Intellectual Property Weekly Abstracts Bulletin — Week of June 20

June 22, 2016

Trademark Decisions

Partial Success on a Motion to Strike Pleadings
LBI Brands Inc. v. AquaTerra Corporation, 2016 ONSC 3572

In this case, the defendants brought a motion to strike various parts of the Statement of Claim without leave to amend. Counsel settled parts of the motion before hearing. Success was divided. Where paragraphs were struck, the plaintiff was allowed to amend its pleading.

Seven paragraphs dealt with allegations that the defendants made false and misleading representations. The defendants filed evidence to try to show these allegations were frivolous and vexatious. However, the Court held that it must accept the facts alleged in the pleading as proven or true unless they are patently ridiculous or incapable of proof. In this case, although the facts pleaded are in dispute, they are material to the pleadings. Thus, the allegations are not scandalous frivolous or vexatious, and were not ordered struck. Similarly, a further paragraph relating to conspiracy was not struck, as the Court held that the necessary facts were pleaded to establish both types of conspiracy claims.

The next impugned paragraphs dealt with allegations under s. 36 of the *Competition Act*. The Court held that such a cause of action requires that the plaintiff must have suffered loss as a result of the defendants' conduct contrary to s. 52(1) of the *Competition Act*. In this case, the causal connection was held not to be plead. Thus those portions of the claim that advanced claims pursuant to s. 36(1) of the *Competition Act* were struck. However, the Court held that the usual practice was to allow leave to amend, and so ordered.

Similarly, the Court held that the intellectual property aspect was missing from a claim pursuant to s. 7(d) of the *Trade-marks Act*. This was held to be a necessary element. Thus the paragraph was struck with leave to amend. However, further paragraphs were struck without leave to amend, as they were held to relate to origin and quality representations, and not intellectual property.

Industrial Design Decisions

Summary Judgment Invalidates an Industrial Design that Was Dedicated to the Public
E. Mishan & Sons. v. Supertek Canada Inc., 2016 FC 613

The Federal Court has granted a summary judgment motion and declared an industrial design invalid.

This action is the second part to a bifurcated proceeding. The Federal Court had previously found the plaintiffs' asserted patent to be invalid and dismissed the infringement action (2014 FC 326 and summarized the week of April 14, 2016; affirmed 2015 FCA 163 and summarized the week of July 27, 2015).

The industrial design at suit relates to an expandable garden hose comprising an inner flexible stretchable hose encased by an outer fabric hose affixed at both ends with customary garden hose fittings.

Before the hearing the plaintiffs had dedicated the industrial design to the public, discontinued the assertion of the design infringement portion of this action, and provided a letter containing a covenant not to sue to the defendants.

It was argued that the issue of validity was now moot after the dedication, but the Court questioned the effect of the dedication and noted that the dedication was made after the counterclaim as to invalidity was filed. The Court still proceeded to assess its validity, and found that the design is not original and is dictated solely by function.

Also, it was questioned whether the defendants are "persons aggrieved" considering the dedication and discontinuance of the industrial design claim. It was found that these actions, all unilaterally made by the plaintiffs, could not serve to eliminate the defendants' status as persons aggrieved.

The Court further ordered a summary trial with respect to Supertek's claim under section 7(a) of the *Trade-marks Act*. The claim pursuant to section 7(a) of the *Trade-marks Act* was found to require live witnesses, where their credibility will play a part in a proper determination of the matter. The Court stated that it would like to hear from the relevant witnesses by subpoena, if necessary, to give evidence in person in Court.

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