Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110607

Docket: A-278-09

Citation: 2011 FCA 193

CORAM: **BLAIS C.J.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

HELI TECH SERVICES (CANADA) LTD. and CORPORACION LA CAMPANA DE LA VILLA S.A. and PHILIP JARMAN

Appellants

and

WEYERHAEUSER COMPANY LIMITED/ COMPAGNIE WEYERHAEUSER LIMITÉE DOING BUSINESS AS CASCADIA FOREST PRODUCTS and DOING BUSINESS AS ISLAND TIMBERLANDS and CASCADIA FOREST PRODUCTS LTD. and ISLAND TIMBERLANDS GP LTD. and TIMBERWEST FOREST CORP. and BRASCAN TIMBERLANDS MANAGEMENT GP INC. and 550777 B.C. LTD. OPERATING AS "R.E.M. CONTRACTING" and CANADIAN AIR-CRANE LIMITED and VIH LOGGING LTD. and INTERNATIONAL FOREST PRODUCTS LIMITED

Respondents

Heard at Vancouver, British Columbia, on June 6, 2011.

Judgment delivered at Vancouver, British Columbia, on June 7, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: BLAIS C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This appeal involves a patent infringement action commenced in the Federal Court by the filing of a statement of claim on January 11, 2006. The appellants (referred to collectively as "Heli Tech") are the plaintiffs in the action. They are appealing the order of Justice O'Reilly issued June 8, 2009, for reasons reported as *Heli-Tech Services (Canada) Ltd. v. Weyerhaeuser Co.*, 2009 FC

592. In that order, Justice O'Reilly reviewed *de novo*, and upheld, the order of Prothonotary Lafrenière dated November 21, 2008, which granted the motions of the respondents Brascan Timberlands Management GP Inc. ("Brascan Timberlands MGP") and Island Timberlands GP Ltd. ("Island Timberlands GP") to strike all allegations against them in the "Second Further Amended Statement of Claim" (the "SFA") without leave to amend, and to dismiss the action against them. For the reasons that follow, I would dismiss the appeal.

Preliminary observations

[2] The SFA has not been filed. It was submitted in the Federal Court in response to a direction of Prothonotary Lafrenière giving Heli Tech a "last chance to propose further amendments to their claim" (recorded entry for September 8, 2008 in Federal Court file T-56-06). The SFA was the subject of argument on the motions in the Federal Court that have resulted in this appeal. Accordingly, I have considered these appeals on the basis that the issues relate to the pleadings in the SFA only.

[3] The phrase "Island Timberlands" is used in the SFA to refer to the respondent Island Timberlands GP. At the same time, there are allegations in the SFA that the patent in issue was infringed by certain things done by another respondent, Weyerhaeuser Company Limited/ Compagnie Weyerhaeuser Limitée ("Weyerhaeuser"), while carrying on business as "Island Timberlands". I understand those allegations to be against Weyerhaeuser only. Therefore, they are not relevant to this appeal and I have ignored them.

The patent in issue

[4] The patent in issue, Canadian Patent No. 2,251,236, is entitled “Helicopter Single Stem Harvesting System”. A copy of the letters patent is included in the record of this appeal. It is intended to be appended to the SFA as Schedule A. In the pleadings, Heli Tech sometimes refers to this patent as the “Harvesting Patent”, and I will do the same in these reasons.

[5] The abstract of the Harvesting Patent reads as follows:

> A method of logging a tree includes the steps of cutting the tree part way through the trunk near the bottom with two cuts lying in generally the same plane to leave a connecting portion (holding wood) between the resulting two generally parallel cut edges, and driving support wedges or the like into both said cuts to stabilize the tree trunk. A helicopter above the tree is connected to a point near the top of the trunk. The helicopter is moved away from the tree, thereby breaking the connecting portion (holding wood) and allowing the upper portion of the tree to be carried away by the helicopter. The method utilizes a grapple connected to the helicopter by two cables, one connected to the helicopter below the pilot's seating position and another bellow [*sic*] the center of gravity.

[6] Paragraph 29 of the SFA alleges that the Harvesting Patent “relates to a new and useful method of preparing and harvesting a lot by helicopter, an apparatus for grasping and securing the log, and an apparatus comprising a helicopter with certain features.”

[7] There are 35 patent claims in the Harvesting Patent. Claims 1 to 16 and claims 27 to 35 are claims for methods of harvesting logs or preparing logs for harvesting. Each claimed method conforms generally to the description in the abstract but with variations. Claims 17 to 25 are claims

for a helicopter grapple, with claims 18 to 25 being dependent on claim 17. Claim 26 is a claim for a helicopter logging apparatus, including a helicopter with certain characteristics and attachments.

Relevant paragraphs of the SFA

[8] In February of 2006, Brascan Timberlands MGP and another respondent, Cascadia Forest Products Ltd., filed a notice of motion seeking, *inter alia*, an order striking all allegations against them and dismissing the action against them. A number of other motions by other respondents were filed at the same time. In an order dated March 1, 2006, Prothonotary Lafrenière, dealt with many of the motions. Among other things, he ordered that the action be case managed, granted Heli Tech leave to file an amended statement of claim, and set dates for the hearing of many of the motions. On March 26, 2006, Chief Justice Lutfy named Justice Hugessen and Prothonotary Lafrenière as the case managers.

[9] Heli Tech filed its amended statement of claim on March 2, 2006. It was before Prothonotary Lafrenière when he heard the remaining motions, along with a "Further Amended Statement of Claim" submitted by Heli Tech. The hearing of the remaining motions resulted in the order dated April 27, 2006 of Prothonotary Lafrenière which required certain amendments to be made to the Further Amended Statement of Claim.

[10] The Further Amended Statement of Claim included two paragraphs that are relevant to this appeal. They are quoted in the table below. In the left column are the relevant paragraphs as they

appear in the Further Amended Statement of Claim submitted by Heli Tech. In the right column are the same paragraphs, amended as required by Prothonotary Lafrenière's order of April 27, 2006:

Further Amended Statement of Claim as submitted by Heli Tech	**Further Amended Statement of Claim as amended by the April 27, 2006 order**
60. The Defendants and each of them, with the exception of the Defendant, VIG Logging Ltd., have induced infringement of method Claims #1-16 and #26-35 of the Harvesting Patent by inducing others to infringe the Harvesting Patent by using the methods of claims #1-16 and #26-35.	60. The Defendants and each of them, with the exception of the Defendant, VIG Logging Ltd., have induced infringement of method Claims #1-16 and #26-35 of the Harvesting Patent by ~~inducing others to infringe the Harvesting Patent by using the methods of claims #1-16 and #26-35.~~ doing the following:
61. The Defendants, Weyerhaeuser, Brascan [Timberlands Management GP Inc.], [Cascadia Forest Products Ltd.], and Island Timberlands [GP Ltd.] have induced other persons, including Select Air and Husby Forest Products ("Husby"), to employ the methods of the invention set out in paragraphs 31 and 34 herein by hiring them to harvest timber in this manner. The Defendants provided instruction and direction to these persons, including providing necessary holding wood tables, and were aware or acted recklessly knowing that Select Air and Husby would employ the methods of the invention, either themselves or through sub-contractors, and thereby infringe the Plaintiff's patent rights.	(a) The Defendants, Weyerhaeuser, Brascan [Timberlands Management GP Inc.], [Cascadia Forest Products Ltd.], and Island Timberlands [GP Ltd.] have induced ~~other persons, including~~ Select Air and Husby Forest Products ("Husby"), to employ the methods of the invention set out in paragraphs 31 and 34 herein by hiring them to harvest timber in this manner. The Defendants provided instruction and direction to these persons, including providing necessary holding wood tables, and were aware or acted recklessly knowing that Select Air and Husby would employ the methods of the invention, either themselves or through sub-contractors, and thereby infringe the Plaintiff's patent rights.

[11] The April 27, 2006 order of Prothonotary Lafrenière also required Heli Tech to provide security for costs, and adjourned the motions of Brascan Timberlands MGP and Cascadia Forest Products Ltd. Heli Tech's appeal of the order for security for costs was dismissed by Justice Campbell (2006 FC 1169).

[12] Heli Tech complied with the order for security for costs, and Prothonotary Lafrenière scheduled the motions of Brascan Timberlands MGP and Cascadia Forest Products Ltd. for hearing. By that time, the parties had agreed that Island Timberlands GP would replace Cascadia Forest Products Ltd. as a moving party. For the hearing of the adjourned motions, Heli Tech submitted the SFA, which as explained above has been treated as the subject of the motions to strike.

[13] Of the 70 paragraphs in the SFA, nine paragraphs refer directly or indirectly to Brascan Timberlands MGP or Island Timberlands GP. Of those nine paragraphs, three are allegations as to the corporate status and nature of the business of Brascan Timberlands MGP and Island Timberlands GP, and the relationships between them (paragraphs 7, 9 and 14).

[14] The other six paragraphs are the true targets of the motions of Brascan Timberlands MGP and Cascadia Forest Products Ltd. Five of the six paragraphs are intended to allege direct infringement by Brascan Timberlands MGP and Island Timberlands GP (paragraphs 53, 57.1, 57.2, 58 and 59), and one is intended to allege that Brascan Timberlands MGP has induced infringement (subparagraph 60(e)).

[15] Paragraph 53 of the SFA reads as follows:

> 53. The Defendant Brascan [Timberlands Management GP Inc.], in the Elsie Lake area of Vancouver Island, has used the helicopter single stem harvesting system in its logging of timber since at least as early as 2005, with the Defendants Cascadia [Forest Products Ltd.] and Island Timberlands [GP Ltd.], which is the method covered by one or more of the claims of the Harvesting Patent.

[16] Paragraphs 57.1 and 57.2 of the SFA contain allegations against “the Defendants”, which I infer is intended to be read as allegations against each of the respondents to this appeal, including Brascan Timberlands MGP and Island Timberlands GP. Those paragraphs read as follows:

> 57.1. The Defendants used the helicopter single stem harvesting system covered by the Harvesting Patent by employing a method for preparing and harvesting logs by means of a helicopter equipped with a suspended grapple, removing trees from the forest by lifting them off of their stumps rather than harvesting them after they have been felled. Under the method employed by the Defendants, a standing tree is topped, the branches removed, and the trunk cut near ground level on at least two sides, leaving holding wood connecting the log to the stump to stabilize it. When the helicopter is above the log and the grapple is beside the top of the log, the grapple is engaged to secure the log and a generally horizontally directed force is applied to the top of the log so as to rupture the holding wood and flying the helicopter with the suspended log to a selected collection area.
>
> 57.2. Further particulars of the use by the Defendants of the standing stem harvesting system covered by the Harvesting Patent include:
>
> > (a) In relation to the first aspect of the invention, the Defendants employed a method of harvesting a log using an airborne vehicle equipped with a suspended grapple comprising topping and disbranching the tree, cutting the tree near ground level on at least two sides of the tree trunk leaving holding wood connecting the log to the stump, stabilizing the trunk with select described methods, moving the airborne vehicle to a position above the log with the grapple beside the top of the log, applying a generally horizontally directed force to the top of the log to rupture the holding wood, flying the airborne vehicle with the suspended log to a collection area, and releasing the log at that collection area.
> >
> > (b) In relation to the second aspect of the invention, the Defendants used a tree harvesting grapple for helicopters comprising: a support member having a top and two sides, a wing connected to each side of the support

> member and extending outwardly therefrom forming a tree receiving recess between the wings and the support member, and a grapple pivotally connected to each wing with the arms being movable from an open position to a closed position extending across the recess to retain trees in the grapple.
>
> (c) In relation to the fourth aspect of the invention, the Defendants employed a method of preparing a tree for standing-stem harvesting directly from the stump comprising: topping the tree, cutting through the trunk to make a pair of horizontal saw cuts parallel to one another and separated by holding wood, and driving in support wedges to stabilize the trunk.

[17] Paragraph 58 of the SFA alleges that the "foregoing activities of the Defendants" have been without the license, permission or consent of Heli Tech. Paragraph 59 alleges that "the use by the Defendants of the helicopter single stem harvesting system" is an infringement of claims 1 to 35 of the Harvesting Patent. I infer that these two paragraphs are intended to include, *inter alia*, the alleged activities of Brascan Timberlands MGP in paragraph 53, as well as all alleged activities of all of the respondents, including Brascan Timberlands MGP and Island Timberlands GP, as described in paragraphs 57.1 and 57.2.

[18] The opening words of paragraph 60 of the SFA allege that the respondents except VIH Logging Ltd. have "induced infringement of method claims #1-16 and #26-35 of the Harvesting Patent [*sic*] doing the following". Those opening words are followed by subparagraphs 60(a) to (e), each alleging that a specific respondent has induced infringement. Brascan Timberlands MGP is not mentioned in any of the subparagraphs, but Island Timberlands GP is mentioned in subparagraph 60(e), which reads as follows.

> 60 (e). The Defendant, Island Timberland[s GP Ltd.], induced an unknown contractor to employ the methods of the inventor as set out in paragraphs 31, 32, 34 and 57.1, by hiring them to harvest timber in a manner, or acting recklessly knowing that they would employ the methods of the inventor, that they would infringe on the Plaintiffs' patent rights.

Paragraphs 31, 32 and 34 of the SFA, as referred to in subparagraph 60(e) of the SFA, describe aspects of the patented invention as described in the disclosure. Paragraph 57.1 is quoted above.

[19] Prothonotary Lafrenière heard the motions of Brascan Timberlands MGP and Island Timberlands GP on November 13, 2008, and on that same date made an order reflecting the following conclusions:

1. Reading the SFA as a whole and as generously as possible, the allegations in the SFA do not disclose a reasonable cause of action against Brascan Timberlands MGP and should be struck.

2. The allegations against Island Timberlands GP as stated in the SFA, taking into consideration the evidence submitted by Heli Tech in response to the motion, do not provide a factual basis for a claim and should be struck.

3. Heli Tech should be denied leave to amend, principally for two reasons. First, Heli Tech's own submissions demonstrate that the allegations of infringement and

> inducement are speculative, and that Heli Tech is simply hoping that evidence will be obtained through discovery to "buttress unfounded allegations or cure deficiencies in the pleadings". Second, Heli Tech has been aware of the objections to the allegations for over two years, and has had ample opportunity to amend them to allege material facts but has failed to do so.

[20] This order was appealed to the Federal Court. The appeal was heard by Justice O'Reilly. He considered the matter *de novo*, as he was required to do because the issues put an end to Heli Tech's claims against Island Timberlands GP and Brascan Timberlands MGP. He reached the same conclusions as Prothonotary Lafrenière, substantially for the same reasons, and dismissed the appeal. Heli Tech now appeals to this Court.

Issues on appeal

[21] Heli Tech raises three issues on appeal:

1. whether the SFA discloses no reasonable cause of action against Brascan Timberlands MGP;

2. whether the SFA fails to allege a factual basis for a claim against Island Timberlands GP; and

3. whether Heli Tech should have been granted leave to amend the statement of claim in so far as it relates to the claims against Brascan Timberlands MGP and Island Timberlands GP.

[22] Two groups of respondents appeared on the appeal. One group was comprised of Island Timberlands GP and Brascan Timberlands MGP, the parties whose motion was the subject of the order under appeal. The second group was comprised of the respondents Cascadia Forest Products Ltd., International Forest Products Limited and Timberwest Forest Corp. who have an interest in the issue of the sufficiency of the pleadings relating to inducement to infringe. Their submissions added nothing substantive to the arguments on appeal.

[23] After carefully considering the written and oral submissions of Heli Tech at the hearing, the panel was unable to detect any error of law, or any other error warranting the intervention of this Court, in the conclusion of Justice O'Reilly that the SFA is fatally deficient in so far as it asserts claims against Brascan Timberlands MGP and Island Timberlands GP. The respondents appearing on the appeal were asked for oral submissions only on the third ground of appeal.

Whether Justice O'Reilly should have granted Heli Tech leave to amend

[24] An order granting or denying leave to amend pleadings is a discretionary decision that must stand in the absence of an error of law or principle, or a failure to exercise the discretion judicially in the sense that there has been a failure to properly consider a relevant factor, or that an irrelevant factor has been taken into consideration. This is well explained by Chief Justice Richard, speaking

for this Court in *Elders Grain Co. v. Ralph Misener (The)*, [2005] 3 F.C.R. 367 (F.C.A.), at paragraph 13:

> An appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial judge. However, if the decision was based on an error of law or if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations or that the trial judge considered irrelevant factors or failed to consider relevant factors, then an appellate court is entitled to exercise its own discretion: *R. v. Carosella*, [1997] 1 S.C.R. 80, at paragraph 49. See also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paragraph 39; Reza v. Canada, [1994] 2 S.C.R. 394, at pages 404-405; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 76-77.

[25] When a plaintiff seeks leave to amend deficient pleadings, it is relevant for the motions judge to consider all of the relevant circumstances, which may include (a) the history of the pleadings in issue, particularly with regard to past amendments (or past attempts to amend) those pleadings, (b) any formal particulars provided by the party whose pleadings are challenged, and (c) any other evidence submitted by that party to establish that the pleadings are capable of being amended to cure the deficiency.

[26] The record in this case includes a lengthy pleadings history, as well as a considerable body of evidence presented by Heli Tech as a basis upon which the deficiencies in the SFA could be cured. It is also significant that the SFA was intended to represent Heli Tech's "last chance" to produce sufficient allegations against Brascan Timberlands MGP and Island Timberlands GP.

[27] As I understand the reasons of Justice O'Reilly (and the reasons of Prothonotary Lafrenière whose decision he upheld), all of the evidence offered by Heli Tech to justify its request for leave to amend the SFA was taken into consideration. Heli Tech submits that Justice O'Reilly's reasons contain no analysis of the evidence. That is true, but in my view a detailed analysis was not required. The reasons expressed by Justice O'Reilly, considered in light of the record before him, explain his conclusions well enough.

[28] Heli Tech argues that the evidence it submitted was capable of establishing that the SFA could be amended to clarify that the alleged infringement by Brascan Timberlands MGP and Island Timberlands GP consists of harvesting logs using the patented methods, and also to clarify that the allegation of inducement by Island Timberlands GP is based on the presumed existence of contracts under which Island Timberlands GP directed or required others to harvest logs using the patented methods.

[29] This argument of Heli Tech fails to address the deficiencies in the SFA identified by Justice O'Reilly, and by Prothonotary Lafrenière. As I understand their decisions, the problem is not that Brascan Timberlands MGP and Island Timberlands GP have not been told clearly enough that Heli Tech accuses them of using the patent methods to harvest logs, and accuses Island Timberlands GP of inducing infringement by hiring others to use the patented methods harvest logs. Rather, the problem is that the allegations in the SFA relating to Brascan Timberlands MGP and Island Timberlands GP purport to describe log harvesting methods used by them or their contractors, but the descriptions merely quote or paraphrase key parts of the patent disclosure and claims, leaving

only speculation and inferences with no factual foundation. Further, the clarifying evidence offered by Heli Tech does not link the alleged wrongful acts to Brascan Timberlands MGP or Island Timberlands GP.

[30] In my view, it was reasonably open to Justice O'Reilly to conclude, on the basis of the record before him, that (a) the allegations in the SFA against Brascan Timberlands MGP and Island Timberlands GP are not based on any evidence or knowledge of Heli Tech as to the log harvesting methods employed by or for the benefit of Brascan Timberlands MGP or Island Timberlands GP; (b) in pleading as it did, Heli Tech hoped to fill in the gaps in its knowledge of the log harvesting methods of Brascan Timberlands MGP and Island Timberlands GP through discovery; and (c) the evidence submitted by Heli Tech in relation to the motions is not capable of curing the deficiencies in the SFA. In my view, in the face of those conclusions and the pleadings history, Justice O'Reilly exercised his discretion judicially when he refused to give Heli Tech leave to amend the SFA.

Conclusion

[31] I would dismiss the appeal. The respondents have asked for the matter of costs to be deferred pending further written submissions. In the event that the parties cannot agree on the costs of this appeal, the judgment will fix deadlines for written submissions on costs.

"K. Sharlow"

J.A.

"I agree
Pierre Blais C.J."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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