Federal Court Cour fédérale

Date: 20240918

Docket: T-1184-21

Citation: 2024 FC 1470

Ottawa, Ontario, September 18, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ADEIA GUIDES INC. AND
ADEIA MEDIA HOLDINGS LLC

Plaintiffs

and

BCE INC., BELL CANADA,
BELL MEDIA INC.,
BELL EXPRESSVU LIMITED
PARTNERSHIP,
NORTHERNTEL, L.P.,
TELEFONAKTIEBOLAGET L M
ERICSSON,
ERICSSON CANADA INC.,
MK SYSTEMS USA INC.,
AND MK MEDIATECH CANADA INC

Defendants

ORDER AND REASONS

I. Overview

[1] In their patent infringement action, the Plaintiffs moved to amend their Second Amended Statement of Claim. The Defendants, who have denied the infringement and the validity of the four patents at issue, opposed the motion. The Plaintiffs were partially successful in having "Additional Vendors" added as contributors to the claimed infringement in their proposed Third Amended Statement of Claim: *Adeia Guides, Inc v BCE Inc*, 2024 FC 942 at paras 6 and 11 [Amendment Order].

[2] The Plaintiffs were unsuccessful, however, regarding the proposed amendments involving "Additional Systems" (as this term is defined in the Amendment Order, along with the term "Additional Vendors"). According to Associate Judge Crinson, the amendments lacked material facts to support a conclusion that the Additional Systems infringe the asserted patent claims and, thus, they had no reasonable prospect of success: Amendment Order at para 7.

[3] In their limited appeal of the Amendment Order, the Plaintiffs take issue with the characterization "Additional Systems," arguing that they instead are components of the already at-issue systems, Fibe TV, Satellite TV, and Crave TV. As such, say the Plaintiffs, the Associate Judge erred in concluding that there were insufficient material facts to support the amendments related to the components. They point to the finding of the previous case management judge, upheld on appeal, that the Plaintiffs had pleaded sufficient material facts to support their infringement claims relating to the at-issue systems: *Rovi Guides, Inc v BCE Inc*, 2022 FC 979 [*Rovi Guides*] at paras 43-46.

[4] The Defendants disagree with the Plaintiffs' contentions that the Associate Judge failed to read the pleading as a whole and failed to take the facts pleaded as true.

[5] Having reviewed the parties' motion materials and heard their oral submissions, I am not persuaded that the Associate Judge applied an incorrect legal test or made any palpable and overriding errors in refusing the amendments related to what are named "Additional Systems" in the Amendment Order, or "Component Amendments" as preferred by the Plaintiffs. For the reasons that follow, the Plaintiffs' motion appealing the Amendment Order will be dismissed.

[6] I will continue to refer to Additional Systems, instead of Component Amendments, in these reasons to avoid adding a layer of confusion at this point. As I will explain, nothing turns on either term.

II. Additional Background

[7] The Plaintiffs' action was commenced in the name of Rovi Guides Inc., with TiVO LLC added as a second Plaintiff in the Amended Statement of Claim. The Plaintiffs' names were changed to Adeia Guides, Inc. and Adeia Media Holdings LLC respectively in the Second Amended Statement of Claim.

[8] The Plaintiffs assert infringement of four Canadian patents, all of which relate to providing access to recordings, delivering video programming, and receiving, transcoding, fragmenting, and distributing content. Specifically, the Plaintiffs allege that the Bell Defendants have infringed the patents through Fibe TV, Satellite TV, and Crave TV. In addition, the

Plaintiffs say that the Ericsson Defendants have infringed the patents through the Mediaroom (now Mediakind) platform.

[9] The Plaintiffs allege direct infringement, as well as infringement by common design, agency, attribution, and induced infringement. The Statement of Claim survived the Defendants' motion to strike in *Rovi Guides*.

[10] Pursuant to the underlying, unreported March 22, 2022 order of then Case Management Judge Aalto [2022 Order], which was the subject of a Rule 51 appeal in *Rovi Guides*, the parties provided a detailed Discovery Plan to the Court. This plan included several areas in dispute, which would "be addressed through the discovery process in the normal course."

III. Standard of Review

[11] On an appeal of an associate judge's order under Rule 51 of the *Federal Courts Rules*, SOR/98-106, the applicable standard of review is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36. See *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63-65, 79 and 83.

[12] The Federal Court of Appeal has summarized the *Housen* appellate standard as follows: "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness": *Worldspan Marine Inc v Sargeant III*, 2021

FCA 130 at para 48; see also *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at para 33.

[13] Unlike correctness, the "palpable and overriding error" standard of review is highly deferential. A palpable error is one that is obvious, while an overriding error is one that affects the decision maker's conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at paras 61-64; see also *NCS Multistage Inc v Kobold Corporation*, 2021 FC 1395 at paras 32-33.

IV. Analysis

A. *No question of law*

[14] The Plaintiffs assert that this appeal engages questions of law in addressing whether the Associate Judge made a reversible error in disallowing the Additional Systems amendments. I disagree. I find that the Plaintiffs have not shown the issue for the Court's determination is anything other than one of mixed fact and law subject to the palpable and overriding error standard.

[15] As *Housen* guides (at para 36), it can be difficult to extricate legal questions from the factual; if the legal principle is not readily extricable, then the question is characterized as one of mixed fact and law subject to the deferential standard.

[16] At the hearing of this motion, the Plaintiffs conceded the Associate Judge cited the correct law but they argue that he applied it incorrectly. Referring to an earlier decision he made in a parallel action involving the same Plaintiffs, the Associate Judge framed the test in the form of two questions: First, do the proposed amendments have a reasonable prospect of success? If no, that ends the analysis. If yes, then second, is it is more consonant with the interests of justice that the amendments be permitted or that they be denied? See *Adeia Guides, Inc v Videotron Ltd*, 2024 FC 762 at paras 7-12.

[17] The Plaintiffs say that the Associate Judge failed to read the pleading as a whole and failed to take the facts pleaded as true. They ask the Court to consider whether permitting these proposed amendments would result in any injustice non-compensable by a costs award and whether the interests of justice would be served by permitting the amendments. In my view, the latter considerations arise only if the first question is answered affirmatively which did not occur here.

[18] I determine that this appeal turns on Associate Judge's interpretation of the proposed Additional Systems amendments in the context of not only the Third Amended Statement of Claim but also his familiarity with the proceeding generally in his role as the case management judge: *Apotex Inc v Wellcome Foundation Limited*, 2003 FC 1229 at para 7. In other words, did the Associate Judge make a palpable and overriding error in disallowing the proposed Additional Systems amendments? As I explain, I find that he did not.

B. *Associate Judge considered whole of pleading*

[19] The Plaintiffs have not persuaded me that the Associate Judge failed to consider the entire proposed Third Amended Statement of Claim for at least three reasons.

[20] First, it is his responsibility constant throughout case management to consider the pleadings as a whole to ensure that they "define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair": *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18.

[21] Second, the Associate Judge is presumed to have considered the parties' motion records including the proposed Third Amended Statement of Claim, absent clear evidence to the contrary: *Housen*, above at para 46; *Hennessey v Canada*, 2016 FCA 180 at para 9; *Millennium Pharmaceuticals Inc v Teva Canada Limited*, 2019 FCA 273 [*Millennium*] at para 11. The Associate Judge's analysis (at para 6) is prefaced with the words "[t]he proposed amended pleading when considered as a whole" and the Plaintiffs have not convinced me that he did not consider the whole of the Third Amended Statement of Claim.

[22] Third, and consonant with the second point above, the Associate Judge permitted some of the proposed amendments, i.e. those involving the Additional Vendors.

C. *Associate Judge took facts as pleaded*

[23] Nor am I persuaded that the Associate Judge failed to take the facts pleaded in the Third Amended Statement of Claim as true.

[24] The Plaintiffs contend in this regard that the Associate Judge erred in the characterization of Additional Systems when they are components of the at-issue systems.

[25] During discovery, the Plaintiffs learned of the components, Mediaroom Reach [MRR], Video Storage and Processing Platform [VSPP] and Scotty, that they now seek to add to the Third Amended Statement of Claim. When the Plaintiffs attempted to ask questions about MRR, VSPP and Scotty, they faced refusals.

[26] On the Plaintiffs' motion to compel answers to the refused questions, the Associate Judge ruled that they needed to plead the components before they could ask more questions; hence, the proposed Additional Systems amendments. I note that on the hearing of this motion, the Plaintiffs confirmed that they have not completed yet a follow up round of discovery.

[27] The Plaintiffs assert that the refused Additional Systems amendments do not add any new causes of action, patent claims, systems, or parties; rather, they involve additional facts to support the causes of action. They say it is illogical to find that there are insufficient material facts regarding the Additional Systems when they are components of already at-issue systems, and twice the Court has found that the causes of action are grounded in sufficient material facts

(i.e. the 2022 Order and *Rovi Guides*). In short, the Plaintiffs submit, additional facts cannot make sufficient material facts insufficient.

[28] The Plaintiffs further submit that because the Second Amended Statement of Claim already referred to Mediaroom and MediaFirst as comprising components of Fibe TV (with the alleged infringements particularized in the schedules to the claim), the additional Fibe TV components, MRR and VSPP, are subsumed in the material facts that the Court has found sufficient. Similarly, Scotty is a component of Crave TV.

[29] The Defendants argue that there are no material facts that relate the proposed Additional Systems amendments to the alleged infringements and, hence, the Associate Judge made no palpable and overriding error. It is not enough, they say, to point to the existing reference to the components Mediaroom and MediaFirst, as a sufficient hook for adding MRR and VSPP, because MediaFirst was never commercialized and, therefore, the alleged infringing activities up to now all relate to Mediaroom (at least insofar as Fibe TV is concerned).

[30] I agree with the Defendants that the Associate Judge made no palpable and overriding error for at least three reasons.

[31] First, the Associate Judge specifically took into account (at para 6) “the assumption that those pleaded facts capable of proof are true.”

[32] Second, he acknowledged (at para 4) that the Plaintiffs' motion to amend the Second Amended Statement of Claim sought to add the additional systems, MRR, VSPP and Scotty, "as components of alleged infringing systems." In my view, the characterization "Additional Systems" is not inconsistent with the relevant amendments as currently worded in the proposed Third Amended Statement of Claim. For example, in only one instance is one of the three components, Scotty, referred to specifically as a "component of Crave TV" (i.e. in disallowed paragraph 43A.a). In other disallowed paragraphs, MRR and VSPP are described as platforms and products. In addition, allowed paragraphs 45A, 45B and 45C, which are introduced with the heading "D. Components of Fibe TV, Satellite TV and Crave TV" make no mention of MRR, VSPP or Scotty.

[33] Third, the Associate Judge found (at para 7) that "[t]here are **no particulars** provided beyond the pleading regarding these Additional Systems where the Defendants or the Court could look to ascertain any material facts." [Emphasis added.] I find this statement is not inconsistent with then Case Management Judge Aalto's expressed sentiment in the 2022 Order (at page 6) that "[i]t would be beneficial, however, for Rovi to stipulate what other functionalities infringe without adding hundreds more pages of particulars."

[34] I am sympathetic to the Plaintiffs' frustration with the "Catch 22" situation in which they believe they find themselves by seeking to comply with the guidance of case management judges assigned to their action.

[35] That said, the Defendants are entitled to know the case they have to meet. In their view, and consistent with the Associate Judge's determination in the Amendment Order, which in my view does not involve a reversible error, there are no particulars that permit the Defendants to link the Additional Systems amendments to the material facts on which the Plaintiffs rely.

[36] The Plaintiffs counter that because the schedules to the Statement of Claim describe infringement without referring to specific components (and have been accepted as sufficiently particularized in the 2022 Order), they should not be required to amend them just to make the refused amendments (or any other similar amendments, for that matter); in other words, the schedules already comport with accepted materiality. That accepted materiality, however, was in the context of Mediaroom, MediaFirst not having been commercialized, as identified in the Statement of Claim (and Second Amended Statement of Claim).

[37] In the end, I am not convinced that the Associate Judge made any palpable and overriding error here. I add that the brevity of the Amendment Order in itself is not a hook on which to hang that hat.

[38] The Federal Court of Appeal guides that the distillation and synthesis of reams of complicated data into brief, comprehensible reasons will not be construed automatically on appeal as misunderstandings of the legal principles or instances of faulty application of the law to the facts: *Millennium*, above at para 9, citing *South Yukon F*orest *Corp v Canada*, 2012 FCA 165 at para 49; *Mahjoub*, above at para 69. In other words, "[a]n inquiry into palpable and

overriding error overlooks matters of form and gets at the substance of what the first-instance court did": *Millennium,* at para 10.

[39] Further, "a non-mention in reasons does not necessarily lead to a finding of palpable and overriding error": *Mahjoub,* above at para 66. A focus on what a decision does not say or could have said or should have said differently (i.e. systems versus components) may be an unduly narrow one, depending on the circumstances. An objective in fulfilling an appellate function is to perform a holistic, organic and fair review of the first-instance decision: *Apotex Inc v Eli Lilly and Company*, 2018 FCA 217 at para 97, citing *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at paras 68-69.

V. Conclusion

[40] For the above reasons, the Plaintiffs' appeal of the Amendment Order will be dismissed.

[41] While it may be small consolation, I note that the Amendment Order was not made with prejudice, meaning that, in the circumstances where the refusals are rooted in a lack of particulars, the Plaintiffs are not precluded from trying again with reformulated amendments.

[42] On the issue of costs, the parties expressed their agreement on a lump sum award of $2,000 to the successful party in any event of the cause, payable in the usual course (i.e. not forthwith). Exercising my discretion, I award the Defendants costs in the amount of $2,000 in any event of the cause, payable by the Plaintiffs in the usual course.

ORDER in T-1184-21

THIS COURT'S JUDGMENT is that:

1. The Plaintiffs Rule 51 motion, appealing the decision in *Adeia Guides, Inc v BCE Inc*, 2024 FC 942, is dismissed.
2. The Defendants are awarded costs in the amount of $2,000 in any event of the cause, payable by the Plaintiffs in the usual course.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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