

CANADA / JUDGMENT

Halford v. Seed Hawk Inc.

2003 FCT 141

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Halford v. Seed Hawk Inc. Court (s) Database Federal Court Decisions Date 2003-02-10 Neutral citation 2003 FCT 141 File numbers T-2406-93 Notes Digest Decision Content Date: 20030210 Docket: T-2406-93 Neutral Citation: 2003 FCT 141 Winnipeg, Manitoba, the 10 day of February, 2003 Present: The Honourable Mr. Justice Pelletier BETWEEN: JAMES W. HALFORD and VALE FARMS LTD. Plaintiffs and SEED HAWK INC., PAT BEAUJOT, NORBERT BEAUJOT, BRIAN KENT and SIMPLOT CANADA LIMITED Defendants

REASONS

1. At the conclusion of the defendants' cases, the Plaintiffs seek to put in additional expert evidence, both on the issue of infringement and on the issue of invalidity. It should be pointed out that the defendants have counterclaimed claiming invalidity of the plaintiffs' patent so that invalidity is not simply raised as a defence. The defendants oppose the introduction of this evidence on the ground that it amounts to the plaintiffs splitting their case and that the evidence sought to be tendered is not admissible in reply.
2. This is a problem which could arise in any circumstance but it is made particularly acute in this case by the history of the pre-trial procedures relating to production of expert's affidavits. Instead of each party producing all of its expert evidence at once, the production of expert affidavits proceeded by dribs and drabs, with some affidavits being served days before the opening of the first session of this trial, some three years ago. Following a change in counsel, more expert affidavits were introduced. This led to problems in the presentation of evidence which I disposed of in reasons now reported at 2001 FCT 1162 in which I directed that all of the plaintiff's evidence on infringement should go in as part of its case in chief regardless of whether the affidavit in which it appears was prepared in chief or in rebuttal of another expert's affidavit. This is what I ruled at that time: It is my view that all of the plaintiff's evidence as to infringement ought to go in at once, regardless of where in the series of affidavits that evidence first arose, subject to one caveat. Evidence which is purely in rebuttal to the defendant's affidavits should only go in after the defendant's evidence is in. But, given the history of this matter, any evidence going to infringement which is capable of standing on its own without reference to any opponent's affidavit should go in through the witness in chief.

3. The plaintiffs are now arguing that they are now entitled to lead reply evidence which did not stand on its own in the previous affidavits. The defendants oppose this on the ground that it amounts to allowing the plaintiffs to split their case. In so far as the plaintiffs' reply evidence with respect to validity is concerned, the defendants argue that the affidavits in response to which the rebuttal affidavits were prepared having been withdrawn, they will be prejudiced if the reply evidence is now allowed to go in.
4. Further, the plaintiffs and the defendant Simplot are at odds about evidence sought to be introduced in reply arising out of evidence given in re-examination and which did not figure in the expert's affidavit. These are the general outlines of the dispute. I will come to the particulars shortly, but before I do, I think it useful to make some general comments about trial practice and the use of expert affidavits.
5. The question of reply evidence is dealt with in two places in the Federal Court Rules 1998: 274 (1) Subject to subsection (2), at the trial of an action, unless the Court directs otherwise,
 - (a) the plaintiff shall make an opening address and then adduce evidence;
 - (b) when the plaintiff's evidence is concluded, the defendant shall make an opening address and then adduce evidence; and
 - (c) when the defendant's evidence is concluded, the plaintiff may adduce reply evidence.
6. The second reference to reply evidence is found under the heading of Simplified Actions: 299(3) Subject to rule 281, reply evidence, including that of an expert witness, may be provided orally at trial.
7. But this does not define the scope of reply evidence. It simply provides that a plaintiff may lead such evidence as is properly within the scope of reply evidence. Further, the reference in Rule 299 to evidence, including expert evidence, being provided orally in a Simplified Action simply reflects the fact that the rules with regard to Simplified Actions contemplate that all evidence in chief will be provided by affidavit.
8. The defendants argue that since we are dealing with expert evidence, the applicable rule is Rule 281, which provides as follows:
 281. Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the rebuttal evidence has been served on all other parties at least 30 days before the commencement of the trial.
9. The plaintiffs argue that they have complied with Rule 281 since the affidavits in question were served some considerable time ago. I do not interpret this Rule in the way in which it has been put to me. Rule 281 does not deal with trial procedure but with pre-trial disclosure, which is one of the primary functions of the exchange of experts affidavits. I do not take Rule 281 as authorizing a party to prepare a rebuttal affidavit which goes to an element of its

case in chief, and to tender that evidence in reply. It may be in rebuttal to another affidavit, but if an affidavit deals with an issue which arises in a party's case in chief, then the evidence should be tendered in chief.

10. The argument which is raised against this position is that a party cannot tender the evidence in reply until the other party's evidence has been led because the nature of that evidence is unknown. The essential purpose of the exchange of affidavits is to ensure that the tenor of the evidence is known. An affidavit in rebuttal does not have to proceed by way of contradicting specific paragraphs in another affidavit. It can, and should, proceed by putting forward the expert's evidence on the issue in a form so as to allow it to be put into evidence in chief. The question of whether the other expert will say what his/her affidavit says is a red herring. If it is part of the party's case in chief, it does not matter if the other expert refers to that issue or not. To hold otherwise allows a party to split its case.
11. Consequently, I continue to be of the view that those portions of the plaintiffs' experts affidavits which deal with infringement ought to have been put into evidence in chief. I will return in a moment to my comments about evidence "standing on its own". The only issue therefore is whether the evidence sought to be tendered is properly reply evidence. In my view, the plaintiff's evidence with respect to validity stands on a different footing in the sense that the onus of making the case for invalidity was on the defendants. As a result, the plaintiff, as defendant by counterclaim is entitled to meet that case after it has been made by the defendants is entitled to lead its defence evidence as it sees fit. Consequently, I do not intend to put any limit on the evidence lead by way of defence to the counter-claim for invalidity, subject to one qualification which I will raise below.
12. This leads to the question of the proper scope of reply evidence. An indirect answer to this question is provided in *Allcock Laight & Westwood Ltd. v. Patten, Bernard and*
13. *Dynamic Displays Ltd.* [1967] 1 O.R. 18 (C.A.) where the Ontario Court of Appeal had this to say about evidence which was sought to be led by way of reply: It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534. That case was considered by this Court and the principle therein enunciated was applied in *R. v. Michael*, [1954] O.R. 926, 110 C.C.C. 30, 20 C.R. 18. The rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.
14. The conclusion which I draw from this passage is that evidence which simply confirms or repeats evidence given in chief is not to be allowed as reply evidence. It must add something new. But since the plaintiff is not allowed to split its case, that something new must be

evidence which was not part of its case in chief. That can only leave evidence relating to matters arising in defence which were not raised in the plaintiff's case in chief. But even this is subject to a limitation which is expressed in the following passage from Sopinka et al. *The Law of Evidence in Canada* 2nd Edition at p. 882: Should reply evidence be excluded if the point in respect of which contradictory evidence is sought to be adduced in reply arose in cross-examination of the other parties' witness rather than their evidence in chief? In *Mersey Paper Co v. Queens (County)* [(1959) 18 D.L.R. (2nd) 19 (N.S.C.A.)], The Nova Scotia Court of Appeal considered this to be an unjustifiable technical distinction. It is submitted that, at least in civil cases, it would depend on whether the matter was part of the plaintiff's case and one which might have been adduced in the plaintiff's case-in-chief. A plaintiff cannot leave part of its case until cross-examination of the defendant's witnesses and then when that goes badly make up for it in reply. Although the authorities are not entirely clear on this point, the better view is that reply evidence that conforms with the principles stated above can be adduced as of right. There is, however, a discretionary power vested in the trial judge to admit such evidence, notwithstanding that it may not be the proper subject of reply.

15. Consequently, I believe that the following principles govern the admissibility of reply evidence: 1- Evidence which is simply confirmatory of evidence already before the court is not be allowed. 2- Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed. 3- Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not be be admitted. To these principles, I add one further. Evidence which is excluded because it should have been led as part of the plaintiffs' case in chief will be examined to determine if it should be admitted in the exercise of my discretion
16. With that framework in place, I turn to the evidence of each of the witnesses. I shall deal first with the evidence of Mr. Schaff and Dr. Tessier on the issue of infringement. As I read the paragraphs from Mr. Schaaf's affidavit which the plaintiff seeks to have admitted on the issue of infringement, they consist of retaking specific paragraphs of Mr. Anderson's affidavit and contradicting them. Mr. Tessier's affidavit is more complex. There are a number of paragraphs which could have gone into evidence in chief as they would have been admissible and understandable even without Mr. Anderson's affidavit before the court. Others do not deal with questions which go to infringement. Others make reference to other affidavits, but develop a line of evidence relatively independent of the affidavit referred to. And then there are some which deal specifically with Mr. Anderson's affidavit.
17. The first question is whether any of this evidence is proper reply evidence. I conclude that Mr. Schaaf's evidence on infringement is not proper reply evidence to the extent that it simply takes up various paragraphs of Mr. Anderson's affidavit and shows why the witnesses disagrees with it. Those portions of Dr. Tessier's evidence which are in the same form are subject to the same assessment To the extent that certain paragraphs do not deal with

matters of infringement, they are equally inadmissible. I have not found any paragraphs which deal with new matters arising out of cross examination. I am unable to identify in the paragraphs which the plaintiffs seek to have admitted in reply any matter which could not have been properly have been the subject of these witnesses evidence in chief. . On general principles relating to reply evidence, I would therefore decline to admit the evidence of these witnesses with respect to infringement.

18. This leads to the second inquiry as to whether I ought to exercise my discretion to allow the evidence to be led even though it would not otherwise be admissible. The only reason for me to do so would be the terms of my earlier ruling to the effect that evidence purely in rebuttal of other affidavits should go in at the conclusion of the defendants case. That ruling was an attempt to deal with the problems created by the fact that expert affidavits were not produced at one time, and that a whole series of affidavits were produced for the sole purpose of contradicting other affidavits.
19. I do not think that it can be seriously argued that, apart from the form of the affidavits, all of the evidence on infringement which it is now sought to put in could have gone in as part of the plaintiff's case. In fact, having reviewed the evidence I am of the view that a portion of it could have and should have gone in during the plaintiff's case in chief in any event. The only reason the whole of the evidence did not go in is that the manner in which the affidavits were created led to the impression that that evidence could not be tendered until the affidavits which were to be contradicted were before the court. This leaves the defendants in the position that the admission of this evidence prejudices them as they would have had the opportunity to deal with it during their case if it had gone in when it should have. As a result, if the evidence goes in the defendants must be given a chance to respond to it.
20. There is another consideration which is peculiar to this trial. We embarked on this exercise in November of 2000 for a trial which was scheduled to last 3 weeks. For reasons which are no one's fault, we have had to resume this 3 times over a period of 3 years , and at the end of this week we will have completed 7 ½ weeks of trial. All of this I have no doubt, has contributed significantly to the cost of this matter. But the fact of the matter is that we are rapidly approaching the point where the greatest injustice to all parties is the delay in deciding the claim on its merits. For that reason, further delay or extensions of time are to be assiduously avoided.
21. Given the terms of my prior ruling, I feel bound to exercise my discretion to allow the plaintiff to lead evidence which falls within the four corners of my order. Consequently, in considering whether a matter is purely in rebuttal of another affidavit, I will take into account any evidence in chief given by the witness on the issue. If the evidence could appropriately have been led in chief by simply deleting a referene to a name for example, I will consider that it should have been led in chief. Furthermore, given that both affidavits cover similar ground, I will not allow repetitive evidence.

22. Dealing first with Dr. Tessier's 2nd affidavit, the following paragraphs which are identified in Schedule C are disallowed for the reasons shown: 139-141 This deals with a commercial embodiment of invention. 279-280 This subject dealt with in chief . See transcript October 26, 2001 at p. 1440. These paragraphs capable of standing alone. 299-301 These paragraphs stand alone. 302 This is an editorial comment which is not relevant to infringement. 303-307 The evidence in para. 307 was the subject of a successful objection at p. 1450 of the transcript of October 26, 2001. The objection would apply to this evidence. Para.'s 303 and 304 are merely introductory and are meaningless without para. 307 312-313 This subject matter was dealt with at p. 1453 and following of the transcript of October 26, 2001. Para. 312 is editorial. Para. 313 stands alone and could have been led in chief. 318-319 This subject was canvassed in cross examination in the transcript of October 30, 2001 and should have gone in as re-examination. 324 This paragraph stands alone 325-330 Paragraph 330 stands alone and should have gone in with the discussion of para's 332 to 335 at p. 1456 and following of the transcript of October 26, 2001. Para.'s 325 and 326 are introductory and are irrelevant without para. 330. 345 This para. is not purely in rebuttal to other affidavits and can stand alone. 353 b) Evidence of tests should have gone in in chief. 353c)-354 Consequential upon exclusion of 353 b) 355-356 Covered in cross examination of Mr. Anderson. This is essentially a matter for argument 359 This para. stands alone. It should have gone in as evidence in chief. 375 This is simply editorial comment and is not relevant to infringement.
23. All other paragraphs of the Second affidavit of Dr. Tessier referred to in Schedule C of the Plaintiff's submission will be admitted.
24. The following paragraphs of Mr. Schaaf's first affidavit dealing with infringement will not be admitted for the reasons stated: 103 Cross reference to material covered in examination in chief at pp. 2893 and following of the transcript of June 19, 2002.
25. There is a considerable overlap with respect to the subject matter of the affidavits of Dr. Tessier and Mr. Schaaf. In the exercise of my discretion, for reasons of bringing this matter to completion in as timely a way as possible, I will not allow repetitive evidence. Since I am unsure of which witness will be called first, I am unable to determine which witness' evidence will be repetitive of the other. But counsel should be aware that I intend to limit the second witness to ground not covered by the first.
26. At the conclusion of the plaintiffs' reply evidence, I will call upon the defendants to advise what evidence if any they feel they must call to deal with the evidence which I have admitted as reply evidence. Similarly, the defendants will have a right of reply to the evidence of invalidity, which evidence will be assessed by the normal rules dealing with reply evidence.
27. Even though the evidence with respect to validity does not go in as a matter of my discretion, but as a matter of right, I do have discretion as a trial judge to exclude evidence which is repetitive. Once again, I propose to exercise this discretion in the interests of bringing this matter to completion in the time allocated to us.

28. That leaves the issue of the reply evidence of Mr. Goldstein. In my view, the same considerations apply to the reply evidence sought to be led except for the issue of "First mover". With respect to the matters other than the issue of First Mover, these questions were all canvassed extensively in chief and in cross examination. The rebuttal evidence simply represents a difference of opinion which has already been expressed. It is, in my view, merely confirmatory. Consequently, it is not proper reply evidence. Furthermore, given that it is simply confirmatory, I do not believe that the plaintiffs are prejudiced by its exclusion.
29. The issue of First Mover stands on a different footing however. It is a new matter first raised in re-examination of the witness. It could have been raised in the plaintiff's case in chief. Had the matter been raised in examination in chief, counsel for the plaintiff could have cross-examined on it. But because, it only arose in re-examination, counsel was deprived of that opportunity. It is unfair to the plaintiffs to be deprived of the opportunity to address that issue either in reply or by cross-examination. The only remedy at my disposal is to allow evidence in reply and I will therefore allow that evidence to be led. "J.D. Denis Pelletier" Judge FEDERAL COURT OF CANADA TRIAL DIVISION NAMES OF SOLICITORS AND SOLICITORS OF RECORD DOCKET: T-2406-93 STYLE OF CAUSE:James W. Halford and Vale Farms Ltd., v. Seed Hawk Inc., Pat Beaujot, Norbert Beaujot, Brian Kent and Simplot Canada Limited PLACE OF HEARING: Winnipeg, Manitoba DATE OF HEARING: February 3, 2003 REASONS OF THE HONOURABLE MR. JUSTICE PELLETIER DATED FEBRUARY 10, 2003 APPEARANCES Steven Raber for the Plaintiff Dean Giles Alexander Macklin for the Defendant-Seed Hawk Doak Horne Wolfgang Riedel for the Defendant-Simplot SOLICITORS OF RECORD Fillmore Riley 1700 Commodity Exchange Tower 360 Main Street Winnipeg, MB R3C 3Z3 for the Plaintiff Gowlings Suite 1400 700 - 2nd Street S.W. Calgary, AB T2P 4V5 for the Defendant-Seed Hawk Meighen, Haddad & Co Barristers & Solicitors P.O. Box 22105 110 - 11th Street Brandon, MB R7A 6Y9 for the Defendant-Simplot

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