Federal Court  Cour fédérale

Date: 20111006

Docket: T-436-05

Citation: 2011 FC 1140

BETWEEN:

VARCO CANADA LIMITED
VARCO, L.P.
WILDCAT SERVICES, L.P. and
WILDCAT SERVICES CANADA, ULC

Plaintiffs
(Defendants by Counterclaim)

and

PASON SYSTEMS CORP. and
PASON SYSTEMS INC.

Defendants
(Plaintiffs by Counterclaim)

REASONS FOR ORDER

PHELAN J.

I. INTRODUCTION

[1] These are the Reasons for the Order dismissing the Defendants' motion to reopen the trial a) to produce a letter dated April 03, 1992 from Brooks Doughtie and Eddy Nink [the Ensco Letter] and a letter authorized by Bobby Bowden [the Bowden Letter] regarding the use of the Wildcat; and

b) to obtain an order requiring Doughtie and Nink to give evidence in Texas while the Court is in that state to take evidence from Messrs. Bates and Bowden.

II. BACKGROUND

[2] Pursuant to the Defendants' first motion to reopen the trial, by order dated April 15, 2011, the Court reopened the trial as a result of discovering that Mr. Bates Sr. was alive and the "Bates File" had been located. A central feature of the Court's decision is the acknowledgement that Mr. Bowden's trial testimony was inaccurate with respect to material aspects of his patent prosecution and his dealings with Bates Sr. The Court chose, rather than dismissing Bowden's evidence, to reopen the trial to obtain the Bates File, Bates Sr.'s evidence and the revised recollection evidence of Bowden.

[3] The Defendants have again found additional documents for which they seek to reopen the trial. As indicated in earlier proceedings, the Bowden Letter can be put in evidence while Bowden is testifying in Texas. For purposes of this motion, no further order is required.

[4] The substance of the Defendants' motion is to adduce a letter dated "April 03, 1992" (the form of the date is an important aspect of this motion). The letter is addressed to Bowden and comes from Ensco Technology Horizontal Drilling under the names of Doughtie and Nink.

[5] The critical aspect of this letter is that it refers to using weight or pressure or both in horizontal drilling on or before April 03, 1992. This usage directly contradicts Bowden's testimony

and would call into further question his credibility. It could particularly affect the issue of Bowden's public disclosure more than one year before he filed for his patent.

[6] As with the first motion, this letter appears to have surfaced in unrelated litigation but it is not the first time the Defendants had an opportunity to see this letter.

III. ANALYSIS

[7] In the first reopening decision I laid out the basic principles for reopening a trial, as set forth in *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59, [2001] 2 SCR 983 (slightly modified where a decision has not yet been reached):

1. Would the evidence, if presented at trial, have changed the result?
2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[8] The applicant on a motion to reopen is required to meet both prongs of the legal test. I will address the due diligence element first.

A. *Due Diligence*

[9] The Defendants appear to blame everyone else for the failure to produce the Ensco Letter. However, the Letter was in the public domain (since approximately April 2001) and well prior to the trial of this action.

[10] As evidenced in the Defendants' motion record, Pason's former counsel Terry Leier (whose name and actions have been raised in other context in this action) instructed an agent to review certain files in the Houston U.S. District Court in October 2002 after the 2nd Amended Answer was filed. According to the Pacer Records (a court document recording system), in the files and attached as part of the 2nd Amended Answer were both the Bowden and Ensco Letters. Leier reported on the very file in the Houston Court but makes no mention of either letter.

[11] There has been no evidence filed, least of all from Mr. Leier or his agent, explaining the failure to produce these letters now said to be so important to this action. It was the Defendants' burden to explain this situation, to show that due diligence was exercised, but it did not.

[12] The Defendants suggest that in some way they were misled on their chain of inquiry about people who worked around the relevant rigs. They received an adverse ruling from the Prothonotary in respect of making inquiries and that ruling was not appealed.

[13] In the end, the Defendants had their hands at or near the Ensco Letter – they fumbled. The Defendants have not explained their error or why the 2nd Amended Answer was not examined or if examined, why the letters were not located or disclosed. As such, I find that the Defendants have not met the due diligence prong of the test to reopen.

[14] However, that does not end the matter. As Justice Lax said in *Degroote v Canadian Imperial Bank of Commerce*, [1998] OJ 1696, 71 OTC 252 at paragraph 11:

> … it is only appropriate to depart from the diligence requirement in cases where there is a real risk that justice cannot be achieved.

B. *Importance of Evidence*

[15] The Defendants argue that this letter written (they say) on April 3 fundamentally contradicts material portions of Bowden's evidence.

[16] The Plaintiffs have advanced the interesting and speculative theory that the letter has a typographical error in the date – that it is more likely to be April 30, 1992 than April 03, 1992 because the use of "03" is an uncommon way to write a date of the 3rd day of a month. If the Plaintiffs are correct or the letter was written after April 30, 1992, then the letter fits squarely within Bowden's evidence.

[17] The two proposed witnesses whose U.S. deposition evidence was available to this Court did not attest to the date of the letter. They recognize the signature and they can locate the event sequence only on the assumption that the letter is dated April 03, 1992. They have no independent recollection of the date of the letter.

[18] The letter is not a business record of one of the parties so one cannot presume either its date or the truth of its contents.

[19] The Defendants have produced no circumstantial evidence which would assist in confirming the date of the letter or even the date format of Ensco letters at that time. There is, for example, no evidence as to how Ensco typed in dates at or about April 1992.

[20] In the absence of the Defendants establishing the true date of the Ensco Letter (and the U.S. deposition evidence does not do so), and there being no evidence that the Defendants can do so at the reopened trial, I am not persuaded that there is a real risk that justice in this case cannot be achieved.

[21] I am not convinced that the evidence proposed to be introduced with all the frailties and uncertainties surrounding it would change or could have an influence on the result. To have an influence on the result the evidence must be such that it could likely change the result. The Ensco Letter and the evidence proposed from the two witnesses do not reach that benchmark.

IV. CONCLUSION

[22] For these reasons, the motion was dismissed with costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
October 6, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-436-05
STYLE OF CAUSE:	VARCO CANADA LIMITED VARCO, L.P. WILDCAT SERVICES, L.P. and WILDCAT SERVICES CANADA, ULC and PASON SYSTEMS CORP. and PASON SYSTEMS INC.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 28, 2011
REASONS FOR ORDER:	Phelan J.
DATED:	October 6, 2011

APPEARANCES:

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