski's Production Order, (b)(v), (c)(iii) and (c)(iv), are not too broad. The Prothonotary's Production Order compelled the production of relevant documents.

Existence of Documents

[33] Pharmascience takes issue with the wording of the Production Order, specifically:

> Pharmascience shall serve an accurate or complete affidavit of documents containing documents listed in categories identified in Schedule "A" hereto, to the extent they exist, by October 1, 2007 [emphasis added].

[34] Pharmascience argues that the wording of "to the extent they exist" used by Prothonotary Milczynski acknowledges that Glaxosmithkline has not established the existence of the documents. Such an interpretation would strain of the ordinary meaning of the words and would be contrary to the jurisprudence of this Court. Justice de Montigny in *Canadian Private Copying Collective*, above, at para. 66, stated the following:

> "As for the argument that some of the documents to be listed may not even exist, and that it would be a massive exercise for the defendants to go through all their records, I cannot but find that these claims are totally preposterous and disingenuous. Obviously, the affidavit of documents does not have to enumerate documents that have never existed."[emphasis added].

[35] The words "to the extent they exist' in Prothonotary Milczynski's Production Order merely reflect the reality that courts have previously recognized, namely, that only documents that exist need to be produced.

[36] Pharmascience argued that that Glaxosmithkline's affiants did not know if the documents existed or were in Pharmascience's possession. The affiants were not in the

employ of Pharmascience nor did they have access to Pharmascience's internal business records. They would only have knowledge of the documents mentioned in the affidavit of documents, general industry practice, or would otherwise be available to them. To make much of the admission by affiants that they do not have specific actual knowledge of Pharmascience documents in question is to overstate the test.

Documents in Possession by a Party

[37] For Prothonotary Milczynski to issue the Production Order she had to be satisfied that there was persuasive evidence that the documents which are the subject of the request were available (*Rhodia UK Ltd*., above, at para. 5). The evidence would be contained in the affidavits of Glaxosmithkline's experts and the cross examination of those individuals.

[38] The affidavits and the cross-examination of affidavits of the Glaxosmithkline affiants, in particular that of Ross Hamilton, provide the rationale for the type of documents that would necessarily be in the possession of Pharmascience. The failure to name specific documents on the part of Glaxosmithkline affiants is a result of the opaque disclosure by Pharmascience, rather than an attempt to cast a wide net on the part of Glaxosmithkline.

[39] Prothonotary Milczynski had the affidavits and cross examination on affidavits before her. The Prothonotary is entitled to assess the whole of the evidence. She was in a position to be satisfied about the sufficiency of evidence that the documents requested by Glaxosmithkline existed, were in the possession of Pharmascience, and were relevant.

[40] Prothonotary Milczynski has been case managing this file since May 2005. She is familiar with these proceedings. She would have been able to review all of the materials filed, and would have had the advantage of hearing submissions of the parties. I find that Prothonotary Milczynski's decision was not based on a wrong principle or misapprehension of the facts.

[41] Accordingly, I would dismiss the appeal by Pharmascience on the challenged provisions of Prothonotary Milczynski's Production Order.

[42] Both parties claimed costs. Given the dismissal of the appeal, there will be costs in any event against Pharmascience.

ORDER

THIS COURT ORDERS that the appeal by Pharmascience is dismissed with costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-117-05
STYLE OF CAUSE:	Pharmascience Inc. v. Glaxosmithkline Inc., Glaxosmithkline PLC, Smithkline Beecham Corporation, The Wellcome Foundation Limited, and Doe Co. and all other entities unknown to the plaintiff which are part of the Glaxosmithkline group of companies.
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	Mandamin, J.
DATED:	November 29, 2007

APPEARANCES:

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