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PATENTS

INFRINGEMENT

Appeal from Federal Court decision (2022 FC 998) on motion for summary trial dismissing appellants' action against respondents for patent infringement — Appeal turning on what constitutes "use" of patented invention for purposes of proving infringement of patent under *Patent Act*, R.S.C., 1985, c. P-4 (Act), s. 42 — Appellants pursuing development of liquefied natural gas (LNG), owning Canadian Patent No. 3027085 ('085 Patent) — '085 Patent relating to apparatus, methods, systems in respect to near-shore or at-shore liquefaction of natural gas — Invention comprising floating modular design, air-cooled liquefaction process, electric-driven compressors — Appellants, 7G (predecessor to respondent ARC Resources) in talks to further appellants' development of their LNG facilities — Appellants disclosed confidential information to group of natural gas producers (Consortium), including design for proposed LNG facility — Consortium later unilaterally ended discussions with appellants — Consortium hired third party to prepare preliminary Front End Engineering Design (pre-FEED) study for LNG facility — Showed high-level summary of pre-FEED study to potential investors, LNG off-takers (companies that use or resell LNG), large-scale industry contractors, allowed four of these third parties to see pre-FEED study itself — Appellants claimed respondents infringed '085 Patent through design, development, marketing to potential investors, LNG off-takers, First Nations, large-scale industry contractors of LNG project that included design for LNG facility that, if built, would comprise essential elements of invention claimed in '085 Patent — Respondents brought motion for summary trial pursuant to *Federal Courts Rules*, SOR/98-106, r. 213 — Federal Court agreed with respondents that summary trial was appropriate to decide matter — Found the allegedly infringing activities not constituting "use" of '085 Patent — Decided that, given claimed system not existing in Canada, respondents' new project not infringing '085 Patent, respondents could not have made, constructed or sold claimed system — Also found that respondents' promotional efforts not constituting infringement in Canada — Appellants argued that, by interpreting Act, s. 42 as requiring that an invention be built in order to establish infringement through use, Federal Court erred for three reasons: (1) it failed to apply Supreme Court's purposive interpretation of "use" set out in *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902 (*Monsanto*); (2) it paid insufficient attention to statutory context; (3) it failed to consider benefit allegedly derived by respondents from appellants' invention, a factor identified in *Monsanto* as indicating infringing use — Whether Federal Court erred in law by requiring that patented invention be built as pre-condition to infringement by "using" under Act, s. 42 — Federal Court not erring in rejecting appellants' novel, expansive interpretation of "use" under s. 42, finding that respondents did not use invention claimed by '085 Patent — In sum, appellants argued that Supreme Court's treatment of meaning of "use" in *Monsanto* standing for proposition that s. 42 granting patentee exclusive right, privilege, liberty of using goal, purpose or advantage of invention for commercial benefit — *Monsanto* saying no such thing — Right to "use" attaches to invention described in patent claims — This is confirmed by terms used by Supreme Court to describe what is "used" under s. 42 — What is "used" under s. 42 is the claimed invention — Supreme Court not equating "object of the patent" with "purpose of the invention" — Question not whether commercial benefit relevant to analysis, but rather whether commercial benefit realized in context of defendant's commercial activities involving the patented object — Term "patented object" designating "subject-matter of the

invention" or "invention" itself as defined in patent claims — Respondents realized no commercial benefit in context of commercial activities involving patented object — To prove infringement, appellants had to show that essential element of claimed invention "utilized with a view to production or advantage" — Federal Court not erring in finding that respondents did not use claimed invention — By arguing that patent protection should extend to invention's goal, purpose or advantage, appellants sought to prevent competitors from using idea or concept underlying their invention for commercial advantage — Finding different way to accomplish benefit of invention by designing around patent not constituting infringement since protection of patent "lies not in the identification of a desirable result but in teaching one particular means to achieve it" — Interpretive outcome sought by appellants would frustrate, not enforce, patent bargain — Subject matter, time-limited monopoly granted by Act not offering protection sought by appellants — Appeal dismissed.

STEELHEAD LNG (ASLNG) LTD. V. ARC RESOURCES LTD. (A-210-22, 2024 FCA 67, Heckman J.A., public reasons for judgment dated April 11, 2024, 35 pp.)