

Federal Court



Cour fédérale

Date: 20180531

Docket: T-1236-01

Citation: 2018 FC 565

Ottawa, Ontario, May 31, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**DARIN GRENKE, as personal representative of
the ESTATE OF EDWARD GRENKE, and
284849 ALBERTA LTD.**

Plaintiffs

and

**DNOW CANADA ULC,
NATIONAL OILWELL VARCO INC., and
769388 ALBERTA LTD.**

Defendants

JUDGMENT AND REASONS
(Claim 17)

[1] The Federal Court of Appeal [FCA] has specifically returned the issue of infringement of Claim 17 to this Court to determine whether the Defendants' instruction manual, properly understood, instructs the practice of the method of Claim 17.

[2] This is a matter separate from the damages award. The parties have acknowledged that the determination of this issue has no impact on the damages to be awarded.

[3] The Defendants urge this Court to make no finding on the basis that the issue is moot and as said above, has no impact on the damages claim. They did not, however, admit the infringement or consent to the declaration but kept the litigation on this point going until the end of the damages trial.

[4] I would, in the usual course, dismiss this matter on grounds of mootness and the lack of any material utility to this litigation. However, I am bound by the instructions of the FCA and this constitutes my reconsideration of the issue.

[5] The FCA elaborated on the issue in *Corlac Inc v Weatherford Canada Ltd*, 2012 FCA 261 at para 46, 440 NR 113:

The instruction manual states that after the sampling valve has been lubricated “the valve can be closed”. At trial, the respondents’ (plaintiffs’) expert testified that “a person of ordinary skill reading this [instruction manual] would know that you don’t actually leave it open, except when you are coming to monitor it [...] because you don’t want oil leaking out” . . . The Judge is better situated than this Court to address what the manual teaches and how an ordinarily skilled person would interpret the instruction manual as it relates to keeping the valves opened or closed. This is in large part a question of fact.

[6] The full description of Claim 17 is included in Annex A to the liability decision in this matter. Claim 17 is directed to a method for restraining oil which involves monitoring a leak passage to determine when a seal fails.

[7] Sub-paragraphs (c) through (e) of Claim 17 claim the following method of using the apparatus of Claim 1:

- c) injecting a lubricant through the leak passage of the furthest upstream seal cartridge and then plugging that leak passage, *while leaving open the leak passage of a seal cartridge downstream of the furthest upstream cartridge,*
- d) *monitoring the left-open leak passage for leaking oil,* and
- e) when such leaking oil is detected, shut down the pump and replacing at least those seal cartridges past which oil has leaked.

[Emphasis added]

[8] At the liability trial, the Court found that Claim 17 “teaches a method of restraining oil leakage in a PC pump that includes a) injecting a lubricant, b) monitoring a leak passage for leaking oil and c) when leaking oil is detected, shutting down the pump and replacing at least those seal cartridges past which the oil has leaked”.

[9] As the expert evidence confirmed, an ordinary person reading Claim 17 would know that the leak passage is not actually left open except when it is being monitored, otherwise oil would be leaking out all over the wellhead – obviously not the intention of the exercise.

[10] The operating procedures for the Defendants’ infringing stuffing box described in the Defendants’ manual referred to sampling valves being used to check for seal failures where produced fluid at the first or second valve means that the seal has failed and the box should be changed.

[11] That instruction must be read in the context of the preceding instruction:

When greasing the seals open the sampling valve by loosening the jam nut, turn stem out 2 turns. When grease comes through the valve, the seal chamber is full and the valve can be closed.

[12] The Plaintiffs' expert Skoczylas interpreted the operating instructions as instructing the skilled person to "check these valves to open them up to look to see if there's produced fluid there". I might add that even an inept home repair person would likely come to the same conclusion because the consequence of leaving the port open after inspection are obvious.

[13] Nelson, the Defendants' expert, on the same subject of the infringing box and the operating procedures for the Corlac product, noted that the passageways that extend through the Corlac stuffing box are fitted with sample valves that are not normally left open, but rather opened when checking to see if there is seal leakage.

[14] I accept Skoczylas' evidence that it would be obvious to a person of ordinary skill in 1994 that the operating instructions provide the functional equivalent of the method of checking for leaks using passages as described in Claim 17.

[15] The Court concluded at the liability trial and reiterates here that, on the balance of probabilities, customers who purchased the Defendants' infringing products would use them in accordance with the operating and maintenance manual provided for the end user oil companies.

[16] Therefore, the Court concludes that the Defendants infringed Claim 17, and the Plaintiffs are entitled to a declaration to that effect with costs.

JUDGMENT in T-1236-01 (Claim 17)

FOR THE REASONS GIVEN, this Court orders and adjudges that:

1. the Defendants have infringed Claim 17 of Canadian Patent No 2,095,937 by inducing their customers to practise the method of Claim 17; and
2. costs in favour of the Plaintiffs of this Judgment are fixed at \$5,000.00 to reflect the continuing pursuit of this issue.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1236-01

STYLE OF CAUSE: DARIN GRENKE, as personal representative of the
ESTATE OF EDWARD GRENKE, and 284849
ALBERTA LTD. v DNOW CANADA ULC, NATIONAL
OILWELL VARCO INC., and 769388 ALBERTA LTD.

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