

Federal Court



Cour fédérale

Date: 20201221

Docket: T-1434-14

Citation: 2020 FC 1176

Ottawa, Ontario, December 21, 2020

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

PHARMASCIENCE INC.

Plaintiff

and

PFIZER CANADA ULC

Defendant

ORDER AND REASONS

I. Overview

[1] The plaintiff, Pharmascience Inc, seeks damages against the defendant, Pfizer Canada ULC, pursuant to s 8 of the *Patented Medicines (Notice of Compliance Regulations)*, SOR/93-133. Pharmascience alleges it lost sales of its pregabalin medication while it was kept off the market by virtue of Pfizer's application under the Regulations to prohibit Pharmascience's entry. The action is set down for trial before me in February 2021.

[2] In preparation for trial, Pharmascience sought an Order requiring Pfizer to produce unredacted copies of two settlement agreements between Pfizer and Teva. In an Order dated August 25, 2020, Prothonotary Kevin Aalto ordered Pfizer to produce an unredacted copy of the first agreement on obtaining Teva's consent. With respect to the second agreement, the Prothonotary declined to order Pfizer to produce an unredacted copy. The redactions in both agreements relate to financial information, in effect, the amounts for which the parties agreed to settle.

[3] Pharmascience appeals that Order and asks me to overturn the Order and compel Pfizer to produce unredacted copies of the agreements.

[4] In respect of the first agreement, Pharmascience maintains that the Prothonotary erred in making disclosure contingent on Teva's consent, and in finding that the information sought was not relevant. In respect of the second agreement, Pharmascience submits that the Prothonotary erred in finding the redacted information not relevant. With respect to both agreements, Pfizer responds by asserting settlement privilege over the redacted amounts.

[5] I find that the question of settlement privilege provides a complete answer to Pharmascience's submissions. Therefore, I will confine these reasons to that issue alone.

A. *Does Settlement Privilege Apply?*

[6] Settlement privilege exists to foster settlements between litigants by shielding communications relating to the terms of settlement. It "wraps a protective veil around the efforts

parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible” (*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at para 2 [*Sable*]). The privilege expressly covers the amount of the settlement since the negotiated amount reflects “the admissions, offers, and compromises made in the course of negotiations” (para 18).

[7] Exceptions to the privilege will be recognized where the party seeking privileged information can show a superordinate public interest favouring disclosure. Examples offered by the Supreme Court of Canada in *Sable* included exposure of misrepresentation, fraud, or undue influence (para 19).

[8] Pharmascience submits that the settlement amounts in the two agreements fall within an exception. Alternatively, Pharmascience argues that Pfizer has waived privilege over that information.

[9] I disagree with Pharmascience. The cases that Pharmascience relies on address circumstances not present here.

[10] Pharmascience relies primarily on three authorities: *Alofs v Blake, Cassels & Graydon*, 2016 ONSC 6907 [*Alofs*]; *Dos Santos v Sun Life Assurance Co of Canada*, 2005 BCCA 4 [*Dos Santos*]; and *Ministry of Correctional Services v McKinnon*, 2010 ONSC 3896 [*McKinnon*].

[11] In *Alofs*, Master Dash held that an exception to the privilege exists when a party requires the privileged information for the proper disposition of a proceeding (para 27). Pharmascience contends that it requires the settlement amounts in order to understand Teva's motivation to settle. It maintains that it requires all of the terms of the settlement in order to assess what would have happened in the but-for world. I am not persuaded that the actual amount of the settlement is necessary for Pharmascience's purposes. I note that Master Dash specifically stated that the exception he recognized should not extend beyond the information actually required by the requesting party for the stated purpose. On that approach, the actual amounts of the settlement may not fall within the exception (para 40). In my view, the same is true here. Pharmascience has the agreements themselves and is aware of their principal terms. I do not see the need for the actual settlement amounts.

[12] In *Dos Santos*, the actual amount of the settlement was necessary in order to calculate the amount payable under a disability insurance policy. The privileged documents were both relevant and necessary for that purpose (para 37). Here, there is no suggestion that the settlement amounts are relevant and necessary to calculate damages.

[13] Finally, in *McKinnon*, the Court relied on *Dos Santos* in finding that the privileged documents were relevant and necessary to determine whether the defendant Ministry had failed to act in good faith in implementing previous decisions against it. Again, there is no comparable claim on the part of Pharmascience here.

[14] Pharmascience also suggests that Pfizer has waived privilege over the settlement amounts by providing partial disclosure of the settlement agreements, citing *Kawartha Lakes v Gendron*, 2018 ONSC 3498. There, the Court found that privilege over the settlement terms had been waived once extensive details of the “meetings, negotiations, offers, and discussions” leading to the settlement had already been disclosed (paras 73 and 74). No corresponding disclosure was provided by Pfizer here that would justify a conclusion that settlement privilege had been waived.

II. Conclusion and Disposition

[15] Pharmascience has not shown that the settlement amounts it seeks fall within an exception to the doctrine of settlement privilege. Nor has it established that Pfizer waived privilege over that information. Accordingly, I must dismiss Pharmascience’s motion, with costs in any event of the cause.

ORDER IN T-1434-14

THIS COURT ORDERS that the motion is dismissed, with costs in any event of the cause.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1434-14

STYLE OF CAUSE: PHARMASCIENCE INC. v PFIZER CANADA ULC

PLACE OF HEARING: HEARING HELD BY VIDEOCONFERENCE IN
TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 27, 2020

ORDER AND REASONS: O'REILLY J.

DATED: DECEMBER 21, 2020

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