

Federal Court



Cour fédérale

Date: 20101104

Docket: T-862-10

Citation: 2010 FC 1085

Toronto, Ontario, November 4, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THROTTLE CONTROL TECH INC.

Plaintiff

and

**PRECISION DRILLING CORPORATION,
PRECISION DRILLING LIMITED PARTNERSHIP,
PRECISION DRILLING TRUST,
VICTORY RIG EQUIPMENT CORPORATION
AND TRINIDAD DRILLING LTD.**

Defendants

AND BETWEEN:

**PRECISION DRILLING CORPORATION,
VICTORY RIG EQUIPMENT CORPORATION
AND TRINIDAD DRILLING LTD.**

Plaintiffs by Counterclaim

and

THROTTLE CONTROL TECH INC.

Defendant by Counterclaim

REASONS FOR ORDER AND ORDER

[1] The plaintiff (Throttle Control) commenced an action against, among others, Precision Drilling Corporation, Precision Drilling Limited Partnership and Precision Drilling Trust claiming that they had infringed its Canadian Letters Patent No. 2,500,253 (the '253 Patent). Those three entities were reorganized into a new corporation, Precision Drilling Corporation. For ease of reference I shall refer to these entities collectively throughout as "Precision Drilling."

[2] Throttle Control served its Statement of Claim on Precision Drilling on June 3, 2010. It is alleged that Precision Drilling "manufactured and/or had manufactured for them in Canada or elsewhere, imported into Canada, distributed, offered for sale, offered for lease, leased, sold in Canada and/or used in Canada, systems, apparatus and/or devices which infringe Throttle Control's intellectual property rights including those embodied in the ['253] Patent." The plaintiff alleges in paragraph 41 of its Statement of Claim that "[s]uch infringing systems, apparatus and/or devices include, without limitation, at least a Ram Position Indicator System." It is accepted that the phrase "Ram Position Indicator System" was coined by the plaintiff.

[3] Precision Drilling served its Statement of Defence and Counterclaim on July 2, 2010. Throttle Control then served Precision Drilling with a Demand for Particulars in respect of the Statement of Defence and Counterclaim on July 30, 2010. This 16-page document set out the particulars demanded in 26 paragraphs, most of which contained multiple subparagraphs of requested information.

[4] Precision Drilling replied to the Demand for Particulars on September 2, 2010, with a 20-page response and some 529 pages of prior art materials. On September 28, 2010, Throttle Control sought further or better particulars which it set out in chart form over 23 pages, listing 19 references that it asserted required particulars. Precision Drilling is of the view that these further particulars are not required for the purpose of pleading to its Statement of Defence and Counterclaim and accordingly has not responded to the further Demand for Particulars.

[5] Precision Drilling brought a motion for an Order that (i) Throttle Control be required to serve and file its Statement of Defence to Counterclaim by October 20, 2010, and (ii) that the action continue as a specially managed proceeding. This was met with a cross-motion from Throttle Control for an Order that Precision Drilling be required to provide answers to the further request for particulars sought on September 28, 2010. Throttle Control consented to the matter continuing as a specially managed proceeding.

[6] These motions were heard by teleconference in Calgary and Ottawa. The defendants' counsel resides in Calgary while the plaintiff's counsel is in Ottawa. The Court and the parties agreed to this manner of hearing the motions, and although the plaintiff sought an order that all further hearings be held by videoconference or teleconference, I will not make that Order. I will order that the action continue as a specially managed proceeding; accordingly, the issue of how motions are to be dealt with in the future is best left to the case management judge.

[7] Precision Drilling submitted that the cross-motion ought to be dismissed because no affidavit was filed by a representative of the plaintiff attesting that the particulars sought were necessary in order to be able to plead to the Statement of Defence and Counterclaim. In *Tommy Hilfiger Licensing Inc. v. 2970-0085 Québec Inc.*, [2000] F.C.J. No. 88, at para. 43, Prothonotary Lafrenière stated:

I might have been inclined to allow the defendant some of the particulars it is seeking. However, the affidavit submitted in support of this motion adopts a style and wording that are much too vague and limited. This affidavit does not contain the specific factual explanations to show a genuine need on the part of the defendant, as opposed to its solicitors, for particulars in order to be able to reply intelligently to the statement of claim. The defendant had to establish, as Muldoon J. put it in *Cooper Canada Ltd. v. Amer Sport International Inc.* (1996), 9 C.P.R. (3d) 549, that:

- (a) the information sought must be necessary, or material, particulars;
- (b) the particulars are not within the defendant's knowledge, or the pleader has no cause to assume that they are within the knowledge of the party demanding them; and
- (c) they are necessary, not just for preparation for trial, but to enable the defendant or other party to plead in response to the impugned pleadings.

[8] I agree that the three requirements noted by Justice Muldoon must be satisfied if the Court is to order particulars. In some cases, an affidavit will be not only useful but will be required, such as when, for example, it appears that the information sought should or could be within the knowledge of the demanding party. If the information sought is not within the knowledge of the demanding party, then an affidavit to that effect is required to counter the inference that would otherwise be drawn. On the other hand, an affidavit from a party that the information is required in order to plead is likely to be of little assistance to the Court in many circumstances. As has been noted by Justice

Lutfy (as he then was) in *McConway & Torley Corp. v. Maritime Steel & Foundries, Ltd.*, [1997] F.C.J. No. 157, the case law is mixed as to the requirement to provide an affidavit but “where particulars have been ordered, the courts have invariably been concerned with identifying the relevant factual issues in the voluminous documentation so often encountered in patent litigation.”

[9] In the present instance, the lack of an affidavit has been noted; however, it would not serve the interests of justice to dismiss the cross-motion in its entirety on that basis.

[10] The motion for particulars must be considered in light of the principles of pleading in this Court. Statements contained in a pleading are all allegations; they have not yet been proven in court nor agreed to by the party opposite. Allegations in a pleading must comply with Rule 181(1) of the *Federal Court Rules* which provides that “[a] pleading shall contain particulars of every allegation contained therein” What are particulars? They are the material facts alleged by the party pleading which, if proved, support the allegation made. Rule 174 provides that “[e]very pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be provided.” Where the particulars of an allegation are not provided or are not sufficiently provided, a party may request further and better particulars: Rule 181(2). The Court when faced with a motion for further and better particulars must thus ask two questions:

- (1) Are the alleged particulars requested material facts or are they evidence? If the former, they may be ordered to be provided; if the latter, they should not be ordered to be provided.

- (2) Are the particulars requested necessary for the purpose of being able to respond (by defence or reply) to the pleading? If they are necessary, then they should be ordered to be provided; if they are not then they should not be order to be provided.

[11] The parties cited many cases that outline the purpose of particulars, including *Gulf Canada Ltd. v. "Mary Mackin" (The)*, [1984] 1 F.C. 884 (C.A.), *Embee Electronics Agencies Ltd. v. Agence Sherwood Agencies Inc.* (1979), 43 C.P.R. (2d) 285 (F.C.T.D.), *Cercast Inc. et al. v. Shellcast Foundries Inc. et al. (No. 3)* (1973), 9 C.P.R. (2d) 18 (F.C.T.D.), *Cremco Supply Ltd. et al. v. Canada Pipe Co.* (1998), 79 C.P.R. (3d) 84 (F.C.T.D.), *Desrochers et al. v. Bombardier Inc.* (1999), 3 C.P.R. (4th) 80 (F.C.T.D.), *Distrimedic Inc. v. Dispill Inc.*, 2006 FC 832, and *Elkay Manufacturing Co. v. Produits Thermo-Concepts Inc.*, [1999] F.C.J. No. 687 (T.D.). These decisions, and others, confirm that particulars:

- a. Inform the party opposite of the case it has to meet;
- b. Prevent surprise at trial;
- c. Enable the party opposite to know what evidence it will have to gather and present at trial;
- d. Focus the allegations and limit the generality of the pleadings;
- e. Limit the issues for trial and discovery; and
- f. Tie the party pleading to the allegations made in the pleading, thus ensuring that nothing new will be raised at discovery or trial without leave.

[12] Notwithstanding these general principles, it remains that when determining whether a party is entitled to the particulars requested, one is very much guided by the nature of the litigation and the facts of the particular case. In patent litigation some general principles have been developed.

[13] When a party pleads invalidity, as Precision Drilling has in its Statement of Defence and Counterclaim, it is generally accepted that in its pleading it must:

- a. Plead the material facts related to prior use, specifying what was used, by whom, where and when;
- b. Identify the portions of the prior art, especially where the invention is complex; and
- c. Identify any alleged combination of prior art which, when read together, support an allegation of obviousness.

[14] The plaintiff grouped the particulars sought under 10 headings, which, for ease of reference, I have adopted:

- a. Logically inconsistent allegations;
- b. Bald allegations of invalidity;
- c. Allegations of ambiguity, inoperability, and inutility made “without limitation”;
- d. Reliance on “other documents” in addition to those listed;
- e. Allegations of ambiguity, obviousness and overbreadth made without reference to particular aspects of the claims or the invention in the patent;
- f. Failure to provide sufficient direction as to the relevant portions of the prior art materials;

- g. Failure to provide sufficient material facts regarding alleged disclosures;
- h. Failure to provide other material facts;
- i. Uncertainty as to what constitutes the “Ram Position Indicator System”; and
- j. Uncertainty as to the patent law concepts relied upon.

[15] The plaintiff described the further particulars sought in the 19 references (the References) set out in Appendix A to its letter to Precision Drilling dated September 28, 2010 (Appendix A). For ease of reference of the parties, I adopt that description when considering the particulars sought by Throttle Control.

a. *Logically inconsistent allegations*

[16] It is submitted that References 11, 12, and 15 of Appendix A make allegations that are logically inconsistent with other allegations in the pleading and thus offend Rule 180 of the *Federal Courts Rules*. Precision Drilling submits that they have not made inconsistent allegations; rather, they have made alternative claims, as is permitted by Rule 178.

[17] Having reviewed the specific submissions of the parties on these three References as well as the pleadings as a whole I am satisfied that the alleged logical inconsistencies are, as Precision Drilling submits, alternative pleadings and thus Rule 180 of the *Federal Courts Rules* has not been breached. In any event, if the pleading offended Rule 180 as alleged, then the appropriate remedy would have been to seek an order striking or amending the Statement of Defence and Counterclaim, not an order for particulars; no such order was sought.

b. Bald allegations of invalidity

[18] Throttle Control submits that Precision Drilling has made allegations that the '253 Patent is invalid without specifying the grounds on which it makes that allegation. It submits that it is entitled to know those grounds in order to adequately and intelligently respond to the Counterclaim. It raises this with respect to References 1 and 19 of Schedule A.

[19] Precision Drilling submits that it has not made any "bald allegations of invalidity" and, to the extent that it may appear so, the paragraphs under attack are general introductory paragraphs followed by specific allegations clearly setting out the alleged bases of invalidity.

[20] Reference 1 relates to paragraph 3 of the Statement of Defence and Counterclaim, which states in relevant part that the '253 Patent "is and has always been invalid." It is a general statement of invalidity. Had there been no further or better pleading, then the submission of Throttle Control would have been maintained. However, immediately thereafter Precision Drilling goes on in some further 10 paragraphs to specify the grounds of invalidity with headings to guide the reader entitled: Anticipation and Obviousness, Ambiguity, Inoperable Embodiments, Lack of Utility, and Covetous Claiming. Accordingly, while it is preferable to avoid general statements and to plead only the particularized statements, I cannot find that Throttle Control requires further particulars to plead to the allegation of invalidity as it is set out in detail in the pleading and because Precision Drilling, as it admitted at the hearing, is bound by those specific allegations made. Therefore, paragraph 3 does not open the door to any other allegation of invalidity of the '253 Patent without amendment to the pleading.

[21] Reference 19 relates to paragraph 36 of the Statement of Defence and Counterclaim which, under the heading Counterclaim, reads as follows:

36 The Defendant Precision, Plaintiff by Counterclaim, claims:

(a) a declaration that the claims of the '253 Patent are, and always have been, invalid;

...

[22] "Form 171D – Counterclaim Against Parties to Main Action Only," as provided in the *Federal Courts Rules*, specifies that the counterclaim flows from the last paragraph of the statement of defence and that under the heading "Counterclaim" is to read as follows:

The defendant (name if more than one defendant) claims: (State here the precise relief claimed.)

(Then set out in separate, consecutively numbered paragraphs, each allegation of material fact relied on to substantiate the counterclaim....)

[23] It is evident that Precision Drilling has obeyed the Rules. It is evident that the paragraph complained of by Throttle Control is not an allegation of material fact but a simple claim that is exactly the reverse of that sought by Throttle Control in paragraph 1(a) of its Statement of Claim which reads: "The Plaintiff claims: a. A declaration that Canadian Letters Patent No. 2,500,253 are valid and subsisting..." Counsel for the plaintiff knows better and his attempt to challenge paragraph 36 of the Counterclaim can only be described as over-reaching in the extreme.

c. *Allegations of ambiguity, inoperability, and inutility made “without limitation”*

[24] References 8, 9 and 10 of Appendix A refer to paragraphs 6, 7, 8, 9, 10 and 11 of the Statement of Defence and Counterclaim. In each of paragraphs 7, 9 and 11 the allegation made is in the nature of a statement which reads: “Specifically, but without limiting the previous paragraph.” Throttle Control submits that pleadings of this nature result in “open-ended allegations of ambiguity, inoperability, and inutility against the ‘253 Patent.” The plaintiff relies on the decision of Prothonotary Hargrave in *Cremco Supply*, above.

[25] The submission of Precision Drilling is as follows:

Precision is limited by the facts set out in the Statement of Defence and Counterclaim. Those facts are as set out in paragraphs 7, 9 and 11 with respect to the allegations of ambiguity, inoperability and lack of utility. The phrase “without limiting the generality of the previous paragraph” is not a material part of the Statement of Defence and Counterclaim; it is merely used to preserve Precision’s right to rely on further particulars which may become known through the discovery process. Precision has plead (sic) the particulars of which it is aware at this date. [emphasis in the original]

[26] The assertion of Precision Drilling that it has pleaded in this manner in order to “rely on further particulars which may become known through the discovery process” illustrates exactly why this is an improper pleading. First, the discovery process is to be limited to the allegations and material facts pleaded and no others. Second, the party opposite is entitled to know the case that it must meet, not the case as it may develop, unless the pleadings are amended after obtaining an order on motion that seeks that relief.

[27] In my view, particulars cannot cure this improper pleading; it ought to be struck. Counsel at the hearing submitted that striking these improper statements was within the relief requested as falling within “further or other relief as Counsel for Throttle Control may advise and this Honourable Court may permit.” Precision Drilling took no serious objection to the Court’s jurisdiction on this motion to strike the offending phrases and they shall be ordered struck.

d. Reliance on “other documents” in addition to those listed

[28] References 3, 6 and 16 of Appendix A refer to paragraphs 4, 5 and 22 of the Statement of Defence and Counterclaim. These paragraphs set out details of prior disclosure in Schedule A, prior art in Schedule B and undisclosed art in Schedule C to the Statement of Defence and Counterclaim. Throttle Control’s objection is not so much to the pleadings as written, but rather is to the statements made in response to the initial Demand for Particulars relating to the References wherein Precision Drilling stated that it “reserves the right to rely on equipment and systems described and referred to in other documents as such information becomes available.”

[29] Precision Drilling’s justification for using this turn of phrase in its response to the Demand for Particulars is similar to that in the previous category: it currently knows of no such information but should not be prevented from relying on it as it becomes available. In my view, this is improper. The plaintiff is entitled to know what the party opposite relies on. If that changes in the future, then Precision Drilling is under a continuing duty to disclose further particulars as they become known to it. It may be that Throttle Control will object and the Court will have to determine whether, in the circumstances as they then exist, Precision Drilling should be permitted to rely on the newly

discovered evidence. Precision Drilling cannot protect its position in the future by the use of the phrase it has used.

[30] Accordingly, Throttle Control is entitled to the further particulars sought, and Precision Drilling's response cannot include the phrase objected to or any similar phrase.

- e. *Allegations of ambiguity, obviousness and overbreadth made without reference to particular aspects of the claims or the invention in the patent*

[31] Under this heading are References 5, 8 and 13 of Appendix A which refer to paragraphs 5, 6 and 14 of the Statement of Defence and Counterclaim. Throttle Control says that it is entitled to know what is being asserted against it and should not have to search it out in a pleading that makes a vague assertion coupled with an indication of where to find it: *Northern Telecom Ltd. v. Reliable Electric Co.* (1986), 8 C.P.R. (3d) 224 (F.C.A.). The paragraphs objected to, it submits, make allegations of obviousness, ambiguity and overbreadth, without referring to any particular aspects of the claims or the invention disclosed in the patent.

[32] I agree with Precision Drilling that it is clear from its initial response to the Demand for Particulars that it is alleging that all of the elements of the claim in the '253 Patent are obvious. This is not a patent containing a complex invention. No further particulars of the sort requested under Reference 5 will be ordered.

[33] Throttle Control alleges that paragraph 6 of the Statement of Defence and Counterclaim, which alleges ambiguity, does not specify, as required, the phrases or particulars of the alleged

ambiguity. In paragraph 7 of the Statement of Defence and Counterclaim, Precision Drilling asserts that “without limiting the generality of the previous paragraph,” the phrase ‘engine engagement of a pipe section’ in claim 1 of the ‘253 Patent is ambiguous. I have already dealt with the impropriety of the “without limiting” turn of phrase. With its elimination, no further particulars are required.

[34] Lastly, Throttle Control complains that paragraph 14 of the Statement of Defence and Counterclaim is deficient in that while it alleges that claims 1-4 of the ‘253 Patent are broader than the invention made, it makes no reference as to what aspects of claims 1-4 are alleged to be broader and no indication as to what invention is alleged to have been made. I agree with Precision Drilling that the claims which are alleged to overclaim have been identified, namely all of them, and therefore no additional facts are required because the claims and specifications speak for themselves: *Elkay Manufacturing*, above.

f. *Failure to provide sufficient direction as to the relevant portions of the prior art materials*

[35] Under this heading are References 3, 6, and 16 of Appendix A which refer to paragraphs 4, 5, and 22 of the Statement of Defence and Counterclaim. Throttle Control submits that Precision Drilling’s response to the initial demand for particulars as to what portions of the various documents cited in Schedules A, B, and C to the Statement of Defence and Counterclaim are relevant to the ‘253 Patent is “inadequate as they continue to cite a number of references at length, and with several cited in their entirety.” Precision Drilling responds, saying that it “identified with specificity in paragraphs 5, 6 and 17 of its Response to Demand for Particulars the exact portions of the documents ... it intends to rely upon in support of its allegations of anticipation, obviousness and

breach of duty of good faith and candour.” It further submits that while it did cite a small portion of the documents in their entirety, it did so because it was relying on the entirety of that document.

[36] I have reviewed the pleadings, including the responses to the demand for particulars as well as the documents that are relied upon in their entirety. There is nothing preventing a party from relying on a document in its entirety. When such is the case, and when at this stage of the process a party informs the Court that it is doing so, it is not for the Court to second guess the accuracy of the assertion unless it appears questionable or dubious based on a review of the document. If it subsequently turns out that the party was overstating its case in that regard, I expect that the party opposite will bring that to the Court’s attention when addressing costs. These particulars will not be ordered as my review of the documents does not lead me to question the assertion of Precision Drilling.

g. Failure to provide sufficient material facts regarding alleged disclosures

[37] Under this heading are References 4 and 7 of Appendix A which refer to paragraphs 4 and 5 of the Statement of Defence and Counterclaim. Throttle Control’s objection is stated by it as follows: “Paragraph 4 of the Precision Drilling Defence alleges that the ‘253 Patent is anticipated in light of the alleged prior disclosures set out in Schedule “A”, but provides no indication to whom these documents were addressed, under what circumstances they were allegedly disclosed, or how the recipient is alleged to constitute the “public” as required under s. 28.2(1)(b).” I am not convinced that the information sought is required to plead to the allegation that the documents constitute prior disclosure. All of the information requested will be produced through discovery and

trial and goes to the issue of whether the documents constitute disclosure to the public as required by the Act.

[38] The allegation with reference to paragraph 5 is of the same nature but deals with obviousness. Again, I am not convinced that the particulars sought are required to plead to the allegation and disclosure will not be ordered.

h. Failure to provide other material facts

[39] Under this heading are References 2, 9, 10, 17 and 18 of Appendix A which refer to paragraphs 3, 8, 9, 10, 11, 22 and 25 of the Statement of Defence and Counterclaim. Throttle Control complains that Precision Drilling has failed to particularize what constitutes its “systems, apparatus, or devices” which it alleges do not infringe the ‘253 patent. I agree with Precision Drilling that there is nothing improper with a statement that none of its “systems, apparatus, or devices” infringe the patent. It is for the plaintiff, Throttle Control, to prove infringement. The only relevant “systems, apparatus, or devices” of Precision Drilling are those that Throttle Control alleges infringes its patent and that is within its knowledge.

[40] Throttle Control says that it requires particulars of paragraph 9 wherein it is alleged that “without limiting the generality of the previous paragraph, claim 1 of the ‘253 Patent and the claims depending thereon include the phrase “engine engagement of a pipe section”.” I have already dealt with the impropriety of this turn of phrase. Throttle Control says that it requires particulars of the phrase “engine engagement of a pipe section” and says that while Precision Drilling has offered

“one possible construction of the phrase [it] does not provide particulars of how such a construction would result in the alleged inoperability.” Again, I fail to see that this is required to plead to the allegation made. The information sought appears more relevant to discovery and trial.

[41] Throttle Control submits that it requires particulars of how Throttle Control became aware of the prior art documents listed in Schedule C which it is alleged Throttle Control failed to disclose during the reissue of the ‘253 Patent. Whether or not Throttle Control was aware of these prior art documents is entirely within its knowledge and, as such, the particulars sought are not required for pleading.

i. *Uncertainty as to what constitutes the “Ram Position Indicator System”*

[42] Under this heading are References 11 and 14 of Appendix A which refer to paragraphs 12, 13 and 14 of the Statement of Defence and Counterclaim.

[43] As previously noted, the phrase “Ram Position Indicator System” was coined by Throttle Control in its Statement of Claim. Precision Drilling responded using Throttle Control’s terminology. Throttle Control’s submission that it now requires particulars of a term it coined is disingenuous and without merit.

j. *Uncertainty as to the patent law concepts relied upon*

[44] Under this heading are References 5, 8 and 11 of Appendix A which refer to paragraphs 5, 6, 7, and 12 of the Statement of Defence and Counterclaim. Throttle Control’s submission is that

without the particulars sought it is uncertain as to what patent law concepts Precision Drilling is relying on in its pleading and thus cannot reply intelligibly.

[45] I have reviewed the parties' submissions against those pleadings and have concluded that the statements made by Precision Drilling are set out with sufficient particularity that Throttle Control can plead to them. They have set out the facts and the law relied upon. Linking the facts alleged to the law asserted is a matter to be explored at discovery and by counsel at hearing; it is not required to plead to the allegations made.

Costs

[46] Counsel were canvassed as to costs if they were successful. Throttle Control seeks costs of \$15,000, while Precision Drilling says that costs at the upper end of Column III, not including disbursements, would be in the order of \$2,600.00.

[47] As the success in the motions before the Court was divided, in the exercise of my discretion, I award no costs to either party.

ORDER

THIS COURT ORDERS that:

1. This action shall continue as a specially managed proceeding.
2. The matter is referred to the Chief Justice for assignment of a case management judge.
3. The phrase: “but without limiting the generality of the previous paragraph” as it appears in paragraphs 7, 9, and 11 of the Statement of Defence and Counterclaim is struck.
4. Throttle Control shall be provided with the particulars sought in its further request for particulars, References 3, 6, and 16 of Appendix A, which refer to paragraphs 4, 5, and 22 of the Statement of Defence and Counterclaim, within 10 days of the date of this Order, wherein Precision Drilling shall not purport to “reserve the right to rely on equipment and systems described and referred to in other documents as such information becomes available.”
5. Throttle Control shall serve and file its Statement of Defence to Counterclaim no later than 20 days after receiving the Amended Statement of Defence and Counterclaim and the particulars ordered herein.
6. No costs are awarded to either party.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-862-10

STYLE OF CAUSE: THROTTLE CONTROL TECH INC. v.
PRECISION DRILLING CORPORATION ET AL

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: October 18, 2010

REASONS FOR ORDER: ZINN J.

DATED: November 4, 2010

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