Federal Court of Appeal  Cour d'appel fédérale

Date: 20190912

Docket: A-275-18

Citation: 2019 FCA 230

CORAM: **STRATAS J.A.**
WEBB J.A.
DE MONTIGNY J.A.

BETWEEN:

MAOZ BETSER-ZILEVITCH

Appellant

and

NEXEN INC. AND CNOOC CANADA INC.,
EACH INDIVIDUALLY AND CARRYING ON
BUSINESS AS A PARTNERSHIP REFERRED TO AS
THE LONG LAKE OIL SANDS PROJECT

Respondents

Heard at Ottawa, Ontario, on September 12, 2019.

Judgment delivered from the Bench at Ottawa, Ontario, on September 12, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: DE MONTIGNY J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on September 12, 2019).

DE MONTIGNY J.A.

[1] This is an appeal from a decision of a judge of the Federal Court (the Judge) pursuant to which the respondents' motion to enforce a settlement agreement was granted. The Court found

that the parties had entered into a binding agreement to settle the underlying patent infringement action, the terms of which are set out in the appellant's written offer to settle dated January 25, 2017. The Judge further found that the agreement covered all essential terms, and proceeded to determine the non-essential terms upon which the parties disagreed in their attempt to formalize the settlement agreement. As a result, the Judge discontinued the appellant's action against the respondents, and ordered the appellant to pay the respondents' motion costs in the amount of $5,000.00.

[2] There is no disagreement between the parties that the decision of this Court in *Apotex Inc. v. Allergan Inc.*, 2016 FCA 155 [*Allergan*] sets out the applicable principles as to when an exchange of settlement correspondence will result in a binding settlement agreement. As stated by the Judge, there must be an objective, mutual intention to create legal relations, consideration flowing in return for a promise, and the terms of the agreement must be objectively certain. In the case at bar, the appellant challenges the application of these principles to the facts, and disputes his findings that there was agreement on key terms of the settlement agreement. It is well established that such issues of contractual interpretation raise questions of mixed fact and law, and are reviewed for palpable and overriding error unless a pure question of law can be extricated: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

[3] In our view, the Judge did not err in finding that a binding settlement agreement had been reached by the parties. Whether an agreement on the essential terms of a settlement has been reached must be assessed objectively, in light of all the circumstances. The fact that the agreement in principle had to be followed by a formal agreement, and that various disagreements

emerged between the parties in the course of drafting that formal agreement, do not detract from the fact that there was an agreement reached on the essential terms spelled out in the parties' correspondence. Disagreeing over the interpretation to be given to the agreement, or over unessential terms, does not void the initial agreement.

[4] The issue to be determined by the Judge was whether an objective bystander would have considered that the parties intended to bind themselves on sufficiently certain essential terms at the time the agreement was reached. In our view, the Judge made no reviewable error in concluding, on the basis of the record, that the parties intended to enter into a binding agreement. The wording of the offer to settle and of the acceptance letter, the parties' conduct and the letter to the Court advising the case management judge that a settlement had been reached, subject to formalization, review and execution by the parties of a formal settlement agreement, could most certainly be interpreted as evidence that a binding agreement on the essential terms of a settlement agreement had been reached.

[5] The mere fact that the parties disagreed on some of the terms of the agreement when they undertook to formalize it does not make those terms any more essential than those terms over which they agreed. As this Court stated in *Allergan*, "continuing disagreement over unessential terms is immaterial". The attempt by either one of the parties to obtain more than was previously agreed does not constitute evidence that there was no agreement on the essential terms of the settlement at the time the appellant offered to settle the action and the respondents accepted that offer.

[6] Finally, we agree with the respondents that it is too late for the appellant to argue that he was entitled to repudiate the settlement agreement on the basis of the respondents' conduct in advancing a formalized settlement agreement with terms allegedly inconsistent with the appellant's offer. This argument was not raised before the Judge, nor was it alleged in the Notice of Appeal. Under questioning, counsel for the appellant clarified that he was no longer pursuing this issue in this Court. In any event, the appellant overstates the importance of the disagreements on the wording of the formal settlement agreement. The appellant has failed to demonstrate the real and practical impacts of the disagreements between the parties (regarding the rights conferred in the license, the necessity of notice prior to sale or assignment of the patent, and the scope of the release), and they certainly do not go to the very essence of the settlement agreement. Nor can it be seriously argued that the wording proposed by the respondents would have deprived the appellant of a substantial part of his benefit in the agreement.

[7] For all of the foregoing reasons, we are therefore of the view that the appeal must be dismissed, with costs payable to the respondents in the amount of $5,000.00 all inclusive.

"Yves de Montigny"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-275-18
STYLE OF CAUSE:	MAOZ BETSER-ZILEVITCH v. NEXEN INC. AND CNOOC CANADA INC., EACH INDIVIDUALLY AND CARRYING ON BUSINESS AS A PARTNERSHIP REFERRED TO AS THE LONG LAKE OIL SANDS PROJECT
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DELIVERED FROM THE BENCH BY:	DE MONTIGNY J.A.

APPEARANCES:

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