Federal Court Cour fédérale

Date: 20160616

Docket: T-1345-13

Citation: 2016 FC 671

Ottawa, Ontario, June 16, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

C. STEVEN SIKES, AQUERO, LLC AND AQUIAL, LLC

Appellants/ Plaintiffs

and

ENCANA CORPORATION, CENOVUS FCCL LTD., FCCL PARTNERSHIP AND CENOVUS ENERGY INC.

Respondents/ Defendants

ORDER AND REASONS

(Delivered orally from the Bench on June 8, 2016)

[1] This is an appeal from the Order of Prothonotary Lafrenière dated January 29, 2016, in which he dismissed the plaintiffs' (now the appellants') motion to have Smart & Biggar removed as Solicitors of Record for the defendants. The appellants also appeal from the award of costs

made payable forthwith to the defendants. I would note that Prothonotary Lafrenière was designated as the case management judge on this matter by the Chief Justice on April 3, 2014.

[2] The underlying motion by the appellants before Prothonotary Lafrenière for removal of Smart & Biggar was brought nearly two years after the commencement of the action and with respect to a telephone call that took place in June of 2008 between Mr. Steven B. Garland, a partner with the law firm of Smart & Biggar and Dr. Steven Sikes, a principal of the appellants. The appellants were seeking to retain counsel to enforce patent rights asserted in the underlying action.

[3] Before Prothonotary Lafrenière, the parties agreed that the test to be applied in determining whether counsel should be disqualified is that as set out in *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at p 1260 [*MacDonald Estate*]. In particular, the Court must enquire as to (1) whether a lawyer received confidential information attributable to a solicitor and client relationship and (2) if so, whether there is a risk that the relevant confidential information will be used to the prejudice of the former client.

[4] After a thorough assessment of the evidence, some aspects of which are challenged on this appeal by the appellants, Prothonotary Lafrenière concluded at para 55 of his Order that the plaintiffs :

> […] have failed to discharge their burden of establishing that a reasonably informed member of the public in possession of all the relevant facts would conclude that there was a solicitor and client relationship between Dr. Sikes and Smart & Biggar[…]

[5] Prothonotary Lafrenière also concluded the plaintiffs failed to establish that "confidential information relevant to the matter at hand was provided to Mr. Garland".

[6] While I do not wish to extensively revisit the facts, I would make the following observations. In the course of his search for legal counsel, Dr. Sikes contacted a total of eight law firms. One of them was Ogilvie Renault LLP. In June 2008, Ms. Van Zant of that firm informed Dr. Sikes she could not represent him or his firm. However, she referred him to several other lawyers, including Mr. Garland.

[7] Dr. Sikes searched Mr. Garland's profile on Smart & Biggar's website, printed a copy of the webpage, and called Mr. Garland on June 16, 2008. During their phone call, which lasted approximately fifteen minutes, Dr. Sikes indicated he was seeking to obtain a lawyer in Canada with respect to a Canadian patent pending and a potential infringement related to water clarification chemicals and processes in the oil-sands industry. Mr. Garland obtained information from Dr. Sikes and opened a general file for the purpose of conducting a conflict of interest search.

[8] It is apparent from a review of the file that Dr. Sikes was aware that a conflict of interest search would be undertaken by Mr. Garland and that he (Mr. Garland) would be in contact with him regarding the result of that search. It is also evident that Dr. Sikes understood the nature of a conflict of interest search, he having been in touch with other counsel who had informed him they could not take the case due to a conflict.

[9] Without going into details as to the contents of their e-mail exchanges, I would note there were such exchanges immediately after the telephone conversation. In one of those e-mails Dr. Sikes' confirmed his interest in obtaining legal counsel in Canada. He indicated the nature of the technology and he indicated the names of a number of operating companies (potential defendants) with a view to facilitating the conflict of interest search. Mr. Garland, in response, forwarded an e-mail indicating that he would complete a "standard" conflict of interest check and respond to Dr. Sikes as soon as possible. At the appeal hearing, Dr. Sikes raised an issue with respect to Mr. Garland's categorization of the conflict check as a "standard" check given that he (Mr. Garland) stated that the check would be limited to water-treatment companies. I disagree with Dr. Sikes contention in that regard. Nothing in the material before me indicates the conflict search or check was other than a standard one.

[10] It is noteworthy that Mr. Garland stated in his e-mail that it was not immediately clear to him, without reviewing the patent or further discussing the technology and marketplace, whether his law firm would necessarily be acting against the interests of the operating companies. The review of the patent and further discussions regarding the technology and the marketplace did not occur.

[11] In support of their motion before Prothonotary Lafrenière, the appellants relied on the affidavit of Dr. Sikes. The defendants relied upon affidavits by Mr. Garland and Mr. Kevin Graham. Prothonotary Lafrenière made the following observations, in part, with respect to the cross-examination of Dr. Sikes:

> [42] […] The cross-examination exposed a number of misstatements, mischaracterizations, embellishments and errors in

> Dr. Sikes' evidence. Representative examples of faulty memory and hyperbole in Dr. Sikes's evidence, as well as instances where Dr. Sikes was vague or evasive on cross-examination, are conveniently reproduced in Schedule A to the Defendants' written representations. I will review a few examples that are particularly troubling.

[12] Prothonotary Lafrenière continued:

> [43] Dr. Sikes stated at paragraph 14 of his affidavit that his conversation with Mr. Garland was incorporated into notes that he could "establish as contemporaneous at that time". The document attached as Exhibit "F" is later identified as a true copy of his contemporaneous notes, redacted for what Dr. Sikes claimed were "non-relevant and potentially prejudicial/privileged items." Dr. Sikes admitted when pressed in cross-examination that the document in question was not actually a contemporaneous record, but rather a "litigation business plan" setting out Dr. Sikes' summary of information obtained as a result of his interviews with Canadian IP firms he contacted in 2008. He further conceded that the plan was only written out after his third call with Mr. Garland on June 23, 2008, a full week after his initial conversation with Mr. Garland.
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> [44] In my view, Dr. Sikes was attempting to bolster his evidence by twice portraying his business plan as "contemporaneous" at paragraph 14 of his affidavit. The emphasis on this adverb was clearly intended to mislead the Defendants and the Court into believing that his notes were made at the time of initial call with Mr. Garland, that they were an accurate and complete record and that they were untainted by subsequent events. This was clearly not the case.
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> [45] Cross-examination also revealed that the discussions referenced in paragraph 11 of the Sikes Affidavit were not directed to Dr. Sikes' "specific circumstances" as alleged. First of all, Dr. Sikes could not provide any details of the said circumstances. Secondly, he acknowledged in cross-examination that Mr. Garland had not reviewed the patent application at the time of the initial telephone call. It is apparent that Mr. Garland would not have been able to provide any useful advice with respect to Dr. Sikes' circumstances without further information, including conducting a review of the patent in issue.

[46] Another troubling aspect of Dr. Sikes' evidence which cast into question his credibility is his repeated insistence that all of the information imparted to Mr. Garland (and to each of the other Canadian IP firms [IP meaning Intellectual Property]) was confidential simply because the communication was made in confidence. The fact that a communication was made in confidence does not establish that the information imparted in that communication was in fact confidential. Beyond vague assertions, Dr. Sikes does not explain what the information was and why such information was confidential.

[47] Dr. Sikes also refused to provide clearly relevant documents through selectively asserting privilege. This impeded Mr. Garland's ability to fully respond to the allegations made against him and this Court's ability to determine whether any confidential information or legal advice was in fact provided.

[48] At the hearing of the motion, I asked counsel for the Plaintiffs whether the Plaintiffs would be prepared to provide to the Court, on a confidential basis, a copy of the handwritten notes that Dr. Sikes had made on Mr. Garland's profile page that he had printed out and over which privilege had been claimed. The Plaintiffs ultimately agreed to produce the document. Upon reviewing the document, it is clear that the content of the sparse scribbled notes is in no way privileged or confidential. Once again, the Defendants and the Court were misled into believing that the notes contained some sensitive, important and highly confidential information and that there were valid reasons for not disclosing them.

[…]

[50] During the cross-examination, Dr. Sikes attempted to add to his evidence by asserting that Mr. Garland had provided "advice" to not pursue the operating companies and only to pursue the water-treatment companies, which was "in part" the basis for the Plaintiffs' delay in commencing this action. These assertions by Dr. Sikes are simply not credible. Dr. Sikes' characterization of the alleged advice varied throughout the cross-examination, ultimately resulting in Dr. Sikes acknowledging that all that was discussed with Mr. Garland (and vetted by Dr. Sikes) was the "standard business practice" that it was inadvisable to sue your customers if it can be avoided.

[13] In my view, the appellants face serious challenges in order to succeed on this appeal. I say this for three reasons. First, Prothonotary Lafrenière's Order is a discretionary one. It is owed a high degree of deference. The test applied with respect to a discretionary order by a Prothonotary is that it ought not to be disturbed unless it raises questions vital to the final issue of the case or is clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts: *Merck & Co Inc v Apotex Inc*, 2003 FCA 488, [2003] FCJ No 1925 at para 19. The second challenge faced by the appellants arises from the fact that Prothonotary Lafrenière was the case management judge assigned to this matter. The burden on the appellants to overturn an interlocutory order by a case management judge is a heavy one. The case management judge is intimately familiar with the history, details, and complexities of the matter. This Court should not interfere with a case management judge's decision except "[…] in the clearest case of misuse of judicial discretion": *Apotex Inc v Sanofi-Aventis*, 2011 FC 52, [2011] FCJ No 402. Finally, another factor that militates against the appellants on this motion flows from the fact that Prothonotary Lafrenière made significant findings of fact and mixed fact and law. Such findings attract a standard of palpable and overriding error in order to be overturned by this Court on appeal: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[14] To summarize, I am faced with a discretionary Order made by a case management judge that is founded upon significant factual findings and credibility findings for which the standard of review is very high. Against that backdrop, I turn again to *MacDonald Estate*. I must consider whether the appellants have established that Prothonotary Lafrenière erred when he concluded that a reasonable person with knowledge of all the relevant facts would not form the belief that Mr. Garland received confidential information as part of a solicitor and client relationship that

could be used to the prejudice of the plaintiffs. Although commonly referred to as a two-part test, it appears there are actually three components to the test as elaborated in *MacDonald Estate*. I would frame them as follows: (a) was there a solicitor-client relationship; (b) was there confidential information exchanged attributable to that relationship, and (c) could that confidential information be used to the prejudice of Dr. Sikes and his companies.

[15] All three elements of that test must be met in order for the appellants to succeed on this appeal. Whether or not the appeal is allowed must be measured against the deferential and palpable and overriding error standards to which I have just alluded.

[16] Prothonotary Lafrenière addressed all three issues. I only intend to address one. In the event the appellants do not establish there existed a solicitor and client relationship, that ends the matter. I conclude there is no basis upon which to interfere with Prothonotary Lafrenière's finding that no solicitor and client relationship existed in the circumstances. In this regard, I am in substantial agreement with the observations and conclusions made by Prothonotary Lafrenière. Having said that, I am cognizant of the appellants assertions of misapprehension of certain aspects of the evidence by Prothonotary Lafrenière. I have considered those brought to my attention, and without naming any of them specifically, it is in my view that none support reversal based upon the standard of review that I must apply.

[17] The appellants also challenge the award of costs made by Prothonotary Lafrenière. Once again, the standard of review is high. An appellate judge is not permitted to intervene for mere error as he or she might do, for example, in a criminal law matter where liberty is at stake. Rule

400 of the *Federal Courts Rules*, SOR98/106 provides that the Court, has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." An award of costs is not to be interfered with except where the court of first instance has made an error in principle or the cost award is plainly wrong: *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2015 FCA 245, [2015] FCJ No 1327. Given the factual conclusions made by Prothonotary Lafrenière and the broad discretion available to him, it cannot be said that his award of costs is plainly wrong or that it is based upon any error in principle.

[18] For all of the above reasons, I would dismiss the appeal from the dismissal of the motion to remove Smart & Biggar as counsel for the defendants, as well as the costs appeal.

[19] On the issue of costs on this appeal, I agree with counsel that the case was ably and expeditiously argued. The parties agree that a $10,000 all inclusive costs award would be appropriate in the circumstances. They do not agree whether the award should be payable forthwith, in the cause or "in any event of the cause". In the circumstances there will be an all inclusive cost award in the amount of $10,000.00 payable jointly and severally by the appellants to the respondents, in any event of the cause.

THIS COURT ORDERS that:

1. The appellants' appeal from the Order of Prothonotary Lafrenière dated January 29, 2016 be dismissed.

2. The appellants shall jointly and severally pay costs to respondents in the sum of $10,000 in any event of the cause.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1345-13
STYLE OF CAUSE:	C. STEVEN SIKES, AQUERO, LLC AND AQUIAL, LLC v ENCANA CORPORATION, CENOVUS FCCL LTD., FCCL PARTNERSHIP AND CENOVUS ENERGY INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 8, 2016
ORDER AND REASONS:	BELL J.
DATED:	JUNE 16, 2016

APPEARANCES:

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David W. Aitken	FOR THE DEFENDANTS ON MOTION TO REMOVE SMART & BIGGAR AS SOLICITORS OF RECORD

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