Federal Court of Appeal

Cour d'appel fédérale

Date: 20241129

Docket: A-249-22 (lead file)
A-102-23

Citation: 2024 FCA 204

CORAM: **GLEASON J.A.**
LOCKE J.A.
HECKMAN J.A.

BETWEEN:

DOUBLE DIAMOND DISTRIBUTION LTD.

Appellant

and

CROCS CANADA, INC. AND CROCS INC.

Respondents

Heard at Ottawa, Ontario, on November 29, 2024.
Judgment delivered from the Bench at Ottawa, Ontario, on November 29, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: LOCKE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 29, 2024).

LOCKE J.A.

[1] Double Diamond Distribution Ltd. (Double Diamond) appeals two decisions of the Federal Court. In the first (2022 FC 1443, *per* Justice Janet M. Fuhrer), the Federal Court found that the respondents' Canadian Industrial Design No. 120939 (the 939 Design) was valid and that Double Diamond had infringed it. This decision also awarded the respondents (Crocs Canada,

Inc. and Crocs Inc., collectively Crocs) an accounting of Double Diamond's profits and set the amount of said profits. In the second decision under appeal (2023 FC 184, *per* Justice Fuhrer), the Federal Court ordered Double Diamond to pay costs to Crocs in a lump sum amount. These decisions will be referred to herein, respectively, as the Liability Decision and the Costs Decision.

[2] In respect of the Costs Decision, Double Diamond brings two motions to introduce new evidence. The proposed new evidence apparently comprises (i) a motion record filed by Crocs in this proceeding at the Federal Court level that led to an Order by Case Management Judge Mireille Tabib dated July 21, 2021 (the Tabib Order), (ii) dozens of documents from a separate Federal Court proceeding between Double Diamond and Crocs, and (iii) a recent decision of the U.S. Court of Appeals for the Federal Circuit in a proceeding similar to the separate Federal Court proceeding. Double Diamond argues that the proposed new evidence is important because the Costs Decision relied on comments in the Tabib Order concerning a pattern of Double Diamond failing to comply with Rules and Orders of the Court, and the Tabib Order was based in part on materials from the separate Federal Court proceeding. Double Diamond also notes that, in the U.S. proceeding, Crocs has admitted that it falsely claimed that its Croslite product was patented. Double Diamond argues that this is relevant to the credibility of Crocs' witnesses.

[3] The second motion to introduce new evidence was dismissed because it was filed only seven days prior to the hearing of the present appeals without adequate explanation for the short notice. The first motion to introduce new evidence will also be dismissed. Double Diamond acknowledges that it must convince us, among other things, that the proposed new evidence is

practically conclusive on an issue on appeal, or that the Court should exercise its residual discretion to admit the new evidence on appeal in the interest of justice. We are far from convinced that such evidence is practically conclusive on any issue in the present appeals. Our conclusion might be different if the Tabib Order itself were under appeal, but it is not. Nor are we convinced that this is a clear case, as would be necessary for the exercise of our residual discretion.

[4] Turning now to the decisions that are under appeal, Double Diamond acknowledges that the applicable standards of review are as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, and findings of fact and questions of mixed fact and law, from which no question of law is extricable, are not overturned absent a palpable and overriding error. “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case.

[5] Double Diamond raises a number of issues on appeal but, in our view, none establishes a reviewable error in accordance with the applicable standards of review. The remainder of these reasons briefly address each of the issues raised by Double Diamond in respect of the Liability Decision and the Costs Decision.

[6] With regard to the Liability Decision, Double Diamond argues that the Federal Court erred in finding that it had not asserted the Rebound Clog as prior art in its pleading. It relies on an assertion that the shoe produced by FinProject for Crocs (which <u>was</u> mentioned in its pleading) was the Rebound Clog. This issue concerns a question of mixed fact and law with no

extricable question of law. Even if we were convinced that the Federal Court made a palpable error in its finding in this regard, Double Diamond's argument would fail because such error is not overriding. At paragraphs 89 and following of its reasons, the Federal Court considered and accepted expert evidence concerning the Rebound Clog. In our view, it was open to the Federal Court to accept this evidence. This expert evidence included the view that the Rebound Clog was not the closest prior art. Accordingly, it appears that a different finding concerning Double Diamond's pleading in respect of the Rebound Clog would have had no effect on the outcome.

[7] Double Diamond argues that the Federal Court erred in concluding that its argument that Crocs had tacitly admitted non-infringement was raised for the first time at trial. Double Diamond cites a passage in its pleading that alleged that, at all material times, Crocs knew or ought to have known that Double Diamond was selling the allegedly infringing goods in Canada. However, that passage does not explicitly allege any tacit admission of non-infringement, and we find no inconsistency between it and the Federal Court's conclusion.

[8] Double Diamond argues that the Federal Court erred in finding infringement. It does not dispute the legal test the Federal Court applied for infringement. Rather, it takes issue with (i) the Federal Court's failure to acknowledge all of the prior art, (ii) its conclusion that the utilitarian function does not predominate in the 939 Design, and (iii) its weighing of the testimony of the parties' respective witnesses. In our view, Double Diamond's arguments in this regard amount to nothing more than a request that this Court reweigh the evidence and reach a different conclusion. That is not our role. We see no reviewable error in the Federal Court's acceptance of the evidence of Crocs' expert witness.

[9] We have the same views concerning Double Diamond’s argument that the Federal Court erred in its conclusion that the 939 Design is valid. The Federal Court was entitled to weigh the evidence as it did, including the expert evidence, and we see no palpable and overriding error in that regard. The Federal Court was also entitled to conclude that any differences in the various figures of the 939 Design were insubstantial variations and not impermissibly distinct designs.

[10] Double Diamond argues that the Federal Court erred in its accounting of Double Diamond’s profits when it refused to accept as evidence a document indicating its expenses. The refusal was based on a conclusion that the document constituted inadmissible hearsay. Double Diamond argues that the document should have been admitted as evidence as an exception to the rule against hearsay. It also asserts that all companies have expenses in making a product.

[11] We see no error in the Federal Court’s hearsay analysis. The document in question was indeed hearsay, and the Federal Court properly considered the fact that the hearsay issue could have been avoided if the document had been introduced through a different witness. We are also of the view that the Federal Court did not err in stating that the burden was on Double Diamond to establish any costs that it sought to deduct from its revenues made from sales of the infringing goods. The Federal Court was not obliged to request better evidence of Double Diamond’s expenses.

[12] Finally, Double Diamond argues that the Federal Court erred in its costs award. It criticizes the Federal Court’s extensive reliance on statements in the Tabib Order about its

conduct. It disputes that it conducted itself badly, and notes the absence of affidavit evidence in this regard.

[13] We are not convinced that the Federal Court erred in its Costs Decision. In light of the considerable discretion afforded to trial judges in fashioning their costs awards, such decisions will not be disturbed on appeal unless they are based on a wrong principle or plainly wrong: *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9, 131 C.P.R. (4th) 1 at para. 3. The Federal Court was entitled to rely on the Tabib Order, and not to require affidavit evidence of Double Diamond's conduct.

[14] It follows from the foregoing that the appeals will be dismissed with costs. Double Diamond's first motion to introduce new evidence will also be dismissed with costs.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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