Federal Court  Cour fédérale

Date: 20141209

Docket: T-1843-14

Citation: 2014 FC 1186

Toronto, Ontario, December 9, 2014

PRESENT: Prothonotary Kevin R. Aalto

BETWEEN:

APOTEX INC.

Plaintiff

and

PFIZER CANADA INC.

Defendant

ORDER AND REASONS

[1] This motion is brought on behalf of the Defendant (Pfizer). It seeks, *inter alia*, the following relief:

1. An Order striking paragraphs 1, 11 and 17 (the "Impugned Paragraphs") of the Statement of Claim (Claim) of Apotex Inc. (Apotex) dated August 26, 2014;

2. In the alternative, an Order requiring Apotex to provide material facts and the particulars of the following Impugned Paragraphs of the Statement of Claim as follows:

(a) With respect to paragraphs 1 and 17 of the Statement of Claim:

(i) the nature of the damages claimed;

(ii) the type of loss or losses that Apotex has allegedly suffered;

(iii) the quantum of losses claimed, including whether the quantum exceeds $50,000.00 as required by Rule 182 of the *Federal Court Rules*.

(a) With respect to paragraph 11 of the Statement of Claim, how Apo-Eletriptan "became approvable" under the *Food and Drug Act* ("FDA") *Regulations* on May 22, 2012.

[2] This is a Section 8 Damages Claim under the *PMNOC Regulations*.

[3] The Claim is very brief, comprising less than 7 pages of text and 18 short paragraphs. Paragraph 1 (a) of the Claim claims damages as follows:

1. The Plaintiff, Apotex Inc. ("Apotex"), claims:

(a) damages suffered by Apotex in respect of the delay in issuance to Apotex of a Notice of Compliance ("NOC") for its eletriptan hydrobromide tablets for oral administration in 20 mg and 40 mg strengths ("Apo-Eletriptan") by reason of the Defendant's institution and prosecution of proceedings

under the *Patented Medicines (Notice of Compliance) Regulations* (the "*Patent Regulations*");

(b) pre-judgment and post-judgment interest;

(c) costs of this action on a scale to be determined by this Honourable Court; and

(d) Such further and other relied as this Honourable Court deems just.

[4] The Claim then goes on to describe in simple terms the basis for the claim for damages including the fact of the serving of a Notice of Allegation and the commencement and ultimate discontinuance of a Notice of Application seeking to prohibit the issuance of a Notice of Compliance to Apotex for its drug product. The Claim also asserts the alleged time frame for the Section 8 Damages. This form of Claim, in almost identical terms, has been used by Apotex in other Section 8 Damages cases.

[5] Pfizer seeks particulars of various paragraphs of the Claim. In its Written Representations Pfizer makes the surprising statements: "The Defendant is unable to understand the case against it" (paragraph 2) and "Pfizer cannot now know the case to be met, cannot go about gathering evidence or organize its case in a knowledgeable way and must take the broadest possible time-wasting approach to discovery" (paragraph 14). Pfizer is a Defendant in at least one of those other proceedings where a similar statement of claim was issued and in which no motions to strike or motions for particulars were brought.

[6] Pfizer raises three matters which it argues in this case should either be struck or particulars provided.

[7] The first issue concerns the use of the phrase "became approvable" in paragraph 12 of the Claim as it relates to Apotex's drug product. That issue was resolved by virtue of Apotex describing the nature of "became approvable" in its Written Representations. Notwithstanding the clarification in Apotex's Written Representations, the use of the phrase is self-evident and would neither have been struck nor would particulars have been ordered.

[8] The second issue relates to the scope of Section 8 Damages. Pfizer argues that the scope of the damages as claimed is unclear. Pfizer argues that the purpose of pleadings is to provide the opposing parties with a clear understanding of the case they have to meet. In argument, Pfizer relied upon the Rules relating to pleadings and to particulars (Rules 181 and 182 in particular) and several of the cases which deal with those requirements.

[9] Notwithstanding the able argument of Pfizer's counsel, I am not persuaded that particulars should be given of the damages claimed. Section 8 Damages, as they are evolving in the case law, are their own unique form of damages as defined in the *PMNOC Regulations*. As was observed in oral reasons for decision dated April 6, 2011 in, *Apotex v. Pfizer Canada Inc. et al.* (Court File No. T-1736-10):

> The Defendants argue that they require particulars in order to fence in the clam of Apotex and to ensure they know the types of claims for damages that they are being faced with. They need this in order to plead as to whether or not a particular head of damage is or is not appropriate or recoverable under Section 8.

There is some substance to that particular argument. The difficulty, however, is that damages are an unknown commodity; not in the quantum sense, but in the contextual sense as to what comprises those damages. It is a bit of a moving target, because information is required from the Pfizer Defendants in order to be able to determine some of the specific elements that will make up the heads of damage.

The Court is very sensitive to the fact that the rules require that the nature of the damages be pleaded. The nature of the damages in this case is not clear from the pleading because it simply claims damages. Specifically, in paragraph 1(a), "Damages suffered by Apotex in respect of the delay in issuance to Apotex of a Notice of Compliance," et cetera.

The scope of those damages are not, in anyway, defined. To properly, fit within the rules of pleading, there should be some explanation of the nature of those damages. In the ordinary course, that would be a legitimate claim for particulars. However, in Section 8 cases, because of the unknowns, this is not a breach of contract case where you can say, "You could have sold X number of widgets at such and such a cost, and what your cost of goods were and the net profit that you would have earned." This is, as I described it during argument, a bit of a crystal ball gazing exercise in that you are trying to predict what would have happened through a particular timeframe.

Information in the possession of Pfizer is essential for Apotex to be able to define, in any real way, the complete nature of those damages. It is a given that it will include, at some point, lost profits or costs incurred by Apotex during the course of these many proceedings. These are sophisticated clients that would understand those particular issues. It makes no sense at this juncture for Apotex to provide a lengthy shopping list of each and every possible claim it might assert for damages when such a list would be, in part, largely speculative because of the unknowns in such cases.

To that extent, in my view, the nature of damages is best left to the expert level of this proceeding based upon the facts that are elicited during the course of examinations.

> The Pfizer Defendants may argue that this does not afford them the opportunity to examine on discovery as to the nature of the damages. However, as I noted in earlier reasons in this motion, this is a case-managed case. Pfizer must know the case it has to meet long before trial so that it can inform its expert and seek the relevant evidence it needs.

[10] In my view, these observations apply equally here. Section 8 Damages are a statutory remedy and this Court and the Federal Court of Appeal have delineated and continue to delineate the scope of those damages. They are calculated from the creation by experts of the "but for" world of what would have happened but for a patent holder issuing a Notice of Application seeking to prohibit the Minister from issuing an NOC to a generic manufacturer. Cases such as *Apotex Inc v. Merck & Co., Inc.*, 2012 FC 620 set out the mechanism for the calculation of Section 8 Damages and cases such as *Teva Canada Limited v. Sanofi-Aventis Inc.,* 2014 FCA 67, *Eli Lilly Canada Inc. v. Novopharm Limited*, 2013 FC 677. *Apotex Inc. v. Merck & Co. Inc*., 2009 FCA 187 and others have created fence posts around the scope of Section 8 Damages. Pfizer does not need particulars of the Section 8 Damages claimed as that is all that is being claimed by way of damages. Further, this case will be specially managed and any issues arising in the proceeding can be efficiently dealt with.

[11] A third very technical issue raised by Pfizer relates to the fact that the Claim does not comply with the technical rules of pleading in that the Claim does not state "where monetary relief is claimed, whether the amount claimed, exclusive of interest and costs, exceeds $50,000.00" (Rule 182(a)). Perhaps because in proceedings arising under the *PMNOC Regulations* there is an implicit assumption that Section 8 Damages exceed without question the $50,000.00 threshold of simplified actions the requirement of Rule 182(a) need not be followed.

However, there is authority for the proposition that as Rule 182(b) is "clear and unambiguous" and that it "remains an obligatory prescription for a statement of claim" [see, *International Water-Guard Industries Inc. v. Bombardier Inc.*, 2007 FC 285 at para. 14] it must be pleaded failing which it may be deemed that the claim does not exceed $50,000.00. It is a simple matter to include this particular plea and, in future, to avoid such motions as this it should be included. In the circumstances of this case, however, I am satisfied that relief from this technicality should be granted pursuant to Rule 55 and that this action shall proceed on the basis that the Section 8 Damages exceed $50,000.00.

[12] As noted, this case will proceed as a specially managed proceeding. This will ensure that the matter proceeds in the just, most economical and timely manner. Pfizer also sought an extension of time to file its defence to the Claim. While Apotex argues they should be given but a few days, in all of the circumstances, Pfizer's request for a two week extension is reasonable given that a Case Management Judge will have to be appointed.

[13] Apotex are entitled to their costs which will be fixed and payable forthwith in the amount of $3,500.00 inclusive of disbursements and HST.

ORDER

THIS COURT ORDERS that:

1. This matter shall proceed as a specially managed proceeding and be referred to the Office of the Chief Justice for the appointment of a Case Management Judge.

2. The motion to strike or alternatively for particulars is dismissed.

3. Pfizer Canada Inc. is granted an extension of time to December 31, 2014 to serve and file its Statement of Defence and any counterclaim it seeks to assert.

4. Within 20 days following the appointment of the Case Management Judge, the parties shall provide mutually convenient dates for a case management conference to review the status of the proceeding and establish a timetable for the next steps in the proceeding

5. Apotex Inc. are entitled to their costs of this motion which are hereby fixed and payable forthwith in the amount of $3,500.00 inclusive of disbursements and HST.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1843-14
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PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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