Federal Court of Appeal | Cour d'appel fédérale

Date: 20210309

Docket: A-91-20

Citation: 2021 FCA 51

CORAM: **BOIVIN J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

SPECTRUM BRANDS, INC.

Appellant

and

SCHNEIDER ELECTRIC INDUSTRIES SAS

Respondent

Heard by online video conference hosted by the Registry on March 9, 2021.
Judgment delivered from the Bench at Ottawa, Ontario, on March 9, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: LEBLANC J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on March 9, 2021).

LEBLANC J.A.

[1] This is an appeal from an order of Justice Ahmed of the Federal Court (the Motion Judge), dated March 16, 2020 (2020 FC 386), dismissing Spectrum Brands, Inc. (Spectrum)'s motion for an extension of time to file a Notice of Application against a decision of the Registrar

of Trademarks (the Registrar) who allowed, in part, Spectrum's opposition to the respondent's application to register the trademark WISER.

[2] The Registrar's split decision was released on September 11, 2019. According to section 56 of the *Trademarks Act*, R.S.C. 1985, c. T-13 (the Act), each party had "two months from the date on which notice of the decision was dispatched by the Registrar" to file an appeal against that decision, if dissatisfied with it. That two-month delay expired on November 25, 2019. Pursuant to rule 300 of the *Federal Courts Rules*, SOR/98-106 (the Rules), appeals under section 56 of the Act are governed by Part 5 of the Rules, which applies to applications for judicial review.

[3] The respondent appealed the part of the Registrar's decision unfavourable to it by filing a Notice of Application on November 25, 2019. Spectrum seeks to do the same with respect to the part of the Registrar's decision that is not favourable to it. However, it was only on February 21, 2020 that Spectrum brought its motion for an extension of time to file the required application.

[4] The Motion Judge found that Spectrum had failed to establish two of the four criteria that must be considered on a motion for an extension of time (*Canada (Attorney General) v. Hennelly*, 244 N.R. 399, [1999] F.C.J. No. 846 (F.C.A.) (QL/Lexis) (*Hennelly*)), that is: a continuing intention to pursue its appeal and a reasonable explanation for the delay in bringing the proposed appeal before the Federal Court.

[5] Spectrum submits that the Motion Judge erred in failing to appreciate the fact that its proposed appeal was, in essence, a cross-appeal of the Registrar's decision and that, as a result, the starting point to determine whether it had a continuing intention to bring the proposed appeal was the filing of the respondent's Notice of Application on November 25, 2019, not the date of the Registrar's decision. It also claims that the Motion Judge failed to account for the overriding consideration that justice be done between the parties, even in cases where one of the four *Hennelly* criteria is not satisfied.

[6] Unless an extricable question of law can be identified, in which case it is to be reviewed on the correctness standard, discretionary orders made by Federal Court judges are reviewed on the palpable and overriding error standard (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 26-37; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2021 FCA 24, [2021] F.C.J. No. 105 (QL/Lexis) at para. 11 (*Western Oilfield*)).

[7] The Motion Judge having identified the correct legal test, we must be satisfied, in order to intervene in this case, that he committed a palpable and overriding error in applying that test to the facts that were before him. It is trite that the palpable and overriding standard of review is a "highly deferential" one, which is "not easily met". To use the oft-quoted metaphor, it is not enough, when arguing palpable and overriding error, "to pull at leaves and branches and leave the tree standing [;] [t]he entire tree must fall." (See *Western Oilfield* at para. 11, quoting from

South Yukon Forest Corp. v. R., 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, quoted with approval in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38).

[8] Here, we see no basis to interfere with the Motion Judge's conclusions.

[9] Regarding the continuing intention criterion, even if we were to accept Spectrum's argument that the delay for bringing its proposed appeal could be calculated as of November 25, 2019, Spectrum acknowledges that it took "some time" to make a decision on whether to "cross-appeal" the impugned decision. As pointed out by the respondent, there is no indication in Spectrum's evidence as to when, between November 25, 2019 and the date Spectrum filed its motion for an extension of time, that decision was made. This hardly evidences Spectrum's alleged continuing intention to file an appeal of the Registrar's decision, even during the entire alternate time frame put forward by Spectrum.

[10] Spectrum also submitted to the Motion Judge that the filing of its notice of appearance in the respondent's appeal in early January 2020 was evidence of its continuing intention to challenge the Registrar's decision. This contention was dismissed as irrelevant to the determination of whether Spectrum had a continuing intention to pursue its own appeal. We see no palpable and overriding error in the Motion Judge's finding on this point.

[11] Finally, Spectrum's claim that the Motion Judge failed to account for the overriding consideration that justice be done between the parties is also without merit in the circumstances of this case. It is well established that "any laxity or failure to pursue an application as diligently

as could reasonably be expected will militate strongly against the granting of an extension of time" (see *Lesly v. Canada (Citizenship and Immigration)*, 2018 FC 272, 59 Imm. L.R. (4th) 270 at para. 21, referring to *Westinghouse Canada Inc. v. Canada (International Trade Tribunal)*, 104 N.R. 191, 1989 CarswellNat 722 (WL) (F.C.A.) at para. 6).

[12] Here, as indicated earlier, the Motion Judge also found that Spectrum had failed to provide a reasonable explanation for its delay. He noted that the time elapsed between the date Spectrum claims should be the starting point of the period within which it was entitled to file a Notice of Application, that is November 25, 2019, and the date it actually filed its motion for an extension of time, that is February 21, 2020, was even lengthier than the two-month period set out in section 56 of the Act.

[13] More importantly, the Motion Judge was not satisfied with Spectrum's explanation that the time it took to re-examine the Registrar's decision in light of the respondent's appeal resulted from the fact that said appeal was filed just before the Thanksgiving holiday in the United States and that Spectrum was served with the Notice of Application on December 10, 2019, that is just before the Christmas holidays. He agreed with the respondent that there is nothing inherently unpredictable about the period surrounding statutory holidays, parties to a litigation being expected to be aware of them and to plan and work within time frames that include such holidays. He also pointed out that Spectrum had provided no explanation for its inaction in the period of more than six weeks between the end of the holiday season and the date on which it sought an extension of time.

[14] We are all of the view that the Motion Judge, based on the law and the material before him, was entitled to conclude that Spectrum had failed to provide a reasonable explanation for its delay in bringing the motion for an extension of time. Coupled with his finding that Spectrum had failed to establish a continuing intention to appeal the Registrar's decision, this provided ample basis for the Motion Judge to dismiss said motion without doing injustice between the parties. Spectrum has not succeeded in establishing that the Motion Judge committed a palpable and overriding error in deciding as he did.

[15] For all these reasons, the present appeal will be dismissed with costs.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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