

Federal Court



Cour fédérale

Date: 20160902

Docket: T-775-16

Citation: 2016 FC 1000

Ottawa, Ontario, September 2, 2016

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

ELBIT SYSTEMS ELECTRO-OPTICS ELOP LTD.

Plaintiff

and

SELEX ES LTD.

Defendant

ORDER AND REASONS

[1] In the context of this infringement action, the Defendant brings a motion for an order striking out parts of the Statement of Claim without leave to amend and for an extension of time within which to serve and file its Statement of Defence.

[2] The action concerns the procurement of upgrades to Canada's fleet of Lockheed CP140 Aurora aircraft, and in particular, to the installation of DIRCIM systems in the aircraft. The

Plaintiff alleges that the systems to be supplied, delivered and installed by the Defendant would infringe the Plaintiff's Canadian Patent No. 2,527,754 entitled "Fiber Laser Based Jamming System". The Defendant is a subcontractor to General Dynamics Mission Systems – Canada ("GDC"), the prime contractor for the upgrade contract. The action claims that the Defendant has, or will imminently infringe the patent by offering, agreeing or contracting with GDC to supply its systems, but also that the Defendant is inducing or procuring the infringement of the patent by GDC and the Canadian Government. It is useful to note that neither GDC nor the Canadian Government are named as defendants, even though allegations are made that they both have or will directly infringe the patent and that GDC has or will induce infringement by the Government of Canada.

[3] The Defendant withdrew its motion in respect of paragraphs 41 and 1(c) of the Statement of Claim ("SOC") and classified the remaining impugned paragraphs of the SOC as follows:

1. Allegations of inducement to induce (portions of paragraph 18 and paragraphs 19 and 37).
2. Bald assertions or speculation (portions of paragraph 21, paragraph 24 and paragraphs 46 to 48).
3. Irrelevant pleadings (portions of paragraphs 12, 13, 14 and 17).

[4] I will adopt this structure and deal with each category in that order.

I. Inducement to induce

[5] The Defendant puts forward two arguments for this category: It argues first that “inducement to induce infringement” is not a recognizable cause of action and, second, that even if such a cause of action arguably exists, the Plaintiff has failed to plead the material facts essential to establish it.

[6] Neither party could refer the Court to any case where procuring or inducing a person to procure or induce another person to infringe was pleaded or considered as a cause of action. The Defendant’s argument rests entirely on the following passage of paragraph 162 of *Weatherford Canada Ltd. v Corlac Inc.*, 2011 FCA 228:

(...) A determination of inducement requires the application of a three-prong test. First, the act of infringement must have been completed by the direct infringer. Second, the completion of the acts of infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place. Third, the influence must knowingly be exercised by the inducer, that is, the inducer knows that this influence will result in the completion of the act of infringement.
(...)

[7] The Defendant argues that, as the Federal Court of Appeal’s three-prong test expressly requires the influence of the alleged inducer on a direct infringer who completes the act of infringement, the test cannot admit for indirect inducement i.e. influencing a person who then influences a direct infringer.

[8] I am not satisfied that the passage of *Corlac* identified by the Defendant was intended by the Federal Court of Appeal to negate indirect infringement as a cause of action, or that the analysis it presents necessarily leads to the conclusion that no cause of action for indirect infringement can exist. There were no allegations of indirect infringement in *Corlac*. Further, the Defendant's argument ignores the first sentence of paragraph 162 of *Corlac*: "It is settled law that one who induces or procures another to infringe a patent is guilty of infringement of the patent". Since inducement is itself an act of infringement, the "act of infringement" referred to in the Federal Court of Appeal's analysis could be read as including a previously established infringement by inducement. For the purpose of determining whether a second or indirect inducer is itself guilty of infringement by inducement, the first inducer could then be construed as the "direct infringer". I need not embark on a complete review of the law of inducement to determine whether the law would otherwise support the Defendant's interpretation of the Federal Court of Appeal's reason in *Corlac*. It was the Defendant's burden to satisfy the Court that a cause of action in indirect inducement did not have the slightest chance of success; its argument, based as it is solely on the interpretation of one paragraph of a 172-paragraph decision, falls far short of the required standard.

[9] The second prong of the Defendant's argument on this issue is that, even assuming that indirect infringement is a recognizable cause of action, the "act of infringement" allegedly completed by the first inducer, GDC, includes an agreement by GDC to indemnify Canada. Since the SOC fails to allege, in turn, that the Defendant's actions in any way influenced GDC in giving that indemnification agreement, the three prong test in *Corlac* cannot be met, and the action is bound to fail. The Defendant's argument requires a very strict reading of the allegations

of the SOC, to the point that the giving of an indemnity by GDC to Canada would become a necessary component of the alleged inducement. I am not satisfied that, either on a fair reading of the SOC or at law, the giving of an indemnity is a *sine qua non* condition of inducement. Further, the SOC specifically alleges, at paragraph 22, that: “Without [the Defendant’s] influence by way of among other things, (...) agreeing (...) to indemnify GDC (...), GDC would not have selected [the Defendant] (...).” Assuming as I must, that this and other allegations of the SOC are proven, I am not satisfied that there are no grounds on which a court might find that the Defendant’s acts influenced GDC’s acts to the point that without them, GDC would not have given the alleged indemnity to Canada.

II. Bald assertions or speculation

[10] The Defendant argues that the allegation in paragraph 21 that “It is also customary and ordinary practice in the defence industry that contracts (...) contain [indemnity clauses]” is speculative as well as irrelevant to the Defendant’s specific activities. I am satisfied that the existence of an industry practice is an allegation of fact. Further, that allegation is arguably relevant as it provides some factual basis for the allegation, in the next paragraph, that the Defendant in fact agreed to indemnify GDC. The allegation should not be struck.

[11] The Defendant also takes issue with the assertion, in paragraph 24, that “at all material times, [the Defendant] has been aware of the ‘754 Patent’”. This allegation is, technically, an allegation of a state of mind that ought to be particularized pursuant to Rule 181. However, I note that the defect would have been more adequately addressed by a motion for particulars. The use of partial motions to strike should not be encouraged where the defect is amenable to being

cured by an informal request for particulars. The Court declines to exercise its discretion to strike this paragraph.

[12] Finally, the Defendant submits that paragraphs 46 to 48 of the SOC improperly speculate as to what it might do in the future. The Defendant cites *Faulding (Canada) Inc. v Pharmacia S.p.A.*, 1998 82 CPR 3rd 435 in support of its argument that they should be struck. I agree with the submissions of the Plaintiff to the effect that the facts alleged in those paragraphs do not purport to set up a speculative cause of action, but to support a claim for a certain species of damages flowing from the alleged acts of infringement. The pleadings therefore do not impermissibly plead a speculative cause of action. If there is an element of foretelling as to the damages that might in the future flow from the infringement, it is not, in the circumstances, purely speculative or improper, as the future losses are reasonably arguable as foreseeable consequences of a specifically pleaded set of past and current factors.

III. Irrelevant facts

[13] The impugned parts of paragraphs 12, 13 and 17 refer to a different and distinct procurement process from a foreign military which the Canadian Government allegedly considered against and rejected in favour of the commercial competitive acquisition process that ultimately led to the allegedly infringing bid. There is nothing in the SOC as drafted that would make that parallel process in any way material to the cause of action alleged against the Defendant. The Plaintiff has not suggested or articulated any way in which the allegations might

be material to the cause of action asserted other than that they “are part of the surrounding circumstances” and “provide context” to the dispute.

[14] I fail to find any materiality to the allegations that the government considered a different procurement process and preferred the allegedly infringing bid, even as “context” or as part of the surrounding circumstances. The Courts are however generally disinclined to strike paragraphs that are mere “surplus” if they are not also prejudicial (*Apotex Inc. v Glaxo Group Limited et al*, 2001 FCT 1351). I find that the presence of these allegations in the SOC is prejudicial to the conduct of this action. The facts alleged are not facts to which the Plaintiff is privy. They are not facts which the Plaintiff controls, or could be permitted to place before the Court at its own discretion as background or contextual facts. Counsel for the Plaintiff, in his oral submissions and in an attempt to clothe the allegations with an appearance of materiality, suggested that an understanding of why the government preferred the competitive bid of GDC to that received from a foreign military might somehow shed light on its inducement allegations. This is pure speculation and casts the allegations as a fishing licence. If allowed to remain in the pleadings, they would oblige the Defendant to look for, consider and disclose any documents in its possession, or in the possession of another third party, that might pertain to that other process or the Canadian Government’s decision to choose the commercial bid. The Defendant should not be put through such an onerous task over allegations that are plainly irrelevant and immaterial.

[15] I have no such concerns in respect of the impugned portions of paragraph 14. The general reference to GDC having issued the request for proposal for the allegedly infringing system as part of other requests for proposals for “various components” of the upgrade program is

sufficiently casual and vague that it does not reasonably require documentary production in respect of these other requests for proposals.

IV. Extension of time

[16] The Defendant seeks an extension of time of 30 days from the date of this order to serve and file its Statement of Defence. The Plaintiff argues that 10 days should be sufficient. I am satisfied that 21 days is reasonable and sufficient in the circumstances.

ORDER

THIS COURT ORDERS that:

1. The following passages shall be struck from the Statement of Claim:
 - a. The text “two separate procurement processes. One process that the Canadian government considered was a purchase directly from a foreign military, and in particular, the United States Air Force. A second process considered was a” in paragraph 12;
 - b. The text “the second” in the first sentence and the entire second and third sentences in paragraph 13; and
 - c. The entire first sentence of paragraph 17.
2. The time within which the Defendant is to serve and file its Statement of Defence is extended to 21 days from the date of this order.
3. This action shall continue as a specially managed proceeding.
4. The parties shall, no later than 15 days from the close of pleadings, file written submissions as to a schedule for the next steps to be taken in this action.
5. Costs, in the amount of \$1,500.00 plus disbursements, shall be in the cause.

"Mireille Tabib"
Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-775-16

STYLE OF CAUSE: ELBIT SYSTEMS ELECTRO-OPTICS ELOP LTD. v
SELEX ES LTD.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: AUGUST 17, 2016

**REASONS FOR ORDER AND
ORDER:** TABIB P.

DATED: SEPTEMBER 2, 2016

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