Federal Court  Cour fédérale

Date: 20220525

Docket: T-1488-20

Citation: 2022 FC 756

Ottawa, Ontario, May 25, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

STEELHEAD LNG (ASLNG) LTD. and STEELHEAD LNG LIMITED PARTNERSHIP

Plaintiffs

and

ARC RESOURCES LTD., ROCKIES LNG LIMITED PARTNERSHIP, ROCKIES LNG GP CORP., and BIRCHCLIFF ENERGY LTD.

Defendants

ORDER AND REASONS

[1] This is an appeal under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], of an Order of Case Management Judge Mireille Tabib on February 28, 2022, [Order] dismissing the Plaintiffs' [Steelhead] Motion for: (1) an Order to add Western LNG as a defendant and to serve

and file an Amended Statement of Claim; and, (2) an Order to compel the Defendants to produce a further and better Affidavit of Documents.

[2] For the reasons that follow and applying the *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] standard of review, there is no basis for this Court to intervene. The Case Management Judge (CMJ) did not err in the application of the law and did not err with respect to her consideration of the facts and the evidence.

I. Background

[3] In the underlying patent infringement action, Steelhead claims that the Defendants have infringed their Patent No. 3,027,085 (085 Patent); an invention for "Liquefaction Apparatus, Methods, and Systems" relating to at-shore liquefaction of natural gas to liquefied natural gas (LNG). In the Statement of Claim filed in December 2020 and amended on May 19, 2021 (collectively referred to as "Claim"), Steelhead alleges:

> 31. Steelhead LNG Limited Partnership subsequently learned that 7G had misappropriated the Steelhead confidential information referenced above, including the invention underlying the 085 Patent, in breach of its contractual and common law obligations, in order to pursue the design and development of a competing LNG export and liquefaction project in British Colombia through the Producer Consortium (the "**Competing LNG Project**")….
>
> …
>
> 38. The Defendants, without the permissions or consent of the Plaintiffs, have been making, constructing, using, selling and/or offering for sale the infringing Competing LNG Project, being an LNG liquefaction and export facility of the type described and claimed in the 085 Patent. In particular, these activities have included the design and development of the infringing Competing LNG Project, and

> the marketing of the same and elsewhere in Canada and elsewhere to potential investors, LNG off-takers and large-scale industry contractors, among others.

[4] In their Statement of Defence, the Defendants claim (at para 6) that they:

> …have *never* made, constructed, used, sold and/or offered for sale *any* liquefied natural gas ("LNG") liquefaction and export facility, let alone an infringing one. [Emphasis in original.]

[5] Further, the Defendants state:

> 24. Indeed, the only purportedly infringing acts particularized by the Plaintiffs are the Defendants' purported "design, development and marketing" of the claimed invention. Even if the Defendants had engaged in such acts, which is denied, they would not be infringing because they are not among the exclusive rights, privileges and liberties conferred on the patent owner by the *Patent Act*, as set out above.
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> …
>
> 29. As set out above, at paragraph 38 of the SOC, the Plaintiffs allege that the Defendants have been making, constructing, using, selling or offering for sale the allegedly infringing "Competing LNG Project". This allegation is not advanced *quia timet*. Rather, the infringing activities are alleged to have already occurred, i.e., the Competing LNG Project has already been made, constructed, used, sold and offered for sale. As detailed below, these allegations are known by the Plaintiffs to be false.

[6] The Defendants have counterclaimed on various grounds including that the 085 Patent is invalid and not infringed.

[7] A Summary trial in this patent infringement action is currently scheduled for June 1, 2022.

II. Order Under Appeal

[8] CMJ Tabib, who has been case managing the underlying patent infringement action, heard Steelhead's Motion for: (1) an Order to add Western LNG as a defendant and to serve and file a Twice Amended Statement of Claim; and, (2) an Order to compel the Defendants to produce a further and better Affidavit of Documents identified as follows:

a) Technical documents showing the design and specifications of the floating LNG facility project being pursued by the Defendants and Western LNG, including in relation to the Ksi Lisims Project (such as, but not limited to, documents prepared by WorleyParsons Ltd. and Wison Offshore & Marine Ltd.), including any surrounding correspondence of the project proponent(s) and engineering and design consultant(s);

b) Presentations, communications and other documents describing the Defendants' marketing, development, regulatory and related activities with respect to the floating LNG facility project being pursued by the Defendants and Western LNG, including the Ksi Lisims Project;

c) Corporate documents setting out the Defendants' relationship to Western LNG and Nisga'a Nation with respect to the Ksi Lisims Project, including any entities established by or for the Defendants and/or Western LNG to contribute or participate with the Ksi Lisims Project in which the Defendants directly or indirectly have an ownership or financial interest;

d) Communications internal to the Defendants, between the Defendants, and/or between one or more of the Defendants and WorleyParsons regarding services to be performed and/or performed by WorleyParsons;

e) Communications internal to the Defendants, between the Defendants, and/or between one or more of the Defendants and KBR regarding services to be performed and/or performed by KBR;

f) and which include a description of each document listed.

[9] In considering the request for further documents, CMJ Tabib noted that Steelhead has the burden of establishing that the documents "likely exist and are relevant". Accepting that the requested documents likely exist, CMJ Tabib then considered if the documents were relevant to the issues raised in the Claim.

[10] The requested documents were in relation to the Ksi Lisims project. CMJ Tabib identified the question as being whether the Ksi Lisims project was the same as the "infringing competing LNG project" alleged in the Claim.

[11] The Defendants took the position that the Ksi Lisims project is a different project, not addressed in the pleadings, and, therefore, irrelevant.

[12] CMJ Tabib notes that the Claim references a single LNG project that was not built nor currently being built. She also notes that the Claim is not a *quia timet* action, but rather a claim for past or present infringement. As she explains, "[a] general intention to commit infringing acts is not pleaded and would not constitute a valid plea".

[13] As Steelhead had not led evidence to show that the Ksi Lisims project was based on the information allegedly misappropriated, the CMJ was not satisfied that the Ksi Lisims project was the same as the original allegedly infringing project or that documents relating to the Ksi Lisims project were relevant. She states "the evidence is overwhelmingly to the effect that the design for the LNG facility at Ksi Lisims, whether or not it otherwise infringes, originated from

Western, without influence from any information supplied by the Defendants, let alone the Plaintiffs' confidential information."

[14] The request for a further and better Affidavit of Documents was dismissed.

[15] On the request to add Western LNG as a Defendant and to amend the claim, the CMJ noted that the proposed amendments relate to the Ksi Lisims project and are premised on the assumption that the Ksi Lisims project is the same as the "the infringing Competing LNG Project" as defined in the Claim. However, as she notes, the Plaintiffs "have not sought leave to amend so as to add the Ksi Lisims project as an allegedly infringing project."

[16] CMJ Tabib concluded that there were no grounds to support the assumption that the Ksi Lisims project is the same as the allegedly infringing project and, therefore, no grounds to tie Western LNG's activities to the project identified in the Claim. She refused the request to add Western LNG as a Defendant.

III. Relevant Rules

[17] The *Rules* relevant to this appeal are Rules 3, 51, 75(1), 104, 223, 227, and 228.

IV. Issues

[18] On this appeal, Steelhead raises the following issues:

A. Did the CMJ err in the application of the test to amend the Claim and add a new Defendant?

B. Did the CMJ improperly weigh the evidence and surrounding circumstances with respect to production of the documents requested?

[19] On this appeal, Steelhead advised that it now only seeks three categories of documents, namely those identified in paragraphs 8 a), b) and c) above, rather than the five categories of documents sought in the Motion before the CMJ.

V. Standard of Review

[20] The parties agree that *Hospira* outlines the applicable standard of review. In Hospira, the Court of Appeal confirmed that appeals of a CMJ's decision are governed by the standards set in *Housen v Nikolaisen*, 2002 SCC 33 (at para 69). The standard of correctness applies to questions of law and questions of mixed fact and law containing an extricable legal principle, whereas questions of fact or mixed fact and law are considered on the standard of palpable and overriding error (*Hospira* at paras 68-69).

[21] Palpable and overriding error is a highly deferential standard of review – "palpable" is an error that is obvious and significant and "overriding" is an error that affects the outcome of the case (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64).

[22] Steelhead alleges that the CMJ made an error of law on the applicable test for amending pleadings. Steelhead also alleges there is a palpable and overriding error in the factual

conclusions reached by the CMJ with respect to the requested documents, thereby, permitting the Court to intervene.

VI. Analysis

A. *Did the CMJ Apply the Wrong Test to Amend the Statement of Claim and Add Another Defendant?*

[23] Steelhead argues that in considering the request to amend the Claim, the CMJ should only have considered the wording of the proposed amendments – and those proposed amendments should have been presumed to be true. In support, they rely upon *Laboratoires Quinton Internationale SL v Biss*, 2010 FC 358 at para 9 which states "…that a Court dealing with an application to amend must assume that the facts pleaded are true…."

[24] They argue CMJ Tabib's statement that "there are no grounds to support the assumption that the Ksi Lisims project is the same as the allegedly infringing project" does not assume the facts pleaded are true and demonstrates that she applied the wrong test to the consideration of this issue.

[25] Although Steelhead frames its Motion as a request to amend the Claim, in my view this is a mischaracterization of the true nature of the request before the CMJ. The core relief sought by Steelhead was to add Western LNG as a defendant. The proposed amendments to the Claim were only necessary if Western LNG is a defendant. This was clearly recognized by the CMJ when she states:

> The Plaintiffs seek leave to make amendments to their statement of claim, but only to add Western LNG as an additional defendant. [Emphasis added.]

[26] Adding a party to a claim, or joinder, is addressed in Rule 104(1)(b), which provides:

> **Order for joinder or relief against joinder**
>
> **104 (1)** At any time, the Court may
>
> …
>
> **(b)** order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

[27] In *Air Canada v Thibodeau*, 2012 FCA 14, the Federal Court of Appeal confirms that Rule 104(1)(b) considerations are an exercise of discretion guided by one test: necessity. Necessity is informed by need to have the party (sought to be added) bound by the result of the action, and whether the party is necessary to "effectually and completely" resolve an issue in the action (at paras 10-11).

[28] Accordingly, the question for the CMJ was whether it was necessary for Western LNG to be a party to this patent infringement action.

[29] The proposed amendments to the Claim in support of the request to add Western LNG as a defendant are outlined in the proposed Twice amended claim as follows:

> 34. As far as is known to the Plaintiffs, in or around 2020, Rockies LNG Limited Partnership brought Western LNG in as a partner in order to participate in the pursuit of the Competing LNG Project.
>
> 35. The Competing LNG Project is now being marketed under the name "Ksi Lisims LNG", with the current proposed location being in the Nass Region of British Columbia (North of Prince Rupert), and includes an LNG facility as claimed in one or more of the Asserted Claims, as described in further detail below.
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> 36. As part of the necessary environmental regulatory approval process for the construction of the Competing LNG Facility, Rockies LNG and Western LNG have submitted an initial project description dated July 2, 2021 with the B.C. Environmental Assessment Office in which they are both named as proponents. Although the Initial Project Description describes the Competing Project Facility in broad terms, the description given would be reasonably understood by the skilled person to describe the facility claimed in one or more of the Asserted Claims.

[30] After considering these proposed amendments, CMJ Tabib concluded as follows:

> The basis for the request is that Western LNG joined the existing, allegedly infringing project, and thus participated in the infringement.
>
> The proposed amendment is premised on the assumption that the Ksi Lisims project is the same as the "infringing Competing LNG Project". The Plaintiffs have not sought leave to amend so as to add the Ksi Lisims project as an allegedly infringing project.
>
> As determined above, there are no grounds to support the assumption that the Ksi Lismis [sic] project is the same as the allegedly infringing project. Absent allegations that would tie Western LNG's activities to the project as currently identified, there are no grounds to support adding it as a defendant.

[31] In assessing the "necessity" of Western LNG as a party to the action, the CMJ considered this issue in the context of the full Claim including the nature of the infringement allegations

advanced by Steelhead. The CMJ's reasoning demonstrates that she considered whether it was necessary to add Western LNG as a party based upon the claim as framed in the Statement of Claim. The CMJ concluded that the proposed addition of Western LNG was in relation to another project that was not identified as an infringing project in the claim or identified as being the "allegedly infringing project". She, therefore, determined that the request to add Western LNG was, in effect, a request to advance a new claim in relation to another project.

[32] As a further basis to challenge the CMJ's finding that Western LNG is not a necessary party, Steelhead argues that the CMJ arrived at this conclusion by relying upon information in the Affidavit of Charlotte Raggett. This, they argue, is an error, as the CMJ should not have considered evidence when assessing the request to amend the claim. For context, the Raggett Affidavit, which was filed by the Defendants for use on the upcoming Motion for Summary trial, was part of the evidence relied upon by Steelhead in support of their Motion for a further and better Affidavit of documents.

[33] Steelhead relies upon *Visx Inc v Nidek Co*, [1996] FCJ No 1721at para 16 [*Visx*] to argue that it was an error for the Prothonotary to rely upon evidence in support of her decision to deny the amendment and joinder of Western LNG. I note that *Visx* addressed the application of different Rules from those directly at issue here.

[34] In any event, on the issue of the consideration of evidence, more recently in *Specialized Desanders Inc v Enercorp Sand Solutions Inc,* 2018 FC 689, Justice Southcott distinguished *Visx*, stating:

> I regard that authority as identifying the principle that no evidence is admissible on a motion to strike pleadings under Rule 221(1)(a) on the ground that they disclose no reasonable cause of action or

> defence. This prohibition is expressly set out in Rule 221(2). I agree that the prohibition also applies, on a motion to amend pleadings, to the Court's consideration whether the proposed amendment would be subject to a successful motion to strike under Rule 221(1)(a). However, outside consideration of the effect of Rule 221(1)(a), evidence can be received on a motion to amend pleadings under Rule 75, for instance in considering the factors prescribed by *Canderel*¸ or in considering the possible application of Rule 221(1)(c), i.e. whether the proposed pleading would survive a motion to strike on the basis that it is scandalous, frivolous, or vexatious.
>
> In considering this point on a standard of correctness, I find no error in law arising from the introduction of evidence before the Prothonotary on these motions (at paras 38-39).

[35] Likewise, in this case, the issue before the CMJ was not solely a request to amend pleadings. The amendment was only necessary in relation to the request to add Western LNG as a defendant. Therefore, Steelhead's core request was to add Western LNG as a defendant. In the circumstances, there was no prohibition against the CMJ considering evidence.

[36] Furthermore, Steelhead's request for additional documents and the request to add Western LNG as a defendant were interdependent requests. Steelhead conceded in their oral submissions that if joinder of Western LNG is unsuccessful, then it follows that the documents sought would also not be granted. Given the interdependent nature of these requests, it was not an error for the Prothonotary to consider the evidence relied upon by Steelhead to support their request for further documentary production in considering their request for joinder of Western LNG.

[37] In my view, the CMJ properly concluded that the request to join Western LNG as a defendant was an attempt by Steelhead to expand the reach of its claim. She, therefore, did not

allow the amendments to the Claim. As noted in *Bauer Hockey Corp v Sport Maska Inc (Reebok-CCM Hockey)*, 2014 FCA 158, the decision to refuse to amend pleadings is discretionary and "[the] Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice…" (at para 12).

[38] In my view, the applicable standard of review to this issue is whether a palpable and overriding error has been established. I conclude such an error has not been established and the decision of the CMJ is owed significant deference. However, even if the appropriate standard of review on this issue is correctness, I find no error in law arising from the CMJ's consideration of the evidence in the application of the test of necessity.

[39] In summary, I have found no error by the Prothonotary in refusing the request to add Western LNG as a defendant and refusing the concomitant pleading amendment.

B. *Did the CMJ Improperly Weigh the Evidence and Surrounding Circumstances with Respect to Production of the Documents Requested?*

[40] As previously noted, Steelhead's request for a further and better Affidavit of Documents is tied to their request to join Western LNG as a defendant. As I have concluded that Steelhead has not established any error by the CMJ on her refusal of their joinder and amendment requests, it follows that her decision that the requested documents are not relevant is entitled to deference.

[41] In considering this issue, the CMJ correctly identified that "relevance" is the test to be applied. In assessing whether the requested documents were relevant to the facts and allegations outlined in the Claim, she notes that the Claim references a single LNG project, whereas the documents sought relating to the Ksi Lisims are for a different project. In the CMJ's view, this distinction established that the documents could not be relevant to the Claim. On this, the CMJ states as follows:

> The specific project described as the "infringing Competing LNG Project" is therefore a project based on the allegedly misappropriated confidential information of the plaintiffs, "including" the invention, which had not yet been published at the time of the misappropriation. The infringing product as described does not, and cannot include any potentially infringing LNG project proposed by the Defendants. Nor can it cover evolutions and modifications to the project that cause the project to lose the identifying characteristics described in the statement of claim, even if this resulting project also infringes. To interpret the statement of claim otherwise would denature the allegations of past or present infringement and turn them into allegations of future, intended infringement, when the criteria for a valid *quia timet* action have not been pleaded. [Emphasis in original.]

[42] The CMJ further notes that although Steelhead pleads that the entire Ksi Lisims project is infringing, she notes that "the subject matter of the patent is not the project as a whole, but an LNG facility composed of specific components." The Prothonotary goes further to expand on this by noting as follows:

> A concept that might infringe the patent but is not based on the allegedly misappropriated information is no longer the "infringing Competing LNG Project"; it is an infringing project, and falls outside the scope of the statement of claim as pleaded. [Emphasis in original.]

[43] After assessing the Claim in relation to the documents requested, the CMJ concludes that she is not satisfied that the Ksi Lisims project or the documents relating to that project are relevant to the issues as pled by Steelhead.

[44] I have considered whether the CMJ's approach to this issue demonstrates a misapprehension of the facts as claimed by Steelhead. However, the analysis undertaken by the CMJ demonstrates that she carefully scrutinized the details of the technical claims advanced by Steelhead in their patent infringement claim specifically in respect to the request for additional documentary disclosure. The potential relevance of the documents was assessed in relation to the allegations outlined in the Statement of Claim.

[45] In my view, the appropriate standard of review for this issue is whether there was a palpable and overriding error. Here, the CMJ applied the correct considerations, carefully assessed the claims advanced by Steelhead, and considered the further documents by reference to the Claim, to conclude that relevance was not established. I cannot find any error on the approach taken by the CMJ on this issue.

VII. Conclusion

[46] In summary, the findings of the CMJ are entitled to significant deference. As noted in *Hospira* at para 103:

> …bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly…deference, absent a reviewable error, is owed, or appropriate, to a case managing prothonotary.

[47] Steelhead had not established any reviewable error by the CMJ. The CMJ applied the relevant legal principles and absent a palpable and overriding error in reaching her decision, there are no grounds for this Court to intervene.

[48] The appeal Motion is, therefore, dismissed.

VIII. Costs

[49] At the hearing, the parties agreed on the costs to be awarded to the successful party. Therefore, the Defendants shall have costs in the all-inclusive amount of $4,000.

ORDER IN T-1488-20

THIS COURT ORDERS that:

1. This appeal Motion is dismissed.

2. The Defendants shall have costs in the all-inclusive amount of $4,000.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1488-20
STYLE OF CAUSE:	STEELHEAD LNG (ASLNG) LTD. and STEELHEAD LNG LIMITED PARTNERSHIP v ARC RESOURCES LTD., ROCKIES LNG LIMITED PARTNERSHIP, ROCKIES LNG GP CORP., and BIRCHCLIFF ENERGY LTD.
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