

**Date: 20080819**

**Docket: T-444-08**

**Citation: 2008 FC 957**

**Vancouver, British Columbia, August 19, 2008**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**PEERLESS LIMITED**

**Plaintiff  
Defendant by Counterclaim**

**and**

**ASPEN CUSTOM TRAILERS INC.  
and  
ASPEN TRAILER COMPANY LTD.**

**Defendants  
Plaintiffs by Counterclaim**

**REASONS FOR ORDER AND ORDER**

[1] The defendants, plaintiffs by counterclaim, Aspen Custom Trailers Inc. and Aspen Trailer Company Ltd. (“Aspen”), seek an order requiring the plaintiff, defendant by counterclaim, Peerless Limited (“Peerless”), to provide particulars regarding material facts alleged in paragraphs 3 and 4 of the plaintiff’s Reply and Defence to Counterclaim, failing which the paragraphs are to be deemed struck out.

[2] This motion arises in the context of an action for patent infringement. Peerless alleges that Aspen has infringed its Canadian Patent 2,402,741 through the manufacture, use and sale of heavy vehicle trailer suspensions (the “Aspen Suspension”) as described in the patent. Aspen denies the allegations and, among other things, alleges that the patent is invalid by virtue of public disclosure of the subject-matter within the meaning of section 28.2 of the *Patent Act*, R.S.C. 1985, c. P-4.

[3] In its Reply and Defence to Counterclaim, Peerless asserts that the first public disclosure of the invention was made by it on September 13, 2001, by the sale of a trailer incorporating the patented suspension system. The following claims are asserted in paragraphs 3 and 4:

3. The Defendants, Plaintiffs by Counterclaim, became aware of the Patented suspension of the Plaintiff, Defendant by Counterclaim, at a time presently unknown to the Plaintiff, Defendant by Counterclaim, but known to them and before the first public disclosure of the Aspen Suspension in late 2001 or early January, 2002.

4. The Plaintiff, Defendant by Counterclaim, states that, at the time of the first public disclosure of the Aspen Suspension by the Defendants, Plaintiffs by Counterclaim, said Defendants, Plaintiffs by Counterclaim, has obtained knowledge directly or indirectly of the invention from the Plaintiff, Defendant by Counterclaim.

[4] By letter dated July 16, 2008, Aspen requested particulars with respect to paragraphs 3 and 4 of the Reply and Defence to Counterclaim. Regarding paragraph 3, Aspen sought particulars of how, where and under what circumstances the defendants allegedly became aware of the patented suspension before the first public disclosure of the Aspen Suspension. As to paragraph 4, Aspen asked for particulars of the means, location, date and circumstances in which such knowledge was allegedly obtained.

[5] Peerless' initial response to the request is dated July 29, 2008, the same day as the filing of this motion. It describes the delivery of Peerless trailers using the patented suspension system to customers in Alberta in the fall of 2001 and alleges that representatives of Aspen attended at the premises of those companies "or at other locations" and examined Peerless trailers during that period. The response also states that "the Reply and Defense to Counterclaim alleges that information was acquired by Aspen at other times and by other means concerning the invention not presently known to Peerless but particulars of such information are within the knowledge of Aspen."

[6] A further response to Aspen's request for particulars was provided by Peerless on August 11, 2008, in which it was alleged that Aspen representatives visited the premises of a named trucking company in Red Deer, Alberta, in December 2001 and examined a Peerless trailer. It is asserted that it is believed that one of the representatives was the President of the Aspen companies.

[7] Aspen's evidence on this motion consists of an affidavit by a legal secretary which states that she was informed by a Vice President of the defendants' companies that they "do not know on which material facts the plaintiff relies in its allegations in paragraphs 3 and 4 of the Reply and Defence to Counterclaim." In my view, such an affidavit is of little or no value as the secretary has no direct knowledge of the facts and the company official who presumably does is shielded from cross-examination. It is insufficient to establish that the information sought is not within the knowledge of the defendants.

[8] Aspen submits that the allegations contained in the Reply and Defence to Counterclaim are open ended and that it is plain on the face of the pleading that particulars are required. In such circumstances, evidence is not required to support the motion: *DePalma v. Bauer Nike Hockey Inc.*, [2003] F.C.J. No. 949 at paragraphs 5 and 6. Moreover, Aspen submits that it is not an appropriate defence against particulars for the plaintiff to say that the information requested is within the knowledge of the defendants: *Contour Optik Inc. v. Hakim Optical Laboratory Ltd.*, [2001] F.C.J. No. 274 at paragraph 8.

[9] The plaintiff's position is that the defendants know the case that they have to meet, that Peerless has provided the best information it presently possesses as to the circumstances in which the defendants learned of the invention by examining trailers sold to the plaintiff's customers. The defendants are in a superior position to know when and under what circumstances they first examined one of the plaintiff's suspension systems and it is impractical to require such information from the plaintiff prior to documentary and oral discovery: *Linden Fabricating and Engineering (Prince George) Ltd. v. Équipement Hydraulique Boréal Inc.*, 57 C.P.R. (3<sup>rd</sup>) 89 at 90.

[10] The issue is the adequacy of the pleading. The defendants contend that particulars are necessary at this stage of the proceeding to enable them to adequately plead to the Defence to Counterclaim and to prepare for trial. They are quite properly seeking to limit the plaintiff to allegations which it may or may not be able to obtain evidence to substantiate. But an applicant for particulars is only entitled to learn the nature of the case and not the way in which it is to be proven: see *Cremco Supply Ltd. v. Canada Pipe Co. (c.o.b. Bibby Ste-Croix Foundries)* [1998] F.C.J. No 435 at paragraph 16.

[11] The facts in *Contour Optik*, above, differ from those of the present motion. In that case the impugned paragraphs of the Defence for which particulars were claimed contained a long list of allegations that the patent at issue was invalid unsupported by any assertions of material facts.

[12] Here, the plaintiff has pleaded material facts as to how the defendants obtained knowledge of the subject-matter. These events occurred more than six years ago and it is to be expected that details of when and where that occurred may be difficult to obtain. In an analogous context, Justice Dubé in *Linden Fabricating*, above, held that it was premature to require particulars of the customers to whom the defendants had sold an allegedly infringing product prior to discovery and that, in any event, the defendants were in a far better position to have that knowledge. Similarly, I conclude that the defendants know the case they have to meet and do not require particulars from the plaintiff in order to plead to the Defence to their Counterclaim.

[13] The defendants seek leave to file a Reply to the Defence to Counterclaim if the motion is dismissed as the time limit for such filing was July 25, 2008. The plaintiff has not opposed the grant of an extension and I see no reason to deny it. While the plaintiff has been successful on the motion, the costs should follow the cause as the filing of the motion effectively produced the result sought by the defendants.

**ORDER**

**THIS COURT ORDERS that:**

1. the defendants' motion for particulars is dismissed;
2. the defendants' are granted leave to file a Reply to the Defence to Counterclaim within  
15 days of the date of this Order; and
3. costs of the motion will be in the cause.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-444-08

**STYLE OF CAUSE:** PEERLESS LIMITED  
v.  
ASPEN CUSTOM TRAILERS INC. et al.

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** August 18, 2008

**REASONS FOR ORDER  
AND ORDER:** MOSLEY J.

**DATED:** August 19, 2008

**APPEARANCES:**

Terry McManus For the Plaintiff  
Defendant by Counterclaim

Lawrence Chan For the Defendants  
Plaintiffs by Counterclaim

**SOLICITORS OF RECORD:**

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