Federal Court of Appeal  Cour d'appel fédérale

Date: 20151118

Docket: A-538-14

Citation: 2015 FCA 257

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

PFIZER CANADA INC., PFIZER INC. and PFIZER IRELAND PHARMACEUTICALS

Appellants
(Defendants/Plaintiffs by Counterclaim)

And

TEVA CANADA LIMITED

Respondent
(Plaintiff/Defendant by Counterclaim)

And

PFIZER PRODUCTS INC.

Plaintiff by Counterclaim

Heard at Toronto, Ontario, on September 30, 2015.

Judgment delivered at Ottawa, Ontario, on November 18, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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PUBLIC REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Pfizer Canada Inc., Pfizer Inc. and Pfizer Ireland Pharmaceuticals (together, the appellants) appeal the Order of Justice John A. O'Keefe of the Federal Court (the judge) denying their motion for summary judgment in respect of Teva Canada Limited's action (the Action) against the appellants under section 8 of the *Patented Medicines (NOC) Regulations* (SOR/93-133) (the NOC Regulations).

[2] The appellants had argued that an agreement between the parties (the Agreement) barred Teva Canada Limited's (Teva) Action. In his Order (2015 FC 760), the judge granted Teva's parallel motion for summary judgment, finding that the appellants cannot assert the Agreement to reduce or otherwise affect Teva's claims in the Action.

[3] The Agreement at the heart of this appeal is confidential and is protected by a confidentiality order. This explains why the public version is redacted.

I. Facts

[4] On December 19, 2006, Novopharm Limited filed an Abbreviated New Drug Submission (ANDS) for its Novo-Sildenafil product, a generic version of VIAGRA. On July 6, 2007, Novopharm served a Notice of Allegation (NOA) on Pfizer Canada Inc. advising that it was seeking a Notice of Compliance (NOC) for Novo-Sildenafil. In response, on August 24, 2007, the appellants commenced an application pursuant to section 6 of the NOC Regulations (Court file no. T-1566-07).

[5] On April 11, 2008, ratiopharm inc. also filed an ANDS seeking to make ratio-Sildenafil. On December 4, 2008, ratiopharm served a NOA on Pfizer Canada Inc. in relation to its ratio-Sildenafil product, alleging that Canadian patent no. 2,163,446 was invalid and that, in any event, ratio-Sildenafil would not infringe it. This was the only patent it needed to address, although Pfizer Canada Inc. had also listed the patent no. 2,044,748 on the Register. In response, on December 15, 2008, Pfizer Canada Inc. and Pfizer Ireland Pharmaceuticals commenced an application pursuant to section 6 of the NOC Regulations (Court file no. T-1935-08). In April 2009, the appellants settled their application against ratiopharm by entering into the Agreement.

[6] In accordance with the Agreement, ratiopharm consented to the issuance of an Order prohibiting the Minister of Health from issuing a NOC for its ratio-Sildenafil product until either the expiry of the patent or until the appellants consented.

[7] The most relevant sections of the Agreement for the appeal before us include the following recitals and provisions:

[REDACTED]

[8] On February 16, 2010, Novopharm changed its name to Teva.

[9] On August 10, 2010, Teva and ratiopharm, along with several other companies, amalgamated under section 185 of the *Canada Business Corporations Act* (R.S.C. 1985, c. C-44). The amalgamated entity continued under the name of Teva.

[10] Meanwhile, the appellants' application against Novopharm (now Teva) proceeded through the courts, ultimately being dismissed by the Supreme Court of Canada in *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2012 SCC 60, [2012] 3 S.C.R. 625. As a result, the Minister issued a NOC for Novo-Sildenafil on November 8, 2012, and the drug name was subsequently changed to Teva-Sildenafil.

[11] On the day the NOC for Novo-Sildenafil was issued, and in accordance with the Agreement, the appellants consented to the issuance of a NOC for ratio-Sildenafil. However, ratio-Sildenafil – which remained distinct from Novo-Sildenafil (now Teva-Sildenafil) and was assigned different Drug Identification Numbers (depending on the strength of the tablets) – has since then been discontinued.

[12] Thereafter, Teva brought the Action for damages for lost sales of Novo-Sildenafil (now Teva-Sildenafil) for the period commencing April 25, 2008. The parties acknowledged that none of the damages claimed in the Action relate to ratio-Sildenafil. The appellants defended the Action on the basis that, among other things, article 7 of the Agreement precluded the Action.

II. Decision of the Federal Court

[13] It is in the context of the Action that the appellants moved for summary judgment and that Teva brought its parallel motion for summary judgment. The judge granted Teva's motion, finding that there was no genuine issue as to whether the appellants could assert the Agreement to reduce or otherwise affect Teva's claim in the Action. The judge did not accept the appellants' argument that the Agreement barred Teva's Action. Although the Agreement did bind Teva,

article 7 did not cover claims in respect of Novo-Sildenafil (now Teva-Sildenafil). The judge awarded to Teva the costs relating to the appellants' motion. The judge also granted the appellants' motion under Rule 151 for a confidentiality order. This aspect of his ruling is not at issue in this appeal.

[14] It is not disputed that the judge was entitled to determine the issue raised by both parallel motions before him by way of summary judgment.

III. Analysis and Decision

[15] The appellants argue that the judge made several reviewable errors, including, among others, that (i) he erred in law by applying a restrictive approach to the interpretation of article 7; (ii) he misconstrued the Agreement by limiting its effect to a claim for damages arising from the proceedings in T-1935-08; and (iii) he failed to give full effect to the legal consequences of amalgamation. According to the appellants, the judge asked the wrong question to determine the objective intention of the parties to the Agreement. Teva also took issue with other findings of the judge, which I need not enumerate here. Indeed, I do not find it necessary to address all these issues in order to decide the merits of this appeal.

[16] There is no dispute as to the standard of review applicable to the issues raised; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, paras. 50, 53-55 [*Sattva*]. In any event, nothing turns on the standard applied, as I am satisfied that the judge came to the correct conclusion regarding whether or not article 7 covers the claim in the Action.

[17] The judge held that the Agreement cannot be interpreted as suggested by the appellants, that is, so as to include any claim in respect of any product containing sildenafil for which an ANDS has been filed by any company amalgamated with Teva at any time, including before the moment the Agreement was entered into. I find it sufficient to say that even if I do not agree necessarily with all the reasons leading to this conclusion, I agree with the judge's ultimate conclusion that article 7 does not cover a claim for damages under section 8 of the NOC Regulations in respect of Teva-Sildenafil for which an ANDS had already been filed by another company (T-1566-07).

[18] In reaching this conclusion, I have adopted the approach to contractual interpretation set out in *Sattva*. As noted by the appellants, the most relevant principles discussed in *Sattva* were recently summarised by our Court in *Offshore Interiors Inc. v. Sargeant*, 2015 FCA 46, paras. 86-87, 467 N.R. 355. It is worth reproducing them here:

> [86] At paragraphs 56 to 58 of his reasons, Rothstein J. indicated that it was proper to consider surrounding circumstances in interpreting the terms of a contract, but that the circumstances, "must never be allowed to overwhelm the words of that agreement," adding that the purpose of considering surrounding circumstances was to help the decision maker to obtain a better understanding of the mutual and objective intentions of the parties as these were expressed in the words of their contract. Further, "[t]he interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract" (*Sattva*, para. 57). Lastly, Rothstein J. made it clear that "surrounding circumstances" could only consist of, "objective evidence of the background and facts at the time of the execution of the contract" (*Sattva*, para. 58).
>
> [87] While there has been some debate in the jurisprudence over what constitutes a "factual matrix," at a bare minimum it encompasses the contract's genesis, its purpose and its commercial context (*Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2012 ONCA 862 (CanLII), [2012] O.J. No. 5772 at para. 69, leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 68). As Chief Justice Winkler of the Ontario Court of Appeal held in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 (CanLII), [2010] O.J. No. 4336 at para. 16:

> 16. The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole -- like a complex commercial transaction -- and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements […].
>
> [Emphasis added]

[19] I have also carefully considered the appellants' argument that article 7 of the Agreement, when read in light of the last recital paragraph, necessarily precludes Teva from claiming damages related to its Teva-Sildenafil product. I simply cannot agree that the words of article 7, read in light of the entire Agreement (which includes the last recital) and the objective evidence of the background and facts at the time of the execution of the Agreement, show the mutual and objective intention of the parties to encompass a claim for damages arising from the lost sales of Novo-Sildenafil (now Teva-Sildenafil) a drug covered by an ANDS filed by a different company.

[20] Even if I were to assume that article 7 was not restricted to the damages arising from the proceedings in T-1935-08, and the judge should have construed the waiver to include claims

relating to other litigation which would put in play patents listed on the Register including future patents listed in connection with VIAGRA®, I agree with Teva that this could only be litigation in respect of a new ANDS by ratiopharm, or possibly its successors (article 12).

[21] As a matter of fact, the appellants acknowledged at the hearing before us that at the time the Agreement was entered into, the parties could not and did not intend to cover another generic company's products containing sildenafil for which an ANDS had already been sought and in respect of which litigation under the Regulations was already underway.

[22] What the appellants submit is that now that Teva, the amalgamated company, is a party to the Agreement by operation of law, the scope of article 7 has changed and now encompasses claims arising from the sale of the Novopharm product that was the subject of litigation in Court file T-1566-07. The appellants believe this is so because the Action now falls within the general "subject matter" of article 7.

[23] This brings me to the effect of amalgamation. There is no dispute that Teva is bound by the Agreement, not only by operation of the law of amalgamation, but also because the parties expressly provided so under article 12 of the Agreement. However, this does not mean that one can go back in time and rewrite the Agreement to apply it to claims arising from litigation excluded under a proper construction of the Agreement (see paragraphs 17-19 above).

[24] In *R. v. Black & Decker Manufacturing Co.*, [1975] 1 S.C.R. 411, 1974 CanLII 15, p. 421, Justice Dickson used the following analogy to illustrate the effect of amalgamation:

> […] in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the *Income Tax Act* or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.
>
> [Emphasis added]

[25] The appellants are now attempting to join both streams in one river well before the amalgamation occurred. This cannot be done. After the amalgamation, the Agreement prevented Teva from claiming damages arising from the proceedings in T-1935-08. At best (and there is no need to decide this, as no new ANDS has been filed), if article 7 is not limited to the aforementioned claim, the Agreement could also prevent Teva from claiming damages arising from litigation under the Regulations relating to a new ANDS filed by ratiopharm or by the amalgamated company after the execution of the Agreement (see paragraphs 19-20 above).

[26] In light of the above, I propose that the appeal be dismissed with costs.

"Johanne Gauthier"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree"
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM THE ORDER THE FEDERAL COURT DATED NOVEMBER 27, 2014, DOCKET NUMBER T-2280-12

DOCKET:	A-538-14
STYLE OF CAUSE:	PFIZER CANADA INC., PFIZER INC. and PFIZER IRELAND PHARMACEUTICALS v. TEVA CANADA LIMITED
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 30, 2015
PUBLIC REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	NOVEMBER 18, 2015

APPEARANCES:

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