

Federal Court



Cour fédérale

Date: 20220706

Docket: T-1488-20

Citation: 2022 FC 998

Toronto, Ontario, July 6, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**STEELHEAD LNG (ASLNG) LTD. and
STEELHEAD LNG LIMITED
PARTNERSHIP**

Plaintiffs

and

**ARC RESOURCES LTD., ROCKIES LNG
LIMITED PARTNERSHIP, ROCKIES LNG
GP CORP., and BIRCHCLIFF ENERGY
LTD.**

Defendants

AND BETWEEN:

**ARC RESOURCES LTD., ROCKIES LNG
LIMITED PARTNERSHIP, ROCKIES LNG
GP CORP., and BIRCHCLIFF ENERGY
LTD.**

Plaintiffs by Counterclaim

and

**STEELHEAD LNG (ASLNG) LTD.,
STEELHEAD LNG LIMITED
PARTNERSHIP, AZIMUTH CAPITAL
MANAGEMENT IB LTD., AZIMUTH
ENERGY PARTNERS IV (NR) LP, AND
AZIMUTH ENERGY PARTNERS IV LP**

Defendants by Counterclaim

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued July 6, 2022)

I. Introduction

[1] This is a motion brought by the Defendants, ARC Resources Ltd., Rockies LNG Limited Partnership, Rockies LNG GP Corp., and Birchcliff Energy Ltd. (collectively, the Defendants), for a summary trial.

II. Background

[2] The proceeding underlying this motion is a patent infringement action brought by the Plaintiffs, Steelhead LNG (ASLNG) Ltd. and Steelhead LNG Limited Partnership (collectively, Steelhead or the Plaintiffs), pursuant to the *Patent Act*, RSC 1985, c P-4 asserting infringement of Canadian Patent No. 3,027,085 (the “085 Patent”).

A. *The Parties*

[3] The Plaintiff Steelhead LNG Limited Partnership was formed in 2013 for the purposes of pursuing the development of liquefied natural gas (LNG) projects in British Columbia in order to increase opportunities for Canadian natural gas producers to sell natural gas to foreign markets. The Plaintiff Steelhead LNG (ASLNG) Ltd. is a wholly owned subsidiary of Steelhead LNG Limited Partnership.

[4] The Defendant ARC Resources Ltd. is the successor in interest to Seven Generations Energy Ltd. (“7G”) by way of amalgamation in early 2021. ARC Resources Ltd. extracts and markets natural gas from gas fields in British Columbia and Alberta.

[5] The Defendant Birchcliff Energy Ltd. explores, develops, and produces natural gas, light oil, and natural gas liquids mainly in Alberta.

[6] The Defendant Rockies LNG Limited Partnership is a consortium of British Columbia and Alberta natural gas producers pursuing LNG export opportunities. The Defendant Rockies LNG GP Corp. is the general partner of Rockies LNG Limited Partnership, with ARC Resources Ltd. and Birchcliff Energy Ltd. as (two of seven) limited partners and each sharing one or more common directors with Rockies LNG Limited Partnership.

B. *The 085 Patent*

[7] The Plaintiff Steelhead LNG (ASLNG) Ltd. is the owner of the 085 Patent, which issued on November 3, 2020 for an invention entitled “Liquefaction Apparatus, Methods, and Systems.” The application for the 085 Patent was filed on December 10, 2018 and became open to public

inspection on February 8, 2019. The 085 Patent claims priority from PCT International Patent Application No. PCT/CA2018/050662 filed on June 1, 2018. The 085 Patent has been in full force and effect since its date of issue and expires on December 10, 2038.

[8] Steelhead LNG (ASLNG) Ltd. licenses the 085 Patent to Steelhead LNG Limited Partnership.

[9] The 085 Patent relates generally to apparatus, methods, and systems in respect to the at-shore liquefaction of natural gas and includes three key elements: a) a floating modular design, b) an air-cooled liquefaction process, and c) electric-driven compressors.

[10] The 085 Patent includes four independent claims (1, 21, 56, and 67), all of which include an apparatus, either independently or used in a system or a method, for the liquefaction of natural gas. For example, independent claim 1 claims “a system for liquefaction of natural gas,” comprising of, among other things:

1. a source of electricity;
2. a source of “feed gas”; and
3. a “water-based apparatus” comprised of
 - a. a hull;

- b. an air-cooled electrically-driven refrigeration (AER) system configured to, among other things, convert the feed gas into LNG and discharge substantially all thermal energy to ambient air with air coolers; and
- c. a “plurality of LNG storage tanks” in a single row configured to receive the LNG from the AER system and output it to an LNG transport vessel.

C. *The Relationship between the Parties*

[11] The following facts and timeline are uncontested and outline the business relationship and interactions between and within the Parties:

1. In early 2014, Steelhead and 7G (the predecessor to the Defendant ARC Resources Ltd.) commenced discussions to further Steelhead’s development of its LNG facilities in British Columbia.

As part of their business relationship and under the protection of applicable confidentiality obligations, 7G came into possession of Steelhead’s confidential information including, among other things, the design for their proposed LNG facility (the “Steelhead Design”).

2. From February 2018 to November 2018, Steelhead (with 7G as their representative) began discussions with a group of natural gas producers (the “Consortium”) with a view to pursuing the design, development, and construction of an LNG export project in British Columbia. In addition to 7G, the Defendant Birchcliff Energy Ltd. was also a member of the Consortium.

On September 14, 2018, Steelhead disclosed to the Consortium confidential information, including the Steelhead Design.

In November 2018, the Consortium unilaterally terminated discussions with the Plaintiffs.

3. Meanwhile, in January 2018, the Consortium (which, as stated above, included the Defendants Birchcliff Energy Ltd. and 7G) hired the engineering, procurement, and construction (EPC) firm Advisian to prepare a preliminary feasibility study of an LNG facility.

In May 2018, Advisian's study was delivered to the Consortium and included broad outlines of an LNG facility – there were no engineering designs or drawings.

In July 2018, the Consortium hired KBR, a second EPC firm, to prepare a preliminary Front End Engineering Design (pre-FEED) study.

Between August 2018 and January 2019, KBR's pre-FEED study was provided to the Consortium on a rolling basis. This study did involve some engineering designs and was classified as a "Class 4" design and cost estimate – "Class 5" being the earliest stage and "Class 1" being the latest stage.

The KBR study was considered to be in the conceptual stage: it included significant optionality (including essential aspects of the Steelhead Design) and had a cost range



The KBR pre-FEED study marked the end of the Consortium's conceptual LNG facility – no further development steps were taken in respect to this specific design.

As stated above, the business relationship between the Consortium and the Plaintiffs ended in November 2018 – during the time that the KBR pre-FEED study was being provided to the Consortium.

4. On December 10, 2018, the Plaintiffs filed their application for the 085 Patent, which claims the Steelhead Design as the invention.
5. On February 8, 2019, the 085 Patent was published.
6. From approximately February 2019 to May 2020, the Consortium showed a high-level summary of the KBR pre-FEED study design to third party potential investors, LNG off-takers, and large-scale industry contractors as part of large presentations, and allowed four of these third parties to see the KBR pre-FEED study itself.

None of the third parties referred to above participated further with the Defendants in respect to the KBR pre-FEED study or design contained therein.

The Consortium also met with Indigenous stakeholders throughout this period.

7. In April 2019, the Consortium began discussions with Western LNG, a Houston-based company engaged in the development of North American LNG export facilities, regarding the design and development of a potential LNG facility.

At no time was the Plaintiffs' Steelhead Design, the 085 Patent, the Advisian feasibility study, or the KBR pre-FEED study provided to Western LNG; Western LNG provided and relied upon its own LNG facility design.

8. On July 4, 2019, the Plaintiffs commenced a civil claim in the British Columbia Supreme Court against the Defendants alleging breach of copyright and moral rights of the Steelhead Design.
9. As of May 1, 2020, the Consortium was formalized as the Defendant Rockies LNG Limited Partnership with several limited partners including the Defendants 7G (now ARC Resources Ltd.), Rockies LNG GP Corp., and Birchcliff Energy Ltd.
10. On November 3, 2020, the 085 Patent was issued.
11. On December 9, 2020, the Plaintiffs commenced the underlying patent infringement action.
12. On July 2, 2021, Western LNG, Rockies LNG Limited Partnership, and the Nisga'a First Nation entered into an agreement to develop the Ksi Lisims project, which is not the subject of this motion or the underlying action (see *Steelhead LNG (ASLNG) Ltd. et al. v. ARC Resources Ltd. et al.*, 2022 FC 756 aff'g *Steelhead LNG (ASLNG) Ltd. et al. v. ARC Resources Ltd. et al.*, T-1488-20, Order of Case Management Judge Tabib dated February 28, 2022 (unpublished)).

D. *The Underlying Action*

[12] As stated above, the Plaintiffs commenced the underlying patent infringement action against the Defendants on December 9, 2020.

[13] In their Amended Statement of Claim, the Plaintiffs allege that the Defendants have been making, constructing, using, and selling and/or offering for sale an infringing LNG project, being used for a liquefaction and export facility of the type described in the 085 Patent, contrary to section 42 of the *Patent Act*.

[14] The Plaintiffs claim that the infringing activities include the design, development, and marketing of an LNG project in Canada and elsewhere to potential investors, LNG off-takers, First Nations, and large-scale industry contractors, among others.

[15] The Plaintiffs are seeking monetary, declaratory, and injunctive relief for the alleged infringement of the 085 Patent.

[16] It is important to note that there is no *quia timet* cause of action in the Plaintiffs' Amended Statement of Claim, and accordingly no issue with respect to forward-looking infringement or threat of infringement.

III. Issues

[17] The issues to be decided on this motion are:

1. Have the Defendants established that this matter is appropriate to be decided by way of summary trial?

2. If yes, have the Defendants' activities infringed the 085 Patent contrary to section 42 of the *Patent Act*?

IV. Analysis

- A. *Have the Defendants established that this matter is appropriate to be decided by way of summary trial?*

[18] Motions for summary trial are directed in accordance with the *Federal Courts Rules*, SOR/98-106 (the "*Rules*") 213 and 216.

[19] *Rule 213* permits a party to bring a motion for summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

[20] Pursuant to *Rule 216(6)*, if the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues, and the existence of conflicting evidence, the Court may grant judgment, unless it would be unjust to do so.

[21] Furthermore, *Rule 3* provides that the *Rules* shall be interpreted and applied so that every proceeding is determined on its merits in the just, most expeditious, and least expensive way.

[22] Ultimately, "the Court must be satisfied that the prerequisites in the *Rules* for summary judgment or summary trial, understood in light of *Rule 3*, are met and that it is able to grant

summary judgment, fairly and justly, on the evidence adduced and the law” (*Viiv Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122 at paragraph 42).

[23] In addition to those conditions set out in *Rule 216(6)* above, there are a number of other factors to be considered on a motion for summary trial. These include, *inter alia*, the complexity and urgency of the matter; any prejudice likely to arise by delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; whether credibility is a crucial factor and the deponents of the conflicting affidavits have been cross-examined; whether the summary trial involves a substantial risk of wasting time and effort, and producing unnecessary complexity; and any other matters which arise for consideration (*Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2010 FC 966 at paragraphs 36 to 37).

(1) The Parties’ Positions

[24] The Defendants, as the party moving for summary trial, bear the burden of demonstrating that summary trial is appropriate (*Teva Canada Limited v. Wyeth and Pfizer Canada Inc.*, 2011 FC 1169 at paragraph 35 [*Teva Canada*]).

[25] The Defendants submit that all of the factors militating in favour of granting judgment following a summary trial are present in this matter:

1. The issues are well defined and will permit the resolution of the case in its entirety.

In fact, there is a single, narrow issue to be decided: based upon an uncontested set of facts as to the activities of the Defendants, did those activities amount to infringement of the 085 Patent;

2. There are sufficient facts and evidence to permit adjudication;
3. The evidence is not controversial;
4. The Plaintiffs have exercised their documentary and oral discovery rights; and
5. There will be no issues in assessing credibility in this case because the fact and expert witnesses are available to testify *viva voce* and did so at the hearing.

[26] Further, the Defendants submit that a summary trial will be the just, most expeditious, and least expensive determination on the merits.

[27] The Plaintiffs submit that summary trial is not appropriate in this case for the following reasons:

1. The Defendants' legal proposition is an incorrect characterization of the law – the *Patent Act* must be interpreted purposively, not literally, and particularly with respect to what constitutes “use” of an invention in Canada;
2. The question of whether any of the Defendants' acts infringe the 085 Patent is a complex factual question unsuitable for summary trial and a more fulsome record is required; and
3. In any event, the record supports a finding of infringement – the Defendants have leveraged Steelhead's patented design and gained a commercial benefit from doing so.

[28] The only issue for determination on this motion is whether the Defendants' activities constitute infringement of the 085 Patent contrary to section 42 of the *Patent Act*, by virtue of using the Steelhead patented design to obtain a commercial benefit.

[29] Pursuant to *Rule 216(6)*, I am satisfied that there are sufficient facts and evidence for the adjudication of the infringement issue put forward by the Defendants and it is an appropriate proceeding for summary trial.

[30] Any issues concerning expert and fact witness testimony were addressed through the *viva voce* testimony offered at the hearing, which is outlined below.

[31] With respect to a fulsome record, the Parties have exercised their rights to documentary and oral discovery. In addition, the Plaintiffs have not provided an indication of what further information it requires that would be pertinent to this motion. That is, the Plaintiffs have not indicated what information it perceives to be missing and how this information could influence whether the Defendants' actions infringed the 085 Patent. I am satisfied that sufficient evidence has been provided at the hearing to determine the question of infringement in this matter.

B. *Have the Defendants' activities infringed the 085 Patent?*

(1) Burden and Onus of Proof

[32] The burden for the determination of the merits of a summary trial reflects that of the underlying trial (*Janssen v. Pharmascience*, 2022 FC 62 at paragraphs 46 to 62; *Janssen v. Apotex Inc.* 2022 FC 107 at paragraphs 50 to 52).

[33] Therefore, while on a motion for summary trial the burden is on the moving party to demonstrate that a summary trial is appropriate, once the onus of the merits of the matter (*e.g.* infringement) are before the Court for determination, the burden and onus of proof of the underlying action applies.

[34] Moreover, the parties in a motion or summary judgment or summary trial are required to put their best foot forward, regardless of where the onus lies (*Kobold Corporation et al. v NCS Multistage Inc.*, 2021 FC 1437 at paragraph 148).

[35] As stated above, the Defendants argue that the sole issue in this motion is whether the Defendants' activities amount to infringement of the 085 Patent, contrary to section 42 of the *Patent Act*. The Plaintiffs have the burden of proving infringement on a balance of probabilities.

[36] The Plaintiffs acknowledge that:

1. Infringement can only have taken place following the publication date of the 085 Patent – February 8, 2019;
2. The Defendants did not make, construct, or sell the invention claimed in the 085 Patent. In fact, the claimed system, method, or apparatus does not exist anywhere in Canada;

3. The only question of fact and law is whether the Defendants have “used” the invention claimed in the 085 Patent; and
4. The Defendants’ Ksi Lisims project does not infringe the 085 Patent.

[37] Initially the Plaintiffs’ position appeared to be that: (1) commercial exploitation to obtain a benefit; (2) in disclosing key elements of the 085 Patent (a floating LNG (FLNG) system with AER) to prospective business parties/interests; (3) at any time, including pre-publication and pre-issuance of the 085 Patent; (4) can and will constitute infringement by unauthorized “use” of the invention. However, at the hearing, the Plaintiffs conceded that the Defendants’ activities pre-publication of the 085 Patent were not relevant, and that the only relevant period to be considered with respect to infringement was February 8, 2019 to May 2020.

[38] In addition, for the purposes of this motion for summary trial only, the Defendants concede that the Court may assume the 085 Patent is valid and that, if the LNG facility that was included in the engineering drawings as part of the KBR pre-FEED study was made, constructed, used, or sold by the Defendants, then, at that time, an act of infringement would have occurred.

[39] Thus, the issue is narrowed to whether the Defendants’ conceptual design for purposes of potential future development of an LNG facility (as set out in KBR pre-FEED study) and presentation of the same to third party stakeholders between February 8, 2019 (the publication date of the 085 Patent) and May 2020 (when the KBR pre-FEED study was abandoned) constitutes *use* of the 085 Patent, contrary to section 42 of the *Patent Act*.

(2) The Expert and Fact Witnesses

(a) *The Defendants' Fact Witnesses*

(i) Ms. Charlotte Raggett

[40] Ms. Raggett is the President and CEO of the Defendant Rockies LNG GP Corp., the general partner of the Defendant Rockies LNG Limited Partnership. She is a former executive with 7G (a predecessor of the Defendant ARC Resources Ltd.).

[41] Ms. Raggett's evidence provides a thorough background of the many stages involved in the design and development of an LNG facility, as well as the entire history of the Defendants' activities as relating to the underlying action and this motion.

[42] Ms. Raggett was a credible and knowledgeable witness. On cross-examination, she highlighted that:

1. Building a FLNG facility takes many years (upwards of ten years) and costs billions of dollars (potentially exceeding ten billion dollars);
2. The crucial "go/ no go" decision for a FLNG project is referred to as the Final Investment Decision or "FID";
3. Pre-FID work can be broken down into three stages: the feasibility stage, the pre-FEED stage, and the FEED stage;
4. The KBR pre-FEED was classified as a "Class 4" design and cost estimate, with "Class 5" being the earliest stage and "Class 1" being the latest stage – Class 4 design and cost estimate was at a "conceptual stage" only;
5. The KBR design had multiple options to be considered in the design, including:

|
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

6. During the relevant times, engagement with Indigenous stakeholders, specifically the Nisga'a First Nation, were facilitated by a team member with strong relationships to First Nations in Northern British Columbia; the Nisga'a First Nation gave a presentation to the Defendants, not the other way around; and discussions regarding an LNG project were more broadly focussed and did not include the specific KBR design.
7. The reference in a presentation of a [REDACTED] [REDACTED] – not the subject of this motion or the underlying action.
8. By the time the Defendants were engaged in discussions with Western LNG, Ms. Raggett believed that the Defendants had developed credibility with important stakeholders, including the government, regulators, First Nations, and local communities.

(ii) Mr. Kyle Banbury

[43] Mr. Banbury is a Manager, Legal at the Defendant ARC Resources Ltd. He was (senior) legal counsel at 7G from July 2016 to April 2021.

[44] Mr. Banbury's evidence provided in his affidavits confirmed that provided by Ms. Raggett. Mr. Banbury was not examined and his affidavits was entered into evidence as read.

(iii) Ms. Kristen Lewicki

[45] Ms. Lewicki is Associate General Counsel at the Defendant Birchcliff Energy Ltd.

[46] Ms. Lewicki's evidence provided in her affidavit confirmed that provided by Ms. Raggett. Ms. Lewicki was not examined and her affidavit was entered into evidence as read.

(iv) Ms. Lisa Ebdon

[47] Ms. Ebdon is a Law Clerk employed by counsel for the Defendants. Her affidavit provided the answers to undertakings from the discovery examination of the Plaintiffs' fact witness, Mr. Ryan Patryluk.

[48] Ms. Lewicki was not examined and her affidavit was entered into evidence as read.

(b) *The Plaintiffs' Expert*

(i) Mr. Willem Ravesloot

[49] Mr. Ravesloot is a Project Executive Consultant and Owner of his own consultancy company, Gawwer BV, since June 2021.

[50] Mr. Ravesloot has a Masters in Mechanical Engineering from the Delft University of Technology, The Netherlands (1988). For 32 years, Mr. Ravesloot held various positions within Shell plc, including numerous positions within LNG projects at various stages of development and operation, in Canada and throughout the world.

[51] Mr. Ravesloot was qualified as an expert as an engineer with particular expertise in project engineering, engineering management, and project development in relation to the liquefied natural gas industry.

[52] Mr. Ravesloot was a credible and knowledgeable expert. While the Defendants raised preliminary objections asserting lack of expertise, improper hearsay, and/or speculative statements at the hearing, the Defendants withdrew their objections and put them to the weight of Mr. Ravesloot's testimony.

[53] Mr. Ravesloot's evidence highlighted the extensive amount of work, time, financial backing, and complexity that comes with the design and development of an LNG facility, generally, including the importance of strong and credible relationships with stakeholders, Indigenous communities, pipeline proponents, regulators, among others.

[54] Mr. Ravesloot outlined the seven stages of an LNG project, with a positive FID required after Stage 4:

1. Initiate/Prefeasibility (identify an opportunity, consider conceptual designs, and assess economic viability).

2. Assess/Feasibility (consider in detail the viability and potential sites of the project. Stage 2 frequently includes a “preliminary design”).
3. Concept Select/Pre-FEED (select a single design or concept to advance through more detailed engineering work).
4. FEED (based on pre-FEED, more engineering work is used to finalize the scope of the project. As stated above, an LNG developer will make a FID at the end of this stage).
5. Execute (fabrication, construction, and commissioning).
6. Operate (actual operation of the LNG project).
7. Demolition (and reclaiming the environment).

[55] There is no real dispute on the seven stages outlined above.

[56] In regards to the Defendants’ activities, Mr. Ravesloot stated that, at every stage of third party engagement, the Defendants relied upon the KBR pre-FEED study as part of their presentation to garner credibility with vital stakeholders for their organization as LNG developers with an achievable design concept.

[57] On cross-examination, Mr. Ravesloot agreed that:

1. At the pre-FEED study stage, an LNG facility cannot produce LNG.
2. Though the mandate provided to KBR by the Defendants for their pre-FEED study may have included the elements of the 085 Patent, this mandate was given eight months before its publication date and the relevant period for this motion.

3. The presentations given by the Defendants were relatively early engagement to demonstrate to potential stakeholders that the Consortium are aware of and are addressing the challenges and are advancing components which must mature before a FID can be made.
4. While he thought it would be unusual and unlikely that the Defendants would start a new development with a new design, he conceded that this appears to be what occurred with Western LNG and the Ksi Lisims project.

(c) *The Plaintiffs' Fact Witnesses*

(i) Mr. Ryan Patryluk

[58] Mr. Patryluk is the former Vice President, Commercial, of Steelhead and currently provides business advisory services to the same.

[59] Mr. Patryluk's affidavit evidence provides similar background information to Ms. Raggett, though ending in November 2018 – three months before the publication of the 085 Patent and the relevant period for this motion. In addition, Mr. Patryluk provided evidence on the protests against the 085 Patent filed by various parties, which is not relevant to the issue in this motion.

[60] Mr. Patryluk was not examined and his affidavit was entered into evidence as read.

(ii) Mr. Victor Ojeda

[61] Mr. Ojeda is the former President of Steelhead and currently provides business advisory services to same.

[62] Mr. Ojeda's affidavit and oral testimony related to purported advantages of the 085 Patent's design – evidence irrelevant to the issue in this motion.

[63] Mr. Ojeda was a credible and knowledgeable witness. While the Defendants raised preliminary objections asserting improper hearsay, opinion, and/or speculative statements, at the hearing the Defendants withdrew their objections and put them to the weight of Mr. Ojeda's testimony.

[64] Mr. Ojeda was not cross-examined.

(3) Claims Construction

[65] The Defendants assert that there is no issue of claim construction in this motion.

[66] Nevertheless, the claims of the 085 Patent were alive in this motion and the applicable principles of claim construction have been summarized by the Federal Court of Appeal in

Tearlab Corporation v. I-Med Pharma Inc., 2019 FCA 179 at paragraphs 30 to 34:

[30] The general principles of claim construction are now well established and were set out by the Supreme Court in three cases (*Whirlpool* at paras. 49-55; *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024 at paras. 31-67 [*Free World Trust*]; *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, 1981 CanLII 15 (SCC), [1981] 1 S.C.R. 504 at p. 520 [*Consolboard*]). These principles can be summarized as follows.

[31] The *Patent Act* promotes adherence to the language of the claims, which in turn promotes fairness and predictability (*Free World Trust* at paras. 31(a), (b) and 41). The words of the claims must, however, be read in an informed and purposive way (at para. 31(c)), with a mind willing to understand (at para. 44). On a purposive construction, it will be apparent that some elements of the claimed invention are essential while others are non-essential (at para. 31(e)). The interpretative task of the court, in claim construction, is to separate and distinguish between the essential and the non-essential elements, and to give the legal protection to which the holder of a valid patent is entitled only to the essential elements (at para. 15).

[32] To identify these elements, the claim language must be read through the eyes of a POSITA, in light of the latter's common general knowledge (*Free World Trust* at paras. 44-45; see also *Frac Shack* at para. 60; *Whirlpool* at para. 53). As noted in *Free World Trust*:

[51] ...The words chosen by the inventor will be read in the sense the inventor is presumed to have intended, and in a way that is sympathetic to accomplishment of the inventor's purpose expressed or implicit in the text of the claims. However, if the inventor has misspoken or otherwise created an unnecessary or troublesome limitation in the claims, it is a self-inflicted wound. The public is entitled to rely on the words used *provided* the words used are interpreted fairly and knowledgeably. [Emphasis in the original.]

[33] Claim construction requires that the disclosure and the claims be looked at as a whole "to ascertain the nature of the invention and methods of its performance, ... being neither benevolent nor harsh, but rather seeking a construction which is reasonable and fair to both patentee and public" (*Consolboard* at p. 520; see also *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2012 SCC 60, [2012] 3 S.C.R. 625 at para. 50). Consideration can thus be given to the patent specifications to understand what was meant by the words in the claims. One must be wary, however, not to use these so as "to enlarge or contract the scope of the claim as written and ... understood" (*Whirlpool* at para. 52; see also *Free World Trust* at para. 32). The Supreme Court recently emphasized that the focus of the validity analysis will be on the claims; specifications will be relevant where there is ambiguity in the claims (*AstraZeneca Canada Inc. v. Apotex Inc.*, 2017 SCC 36, [2017] 1 S.C.R. 943 at para. 31; see also *Ciba* at paras. 74-75).

[34] Finally, it is important to stress that claim construction must be the same for the purpose of validity and for the purpose of infringement (*Whirlpool* at para. 49(b)).

[67] The relevant date for construing the claims is the publication date: February 8, 2019.

[68] That being said, I find that the Defendants' position that there can be no infringement, given that there was no LNG system, apparatus, or method made, constructed, used, or sold, can be determined on the facts presented to the Court, particularly given that the sole issue is whether the Defendants' impugned activities constitute "use" of the claimed 085 invention.

(4) Infringement

[69] To establish that the Defendants' activities infringed the 085 Patent, the Plaintiffs must prove, on a balance of probabilities, that the Defendants used all the essential elements of one or more of the claims of the 085 Patent through making, constructing, using, and/or selling the 085 invention as claimed in the claims in that patent. This is a question of mixed fact and law: (1) there is the legal question of what constitutes "use" of the claimed invention; and (2) there is the factual question of what were the Defendants' activities that allegedly amount to infringement.

[70] The Plaintiffs argue that section 42 of the *Patent Act* attracts a purposive interpretation, as opposed to a more literal reading, with respect to the sole issue of what constitutes "use" of a patented invention. They claim that any activity that delivers a commercial benefit to an alleged infringer, from use alone, constitutes an act of infringement. More specifically, the Plaintiffs claim that the Defendants' presentation of the KBR pre-FEED study (which included a design

which the Defendants concede for the purposes of this summary trial only would have infringed the 085 Patent if made) to third parties between February 8, 2019 and May 2020 allowed them to gain credibility in the LNG field, leading to their business relationship with Western LNG, and, thus, constituted use of the 085 Patent resulting in a commercial benefit, contrary to section 42 of the *Patent Act*.

[71] The Defendants argue that the Plaintiffs are attempting to “blur” the distinction between patent rights and purported copyright rights – behaviour that the Supreme Court of Canada has warned against (*Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 SCR 302 at paragraphs 37 to 39). In addition, they assert that the Plaintiffs are attempting to *ex post facto* redraft the claims of the 085 Patent to include the “design” of the invention, not the invention as claimed.

[72] The Defendants further assert that, at best, the Plaintiffs’ allegations amount to “paper” acts of infringement, which are not actionable (*Domco Industries Ltd. v. Mannington Mills Inc.*, [1990] FCJ No. 269 (FCA) [*Domco*] at paragraphs 7, 18, 32, and 33, *aff’d* *Domco Industries Ltd. v. Mannington Mills Inc.*, [1988] 24 FTR 234 (FC), leave to appeal *ref’d* [1990] SCCA No. 243 (SCC)).

[73] Pursuant to section 42 of the *Patent Act*, a patent grants to the patentee “the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used.” A patentee may thus exclude others from exercising this exclusive right to make, construct, use, and sell the claimed invention.

[74] As stated above, patent infringement occurs when each of the essential elements of the claim of a patent are taken, through the unauthorized manufacture, construction, use, or sale of the claimed invention. There is no infringement if an essential element is different or omitted (*Free World Trust v. Électro Santé*, 2000 SCC 66 at paragraph 31(f)).

[75] There is no dispute that in each of the independent claims of the 085 Patent, whether to a system (claim 1), an apparatus (claims 21 and 67), or a method (claim 56), there is a series of essential elements that comprise the claimed system for liquefying natural gas, including a water-based apparatus that comprises a floating hull, storage tanks, and an AER system. Thus, infringement can only occur if, and when, such a system, apparatus, and/or method includes an apparatus that is made, constructed, used, and/or sold in Canada.

[76] Given that the claimed system, method, or apparatus does not exist in Canada and that the Ksi Lisims project (which is yet to break ground) does not infringe the 085 Patent, it necessarily follows that the Defendants have not made, constructed, or sold it. The Plaintiffs do not argue that their exclusive rights to make, construct, and sell the claimed invention have been infringed.

[77] Rather, the only remaining question is whether reference to a conceptual design of an LNG project by the Defendants in promotional materials to third parties as outlined above in paragraph 11(7) during the period of February 8, 2019 to May 2020 [REDACTED], constitutes “use” of the claimed invention in the 085 Patent.

[78] The Supreme Court of Canada has undergone a purposive and contextual examination of section 42 of the *Patent Act*, and more specifically, the meaning of “use” contained therein (*Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 [*Monsanto*]). In *Monsanto*, the Supreme Court held, *inter alia*, that:

1. “As a practical matter, inventors are normally deprived of the fruits of their **invention** and the full enjoyment of their monopoly when another person, without licence or permission, **uses the invention** to further a business interest. Where the defendant’s impugned activities furthered its own commercial interests, we should therefore be particularly alert to the possibility that the defendant has committed an infringing use.” (at paragraph 37)
 2. “A defendant’s commercial activities **involving the patented object** will be particularly likely to constitute an infringing use.” (at paragraph 38)
 3. “This confirms the centrality of the question that flows from a purposive interpretation of the Patent Act: did the defendant, by his acts or conduct, deprive the inventor, in whole or in part, directly or indirectly, of the advantage of the **patented invention**?” (at paragraph 44)
 4. “In determining whether the defendant **“used” the patented invention**, one compares the object of the patent with what the defendant did and asks whether the defendant’s actions involved that object.” (at paragraph 45)
- [Emphasis added].

[79] The Plaintiffs’ argument takes principles contained in *Monsanto* – such as the purposive interpretation of the *Patent Act* – but does not account for the fact that the patented invention (*i.e.*

the Steelhead LNG facility), whether as an apparatus, system, or method, did not exist during the relevant time frame and therefore could not be used. The 085 Patent does not claim the conceptual design of the LNG facility invention. Moreover, during the relevant period of alleged infringement – February 8, 2019 to May 2020 – there was no commercial benefit obtained by the Defendants.

[80] The Defendants admit for the purposes of summary trial that they obtained a drawing of a water-based apparatus for liquefaction of natural gas, [REDACTED]. However, the claimed invention is an actual, physical apparatus, system, or method using such an apparatus, not a drawing of one. Indeed, simply a drawing of an invention for promotional purposes only does not make “use” of a patented invention.

[81] Given that there is no dispute that there has not been any infringement by reason of making, constructing, or selling the 085 claimed invention, the Defendants’ position is simply that, on the facts and relevant law here, there has also been no use of a system, method, or apparatus as claimed in the 085 patent claims, and as such, they have not interfered with the Plaintiffs’ full enjoyment of the monopoly conferred on them by law, directly or indirectly.

[82] Any marketing, offering, or promotional activity of the invention contained in the 085 Patent would, at best, amount to “paper offers”, without actual use of the invention claimed in the 085 Patent, which does not amount to infringement (*Domco* at paragraphs 7, 18, 32, and 33). The Defendants’ expert, Mr. Ravesloot, agreed on cross-examination that the Defendants’ presentation of the KBR pre-FEED study was an early engagement to demonstrate to potential

stakeholders, including potential third party investors, LNG off-takers, large-scale industry contractors, and First Nations, that the Consortium were aware of and were addressing challenges and are advancing potential options for an FLNG facility which must go through multiple stages of consultation and approval before a FID can be made in an LNG facility more broadly.

[83] Those promotional efforts alone, in the pre-FEED stages of consultation, including even the patented depictions of infringing articles, do not constitute infringement in Canada. As stated in *Pfizer Research and Development Co. v. Lilly Icos LLC*, 2003 FCT 753 at paragraph 21, citing *Faulding (Canada) Inc. v. Pharmacia S.p.A* (1998), 82 CPR (3d) 435 (FC), aff'd (1999), 3 CPR (4th) 575 (FCA): “Claims for infringement that are premised on indefinite acts in the future are in the realm of speculation.”

[84] Based on the evidence, it appears that, if anything, the Consortium were marketing themselves to potential business partners with the KBR pre-FEED study design as proof of concept that an LNG facility was feasible in the area. This does not even amount to a “paper offer” as conceived in *Domco*. The Defendants’ business was and is seeking to supply natural gas to a FLNG facility; the Defendants did not use a FLNG facility at all, and certainly not one within the claims of the 085 Patent.

[85] In addition, the Plaintiffs have not provided evidence that a commercial benefit was obtained by the Defendants through their presentation of the KBR pre-FEED study. As stated above, all third parties shown the KBR study did not engage in further business relationships

with the Defendants, and the testimony of Ms. Raggett revealed that relationships with Indigenous stakeholders were as a result of a team member and that the KBR pre-FEED study was never part of the discussions with First Nations. In addition, Western LNG approached and entered into a relationship with the Defendants accompanied by its own LNG facility design.

[86] This matter can be distinguished from *Dunlop Pneumatic Tyre Co v. British & Colonial Motor Car Co* (1901), 18 RPC 313 (H CJ) and *Eurocopter v. Bell Helicopter Textron Canada Ltée*, 2012 FC 113. In both cases, the patented object was made, in the alleged infringer's possession, and was exposed for sale. As stated above and as acknowledged by the Plaintiffs, the Defendants never made, constructed, or sold the invention claimed in the 085 Patent.

[87] It should be reiterated that this is not a *quia timet* action and as such this action brought for patent infringement before infringement has occurred is, at best, premature (*AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraphs 6 to 7).

[88] Even an intention to infringe, if it can be shown, which I find it was not provided in the evidence here, does not establish infringement (*Halford v. Seed Hawk Inc.*, 2004 FC 88 at paragraph 322).

V. Conclusion

[89] This is an appropriate case for determination by summary trial. The Plaintiffs have not shown, on a balance of probabilities, that the Defendants' design, development, and presentation

of the KBR pre-FEED study designs constituted use, and therefore infringement, of the 085 Patent contrary to section 42 of the *Patent Act*.

[90] Following the hearing, the Parties provided submissions on costs. The Parties agreed that, based on the Court's dispositive finding of non-infringement in the Defendants' favour, 100% of reasonable disbursements of the action to date (inclusive of the summary trial, but exclusive of any motions for which costs have been fixed) be awarded to the Defendants.

[91] In regards to reasonable legal fees, "where a defendant in the main action prevails with respect to... the plaintiff's allegations of infringement...an assessment of an appropriate lump sum award should begin at the mid-point of the 25-50% range, plus reasonable disbursements" (*Allergan v. Sandoz*, 2021 FC 186 [*Allergan*] at paragraph 32).

[92] The Plaintiffs' position is that a lump sum award of 25% is appropriate because there is no unusual complexity and the Defendants were awarded security for costs based on a lump sum of 25%. The Defendants argue that recent case law of this Court have awarded 30% or more of the successful party's reasonable fees (see, for example, *Dow Chemical v. Nova Chemicals*, 2016 FC 91 at paragraph 29, aff'd 2017 FCA 25 at paragraph 21 (30%); *Hospira Healthcare v. Kennedy Trust for Rheumatology Research*, 2018 FC 1067 at paragraph 26 (50%); *Apotex v. Shire LLC*, 2018 FC 1106 at paragraph 30 (30%)).

[93] I find that the Defendants will be awarded 30% of reasonable legal fees and 100% of reasonable disbursements for the action to date, inclusive of the summary trial, but exclusive of

any motions for which costs have been fixed. As stated in *Allergan*, the starting point for analysis is 37.5%. Given that this motion for summary trial was brought at an early stage in the litigation, required less than three full days of hearing, and focused on a discrete issue, an award of 30% of reasonable legal fees is appropriate.

[94] As agreed between the Parties, within 45 days upon receipt of the Court's decision on the summary trial, they will endeavour to agree on a reasonable costs quantum in accordance with the foregoing parameters, failing which they may seek guidance from the Court in respect of any discrete issues that they cannot agree upon.

JUDGMENT in T-1488-20

THIS COURT'S JUDGMENT is that:

1. The Defendants' motion for summary trial is granted.
2. The Defendants have not infringed the 085 Patent.
3. The Plaintiffs' action is dismissed in its entirety, with the Defendants' counterclaim continuing.
4. The Defendants' are awarded 30% of reasonable legal fees and 100% of reasonable disbursements, inclusive of the summary trial, but exclusive of any motions for which costs have been fixed.
5. Within 45 days of receiving this decision, the Parties will endeavour to agree on a reasonable costs quantum in accordance with the foregoing parameters, failing which they may seek guidance from the Court in respect of any discrete issues that they cannot agree upon.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1488-20

STYLE OF CAUSE: STEELHEAD LNG (ASLNG) LTD. ET AL. V. ARC
RESOURCES LTD. ET AL.

PLACE OF HEARING: VANCOUVER, ONTARIO

DATE OF HEARING: JUNE 1-3, 2022

**PUBLIC JUDGMENT AND
REASONS:** MANSON J.

DATED: JULY 6, 2022

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