Federal Court of Appeal | Cour d'appel fédérale

Date: 20160831

Docket: A-272-15

Citation: 2016 FCA 212

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

BEAM SUNTORY INC., BEAM CANADA INC. AND JIM BEAM BRANDS CO.

Appellants

and

DOMAINES PINNACLE INC.

Respondent

Heard at Montréal, Quebec, on March 7, 2016.

Judgment delivered at Ottawa, Ontario, on august 31, 2016.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The appellants Beam Suntory Inc., Beam Canada Inc., and Jim Beam Brands Co. (referred to collectively as "Beam") were sued in the Federal Court and in the Superior Court of Quebec by the respondent Domaines Pinnacle Inc. ("Domaines") with respect to trademark issues arising from the use of the word Pinnacle in connection with the sale of alcoholic beverages. As the trial date in the Federal Court approached, the parties had settlement

discussions which led to Beam making an offer to settle pursuant to Rule 420 of the *Federal Courts Rules*, SOR/98-106, pursuant to which the claim and counterclaim in the Federal Court action would be discontinued with each party to bear its own costs. This offer was accepted but a dispute arose as to whether the offer also included the discontinuance of the Superior Court action. Beam says it did; Domaines says it did not.

[2] Each party brought a motion before the Federal Court seeking to have its position ratified. In reasons reported as 2015 FC 680 (Reasons), the Federal Court Judge concluded that there was a settlement of the Federal Court action and counterclaim but that the Superior Court action was not settled. As a result, he ordered a permanent stay of proceedings with respect to Beam's counterclaim. Beam now appeals from this decision.

[3] For the reasons which follow, I would dismiss the appeal.

I. THE FACTS

[4] The following brief outline of the facts is taken from an earlier proceeding in this action. It explains the nature of the dispute between the parties as well as the procedural history leading to the events giving rise to this appeal.

> 7 The plaintiff [Domaines] manufactures various apple-based alcoholic products, particularly an ice cider named "Domaine Pinnacle". The plaintiff has been selling it since 2001 in its store and since 2002 to the Société des alcools du Québec. The defendants [Beam] distribute flavoured vodkas also called "Pinnacle." The vodka brand Pinnacle was first introduced in the United States in 2003, and then in Canada in 2005 by one of the defendants in the Federal Court action: White Rock Distilleries, Inc. It was subsequently acquired in June 2012 by Jim Beam Brands Co. and Beam Inc., who continued to sell the Pinnacle vodka in Canada, with the exception of Quebec.

> 8 On December 7, 2012, the plaintiff filed a motion to institute proceedings in the Quebec Superior Court, seeking to obtain a permanent, interlocutory and interim injunction against the defendant Beam Inc. to prevent the commercialization of vodkas and other Pinnacle [liquors] on the Quebec market.
>
> 9 On February 13, 2013, the plaintiff also instituted proceedings in the Federal Court against defendants Beam Inc., Beam Canada Inc., and White Rock Distilleries Inc., alleging unfair competition and trade-mark infringement under paragraphs 7(*b*) and 7(*c*) of the *Trade-marks Act*, RSC 1985, c. T-13. Defendants Beam Inc. and Beam Canada Inc. brought a counterclaim seeking, *inter alia*, a declaration that the use of the "Pinnacle" mark for their vodka does not infringe any of the rights alleged by the plaintiff in Canada under the *Trade-marks Act*.
>
> 10 On April 25, 2013, the defendants indicated their intention to request a stay of proceedings in the Quebec Superior Court, on the basis that there was a bifurcation of proceedings in the Federal Court as far as Quebec was concerned and of *lis pendens* and/or *forum non conveniens*. On April 26, 2013, the plaintiff filed a motion in the Federal Court to amend its statement under section 75 of the Rule, expressly seeking to exclude Quebec from its pleading. The defendants opposed the motion to amend and a hearing was held before Prothonotary Morneau on May 13, 2013.The order under was appeal was issued on May 14, 2013.
>
> (*Domaines Pinnacle Inc. v. Beam Inc.*, 2013 FC 831, [2013] F.C.J. No. 982 (*Domaines 2013*).)

[5] To complete the procedural history, I would add that the application for a stay of the Superior Court action was granted by that court pending the completion of proceedings in the Federal Court. In addition, the motion to exclude Quebec from the scope of the Federal Court action was dismissed: *Domaines 2013*. Finally, White Rock Distilleries no longer has an interest in these proceedings.

[6] The trial of the Federal Court action and counterclaim was set down for five days commencing on April 13, 2015. Against the backdrop of the events described above and with the trial date rapidly approaching, Mr. Charles Crawford, Domaines' principal, and Mr. Neale Graham, Beam's principal, had a telephone conversation on March 25, 2015. In the course of

that conversation, Mr. Crawford offered to settle all outstanding matters in exchange for a substantial payment from Beam. Mr. Graham indicated that he would have to consult internally and that he would get back to Mr. Crawford.

[7] On the morning of March 30, Mr. Graham received from his counsel a document entitled "Talking points of Beam's final settlement offer for discussion with Charles Crawford", which provides as follows:

> Beam's Settlement Counter-Offer:
>
> 1. Coexistence between the parties' respective trademarks and products across Canada.
>
> 2. Both parties to register their respective trademarks in association with their respective products.
>
> 3. Domaines Pinnacle dismisses both its actions against Beam with prejudice.
>
> 4. Beam withdraws its counterclaim.
>
> 5. Each party pays its own legal costs.
>
> This is Beam's final offer and does not include the payment of any money by either side.
>
> If interested in a settlement along these lines, settlement documents will need to be prepared and there will only be an agreement when both parties have agreed on all the terms of same and have signed the settlement agreement document.
>
> If not interested in a settlement along these lines, Beam is prepared to see them in Court on April 13th for the trial.
>
> An unconditional settlement offer under Federal Courts Rules will be made by Beam's counsel to Charles' [Crawford] Counsel that will remain valid until end of 1st day of the trial.
>
> (A.B., at page 857.)

[8] Late in the day of March 30, before Mr. Graham got back to Mr. Crawford, Beam's counsel forwarded a formal offer of settlement to counsel for Domaines which I reproduce below:

> Re: Domaines Pinnacle Inc. v. Beam Suntory Inc., Beam Canada Inc. and Jim Beam Brands Co.
>
> Federal Court File No. T-290-13
>
> Dear [Counsel]:
>
> Pursuant to Rule 420 of the *Federal Court Rules*, the Defendants / Plaintiffs by Counterclaim Beam Suntory Inc. and Beam Canada Inc. and the Plaintiff by Counterclaim Jim Beam Brands Co. hereby make the following written offer to settle the above-mentioned matter:
>
> 1. the Plaintiff [Domaines] will discontinue its action;
> 2. the Plaintiffs by Counterclaim [Beam] will discontinue their counterclaim;
> 3. each party will bear its own costs.
>
> This offer shall expire on April 13, 2015 at 5 p.m.
>
> Yours very truly,
>
> (Appeal Book (A.B.), at pages 763-764.)

[9] Accompanying this letter was an email in which counsel for Beam wrote:

> We trust that you will bring to your client's attention the cost consequences where a party obtains a judgment less favourable than a written offer to settle made by the opposing party.
>
> (A.B., at page 762.)

[10] Mr. Crawford and Mr. Graham finally spoke on April 1. There is some dispute as to what was said in the course of that conversation. In his affidavit submitted for the purposes of the summary trial before the Federal Court Judge, Mr. Graham says that he read the five numbered

"Talking Points" verbatim to Mr. Crawford who, in his affidavit, denies this (A.B., at pages 853 and 1473 respectively). The Federal Court Judge preferred the evidence of Mr. Crawford to that of Mr. Graham.

[11] That said, the Federal Court Judge found that neither Mr. Graham nor Mr. Crawford mentioned the Rule 420 offer to settle in the course of their conversation (Reasons, at paragraph 46).

[12] Later on April 1, Domaines' counsel wrote to the registry of the Federal Court, with a copy to Beam's counsel, indicating that Domaines had accepted Beam's Rule 420 offer to settle, a copy of which was included with Domaines' letter. A signed copy of a notice of discontinuance was included for filing.

[13] Domaines's counsel advised the registry that Beam's notice of discontinuance would follow in due course.

[14] Beam's counsel wrote to Domaines' counsel the next day, indicating that before Beamwould provide a notice of discontinuance with respect to its counterclaim, it required Domaines to provide it with a notice of discontinuance of the Superior Court action so that both could be filed at the same time. Counsel for Domaines replied that Beam was bound by its written offer which Domaines had accepted, pointing out that nothing in that document required it to discontinue the Superior Court action.

[15] At that point, Beam and Domaines brought cross-motions before the Federal Court Judge. Domaines sought to enforce the transaction (or settlement, in common law terms) created by its acceptance of Beam's Rule 420 offer to settle while Beam argued that Domaines acted in bad faith in treating its offer as limited to the Federal Court action and that the filing of the notice of discontinuance was abusive.

II. THE DECISION UNDER APPEAL

[16] The Federal Court Judge wrote learned reasons in which he explored the effects of a Rule 420 offer to settle, the role of the *Civil Code of Quebec*, C.Q.L.R. c. C-1991 ("*Civil Code*") in Federal Court proceedings arising in Quebec, the nature and attributes of a transaction under the *Civil Code* and the limited role of the Federal Court in relation to transactions and other contracts between individuals.

[17] The Federal Court Judge rejected Beam's argument that there was no contract, and therefore no transaction, because there was a defect of consent. He dismissed Beam's argument that the offer which Domaines accepted was not the offer which Beam made or intended to make. The Federal Court Judge did not accept that its offer to settle could not be read literally but must be understood in light of the pleadings in the Federal Court which apply to the whole of Canada including Quebec. Beam argued that the object of its offer was not only the mutual notices of discontinuance in the Federal Court but also the discontinuance of the Superior Court action which sought the same relief as the Federal Court action except that it was limited to Quebec.

[18] The Federal Court Judge found that the only reasonable interpretation of the object and effect of the Rule 420 offer to settle is that which appears from the clear words used by Beam. Since those words contain no limitation, it was not open to the Court to read one in. Furthermore, in the absence of any ambiguity, it was not necessary to look past the terms of the offer: Reasons, at paragraph 33. The Federal Court Judge noted that Beam did not plead that an error was introduced when the offer was drafted. In fact, senior counsel for Beam acknowledged before the Federal Court Judge that:

> […] the final offer of March 30, 2015, did not refer to the provincial action because the Federal Court simply does not have jurisdiction on that aspect of the dispute, and therefore could not, in a final judgment, order the dismissal of the provincial action.
>
> (Reasons, at paragraph 33.)

[19] The Federal Court Judge then dealt with the issue of whether extrinsic evidence was admissible to construe the terms of the Rule 420 offer to settle. The extrinsic evidence in question was the "Talking points" reproduced above and the circumstances surrounding their production. He found that the extrinsic evidence was inadmissible as there was no ambiguity. Furthermore, he held that extrinsic evidence was not admissible to contradict Beam's offer in the absence of a commencement of proof, as required by article 2863 of the Civil Code, or to complete the offer as it was not manifestly incomplete as provided in article 2864. In any event, this evidence was not conclusive. In the course of this analysis, the Federal Court Judge made findings with respect to the credibility of Messrs. Crawford and Graham. His findings did not favour Mr. Graham.

[20] In the result, the Federal Court Judge found that Domaines' acceptance of Beam's Rule 420 offer effectively put an end to the Federal Court litigation. In light of Beam's refusal to discontinue its counterclaim, the Federal Court Judge ordered a permanent stay of proceedings with respect to the latter.

[21] Finally, the Federal Court Judge dealt with the issue of costs. Domaines asked for solicitor-client costs on the basis that Beam's conduct was reprehensible. Its refusal to file a notice of discontinuance forced Domaines to continue to prepare for trial of the counterclaim at the same time as it prepared its motion to enforce the settlement, thus forcing to incur unnecessary costs. In addition, Beam made gratuitous accusations of a defamatory nature about Domaines and its principal, Mr. Crawford. The Federal Court Judge agreed that elements of Beam's conduct were reprehensible so that costs should be increased as a consequence. However he declined to award Domaines' its solicitor-client costs of $50,000 but, instead, set costs at $30,000.

III. ANALYSIS

[22] In his memorandum of fact and law, Beam's new counsel raises issues of *consensus ad idem* and mistake, arguing that the Federal Court Judge erred in finding that the acceptance of Beam's Rule 420 offer to settle constituted a binding contract. Beam also argues that the Federal Court Judge erred in rejecting extrinsic evidence in the form of the "Talking Points", arguing that these were evidence of surrounding circumstances which should have been taken into account in interpreting the terms of the Rule 420 offer to settle. Finally, Beam objects to the Federal Court Judge's "unsupported findings regarding Mr. Graham's credibility and [Beam's] conduct".

[23] In my view, these arguments, other than those going to credibility, all rest on the notion that Beam intended to make a Rule 420 offer to settle which included the Superior Court action.

[24] These arguments cannot succeed. The words of Beam's Rule 420 offer to settle are unambiguous while the evidence of the surrounding circumstances including the operation of Rule 420, if admissible, does not support Beam's position.

[25] Since this is an appeal from the decision of a Federal Court Judge rendered after a summary trial, the standards of review are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Recently, the Supreme Court of Canada held that contractual interpretation is a question of mixed fact and law. Because this type of question is fact driven, it is rare that a pure question of law may be readily extricated: *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paragraphs 50 and 55. This case is no exception. Accordingly, this Court will not intervene unless a palpable and overriding error is identified.

[26] As a preliminary matter, it is appropriate to note that since the events giving rise to this dispute arose in Quebec, and because Federal law is silent on the subject, the applicable law is the *Civil Code*. Beam's expression of its argument in common law terms is therefore inapt. That said, the concept invoked by Beam, the absence of a common intention, is not foreign to the *Civil Cod*e. Although Beam did not frame its argument before the Federal Court Judge in terms of mistake , I understand its' argument before us to be substantially the same as its 'argument below i.e. that there was a defect of consent in that the parties shared no common intention which could be the basis of a valid contract: Reasons at paragraph 14.

[27] At common law, there must be *consensus ad idem* before there can be a contract, that is, there must be a "meeting of the minds" as to the terms of an agreement. The common law requirement of a "meeting of the minds", though expressed in different terms, appears in article 1378 of the *Civil Code* which provides that a contract is an "agreement of wills" and in article 1393 which says that an acceptance which does not correspond to the offer is not an acceptance:

1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation. …	1378. Le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation. …
1393. Acceptance which does not correspond substantially to the offer or which is received by the offeror after the offer has lapsed does not constitute acceptance.	1393. L'acceptation qui n'est pas substantiellement conforme à l'offre, de même que celle qui est reçue par l'offrant alors que l'offre était devenue caduque, ne vaut pas acceptation.
It may, however, constitute a new offer.	Elle peut, cependant, constituer elle-même une nouvelle offre.

[28] Articles 1385 to 1387 emphasize that a contract is formed by the exchange of consents :

1385. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form. …	1385. Le contrat se forme par le seul échange de consentement entre des personnes capables de contracter, à moins que la loi n'exige, en outre, le respect d'une forme particulière comme condition nécessaire à sa formation, ou que les parties n'assujettissent la formation du contrat à une forme solennelle. …
1386. The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person.	1386. L'échange de consentement se réalise par la manifestation, expresse ou tacite, de la volonté d'une personne d'accepter l'offre de contracter que lui fait une autre personne.
1387. A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve	1387. Le contrat est formé au moment où l'offrant reçoit l'acceptation et au lieu où cette acceptation est reçue, quel qu'ait été le moyen utilisé pour la communiquer et lors même que les

agreement as to secondary elements.	parties ont convenu de réserver leur accord sur certains éléments secondaires.

[29] The parties' consent must be free and enlightened, and must not result from error: article 1399 of the *Civil Code,* reproduced below. Article 1400 thus provides that error which goes to the nature of the contract, to the object of the prestation or to any essential element that determined the consent vitiates the consent of the parties. This is similar to the common law notion of mistake. The consequence of an error within the meaning of article 1400 is the annulment of the impugned contract: article 1407 of the *Civil Code*. The effect of annulment is retroactive; the contract is deemed to have never existed, that is, to have never been formed: article 1422 of the *Civil Code*.

1399. Consent must be free and enlightened.	1399. Le consentement doit être libre et éclairé.
It may be vitiated by error, fear or lesion.	Il peut être vicié par l'erreur, la crainte ou la lésion.
1400. Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.	1400. L'erreur vicie le consentement des parties ou de l'une d'elles lorsqu'elle porte sur la nature du contrat, sur l'objet de la prestation ou, encore, sur tout élément essentiel qui a déterminé le consentement.
An inexcusable error does not constitute a defect of consent.	L'erreur inexcusable ne constitue pas un vice de consentement.

[30] The question which is dispositive of this appeal is whether there was in fact an acceptance on the same terms as the offer: article 1393 of the *Civil Code*. To answer that question, we must first define the content of Beam's offer. It is stark in its simplicity. It refers to the Federal Court action by name and docket number. It has three terms, none of which is, on its face, ambiguous. These terms deal only with the Federal Court action and refer to the

discontinuance of the claim and the counterclaim and to costs. There is no mention at all of the Superior Court Action and nothing which could be construed as referring to that action.

[31] Beam argues that these apparently unambiguous words refer to a different offer to settle, the terms of which are found in the "Talking Points" which should be consulted to ascertain Beam's true intention in making its Rule 420 offer. The Civil Code stipulates the circumstances in which recourse may be had to extrinsic evidence: see articles 2863 and 2864. However, it is not necessary to decide if the "Talking Points" are admissible because, even if they are, they do not support Beam's position.

[32] A careful reading of the "Talking Points" shows that they contemplate two offers. The first is contained in the 5 numbered points at the beginning of the document and the two immediately following paragraphs. The 5 numbered points contemplate the settlement of both the Federal Court actions (claim and counterclaim) and the Superior Court action. The mode of settlement is that Domaines would have both of its actions dismissed with prejudice while Beam would withdraw its counterclaim. In addition the parties would agree to the coexistence of their marks across Canada and each would register its marks in relation to its products. No money would change hands as part of the settlement and each party would bear its own costs.

[33] If Domaines was interested in this proposal, formal settlement documents would be drawn up: no settlement would be effective until there was agreement on all the terms and the settlement documents were signed by both parties. If Domaines was not interested, then the matter would proceed to trial and Beam's counsel would make the second offer, an unconditional

offer to settle under the *Federal Courts Rules* which would remain open until the end of the first day of trial.

[34] Aside from issues of timing, to which I shall return, I take the "Talking Points" as laying out Beam's Plan A and Plan B. Plan A involved the settlement of all outstanding differences between the parties, including the Federal Court and Superior Court actions. That settlement was to be negotiated until agreement was reached on all terms and a formal agreement signed by representatives of each party. Plan B was Beam's fall-back position if Plan A failed: Beam would proceed to trial in the Federal Court and would seek to obtain double costs under the *Federal Courts Rules*.

[35] Beam now seeks to convince us that there was only ever a Plan A and that its Rule 420 offer to settle was intended to communicate it, but this position is clearly at odds with the contents of the "Talking Points". Beam's Rule 420 offer to settle does not deal with coexistence of the parties respective marks across Canada nor with registration of those marks. Furthermore, the terms proposed in the "Talking Points" would not be binding until they had been incorporated into a formal agreement, all the terms of which had been agreed to by the parties. These elements, and others, do not appear in Beam's Rule 420 offer to settle which, therefore, cannot be taken as communicating Plan A.

[36] Beam was engaged in take-it-or-leave-it negotiations. If Domaines was not prepared to accept Beam's terms then the matter would proceed to trial with a Rule 420 offer to settle hanging over its' head. That offer, however, would deal only with the Federal Court action.

[37] Some light is thrown on Beam's intention by examining the operation of Rule 420 which, for ease of reference, I reproduce below:

420 (1) Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.	420 (1) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le demandeur fait au défendeur une offre écrite de règlement, et que le jugement qu'il obtient est aussi avantageux ou plus avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens mais non au double des débours.
(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,	(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante :
(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or	*a)* si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;
(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.	*b)* si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.
(3) Subsections (1) and (2) do not apply unless the offer to settle	(3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes :

(a) is made at least 14 days before the commencement of the hearing or trial; and	*a)* elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;
(b) is not withdrawn and does not expire before the commencement of the hearing or trial.	*b)* elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.

[38] The object of Rule 420 is to create an incentive to settlement by imposing cost penalties on parties who do not accept a reasonable settlement proposal: *Leuthold v. Canadian Broadcasting Corp.*, 2014 FCA 174, [2014] F.C.J. No. 669 at paragraph 11. But in order to benefit from the Rule, the party making the offer must meet certain conditions. The first is that the offer must be made no later than 14 days before the beginning of the trial and the offer must remain open until the commencement of the hearing (Rules 420(3)(*a*)and (*b*)).

[39] The second is that the offering party must obtain a judgment at least as favourable as the terms of the offer (Rules 420(1) and (2)). This has implications for the subject matter of the offer. The offer must be one whose terms are within the power of the Court to award. An offer containing terms which exceed the Court's jurisdiction cannot give rise to a judgment which at least as favourableas the terms of the offer since the extra-jurisdictional term can never be matched or exceeded.

[40] If Beam intended to make a Rule 420 offer to settle which would result in double costs if the Court ruled in its favour, it would have to draft and present its offer so that it complied with these conditions. The evidence suggests that that is precisely what Beam did.

[41] The offer itself is said to be made pursuant to Rule 420 as can be seen from its text which I have reproduced above. Furthermore, it was accompanied by a communication which stressed the potential cost consequences of declining an offer to settle.

[42] As to the first condition, the offer to settle was forwarded to Domaines' counsel late in the day on March 30. Had the offer been made after the April 1 conversation between Messrs. Crawford and Graham, it would not have respected the 14 day minimum found in Rule 420(3)(*a*) and, as a result, would not have triggered Rule 420 cost consequences if Beam received a favourable judgment after trial. Presumably this is why Beam's Rule 420 offer was made before Mr. Graham returned Mr. Crawford's telephone call and attempted to lay out the elements of Beam's Plan A offer. This timing was not indicative of a change in Beam's bargaining position but rather was imposed on it by the passage of time. As things turned out, Beam found itself in precisely the position in which it intended to be: it was proceeding to trial with a Rule 420 offer to settle on the table.

[43] As to the second condition, I note counsel's candid admission before the Federal Court judge that Beam's offer did not refer to the Superior Court action because the Federal Court did not have jurisdiction over that action, and therefore could not, in a final judgment, order its dismissal: see Reasons at paragraph 33.

[44] Taking all these factors together, I find that that the Beam's offer was intended to satisfy the conditions of Rule 420 and as a result, it dealt only with the Federal Court action. The offer

could not include the Superior Court action since, as counsel for Beam recognized, the Federal Court could not deal with that action.

[45] Turning now to Domaines' acceptance of Beam's offer, it was unconditional and was communicated to Beam via Domaines' counsel's April 1letter to the Federal Court registry. *Prima facie*, we have the unconditional acceptance of an offer resulting in a binding contract: see article 1387 of the *Civil Code*. The Federal Court Judge found that the mutual concessions, which are an element of a transaction as set out in article 2631 of the *Civil Code*, reproduced below, consisted of the costs and disbursements either saved or forgone in settling the Federal Court action: see Reasons at paragraph 31. Therefore the agreement of the parties, as reflected in the accepted Rule 420 offer to settle, constituted a transaction with respect to the Federal Court action:

2631. Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.	2631. La transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques.
A transaction is indivisible as to its subject.	Elle est indivisible quant à son objet.

[46] In the result, I agree with the Federal Court judge's disposition of Domaines' motion. I have not been persuaded that the Judge made any error that could justify our intervention.

[47] I believe that it is important to point out to counsel the unintended consequences of their argument in this case. By arguing that there was no transaction because there was no common

intention, Beam's counsel necessarily put themselves in the position of saying that there were unwritten terms to Beam's Rule 420 offer to settle. This means that the only way that Beam could benefit from its Rule 420 offer to settle was if it failed to disclose those terms to the Court in the event of a favourable judgment. Disclosure would have taken Beam's outside the ambit of Rule 420. Beam's position in this litigation, if accepted, would make it possible for an unprincipled party take undeserved advantage of Rule 420, misleading the Court by its silence as to the unwritten terms of the offer, or worse, by actively misrepresenting the terms of the offer. I do not believe that this was the intention of counsel in this case but it would be difficult to persuade those who thought otherwise that they were being unreasonable.

[48] Beam also asks us to intervene so as to vary the Federal Court judge's reasons so to remove the unflattering references to Mr. Graham and to Beam. An appeal lies from the judgment of a court, not from the reasons for judgment: *Narvey v. Canada (Minister of Citizenship & Immigration)*, 2001 FCA 85, [2001] F.C.J. No. 428 at paragraph 5; *Huartt v. Specialized Property Evaluation Control Services Ltd*, 2016 ABCA 142, [2016] A.J. No. 449 at paragraph 6.

[49] The findings to which objection is taken are a direct result of the Beam's approach to the litigation. Credibility issues arose because Beam took the position that Mr. Crawford accepted its Rule 420 offer to settle knowing full well, as a result of his conversation with Mr. Graham, that Beam intended it to include the discontinuance of the Quebec Superior Court action. In its argument, Beam accused Mr. Crawford of engaging in a "deceitful ploy" and of acting in bad faith when he maintained that the Rule 420 offer applied only to the Federal Court action. The

Federal Court Judge examined the question and concluded that, in fact, it was Beam that was acting in bad faith: Reasons, at paragraph 46.

[50] The Federal Court Judge examined the evidence and the circumstances with care and gave a detailed explanation as to how he came to his conclusion: see Reasons, at paragraphs 43 to 48. Those reasons, read as a whole, support his conclusions both as to Beam's bad faith and Mr. Graham's credibility, notwithstanding any alleged mistaken inference on the Federal Court Judge's part.

[51] When a party accuses another of acting in bad faith, it must be prepared to have its own conduct scrutinized. Sometimes that scrutiny bears unexpected and unwelcome fruit.

[52] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
A. F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-272-15
STYLE OF CAUSE:	BEAM SUNTORY INC., BEAM CANADA INC. AND JIM BEAM BRANDS CO. v. DOMAINES PINNACLE INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 7, 2016
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	AUGUST 31, 2016

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