

Federal Court



Cour fédérale

**Date: 20101006**

**Docket: T-1270-08**

**Citation: 2010 FC 997**

**Ottawa, Ontario, October 6, 2010**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**GARFORD PTY LTD.**

**Plaintiff**

**and**

**DYWIDAG SYSTEMS INTERNATIONAL,  
CANADA, LTD., MR. BOB BISHOP  
AND MR. KENNETH SOSTEK**

**Defendants**

**AND BETWEEN:**

**DYWIDAG SYSTEMS INTERNATIONAL, CANADA, LTD.**

**Plaintiff by Counterclaim**

**and**

**GARFORD PTY LTD.**

**Defendant by Counterclaim**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is a motion brought by Garford Pty Ltd. (Plaintiff) seeking leave to serve and file a Further Amended Statement of Claim.

[2] There is no dispute between the parties concerning the Court's ability to grant amendments at this time. The sole objection raised by Dywidag Systems International, Canada, Ltd. (Defendant) is that the amendments raise claims sounding in unjust enrichment as ancillary claims to statutory causes of action already pleaded by the Plaintiff and are beyond the jurisdiction of this Court to decide.

[3] The proposed amendments read as follows:

1.(k) a declaration that the Defendants have been, and continue to be, unjustly enriched at the expense of the Plaintiff by receipt of ill-gotten profits arising from their wrongful acts in acquiring Thiessen, Ground Control and SMP, entering into non-competition agreements with the owners of the acquired companies, thereby taking away from Garford the opportunity to license the '806 and '622 Patents in Canada and thereby also providing the Defendant, with an ill-gotten foothold in the market, from which it has also obtained ill-gotten profits;

(l) a declaration that the Defendants hold the ill-gotten profits in a constructive [*sic*] trust for the benefit of the Plaintiff;

...

61. The Defendants have been, and continued to be, unjustly enriched at the expense of the Plaintiff by receipt of ill-gotten profits arising from their wrongful acts in acquiring Thiessen, Ground Control and SMP, entering into non-competition agreements with the owners of the acquired companies, thereby taking away from Garford the opportunity to license the '806 and '622 Patents in Canada and thereby

also providing the Defendants with an ill-gotten foothold in the market, from which DSI also has obtained ill-gotten profits.

[4] I am generally in agreement with the Defendant's assessment of the legal principles involved in this motion and will use them to summarize the relevant jurisprudence and its applicability to the situation before me.

[5] The test for determining this Court's jurisdictional reach is not controversial. In *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 at paragraph 11, the Supreme Court of Canada set out the three conditions that must be met for this Court to have jurisdiction to determine a cause of action.

- a. There must be a statutory grant of jurisdiction by the federal Parliament;
- b. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
- c. The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[6] Common law causes of action that fail to satisfy this test are beyond this Court's jurisdiction. See *Robinson v. Canada*, [1996] F.C.J. No. 463 (T.D.) and *Pacific Western Airlines Ltd. v. Canada*, [1979] F.C.J. No. 135 (C.A.).

[7] In addition, the federal law relied upon must contemplate civil recourse to resolve the matter. The creation of a statutory offence will not, in itself, provide the jurisdiction for a civil action based on the alleged misconduct. Where Parliament has provided a specific civil cause of action in the event of a statutory breach, this is an exception to the general rule. See *Stoney Band v.*

*Canada (Minister of Indian Affairs and Northern Development)*, 2005 FCA 220, [2005] F.C.J. No. 1181.

[8] This Court does have some equitable jurisdiction by virtue of section 3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This statutory grant allows the Court to apply the rules of equity in cases in which it otherwise has jurisdiction (as for example, in admiralty matters), but it does not give the Court a general jurisdiction in a civil action to consider equitable claims and remedies where the action is based on a statutory cause of action. See *Bédard v. Kellogg*, 2007 FC 516, [2007] F.C.J. No. 714.

[9] Careful attention must therefore be paid to the specific law under which jurisdiction is claimed. Where the statute relied upon provides a particular civil cause of action that does not include a claim for unjust enrichment, a substantive claim in unjust enrichment lies outside the federal law relied upon and the Court lacks jurisdiction over it.

[10] The unjust enrichment and constructive trust claims included within the Proposed Amendments are made in the context of alleged breaches of the *Competition Act*, R.S.C. 1985, c. C-34. The Plaintiff's claim under the *Competition Act* is brought pursuant to section 36, which provides as follows:

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the

36. (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une

Tribunal or another court under this Act,	ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[11] Section 36 provides a civil remedy by which a person who has suffered loss as a result of certain offences under the *Competition Act* may be compensated, exclusively, for actual loss or damage. The Plaintiff's failure to show actual loss and damage is fatal to the claim. Section 36 does not provide a vehicle for the recovery of any enrichment of the wrongdoer, and it cannot provide the basis for an equitable or restitutionary remedy, i.e., a claim in unjust enrichment. The remedies available for a breach of the *Competition Act* are limited to the recovery of the Plaintiff's actual loss and damage. See *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 and 947101 *Ontario Ltd. (c.o.b. Throop Drug Mart) v. Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.).

[12] In *Bédard*, above, at paragraph 44-47, Justice Gauthier provided the following guidance regarding a pleading of unjust enrichment in the context of the *Competition Act*:

It is true that the Court is a court of equity (section 3 of the *Federal Courts Act*). Although this allows the Court to apply the rules of

equity in cases in which it otherwise has jurisdiction (as, for example, in admiralty matters), that does not give it a general jurisdiction in a civil action.

The chief argument put forward by the applicant was recently discussed in an appeal from an Ontario decision authorizing a class action (the Sure Step System) in *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421, in which the Court concluded that the law in Canada was not clear. It appeared from that case that the various theories to which the applicant referred were either separate causes of action or a particular type of remedy.

In both cases, it is quite clear that the Court does not have jurisdiction to consider them. If this is a separate cause of action from that set out in section 36, it is within provincial jurisdiction.

If instead it is a type of remedy, it goes beyond what is set out in section 36, which clearly provides that the amount awarded is as compensation, that is, it is determined in accordance with the loss or damage suffered. On the contrary, the remedy in the decisions cited by the applicant is decided on in accordance with the benefit received by the respondent... .

[13] Section 36 of the *Competition Act* provides a cause of action and a remedy which leaves no room for unjust enrichment and constructive trust claims. As they are applied to the Plaintiff's claims under section 36 of the *Competition Act*, therefore, the Proposed Amendments are beyond this Court's jurisdiction and must be refused.

## **JUDGMENT**

### **THIS COURT ORDERS AND ADJUDGES that**

1. The motion to amend is dismissed;
2. The parties may address the Court on the issue of costs. This should be done initially, at least, in writing.

“James Russell”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1270-08

**STYLE OF CAUSE:** GARFORD PTY LTD.

Plaintiff

- and -

DYWIDAG SYSTEMS INTERNATIONAL et al.  
Defendants

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 7-8, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** October 6, 2010

**APPEARANCES:**

P. Bradley Limpert  
Christina Cupone Settimi

PLAINTIFF

Heather E.A. Watts  
Robert J.C. Deane

DEFENDANTS

**SOLICITORS OF RECORD:**

Cameron MacKendrick LLP  
Intellectual Property Law  
Toronto, ON

PLAINTIFF

Deeth Williams Wall LLP  
Barristers & Solicitors  
Toronto, ON

DEFENDANTS