Federal Court of Appeal | Cour d'appel fédérale

Date: 20120611

Docket: A-455-11

Citation: 2012 FCA 174

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

HOLLICK SOLAR SYSTEMS LIMITED
and CONSERVAL ENGINEERING INC.

Appellants

and

MATRIX ENERGY INC.

Respondent

Heard at Montréal, Quebec, on June 4, 2012.

Judgment delivered at Ottawa, Ontario, on June 11, 2012.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] Hollick Solar Systems Limited and Conserval Engineering Inc., the appellants, appeal from a judgment of Scott J. of the Federal Court (judge) that denied the appellants' claim that Matrix Energy Inc., the respondent, infringed its Canadian Patent No. 1,326,619 (the '619' patent) by selling a solar air system known as the MatrixAir system (Matrix system).

[2] The appeal raises the following issue:

Did the judge make a reviewable error in concluding that the Matrix system does not infringe the appellants' '619' patent?

[3] Subsumed in this ground of appeal are the allegations that the judge erred in:

a) his interpretation and construction of claim 10 of the '619' patent when he ruled that the placement of the air inlet at the top of the panel of the appellants' SolarWall solar air heating system was an essential element of the invention;

b) coming to the conclusion that the variant in the Matrix system had a material effect on the way the appellants' invention described in claim 10 of the '619' patent works;

c) wrongfully discarding the testimony of the appellants' expert; and

d) failing to address the appellants' subsidiary argument that the respondent Matrix system as offered for sale and sold does in fact infringe the '619' patent because the air intake in the Matrix system is not really located at the bottom and, in fact, on some systems the intake is located at the top.

[4] For reasons which follow, I am of the view that this appeal should be dismissed.

The facts giving rise to the litigation

[5] Hollick Solar Systems Limited (Hollick) and Conserval Engineering Inc. (Conserval) are associated companies. Conserval delivered renewable energy solutions for 30 years, such as solar air heating systems. It does not manufacture such systems. Rather, it purchases key components from suppliers and resells them.

[6] Matrix is a corporation which offers a range of solar systems since 1985. From 1991 until March 2007, it distributed solar air heating systems designed by Conserval. As a result of a disagreement between the parties, Matrix Distributorship Agreement with Conserval expired and it began quoting and selling a solar air heating system known as the MatrixAir system.

[7] The Matrix system is in fact the appellants' system with the following variant. Instead of having an inlet at the top of the air collection space as described in the appellants' '619' patent and embodied in claims 1 and 10 of said invention, the Matrix system's inlet is located at or near the bottom of the air collection space.

Analysis of the judge's decision and the contentions of the parties

[8] It is not necessary to address the subsidiary argument of the appellants in view of the conclusion I have reached on the main issue.

[9] It is obvious from the judge's reasons and the parties' respective memorandum of facts and law on appeal that the sole issue in these proceedings was whether the location of the air intake mentioned in claims 1 and 10 of the '619' patent was an essential element of the invention, thereby limiting its scope.

[10] At paragraphs 2 and 35 of his reasons for judgment, the judge writes:

> [2] Initially the defendant disputed the validity of the patent. Subsequently, it amended its pleading and took the position that the MatrixAir system is a variant outside the scope of the '619' patent, as a result the patent cannot be infringed. The defendant filed an amended statement of defence and counterclaim on January 11, 2008.
>
> [35] The plaintiffs allege that the present case concerns one sole issue that is whether the limitation "at the top" found in claims 1 and 10 is essential or not. A finding that said limitation is not essential according to plaintiffs means that it can be omitted and consequently all MatrixAir systems offered for sale and sold by defendant have infringed Canadian Patent 619.

[11] At paragraph 7 of their memorandum of facts and law on appeal, the appellants assert that:

> The main question at issue is to determine whether the limitation "at the top" is not an essential element of claim 10 such that the MatrixAir system would infringe that claim.

[12] Then the appellants go on to reassert their alternative contention previously mentioned in paragraph d) which is conditional on a finding that the limitation is an essential element of claim 10.

[13] That the respondent understood the sole issue to be the essential character of the “at the top” limitation in claim 10 permeates throughout its memorandum of fact and law.

[14] The judge made a passing reference to the approach defined by the Supreme Court to claim interpretation in *Free World Trust v. Electro Santé Inc.*, [2000] 2 S.C.R. 1024: see paragraph 51 of his reasons for judgment. He then proceeded to decide the sole issue before him. He looked at the *Free World Trust* case for further guidance: *ibidem* at paragraph 54. He followed the teachings of the Supreme Court in determining if the impugned limitation of claim 10 is an essential element of the invention.

[15] It was not in dispute that the Matrix system had a variant of the appellants’ SolarWall air heating system. The question to be answered then was: does the variant have a material effect upon the way the invention works?

[16] In answering this question, the judge considered the expert evidence provided by both the appellants and the respondent. He discarded the evidence of the appellants’ expert on a number of issues, but provided justifications each time he did so. While it is true that he seems to have misunderstood the appellants’ expert evidence (see paragraph 58 of his reasons for judgment) on the issue of whether efficiency is the criterion to be used in assessing the effect of the variant, he applied the proper test to the issue. At paragraph 59, he wrote:

> The criterion is not whether the variant improves the performance of the invention but rather does it have a significant effect on how the device functions, be it positive or negative.

[17] The judge accepted the testimony of the respondent's expert to the effect that the variant has a material effect on the way the invention works: see paragraphs 64, 72, 73 and 74 of his reasons for judgment. We are in effect asked to second-guess the judge on his appreciation of expert evidence on factual issues and issues of credibility, and then substitute our own appreciation. We are at great disadvantage in this respect and, according to the standard of review applicable, we cannot engage in such an exercise unless the judge made errors of law or overriding and palpable errors on questions of fact or mixed law and fact: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. On the record before us, I cannot find any error of the kind which would have a material impact on the decision under appeal and justify our intervention.

[18] For these reasons, notwithstanding the able submissions of counsel for the appellants, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

"I agree
Pierre Blais C.J."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Pascal Lauzon	FOR THE APPELLANTS
François M. Grenier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BCF Montréal, Quebec	FOR THE APPELLANTS
ROBIC, LLP Montréal, Quebec	FOR THE RESPONDENT