Federal Court of Appeal  Cour d'appel fédérale

Date: 20170213

Docket: A-240-16

Citation: 2017 FCA 32

CORAM: **STRATAS J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

NOV DOWNHOLE EURASIA LIMITED and DRECO ENERGY SERVICES ULC

Appellants

and

TLL OILFIELD CONSULTING LTD. and ACURA MACHINE INC.

Respondents

Heard at Toronto, Ontario, on January 11, 2017.

Judgment delivered at Ottawa, Ontario, on February 13, 2017.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: STRATAS J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellants, NOV Downhole Eurasia Limited and Dreco Energy Services ULC, sought leave in the Federal Court to amend their statement of claim in a patent infringement action against TLL Oilfield Consulting Ltd. and Acura Machine Inc.

[2] The proposed amendments fall into two categories: the addition of individuals as parties and a claim for joint and several liability.

[3] The appellants seek to add three individuals as additional defendants in the action: Troy Lorenson, David Nicholson, and Petr Macek. Messrs. Lorenson and Nicholson were each directors and officers of one of the respondents, and Mr. Macek was involved in the development of an allegedly infringing product.

[4] The motion was dismissed by the Federal Court (*per* Prothonotary Milczynski), and a Rule 51 appeal was similarly dismissed (*per* Bell J., the judge) (2016 FC 685).

[5] In this further appeal, the appellants submit that the judge made reviewable errors and that leave to make the amendments should be allowed. Since the judge had substantially adopted the Prothonotary's analysis and conclusions (reasons, paragraph 9), this appeal focused mainly on the reasons of the Prothonotary.

[6] In my view, the Federal Court did not err in law in identifying and applying the legal principles concerning the amendment of pleadings. Nor did it err in law in its understanding of this Court's decision regarding the personal liability of directors and officers in *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.* (1978), 89 D.L.R. (3d) 195, 40 C.P.R. (2d) 164, which was also cited in *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 (at para. 60). Similarly, the Federal Court did not err in law with respect to the legal principles to be applied regarding the personal liability of third parties such as Mr. Macek.

[7] Absent an error of law, the decision whether to allow an amendment can be set aside only on the basis of palpable and overriding error: *Hospira Healthcare Corporation v. The Kennedy Institute of Rheumatology*, 2016 FCA 215, at paras. 69-79. This is a high standard: *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 38-39, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46 and *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77. I am not persuaded that there is any palpable and overriding error in this case.

[8] The appellants submit that the Federal Court erred by failing to properly consider all relevant pleaded facts with respect to the allegations against the three individuals. I disagree. When the decisions of the Prothonotary and the judge are reviewed as a whole, it is clear that the Federal Court took into account all relevant pleadings.

[9] Further, in my view the proposed pleading is deficient because it does not contain material facts with sufficient specificity to establish "the deliberate, wilful and knowing pursuit of a course of conduct," as described in *Mentmore*. Most of the pleaded facts describe ordinary activities of directors and officers, such as causing the corporations to develop a competing product and to pay out profits to the officers and directors. The facts set out in the proposed pleading do not establish the type of conduct that is necessary for personal liability.

[10] Although the pleading does contain a statement that "the defendants knowingly and willfully pursued a course of conduct that was likely to constitute an infringement of the 065 Patent or reflected an indifference to the risk of infringement" (paragraph 72), this is merely a conclusory statement that parrots the applicable test from *Mentmore*. It does not constitute a

material fact: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301, at paragraph 34.

[11] Accordingly, there is no reviewable error in the Federal Court's decision to deny leave to add further defendants.

[12] The second type of amendment adds a claim for joint and several liability. The appellants submit that the Federal Court failed to consider that this claim applies to the original corporate defendants as well as the individuals. The Federal Court denied leave to make these amendments, although the reasons do not explicitly refer to joint and several liability of the two corporations.

[13] A claim for joint and several liability requires, at a minimum, material facts which support that liability should be joint. In this case, the pleaded facts are to the effect that each of the corporate defendants infringed the plaintiffs' patent. These material facts are not sufficient to support a claim for joint and several liability. Accordingly, the Federal Court made no reviewable error in declining this amendment.

[14] Accordingly, I would dismiss the appeal with costs.

"Judith M. Woods"
J.A.

"I agree
David Stratas J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-240-16
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BELL DATED JUNE 17, 2016, NO. T-1280-13	
STYLE OF CAUSE:	NOV DOWNHOLE EURASIA LIMITED AND DRECO ENERGY SERVICES ULC v. TLL OILFIELD CONSULTING LTD. AND ACURA MACHINE INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 11, 2017
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	STRATAS J.A. GLEASON J.A.
DATED:	FEBRUARY 13, 2017

APPEARANCES:

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