

Federal Court



Cour fédérale

Date: 20170612

Docket: T-2060-16

Citation: 2017 FC 575

Ottawa, Ontario, June 12, 2017

PRESENT: Case Management Judge Mandy Ayles

BETWEEN:

MOSTAR DIRECTIONAL TECHNOLOGIES INC.

Plaintiff

and

**DRILL-TEK CORPORATION AND DRILL-TEK
MWD SERVICES LTD.**

Defendants

ORDER AND REASONS

[1] **UPON MOTION** by the Defendants, heard June 2, 2017 in Toronto, Ontario, for:

- (a) An order, pursuant to Rule 221(1)(a), (c) and (f) of the *Federal Courts Rules* [Rules], that the Amended Statement of Claim be struck, without leave to amend, and the within action dismissed, on the basis that the Plaintiff's claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious, and is an abuse of the process of this Court;

- (b) An order awarding the Defendants their costs of this motion and the within action on a full indemnity basis, or otherwise fixed in the amount of \$20,000.00, payable forthwith, or an order for costs as the Court may otherwise permit;
- (c) In the alternative, should this Court allow this claim to continue and the Amended Statement of Claim to stand without further amendments, an order granting the Defendants leave to file a Statement of Defence and Counterclaim 45 days from the date of an order on this motion; and
- (d) Such other and further order or direction as to this Honourable Court may seem just;

[2] **CONSIDERING** the Notice of Motion filed April 21, 2017, the affidavit of Neil McWilliams sworn April 14, 2017 and the exhibits thereto, and the written representations filed by the Defendants;

[3] **CONSIDERING** the written representations filed by the Plaintiff;

[4] **CONSIDERING** the submissions of the parties at the hearing of the motion;

[5] The Defendants seek to strike the Amended Statement of Claim, without leave to amend, on the basis that: (a) pursuant to Rule 221(1)(a), it discloses no reasonable cause of action; (b) pursuant to Rule 221(1)(c), it is scandalous, frivolous or vexatious; and (c) pursuant to Rule 221(1)(f), it is otherwise an abuse of process. For the reasons that follow, I am allowing the motion with costs of the motion and the underlying action to the Defendants.

I. Facts

[6] This action involves a claim of patent infringement and inducement in relation to the Plaintiff's Canadian Patent No. 2,666,695 [695 Patent], Canadian Patent No. 2,544,457 [457 Patent], Canadian Patent No. 2,584,671 [671 Patent] and Canadian Patent No. 2,634,236 [236 Patent].

[7] The Plaintiff is a provider of various directional drilling services and solutions for drilling projects in the oil and gas industry, including measurement while drilling [MWD] equipment and directional drilling services. The Plaintiff manufactures, offers for sale and offers for rent an MWD tool that transmits sensor data acquired down hole to a surface receiver using either or both mud pulse [MP] telemetry and electromagnetic [EM] telemetry, and a gap sub-assembly for a drill string that is used in implementing EM telemetry. The Plaintiff's patents at issue in this proceeding relate to: (a) a dual-telemetry MWD system; (b) adapting or retrofitting an existing MWD tool to provide dual-telemetry and/or EM telemetry; and (c) a gap-sub assembly for a drill string that is used in implementing EM telemetry.

[8] In the Amended Statement of Claim, the Plaintiff seeks various forms of relief, including:

- A. A declaration that the 695 Patent, the 457 Patent, the 671 Patent and the 236 Patent [Mostar Patents] are valid and subsisting and have been owned by the Plaintiff at all material times;
- B. A declaration that the Defendants have infringed the Plaintiff's exclusive rights by manufacturing, importing into Canada, exporting from Canada, selling,

offering for sale, renting, offering for rental, advertising, promoting, using, and inducing others to use, devices, systems or methods:

- i. Defined by claims 1-11, 13-24, 26-30, 32-41, 43-49 and 51-56 of the 695 Patent;
- ii. Defined by claims 1, 3, 5, 6, 8, 32-38, 39-45 and 46-55 of the 457 Patent;
- iii. Defined by claims 1-10, 11-18 and 19-29 of the 671 Patent; and
- iv. Defined by claims 1-42 of the 236 Patent [collectively, the Asserted Claims]; and

C. An interim, interlocutory and permanent injunction restraining the Defendants, their respective directors, officers, servants, agents, clients or other persons controlled by the Defendants, directly or indirectly, from:

- i. Infringing any of the Asserted Claims or inducing others to do so; and
- ii. Manufacturing, importing into Canada, exporting from Canada, selling, offering for sale, renting, offering for rental, advertising, promoting, using or inducing any third party to use, any device, system or method that would infringe any of the Asserted Claims, including without limitation the Defendants' Twin EM system, Twin EM MWD system, 175c MWD system and EM add-on.

[9] Manufacturing, importing into Canada, exporting from Canada, selling, offering for sale, renting, offering for rental, advertising, promoting, using or inducing any third party to use, any device, system or method that would infringe any of the Asserted Claims, including without limitation the Defendants' Twin EM system, Twin EM MWD system, 175c MWD system and EM add-on.

6. The Defendants are providers of technology solutions and services to the upstream drilling industry. The Defendants manufacture, offer for sale and offer for rental a line of MWD products that transmit sensor data acquired down hole to one or more surface receivers. The MWD products include the Twin and 174c MWD systems that transmit the sensor data using either MP or EM telemetry or both MP and EM telemetry simultaneously, and an EM tool that is adapted to be used with existing tensor-based MWD equipment. The Defendants also manufacture a gap-sub assembly to be used with EM telemetry implementations.

20. At a date known to the Defendants but unknown to the Plaintiff, the Defendants began: (a) manufacturing, promoting and offering for sale and rental devices and systems; and (b) offering to perform methods and inducing others to perform methods, that infringe the Plaintiff's rights under each of the Mostar Patents. More particularly, the Defendants are offering for sale and rental systems that they call "Twin EM", "175c MWD", "EM add-on" or "Twin EM MWD System" and that either combine EM and MP telemetry or allow a customer to add an EM transmitter to its existing MP MWD tool string (collectively, the "Accused Devices/Methods").

21. At a minimum, the Defendants' Accused Devices/Methods infringe the Asserted Claims.

22. The Plaintiff is not aware of all of the particulars of the Defendant's devices, systems and activities and, as such, it may be that such devices, systems and activities also infringe other claims of the Mostar Patents. The Plaintiff seeks the relief set out above in respect of all such devices systems and activities that infringe any claims of the Mostar Patents.

[10] The Amended Statement of Claim pleads the following additional material facts in relation to the claim of inducement:

23. The Defendants have been inducing and acting in concert with customers to infringe the Mostar Patents. Customer who buy or rent and then use the Accused Devices/Methods, or who hire the Defendants to use the Accused Devices/Methods, also infringe, at a minimum, the Asserted Claims.

24. The Defendants have induced customers to infringe by:

(a) Selling and renting Accused Devices to them and using the Accused Devices and Accused Methods on jobs performed for such customers;

(b) Advertising and promoting to them the benefits and advantages of the Accused Devices/Methods; and

(c) Providing them with technical training and technical support in respect of the Accused Devices/Methods.

[11] Following receipt of the initial Statement of Claim, the Defendants served the Plaintiff with a request for particulars seeking particulars of how each of the Defendant's devices, systems or activities as referenced in the Statement of Claim infringed the 151 Asserted Claims, including the parts or specific actions/capabilities of the Defendants' systems that corresponded to the various claim elements, and seeking various particulars relating to the claim of inducement.

[12] The Plaintiff's response to the request for particulars provided only the following additional particulars in relation to the claims of infringement:

A. In response to the request for particulars of the alleged infringement of the claims of each of the 695, 457 and 671 Patents by the Defendants' Twin EM system, Twin EM MWD system and 175c MWD system, the Plaintiff stated:

The Defendants have advertised, sold and/or offered for sale systems under the names or identifiers “Twin EM”, “Hunter Integrated Twin telemetry”, “Twin EM MWD”, and “175c MWD”. Although the Plaintiff is not aware as to the extent of all of the differences among the systems offered in association with these names, all of these systems refer to a similar dual telemetry system that adds or otherwise includes EM capabilities to/with mud pulse systems. The mud pulse systems have been referred to as “Tensor-style” or “existing mud-pulse” tools/systems in various forms. As such, the making, using, selling, and operating of any or all of these systems infringes the [Asserted Claims of the 695, 457 and 671 Patents].

- B. In response to the request for particulars of the alleged infringement of the claims of each of the 695, 457 and 671 Patents by the Defendants’ EM add-on system, the Plaintiff stated:

The Plaintiff’s understanding of the EM add-on system is that it is directed to the provision of an EM tool that retrofits or adapts an existing mud-pulse tool/system to effectively create a Twin EM system.

- C. In response to the request for particulars of the alleged infringement of the claims of the 236 Patent by the Defendants’ Twin EM system, Twin EM MWD system, 175c MWD system and EM add-on system, the Plaintiff stated:

The 236 Patent claims a gap sub-assembly, and a method for assembling a gap sub-assembly. The MWD systems listed in request nos. 4(a), (c), (e) and (g), and similar dual telemetry systems that add or otherwise include EM capabilities to/with mud pulse systems, require a gap sub-assembly to create a region of isolation in the drill string, for operating the EM telemetry. As such, the making, using, selling, and assembly of the Defendant’s gap-sub assembly, and operation of the Defendant’s systems along with such a gap sub-assembly infringes the following claims of the 236 Patent: 1-42.

The entire gap sub-assembly infringes the asserted claims of this patent.

[13] In relation to the claim of inducement, the Plaintiff provided the Defendants with particulars relating to the benefits and advantages of the Accused Devices/Methods.

[14] At the time of delivery of its response to the request for particulars, the Plaintiffs also served the Defendants with the Amended Statement of Claim. The effect of the amendment was to add five additional Asserted Claims, bringing the total Asserted Claims to 151. No additional material facts were pleaded in the Amended Statement of Claim.

II. Analysis

[15] The threshold for striking out a statement of claim is high. A statement of claim will only be struck out where it is plain and obvious that the pleading should be struck on the basis of one of the grounds detailed in Rule 221(1).

[16] In the case of a Rule 221(1)(a) motion, the Court will only strike a statement of claim where it is plain and obvious that the pleading discloses no reasonable cause of action. In making that assessment, the material facts pleaded must be taken as true, unless the allegations are based on assumption and speculation. If a statement of claim contains bare assertions without material facts upon which to base those assertions, then it discloses no cause of action and is liable to be struck. However, if there is any doubt as to whether a cause of action can succeed, the matter should be left for a decision of the trial judge [see *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441 at paras. 7-8, 27; and *R v Imperial Tobacco*, 2011 SCC 42 at paragraph 17]

[17] On the requirement to plead material facts at the time the claim is commenced, the Supreme Court of Canada stated in *R. v Imperial Tobacco Canada Ltd.*, *supra* at para. 22:

It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[Emphasis added.]

[18] In the case of a Rule 221(1)(c) or (f) motion, a pleading will be struck as being scandalous, frivolous or vexatious or an abuse of process where the claim is so clearly futile that it has not the slightest chance of succeeding [see *Apotex Inc. v Syntex Pharmaceuticals International Limited et al.*, 2005 FC 1310 at para. 33].

[19] A pleading may be struck as frivolous or vexatious where the claimant can present no rational argument, based upon the evidence or law, in support of the claim, or where the pleading is so deficient in factual material that the defendant cannot know how to answer and a Court will be unable to regulate the proceeding [see *kisikawpimootewin v Canada*, 2004 FC 1426 at para 8].

[20] A pleading may be struck as an abuse of the Court's process if the action was commenced as a fishing expedition in the hopes that a cause of action will become apparent [see *Painblanc v Kastner*, [1994] FCJ No 1671 at para 4 (FCA)].

[21] As has been recognized by the Federal Court of Appeal, it is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to how the facts might be variously

arranged to support various causes of action [*Mancuso v Minister of National Health and Welfare*, 2015 FCA 227 at para 16-17 [*Mancuso*]].

[22] The Federal Court of Appeal recognized at paragraph 17 of *Mancuso* that:

The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial

[emphasis added]

[23] The Court agrees with the Plaintiff that an analysis of the sufficiency of the material facts pleaded in the Amended Statement of Claim is contextual and fact-driven. As stated by the Federal Court of Appeal in *Mancuso*:

There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[24] In assessing the sufficiency of the material facts in a patent infringement action, a statement of claim should clearly show: (a) facts by virtue of which the law recognizes a defined right as belonging to the plaintiff; and (b) facts that constitute an encroachment by the defendant on that defined right of the plaintiff. If a statement of claim does not disclose these two elements of the plaintiff's cause of action, the statement of claim does not disclose a cause of action and

may be disposed of summarily [see *Dow Chemical Co. v. Kayson Plastics & Chemicals*, (1966), 47 C.P.R. 1 at para. 27 (Can. Ex. Ct) [*Dow Chemical*]].

[25] A defendant is entitled to understand clearly and precisely the exact nature of the invention, as well as how the precise manner in which, according to the plaintiff, the defendant has infringed the claims of the patent [see *Chart Industries Ltd. v Hein-Werner of Canada Ltd.*, 2004 FC 1421 at paras 3-4].

[26] However, even in circumstances where the pleading is missing some elements and others are incomplete, if the pleading contains enough information to allow the defendant to know with some certainty the case to be met, the pleading will not be struck [see *Pharmaceutical Partners of Canada Inc. v Faulding (Canada) Inc.*, 2002 FCT 1010 at para 13].

[27] In this case, the central issue is whether the Plaintiff has pleaded sufficient material facts to meet part (b) of the *Dow Chemical* test – namely, whether the Plaintiff has pleaded sufficient material facts that constitute an encroachment by the Defendants on the Plaintiff's defined rights in the Mostar Patents.

[28] The Defendants assert that the Amended Statement of Claim is improper as it pleads no material facts as to “how” the Defendants have infringed the Asserted Claims. The Defendants assert that this Court has already recognized that, with limited exceptions, a party cannot simply use the language of the claims of the patents at issue to describe the acts of the Defendants and where a party does so, the pleading does not meet the standard required by the *Rules*. The Defendants assert that no exception to this rule applies in this case, but that in any event, the

Plaintiff has not even pleaded the language of the Asserted Claims. Rather, the Plaintiff only makes reference to the claim numbers of the 151 Asserted Claims.

[29] I agree with the Plaintiff that this Court has recognized that there is no hard and fast rule against a plaintiff pleading the language of the claims of the patents at issue in the proceeding in order to meet part (b) of the *Dow Chemical* test. Each case must be assessed on its own facts, the evidence presented and the exact wording of the patent and the statement of claim. In some cases, the wording of the claim is such that it can be used as a model to describe exactly what the defendant has done that constitutes an encroachment on the rights of a plaintiff [see *General Electric Co. v Wind Power Inc.*, 2013 FCT 537 at para 18-19 [*General Electric*]; *Stryker Corporation et al v Umamo Medical Inc. et al*, 2016 FC 378 at para 11 [*Stryker*]].

[30] However, in this case, the Plaintiff has not even pleaded the language of the 151 Asserted Claims and therefore I fail to see how the *General Electric* and *Stryker* cases are of assistance to the Plaintiff.

[31] The Plaintiff has asserted that it has pleaded sufficient material facts to meet part (b) of the *Dow Chemical* test as it has pleaded the names of the Defendants' infringing devices and has pleaded the claim numbers comprising the Asserted Claims. The Plaintiff asserts that nothing further is required of it at this stage of the proceeding and that it should be permitted to move forward to the discovery phase of the litigation. It is only later in the litigation process that the Plaintiff asserts that it should be required to further particularize "how" the Defendants' devices and methods infringe the Asserted Claims.

[32] I have considered the totality of the material facts pleaded by the Plaintiff in the Amended Statement of Claim, as well as the particulars provided by the Plaintiff in response to the request for particulars, notwithstanding that this Court has recognized that a plaintiff cannot supplement insufficient pleadings to make them sufficient through particulars [*Mancuso, supra* at para 20].

[33] I reject the Plaintiff's assertion that the identification of the Defendants' model names and the enumeration of the claim numbers comprising the Asserted Claims are sufficient to enable the Defendants to know how they have allegedly infringed the Asserted Claims. In doing so, I note that the Plaintiff has failed to provide the Court with any case law that has recognized such a level of material facts as being sufficient to support a claim for patent infringement.

[34] The Plaintiff asserts that the Defendants have an understanding of their own devices and methods, as detailed in the various public statements that were produced by the Plaintiff in response to the Defendants' request for particulars. The Plaintiff asserts that these statements utilize similar terminology to elements recited in the Asserted Claims and accordingly, the Defendants are capable of understanding the Asserted Claims and the manner in which their devices and methods are alleged to be infringing. On that basis, the Plaintiff asserts that sufficient material facts have been pleaded to enable the Defendants to plead over.

[35] I reject this assertion. It is not for the Defendant to undertake guesswork in order to respond to the Amended Statement of Claim. Specifically: (a) to guess as to how the Plaintiff is alleging that their activities correspond to the elements of the 151 Asserted Claims; (b) to guess as to how the Plaintiff is construing the scope of the 151 Asserted Claims; and (c) to guess the

extent to which the Plaintiffs allege that the Defendants' activities infringe the 151 Asserted Claims.

[36] The Defendants are entitled to know the precise manner in which, according to the Plaintiff, the Defendants have infringed the 151 Asserted Claims. Without knowing the "how", the Defendants are unable to know the case they need to meet and are prevented from pleading intelligently in response [see *Harrison v Sterling Lumber Company*, April 5, 2007 Order of Prothonotary Lafreniere; *Heli Tech Services (Canada) Ltd. v Wyerhaeuser Co.*, November 21, 2008 Order of Prothonotary Lafreniere, aff'd 2009 FC 592, aff'd 2011 FCA 193]. Neither the Amended Statement of Claim nor the particulars furnished by the Plaintiff provide such precision.

[37] I agree with the Defendants that while the Plaintiff owns certain patents in the field of combining MP and EM telemetry, the Mostar Patents claim specific and intricate methods and designs for implementing this combination. The Plaintiff does not have a monopoly over all devices and methods in that field and is not entitled to claim infringement beyond the scope of the claims of the Mostar Patents. In the absence of sufficient material facts as to "how" the Defendants' devices and methods infringed the Mostar Patents, the Plaintiff appears to be overreaching to allow it to monopolize any devices and methods that combine MP and TM telemetry, which is improper [see *Free World Trust v Electro Sante Inc.*, 2000 SCC 66 at para 32].

[38] The Plaintiff relies on the decision of the Honourable Madam Justice Mactavish in *Novartis AG v Apotex Inc.*, 2006 FC 1277 [*Novartis*] and the decision of the Honourable Madam Justice Layton-Stevenson in *Pharmaceutical Partners of Canada Inc. v Faulding (Canada) Inc.*,

2002 FCT 1010 [*Pharmaceutical Partners*], to assert that, on this motion, this Court should base its decision on whether the Amended Statement of Claim provides enough information so as to allow the Defendant to know, with some certainty, the case they have to meet and to allow them to plead over. In the absence of affidavit evidence from the Defendants that it cannot plead over, the Plaintiff urged this Court to dismiss the motion.

[39] I do not view the decisions in *Novartis* or *Pharmaceutical Partners* as in any way modifying the obligation of the Plaintiff to plead sufficient material facts to support a claim of patent infringement as detailed in *Dow Chemical*. The underlying rationale for requiring sufficient material facts is to enable a defendant to know the case that it has to meet and to enable a defendant to intelligently plead in response to the statement of claim. In *Novartis*, Justice Mactavish reviewed the material facts pleaded by Novartis and found that sufficient material facts had been pleaded to support a claim for patent infringement, which enabled Apotex to know, with some certainty, the case that it had to meet and to allow it to plead over.

[40] At the hearing of this motion, the Plaintiff asserted that the motion ought to be dismissed as the Defendants had acknowledged at the hearing that they could plead over based on the current state of the Amended Statement of Claim. While the Defendants acknowledged that they could file a bare-bones pleading that simply denied all allegations made against them, a pleading of such a nature is not what is intended by the Court when it makes reference to the ability to plead over, such as in *Novartis* or *Pharmaceutical Partners*.

[41] A bare-bones pleading that simply denies all allegations does little, if anything, to identify and frame the issues for discovery and to guide the parameters of relevancy of evidence at discovery and trial, which defeats the very purpose of pleadings. A defendant must, through a

review of the statement of claim, have a sufficient understanding of the case that it has to meet so as to enable it to deliver a statement of defence that gives some level of precision to the issues for discovery and trial. That cannot be done based on the current Amended Statement of Claim.

[42] The Plaintiff provided the Court with a chart in Schedule B to its written representations that attempts to link, through the use of arrows, the language of a number of the Asserted Claims to various public statements made by the Defendants regarding its devices and methods [Chart]. The Chart was not produced to the Defendants as part of the Plaintiff's response to the request for particulars, nor was it appended to an affidavit as part of the Plaintiff's responding motion materials. Notwithstanding, I have considered the Chart in reaching my decision and I am not persuaded that it provides the necessary material facts to save the Amended Statement of Claim.

[43] Accordingly, I find that the Plaintiff has failed to plead sufficient material facts that constitute an encroachment by the Defendants on the defined rights of the Plaintiff, such that it is not plain and obvious that a reasonable cause of action of infringement is disclosed in the Amended Statement of Claim. To conclude otherwise would be to permit the Plaintiff to use the discovery process to explore potential grounds for their 151 claims of infringement, which this Court cannot permit. On that basis, the claims of infringement should be struck pursuant to Rule 221(1)(a).

[44] Moreover, an allegation of infringement made without any evidentiary foundation constitutes an abuse of process. As the Amended Statement of Claim fails to plead sufficient material facts in relation to the infringement of the 151 Asserted Claims, it also warrants being struck as an abuse of process pursuant to Rule 221(1)(f).

[45] I now turn to the claim of inducement. A determination of inducement requires the application of a three-prong test: (i) the act of inducement must have been completed by the direct infringer; (ii) the completion of the acts of infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place; and (iii) the influence must knowingly be exercised by the inducer, that is, the inducer knows that this influence will result in the completion of the act of infringement [see *Stryker, supra* at para 15].

[46] I find that, even taking into account the particulars provided by the Plaintiff in relation to the benefits and advantages of the Defendants' devices and methods, the Plaintiff has failed to set out material facts supporting each element of the test for inducement. As such, I find that it is plain and obvious that the Amended Statement of Claim does not disclose a reasonable cause of action in respect of inducement and should be struck pursuant to Rule 221(1)(a). Moreover, in the absence of an evidentiary foundation, the claim of inducement also constitutes an abuse of process and should be struck pursuant to Rule 221(1)(f).

[47] In order to strike out a pleading without leave to amend, the Court must be satisfied that any defect in the pleading is one that cannot be cured by amendment [see *Collins v Her Majesty the Queen*, 2011 FCA 140]. I asked the Plaintiff at the hearing of the motion whether the Plaintiff would be in a position to plead the required material facts of satisfy part (b) of the *Dow Chemical* test were I to strike the Statement of Claim and grant the Plaintiff leave to amend. The Plaintiff advised that it could not do so at this stage of the proceeding.

[48] Given the Plaintiff's admission that it is unable to provide any further material facts to remedy the defects in the Amended Statement of Claim, I am satisfied that there is no reason to grant the Plaintiff leave to further amend the Amended Statement of Claim.

[49] Therefore, the Amended Statement of Claim will be struck out and the action dismissed. However, I am doing so without prejudice to the right of the Plaintiff to file a new action should new, non-speculative circumstances arise.

[50] On the issue of costs, I see no reason to deviate from the normal practice of awarding costs of the motion to the successful party. Moreover, as this motion disposes of the underlying proceeding as well, the Defendants are also entitled to their costs of the action to date.

[51] In its written submissions, the Defendants sought costs in the amount of \$20,000.00 for the motion and the action. At the hearing of the motion, the Plaintiff agreed that a lump sum cost award in the amount of \$20,000.00 would be an appropriate award of costs to the Defendants if they were successful on the motion or to the Plaintiff if the motion was dismissed. In the circumstances, I find that the Defendants are entitled to their costs of the motion and underlying action fixed in the amount of \$20,000.00, inclusive of all fees, disbursements and taxes.

ORDER

THIS COURT ORDERS that:

1. The Amended Statement of Claim is hereby struck out.
2. This action is dismissed without prejudice to the Plaintiff to file a new action when new, non-speculative circumstances arise.
3. Costs of the motion and action, hereby fixed in the amount of \$20,000.00, inclusive of disbursements and taxes, shall be paid by the Plaintiff to the Defendants.

"Mandy Ayles"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2060-16

STYLE OF CAUSE: MOSTAR DIRECTIONAL TECHNOLOGIES INC. v
DRILL-TEK CORPORATION AND DRILL-TEK MWD
SERVICES LTD.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 2, 2017

ORDER AND REASONS: AYLEN P.

DATED: JUNE 12, 2017

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