

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100917

Docket: A-220-10

Citation: 2010 FCA 232

Present: STRATAS J.A.

BETWEEN:

DYWIDAG SYSTEMS INTERNATIONAL, CANADA, LTD.

Appellant

and

GARFORD PTY LTD.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 17, 2010.

REASONS FOR ORDER BY:

STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] In this Court, the appellant, Dywidag Systems International, Canada, Ltd., appeals an interlocutory order made by Justice Zinn of the Federal Court: 2010 FC 581.

[2] Dywidag has brought a motion for a stay or suspension of Justice Zinn's order until this Court determines the appeal.

A. *Procedural history and submissions on the motion*

[3] Justice Zinn's order arises within an action brought by the respondent, Garford Pty Ltd., against Dywidag and others in the Federal Court. In this action, Garford seeks compensatory damages and an accounting of profits arising from patent infringement and breach of the *Competition Act*, R.S.C. 1985, c. C-34.

[4] In actions such as this, two broad issues need to be decided: whether the defendants are liable and, if so, what remedies should be granted.

[5] Dywidag, one of the defendants in the action, brought a motion seeking an order to have the liability issues determined first, and the remedial issues determined later, if it becomes necessary to do so.

[6] Prothonotary Milczynski granted that order. As a result of the order, the parties were excused from producing documents, conducting discoveries or proceeding to trial on the remedial issues. Production, discovery and trial were to proceed first on the liability issues.

[7] Garford appealed the order of Prothonotary Milczynski. Justice Zinn allowed the appeal and set aside the order of Prothonotary Milczynski. As a result, the liability and remedial issues are to be dealt with together, as is usually the case in actions, not separately.

[8] The practical effect of this, among other things, is that Dywidag will now have to produce documents and disclose information on all issues, including the remedial issues, to Garford. One might speculate that the documents and information are financial in nature, but there is no evidence to that effect.

[9] Dywidag appeals to this Court. In its notice of appeal, it alleges that Justice Zinn erred and asks this Court to restore the order of Prothonotary Milczynski. It seeks a stay or suspension of Justice Zinn's order until this Court determines the appeal. It submits that if Justice Zinn's order is carried out, confidential documents and information will be disclosed to Garford and, as a result, the appeal to this Court will be academic.

B. Analysis

[10] The parties are agreed that in order to succeed in its request for a suspension or stay of Justice Zinn's order, Dywidag must satisfy all three requirements set out in the Supreme Court's decision of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Dywidag must show that there is an arguable case or serious issue on the appeal, it will suffer irreparable harm if the order is not stayed, and the balance of convenience favours the granting of the relief sought.

[11] For the purposes of determining this motion, it is only necessary to address the second of these requirements, whether Dywidag will suffer irreparable harm. Dywidag has not met this requirement, and so its motion for a stay or suspension of Justice Zinn's order will be dismissed.

[12] In its submissions on the motion, Dywidag asserts that it will suffer irreparable harm for two reasons. First, the documents and information are confidential and once they are produced, the confidentiality is lost and cannot be retrieved. Second, if the documents are produced and the information is disclosed, the appeal in this Court of Justice Zinn's order will be moot or academic.

- I -

[13] In support of its motion, Dywidag offered an affidavit of roughly one page in length. The affidavit does nothing more than append, without comment, the notices of motion, orders and reasons for order in this matter. There is not a single word devoted to the subject of irreparable harm.

[14] To establish irreparable harm, the moving party should file evidence at a convincing level of particularity that demonstrates a strong likelihood that unavoidable irreparable harm will result unless a stay is granted. Assumptions and assertions, unsupported by evidence, carry no weight.

[15] In the words of Justice Desjardins in *Haché v. Canada*, 2006 FCA 424 at paragraph 11, irreparable harm "must be established by clear and compelling evidence" and "[m]ere assertions do

not suffice.” See also *Bathurst Machine Shop Ltd. v. Canada*, 2006 FCA 59, [2006] 2 C.T.C. 276 at paragraph 24 and *Laperrière v. D & A MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 18. Authorities such as these recognize that court orders are binding when they are made and they should not be suspended merely on the basis of assumption and assertion.

[16] There is no evidence in this motion as to the nature or quality of the documents and information that might be disclosed, why they might be confidential, and what harm would result if confidentiality is lost. There is no evidence that the documents and information in issue here are more sensitive than those that are regularly disclosed to opposing parties in an action such as this. There is no evidence showing why available mechanisms to protect confidentiality will not suffice, such as the implied undertaking of confidentiality (see *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157) and the availability of confidentiality orders in appropriate circumstances. In that regard, five months ago, Garford invited Dywidag to comment and agree on a draft confidentiality order, all-encompassing in scope. From Dywidag, there has been silence.

- II -

[17] As mentioned above, Dywidag also asserts that it will suffer irreparable harm for another reason: if this Court does not grant the stay, confidential documents and information will be produced and the appeal in this Court will be moot or academic, *i.e.* will have no practical consequences.

[18] I do not agree. If this Court allows the appeal from Justice Zinn's decision, Prothonotary Milczynski's order will be reinstated. Many practical consequences would follow from that. Any documents that are relevant to remedial issues and that were produced to the defendants as a result of Justice Zinn's order could be returned to Dywidag. Depending on the scheduling of the appeal to this Court, a decision of this Court could well be available before the examinations for discovery start. In this regard, I note that the order of Justice Zinn was made almost four months ago, on May 28, 2010, and Dywidag has not attempted to limit or prevent any damage arising from it by expediting this motion for a stay or by expediting the appeal to this Court.

[19] Under the scenario discussed in the preceding paragraph, it is true that Garford might learn some information from the documents that Dywidag temporarily provided to it. Dywidag emphasizes this point. It says that when information is provided and later events show that it should not have been provided, the information cannot be unlearned. As a result, Dywidag seems to say, there must automatically be a finding of irreparable harm. It cites three cases in support of its submission: *Pelletier v. Canada (Attorney General)*, 2004 FCA 277, 337 N.R. 319; *Canada (Minister of National Revenue) v. National Foundation for Christian Leadership*, 2005 FCA 20, 1 C.T.C. 349; *Eli Lilly and Co. v. Interpharm Inc.* (1993), 63 F.T.R. 169 (F.C.).

[20] These cases do not support Dywidag's submission. Instead, they show that much turns on the nature of the information provided and the nature of the harm caused by the fact that the recipient of the information cannot unlearn it – matters that are established by evidence. Here, no evidence has been supplied.

C. Disposition

[21] Accordingly, the motion for a stay is dismissed, with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-220-10

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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: September 17, 2010

WRITTEN REPRESENTATIONS BY:

Heather E.A. Watts
Jennifer L. Jannuska

FOR THE APPELLANT

P. Bradley Limpert
Christina Capone Settimi

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Deeth Williams Wall LLP
Toronto, Ontario

FOR THE APPELLANT

Cameron MacKendrick LLP
Toronto, Ontario

FOR THE RESPONDENT