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PATENTS

PRACTICE

Motions for discovery brought by plaintiff Meridian Manufacturing Inc. (Meridian), defendant Concept Industries Ltd. (Concept) — Underlying patent infringement action brought by Meridian alleging that Concept infringed Canadian Patent No. 3,036,430 ('430 Patent) — '430 Patent relating to hopper bottom for supporting storage bin such as grain storage bin — Motion for summary judgment previously dismissed [6,7]— One of Concept's defences therein was that '430 Patent invalid because it is anticipated by prior art hopper made by JTL Industries Ltd (JTL Hopper) — Timeline for steps in proceeding calling for, *inter alia*, examinations for discovery to be completed by September 2023 — Concept provided answers to undertakings given at discovery in October 2023 — Meridian asserted that many of the documents produced after discovery of Concept's corporate representative, Lonny Thiessen, were in possession, power, or control of Concept long before they were produced, that Concept failed to comply with its disclosure, continuing disclosure obligations under *Federal Courts Rules*, SOR/98-106, rr. 223, 226 — Meridian described Concept's failure to produce documents in advance of Mr. Thiessen's examination as intentional, sufficiently egregious to constitute abuse of process — Asked Court to sanction this breach by striking certain paragraphs in Concept's Statement of Defence and Counterclaim, preventing Concept from relying on new documents at trial, or awarding costs — Also sought responses to certain undertakings given on examination for discovery; production of unredacted copies of certain documents produced; an order substituting different corporate representative for discovery in place of Mr. Thiessen — Concept's motion related to refusal by Meridian to provide undertakings at examination for discovery of its representative — Whether motions should be allowed — Importance to efficient, effective litigation of documentary discovery obligations set out in rr. 223, 226 underscored by r. 232, which prevents party from relying on undisclosed documents at trial without leave of Court — In present case, issue of whether JTL Hopper constituted invalidating prior art key question in action since Concept filed its Statement of Defence and Counterclaim — Need to diligently search for documents relevant to that issue, to assemble its invalidity case based on JTL Hopper, should have been clear to Concept since outset of matter — That obligation not dependent on waiting for requests for documents during examinations for discovery or reminders from opposing counsel — Additional documents may be located, identified as relevant later in proceedings, including after discoveries in process of responding to undertakings — However, Concept did not meet its documentary discovery obligations as set out in rr. 223, 226, inadequately explained its failure or inability to produce new documents, serve supplementary affidavit of documents until after conduct of discoveries — At the same time, not every failure to comply with documentary discovery obligations constitutes abuse of process — Despite Meridian's efforts to paint Concept's failure as egregious, deliberate attempt to delay production of documents, Concept did not engage in deliberate or flagrant attempt to hide or delay production for tactical or other advantage — R. 227 empowering Court to grant variety of sanctions if satisfied that affidavit of documents inaccurate or deficient — Drastic sanction of striking paragraphs of Concept's Statement of Defence and Counterclaim not warranted — Preventing Concept from relying on new documents at trial not remedy expressly contemplated under r. 227 — Remedy for lack of timeliness in documentary disclosure is adjournment to permit party to pursue remedies otherwise provided in *Federal Courts Rules*; not to exclude evidence that would otherwise be

admissible — Not in interests of justice to prevent Concept from adducing potentially relevant prior art based on its late disclosure — Appropriate in this case to award costs pursuant to r. 227(d) that reasonably reflects the additional costs incurred by Meridian arising from fact that Concept did not disclose new documents until after Mr. Thiessen first examined for discovery — Court not satisfied that Mr. Thiessen not appropriate witness — Meridian's request for order under r. 237(3) therefore dismissed without prejudice to its ability to seek substitution if it turns out that Mr. Thiessen inappropriate witness — Meridian entitled to degree of specificity as to parts of each piece of prior art on which Concept relied for each of its invalidity defences — Meridian's motion granted in part, while few unresolved issues on Concept's motion dismissed.

MERIDIAN MANUFACTURING INC. V. CONCEPT INDUSTRIES LTD. (T-1506-20, 2024 FC 604, McHaffie J., reasons for order dated April 22, 2024, 25 pp.)