Date: 20081126

Docket: A-500-07

Citation: 2008 FCA 371

CORAM: **RICHARD C.J.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

APOTEX INC.

Appellants
(Respondent)

and

MERCK & CO., INC. and
MERCK FROSST CANADA & CO.

Respondents
(Applicants)

and

THE MINISTER OF HEALTH

Respondent
(Respondent)

Heard at Toronto, Ontario, on November 25, 2008.

Judgment delivered at Toronto, Ontario, on November 26, 2008.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: RICHARD C.J.
SHARLOW J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

[1] This is an appeal by Apotex Inc. from a decision of the Federal Court (2007 FC 1035) in which Justice Gibson granted a motion by Merck & Co. and Merck Frosst Canada & Co. ("Merck") under rule 414 of the *Federal Courts Rules*, SOR/98-106, to review an assessment of costs by an assessment officer, Mr Robinson, (2007 FC 312) in favour of Apotex. The dispute concerns the reasonableness of the fees of two experts claimed as disbursements by Apotex as part of its costs.

[2] The costs assessment arose from a proceeding by Merck under section 6 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 ("*PMNOC Regulations*"). Merck requested an order prohibiting the Minister of Health from issuing a Notice of Compliance to Apotex for its version of Merck's osteoporosis medicine, FOSAMAX, until the expiry of a patent held by Merck which, if valid, would be infringed by Apotex's formulation. After a hearing lasting two days, the Applications Judge, Justice Mosley, held that the allegation of invalidity of the patent was justified, dismissed Merck's application for prohibition, and (at para. 141) awarded Apotex its costs "to be calculated on the ordinary scale".

[3] Merck challenged a number of the disbursements in Apotex's bill of costs in a two-day hearing before the Assessment Officer, who wrote 57 pages of reasons allowing Apotex $605,575.78 of the $831,900.50 that it had claimed as costs. A number of these items were reviewed by Justice Gibson in a hearing lasting a day. Before this Court, the only issue in dispute concerned the fee paid to a Dr Langer (assisted by a Dr Lipp) for an affidavit of 171 pages dealing with the various grounds on which the patent was attacked, on some of which the Applications Judge subsequently found Merck's patent to be invalid.

[4] Apotex claimed as a disbursement the fee of $404,528.84 that it had paid for Dr Langer's affidavit, of which $322,512.84 was paid to Dr Langer and $82,016.00 to Dr Lipp. The fee was based on a total of 474 hours' work at an hourly rate of $1,389.00 for Dr Langer and $266.24 for Dr Lipp. Merck argued that this fee was excessive and challenged the reasonableness of both the hourly rate and the number of hours claimed.

[5] Apotex submitted to the Assessment Officer an affidavit from a solicitor stating that these amounts had been paid by Apotex and were reasonable; Merck did not cross-examine on this affidavit. The Assessment Officer also had before him the complete record of the prohibition proceeding, including the experts' affidavits and the reasons of Justice Mosley indicating his reliance on the evidence of Apotex's experts, Dr Langer included, in reaching his conclusion that the patent was invalid.

[6] Merck submitted no affidavit in support of its allegation that Dr Langer's fee was unreasonable, but relied on a comparison with the disbursements claimed by Apotex in respect of the fees paid to their other expert witnesses. This revealed that Dr Langer claimed for more than six times the number of hours claimed by any other Apotex witness.

[7] Assessment Officer Robinson rejected (at para. 55) as "very arbitrary" Merck's suggestion that Dr Langer's allowable hours and hourly rate be reduced by using one of Apotex's other expert witnesses as a "benchmark". That proposal would have reduced the fee to $19,600.00.

[8] In the event, the Assessment Officer reduced Dr Langer's hourly rate to the highest rate that he had been allowed as an expert witness in earlier related proceedings, namely $695.00. This reduced the allowable fee for Dr Langer from $322, 512.34 to $155,860.00, a reduction of approximately 50%. The combined fee of Dr Langer and Dr Lipp was thus significantly reduced from $404,528.84 to $237,696.00.

[9] The Assessment Officer reached this conclusion on the basis of the evidence before him. He referred correctly to the general principles established by the jurisprudence on the taxation of costs, including the warning that a losing party should not have to pay for "the 'Cadillac' of experts", and noted that, as is common in assessments, the material before him was far from exhaustive.

[10] In lengthy reasons written to dispose of Merck's motion to review the certificate of costs, Justice Gibson correctly identified the applicable standard of review as that prescribed in *Bellemare v. Canada (Attorney General)* (2004), 437 N.R. 179 (F.CA.), namely, that a Judge may intervene only when an error of principle is apparent in the assessment, or where it can be inferred from the amount of the assessment that such an error must have been committed.

[11] Justice Gibson held (at para. 36) that, in view of the fact that Dr Langer claimed a far greater number of hours than Apotex's other expert witnesses, who had prepared affidavits on the same aspects of the case as Dr Langer, the Assessment Officer committed an error in principle in his "arbitrary rejection" of a reduction in Dr Langer's allowable hours.

[12] Having thus concluded that his intervention was warranted, Justice Gibson reduced Dr Langer's hours to the average number of hours claimed by Apotex's other experts, namely, 31 hours for Dr Langer and 32 hours for Dr Lipp. The result was to reduce dramatically their allowable fees from the $237,696.00 assessed by the Assessment Officer to $31,785.00, which is approximately half the fee allowed to Apotex's highest paid expert. In nearly all other respects, Justice Gibson upheld the assessment.

[13] With all due respect, I cannot agree that the Assessment Officer committed an error of principle warranting the intervention of the Court when he neither reduced Dr Langer's allowable number of hours, nor explained explicitly why he had not done so. Indeed, he had rejected as arbitrary Merck's suggestion that he should calculate Dr Langer's allowable fee by reference to the hours claimed by another witness. I infer from the officer's reasons when read as a whole that, having reduced the hourly rate substantially, he was satisfied that, in light of all the circumstances, he had arrived at a reasonable total fee. On these facts, I do not think that he was required as a matter of law to add to already lengthy reasons by detailing further why he did not also reduce Dr Langer's allowable hours.

[14] In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.

[15] Justice Gibson referred to these considerations, including the importance of finality of litigation, when he refused (at para. 53) to award any costs in the motion to review the assessment of costs in the underlying proceeding. In my opinion, these contextual factors are equally relevant to a determination of whether when an assessment officer has erred "in principle" in assessing the reasonableness of costs.

[16] For courts to intervene in assessments in any but the plainest cases is likely a poor use of judicial resources. In my view, devoting three and a half days to determining the allowable costs of a two-day "summary" proceeding under the *PMNOC Regulations* has done little to advance the public interest in the due administration of justice.

[17] Since I am of the view that Justice Gibson ought not to have intervened, it is not necessary to decide whether he committed any reversible error in "benchmarking" Dr Langer's allowable hours on the basis that he did.

[18] Finally, I would strongly endorse Justice Gibson's recommendation (at para. 51) that the judge who presided at the underlying proceeding is in the best position to review the assessment of costs and that, whenever possible, the presiding judge should conduct any review of an assessment officer's decision.

[19] Better still, the parties should always endeavour from the outset to reach an agreement on costs. And, equally important, when they cannot agree, they should identify contentious issues at an early stage, and request the presiding judge to give directions to the assessment officer as provided by rule 403 of the *Federal Courts Rules*.

[20] For these reasons, I would allow the appeal with costs, and vary the Motion Judge's order so that the amounts assessed by the Assessment Officer for the fees of Dr Langer and Dr Lipp are restored.

"John M. Evans"
J.A.

"I agree
J. Richard C.J."
"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-500-07
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE GIBSON DATED 09-OCT-2007, IN THE FEDERAL COURT NO. T-884-03)	
STYLE OF CAUSE:	*APOTEX INC. v. MERCK & CO. INC. ET AL*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	November 25, 2008
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	RICHARD C.J. SHARLOW J.A.
DATED:	November 26, 2008

APPEARANCES:

Mr. David Lederman	FOR THE APPELLANT
Mr. Patrick E. Kierans Ms. Kristin Wall	FOR THE RESPONDENT (MERCK & CO. INC. AND MERCK FROSST CANADA & CO.)

SOLICITORS OF RECORD:

GOODMANS LLP Toronto, Ontario	FOR THE APPELLANT
OGILVY RENAULT LLP Toronto, Ontario	FOR THE RESPONDENT (MERCK & CO. INC. AND MERCK FROSST CANADA & CO.)