1964
Oct. 23

BETWEEN:

PREFORMED LINE PRODUCTS COMPANY, N. SLATER COMPANY LIMITED and SLATER STEEL INDUSTRIES LIMITED ..... PLAINTIFFS;

AND

PAYER ELECTRICAL FITTINGS COMPANY LIMITED, and R. LEO PAYER ..... DEFENDANTS.

Practice—Application for issue of Writ of Attachment—Application to commit—Breach of injunction—Contempt of order of Court—Injunction binding only on defendants in action—Validity of patents open to attack by persons not parties to action despite judgment—Degree of proof required on contempt application.

This is an application for an order giving leave to issue a Writ of Attachment against Raymond Payer or, in the alternative, to commit the said Raymond Payer, on the grounds that he is in breach of an injunction granted by this Court or, in the alternative, that he has acted in contempt of an order thereof. The injunction in question was part of a consent judgment delivered in a patent infringement action in which the applicant was one of the plaintiffs but to which the said Raymond Payer was not a party.

The applicant contended that R. Leo Payer, one of the defendants in the patent infringement action, committed a breach of the injunction and that the respondent, Raymond Payer, aided and abetted him therein and is therefore in contempt of Court or, in the alternative, that the respondent, Raymond Payer, is in contempt of Court in that he assisted or aided in carrying on activities which would have been an infringement of the invention had they been carried on by the said defendant, R. Leo Payer.

Held: That, notwithstanding the form of the injunction it is clear that it is binding only on the defendants in the action.

2. That, having regard to the nature of the applicant's contentions, the defendant in the infringement action, R. Leo Payer, should have been advised of the substance of the contentions and have been given an opportunity of being heard.

3. That the validity of the patents referred to in the judgment in this case is, notwithstanding that judgment, open to attack by any person other than the parties bound by that judgment, and the respondent, Raymond Payer, is therefore entitled to make such an attack.

4. That even if it had been established that R. Leo Payer had aided the respondent, Raymond Payer, in carrying on the manufacture and sale of products embodying the patented inventions mentioned in the judgment, it does not follow that Raymond Payer would have been guilty of contempt.

5. That the application is dismissed.

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APPLICATION for leave to issue a Writ of Attachment or, in the alternative, to commit for contempt a person not a party to the action.

The application was heard on October 23, 1964 by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa and was dismissed with costs.

D. G. Finlayson for plaintiff Preformed Line Products Company.

D. J. Wright for plaintiff N. Slater Company Limited.

Redmond Quain, Q.C. and *B. Pollack* for Raymond Payer.

JACKETT P. delivered the following reasons for dismissing the application:

This is an application for an order giving leave to the plaintiff to issue a Writ of Attachment against Raymond Payer or, in the alternative, to commit the said Raymond Payer, or for such other order as seems just on the grounds that the said Raymond Payer is in breach of an order dated March 11, 1963, or in the alternative, that he has acted in contempt of an order of this Honourable Court.

On March 11, 1963, consent judgment was delivered in a patent infringement action in which Preformed Line Products Co. and the Slater Co. Ltd. and Slater Steel Industries Ltd. were plaintiffs and Payer Electrical Fittings Co. Ltd. and R. Leo Payer were the defendants. Among other things that judgment provided that the defendants, their representatives, servants, agents and workmen be enjoined from further infringing Canadian Patents Nos. 495,848, 484,432 and 589,353 or the rights conferred by the said patents during the continuance of the said Letters Patent.

Notwithstanding the form of this injunction, it is clear in my view that it is only binding on the defendants in the action. See *Marengo v. Daily Sketch and Sunday Graphic, Ltd.*[1] where Lord Uthwatt, at page 407, said:

> The reference to servants, workmen, and agents in the common form is nothing other than a warning against wrongdoing to those persons who may by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant There its operation, in my opinion, ends.

[1] [1948] 1 All E R 406

While this application is in terms an application for a Writ of Attachment for breach of the Order of this Court or, alternatively, on the ground that Raymond Payer is in contempt, counsel for the applicant indicated upon opening that he was limiting the application to committal for the contempt branch of the application.

Although it does not appear too clearly from the application, the applicant based his application on two alternative contentions: first, the contention that the individual defendant, R. Leo Payer, committed a breach of the injunction and that the respondent here aided and abetted him in that breach and is therefore in contempt of Court; and second, in the alternative, on the contention that the respondent here is in contempt of Court in that he assisted or aided in carrying on activities which would have been an infringement of the invention had they been carried on by the defendant R. Leo Payer.

Having regard to the nature of these contentions, it is unfortunate in my view that the defendant, R. Leo Payer, is not present on this application. I am informed by counsel for the applicant that the defendant, R. Leo Payer, was represented and was prepared to appear but did not do so because his counsel was informed by counsel for the applicant that no relief was being claimed against R. Leo Payer. Before adjudicating on the matter in favour of the applicant, I should be inclined to require that R. Leo Payer be advised of the substance of the contentions and be given an opportunity of being heard.

Clearly, the validity of the patents referred to in the judgment in this case is, notwithstanding that judgment, open to attack by any person other than the parties bound by that judgment. I should myself have thought that, not being such a party, the respondent to this application, Raymond Payer, is therefore entitled to make such an attack. Nevertheless, counsel for the applicant indicated that this application is brought in the hope of avoiding expensive infringement proceedings against Raymond Payer.

The submission of counsel for the applicants as to the actual facts established by his material (which material consists of an affidavit of William Frederick Corkran, an

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affidavit of one Walker and an affidavit of one Grant) is, as I understand it, in substance as follows:

(1) R. Leo Payer at one time was employed by one of the plaintiffs as an engineer and, upon leaving that employment, took with him specifications of a product manufactured and sold by that plaintiff, which product embodied a patented invention or inventions;

(2) after leaving that plaintiff's employment, R. Leo Payer and the defendant company manufactured and sold products embodying the same patented invention or inventions. R. Leo Payer was president and a director of the defendant company, Raymond Payer, the respondent here, was secretary-treasurer of that company, and their father, Leo Payer, was a director;

(3) on March 11, 1963, by a consent judgment in these proceedings, the defendant company and R. Leo Payer were enjoined from infringing the patents in question;

(4) following that judgment, a company brought into existence by one of the plaintiffs acquired most of the assets of the defendant company and Raymond Payer and R. Leo Payer were associated with that company for periods of two and three months respectively;

(5) shortly after that relationship ceased, Raymond Payer and certain other members of the Payer family brought into existence another company, which proceeded to manufacture and sell products that also embodied the patented inventions that were referred to in the judgment; this company used a catalogue that was, in substance, identical to that that had been employed by the defendant company;

(6) while there is no evidence that R. Leo Payer had participated in the activities of this new company and particularly that he was associated in any way with the production or sale of products embodying the patent inventions referred to in the judgment of March 11, 1963, it is established

(a) that the specifications that R. Leo Payer took when he left the employment of the plaintiff have never been returned, and

(b) that R. Leo Payer is the only Payer referred to in the evidence that has the competence, ability and

experience to carry out the production of the products in question.

Counsel for the applicants argues that certain inferences be drawn from these established facts, namely, that R. Leo Payer has supplied the new company with the old specifications that he took from the plaintiff and further that R. Leo Payer is helping the new company in the production of the articles embodying the patented invention.

The next step that counsel invites the Court to take is to conclude that it follows from such inferences

(a) that R. Leo Payer has been using the patented inventions contrary to the injunction and that Raymond Payer has aided and abetted him and is therefore guilty of contempt or

(b) alternatively, that Raymond Payer has accepted from R. Leo Payer aid in doing what would have been a breach of the injunction if it had been done by R. Leo Payer and that this was a contempt of Court by Raymond Payer.

I reject the application because I am not able to draw these inferences from the alleged facts even if such facts have been established. At most, if the facts are as submitted by the applicants, there is a suspicion that R. Leo Payer may have participated in the activities of the new company. In my view, it cannot be said that these facts establish that R. Leo Payer was in any way directly or indirectly a party to the operations of the new company even if I apply only the test applicable in civil proceedings of "balance of probability" and not the test applicable in criminal cases which I should have thought is applicable before finding that a person should be punished for contempt.

I should say that if I were able to draw the proposed inferences from the basic facts, I should then have had to cope with a number of questions concerning the adequacy of the proof of the basic facts. I am far from satisfied that many of the facts have been established by satisfactory evidence, if at all.

I should also say that, even if I had been persuaded that R. Leo Payer had aided (by advice or supplying of specifications) Raymond Payer in carrying on the manufacture and sale of products embodying the patented inventions mentioned in the judgment, I am far from satisfied that

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Raymond Payer would have been guilty of contempt. Had R. Leo Payer been cited for contempt for manufacture in defiance of the injunction that was directed to him and had Raymond Payer been cited for knowingly assisting R. Leo Payer in a breach of that injunction, the situation would be quite different. That is not the situation here.

I must refer also to the fact that, prior to R. Leo Payer withdrawing from the case on the assurance from the plaintiff that no relief was being sought against him, he filed an affidavit stating his compliance with the injunction and his abstention from participation in the activities of the new company. Counsel for the applicants drew my attention to this affidavit in some detail and also to a second affidavit of Mr. Corkran in reply to it. Subsequently, counsel for the applicant indicated that he was not relying on either of these two affidavits. (He of course referred to them only in an attempt to throw doubt on the accuracy of the statements in the affidavit of R. Leo Payer.) I am not at all satisfied that this material is not part of the material that I should take into consideration in view of the reference made to it by counsel for the applicant. However, in view of the conclusions that I have reached on the other material, I do not have to decide that question. There is no doubt in my mind that looking at the two additional affidavits would only tend to support the conclusion that I have already reached.

The application is dismissed with costs.