

Federal Court



Cour fédérale

Date: 20090818

Docket: T-737-08

Citation: 2009 FC 836

[ENGLISH TRANSLATION]

Montréal, Quebec, August 18, 2009

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

**EUROCOPTER
(simplified joint stock company)**

**Plaintiff/Defendant
by Counterclaim**

and

BELL HELICOPTER TEXTRON CANADA LIMITED

**Defendant/Plaintiff
by Counterclaim**

REASONS FOR ORDER AND ORDER

[1] In this case, the Court is dealing with a motion by plaintiff Eurocopter (hereinafter Eurocopter) to have objections decided.

Background

[2] The general background in which this motion was filed is essentially as follows.

[3] On May 9, 2008, Eurocopter instituted an infringement action regarding its Canadian patent number 2,205,787 (hereinafter “patent ‘787”) against the defendant Bell Helicopter Textron Canada Limited (hereinafter Bell Helicopter).

[4] Patent ‘787 deals with landing gear for helicopters and is titled “Skid landing gear for helicopters”.

[5] In its statement of claim, Eurocopter alleges, *inter alia*, that Bell Helicopter manufactures, distributes, uses, imports, offers for sale or sells in Canada a helicopter called the Bell 429 (hereinafter the Bell 429), which is equipped with landing gear that infringe upon patent ‘787.

[6] Afterwards, on or around July 28, 2008, Bell Helicopter filed its defence and counterclaim in which it denies any infringement and maintains that patent ‘787 is invalid.

Analysis

I - Questions to answer and documents to produce during an examination on discovery: Applicable general principles

[7] In *Reading & Bates Construction Co. and al v. Baker Energy Resources Corp. and al* (1988), 24 C.P.R. (3rd) 66, McNair J., in a six-point general reminder, first defines at points 1 to 3 the parameters that make it so that a question or a document is relevant, to then state at points 4 to 6 a series of circumstances or exceptions that make it so that on the off chance, in the end, a question does not have to be answered or a document does not have to be produced.

[8] The Court states the following at pages 70 to 72:

1. The test as to what documents are required to be produced is simply relevance. The test of relevance is not a matter for the exercise of the discretion. What documents parties are entitled to is a matter of law, not a matter of discretion. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Trigg v. MI Movers Int'l Transport Services Ltd.* (1986), 13 C.P.C. (2d) 150 (Ont. H.C.); *Canex Placer Ltd. v. A.-G. B.C.* (1975), 63 D.L.R. (3d) 282, [1976] 1 W.W.R. 644 (B.C.S.C.); and *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).

2. On an examination for discovery prior to the commencement of a reference that has been directed, the party being examined need only answer questions directed to the actual issues raised by the reference. Conversely, questions relating to information which has already been

produced and questions which are too general or ask for an opinion or are outside the scope of the reference need not be answered by a witness: *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.* (1984), 82 C.P.R. (2d) 36 (F.C.T.D.); affirmed 1 C.P.R. (3d) 242 (F.C.A.).

3. The propriety of any question on discovery must be determined on the basis of its relevance to the facts pleaded in the statement of claim as constituting the cause of action (...)

4. The court should not compel answers to questions which, although they might be considered relevant, are not at all likely to advance in any way the questioning party's legal position: *Canex Placer Ltd. v. A.-G. B.C.*, supra; and *Smith, Kline & French Laboratories Ltd. v. A.-G. Can.* (1982), 67 C.P.R. (2d) 103 at p. 108, 29 C.P.C. 117 (F.C.T.D.).

5. Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances: *Smith, Kline & French Ltd. v. A.-G. Can.*, per Addy J. at p. 109.

6. The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged: *Carnation Foods Co. Ltd. v. Amfac Foods Inc.* (1982), 63 C.P.R. (2d) 203 (F.C.A.); and *Beloit Canada Ltee/Ltd. v. Valmet Oy* (1981), 60 C.P.R. (2d) 145 (F.C.T.D.).

[Emphasis added.]

[9] In addition, the list of exceptions at points 2 and 4 to 6 of *Reading & Bates* does not, in my view, aim to be strictly comprehensive.

[10] In many situations, the balance to which the Court refers in *Reading & Bates* at point 5 is required.

[11] In fact, as mentioned in *Faulding Canada Inc. v. Pharmacia S.p.A.* (1999), 3 C.P.R. (4th) 126, page 128:

[...] the general tendency of the courts to grant broad discovery must be balanced against the tendency, particularly in industrial property cases, of parties to attempt to engage in fishing expeditions which should not be encouraged.

[12] Rule 242 of the *Federal Courts Rules* (the Rules) has a warning for that purpose. In fact, paragraphs 242(1)(b) to (d) of the Rules read as follows:

242. (1) A person may object to a question asked in an examination for discovery on the ground that

(...)

(b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

(c) the question is unreasonable or unnecessary; or

(d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

242. (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

(...)

b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;

c) la question est déraisonnable ou inutile;

d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

[13] Additionally, a party cannot be required during an examination for discovery to answer a question that forces it to express an opinion, whether it be an expert opinion, its interpretation of a patent or its beliefs. In *Philips Export B.V. v. Windmere Consumer Products Inc.* (1986), 8 C.P.R. (3d) 505, the following is stated at page 508:

Question 467, which must be read with Q. 466, asks for the belief of the plaintiff. In both the *Smith, Kline & French* case and in *Sperry Corp. v. John Deere Ltd. et al.* (1984), 82 C.P.R. (2d) 1, it is stated that opinion cannot be asked, as a rule, of a person being examined who is not an expert and that a party cannot be asked to express its position in terms of mental attitudes.

[Emphasis added.]

(See also *Rivtow Straits Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1977] 1 F.C. 735, page 736.)

[14] In the motion under review, there are still a considerable number of objections or questions to answer. As required by this Court, the parties produced a joint table that, in the Court's view, reflects the essential items of the grounds that favour or do not favour an answer to any question to be determined.

[15] Thus, the Court reproduced this table and titled it "Table Regarding the Plaintiff's Motion".

[16] After having reviewed the records for the parties' motions, having heard their counsel and keeping in mind the relevant case law principles, including those cited above and those raised by the parties, the Court noted in the Table Regarding the Plaintiff's Motion using a double pipe ("||") in

the margin regarding all or any of a party's reasoning for each question to be determined whether at the end that question must or must not be answered. The pipe in the margin is also found in one or the other of the last two columns of the Table Regarding the Plaintiff's Motion.

[17] Thus, the motion by Eurocopter is allowed in part as follows, and Bell Helicopter will therefore need to respond — on or before August 22, 2009 — to the ten undertakings to which Bell Helicopter is already committed to replying and to the questions listed in the Table Regarding the Plaintiff's Motion, except for the questions that were withdrawn and except for the following questions: 3 to 6, 9, 10, 22, 25 to 29, 37 to 39, 44, 46, 53, 56, 57, 61, 64 to 67, 70 to 78, 80, 81, 97, 155 to 157.

[18] Here, the Court finds that it did not have to make a determination in itself as to the second remedy set forth by Eurocopter in its notice of motion, given that the continuation of Mr. Gardner's examination is already scheduled and that its objective is, in principle, what is sought by this remedy.

[19] Moreover, as for the application from Bell Helicopter in its responding motion record such that the Court is avoiding ruling on certain questions, given the announcement of a motion to split, the Court decided not to accept this possibility and its possible success as part of determining questions to be answered here.

[20] Moreover, as for the application from Bell Helicopter in a letter dated August 14, 2009, and which seeks to restrict the number of people who are moreover present at Mr. Gardner's

examination, which took place from June 10 to 12, 2009, after having considered that letter and the oral submissions from the parties in that regard, the Court does not intend to reduce the number of such people with respect to Mr. Gardner's examination, which must continue on August 25 and 26, 2009, given that the Court is not satisfied that such a number of people prejudiced the proceedings on June 10 to 12, 2009, or that it will prejudice the proceedings that are to be held on August 25 and 26, 2009. In addition, this is not allowing third parties, as was the case in *S & M Brands, Inc. v. Paul*, 2003 F.C. 1035, to represent one of the parties to the litigation.

[21] Lastly, given that some of the question sought by Eurocopter did not have to be answered and since we cannot rule out that Bell Helicopter would possibly have done its research for the documents sought by Eurocopter, the Court finds that Bell Helicopter can answer, on or before August 22, 2009, to the questions ordered here, despite the affidavit from Mr. Gardner dated August 13, 2009, which indicates that a considerable number of hours would be required to find the information sought by the questions asked by Eurocopter.

[22] Given the length of the Table Regarding the Plaintiff's Motion, it is deemed to be part of the reasons for order and order but will be sent under separate cover by the clerk to the counsel for the parties by confidential email.

[23] As for the costs in Eurocopter's motion, after having reviewed the written and oral submissions from the parties on the topic, and after having considered rules 400(3)(a), (g) and (i), and 400(4), I am of the view that Eurocopter is to be granted its costs in its motion, in accordance with the middle of column III of Tariff B.

“Richard Morneau”

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-737-08

STYLE OF CAUSE: EUROCOPTER (simplified joint-stock company)
and
BELL HELICOPTER TEXTRON
CANADA LIMITED

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: August 17, 2009

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: August 18, 2009

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