

Date: 20090914

Docket: A-196-09

Citation: 2009 FCA 266

**CORAM: SEXTON J.A.
BLAIS J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

SIMPSON STRONG-TIE COMPANY INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

Heard at Toronto, Ontario, on September 14, 2009.

Judgment delivered from the Bench at Toronto, Ontario, September 14, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

BLAIS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on September 14, 2009)

BLAIS J.A.

[1] This is an appeal of an order by Justice Mandamin of the Federal Court (motion judge) dated April 21, 2009 upholding an order by Prothonotary Aalto dated December 31, 2008 whereby he dismissed the appellant's application for production of documents sought in the direction to attend (DTA) and for answers to the questions refused in the cross-examination on affidavit.

[2] To succeed, it must be demonstrated that the motion judge's decision was plainly wrong in the sense that it was based on an error of law or a misapprehension of the fact, pursuant to the decision of our Court in *Merck & Co., Inc. v. Apotex Inc.* [2004] 2 F.C.R. 459 , 2003 FCA 488 (*Merck*) whereby:

Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[3] We are of the view that the motion judge was correct in deciding that the issues were not vital to the final outcome.

[4] Turning to the second element of the test established in *Merck*, above, the motion judge examined whether the prothonotary was clearly wrong in the exercise of his discretion.

[5] In the instant case, in dismissing the motion, the case management prothonotary ruled that in its DTA, the appellant had overreached as to what documents the affiants were required to produce. Rule 91(2)(c) as it relates to an affiant only requires the production of documents "in that person's possession, power or control that are relevant to the application or motion."

[6] Further, the prothonotary ruled that the appellant had failed to lay a proper foundation in cross-examination to demonstrate that the documents were in the possession of the affiants and hence obtain the production of additional documents (Order of Prothonotary Aalto dated December 31, 2008, pages 6-7).

[7] The prothonotary gave extensive reasons in dismissing the motion. It was not based upon a wrong principle or upon a misapprehension of the facts. The motion judge did not err on this count.

[8] Regarding the scope of cross-examination as it relates to the requirement to produce documents pursuant to a DTA, we are of the view that the prothonotary applied the correct principles discussed in *Merck Frosst Canada Inc. v. Canada* (1997), [1997] F.C.J. 1847 (F.C.T.D.) affirmed [1999] FCJ No. 1536 (F.C.A.). The motion judge did not find any error with respect to this issue. Neither do we.

[9] In *j2 Global Communications, Inc. v. Protus IP Solutions Inc.*, (2009 FCA 41, 387 N.R. 135), Justice Evans explained that because of the discretionary and interlocutory nature of motions, appellants have a heavy burden to meet before the Federal Court of Appeal will overturn a decision (at para 5). He further stated:

Because of their intimate knowledge of the litigation and its dynamics, prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases...since this Court is far removed from the fray, it should only intervene in order to prevent undoubted injustices and to correct clear material errors (at para 16).

[10] This appeal will therefore be dismissed with costs.

“Pierre Blais”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-196-09

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANDAMIN
DATED APRIL 21, 2009, IN DOCKET NO. T-1570-07.**

STYLE OF CAUSE: SIMPSON STRONG-TIE
COMPANY INC. v. PEAK
INNOVATIONS INC.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 14, 2009

**REASONS FOR JUDGMENT
OF THE COURT BY:** (SEXTON, BLAIS &
LAYDEN-STEVENSON J.J.A.)

**DELIVERED FROM
THE BENCH BY:** SEXTON J.A.

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