

Federal Court



Cour fédérale

Date: 20211210

**Dockets: T-1420-18
T-567-20**

Citation: 2021 FC 1395

Ottawa, Ontario, December 10, 2021

PRESENT: The Honourable Mr. Justice Manson

Docket T-1420-18

BETWEEN:

NCS MULTISTAGE INC.

Plaintiff/ Defendant by Counterclaim

and

**KOBOLD CORPORATION, KOBOLD
COMPLETIONS INC., and 2039974
ALBERTA LTD.**

Defendants/ Plaintiffs by Counterclaim

Docket: T-567-20

AND BETWEEN:

NCS MULTISTAGE INC.

Plaintiff/ Defendant by Counterclaim

and

PROMAC INDUSTRIES LTD.

Defendant/ Plaintiff by Counterclaim

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] This is a motion brought by the Plaintiff of both actions, NCS Multistage Inc. [“NCS”], under *Rule 51* of the *Federal Courts Rules*, SOR/98-106 [the “*Rules*”] to appeal two Orders of Prothonotary/Case Management Judge Ring [the “*Judge*”], both dated November 23, 2021 [collectively, the “*Orders*”]. The Orders relate to two motions brought by NCS on November 1, 2021: a motion to amend NCS’s pleadings and a motion to compel documents [collectively, the “*Motions*”].

[2] The Plaintiff is seeking an order:

1. Setting aside the Orders of the Judge and granting the relief sought by NCS in its Motions;
2. Awarding NCS its costs of this appeal; and
3. Such further and other relief as this Honourable Court may deem just.

II. Background

A. *The Underlying Actions*

[3] In July 2018, NCS commenced Court File No. T-1420-18 [the “*Kobold Action*”] against the Defendants, Kobold Corporation, Kobold Completions Inc., and 2039974 Alberta Ltd.

[collectively, “Kobold”]. In the Kobold Action, NCS alleges infringement by Kobold with respect to seven patents.

[4] Kobold counterclaimed alleging that NCS infringes two of Kobold’s patents. The counterclaim in respect to one of the patents is no longer being pursued.

[5] In May 2020, NCS commenced Court File No. T-567-20 against the Defendant, Promac, for infringement of the same seven NCS patents as in the Kobold Action [the “Promac Action”]. Promac has also filed a counterclaim against NCS.

[6] The trials of these two actions are scheduled to be heard together commencing January 12, 2022.

[7] NCS and Kobold conducted a first round of examinations for discovery in the Kobold Action in the summer of 2020 and argued motions arising from the discoveries from November 2020 to February 2021. The Parties conducted further discoveries in May and June 2021. These involved a first attendance in the Promac Action and a second attendance in the Kobold Action. The Parties argued refusals motions arising from the discoveries at the end of July and near the end of August 2021.

[8] Between the two actions, there were 20 days of discovery and 8 days of refusals motions. At the conclusion of the final day of refusals motions on August 20, 2021, the Parties and the Court agreed that there would be no further re-attendances and discovery was closed.

B. *The Motions*

[9] The Judge heard three motions on November 10, 2021. Kobold and Promac brought one motion jointly to amend their statements of defence and counterclaim. The Judge allowed this motion in Order #1 of November 23, 2021. NCS did not appeal this Order #1.

[10] NCS brought the other two motions that were heard on November 10, 2021. One was a motion to compel a further and better affidavit of documents [the “Motion to Compel”] and the second was a motion to amend NCS’s Statements of Claim in the two actions [the “Motion to Amend”].

[11] The Judge denied both the Motions in separate Orders dated November 23, 2021: Order #2 for the Motion to Compel and Order #3 for the Motion to Amend.

[12] Order #2 and Order #3 are the subject of the present appeal motion.

C. *The Present Appeal Motion*

(1) Appeal of Order #2 – Motion to Compel

[13] The Judge denied NCS’s Motion to Compel a further and better affidavit of documents with respect to the three categories of documents sought by NCS. For the present appeal, the only category under review is for documents from 2010 to September 2014. NCS withdrew its appeal with respect to the other two categories.

[14] The original relief sought (relating to the one category under appeal) in the Motion to Compel before the Judge is set out below:

- a) The Defendants produce Solidworks files, engineering drawings, and assembly drawings which disclose the design of any tool manufactured or sold by the Defendants in the period of 2010 to September 2014, to the extent that such designs differ from the designs already disclosed in documents disclosing the form of multi-function valves in the Defendants documents KOB0431 CEO (Solidworks); KOB0144 CEO (Assembly Layout, January 29, 2015) ; KOB0426 CEO (Assembly Layout, August 5, 2015); and KOB0379 CEO (Assembly Layout, September 25, 2014).

NCS seeks one of each of Solidworks files, engineering drawings, and assembly drawings (for a total of three documents) for each such design commercialized in the period of 2010 to 2013.

[15] In the present appeal motion, NCS changed the relief sought as shown below:

- b) The Defendants produce Solidworks files, engineering drawings, and assembly drawings which disclose the design of the equalization valve(s) manufactured, sold, or used by the Defendants in the period of January to September 2014,
 - i. however, such production is only sought to the extent that such designs differ from the designs already disclosed in documents disclosing the form of multi-function valves in the Defendants documents KOB0431 CEO (Solidworks); KOB0144 CEO (Assembly Layout, January 29, 2015); KOB0426 CEO (Assembly Layout, August 5, 2015); and KOB0379 CEO (Assembly Layout, September 25, 2014);

- c) For each design of any tool manufactured or sold by the Defendants in the period of 2010 to 2013, NCS seeks that the Defendants produce one of each of Solidworks files, engineering drawings, and assembly drawings (for a total of three documents)

[16] NCS made three main changes to the order requested in this appeal motion:

1. A change from “any tool” to “the equalization valve(s)” in the new item “b”;
2. A change in the new item “c” to “any tool manufactured or sold” from 2010 to 2013, instead of only “commercialized” tools; and
3. A change in the new item “b” to a period of “January 2014 to September 2014” instead of a period of “2010 to September 2014”.

[17] In her Order #2, the Judge denied NCS’s Motion for Compel the Defendants to produce the documents being requested by NCS for the period between 2010 and 2013.

[18] The Judge found that the eve of trial is not the appropriate time to begin an assessment of the merits of the Plaintiff’s claims. If NCS regarded the alleged acts of infringement by the Defendants before 2014 as real questions in controversy, it would have addressed them in a meaningful manner at some point during the discovery process, rather than maintaining their specific pleas of infringement commencing in 2014, and agreeing with the Defendants during previous motions to compel that the time period in issue was from 2014 onward [Order #2 at page 5].

(2) Appeal of Order #3 – Motion to Amend

[19] NCS brought a Motion to Amend its Statements of Claim in the Kobold Action and the Promac Action. The Defendants of both action, Kobold and Promac, consented to most of the proposed amendments. The amendments that remained in dispute were in paragraph 12 of the Kobold Action [the “Constructive Trust Amendment”], and in paragraphs 40 and 29 of the Kobold Action and the Promac Action, respectively [the “Period of Alleged Infringement Amendments”].

(a) *The Constructive Trust Amendment*

[20] The proposed Constructive Trust Amendment related to the last sentence of paragraph 12 of the Statement of Claim in the Kobold Action:

12. [...] Profits that have been made from the three defendants as a result of the infringing activities are transferred from Kobold Completions to Kobold Corp. and 2039974 Alberta Ltd. and any such profits delivered from any Kobold entity from infringing products or services are the subject of a constructive trust for the benefit of NCS.

[21] This was the first time that the remedy of constructive trust had been raised in this litigation.

[22] In her Order #3, the Judge denied NCS’s proposed Constructive Trust Amendment for the following reasons:

- NCS’s proposed plea of a constructive trust fails to satisfy the threshold requirement on the Motion to Amend. It baldly asserts that Kobold’s profits should be the subject of a constructive trust, but it does not provide the necessary underpinning of material and necessary facts leading up to that assertion [Order #3 at paragraphs 27 to 30].
- NCS’s reference to “any Kobold entity” in its proposed amendment to paragraph 12 is overly vague and ambiguous. It does not allow counsel for Kobold “to advise their clients, to prepare their case, and to map a trial strategy” [Order #3 at paragraph 31].
- Even if a constructive trust was properly pled by NCS, it would not serve the interests of justice to allow NCS to amend paragraph 12 to allege a “constructive trust” at this time. NCS has not provided any reasonable explanation for the delay in seeking the amendment to paragraph 12 [Order #3 at paragraph 33].
- The proposed amendment to paragraph 12 represents a significant expansion of the legal and factual issues in dispute and will create additional burden on and prejudice to the Defendants, especially given the tight timelines under the existing scheduling Orders ahead of the trial [Order #3 at paragraph 34].
- The granting of the proposed amendment to paragraph 12 will not facilitate the Court’s consideration for the true substance of the issues in dispute in the Liability Phase of the trial on their merits [Order #3 at paragraphs 35 to 37].

[23] The Judge ordered that, if and when this litigation proceeds to the Quantification Phase, NCS may reapply to amend its Statement of Claim to address its constructive trust allegation [Order #3 at paragraphs 38 to 40].

(b) *The Period of Alleged Infringement Amendments*

[24] The proposed amendments to paragraph 40 in the Kobold Action, and paragraph 29 in the Promac Action were the following (shown in track changes):

The Kobold Action (T-1420-18)

40. Since around about January 2016 for the G5 Tool and from about 2013 ~~2014~~ until 2016 for the G3 Tool, Kobold has infringed the '676 Patent by manufacturing, using and renting or otherwise making available the G3 and G5 Tools, which are used in wellbore completion services to shift the G3 or G5 Sleeves, to perforate casing and to deliver a treatment fluid to a formation. As indicated in paragraph 49, 72, and 80, NCS is claiming for all infringing activities from the laid open date of each of the asserted NCS Patents.

The Promac Action (T-567-20)

29. Promac has manufactured and sold the G5 Tools and Related Tools since around about January 2016 and for the G3 Tool from around 2014 ~~2012~~ until 2016, but as indicated in paragraphs 54, 62, and 69, NCS is claiming infringement and reasonable compensation for damages for all of Promac's infringing activities.

[25] In her Order #3, the Judge denied NCS's proposed Period of Alleged Infringement Amendments for the following reasons:

- The amendment to paragraph 29 (in the Promac Action) has no reasonable prospect of success because it is statute barred [Order #3 at paragraphs 43 and 44].
- It would not serve the interests of justice to allow NCS to amend either paragraph 40 (the Kobold Action) or paragraph 29 (the Promac Action) to expand the period of alleged infringement in both actions. NCS specifically and repeatedly pleads in both actions that the period of infringement commenced in 2014. NCS's conduct in discoveries (which the Parties have concluded) was consistent with the alleged infringement having commenced in 2014. In addition, during previous motions to compel, NCS agreed that the time period in issue was from 2014 onward [Order #3 at paragraph 46 and 47].
- NCS has not provided the Court with a satisfactory explanation for the delay in seeking these amendments [Order #3 at paragraph 47].
- The proposed amendments expand the scope of the dispute and will create prejudice to the Defendants [Order #3 at paragraph 48].
- The granting of the proposed amendments will not facilitate the Court's consideration of the true substance of the issues in dispute between the Parties [Order #3 at paragraph 49].

III. Issues

[26] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Court err in denying NCS's Motion to add the Constructive Trust Amendment?

3. Did the Court err in denying NCS's Motion to add the Period of Alleged Infringement Amendments?
4. Did the Court err in denying NCS's Motion to Compel the production of additional documents from 2010 to September 2014?

IV. Standard of Review

[27] The standard of review on a *Rule 51* motion appealing a Prothonotary's decision is the appellate standard described by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 at paragraphs 7 to 36 [*Housen*] [*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraphs 63, 65, 79, and 83].

[28] Pursuant to *Housen*, questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness [*Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.*, 2021 FC 986 at paragraph 15].

[29] The Plaintiff argues that the issues regarding the Motion to Amend are questions of law or extricable questions of law and are subject to a standard of correctness and that the issue regarding the Motion to Compel documents from January to September 2014 is also an error of law and subject to a standard of correctness. The issue regarding the Motion to Compel documents from 2010 to 2013 is a mixed question of fact and law subject to the standard of overriding and palpable error but depends upon a prior error of law in the Motion to Amend.

[30] The Defendants submit that the only issue on appeal that is an extricable legal issue is the articulation of the law of constructive trusts. The Defendants argue that all other alleged errors are issues of fact or mixed fact and law and are subject to the standard of palpable and overriding error.

[31] I agree with the Defendants. Each issue is a question of mixed fact and law subject to the standard of overriding and palpable error. The only extricable question of law in this proceeding appears to be that of the articulation of the law on constructive trusts. Where there is a question of whether the Judge has erred in her interpretation of the legal principles of constructive trusts, there is a standard of correctness.

[32] Palpable and overriding error is a highly deferential standard of review. “Palpable” means an error that is obvious. Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence [*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at paragraphs 61 and 62].

[33] If an error is palpable, the judgment below does not necessarily fall. The error must also be overriding. “Overriding” means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this

palpably wrong fact is excluded but the outcome stands without it, the error is not “overriding.” The judgment of the first-instance court remains in place [*Mahjoub* at paragraphs 63 and 64].

V. The Parties’ Positions

A. *Did the Court err in denying NCS’s Motion to add the Constructive Trust Amendment?*

[34] The Plaintiff submits that the Judge misconstrued the law of constructive trusts as set out in *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, 2001 FCT 889 [*Baker Petrolite*] and *Soulos v. Korkontzilas*, [1997] 2 SCR 217 [*Soulos*].

[35] More specifically, the Plaintiff claims that the Judge’s reasoning was that an obligation must have existed *prior* to the commencement of this action and this is directly contrary to *Baker Petrolite* and *Moore v. Sweet*, 2018 SCC 52 [*Moore*]. In finding that the Plaintiff must establish some distinct equitable obligation between the Parties, the decision led to the further error that allowing the Constructive Trust Amendment will significantly expand the legal and factual issues in dispute.

[36] In addition, the Plaintiff submits that the determination of the existence of a trust relationship and if tracing will be required as part of the Quantification Phase is rightly placed in the Liability Phase, contrary to the Judge’s findings in Order #3.

[37] Further, the Plaintiff claims that the Defendants did not adduce any evidence to demonstrate prejudice that would arise from the allowance of this amendment.

[38] The Defendants argue that the Judge did not err in refusing to allow the Constructive Trust Amendment. The Defendants submit:

- The proposed amendment has no reasonable prospect of success. It is vague and overbroad, and if allowed would require further discovery to clarify;
- The Plaintiff did not plead the requisite material facts to support the existence of an equitable obligation between the Parties;
- The Judge correctly interpreted and applied the law on constructive trusts in *Baker Petrolite, Soulos, Moore, and Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*];
- The Judge correctly applied the factors in *Canderel Ltd. v. Canada*, [1994] 1 FC 3 (FCA) [*Canderel*]. Specifically, she found that the Plaintiff has not provided any reasonable explanation for the delay in seeking the Constructive Trust Amendment; the proposed amendment represented a significant expansion of the legal and factual issues in dispute that will create additional burden on and cause prejudice to the Defendants; and granting the proposed amendment would not facilitate the Court's consideration of the true substance of the issues in dispute in the Liability Phase of the action; and
- The Judge was correct in finding that the issue of a constructive trust is an issue for the Quantification Phase of an action.

B. *Did the Court err in denying NCS's Motion to add the Period of Alleged Infringement Amendments?*

[39] The Plaintiff submits that the Judge erred in denying its Period of Infringement Amendments. The Plaintiff argues that the Statements of Claim indicate allegations of infringement “occurring after the laid open date,” which may date back as early as 2010 in the case of four of the asserted patents. Thus, the Judge erred in interpreting the Plaintiff’s pleadings and concessions at discovery to find that the infringement commenced in 2014.

[40] The Plaintiff also argues that it did meaningfully address claims of infringement before 2014 (*i.e.* in discovery regarding a valve that may have been commercialized by the Defendants as early as June 2013). However, the efforts were resisted. Therefore, the Judge erred in finding that the Plaintiff had not pursued earlier infringement claims. The Plaintiff also claims that the evidence of earlier infringement demonstrates serious prejudice for the Plaintiff with the denial of this amendment.

[41] Moreover, the Plaintiff states that the Period of Alleged Infringement Amendments simply clarify the pleadings and do not expand its scope. Therefore, they are not at risk of being struck due to a limitations defence. They also state that the discoverability principle applies.

[42] Lastly, the Plaintiff argues that the Defendants did not adduce any evidence to demonstrate what new burden may be imposed upon them if the proposed Period of Alleged Infringement Amendments was allowed.

[43] The Defendants submit that the Judge did not err in denying the Alleged Period of Infringement Amendments. The Defendants argue that the Judge correctly relied on her high

familiarity with the circumstances and issues in dispute in the present actions in determining the character of the pleadings. On a review of the pleadings as a whole and in light of the conduct of NCS during the lengthy discovery process, the period of infringement pleaded is from 2014 onward and that the amendments represent a reversal of position.

[44] In addition, the Defendants claim that the prejudice that the amendments would cause them is clear on the face of the record – NCS is asking the Court to compel extensive searches of their records for the last decade on the eve of trial. The Defendants submit that the Judge correctly characterized this as a fishing expedition.

[45] Further, the Defendants argue that there is no serious prejudice to NCS on the denial of these amendments. They state that NCS agreed that the time period in issue was from 2014 onward during previous motions to compel and the present appeal is an attempt to go back on that agreement and an attempt to collaterally attack previous orders of the Judge.

[46] Lastly, the Defendants claim that the Judge was correct in finding that expanding the period of alleged infringement from 2014 to 2012 in the Promac Action is contrary to the statutory limitation period of six years in section 55.01 of the *Patent Act*, RSC, 1985, cP-4. Also, NCS did not raise the argument regarding the discoverability principle in the underlying Motions and has not adduced any evidence in support of this argument. Further, the Defendants argue that allowing the Plaintiff's interpretation of the pleadings would deny Promac the right to plead in response that the limitation period applies and discover on those issues.

C. *Did the Court err in denying NCS's Motion to Compel the production of additional documents from 2010 to September 2014?*

(1) January 2014 to September 2014

[47] The Plaintiff submits that the Court erred in failing to grant production relevant to an early valve manufactured in January 2014 to September 2014. The Plaintiff argues that the Judge failed to fully address the remedy sought by the Plaintiff. In addition, the Plaintiff claims the Defendants did not adduce evidence to challenge the Plaintiff's evidence that a valve was used in this time period.

[48] The Plaintiff claims that if the Court's error had been in respect of evidence, this failure to consider or address relevant matters would give rise to a reasoned belief that the hearing judge must have forgotten, ignored or misconceived evidence in a way that affected his or her conclusion, which would constitute a palpable and overriding error.

[49] The Defendant submits that this relief was not presented in NCS's motion as a separate request, but as a single request for documents from 2010 to September 2014. The Judge did address this relief sought in her denial in NCS's request for documents from 2010 to 2013. NCS seeks an order compelling Kobold to produce documents for the period of January to September 2014 as a separate category and has changed its request from "tools" to "equalization valve(s)" for the period of January to September 2014 only. This request was not part of NCS's initial motion that the Judge denied.

[50] Further, requests for similar documents were addressed in previous refusal motions.

(2) 2010 to 2013

[51] The Plaintiff claims that the Court declined to grant production of documents between 2010 and 2013 on the same basis that the Period of Alleged Infringement Amendments were denied. The Plaintiff's position in regards to the Period of Alleged Infringement Amendments issue are addressed above.

[52] The Defendant argues that the Plaintiff does not assert that the Judge made any error stating the legal principles governing a motion to compel a further and better affidavit of documents, nor does it argue that Judge misapprehended the facts in evidence.

[53] Further, the Defendants argue that even if the Plaintiff was successful in expanding the time period, it is required to prove relevance of seeking documents to 2010. In addition, as stated above, the Plaintiff has changed its requested relief in this appeal from the underlying motion.

[54] As a result, the Judge has properly relied on her experience with this matter and taken into account the context and circumstances in which NCS's request was made. She noted the representations made in the previous evidence-gathering process of discovery and refusals motions, and the proximity of the pending trial.

VI. Analysis

A. *Did the Court err in denying NCS's Motion to add the Constructive Trust Amendment?*

[55] As stated above, this issue is a question of mixed fact and law subject to the standard of overriding and palpable error. The only extricable question of law is that of the articulation of the law on constructive trusts, which is subject to the standard of correctness.

[56] In Order #3 on the issue of the Constructive Trust Amendment, the Judge correctly articulated the law on constructive trusts. The Plaintiff has not established that there was any overriding or palpable error.

[57] The Judge correctly sets out the legal principles governing the amendment of pleadings. *Rule 75* provides that this Court may at any time allow a party to amend a document on such terms as will protect the rights of all parties. The general rule is that “an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice” [*Canderel; Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215 at paragraph 19].

[58] The Judge then sets out that there is a threshold question of whether the pleading has a reasonable chance of success [*Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 at paragraphs 29-32].

[59] Once it has been established that the proposed amendment has a reasonable prospect of success, the other factors set out in *Canderel* must be considered. The criterion based on the

interests of justice allows a Court to consider factors such as the timeliness of the motion to amend, the extent to which the proposed amendment would delay the proceedings, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter, and whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits , among other factors [*Canderel* at page 8; *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2014 FCA 65 at paragraph 17; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 242 at paragraph 3].

[60] The Judge found that:

- i. NCS's proposed amendments failed on both the threshold question of whether the pleading has a reasonable chance of success, and on the consideration that it would not be in the interests of justice to allow the amendments;
- ii. NCS should be granted leave to reapply to bring the constructive trust amendment if the action proceeds to the Quantification Phase; and
- iii. The Constructive Trust Amendment failed the threshold question because the pleading is vague and overbroad with respect to the assertion over "any Kobold entity" and because NCS failed to plead the necessary material facts to support a plea for constructive trust. NCS has not appealed the first finding.

[61] NCS has not asserted that the finding of vagueness and overbreadth was an error. NCS did not shed any light on this issue in its Motion Record. Further, NCS does not address this

finding by the Judge, let alone identify any palpable or overriding error by the Judge on this point.

[62] I find that the Judge correctly found that this plea is vague and prejudicial to Kobold, who is entitled to know the case it has to meet. Such a pleading would require additional discovery, given the vagueness of what is being asserted by NCS.

[63] I also find that the Judge correctly articulated the law on constructive trusts in her determination of whether, at this threshold stage, NCS has pled the requisite material facts to substantiate its proposed constructive trust plea.

[64] The Plaintiff does not appear to question that the legal principles under *Baker Petrolite*, *Soulos, Moore*, and *Pro-Sys* provide the foundation for the law on constructive trusts and are relevant to this proceeding. Rather, the Plaintiff alleges that the Judge erred in law in her reasoning that an obligation must have existed prior to the commencement of this action and that this is directly contrary to *Baker Petrolite* and *Moore*.

[65] The Plaintiff points to the following statement made by the Judge in Order #3 to demonstrate its allegation:

NCS has not directed the Court to any material facts in its pleading that would show that Kobold was under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the profits which are the subject matter of the constructive trust, or that Kobold acted in breach of its equitable obligation to NCS.

A fair reading of this paragraph does not demonstrate any incorrect articulation of the law on constructive trust on the part of Judge.

[66] The jurisprudence describes two “types” of constructive trust remedies. First, an “unjust enrichment” type constructive trust, and second, a “wrongful act” type constructive trust.

[67] During oral arguments for the Motion to Amend, NCS relied on *Soulos* and argued that only the “wrongful act” type constructive trust was at issue and that the pleading requirements need not be satisfied in this instance. The Judge noted that this was surprising, given that NCS’s proposed Constructive Trust Amendment was based on *Baker Petrolite* – a case pertaining to an “unjust enrichment” type constructive trust.

[68] In *Soulos*, the Supreme Court identifies four requirements to establish a constructive trust for wrongful conduct. These requirements are included in Order #3. The first requirement is that “the defendant must have been under an equitable obligation.”

[69] I find that the Judge correctly found that NCS’s pleading failed to plead facts supporting the existence of an equitable obligation between the parties. NCS does not contest this finding. NCS also does not contest that they have not pled the requisite material facts for an unjust enrichment type constructive trust such as in *Pro-Sys* or *Moore*.

[70] NCS appears to argue that there is a third type of constructive trust grounded in a plea for an accounting of profits and that the Court has fallen into error by requiring the Plaintiff to plead

further material facts beyond establishing entitlement to an accounting of profits arising as a consequence of the Defendants' infringement.

[71] The argument was properly rejected: a proper equitable basis to ground a right in property must be established to obtain the equitable remedy, which is not present on the facts here.

[72] The imposition of a constructive trust does not automatically flow from an entitlement to an accounting of profits [*Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 [*Lac Minerals*] at paragraph 678]. Regardless of whether there is another type of constructive trust flowing from an accounting of profits, NCS has not included any specific referential property in its proposed pleading. A constructive trust is a right in property, that is "an entitlement to enforce rights against a particular piece of property" [*Moore* at paragraph 90]. It is not a charge over the general assets of a company, which is what NCS appears to be trying to obtain.

[73] No matter which type of constructive trust is asserted, NCS has not pled the requisite material facts to support it. Moreover, even if the constructive trust pleading were acceptable, it would not serve the interests of justice to allow the proposed constructive trust amendments.

[74] In particular, the Judge determined that (1) NCS did not provide any reasonable explanation for the delay in seeking the constructive trust amendment, (2) the proposed amendment represented a significant expansion of the legal and factual issues in dispute that will

create additional burden on and cause prejudice to the defendants, and (3) granting the proposed amendment would not facilitate the Court's consideration of the true substance of the issues in dispute in the Liability Phase of the action.

[75] In its Motion Record for this appeal, NCS has still not provided an explanation for the timeliness of this request, nor do they appeal this finding. The Judge has been managing this litigation since 2018, and has presided over 8 days of refusals motions following 20 days of discovery in the two actions prior to hearing the Motion to Amend. Deference is owed to the Judge's understanding of the background of the action and issues in controversy, which informed her considerations of the factors for and against allowing an amendment.

[76] Further, the Judge correctly found that the issue of a constructive trust would be an issue for the Quantification Phase of the action, and granted leave to NCS to reapply for the constructive trust amendment if the litigation proceeds to that phase.

[77] The Judge correctly noted that the concept of a constructive trust is primarily a remedy. In particular, the jurisprudence establishes that a constructive trust will not be imposed unless it is established that a monetary remedy is insufficient. The question of the appropriate remedy only arises once a valid restitutionary claim has been made out [*Lac Minerals*]: this would occur in the Quantification Phase of this bifurcated action.

[78] NCS is not being prohibited from ever raising the matter of constructive trust. It will have an opportunity to reapply for leave to amend its pleading to address this issue, if the action proceeds to the Quantification Phase.

[79] In Order #3 on the issue of the Constructive Trust Amendment, the Judge correctly articulated the law on constructive trusts and the legal principles governing the amendment of pleadings. The Plaintiff has not established that there was any overriding or palpable error. The Judge has extensive experience with this particular litigation and in her Order #3 has interpreted the law and the facts in consideration of the entire context of the Kobold Action.

B. *Did the Court err in denying NCS's Motion to add the Period of Alleged Infringement Amendments?*

[80] Whether the legal test to allow a motion to amend was correctly applied to the facts is a question of mixed fact and law and subject to the standard of review of palpable and overriding error.

[81] NCS alleges that the Judge erred in her characterization of the pleadings alleging infringement from 2014 onward.

[82] As stated previously, the Judge is highly familiar with the circumstances and issues in dispute in the present actions. The Judge correctly relied on her understanding of the issues in determining the character of the pleadings.

[83] In her role as Case Management Judge, the Judge has presided over a lengthy discovery process in which she was tasked with assessing the pleadings of both Parties to determine the relevance of questions refused on discovery. Throughout the discovery and refusals motion process, NCS repeatedly agreed that the time period in issue was 2014 onward. The Judge held that the conduct of NCS demonstrates that allegations of infringement prior to 2014 were not regarded as real questions in controversy.

[84] On a review of the pleadings as a whole and in light of the conduct of NCS during the lengthy discovery process, the Judge found that the period of infringement pleaded is from 2014 onward and that the amendments represent a reversal of position. The Judge correctly states the Court may look to the conduct of the parties in determining whether a requested amendment relates to a real question in controversy.

[85] The Judge found that these factors of the *Canderel* test weighed against allowing the proposed amendments and concluded that it would not be in the interests of justice to do so, particularly in light of the late timing of the Motions on the eve of trial without any reasonable explanation. NCS has not identified any palpable or overriding error in the Judge's decision.

[86] Through her extensive experience with this litigation, the Judge was aware of the circumstances and context when she found that this amendment is not in the interests of justice at this stage of the litigation.

[87] Lastly, the Judge held that expanding the start date for the period of alleged infringement from 2014 to 2012 in the Promac Action is contrary to the statutory limitation period of six years in section 55.01 of the *Patent Act*.

[88] The Promac Action was commenced in May 2020. The Plaintiff is now arguing that the discoverability principle applies. However, this argument was not before the Judge in the underlying motion.

[89] The Plaintiff has not established that the Judge made a palpable and overriding error in denying the Plaintiff's Motion to Amend and add its Period of Alleged Infringement Amendments.

[90] In regards to the entirety of the Plaintiff's Motion to Amend, it is not the Court's role to "rework" a party's pleading in an attempt to help give validity to what is otherwise a vague and ambiguous or improper overreaching plea. As highlighted in multiple instances above, the Judge correctly relied on her extensive experience with these Parties and the circumstances and context of this litigation in coming to her decisions. She is well aware of the positions of the Parties, the character of the pleadings, and the merits at issue.

C. *Did the Court err in denying NCS's Motion to Compel the production of additional documents from 2010 to September 2014?*

[91] NCS alleges that the Judge erred by not ruling on the issue of document production during the period of January 2014 to September 2014 in Order #2. However, this is a mischaracterization of what was before the Judge in the underlying Motion to Compel.

[92] As outlined previously, the Plaintiff has changed the relief sought in this appeal motion from what was sought in the underlying Motion to Compel. In the underlying motion, a single request for documents from 2010 to September 2014 was sought with an apparent clarifying paragraph emphasizing that it was documents from 2010 to 2013 that the Plaintiff was seeking. The scope and character of NCS's presently requested order is different than the one NCS put in front of the Judge deciding the underlying motion.

[93] There is no argument that any error was made in stating the legal principles governing a motion to compel a further and better affidavit of documents, nor does it argue that the Judge misapprehended the facts in evidence.

[94] As provided above, the Judge correctly characterized the pleadings as being from 2014 onward. NCS has not identified any palpable or overriding error in the Judge's decision.

VII. Conclusion

[95] In conclusion, the Plaintiff's motion to appeal the Orders of Judge dated November 23, 2021 is dismissed. The Orders remain in place.

[96] It bears repeating that the underlying Motions and this appeal were brought on the eve of trial. A trial in which concessions have been made in order to meet the requisite deadlines and commence the trial on January 12, 2021 – a timeline deemed essential by the Plaintiff. The Plaintiff is aware of the extensive discovery and related motions that have inundated this litigation, as well as the Judge's extensive understanding and experience of the circumstances and context of this litigation.

[97] This Court will continue to discourage these late-in-the-day procedural disputes, which leave this Court with these last minute skirmishes on the eve of trial.

AMENDED JUDGMENT in T-1420-18 and T-567-20

THIS COURT'S JUDGMENT is that

1. Having received a Reply today (December 10/21), which was not provided for in the direction issued by Justice McVeigh regarding the hearing of this motion in writing nevertheless the Reply was accepted for filing. I have reviewed the Reply and I find that there is still no palpable and overriding error made by the Prothonotary;
2. The Plaintiff's motion to appeal the Orders of Judge under Rule 51 is dismissed;
3. Costs to the Defendants in the amount of \$7,500.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1420-18

STYLE OF CAUSE: NCS MULTISTAGE INC. v KOBOLD CORPORATION, KOBOLD COMPLETIONS INC. and 2039974 ALBERTA LTD.

AND DOCKET: T-567-20

STYLE OF CAUSE: NCS MULTISTAGE INC. v PROMAC INDUSTRIES LTD.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MOTION IN WRITING

JUDGMENT AND REASONS: MANSON J.

DATED: DECEMBER 10, 2021

AMENDED: DECEMBER 10, 2021

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