
CANADIAN RADIO PATENTS LIM- }
 ITED ET AL } PLAINTIFFS;

1927
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 June 13.  
 July 8.

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AND

HIGEL RADIO LIMITED ..... DEFENDANT.

*Practice—Patents—Further particulars—Rule 28—English Order LIII A.*

*Held*, that under Rule 28 of the General Rules and Orders of this Court, the Court or a judge thereof may order such further and better particulars as such Court or judge may see fit.

2. That the practice laid down in Order LIII A of the High Court of Justice in England has not so far been adopted in this Court. That, however, said Order was only declaratory of what the practice was previously.
3. That in an action for the alleged infringement of a radio receiving set the plaintiffs should give the following particulars, namely: showing what tuned radio frequency sets claimed to be infringements of plaintiffs' patent have been or are being sold and used by the defendant, so far as known to the plaintiffs; and also showing the claims of the said patent which are alleged to be infringed by the defendant.

APPLICATION by defendant for an order compelling the plaintiffs to give further and better particulars.

The action of the plaintiffs was for an injunction against the defendant restraining it from using a certain receiving set alleged to be an infringement of their patent. Plaintiffs' patent was for improvements in selective tuning systems.

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The application was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*W. D. Herridge, K.C.*, for the Motion.

*O. M. Biggar, K.C.*, *contra*.

The facts and points of law raised on the application are set out in the reasons for judgment.

THE PRESIDENT, now (July 8, 1927), delivered judgment.

In these two cases the defendants have applied by summons for an order directing the plaintiffs to furnish further and better particulars as follows:—

(a) Under paragraph 1 of the Particulars of Objection,—Shewing what tuned radio frequency sets are sold by the defendant;

(b) Under paragraph 1 of the Particulars of Objection,—Stating what Claims of the said Canadian Patent Number 208,583 are alleged to be infringed by the defendant.

Mr. Herridge appeared for the defendants in support of the summons in each case and Mr. Biggar, K.C., appeared for the plaintiffs, opposing the summons.

As the matter is one of importance in the practice of the Court in actions for the infringement of patents of invention, I asked each counsel to supplement his oral argument with a statement in writing of the points and authorities relied on by him. This has been done and I have had the advantage of perusing the same and considering the authorities.

Mr. Biggar's argument briefly stated is that the present Exchequer Court rules embody a practice in respect of particulars of breaches to be furnished by the plaintiff in an infringement action which is substantially the same as that prevailing in England under the Patent Act, 1883. He pointed out that this practice was superseded by the provisions of the English Order LIII-A made under the Patents and Design Acts of 1907 and 1919, and he contended that under this new practice more precision and exactitude is required from the plaintiff in furnishing particulars of breaches.

Before proceeding to compare the provisions of rule 25, of the General Rules and Orders of this Court with the present rules prevailing in England I will refer to Terrell on Letters Patent, 2nd Ed., 1889, cited to me by Mr. Biggar

as disclosing the English practice at that time. At page 222, section 29 (1) of the English Act, 1883, is quoted as follows:—

In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or a judge at any subsequent time, particulars of the breaches complained of; (4) at the hearing no evidence shall, except by leave of the Court or a judge, be admitted in proof of any alleged infringement, or objection of which particulars are not so delivered; (5) particulars delivered may from time to time be amended by leave of the Court or a judge.

In his commentary upon this provision Mr. Terrell observes:— (p. 222).

Particulars of breaches are particulars of the times, places, occasions, and manner in which the plaintiff says the defendant has infringed his letters patent. The defendant must have full, fair, and distinct notice of the case to be made against him, *Needham v. Oxley* (1). In *Batley v. Kynock* (2), Sir James Bacon, V.C., said: "All that is required and provided by the Patent Law Amendment Act, 1852, which has made no alteration in the practice to be observed in these cases, is that the defendants shall not be taken by surprise, and it is the duty of the judge to take care that by the particulars of breaches they shall have full and fair notice of the case that they will have to meet."

It had undoubtedly prior to the passing of the Patent Law Amendment Act, 1852, been the practice of the Courts to compel plaintiffs to give particulars of breaches and the cases which were then decided as to the sufficiency of particulars are applicable now; for then, as now, the object was that the defendant should be warned with reasonable certainty of the case that was to be made against him. . . . If the particulars delivered are too general the defendant should apply for further and better particulars.

If this is a correct presentation of the practice prevailing before the English Order LIII-A was passed, and, further, if our Exchequer Court practice to-day is the same as that, then it would seem that I have power to entertain the application for an order directing further and better particulars of breaches in infringement actions. I may say too, that in arriving at this conclusion I am only following in the footsteps of other Judges who have sat in this Court.

Turning now to a comparison of the provisions of the English Order LIII-A with those of rule 25 of the practice of this Court I find that while rule 11 of the English Order cited is substantially the same as our rule 25, there is a new and more specific formulation of the duty of the plaintiff in respect of stating particulars of breaches in rule 14 of the English Order (See Annual Practice, 1927, p. 967). This rule has so far not been adopted in our practice, but I think

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(1) (1863) 1 H. & M. 248.

(2) (1874) L.R. 19 Eq. at p. 231.

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it clear from the authorities cited on page 968 of the Annual Practice that the present English rule is only declaratory of the practice recognized in the books for a very long period. For instance, there is a case cited at p. 968 in the work last mentioned which was decided in 1887, *Haslam & Co. v. Hall* (1), and which is relied on for the following proposition:—

It must be remembered that if the defendant is unable to ascertain from the particulars with sufficient precision what type of machine or process is complained of, the onus will lie on him to apply for further and better particulars, and to give some evidence to show that the information given is insufficient (*Haslam & Co. v. Hall*, (1887) 4 R.P.C. 203); he should not wait until the trial to complain.

In my foregoing observations I have made no reference to the very wide powers conferred upon me by rule 28 of the practice of the Exchequer Court. It provides that:—  
 “Further and better particulars may be ordered to be delivered as the Court or a Judge may see fit.” This rule refers to particulars in patent actions, and it seems to me that its terms could not be wider. I am of opinion that under this rule alone I have power to make an order for further and better particulars in such a case as the present.

Coming now to the merits of the application, I have examined the bearing upon the cases of the further particulars asked for, and I think that the interests of justice will be served if I direct that further and better particulars be given in each of these cases as follows:—

1. Showing what tuned radio frequency sets claimed to be infringements of plaintiffs' patent as set out in his statement of claim herein have been or are being sold and used by the defendant so far as known to the plaintiff.
2. Showing the claims of the said patent which are alleged to be infringed by the defendant.

In each case there will be an order accordingly in the usual form and terms. Costs of and incidental to the application to be costs in the cause.

*Judgment accordingly.*