

Federal Court



Cour fédérale

Date: 20160310

Docket: T-1543-15

Citation: 2016 FC 308

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

**EMERSON ELECTRIC CO. and EMERSON
ELECTRIC CANADA LIMITED**

Plaintiffs

and

CANADIAN TIRE CORPORATION LIMITED

Defendant

ORDER AND REASONS

I. Factual and Procedural Background

[1] The Defendant, Canadian Tire Corporation Limited [CTC], seeks an order under Rule 221 of the *Federal Courts Rules* striking two sentences in each of paragraphs 28, 31, 34, 37 and 38(b) of the Plaintiffs' Amended Statement of Claim, which it claims are open-ended, bald pleadings unsupported by material facts:

Additionally, Canadian Tire may sell or have sold, including in its 2008-2010 and 2011-2013 product lines, other wet/dry vacuum models comprising said characteristics that the Plaintiffs are not currently aware of, but that are within the knowledge of the Defendant. The Plaintiffs claim in respect of all such infringing activities.

[2] In the alternative, CTC requests an order under Rule 181 of the *Federal Courts Rules* that the Plaintiffs provide a further amended Statement of Claim providing particulars of the allegation in the sentences set out above, along with other ancillary procedural relief and costs.

[3] The Plaintiffs, Emerson Electric Company and Emerson Electric Canada Limited, collectively referred to as [Emerson] design and manufacture wet/dry vacuums, which products are sold in Canada under various brands, including its own RIDGID trademark.

[4] Emerson has obtained a number of patents on various inventions embedded in its wet/dry vacuum products, including:

- i. Canadian patent No. 2,273,431 [Wet/dry vacuum with non-cylindrical canister]
- ii. Canadian patent No. 2,281,241 [Wet/dry vacuum with reduced operating]
- iii. Canadian patent No. 2,265,349 [Vacuum cleaner muffler/deflector]
- iv. Canadian patent No. 2,452,822 [Multi-stepped appliance accessory]
- v. Canadian patent No. 2,236,610 [Caster foot with accessory storage]

[5] Up until in or around 2009, CTC sold Emerson's wet/dry vacuum products, at which time it discontinued sales of its vacuum cleaners from its product line and replaced these products with other vacuum cleaners manufactured by another manufacturer. Emerson claims that these vacuum cleaners sold by CTC infringe several of its patents described above.

[6] In 2015, Emerson launched patent infringement proceedings against CTC claiming infringement and encroachment of its intellectual property rights in Canada. In its statement of claim, Emerson specifically designated several vacuum cleaners being sold by CTC as infringing its patents. However, it claims that not all infringing products sold by CTC since 2009 (the applicable limitation date for claims under the Patent Act) up until 2013 are still available for purchase and examination in 2015.

[7] As Emerson claims that many infringing products sold in previous years were no longer available for purchase, it pled what might be described as an open-ended claim of infringement in its Statement of Claim, and thereafter in its Amended Statement of Claim, in respect of these unknown products.

[8] An example of the impugned pleading in the context of paragraphs 27 and 28 of the amended statement of claim is set out below, with the emphasized last two sentences of paragraph 28 being those that CTC seeks to strike:

27. Since a date unknown to the Plaintiffs but known to the Defendant, and continuing to the present, the Defendant Canadian Tire has imported into Canada and subsequently sold to others in Canada wet/dry vacuum cleaning appliances with a canister and lid

assembly, comprising a non-cylindrical collection canister comprising substantially curved ends and sides substantially flatter than said curved ends, said canister being constructed of a material capable of being collapsed under vacuum loads; and a lid, adapted to engage said canister around a top perimeter thereof, supporting said canister such that said lid cooperates with said canister to resist collapse of said assembly.

28. The wet/dry vacuum cleaning appliances imported into Canada and subsequently sold to others in Canada by Canadian Tire, having the characteristics described in paragraph 27, include the “Duravac 12L Wet/Dry Vac” model (no. 199-7640-2) which was part of Canadian Tire’s 2014-2015 product line and is still being sold in stores and online (www.canadiantire.ca), and the “MAXIMUM Portable Wet Dry Vacuum, 19 L” model (no. 54-0251-4) which is part of Canadian Tire’s most recent product line currently being sold in stores. Additionally, Canadian Tire may sell or have sold including in its 2008-2010 and 2011-2013 product lines, other wet/dry vacuum models comprising said characteristics that the Plaintiffs are not currently aware of, but that are within the knowledge of the Defendant. The Plaintiffs claim in respect of all such activities.

[9] On October 19, 2015, CTC served Emerson with a Demand for Particulars requesting the model numbers for the products referred to in paragraphs 28, 31, 34 and 37 of the Statement of Claim. Emerson declined to provide the information on the grounds that the information was unknown to it and within the knowledge of CTC. The Plaintiffs thereafter, filed an Amended Statement of Claim alleging infringement of a new patent, and again repeating the same allegations of infringement in paragraph 38(b).

[10] CTC claims that the offending open ended sentences in paragraphs 28, 31, 34, 37 and 38(b) of the Plaintiffs’ Amended Statement of Claim are vexatious and an abuse of process and ought to be struck.

II. The Law

A. *Motion to Strike*

[11] The test applicable to a motion to strike in Canada is well-known. It was formulated by the Supreme Court in *Hunt* and has since been reiterated on a number of occasions including by the Federal Court of Appeal:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff’s statement of claim be struck out under Rule 19(24)(a).

[Emphasis added]

Hunt v Carey Canada Inc, [1990] 2 SCR 959 at 980 (Wilson, J.) [*Hunt*]; *R. v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45 paras 17, 19-21 (McLachlin C.J.)

[12] Rule 221 of the *Federal Courts Rules*, provides that the Court may strike a portion of a pleading on the ground that it is, amongst other things, scandalous, frivolous or vexatious or that it is an abuse of process. Courts in various decisions, including those examined below, have

continually held that pleadings will be vexatious or an abuse of process if they do not provide sufficient particulars to enable the defendant to prepare a response.

III. Analysis

[13] In considering whether sufficient particulars are provided to support a pleading, the parties in this matter primarily focused on a series of decisions of the Exchequer and Federal Courts that have dealt with this issue in relation to pleadings in patent infringement or related claims. I think it is fair to say that the parties provided contrasting interpretations of the conclusions to be drawn from these decisions. This necessitates a brief review of the jurisprudence to clarify what the Court considers to be the appropriate application of the relevant case law.

[14] The leading decision on the sufficiency of pleadings involving open ended claims of infringement, relied on both parties, is that of *Dow Chemical Co. v Kayson Plastics & Chemicals Ltd*, 1966 CarswellNAT 48 (Exch. Ct.) [*Dow Chemical*]. At paragraph 21 of the decision, Justice Jackett, in considering whether the pleading of infringement before him was a nullity, stated that the plaintiff must allege sufficient facts that the court can be satisfied, assuming their truth, that demonstrate “an arguable cause of action.” I cite the relevant portion of his remarks in this regard from paragraph 12 of his decision:

... A bare assertion that the defendant has infringed the plaintiff's rights is not an allegation of facts constituting a cause of action and a statement of claim in which that is the only assertion of infringement could be struck out as being an abuse of the process of the Court. ... The facts must be alleged in such a way that the

Court can be satisfied that, assuming the truth of what is alleged, the plaintiff has an arguable cause of action. It would be no answer to an application to strike out in such a case for the plaintiff to say that, if he is allowed to have unrestricted discovery of the defendant, he may then be in a position to plead a cause of action.

...

[Emphasis added]

[15] Whether allegations are supported by material facts, of course, depends upon the nature and extent of pleadings in the matter under review. In *Dow Chemical*, the pertinent pleading of the open ended claim in question was as follows:

1. The Defendant has since the date of issue of Canadian Letters Patent No. 525,041 infringed the said letters patent by manufacturing or producing in Canada rubber reinforced styrene polymers by a method or methods which infringes the said Canadian letters patent and by selling in Canada products manufactured or produced in accordance with such method or methods.

...

3. The precise number and dates of all the defendant's infringements are at present unknown to the plaintiff and the plaintiff will claim to recover full compensation in respect of all infringements. The plaintiffs specifically alleges, however, that the defendant's high impact polystyrene marketed by it since at least as early as 1963 under the defendant's designation "KHI", "Kayson Impact Polystyrene" are infringements for the reasons set out in paragraph 1 hereof.

[Emphasis added]

[16] The Defendant sought particulars identifying the "rubber reinforced styrene polymers" referred to in paragraph 1. In ordering particulars, I reason that Justice Jackett concluded that a pleading of infringement identifying polymers manufactured "by a method or methods" offers no

material facts as to how the infringement actually occurred, without some particularization by either identifying them or describing the methods of manufacture.

[17] Moreover, in relation to the specific infringing product that was identified in paragraph 3 described as “Kayson Impact Polystyrene,” the pleading offers no additional information describing the nature or character of the infringement. The infringements are merely described “for the reasons set out in paragraph 1 hereof.” This reference links back to the generic description of “a method or methods” described above.

[18] It is against this background that Justice Jactett proceeded to consider the plaintiff’s alternative submission on which the parties in this matter expended considerable submissions, but which I do not find are pertinent to this case. In order to save the “bald” or open-ended pleading of “rubber reinforced styrene polymers”, the plaintiff advanced an argument seeking to enlarge the extent of infringement claimed beyond the single Kayson Impact Polystyrene product that was properly identified. Counsel’s submission is described in the reasons of *Dow Chemical* at paragraph 8 as follows:

Counsel for the plaintiff takes the position, in effect, that the plaintiff, if it has information of one type of infringement of its patent, is entitled to launch proceedings for infringements of that type and for anything else that the defendant may have done that constitutes infringement of the same patent, so that he will be in a position, in the course of obtaining discovery from the defendant, to explore the possibility of there having in fact been types of infringement of which he did not know when he launched his action.

[Emphasis added]

[19] I understand “one type of infringement” in the above remarks to specify the manufacturing of the named Kayson Impact Polystyrene product. However, there is no link between that product and the “rubber reinforced styrene polymers” for which the defendant seeks particulars. These are only described as being infringed by unparticularized “methods” which I agree is no description at all. In the circumstances of the *Dow Chemical* pleading, therefore, the failure to provide particulars of the rubber reinforced styrene polymers was a failure to provide material facts describing an arguable cause of action, such that the offending portion of the pleading was found to be a nullity. The “one type of infringement” argument rejected by Justice Jaccett can be restated as a principle that specifying one instance of infringement does not open up a fishing expedition “for anything else that the defendant may have done that constitutes infringement of the same patent”.

[20] This not the Plaintiff’s position in this matter. Rather it argues that *Dow Chemicals* is distinguishable and actually supportive of its case on its facts because its pleading provides material facts describing the characteristics of expressly identified infringing vacuum cleaners which acts as a specific link to the characteristics of the unknown vacuum cleaners that CTC may have sold during the 2009 to 2013 timeframe.

[21] Emerson relies upon the decision of Justice Walsh in *Superseal Corp. v Glaverbel-Mecaniver et al* (1975), 20 C.P.R. (2d) 77 [*Superseal*]. This decision is helpful because Justice Walsh provides a summary of the *ratio* of *Dow Chemical*, which I set out below with my emphasis, as well as a reference in square brackets to the specific products referred to in *Dow Chemical*:

This judgment is also authority for the proposition that a plaintiff cannot give particulars respecting one particular breach [Kayson Impact Polystyrene product] of which he complains and then add allegations of a vague nature [rubber reinforced styrene polymers] respecting other breaches which he suspects but of which he is not definitely aware.

[Emphasis added]

[22] Justice Walsh distinguishes *Dow Chemical* based on the facts in *Superseal* by finding that there was sufficient disclosure of “an arguable case,” as follows:

The present case is a very clear example of a situation where the defendants know far better than plaintiff can hope to what infringements, if any, of plaintiff's patents or copyright they have committed and cannot claim that they will be taken by surprise by anything in plaintiff's pleadings. While the burden of proof is, of course, always on a plaintiff to establish its cause of action and the damages resulting to it from any alleged breaches by defendants of its patents or copyright, I nevertheless find in the present case that the amended declaration discloses sufficient information to give plaintiff an arguable case and that information as to further infringements “of the same type” if any such exist can readily be obtained on discovery.

[Emphasis added]

[23] In *Superseal*, the defendants complained “that only one specific sale is given as an example of the infringement of the first patent for double glazed windows and two examples of the alleged infringement of the second patent relating to double glazed sliding doors, together with general allegations of other infringements of which the plaintiff cannot give details at present...”.

[24] As I understand *Superseal*, Justice Walsh concluded that sufficient material facts were provided to describe an arguable case when the plaintiff provided specific examples of infringements of its products that allowed for claims of similar infringements based on the same characteristics of unknown products, which were known only to the defendant.

[25] I find that the facts in this matter are similar, and moreover by their greater particularization align more forcefully with the conclusion reached in *Superseal*. In that matter, the particulars of the nexus between the defined infringing product and other products claimed but unknown, were not defined beyond their being similar to the characteristics of double glazed windows and doors. I conclude that Justice Walsh considered this sufficient because the characteristics of double glazing do not lend themselves to much confusion.

[26] In this matter, the specificity of the characteristics defining the infringement go much farther and is quite detailed, as is repeated from paragraph 27 of the claim above:

...vacuum cleaning appliances with a canister and lid assembly, comprising a non-cylindrical collection canister comprising substantially curved ends and sides substantially flatter than said curved ends, said canister being constructed of a material capable of being collapsed under vacuum loads; and a lid, adapted to engage said canister around a top perimeter thereof, supporting said canister such that said lid cooperates with said canister to resist collapse of said assembly.

[27] By matching previous vacuum models “comprising said characteristics” in paragraph 28 of the claim referring to those described above, I adopt Justice Walsh’s conclusions that the situation herein constitutes “a very clear example of a situation where the defendants know far

better than plaintiff can hope to what infringements, if any, of plaintiff's patents or copyright they have committed and cannot claim that they will be taken by surprise by anything in plaintiff's pleadings."

[28] Moreover, I do not find that the Defendant's task of identifying vacuum cleaners with the alleged infringing characteristics to be at all onerous. It appears that the same manufacturer has supplied all of the alleged offending vacuum cleaners since 2009. It can certainly identify those vacuum cleaners that had the same components as those claimed to infringe the Plaintiffs' patents after 2013, or those of a sufficient degree of similarity as to raise a reasonable argument of infringement.

[29] We are not talking about a large number of models of vacuum cleaners, or an exceedingly long period of time prior to 2014 when the infringements occurred, being limited by a lawfully defined period of prescription. This is a situation where any injustice that may arise from the disposition of the motion strongly favours the Plaintiffs' rights at this juncture of the action, where Emerson's pleadings are presumed to be true.

[30] I also reject CTC's submissions that the matters of *Harrison v Sterling Lumber Co*, 2008 FC 220 [*Harrison*] and *Heli Tech Services (Canada) Ltd. v Weyerhaeuser Co.*, 2009 FC 592 [*Heli Tech*] support its position. In both cases it was clear that the courts were dealing with "bare allegations" in pleadings which were unsustainable due to the lack of material supporting facts.

[31] In *Harrison*, Justice Simpson concluded that the following claim was unsustainable:

The defendants have infringed letters patent No. 704,693 by making, constructing and using apparatus and moulds covered by claims 1 to 6, 8 and 9 of the said letters patent.

[Emphasis added]

[32] She commented at paragraph 12 of her reasons that the defendants did not know “which [infringing] apparatus(es) or method(s) were used in their manufacture” and concluded at paragraph 22 of her decision that the pleadings were “entirely bald and the Plaintiff does not have the ability to correct them with particulars before discovery because it lacks the necessary knowledge.”

[33] Justice O’Reilly came to a similar conclusion in *Heli Tech* where he found that Prothonotary Lafrenière had concluded that the allegations with respect to the claim “amounted to ‘bald assertions without any material facts’” and without any evidence to support them. I find that there were no supporting facts whatsoever in *Heli Tech* that could come close to providing a nexus to the open ended pleading. In dismissing the appeal to set aside the Prothonotary’s order striking offending portions of the statement of claim, Justice O’Reilly thereafter concluded that “the pleadings clearly fail to set out material facts supporting allegations of direct infringement and inducement.”

[34] Accordingly, for the reasons above, I dismiss CTC’s motion to strike portions of paragraphs that it claims are general allegations of infringement devoid of any material facts.

[35] The Court further rejects the Defendant’s alternative motion for further particulars of the alleged offending portions of the Amended Statement of Claim. Sufficient particulars of the

nature of the claimed infringements have been provided. Obviously in terms of identifying any possible offending vacuum cleaners sold in the period from 2009 to 2013, the Plaintiffs do not have the sufficient knowledge to identify them, whereas CTC does.

[36] The parties agreed that cost of the motion should be fixed at \$3000 “all in”, which the Court accepts and awards to the Plaintiffs.

THE COURT ORDERS THAT the motion is dismissed with costs awarded to the Plaintiffs in the “all in” amount of \$3000.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1543-15

STYLE OF CAUSE: EMERSON ELECTRIC CO. and EMERSON ELECTRIC
CANADA LIMITED v. CANADIAN TIRE
CORPORATION, LIMITED

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APPEARANCES:

Jean-Sébastien Dupont FOR THE PLAINTIFFS

Steven Tanner FOR THE DEFENDANT

SOLICITORS OF RECORD:

Smart & Biggar FOR THE PLAINTIFF
Montreal, Quebec

McCarthy Tétrault LLP FOR THE DEFENDANT
Toronto, Ontario