

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131122

Docket: A-74-12

Citation: 2013 FCA 261

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

A-74-12

BETWEEN:

**BELL HELICOPTER TEXTRON
CANADA LIMITÉE**

Appellant

and

**EUROCOPTER,
société par actions simplifiée**

Respondent

Dealt with in writing without appearances of parties.

Order delivered at Ottawa, Ontario, on November 22, 2013.

**REASONS FOR ORDER BY:
CONCURRED IN BY:**

**MAINVILLE J.A.
NOËL J.A.
TRUDEL J.A.**

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REASONS FOR ORDER

MAINVILLE J.A.

[1] Following a long trial, Martineau J. of the Federal Court issued on January 30, 2012 reasons for judgment and judgment (bearing citation number 2012 FC 113) in a patent infringement and validity case concerning Eurocopter's Canadian Patent No. 2,207,787 (the '787 Patent) by which he:

(a) declared that Bell Helicopter Textron Canada Limitée (“Bell Helicopter”) had infringed claim 15 of the ‘787 Patent 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 to be determined in subsequent hearings; and

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

[2] Bell Helicopter appealed this judgment to this Court, and Eurocopter cross-appealed, notably with respect to the invalidation of the patent claims. This Court dismissed both the appeal and the cross-appeal in a judgment dated September 24, 2013 for the reasons set out in *Bell Helicopter Textron Canada Limitée v. Eurocopter, société par actions simplifiée*, 2013 FCA 219.

[3] Eurocopter has now submitted a motion in writing pursuant to Rule 397 of the *Federal Courts Rules*, SOR/98-106 requesting this Court to reconsider its reasons. As a result of such a reconsideration, Eurocopter asks that paragraphs 157 and 158 of this Court’s reasons be modified in such a way as to recognize that the specification of the ‘787 Patent provides that the embodiment of the invention set out in claim 16 (which was invalidated) has the advantage of improving ground resonance behaviour in helicopters. In its reply to Bell Helicopter’s motion material, Eurocopter adds in vague terms that these corrections to paragraphs 157 and 158 of the Court’s reasons should lead this Court to also reconsider its judgment.

[4] Presumably, the reconsideration sought by Eurocopter would result in this Court (a) finding that the '787 Patent holds a sound line of reasoning with respect to the utility of the embodiment of the invention with a front cross-piece offset backwards, and (b) modifying accordingly its judgment by allowing Eurocopter's cross-appeal with respect to claim 16 and the other patent claims which have been invalidated.

[5] For the reasons further set out below, I would dismiss this motion.

[6] Claim 15 of the '787 Patent concerns an embodiment of the helicopter landing gear at issue with an integrated front cross piece which is offset forwards with respect to the plane of contact of the longitudinal support surfaces of the skids on the ground (offset forwards embodiment), while claim 16 of that patent concerns an embodiment of the landing gear with an integrated front cross piece which is offset backwards with respect to that plane of contact (offset backwards embodiment).

[7] Martineau J. found that the specification of the '787 Patent contained the following with respect to the offset forwards embodiment set out in claim 15:

[351] It is taught in the '787 Patent that the ground resonance behaviour is characterized in particular by the landing gear's roll stiffness. In this regard, the inventors mention in the specification that the variant according to which the support points of the front cross piece are offset longitudinally towards the front of the aircraft (claim 15), such as the embodiment shown at Figure 1, has the advantage of allowing the roll operation of the assembly to cause the front piece to work both in torsion and in bending rather than in pure bending.

[352] Thus, in reading the specification, the POSITA would understand that in making a landing gear similar to Figure 1 [the offset forwards embodiment], the ground resonance behaviour of the helicopter (notably in the roll mode) can be improved. Although reduction in roll stiffness is not specifically promised, a better frequency adaptation, in relation to the phenomenon known as "ground resonance", is certainly an important promise of the '787

Patent, together with other disclosed advantages of the invention. At this point, one must ask itself whether there are tests or data to support such a promise.

[Emphasis added]

[8] Martineau J. also found that the inventors had successfully tested the offset forwards embodiment described in claim 15 of the '787 Patent prior to the Canadian filing date, and that they had consequently demonstrated its utility: Martineau J.'s Reasons at paras. 353 to 360.

[9] However, Martineau J. invalidated claim 16 of the patent on the ground that - contrary to claim 15 concerning the offset forwards embodiment - there was a lack of demonstrated utility or sound prediction with respect to the embodiment with the integrated front piece offset backwards: Martineau J. Reasons at para. 360.

[10] Martineau J. came to that conclusion principally on the followings grounds:

[362] According to the specification, the variant in Figure 11e [the offset backwards embodiment set out in claim 16] "procures the specific advantages" mentioned elsewhere in the specification. Thus, the POSITA would understand that in choosing to implement this particular embodiment of the Moustache landing gear, it is specifically promised by the inventors that this will also allow a manufacturer of helicopters to reduce costs and to mix flexibility with ground resonance safety.

[363] Apart from the general assertion that the embodiment shown in Figure 11e "procures the specific advantages" mentioned elsewhere in the specification, there is no particular demonstration in the patent, nor testimonial or documentary evidence that, at the Canadian filing date, the inventors had made and tested a Moustache landing gear whose front cross piece was offset backwards.

[364] Moreover, Dr. Wood was very reluctant at trial to conclude that the promised utility of an embodiment whereby the integrated front cross piece is offset backwards had been demonstrated at the Canadian filing date. No calculations or tests were performed prior to the filing date to determine the effect of this configuration on ground resonance.

[365] At the Canadian filing date, the inventors had no evidence that an inclination backwards had any ground resonance advantage. Therefore, the promised advantage with respect to an embodiment included in claim 16 of the '787 Patent is speculative and this Court accepts Bell's experts assertion that there was no factual basis for the prediction.

[366] Furthermore, even if Eurocopter's experts suggested that this configuration would also yield a flexible landing gear, the Court accepts Dr. Hodges's testimony that a POSITA would think that such a landing gear "might be more vulnerable to buckling on impact than the forward slant, which would cause the landing gear to suffer a possible mode of failure".

[367] Even if it is accepted that the results presented at pages 9-14 and Figures 12 and 13 of the '787 Patent demonstrate the flexion of the transition zone of a landing gear with a front cross piece offset forwards (claim 15), the fact remains that there was no demonstration for a landing gear with a front cross piece offset backwards (claim 16).

[368] Absent any evidence of actual testing by the inventors, perhaps the inventors had data upon which they could have predicted that the variant in Figure 11e (claim 16) "procures the specific advantages" mentioned elsewhere in the specification. If any such data existed at the time, it has not been produced in this trial. Monopoly cannot be founded on speculation or guessing. The Court accepts at least on this point Bell's experts' opinion that available data did not support a sound prediction with respect to an embodiment included in claim 16 (offset backwards).

[369] After careful consideration of the factual and expert evidence, the Court finds on a balance of probabilities that contrary to the principle clearly articulated by Justice Layden-Stevenson in *Eli Lilly v Novopharm*, above, at para 60, the inventors had no information upon which to base the promise they expressly made in respect of the variant in Figure 11e. The utility of a helicopter landing gear according to claim 16 had not been demonstrated at the Canadian filing date, namely, June 5, 1997. Moreover, relevant data available prior to June 5, 1997, did not permit the inventors to soundly predict the behaviour of a Moustache landing gear with a front cross piece which is offset backwards and in any event, there is no line of reasoning described in the '787 Patent in that respect.

[Emphasis added]

[11] Eurocopter acknowledged that it had never tested the embodiment of the invention with a front cross piece offset backwards. It nevertheless argued in its cross-appeal that it had demonstrated the utility of the offset backwards embodiment through mathematical calculations or, alternatively, through sound prediction. It specifically submitted (at para. 147 of its Memorandum of fact and law relating to its cross-appeal) that Martineau J. had erred in finding that no sound line

of reasoning had been described in the '787 Patent with respect to the offset backwards embodiment. At footnote 251 of its Memorandum in cross-appeal, it specifically referred for this purpose to page 3 line 20 to page 4 line 3 of the '787 Patent, which reads as follows in the original French version:

La variante selon laquelle les points d'appui au sol de la traverse avant sont déportés longitudinalement vers l'avant de l'appareil par rapport aux points de fixation sur la structure de celui-ci présente l'avantage de permettre que le fonctionnement en roulis de l'ensemble fasse travailler la traverse avant à la fois en torsion et en flexion au lieu d'en flexion pure. Il en résulte une raideur en roulis abaissée, ce qui améliore le comportement de l'hélicoptère en résonance sol dans le mode de roulis, ce qui évite tout phénomène divergent risquant de causer un accident.

[12] This Court dismissed these submissions of Eurocopter, and rather confirmed the findings and conclusions of Martineau J. concerning the lack of demonstrated utility and of sound prediction with respect to the offset backwards embodiment. In particular, this Court stated the following at paragraphs 157 to 162 of its Reasons:

[157] However, the specification also sets out that it is the embodiment of the invention in which the front cross piece is offset forwards (as provided in claim 15) which "has the advantage of allowing the roll operation of the assembly to cause the front piece to work both in torsion and in bending rather than in pure bending": Reasons at para. 351.

[158] As noted by the Judge (at para. 352 of the Reasons) a skilled person reading the specification would understand from this that the landing gear under the embodiment of a front cross piece forward inclination would improve the ground resonance behavior of the helicopter, notably in the roll mode. However, by reading the specification, a skilled person would not readily come to the same conclusion with respect to the embodiment of a front cross piece backward inclination, since there is no demonstration or explanation to this effect in the specification (Reasons at para. 363).

[159] In this case, Eurocopter did not provide evidence that it had either demonstrated or soundly predicted the utility of the backward inclination embodiment prior to the pertinent date. Eurocopter did not do so in the patent specification and it failed to do so at trial. In its Memorandum, it points to the testimony of Mr. Pierre Prud'homme Lacroix, but fails to identify any specific aspect of this testimony which provides cogent evidence of any sound prediction based on the backward inclination embodiment.

[160] Eurocopter however submits that it was not required to submit any evidence of utility or of sound prediction with respect to the backward inclination embodiment since Bell Helicopter had the burden of demonstrating invalidity on this ground.

[161] I agree that Bell Helicopter was required to bring evidence that the inventors had not demonstrated or soundly predicted the promised utility of the embodiment of the invention with the front cross piece offset backwards. Such evidence was in fact submitted by Bell Helicopter and obviously accepted by the Judge: Expert Statement of Dr. Hodges at paras. 132 and 171 (AB Vol. 11 Tab 149 at pp. 2876 and 2886); Expert Statement of Dr. Gandhi at para. 124 (AB Vol. 12 Tab 162 at p. 3126). As noted by Dr. Hodges, there were no documents supplied by Eurocopter with respect to the embodiment with the front cross piece offset backwards, and that embodiment appeared more susceptible to buckling on impact.

[162] It was incumbent on Eurocopter to submit evidence to rebut Bell Helicopter's experts. In light of the lack of any evidence of testing or of any calculations supporting a sound line of reasoning for this embodiment at the time the '787 Patent was applied for, Eurocopter's submissions must fail.

[13] Eurocopter now says that paragraphs 157 and 158 of the Court's reasons are the result of inadvertence or of a clerical error. To support its motion for reconsideration, it submits again the very same argument as the one it originally made at paragraph 147 of its Memorandum of fact and law relating to its cross-appeal, *i.e.* that page 3 line 20 to page 4 line 3 of the '787 Patent (reproduced above) set out a sound line of reasoning which demonstrates the utility of the offset backwards embodiment.

[14] There are three principal reasons why Eurocopter's motion should be dismissed.

[15] First, Eurocopter's motion is a rather crude attempt to argue anew a ground of appeal which it had been originally raised in its Memorandum of fact and law with respect to its cross-appeal. As aptly noted by Hugessen J.A. in *Kibale v. Canada (Transport Canada)* (F.C.A.) (1988), 103 N.R. 387, the rule allowing for reconsideration "is not a means whereby the losing party may validate or

complete his plea.” Likewise, that rule is not a means by which a litigant may argue an issue a second time in the hope that the Court will change its mind.

[16] Second, Martineau J.’s findings set out above, and which were fully confirmed by this Court, were based on an interpretation of the patent specification as a whole, including particularly the drawings reproduced in the patent. Moreover, these findings were made with due regard to the abundant expert evidence which was before Martineau J. as to how a person skilled in the art or science to which the patent pertains would understand both the patent specification and the patent claims.

[17] Martineau J. clearly acknowledged that the specification of the ‘787 Patent spelled out that the offset backwards embodiment would produce the advantages claimed by the inventors, including improved ground resonance behaviour. However, Martineau J. also concluded that simply promising the advantages was not the equivalent of providing a sound line of reasoning. He also found that no cogent line of reasoning with respect to the offset backward embodiment had been set out in the patent. This Court agreed with him. As a result, the submission made by Eurocopter at paragraph 147 of its Memorandum of fact and law relating to the cross-appeal was clearly rejected by this Court.

[18] Third, even if Martineau J. had erred with respect to this matter, and even if the specification of the ‘787 Patent did set out some form of a line of reasoning with respect to the offset backwards embodiment, this would not lead to the result sought by Eurocopter. Indeed, Bell Helicopter had brought evidence that the inventors had not demonstrated or soundly predicted the promised utility

of the embodiment of the invention with the front cross piece offset backwards. It would therefore have still been incumbent on Eurocopter to rebut that evidence through its own evidence of testing or through calculations supporting a sound line of reasoning for that embodiment at the time the '787 Patent was applied for. Eurocopter failed to do so. As a result, its cross-appeal would still fail.

[19] As a final procedural issue, Bell Helicopter challenges the appropriateness of the affidavit submitted by Julie Desrosiers (an attorney working for the law firm representing Eurocopter) in support of Eurocopter's motion. This affidavit does not simply seek to add to the record certain uncontested facts or documents. Rather, it seeks to set out a particular interpretation of the '787 Patent by someone who is clearly not a person skilled in the art or science to which the patent pertains. The affidavit even includes a new drawing never before produced in the record. It is also argumentative and largely irrelevant. The affidavit is improper, and it should be disregarded and struck from the record. As noted in *Merk & Co. v. Apotex Inc.*, 2003 FCA 488, 30 C.P.R. (4th) 40 at para. 48, this Court does not look favorably to affidavits deposed by counsel when the affidavits refer to contentious issues of substance.

[20] I would consequently strike from the record the affidavit of Julie Desrosiers sworn October 4th, 2013. I would also dismiss Eurocopter's motion with costs.

"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-74-12

STYLE OF CAUSE: BELL HELICOPTER TEXTRON
CANADA LIMITÉE v.
EUROCOPTER, société par actions
simplifiée

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: MAINVILLE J.A.

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

DATED: November 22, 2013

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