Federal Court of Appeal | Cour d'appel fédérale

Date: 20160518

Docket: A-204-15

Citation: 2016 FCA 155

CORAM: **NADON J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

APOTEX INC.
and APOTEX PHARMACHEM INC.

Appellants

and

ALLERGAN, INC., ALLERGAN SALES, LLC.
ALLERGAN USA, INC. and KYORIN
PHARMACEUTICAL CO., LTD.

Respondents

Heard at Ottawa, Ontario, on December 9, 2015.

Judgment delivered at Ottawa, Ontario, on May 18, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Some time ago, the respondents, Allergan, Inc. *et al.*, brought an action in the Federal Court against the appellants, Apotex Inc. *et al.*, for patent infringement.

[2] Later, the parties discussed settlement. At one point, Allergan concluded that a settlement had been reached. Apotex disagreed. So Allergan moved in the Federal Court for an order enforcing what it says are the terms of settlement. Apotex opposed.

[3] The Federal Court (*per* Hughes J.) found that the parties had settled the litigation. On March 24, 2015 it issued an order enforcing the terms of the settlement: 2015 FC 367.

[4] Apotex appeals to this Court. It submits that the Federal Court erred in principle in finding that there was a settlement agreement. I agree with Apotex's submission. Therefore, I would allow the appeal, set aside the Federal Court's order, and grant Apotex its costs here and below.

A. Basic facts

[5] Allergan brought an action in the Federal Court (file T-1267-10) alleging that Apotex has infringed Canadian Patent No. 1,340,316 by selling, manufacturing and exporting products containing gatifloxacin.

[6] Settlement discussions took place from April 2012 to March 2014. The record before us contains an initial set of letters, emails, draft Minutes of Settlement enclosed with emails, and reporting letters to the Federal Court, which was managing the action.

[7] Later in these reasons, I shall look at some of what the parties said in some of these documents. For present purposes, I shall focus on the documents the Federal Court relied upon to find that the parties had settled the action.

[8] The Federal Court found (at paras. 44-50) that a settlement had been reached. In the course of its reasons, it examined two sets of documents:

- *The initial exchange: three letters and an email.* A couple of years after Allergan started the action, Apotex sent Allergan a letter offering to settle it. Allergan replied by letter, seeking clarification "to advance this case towards settlement." Apotex supplied that clarification. An email followed that was silent concerning the clarification. These three letters and one email were all sent in April 2012. The Federal Court suggests (at paras. 44-46) that as a result of these communications an agreement was essentially in place and all that happened afterward was minor and non-essential.

- *The January 13, 2014 - February 24, 2014 exchange.* Following the initial exchange, twenty-three months of emails followed. The parties also exchanged a number of draft Minutes of Settlement. In the end, discussions broke off. However, the Federal Court found that an email sent by counsel for Allergan on February 24, 2014 accepted the terms contained in draft Minutes of Settlement enclosed with an email counsel for Apotex sent on January 13, 2014. The Federal

Court concluded (at paras. 48-51) that this was a matching offer and acceptance as to all terms.

[9] In October 2014, six months after negotiations fell apart, Allergan moved for an order enforcing the settlement agreement it thought it had reached. In its view, although the parties did not place signatures on a formal agreement, the parties had reached agreement on all essential terms.

[10] The Federal Court concluded that the parties had reached a settlement agreement and so it granted Allergan's motion.

B. Analysis

(1) The jurisdiction of the Federal Courts to consider whether the parties have reached a settlement agreement

[11] Before the Federal Court, the parties accepted that it had jurisdiction to decide the motion. Nevertheless, knowing its status as a statutory court and recognizing that it had to be certain of its jurisdiction, the Federal Court prudently considered this issue.

[12] The Federal Court held that it had jurisdiction to determine whether a patent infringement action had been settled and, if so, to enforce the settlement agreement (at paras. 32-33). It cited the Federal Court's jurisdiction over patent infringement actions under s. 20 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 54(2) of the *Patent Act*, R.S.C. 1985, c. P-4 and several

authorities confirming its jurisdiction, such as *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242, [1941] 2 D.L.R. 545 and *Flexi-Coil Ltd. v. Smith-Roles Ltd.* (1980), [1981] 1 F.C. 632, 50 C.P.R. (2d) 29 (T.D.).

[13] On the issue of jurisdiction, I agree with the Federal Court and substantially adopt its analysis. I would add the following. Contract law, when viewed in a vacuum, is normally under provincial jurisdiction. However, the Federal Court has jurisdiction when the contract law issue before the Court is part and parcel of a matter over which the Federal Court has statutory jurisdiction, there is federal law essential to the determination of the matter, and that federal law is valid under the constitutional division of powers: *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641; *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88, 384 D.L.R. (4th) 547.

[14] The Federal Court had jurisdiction for another reason. The existence or non-existence of a settlement agreement affects the status of proceedings before this Court. If the former, the action subsists; if the latter, it does not. As part of its plenary powers, this Court has jurisdiction to rule upon whether or not a proceeding subsists: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35 to 38; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36; *Mazhero v. Fox*, 2014 FCA 226 at para. 9.

[15] Where both the Federal Court and a provincial superior court have concurrent jurisdiction over the matter, the Federal Court may decline jurisdiction, stay the matter before it, and give

way to the provincial superior court because it considers the provincial superior court to be a more appropriate forum: *Federal Courts Act*, above, s. 50.

(2) The requirements for a settlement agreement

(a) General principles

[16] This case concerns whether a settlement agreement has been reached in a common law jurisdiction. The following summary of the requirements for a settlement agreement is restricted to common law jurisdictions. The requirements in Québec, in particular under ss. 1385-1396 of the *Civil Code of Québec*, C.Q.L.R., c. C-1991, should await a future case.

[17] After canvassing some of the jurisprudence concerning the formation of settlement agreements, the Federal Court set out the requirements as follows (at para. 41):

- for there to be a binding contract, there must be an offer and acceptance wherein the terms of the offer are matched by the terms of the acceptance;
- the acceptance must be unequivocal;
- there can be an offer and acceptance so as to create a binding contract even where the parties contemplate the execution of a more formal document;
- negotiations as to the more formal document do not necessarily mean that an offer or acceptance has been repudiated.

[18] As shall be seen from the discussion below, the first proposition needs to be qualified. A settlement agreement arises once there is a matching offer and acceptance on all essential terms;

continuing disagreement over unessential terms is immaterial. This notion of essential terms, in fact, is quite central to the law concerning settlement agreements. Indeed, it is quite central to the outcome of this case.

[19] I do not disagree with the remaining propositions, stated in their generality. However, they do not supply all the principles necessary to decide this case or other such cases.

[20] A court will find that a settlement agreement has been reached when certain requirements are satisfied. I have grouped these into five separate matters to be considered.

– I –

[21] First, the court must find on the evidence before it that, objectively viewed, the parties had a mutual intention to create legal relations.

[22] The test is whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and in accepting it, intended to enter into legal relations: see, *e.g.*, *McCabe v. Verge* (1999), 182 Nfld. & P.E.I.R. 135 at para. 13 (Nfld. C.A.); *British Columbia (Minister of Transportation & Highways) v. Reon Management Services Inc.*, 2001 BCCA 679, 208 D.L.R. (4th) 175 at para. 24.

[23] The requirement of an objective, mutual intention to create legal relations does not mean that there must be formality. Settlements need not be reached through counsel or in pre-planned, formal discussions.

[24] Indeed, many cases show that—sometimes much to the surprise of clients and lawyers alike—seemingly idle conversations can have binding, legal consequences. Binding settlements can arise from impromptu, informal communications in relaxed, non-business settings. See, *e.g.*, *McCabe*, above at para. 11; *UBS Securities Canada, Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93 (C.A.); *Ward v. Ward*, 2011 ONCA 178, 104 O.R. (3d) 401 at para. 64; *RTS Flexible Systems Limited v. Molkerei Alois Muller Gmbh*, 2010 UKSC 14, [2010] 1 W.L.R. 753 at para. 45.

– II –

[25] Second, like all other agreements, a settlement agreement must satisfy the requirement that there be consideration flowing in return for a promise. In settlement agreements, this is almost certainly never a problem—by definition, settlements are compromises, and so there will be consideration flowing both ways.

–III –

[26] The Court must also find, as an objective matter, that the terms of the agreement are sufficiently certain: see, *e.g.*, *Bawitko Investments Limited v. Kernels Popcorn Limited* (1991),

53 O.A.C. 314, 79 D.L.R. (4th) 97 at pp. 103-104 at p. 104 (Ont. C.A.); *Olivieri v. Sherman et al.*, 2007 ONCA 491, (2007), 86 O.R. (3d) 778 at para. 49 (C.A.). Where the parties "express themselves in such fashion that their intentions cannot be divined by the court…the agreement will fall for lack of certainty of terms": John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at p. 91. Another way of putting this is that the court must be satisfied that the parties were objectively *ad idem* or were objectively of a common mind.

[27] It is not for the courts to amend the parties' offer and acceptance and make the terms certain. The Court will not make "a new agreement for the parties" where they "were never *ad idem*": *Kelly v. Watson* (1921), 61 S.C.R. 482, 57 D.L.R. 363.

[28] That being said, where the parties were objectively of a common mind and "intended some legal relationship to exist between them," often their reasonable expectations can be discerned and "courts will generally strive to give effect to [them]": *Hunt River Camps/Air Northland Ltd. v. Canamera Geological Ltd.* (1998), 168 Nfld. & P.E.I.R. 207, 517 A.P.R. 207 at pp. 217-18 (Nfld. C.A.); see also, *e.g.*, *Canada Square Corp. v. Versafood Services Ltd.* (1982), 34 O.R. (2d) 250, 130 D.L.R. (3d) 205 (C.A.); *Olivieri*, above at para. 50.

[29] Lack of certainty of terms leading to a finding that there was no agreement is something quite different from the presence in an agreement of words that have a range of meaning. For example, words like "disparage" or "scientific" may have a range of meaning but as long as a court can divine a meaning from those terms in the circumstances of a particular case, the agreement is not void for uncertainty: see *Olivieri*, above at para. 49.

– IV –

[30] An agreement does not arise until there is matching offer and acceptance on all terms essential to the agreement: *Olivieri*, above at para. 32; *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114, 37 B.C.L.R. 62 (C.A.) at para. 35; *Bawitko*, above at pages 103-04. Disagreement, objectively assessed, on an essential term will mean that there is no agreement: *Reon Management Services Inc.*, above at para. 34.

[31] How does a court decide what terms are essential and what terms are not?

[32] The court is to view the specific facts of the case objectively in light of the practical circumstances of the case and ask whether the parties intended to be legally bound by what was already agreed or, in other words, whether an "honest, sensible business[person] when objectively considering the parties' conduct would reasonably conclude that the parties intended to be bound or not" by the agreed-to terms: *G Percy Trentham Ltd v Archital Luxfer Ltd* (1992), [1993] 1 Lloyd's Rep 25, 63 B.L.R. 44 (C.A.) at paras. 50 and 86; *Ward* at para. 61; *Hughes v. City of Moncton*, 2006 NBCA 83, 304 N.B.R. (2d) 92 at para. 6. Put another way, looking not through the eyes of lawyers, but through the eyes of reasonable businesspeople stepping into the parties' shoes, was there something essential left to be worked out? See *Investors Compensation v. West Bromwich Building Society*, [1998] 1 All E.R. 98; [1998] 1 W.L.R. 896 (H.L.); *Chartbrook v. Persimmon Homes*, [2009] UKHL 38, [2009] A.C. 1101; *Re Sigma Finance*, [2009] UKSC 2, [2010] 1 All E.R. 571. Another way of putting it is to ask how "a reasonable [person], versed in the business, would have understood the exchanges between the parties":

Bear Stearns Bank plc v. Forum Global Equity Ltd., [2007] EWHC 1576 (Q.B.D. Comm.) at para. 171.

[33] When courts find that there has been an agreement on essential terms, they will often imply non-essential terms into the agreement: *McCabe*, above at para. 20; *Fieguth*, above; *Hughes*, above at para. 6. The lack of agreement on non-essential terms will not stand in the way of a finding of an agreement. Put another way, "it is not necessary that the original contract include all the ancillary terms that are already implicit in its content": *Ward*, above at para. 54. "Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement": *RTS Flexible Systems*, above at para. 45. For example, assuming an agreement on essential terms is otherwise in place, courts can imply terms concerning the granting of a release, the manner of payment and the timing of payment: *Fleguth*, above at para. 21; *Hodaie v. RBC Dominion Securities*, 2012 ONCA 796 at para. 3; *Imperial Oil Ltd. v. 416169 Alberta Inc.*, 2002 ABQB 386, 310 A.R. 338. Often these will be "mere formalities or routine language": *Bawitko*, above at p. 106.

[34] A vexed question is whether words such as "subject to formal agreement" in an offer or acceptance will forestall the existence of an agreement until the formal agreement is signed. The question is vexed because the answer turns on constructing the communications between the parties, sometimes a challenging task.

[35] Even though parties might agree that they will draw up a later formal written agreement evidencing the terms of the settlement, they may have already bound themselves because they have agreed, orally or in writing, to all the essential terms. Put another way, "[t]he fact that a further document was required to formalize the agreement between these parties is not an impediment to finding that [an oral or written exchange constitutes] a binding contract if the terms in the [exchange] contain agreement on all of its essential terms": *Gutter Filter Company LLC v. Gutter Filter Canada Inc.*, 2011 FC 234 at para. 11.

[36] In some circumstances, however, words such as "subject to reaching a formal agreement" can be enough to ensure that there is no agreement until the formal agreement has been signed: *Olivieri*, above at para. 48. The question is whether the parties have only reached "an agreement to later agree on essential provisions" or "to defer the binding nature of the agreement until the execution of the proposed subsequent formal contract": *Ward*, above at para. 53.

[37] As the Court of Appeal for Ontario wrote in *Bawitko* (at p. 104):

> When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already

> complete and binding contract but is essential to the formation of the contract itself.

[38] In the end, whether or not a "subject to formal agreement" clause precludes a finding of agreement is a question of construction. That question focuses on "whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through": *Calvan Consolidated Oil & Gas Ltd. v. Manning*, [1959] S.C.R. 253 at p. 261, 17 D.L.R. (2d) 1; *Hatzfeld-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at pp. 288-89. In the former case, there is no enforceable contract; in the latter, there is.

[39] This is assessed objectively, looking at the correspondence passing among the parties, with a view to ascertaining whether the parties, through an exchange of matching correspondence, intended to create immediate legal relations: *Newbury v. Sun Microsystems*, [2013] EWHC 2180 at paras. 19-24 (Q.B.D.). Some courts have used subsequent conduct of the parties to shed light on whether there has been an agreement on essential terms: *Bawitko*, above at p. 107; *Ward*, above at paras. 55, 65, 68-76; *Andrews v. Lundrigan*, 2009 ONCA 160, 247 O.A.C. 15 at para. 8; *Dominak v. Lockhart*, 2014 BCCA 432, 65 B.C.L.R. (5th) 318 at para. 35.

– V –

[40] In particular cases, other requirements might arise. For example, legislation can create special requirements for certain types of contracts, such as the need for an agreement for a sale of land to be evidenced in writing: see, *e.g.*, *An Act for Prevention of Frauds and Perjuries*, 29

Chas. 2 c. 3, (Eng., 1677); and by way of illustration see *Girouard v. Druet*, 2012 NBCA 40, 386 N.B.R. (2d) 281.

[41] Legislation can also forbid the making of certain contracts. It can also incorporate certain mandatory terms into agreements notwithstanding the parties' actual agreement.

[42] Where agents for the parties, such as counsel, are conducting the negotiations, the usual law relating to the formation of contracts through agents applies.

[43] Thus, in the case of parties represented by counsel, if both counsel possess the apparent authority to bind their clients—neither has qualified their authority at the outset or neither has qualified an offer or acceptance by saying it is "subject to my client's approval" or "subject to instructions"—then a matching offer and acceptance by counsel binds the clients. A lawyer's explicit reservation of the client's authority to decide whether an offer is accepted means that there can be no agreement until the client is heard from.

(b) The standpoint of the court in assessing the requirements for a settlement

[44] The Federal Court suggested (at para. 42) that when assessing whether the requirements for a settlement agreement are met, the Court must adopt a "subjective standard, not an objective one."

[45] I disagree. In assessing whether the requirements are met, the Court must adopt an objective standpoint. This can be seen from almost all of the cases set out above. They continually speak of objective, not subjective, evaluations of the evidence.

[46] So, for example, in determining whether a party has accepted a settlement offer, the court is not interested in the party's actual intentions. Rather, the standpoint is objective:

> If, whatever a [person's] real intention may be, [the person] so conducts himself [or herself] that a reasonable [person] would believe that he [or she] was assenting to the terms proposed by the other party, and that the other party upon that belief enters into a contract with him [or her], the [person] thus conducting himself [or herself] would be equally bound as if he [or she] had intended to agree to the other party's terms.

(*Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at p. 607, 19 W.R. 1059 and see, most recently, *RTS Flexible Systems*, above at para. 45.)

[47] Put another way, the subjective reservations of one party do not prevent the formation of a binding agreement if, to all objective, outward appearances, the parties have intended to create legal relations and have agreed in the same terms on the same essential subject matter: *Newbury*, above at para. 14, citing *Air Studios (Lyndhurst) Limited T/A Entertainment Group v. Lombard North Central PLC*, [2012] EWHC 3162 at para. 5 (Q.B.D.).

[48] Accordingly, evidence into the actual state of mind or subjective intention of the parties is irrelevant: *Lindsay v. Heron & Co.* (1921), 50 O.L.R. 1, 64 D.L.R. 92 (Ont. S.C. (A.D.)). Where the parties are exchanging written communications, intentions are to be measured by an

objective reading of the language chosen by the parties to reflect their agreement: *Olivieri*, above at para. 44; *Andrews*, above at para. 8.

[49] The same point was put well in *Lindsay*, above at pp. 98-99:

> The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.

[50] The whole course of the parties' negotiations must be considered and an objective test must be applied: Hugh Beale, ed., *Chitty on Contracts*, 31st ed. (London: Sweet & Maxwell, 2012), vol. 1, paras. 2-028 and 2-029.

[51] In this case, the Affidavit of Erin McIntomny, filed by Allergan, appends the various letters, emails and draft Minutes of Settlement without commentary. The Affidavit of Benjamin Hackett, filed by Apotex, does likewise but adds relatively uncontroversial context surrounding the documents. Both affidavits largely let the documents speak for themselves, allowing the Court to assess the matter objectively. If it were necessary, the affidavits could have provided objective information about the circumstances surrounding the negotiations, but here they did not need to do so. Quite properly, neither affidavit offers evidence as to the parties' subjective intentions. This is the proper approach.

(c) A warning

[52] The foregoing shows that a settlement agreement may be reached quickly without formality and, from a subjective standpoint, sometimes unexpectedly: settlement agreements almost always involve consideration, settlement discussions usually take place in a context where an intention to create legal relations can be presumed, informal discussions can count, a meeting of minds is assessed objectively, an agreement on all essential terms is binding even though the parties are still negotiating over other terms and, unless essential, terms such as the provision of releases can be easily implied into an agreement to complete it. The recent decision of the Supreme Court of the United Kingdom in *RTS Flexible Systems*, above, underscores these points.

[53] This has practical ramifications. If a party does not want to be bound until it has agreed to all terms it subjectively considers essential to the deal, in every offer it communicates it must make that wish objectively clear.

(3) Applying these principles to the facts of this case

[54] As mentioned above, in finding that the parties had reached a settlement agreement, the Federal Court focused on two sets of evidence. First, an initial exchange: three letters and an email in April 2012. Second, an exchange of emails on January 13, 2014 and February 24, 2014.

[55] I shall examine these two bases. Then I shall examine the rest of the documents in the record before us. In my view, applying the proper principles set out above, it is not possible to find that the parties reached a settlement agreement.

(a) The initial exchange: three letters and an email in April 2012

[56] As mentioned above, the negotiations began with the exchange of three letters and one email in April 2012.

[57] The Federal Court held that all the essential terms were agreed to in this exchange. It said (at paras. 45-46) that the e-mail exchanges and the draft formal agreements exchanged afterward only added "added preambles," minor words "such as that the agreement is binding on heirs, assigns, etc.," and "fussing as to the wording of the Minutes of Settlement."

[58] This holding suffers from several errors that warrant our interference.

[59] The Federal Court asserted that all the essential terms were agreed to in this exchange without considering the law as to essentiality and how it applies in the case. In setting out four legal propositions that govern the case, it did not mention essentiality. Further, it did not analyze what terms were essential in accordance with the principles discussed above. As will be seen, these principles take the analysis in a different direction.

[60] In reaching its conclusion, the Federal Court said that it must apply a "subjective standard, not an objective one, as to whether there has been a binding contract" (at para. 42). As is evident from the discussion of the principles above, this was in error. As will be seen, at a key portion of its analysis, the Federal Court appears to have been distracted by Allergan's subjective view of the importance of certain terms that had to be negotiated out, rather than keeping to an objective assessment of the matter from the standpoint of a reasonable businessperson.

[61] Taken together, this constitutes legal error that warrants our interference: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As this matter applies to contractual formation rather than interpretation, the recent words on the appellate standard of review in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 do not apply. But even if they did, *Sattva* maintains the *Housen* position that an error of law or extricable principle will justify appellate interference (at para. 53).

[62] The first letter in this initial exchange, dated April 9, 2012, was from Apotex to Allergan. It proposed the following terms:

> 1. This offer shall remain open for acceptance until 1 minute after the commencement of trial or until such time prior thereto that it is withdrawn in writing.
>
> 2. [Allergan] will discontinue the action on a without costs basis.
>
> 3. [Apotex] will undertake:
>
> a. that no gatifloxacin containing formulations will be manufactured for commercial sale by [Apotex] in Canada until expiry of Canadian Patent No. 1,340,316 (the '316 patent");
>
> b. that any use of gatifloxacin API in Canada by [Apotex] to expiry of the '316 patent will be solely for regulatory and/or experimental use;

> c. that no gatifloxacin containing formulations manufactured by [Apotex] for regulatory and/or experimental use to expiry of the '316 patent will be sold commercially; and
>
> d. that any gatifloxacin API that has not been used for regulatory and/or experimental use by expiry of the '316 patent will be destroyed on expiry of the '316 patent.

[63] By letter dated April 20, 2012, Allergan asked for clarification as to the scope of paragraph 3 both in terms of parties and locations:

> Could you please clarify whether this undertaking relates to any manufacturer in Canada for commercial sale anywhere in the world until after expiry of the '316 patent. Or whether it contemplates that there will be no manufacturer for commercial sale in Canada but would permit commercial manufacture for commercial sale outside of Canada until expiry of the '316 patent.
>
> …
>
> In addition, could you please confirm that the undertaking given by [Apotex] would extend to any company under the power or control or affiliated with [Apotex].

[64] Allergan said the clarifications it requested were "relatively minor concerns." That may have been said for tactical reasons in the negotiation or that might have been its subjective view, but, as I will explain later—looking at the matter objectively—an issue as to the scope of the restrictions to be placed upon Apotex under the deal is significant, not minor.

[65] In a letter dated April 24, 2012, Apotex offered a clarification regarding the scope of paragraph 3:

> We are writing to confirm that the undertaking not to manufacture gatifloxacin containing formulations for commercial sale by [Apotex] in Canada until after the expiry of the '316 patent relates to manufacture in Canada for commercial sale

> anywhere in the world and that the undertaking extends to any company under the power or control of or affiliated with [Apotex].

[66] Apotex added some additional comments on its clarification:

> Please understand that, in providing you with the undertaking, the Apotex companies do not require regulatory approvals that commercial manufacture be done at the same site as development. For the U.S., for example, there would have been and is no difficulty transferring manufacture to a site outside of Canada. It has always been Apotex's intent to do that, until expiry of the Canadian patent.
>
> In the latter regard, the reason that Apotex has not launched in the U.S. on that basis is that your clients have destroyed the market by switching the market to a changed product while Apotex was litigating and awaiting litigation.

[67] In response, counsel for Allergan sent an email three days later. The email did not state that Apotex's offer was accepted. It said nothing about whether the clarification was satisfactory or whether the additional comments on the clarification caused it concern. Instead, the email from counsel for Allergan advised that "we are making good progress in settlement discussions." It also added that counsel did not have instructions from his client and would not have those instructions for another two weeks. Those two weeks went by—in fact, more weeks went by—without word from counsel from Allergan about whether his client had supplied instructions. By early June 2012, counsel for Allergan circulated draft Minutes of Settlement "to get the ball rolling" subject to his client's "input." By late June 2012, he circulated a revised draft, subject to his client's input and instructions. Afterward, the parties began to negotiate and differ over the scope of the restrictions to be imposed upon Apotex, the subject-matter of what was originally paragraph 3 in the April 9, 2012 letter.

[68] Viewing this evidence objectively from the standpoint of a businessperson—not subjectively—the three letters and the email cannot constitute an offer and acceptance. Properly characterized, they are an offer on one side and on the other side, at its highest, a statement of optimism that progress towards a deal was being made and a reservation that Allergan, the contracting principal, needed to consider the matter and decide whether it agrees. The circulation of draft Minutes of Settlement afterward was not an exercise in papering a deal on all essential terms already agreed to by the parties. Rather, it and subsequent iterations and surrounding discussions became a means by which the scope of the restrictions upon Apotex, originally in paragraph 3 of the April 9, 2012 letter and never agreed to, were debated.

[69] At this point, it is useful to assess whether the scope of the restrictions upon Apotex was an essential term. If one were to adopt a subjective standpoint in assessing the matter, one would note Allergan's comment that the clarifications it requested were "relatively minor concerns." The Federal Court, adopting a subjective standpoint, appears to have bought into that characterization, agreeing that the concerns were minor (at paras. 43-44), characterizing the later discussions in twenty-three months of emails and draft Minutes of Settlement—many of which concerned the scope of the restrictions upon Apotex—as "fussing and wordsmithing" over minor issues.

[70] We must view the emails and drafts objectively from the standpoint of a reasonable businessperson, not subjectively. Viewed in that way, the scope of the restrictions upon Apotex was not at all minor. It was a substantial part of the consideration that Allergan was to receive under the contemplated agreement.

[71] Objectively viewed, we have Allergan, the holder of a patent prohibiting others from manufacturing, selling and distributing a patented invention. It has sued those that it believes have been violating that prohibition, namely Apotex. The reasonable businessperson, viewing the matter objectively, would appreciate that in any settlement, a patentee in Allergan's position would want clarity about exactly who, if anyone, would be manufacturing, selling and distributing the invention in the future. Objectively viewed and objectively assessed, the scope of the restrictions upon Apotex was an essential term. The three initial letters and the email in April 2012 do not objectively show an offer and acceptance of that essential term.

(b) The exchange of communications on January 13, 2014 and February 24, 2014

[72] In an email dated January 13, 2014, counsel for Allergan advised that it had "recommended that [its] client accept the revisions…as encapsulated in the attached [draft agreement] and our client is inclined to accept subject to completing one additional step on their end." It asked counsel for Apotex to "confirm that the attached is acceptable to your client." A couple of weeks later, counsel for Allergan proposed certain amendments to the draft agreement.

[73] In an email dated February 14, 2014, counsel for Apotex responded. He rejected the latest amendments proposed on the draft agreement and added that "we are, however, willing to recommend to our clients that we accept your prior draft, circulated January 13, 2014."

[74] In an email dated February 24, 2014, counsel for Allergan advised that "[further] to our discussions this morning, our clients agree to accept the terms that you put forward in your email dated December 14, 2013 and as captured in the draft circulated January 13, 2014."

[75] The Federal Court found that there was an agreement arising from the exchange of these emails. However, on this evidence, it is not legally possible to find an agreement.

[76] In the February 14, 2014 email, counsel for Apotex only agreed to recommend to his client that it agree. In so saying that, counsel for Apotex stated that he did not have authority to bind his client; he would have to check with his client. So while Allergan was willing to agree to the draft that was circulated on January 13, 2014, Apotex's position was unknown.

[77] This is not a case where counsel for Apotex possessed apparent authority to bind his client. Counsel made it very clear that he did not possess that authority and would have to check with his client.

[78] In a letter to the Federal Court dated March 17, 2014, counsel for Allergan gave an update on the status of the action. Counsel for Allergan summarized the events that had taken place:

> Briefly, on December 13, 2013 counsel for Apotex offered revisions to the Minutes of Settlement. On January 13, 2014 counsel for [Allergan] accepted counsel for Apotex's revisions. On February 14, counsel for Apotex confirmed its position subject to confirmation by Apotex. On February 24, [Allergan] confirmed its acceptance of the Minutes of Settlement. On February 26 and March 17 counsel for [Allergan] asked counsel for Apotex when the Minutes of Settlement would be signed. We are still awaiting confirmation. [emphasis added]

[79] That confirmation never came. In fact, in its letter to the Federal Court dated March 17, 2014, Apotex confirmed that "we have consistently communicated to counsel for [Allergan] that we did not have instructions regarding the revised Minutes of Settlement and had recently communicated to counsel that we were awaiting instructions regarding the current proposed revised Minutes of Settlement."

[80] In finding an agreement based on the January 13, 2014 and February 24, 2014 emails, the Federal Court found that (at para. 46) "[i]n the back and forth, the solicitors are careful to protect their backsides by using words such as 'subject to my client's instructions' or 'I will seek instructions'." But this is no minor thing that can be glossed over or ignored. When counsel for Apotex told counsel for Allergan that he would have to check with his client, he was saying that he did not have the authority to bind his client. In these circumstances, there could be no legally-effective acceptance of Allergan's offer based solely on the words of counsel for Apotex.

[81] In conclusion, Allergan agreed to the Minutes of Settlement circulated on January 13, 2014. But Apotex never did, either in its own right as a principal or through counsel with apparent authority to settle. On these facts, there can be no settlement agreement.

(c) The remaining communications between the parties: no settlement agreement

[82] Examining all of the remaining communications between the parties, I find that at no time was there a matching offer and acceptance on all essential terms. Indeed, most of the parties' communications, objectively viewed, show disagreement over the scope of the

restrictions to be imposed on Apotex (originally in paragraph 3 in the initial exchange of letters). As I have said, this was an essential term. There was never a matching offer and acceptance on it.

[83] From time to time, the parties proposed different wording and the differences significantly affected the scope of the restrictions. True, as the Federal Court suggested (at para. 46), the difference would be small bits of wording like "for or," "by or for," or "or for." But to the objective businessperson, small bits of wording can have a huge difference. This was not just "fussing and wordsmithing," as the Federal Court said (at para. 45).

[84] Compare, for example the last two versions of the clause concerning the restrictions to be imposed on Apotex. The wording changes are small but the potential effect on the scope of the restrictions upon Apotex is significant.

[85] On December 13, 2013, the relevant clauses read as follows:

> 2. The Defendants [Apotex] agree and undertake as follows:
>
> (a) that gatifloxacin or gatifloxacin formulations will not be made, used or imported into Canada for or by the Defendants for commercial sale in Canada or for commercial sale anywhere in the world for or by the Defendants until expiry of Canadian Patent No. 1,340, 316 (the "'316 Patent");
>
> (b) that any and all manufacture, import and/or use of gatifloxacin into Canada by or for the Defendants before expiry of the '316 Patent will be solely for regulatory or experimental use;
>
> (c) that no gatifloxacin or gatifloxacin formulation used or manufactured by or for the Defendants for regulatory and/or experimental use before expiry of the '316 Patent will be sold commercially; and

(d) that any gatifloxacin or gatifloxacin formulation that has not been used for regulatory or experimental use by expiry of the ’316 Patent will be destroyed on expiry of the ’316 Patent.

(e) “The Defendants” means each Defendant separately or collectively, and includes the officers, directors, servants, employees, shareholders, agents, representatives, privies and partners of each Defendant together with all those over whom each Defendant has authority, interest or control or with whom each Defendant acts in concert.

3. This agreement is binding on and benefits the parties, their respective successors and assigns.

[86] On January 13, 2014, the relevant clauses read as follows:

2. The Defendants [Apotex] agree and undertake as follows:

(a) that no gatifloxacin or gatifloxacin formulations has or will be imported into Canada, exported from Canada, made in Canada, assigned in Canada or used in Canada by the Defendants for commercial use or sale in Canada or for commercial use or sale anywhere in the world for or by the Defendants until expiry of Canadian Patent No. 1,340, 316 (the “’316 Patent”);

(b) that any and all manufacture in Canada of gatifloxacin or gatifloxacin formulations, important into Canada of gatifloxacin or gatifloxacin formulations, export from Canada of gatifloxacin or gatifloxacin formulations, assignment in Canada of gatifloxacin or gatifloxacin formulations or use in Canada of gatifloxacin or gatifloxacin by or for formulations by the Defendants before expiry of the ’316 Patent shall be solely for regulatory and/or experimental use; and

(c) that any and all gatifloxacin or gatifloxacin formulations used for regulatory and/or experimental use will not be used in Canada, assigned, sold in Canada or exported from Canada by or for the Defendants, but shall be promptly destroyed once no longer required for regulatory or experimental use.

3. This Agreement is binding on and benefits the parties, their respective successors, assigns or any company under the power or control of or affiliated with the Defendants.

[87] The differences are subtle. But there is no question that from an objective standpoint the restrictions on Apotex imposed by the clauses have materially differing scope.

[88] For the foregoing reasons, I find that the parties never reached a settlement agreement.

C. A later motion

[89] While judgment in this appeal was under reserve, Allergan moved for judgment dismissing the appeal on the ground that the ’316 Patent had expired and so the appeal was moot. Apotex opposed the motion.

[90] This Court issued an order dismissing the motion. In doing so, it followed the principles the Supreme Court set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231.

[91] In our view, the appeal was not moot. Whether or not the matter was settled could have practical significance for the parties. For example, if the parties did settle the action, then Apotex would have been subject to obligations under the settlement agreement, obligations that, if breached, could be the foundation for a future damages claim.

[92] Even if the appeal no longer had any practical significance, this Court would have exercised its discretion in favour of hearing the matter. Due to the absence of authority from this

Court on the legal points in this appeal and due to some uncertainty in the parties' positions on the state of the law, it was in the public interest for us to determine this appeal.

D. A final observation

[93] For the benefit of future cases like this, a final observation regarding the Federal Court's order needs to be made.

[94] In its motion, Allergan sought an order enforcing the parties' alleged settlement agreement. In granting Allergan's motion, the Federal Court did not just declare that the parties had reached a settlement and identify the terms of the settlement. It set out what it considered to be the exact terms of the settlement agreement and it ordered Apotex to comply with those terms.

[95] In effect, the alleged settlement agreement was replaced by a court order. And if Apotex were to breach that order, Allergan could launch proceedings against Apotex for contempt. Normally, parties that breach settlement agreements expose themselves to a contractual claim, not proceedings for contempt of court.

[96] The record before the Federal Court did not justify the sort of order it made. All it had before it was a *bona fide* dispute about whether there was a settlement agreement. At no time did Apotex suggest that if there were a settlement agreement it would disobey it. In these circumstances, if the Federal Court considered that the parties had reached a settlement, it only

needed to declare that a settlement agreement had been made and identify the documents in the record that evidence it.

[97] In the end, the over-extensive nature of the Federal Court's order does not matter. The order must be set aside because the parties did not reach a settlement agreement.

E. Proposed disposition

[98] Therefore, I would allow the appeal, set aside the order dated March 24, 2015 of the Federal Court in file T-1267-10, dismiss the motion, and award the appellants their costs here and below.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-15
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGHES DATED MARCH 24, 2015, NO. T-1267-10	
STYLE OF CAUSE:	**APOTEX INC. and APOTEX PHARMACHEM INC. v. ALLERGAN, INC., ALLERGAN SALES, LLC. ALLERGAN USA, INC. and KYORIN PHARMACEUTICAL CO., LTD.**
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. TRUDEL J.A.
DATED:	MAY 18, 2016

APPEARANCES:

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