

Ottawa
1966
Sept. 16
Sept. 23

BETWEEN:

PRECISION METALSMITHS INC. PLAINTIFF;

AND

CERCAST INC., VESTSHELL INC., }
and FRANK VALENTA } DEFENDANTS.

Patents—Pleading—Allegation of infringement not supported by allegation of material facts—Insufficiency of.

A plaintiff's pleadings (statement of claim and particulars of breaches) which allege that defendant has infringed plaintiff's patent rights (1) by constructing and using apparatus and moulds covered by product claims of the patent, and (2) by using processes covered by process claims of the patent, fail to allege the material facts necessary to show a cause of action, viz a description of the apparatus and moulds and of the processes referred to which will show that they fall within the claims of the patent.

Dow Chemical Co. v. Kayson Plastics & Chemicals Ltd. [1967]
1 Ex. C.R. 71 applied: *Exchequer Court Rules* 20, 88, referred to.

APPLICATION to strike out statement of claim.

Donald N. Plumley for plaintiff.

Kent H. E. Plumley for defendants.

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JACKETT P.:—An application herein was argued before me on Friday, September 16, 1966. The application was for an order that the Statement of Claim be struck out either in whole or in part on any one or more of several different grounds. While I indicated when I disposed of the matter that I did not intend to give reasons, I have since decided that I ought to do so. This, as it seems to me, is advisable both because they may be necessary when further applications are made in this action and because the questions that I had to consider may arise in other actions.

The Statement of Claim, which was filed on April 5, 1966, alleges that the plaintiff is the owner of one Canadian patent (hereafter referred to as the "product patent") "for an invention of Claude N. Watts entitled 'Sprue Form and Method of Precision Casting'" and is also the owner of another Canadian patent (hereafter referred to as the "process patent") "for an invention of Claude N. Watts entitled 'Process and Slurry Formulation for Making Precision Casting Shells'". No other information is given by the Statement of Claim concerning the nature of the inventions in respect of which such patents were granted. Copies of the patents were put before the Court during argument but they have not been filed as part of the Statement of Claim or otherwise made part of the Court record.

The Statement of Claim further alleges that "The defendants have infringed the rights of the plaintiff under both of the said letters patent as set out in the particulars of breaches delivered herewith". The body of the Particulars of Breaches filed at the same time as the Statement of Claim reads as follows:

1 The defendants have infringed letters patent No 704,693 by making, constructing and using apparatus and moulds covered by claims 1 to 6, 8 and 9 of the said letters patent.

2 The defendants have infringed letters patent No. 719,635 by using the processes covered by claims 1 to 8 of the said letters patent.

3. The precise number and dates of all the defendants' infringements are at present unknown to the plaintiff, but the plaintiff will claim to recover full compensation in respect of all such infringements.

4 The plaintiff will rely on claims 1 to 6, 8 and 9 of letters patent No 704,693 and claims 1 to 8 of letters patent No 719,635.

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Pursuant to a demand made by the defendants upon the plaintiff for particulars of the Particulars of Breaches, the plaintiff filed a document entitled "Reply to the Demand for Particulars of the Particulars of Breaches" bearing date May 5, 1966, the body of which reads as follows:

1. As to paragraphs 1, 2 and 3 of the said demand, the plaintiff says that in a visit to the plant of Cercast Inc., in Montreal on or about September 20, 1965, representatives of the plaintiff observed hollow sprue moulds which the plaintiff alleges were made, constructed and used in infringement of claims 1-6, 8 and 9 of the said Letters Patent No. 704,693 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

2. As to paragraphs 4-9 of the said demand, the plaintiff alleges that the processes used by the defendants to prepare the moulds referred to in paragraph 1 are within the knowledge of the defendants and the plaintiff alleges that the said processes have been used in infringement of claims 1-8 of Canadian Letters Patent No. 709,635 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

3. As to paragraphs 1-9 of the said demand, the plaintiff alleges that the participation of each of the defendants in the making, constructing and using of the moulds referred to in paragraph 1 hereof and the processes referred to in paragraph 2 hereof, is within the knowledge of all the said defendants, the defendant Valenta being an officer and director of each of the other defendants.

On May 19, 1966, an application was made by the defendants to my brother Noël for an order requiring the plaintiff to provide further particulars of paragraphs 1 and 2 of the Particulars of Breaches. In effect, the application was, *inter alia*, for particulars identifying "the specific apparatus and moulds which the Plaintiff alleges have been made, constructed and used . . . in infringement of claims 1 to 6, 8 and 9 of Canadian Letters Patent 704,693" and for particulars identifying "the specific process or processes which the Plaintiff alleges have been used . . . in infringement of claims 1 to 8 of Canadian Letters Patent 719,635". The application for particulars identifying "the specific apparatus and moulds" was dismissed but the plaintiff was ordered to provide the defendants with

1. particulars identifying the specific process or processes which the plaintiff alleges have been used by the defendant, Cercast Inc., in infringement of claims 1 to 8 of Canadian Letters Patent 719,635;

2. particulars identifying the specific process or processes which the plaintiff alleges have been used by the

defendant Vestshell Inc., in infringement of claims 1 to 8 of Canadian Letters Patent 719,635;

3. particulars identifying the specific process or processes which the plaintiff alleges to have been used by the defendant, Frank Valenta, in infringement of claims 1 to 8 of Canadian Letters Patent 719,635.

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Pursuant to this order, a document dated July 13, 1966, and entitled "Further Particulars of Paragraph 2 of the Particulars of Breaches Delivered Pursuant to the Order of the Honourable Mr. Justice Noël Dated May 19, 1966" was filed. The body of that document reads as follows:

1. The specific processes which the plaintiff alleges have been used by:—

- (a) the defendant, Cercast Inc;
- (b) the defendant, Vestshell Inc; and
- (c) the defendant, Frank Valenta;

in infringement of claims 1-8 of Canadian Letters Patent 719,635 are the following:

- (i) as to claim 1—the process of building a shell mold around a disposable pattern having restricted passages comprising applying a first refractory coating to said pattern, drying said first coating, applying another refractory coating to said pattern by dipping the pattern into a refractory slurry bath, said refractory slurry bath being characterized by having a viscosity thin enough so that it can be forced into the restricted passages, viscosity high enough so that it will remain in the restricted passages during subsequent draining operations to provide a solid and continuous shell mold, and having sufficiently large refractory grains so that the slurry packed into said restricted passages will not crack on hardening, applying a vacuum to said slurry bath with the pattern immersed therein until substantially all occluded air is removed, said vacuum being great enough that the slurry will be forced into the restricted passages of the pattern and will be caused to substantially uniformly coat said pattern when the vacuum is released and the slurry bath is restored to atmospheric pressure, restoring said slurry to atmospheric pressure so that the slurry is forced into the restricted passages to substantially uniformly coat said pattern, removing the pattern from the slurry bath, draining excess slurry from the pattern, and applying a stuccoing material to said another coating of slurry, drying said another refractory coating, and thereafter continuing to build up the shell mold by the steps including dipping the pattern into a refractory slurry, stuccoing, and drying;
- (ii) as to claim 2—the process referred to in paragraph (i) hereof wherein said refractory slurry bath is further characterized by a viscosity within a range of from about 7,000 centipoise to about 10,000 centipoise;

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- (iii) as to claim 3—the process referred to in paragraph (1) hereof wherein the first refractory coating is applied to said pattern by dipping said pattern into a slurry bath of from about 1,300 centipoise to about 1,500 centipoise, draining excess slurry, and thereafter stuccoing said pattern with refractory material to arrest further draining;
- (iv) as to claim 4:
- A. the process referred to in paragraph (i) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;
 - B. the process referred to in paragraph (ii) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;
 - C. the process referred to in paragraph (iii) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;
- (v) as to claim 5—the process of forming a shell mold around a disposable pattern and simultaneously forming a solid core within restricted passageways of the pattern, comprising, providing a slurry capable of flowing by gravity into all interstices of the pattern, dipping the pattern into said slurry and draining excess slurry followed by stuccoing all surfaces including the interstices to arrest excess draining, thereafter providing a second slurry having a binder consisting principally of silica sol with from about .5% to 2% by weight of polyvinyl alcohol and having a viscosity substantially within the range of from 7,000 centipoise to 10,000 centipoise, determining the existence of any internal cavities from which such second slurry would drain if filled with such slurry and reducing such cavities by a further dip in thin slurry followed by stuccoing, and thereafter placing the pattern into a bath of such second slurry and reducing the atmospheric pressure surrounding the bath and thereafter restoring the atmospheric pressure to drive the second slurry fully into any remaining interstice, and finally finishing the building of the external shell by dipping and stuccoing;
- (vi) as to claim 6—the process referred to in paragraph (v) hereof in which the said further dip to reduce the cavity size is a vacuum fill of the first slurry followed by draining and stuccoing;
- (vii) as to claim 7—the process of building a shell mold around a disposable pattern and simultaneously forming a solid core within restricted passageways of the pattern comprising the steps: (1) providing a refractory powder plus binder slurry of about 1,300 to 1,500 centipoise and a separate stucco means having a very fine granular refractory; (2) dipping a pattern to be cored and coated into said slurry, draining excess slurry, and thereafter applying the very fine stucco to arrest further draining; (3) providing a second slurry of refractory powder

with a combination of silica sol and polyvinyl alcohol as binders and adjusted in viscosity within a range between 7,000 centipoise and 10,000 centipoise; (4) placing said disposable pattern under a bath of said second slurry and evacuating the atmosphere around the bath, thereafter restoring the atmospheric pressure to drive said second slurry fully into any remaining interstice, and (5) finishing the shell by conventional methods of dipping and stuccoing;

(viii) as to claim 8—the process referred to in paragraph (vii) hereof in which the said second slurry has a silica sol binder type with an addition of from about .5% to about 2% polyvinyl alcohol by weight.

2. The processes hereinbefore referred to and used by the defendants and alleged by the plaintiff to infringe the said Letters Patent No. 719,635 as referred to in paragraph 2 of the particulars of breaches are practised by the defendants within the confines of their own plants and the said processes are within the knowledge of the defendants.

I have set forth at some length the state of the plaintiff's pleadings because it was on an appraisal of them that I had to make a decision as to what disposition to make of the defendants' application that the Statement of Claim be struck out.

In *Dow Chemical Co. v. Kayson Plastics & Chemicals Ltd.*,¹ I made a comment concerning pleadings in actions of this claim, which reads as follows:

In general, under our system of pleading, a statement of claim for an infringement of a right should clearly show

- (a) facts by virtue of which the law recognizes a defined right as defined right of the plaintiff.
- (b) facts that constitute an encroachment by the defendant on that defined right of the plaintiff.

If the Statement of Claim does not disclose those two elements of the plaintiff's cause of action, it does not disclose a cause of action and may be disposed of summarily.

While, as far as I know, there is no special rule in relation to claims for infringement of a patent that would exempt such proceedings from this elementary requirement, there appears to be a practice, which is not peculiar to this country, whereby the Statement of Claim does not describe the particular monopoly right of the plaintiff which he claims to have been infringed but is limited to an assertion that the plaintiff is an owner of a patent bearing a certain number and having a certain title. This patent is not part of the pleadings so that the pleading tells neither the Court nor the defendant anything about the rights of the plaintiff that, according to him, have been infringed. Furthermore, if the Court or the defendant acquires a copy of the patent, which can be done at a price, more often than not, it will be found that the patent purports to grant to the plaintiff a large number of monopolies and the Court and the defendant are left to guess which one or more is the subject matter of the action.

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¹[1967] 1 Ex. C.R. 71.

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It seems to follow from this departure from the ordinary rules of pleading that the plaintiff then adopts the device found in the Statement of Claim in this action of omitting to allege any facts that would constitute an infringement of the plaintiff's rights and the Statement of Claim is limited to a bare assertion that the plaintiff's rights have been "infringed".

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The question that occurs to me is whether there is any possible basis upon which such a statement of claim can be supported under our Rules.

I am informed by counsel that the product patent contains claims in respect of apparatus known as a "sprue" used in making moulds for ferrous and non-ferrous casting and also contains claims for moulds for use in such casting. I am further informed that the process patent contains a number of claims each of which is for a process for making a mould for ferrous and non-ferrous casting.

At this point, it may be well if I re-state the basic principle involved. A statement of claim must contain a concise statement of the "material facts" upon which the plaintiff relies as giving him a cause of action; it must not contain "the evidence". (Rule 88) Put another way, a statement of claim must contain a statement of the facts that give him a cause of action but must not contain the facts upon which he relies to prove those facts. If the material facts stated by a statement of claim clearly reveal no cause of action, it should be struck out.

In an action for infringement of a patent under the *Patent Act*, there must therefore be in the Statement of Claim allegations

- (a) of facts from which it follows as a matter of law that the plaintiff has, by virtue of the *Patent Act*, the exclusive right to do certain specified things, and
- (b) that the defendant has done one or more of the specified things that the plaintiff has the exclusive right to do.

It is not a compliance with the requirement that the material facts be alleged merely to state the conclusions that the Court will be asked to draw, which are

- (a) that the plaintiff is the owner of one or more specified Canadian patents, and
- (b) that the defendant has infringed the plaintiff's rights under such patents.

On this application, no attack was made upon that part of the Statement of Claim that set up the plaintiff's rights under the *Patent Act*, and I am not to be taken as suggesting that there should have been such an attack. The attack was restricted to the adequacy of the allegations upon which the plaintiff bases its claim that the defendants infringed those rights.

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Reference should be made to Rule 20, which provides that, in an action for infringement of a patent, a plaintiff must deliver with his statement of claim "particulars" of the "breaches complained of". Strictly speaking, this rule and Rule 88, when read together, require that the Statement of Claim should allege the specific things that the defendant has done and that the plaintiff has the exclusive right to do, and the "particulars" delivered under Rule 20 should contain merely "particulars" of such breaches, or, in other words, "particulars" of the "breaches" that have been "complained of" in the Statement of Claim. However, I would not encourage applications by a defendant in relation to the operation of this requirement so long as the Statement of Claim and the statement of "particulars", read together, contain an allegation in sufficient particularity of the acts complained of as "breaches".

In considering whether there has been such a sufficient allegation of breaches in a patent infringement action, it is necessary to examine the elements of the cause of action. By virtue of section 46 of the *Patent Act*, a patent grants to the patentee the exclusive right "of making, constructing, using and vending to others to be used" the "invention" that is the subject matter of the patent. While the statute contemplates that a patent is to be for only one invention, it is not invalid if it is granted for more than one invention (section 38) and in practice patents frequently are granted for several inventions, each of which is defined by one of the several claims at the end of the specification. An invention may be *inter alia* a process, a product or a machine (section 2(d)). In any particular case, the plaintiff's cause of action may be *inter alia* that the defendant has made a product that falls within a claim in the plaintiff's patent, or has used such a product or has sold such a product to others to be used; or it may be that the defendant has used a process that falls within a claim in the plaintiff's patent. The defendants' application in this case,

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is, in effect, based upon the ground that there had been no sufficient allegation of any such fact or of any other fact that constitutes the doing of something that, by virtue of the patents in question, the plaintiff has the exclusive right to do. Obviously, if the Statement of Claim read with the Particulars contains no allegation of any facts constituting any breach of the patents, no cause of action has been pleaded.

I propose first to examine the pleadings to determine whether any breach of the product patent has been pleaded.

Paragraph 6 of the Statement of Claim says that the defendants have infringed the rights of the plaintiff under the letters patent "as set out in the particulars of breaches delivered herewith". As already indicated, the allegation that the defendants have "infringed" the plaintiff's rights is not, in my view, an allegation of any facts constituting infringement or breach of the plaintiff's rights but is a mere statement of the conclusion of law that the plaintiff proposes to ask the Court to find on unstated facts. However, paragraph 6 is an indication that the Particulars of Breaches delivered with the Statement of Claim is to be read with it and that document contains one paragraph that may be regarded as an allegation concerning the product patent. That paragraph reads as follows:

The defendants have infringed letters patent No. 704,693 by making, constructing and using apparatus and moulds covered by claims 1 to 6, 8 and 9 of the said letters patent.

In effect, this is an allegation that the defendants have made *and* used apparatus "covered" by all the four "sprue" claims in the patent and an allegation that the defendants have made *and* used moulds "covered" by four of the five mould claims in the patent. This, in my view, is not an allegation of "material facts". The only allegation of fact it contains is that the defendants have made and used apparatus and moulds. The balance of the allegation is that the undescribed apparatus and moulds that the defendants are alleged to have made are "covered" by all but one of the claims in the patent. What this means, as I understand it, is that, when the character of the apparatus and moulds is discovered and the meaning of the claims is settled (which meaning is a question of law), it will be found that the apparatus and moulds fall within some one or other of

the claims. Obviously, this allegation does not contain such a description of the apparatus and moulds that the defendants are alleged to have made and used as will show (assuming the correctness of the allegation) that they are in fact within the boundaries established by one or other of the claims. In the absence of such a description, there is no allegation of the material facts necessary to show a cause of action for infringement. I turn, therefore, to the Reply to the Demand for Particulars of the Particulars of Breaches where the relevant statement reads:

. . . the plaintiff says that in a visit to the plant of Cercast Inc., in Montreal on or about September 20, 1965, representatives of the plaintiff observed hollow sprue moulds which the plaintiff alleges were made, constructed and used in infringement of claims 1-6, 8 and 9 of the said Letters Patent No. 704,693 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

The fact that certain persons "observed" certain "moulds" at a certain place is not a material fact in an infringement action. It may or may not be a fact that tends to prove a material fact. However, that is not the real vice in this further and last allegation by the plaintiff upon which it seeks to support a claim for infringement of the product patent. An examination of the "mould" claims in the patent makes it plain that merely describing a mould as a "hollow sprue mould" is not a sufficient description to place it within the boundaries of any of such claims. Obviously, the plaintiff's representatives saw something else in the moulds that made them conclude that the moulds fell within the boundaries of one or more of the claims in the patent. Whatever it was that they so observed is presumably the characteristic of the moulds in question that should be alleged so that it may be apparent on examination of the Statement of Claim that a cause of action has been alleged. It would appear that, while the plaintiff has not so alleged, it is possible that it may be in a position to allege that the defendant Cercast Inc. has either used or made or has both made and used moulds of a specified description and that it may then be in a position to argue that moulds of that description fall within the boundaries of one or more of the mould claims. Counsel for the plaintiff further suggested that the observations made by the plaintiff's representatives of the "moulds" in the Cercast Inc. plant may, having regard to the role played by sprues in the construction of

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moulds, have put the plaintiff in a position to make allegations that the defendant Cericast Inc. made or used or made and used sprues of a specified description and that it may then be in a position to argue that sprues of that description fall within the boundaries of one or more of the sprue claims in the product patent. Nothing in the pleading indicates, even indirectly, any fact upon which it might be concluded that either of the defendants, Vestshell Inc. and Frank Valenta, did any act constituting a breach of the product patent.

I therefore concluded that the Statement of Claim could not be allowed to stand in so far as the product patent is concerned but that the plaintiff should be allowed an opportunity to apply for leave to substitute proper allegations of breaches in which such particulars are given as the plaintiff can give at this stage. An application for such leave will have to be supported by material establishing that the new allegations are based upon a proper factual basis and are not a mere re-framing of the pleading to meet the views herein expressed.

I turn now to the similar attack made on the pleading in respect of the allegations of breaches of the process patent.

In so far as the process patent is concerned, the commencement point is again paragraph 6 of the Statement of Claim which, as already indicated, is merely a cross-reference to the Particulars of Breaches. That document states merely that

The defendants have infringed letters patent No. 719,635 by using the processes covered by claims 1 to 8 of the said letters patent.

I need not repeat here the analysis of the vice of such an allegation that I made above with reference to the corresponding allegation in the same document about the product patent. The only allegation of fact in this allegation is that the defendants used certain "processes" that are not described. The balance of the allegation is, in effect, a statement that, when the character of such processes is discovered and the meaning of the claim is settled (which meaning is a question of law) it will be found that the processes fall within one or more of the claims. Obviously, this allegation does not contain any description of the processes that the defendants are alleged to have used and it is therefore not a sufficient allegation of material fact to show

that the plaintiff has an arguable cause of action in respect of the process patent. Turning to the Reply to the Demand for Particulars of the Breaches of Particulars, it appears that the plaintiff adds nothing except the statement that "the processes used by the defendants . . . are within the knowledge of the defendants". This still leaves a complete gap so far as any allegation of the character of the processes alleged to have been used by the defendants is concerned. The plaintiff was then ordered to identify the processes that it alleged were used by the defendants in infringement of the process patent and, according to counsel for the defendants, who was not challenged by counsel for the plaintiff—I have not compared the language myself—its reply purports to identify the process used by the defendants by applying to it the language of the claims in the patent without any change. In my view, such an allegation is merely another way of saying that the defendant used a process, that is not described, which is "covered" by the claims in the patent. It is therefore not a description of the particular process that the defendants are alleged to have made or used.¹

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I therefore concluded that the Statement of Claim could not be allowed to stand in so far as the process patent is concerned. Inasmuch as none of the particulars given in respect of the alleged breaches of the process patent gave

¹ If it were conceivable that there is a product claim that is not so worded as to "cover" many different products so long as they fall within a specified class, it might be conceivable that a cross-reference to such a claim would be an adequate description of the particular product that the defendant is alleged to have made or used in breach of the plaintiff's exclusive right under the patent. None of the claims in the patents in question is such a claim.

The alternative to the view that I have adopted—that this type of pleading is not an allegation of the material facts at all and therefore discloses no cause of action—is that it is an allegation of material fact but in such broad and vague terms that neither the Court nor the defendants know what the plaintiff's real cause of action is, in which event, it must be struck out as being embarrassing. Compare *Philipps v. Philipps*, (1878) 4 Q.B.D. 127.

Where there is a failure of the plaintiff to allege a material fact except in the terms of the legal definition of a particular element in his cause of action and such failure persists notwithstanding a demand for particulars, the obvious inference is that the cause of action does not exist in fact. Compare *Davey v. Bentinck*, [1893] 1 Q.B. 185, per Lord Esher, M.R.: "The conclusion is irresistible that there were no such services . . . and without these there is no cause of action and the action is frivolous and vexatious and oppressive".

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any indication of any factual basis for such allegations, my first inclination was not to allow any opportunity for substitute pleading. Upon reconsideration, however, I decided to allow the same opportunity therefor as I had decided to allow in respect of breaches of the product patent.

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In the result, I ordered

- (1) That paragraphs 2 to 8 inclusive, of the Statement of Claim and all statements of particulars of breaches be struck out;
- (2) That the plaintiff be granted leave to apply for leave to substitute other pleading for that that is so struck out;
- (3) That, if no such application be made within four weeks from the date of the order, the defendants may apply to have the action dismissed;
- (4) That the defendants have the costs of the application to strike out in any event of the cause.