

Federal Court



Cour fédérale

Date: 20220704

Docket: T-893-21

Citation: 2022 FC 974

Toronto, Ontario, July 4, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

WI-LAN INC.

Plaintiff (Respondent)

and

APPLE CANADA INC. and APPLE INC.

Defendants (Appellants)

ORDER AND REASONS

[1] The defendants appealed under Rule 51 of the *Federal Courts Rules*, SOR/98-106, seeking to reverse an Order dated October 6, 2021 made by Associate Judge Milczynski, serving as the Case Management Judge of this patent proceeding. The Associate Judge dismissed the defendants' motion for an Order striking out the Statement of Claim dated June 3, 2021, and, alternatively, for particulars of certain allegations in that pleading.

[2] For the reasons below, the appeal will be dismissed, with costs fixed by the Court.

I. Allegations in the Statement of Claim

[3] The plaintiff, Wi-LAN Inc., alleged in its Statement of Claim that “at least” 59 Apple mobile devices infringe certain claims of Canadian Patent No 2,686,159 (the “159 Patent”) because they implement certain standards for cellular telecommunications defined in the pleading as the “4G Standards” and the “5G Standards” (the “Standards”). The Statement of Claim alleged that the Standards incorporate the methods claimed in the 159 Patent. As a result, according to the plaintiff, the defendants infringe the 159 Patent by making, using, selling mobile devices compatible with these Standards. The Statement of Claim also alleges that Apple products are made or specifically configured to implement, comply with or interoperate with the Standards.

[4] Paragraph 20 of the Statement of Claim pleads that in general, non-limiting and non-technical terms, the 159 Patent discloses and claims technologies related to the use of “non-contention reserved access identifiers by mobile stations (e.g. cell phones) to enable efficient random access for various purposes”. The pleading provides an example that a mobile station (cell phone) can use the technologies disclosed and claimed by the 159 Patent to carry out an efficient handover as it travels from one base station (a cell tower) to another base station.

[5] The Statement of Claim pleads that any Apple mobile station that implements, complies with or interoperates with the Standards infringes specified claims in the 159 Patent when it is used, manufactured, imported, distributed, offered for sale, sold, supplied and/or otherwise made available in Canada.

[6] Schedules are attached to the Statement of Claim. Schedule B is alleged to be a test report by an independent third party that tested one Apple device, the iPhone 12 Pro.

[7] Schedule C is a claim chart. Paragraphs 71-72 of the Statement of Claim plead that Schedule C:

... provides a preliminary and non-limiting illustration of Apple's infringement by the Infringing Devices, in respect of the Asserted Claims and with additional reference to exemplary portions of the Test Report and exemplary portions of the 4G Standards and the 5G Standards.

The full extent and nature of Apple's infringing activities is unknown to Wi-LAN, but is known to Apple. Wi-LAN claims relief in respect of all acts of infringement, direct or otherwise, committed by Apple.

[8] The defendants moved to strike out the Statement of Claim and, alternatively, for particulars. The Associate Judge dismissed their motion.

II. Standards of Appellate Review and the Parties' Positions

A. *The Hospira Standards for Rule 51 Appeals*

[9] The applicable standards of review on this appeal are not in dispute. On an appeal from a discretionary order of an Associate Judge under Rule 51, the Court applies the standards of review established in the Federal Court of Appeal's decision in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331. The Federal Court may only interfere with a discretionary decision of an Associate Judge if the Associate Judge made an error on a question of law, or if the Associate Judge made a palpable and overriding error on a

question of fact or mixed fact and law: *Hospira*, at paras 68-69 and 79. The Federal Court of Appeal in *Hospira* adopted the same appellate review standard for Rule 51 appeals as set out by the Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, for appellate review of decisions by trial judges: *Housen*, at paras 19-37.

[10] The correctness standard may also apply to a question of law or a legal principle that is extricable from a question of mixed fact and law: *Hospira*, at paras 66 and 71-72. See also *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344, at paras 57 and 74; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, [2017] 1 SCR 688, at para 44. The palpable and overriding error standard applies if the impugned findings are factually suffused or a legal principle is not readily extricable: *Mahjoub* at paras 60, 156 and 318; *Housen*, at para 36; *Teal Cedar Products*, at paras 43-44.

[11] The palpable and overriding standard is a highly deferential standard of review: *Benhaim v St-Germain*, 2016 SCC 48, [2016] 2 SCR 352, at para 38; *Mahjoub*, at paras 61-64. The correctness standard permits the Court to substitute its own conclusion for the Associate Judge's conclusion.

[12] A Case Management Judge is assumed to be very familiar with the particular circumstances and issues in a proceeding. Decisions are afforded deference, especially on factually suffused questions: *Hospira*, at paras 102-103.

B. *The Parties' Positions on the Appeal*

[13] The appellants/defendants' Notice of Motion and their written submissions on this appeal requested an Order setting aside the Order of the Associate Judge and striking out the Statement of Claim under Rule 221 for failing to plead material facts disclosing a reasonable cause of action.

[14] The Notice of Motion also requested an Order, in the alternative, for further and better particulars under Rule 181. However, the defendants made no substantive written or oral submissions concerning particulars on the appeal. The Associate Judge noted that the defendants adduced no evidence that they were unable to understand the case to meet and/or adequately prepare a pleading in response to the Statement of Claim.

[15] In many respects, the defendants' appeal sought to reargue the motion to strike that was before the Associate Judge, while seeking to identify a reversible error in her reasoning. The defendants made several submissions that purported to identify errors of law in the Associate Judge's Order. The defendants sought to characterize a "novel question of law" of whether the Statement of Claim disclosed a reasonable cause of action for a "standards-based claim".

[16] The defendants' principal submissions concerned the presence of sufficient material facts in the Statement of Claim. The defendants submitted that the Associate Judge made a palpable and overriding error by determining that the Statement of Claim disclosed a cause of action, specifically by concluding that it contained sufficient material facts to allege infringement of the 159 Patent. The defendants argued that certain aspects of the Statement of Claim were pleaded

“in an exemplary manner and not in a closed manner”. As such, the Associate Judge allegedly erred by stating the plaintiff pleaded that the claimed invention was “incorporated into particular sections of the 4G and 5G Standards for cellular telecommunications” and by not considering the insufficiency of this plea. The defendants argued that the Statement of Claim was required to tell them “who, when, where, how and what” gave rise to their liability, as required by *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, at para 19. They emphasized the “how” aspect of pleading material facts. They submitted in considerable detail that the pleading did not satisfactorily plead the specific provisions of all of the published versions (entitled “Releases”) of the Standards that were alleged to have been infringed and instead pleaded some provisions in an exemplary manner.

[17] At the hearing of this appeal, the defendants zeroed in on paragraph 71 of the Statement of Claim, which pleaded that the claim chart in Schedule C provided a “preliminary and non-limiting illustration” of the defendants’ alleged infringements. The defendants submitted that by permitting the pleading to contain a “preliminary” and “non-limiting” descriptions of infringement, the Associate Judge failed to abide by legal principles set out respectively in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45, at paras 22 and 24, and *Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085, at para 26.

[18] The respondent/plaintiff submitted that the first alleged error of law was not an error of law; rather, it was “entirely fabricated” when the defendants characterized the issue as a “novel question of law”. Instead, according to the plaintiff, the defendants merely disagreed with the

Associate Judge's application of settled law, on a motion to strike, to the specific facts of this case as alleged in the Statement of Claim.

[19] The plaintiff also submitted that reference to open-ended or exemplary language is not a basis to strike a Statement of Claim or to order further particulars (citing *Reliance Comfort Limited Partnership v Commissioner of Competition*, 2013 FCA 129). In addition, the plaintiff submitted that the defendants had improperly raised new arguments at the hearing of this appeal that were not argued before the Associate Judge, related to the allegations in paragraph 71 of the Statement of Claim.

[20] To respond to the defendants' submissions, the plaintiff made correspondingly detailed arguments to support the Associate Judge's conclusion that the Statement of Claim disclosed material facts sufficient to support the claims of infringement.

[21] The defendants' written submissions also argued that the Associate Judge erred in law by determining that, when read as a whole, the Statement of Claim alleged that the methods claimed by the 159 Patent were "essential". In the defendants' submission, a Statement of Claim can only have one correct interpretation and the interpretation provided by the Associate Judge was erroneous. The plaintiff disagreed, submitting that the Associate Judge correctly noted that it was self-evident from the Statement of Claim that the defendants necessarily infringed when their devices implemented, complied with or interoperated with the Standards that incorporated the claimed invention. The plaintiff acknowledged that the Associate Judge's Order properly characterized the crux of its claim when the Associate Judge stated:

Wi-LAN pleads that the claimed invention described above is incorporated into particular sections of the 4G and 5G standards for cellular telecommunications. These 4G and 5G standards were developed by a global organization (3GPP) that produces compatibility standards for cellular telecommunications networks. If devices implement, comply with or interoperate with these sections of the 4G or 5G Standards, Wi-LAN argues that those devices necessarily use the claimed invention. To the extent Apple makes, uses or sells such 4G or 5G standard compliant mobile devices, Wi-LAN alleges that Apple has infringed the 159 Patent.

[22] The plaintiff observed that it will be for the trial judge to decide whether the claim was made out on the evidence of the merits. For now, the pleading disclosed a proper cause of action.

III. Analysis

A. Issues related to the Alleged Failure to Plead Material Facts

[23] In my view, the defendants' submissions cannot succeed with respect to an alleged failure to plead material facts in the Statement of Claim.

[24] First, the defendants did not submit that the Associate Judge applied an incorrect standard or principle of law under Rule 221 of the *Federal Courts Rules*. Nor did the defendants identify a true question of law owing to the "novel" nature of this claim. Instead, the defendants' arguments on appeal are properly characterized as the application of settled law on a motion to strike to allegations of infringement of a patent. The defendants' position was in substance a re-argument of the motion to strike, with different emphasis and arguments, in an effort to show that the Associate Judge erred in applying the undisputed test on a motion to strike to the facts (i.e., allegations in the Statement of Claim, which are assumed to be true). That kind of alleged

error is one of mixed fact and law, which attracts the palpable and overriding error standard of review: *Bewsher v Canada*, 2020 FCA 216, at paras 6-7.

[25] Second, considering the merits of the defendants' position, I conclude that the Associate Judge did not make a reversible error in her analysis of allegations in the Statement of Claim.

[26] Under Rule 174, “[e]very pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.” A party is required concisely to plead sufficient material facts to support the claim or cause of action alleged and relief sought: *Mancuso*, at paras 16-17. The purposes of pleading sufficient material facts are to provide notice to the other party(ies) to enable the preparation of a Statement of Defence, to define the issues to be tried with reasonable precision, to frame the discovery process, to allow counsel to advise their client(s), prepare the case and develop a trial strategy, and to establish the parameters of relevancy of evidence at discovery and eventually at trial: *Mancuso*, at para 17.

[27] It is improper in a pleading to make bald, conclusory allegations without a foundation in pleaded material facts: *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184, at paras 34-35. However, there is no bright line between material facts and such bald allegations. A pleading must be assessed in light of the elements of the cause(s) of action pleaded and the material facts as pleaded. Looking at the pleading as a whole, the pleading must define the issues “with sufficient precision to make the pre-trial and trial proceedings both manageable and fair”: *Mancuso*, at para 18. In deciding whether pleadings are “manageable and fair”, the Court on a

motion to strike “should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties”: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215, at para 36.

[28] In the passage emphasized by the defendants, Justice Rennie also stated in *Mancuso*:

[19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[Underlining added.]

[29] The Federal Court of Appeal has held that this underlined sentence in *Mancuso* must be understood in light of the “manageable and fair” requirement: *Enercorp*, at para 37; *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4, at para 39.

[30] Recognizing the law above and the required deferential standard on appeal, I have concluded that the Associate Judge’s Order in this case contained no palpable and overriding error.

[31] The Associate Judge’s Order stated as follows with respect to the illustrative nature of the pleading:

Wi-LAN has identified 59 Apple products. It has tested one of them to provide more detailed particulars of infringement and alleges that the remaining 58 products do the same. The list is not exhaustive as Wi-LAN states it is unaware of what other products might be in development. At this early stage of the proceeding, the

non-exhaustive list of allegedly infringing devices is not improper. While it claims that any/all of Apple's products that are 4G or 5G standard compliant infringe, and only Apple knows precisely what those products are. As *LeddarTech Inc v Phantom intelligence Inc*, 2017 FCA 224 at paras 5-6 notes, open-ended pleadings of infringement are permissible, provided a nexus exists between the particular characteristics giving rise to the infringement and the characteristics of unspecified products alleged to infringe.

In the within case, there is a nexus (4G or 5G standard compliance/compatibility) between the defined products alleged to infringe and the possible other products that have the same allegedly infringing characteristics (see also *Emerson Electric Co v Canadian Tire Corporation Ltd* 2016 FC 308).

[32] The defendants did not expressly challenge the first paragraph of this passage. I find no palpable and overriding error in it (nor any legal error).

[33] The focus of the defendant's position on this appeal shifted away from an argument based on *LeddarTech Inc v Phantom intelligence Inc*, 2017 FCA 224 and *Emerson Electric Co v Canadian Tire Corporation, Limited*, 2016 FC 308, to an argument that sought to distinguish those cases and argue that the Statement of Claim did not sufficiently plead a nexus because of the exemplary or illustrative pleading of the provisions of the 4G Standard and 5G Standard Releases, as part of the allegations of infringement. I agree with the plaintiff that these arguments were not the focus of the defendants' position before the Associate Judge; they were made summarily as part of a larger argument in the defendants' written submissions (the defendants referred in reply to paragraphs 58-60 of those submissions, esp 60(a)). The Associate Judge should not be faulted for not focusing on the argument now made on appeal.

[34] The plaintiff submitted that its position was necessarily “preliminary” because it was an allegation in a pleading—it remains subject to proof in the claims construction process in accordance with expert evidence by a skilled person reading the 159 Patent.

[35] With respect to the exemplary language in the Statement of Claim, the plaintiff explained that the specific references in Schedule C to certain versions of the Standards (Releases 8 and 15) were illustrative because the other Releases contained substantially the same language. The plaintiff submitted that it would be unwieldy and highly repetitive to make the same allegations over and over again with respect to each of the other Releases (9 to 14 and 16 and following). In addition, the plaintiff submitted that the test report in Schedule B provided information that was illustrative of how all the other (58) Apple devices were alleged to have infringed the 159 Patent.

[36] The plaintiff also relied on *Reliance*, in which the Federal Court of Appeal dismissed an appeal from an Order made by Rennie, J., who declined to strike out allegations in a pleading filed at the Competition Tribunal. The Court of Appeal noted that Justice Rennie concluded that the pleading disclosed a cause of action with or without the open-ended pleadings. The Court of Appeal found that *Reliance* was not a case where the existence of the cause of action was dependent on facts that may turn up during discovery: *Reliance*, at paras 6-7, referring to *Imperial Tobacco Canada*, at para 22.

[37] In my view, the Associate Judge, in her role as the Case Management Judge, made no palpable and overriding error in finding sufficient material facts to enable the defendants to plead and for the lawsuit to proceed to the discovery phase. As the Associate Judge did in this case,

pleadings must be read as a whole and with a view to whether, substantively, the litigant has pleaded sufficient material facts to enable the other party to plead meaningfully.

[38] The Associate Judge found that this Statement of Claim did so. She was aware of the contents of the Statement of Claim, including its Schedules. The Associate Judge expressly determined that that the Statement of Claim sufficiently pleaded a nexus between defined products alleged to infringe and the possible other products that have the same allegedly infringing characteristics.

[39] In addition, the plaintiff's explanations and the *Reliance* decision are sufficient to answer the defendants' submissions on this appeal with respect to the preliminary, exemplary or illustrative nature of the allegations in this Statement of Claim and its schedules. Even if words such as "exemplary" and "non-limiting" in Schedule C, combined with the use of "exemplary" and "illustrative" in paragraph 71 of the Statement of Claim, *could* be read in a manner advocated by the defendants, which in turn could lead to concerns about the lack of a closed list of provisions in the Standards that could lead to issues at discovery, it does not follow that the Associate Judge's decision contained an error that is palpable and overriding: *Mahjoub*, at para 61; *Enercorp Sand Solutions*, at para 36 (referring to the relative knowledge and means of knowledge of the parties). As in *Reliance*, this is not a case in which the pleading requires the discovery of new facts at discovery to sustain it. The defendants' position did not demonstrate that the Statement of Claim did not contain any cause of action at all for infringement, owing to the non-limiting language or the absence of a closed list of all specific provisions in all of the Releases. Nor did the defendants show why the non-limiting language prevented them from

responding meaningfully in a Statement of Defence and then proceeding on to documentary and oral discovery. I find insufficient cause to believe that the proceedings or discovery would be unmanageable or unfair with the Statement of Claim as it stands, so as to warrant intervention on appeal: *Enercorp Sand Solutions*, at paras 36-37.

[40] Accordingly, I dismiss the defendants' arguments related to alleged insufficient material facts pleaded in the Statement of Claim.

B. The Associate Judge's statement that the methods claimed were "essential"

[41] As noted, the defendants also argued that the Associate Judge erred in law in determining that when read as a whole, the Statement of Claim alleged that the methods claimed by the 159 Patent were "essential".

[42] The Associate Judge stated:

To the extent Apple has argued that Wi-LAN has failed to specifically plead the methods claimed by the 159 Patent are "essential", I read the Claim as a whole to make that allegation by way of the allegations that the 159 Patent are incorporated in the 4G and 5G Standards themselves. With respect to the argument that compliance with 4G and 5G Standards may or can be achieved in other ways, that is an allegation that can be pleaded in Apple's statement of defence.

[43] The defendants' submission on appeal did not disclose an extricable question of law on this issue. In any event, I see no error in the Associate Judge's statement.

[44] The plaintiff submitted to this Court that it was “self-evident from the Claim” that its allegation was not that Apple may or optionally infringed the 159 Patent; rather, the allegation was “clearly that Apple *necessarily* infringed” when its devices implemented, complied with, or interoperated with the 4G and 5G Standards that incorporated its claimed invention [original emphasis]. It was not necessary for the plaintiff to plead additional material facts to disclose a proper cause of action.

[45] Reading the Statement of Claim and its schedules, the defendants have not persuaded me that the Associate Judge made a reversible error by reaching the conclusion above. Additional information may be obtained from the plaintiff in the discovery process.

C. Particulars

[46] As noted already, the defendants’ Notice of Motion on this appeal requested, in the alternative, an Order for further and better particulars under Rule 181.

[47] The Associate Judge declined to order such particulars. She held that the defendants had to establish with evidence that they were unable to understand the case to meet and/or adequately prepare a pleading in response. The Associate Judge held that in the absence of any such evidence filed on a motion for particulars, the deficiencies of the pleading that is the subject of the motion must be clear on the face of the pleading itself.

[48] The defendants did not challenge these conclusions and did not make substantive submissions on the appeal specifically about the need for further particulars. Accordingly, and in

view of my conclusions above, there is no basis to reverse the Associate Judge's decision on this issue.

IV. Conclusion

[49] The defendants' appeal is therefore dismissed.

[50] Having considered the parties' costs submissions at the hearing, I exercise the discretion under the *Federal Courts Rules* to fix costs of the appeal at \$7,500, all-inclusive, payable by the defendants to the plaintiff within 30 days of this Order.

ORDER in T-893-21

THIS COURT ORDERS that:

1. The appeal is dismissed.
2. The defendants shall pay costs of this appeal to the plaintiff in the amount of \$7,500.00 within 30 days of this Order.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-893-21

STYLE OF CAUSE: WI-LAN INC. v APPLE CANADA INC. and APPLE INC.

PLACE OF HEARING: TORONTO, ONTARIO

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ORDER AND REASONS: LITTLE J.

DATED: JULY 4, 2021

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