

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130924

Docket: A-328-12

Citation: 2013 FCA 220

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

**BELL HELICOPTER TEXTRON
CANADA LIMITÉE**

Appellant

and

**EUROCOPTER
société par actions simplifiée**

Respondent

Heard at Montréal, Quebec, on May 27 and 28, 2013.

Judgment delivered at Ottawa, Ontario, on September 24, 2013.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**NOËL J.A.
TRUDEL J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130924

Docket: A-328-12

Citation: 2013 FCA 220

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

**BELL HELICOPTER TEXTRON
CANADA LIMITÉE**

Appellant

and

**EUROCOPTER
société par actions simplifiée**

Respondent

REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] Bell Helicopter Textron Canada Limitée (“Bell Helicopter”) and Eurocopter were involved in patent infringement litigation which resulted in a judgment dated January 30, 2012, bearing citation number 2012 FC 113 (the “Patent Infringement Judgment”), in which Martineau J. of the Federal Court (the “Judge”):

(a) declared that Bell Helicopter had infringed claim 15 of Canadian Patent No. 2,207,787 (the ‘787 Patent) owned by Eurocopter by using a helicopter landing gear known as the “Legacy landing gear”;

(b) declared that Bell Helicopter had not infringed claim 15 of the ‘787 Patent by using and selling a helicopter landing gear known as the “Production landing gear”;

(c) enjoined Bell Helicopter from manufacturing, using or selling the Legacy landing gear or any similar landing gear until the '787 Patent expires, or is otherwise held to be invalid;

(d) declared that Eurocopter was entitled to all damages, including punitive damages, as a result of its infringement of claim 15 of the '787 Patent, the quantum of which is to be determined in subsequent hearings; and

(e) invalidated all the other claims of the '787 Patent.

[2] Bell Helicopter and Eurocopter respectively appealed and cross-appealed the Patent Infringement Judgment. Both the appeal and the cross-appeal were dismissed by this Court for reasons issued concurrently with these reasons.

[3] Subsequent to the Patent Infringement Judgment, the Judge issued another judgment dated July 3, 2012 and cited as 2012 FC 842 concerning the issue of costs (the "Costs Judgment"). Under the Costs Judgment, Bell Helicopter was ordered to pay fifty-percent (50%) of Eurocopter's costs (calculated at the upper end of column IV of Tariff B) with respect to reasonable fees and expenses for one senior counsel, two junior counsel, expert witnesses, one in-house counsel, one technical representative, and other taxable pre-trial, trial and post-trial costs and disbursements related to the litigation leading to the Patent Infringement Judgment.

[4] These reasons concern Bell Helicopter's appeal from that Costs Judgment.

[5] The Judge found that Eurocopter had been overall the most successful party in the Patent Infringement Judgment, and was therefore entitled to costs. However, in light of Bell Helicopter's partial success in defending its Production landing gear, he reduced these costs by 50%. He also

took into account that Bell Helicopter had unnecessarily lengthened the proceeding by failing to admit facts that should have been admitted.

[6] Bell Helicopter submits that success was mixed in the Patent Infringement Judgment, and that each party should consequently bear its own costs. It also disputes that it unnecessarily lengthened the proceedings. In any event, Bell Helicopter alleges that the Judge erred by awarding costs with respect to Eurocopter's technical representative, and that Eurocopter failed to support its costs submissions with an affidavit.

[7] A trial judge enjoys considerable discretion in fashioning a costs award, and that judge's decision on costs will generally be insulated from appellate review: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 at paras. 47 and 49; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 77.

[8] An appellate court should thus only intervene where the costs award is based on an error in principle or is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at para. 27; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 43; *Apotex Inc. v. Merck & Co.*, 2006 FCA 324, 55 C.P.R. (4th) 81 at paras. 3 and 4; *Buhlman v. Buckley*, 2012 FCA 9, 346 D.L.R. (4th) 251 at para. 8.

[9] In this case, the Judge found that Eurocopter was overall the most successful party. I agree. The Judge found that Bell Helicopter's Legacy landing gear infringed the '787 Patent, and, as a

result of that infringement he consequently issued an injunction prohibiting Bell Helicopter from using or selling that landing gear, ordered the destruction of those landing gears which had been manufactured by Bell Helicopter, and further declared that Eurocopter was entitled to damages, including punitive damages.

[10] Though the Judge invalidated the claims of the '787 Patent relating to the embodiment of the invention with the front cross piece inclined backwards, those claims were of little or no concern to the infringement action initiated by Eurocopter. The invalidation of those claims was a side issue which had little practical effect on the overall litigation. Moreover, though Bell Helicopter was successful with respect to its Production landing gear, the Judge took that factor into account by reducing Eurocopter's costs award by 50%.

[11] The Judge also found that Bell Helicopter had "unnecessarily lengthened the proceeding by failing to admit facts that should have been admitted" (Costs Reasons at para. 49) giving rise to a consideration of the factors set out under paragraphs 400(3)(i) and (j) of the *Federal Courts Rules*, SOR/98-106. The Judge found that Bell Helicopter's own expert witness, Dr. Hodges, admitted towards the end of the trial that the Legacy landing gear embodied all the essential elements of the '787 Patent. This was an admission which, in the Judge's view, should have been made at the outset of the trial.

[12] Bell Helicopter submits that though it never admitted that the Legacy landing gear embodied the essential elements of the '787 Patent, it nevertheless never denied that fact: Bell Helicopter's

Costs Memorandum at para. 58. This was clearly not what the Judge understood from the dynamics of the litigation before him. At best, Bell Helicopter may have maintained an ambiguous position with respect to the Legacy landing gear. The Judge's assessment of the dynamics of the trial was that by maintaining this ambiguity, Bell Helicopter unduly complicated and prolonged the litigation. That was an assessment which the Judge was entitled to make and which was supported by the evidence.

[13] Finally, Bell Helicopter submits that the Judge erred by awarding costs with respect to Eurocopter's technical representative Mr. Prud'homme Lacroix. Though Mr. Prud'homme Lacroix did not testify as an expert, the Judge found his testimony to be particularly relevant. It should be noted that Mr. Prud'homme Lacroix is one of the co-inventors of the landing gear disclosed in the '787 Patent, and that his testimony provided the Judge with important technical information concerning the invention. Moreover, he was the *de facto* representative and technical advisor of Eurocopter throughout the proceedings in the Federal Court. It was well within the Judge's discretion to award costs for Mr. Prud'homme Lacroix, particularly since the Judge was in a position to assess his contribution throughout the long trial.

[14] As for Bell Helicopter's submission that affidavit evidence should have been presented by Eurocopter in support of its motion for directions on costs, I will simply note that arguments for directions on costs may be addressed without affidavit evidence insofar as they are supported by evidence adduced at the trial or the Judge's knowledge of the trial: *Wellcome Foundation Ltd. v. Apotex Inc.* (2001), 12 C.P.R. (4th) 25 (FCTD) at para. 11(3); *Eli Lilly v. Apotex Inc.*, 2011 FC 1143

at para. 8. In this case, Bell Helicopter has failed to convince me that any of the Judge's directions on costs were not so supported.

[15] When viewed in the overall context of the proceedings, the Judge's directions on costs were based on correct principles. These directions were certainly not "plainly wrong".

[16] I would therefore dismiss this appeal, with costs in favour of Eurocopter.

"Robert M. Mainville"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-328-12

**AN APPEAL FROM A JUDGMENT THE HONOURABLE JUSTICE MARTINEAU
DATED JULY 3, 2012, NO. 2012 FC 842**

STYLE OF CAUSE: Bell Helicopter Textron Canada
Limitée v. Eurocopter, société par
actions simplifiée

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 27 and 28, 2013

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

DATED: September 24, 2013

APPEARANCES:

Judith Robinson FOR THE APPELLANT
Joanne Chriqui

Marek Nitoslawski FOR THE RESPONDENT
Julie Desrosiers

SOLICITORS OF RECORD:

Norton Rose Canada LLP FOR THE APPELLANT
Montréal, Québec

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l. FOR THE RESPONDENT
Montréal, Québec