

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110921**

**Docket: A-220-10**

**Citation: 2011 FCA 264**

**Present: MAINVILLE 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 21, 2011.

**REASONS FOR ORDER BY:**

**MAINVILLE J.A.**

Federal Court  
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**and**

**GARFORD PTY LTD.**

**Respondent**

**REASONS FOR ORDER**

**MAINVILLE J.A.**

[1] The appellant has submitted a motion seeking orders from this Court (a) allowing it to file an amended Notice of Appeal in this file A-210-10 (the "Bifurcation Appeal"); (b) ensuring that this appeal will be heard immediately after the hearing of the appeal in Court file A-421-10 (the "*Competition Act* Appeal"); (c) providing a schedule for the perfection of this appeal and of the *Competition Act* Appeal; (d) granting such further and other relief as the Court may permit; and (e) granting costs on the motion.

Procedural history

[2] The respondent in this appeal (“Garford”) had filed a Statement of Claim in the Federal Court seeking, *inter alia*, various remedies in relation to alleged patent infringements by the appellant (“Dywidag”) as well as damages and compensation pursuant to subsection 36(1) of the *Competition Act*, R.S.C. 1985, c. C-34. These claims are vigorously contested by Dywidag, which has also counterclaimed against Garford by notably seeking from the Federal Court various patent invalidity declarations.

[3] By motion dated July 24, 2009, Dywidag sought an order bifurcating the liability phase of the action from the damages or accounting for profits phase. A Prothonotary of the Federal Court granted this motion and ordered bifurcation. Garford appealed this order to a judge of the Federal Court, and on May 28, 2010 Justice Zinn allowed Garford’s appeal and set aside the bifurcation order for reasons cited as 2010 FC 581. Dywidag now appeals to this Court.

[4] In the context of this Bifurcation Appeal, Dywidag brought a motion to stay or to suspend the order of Justice Zinn until this Court determines the appeal. This motion was dismissed by Justice Stratas J.A. on September 17, 2010 in reasons cited as 2010 FCA 232. The combined effects of the orders of Justice Zinn and of Justice Stratas J.A. are that the action before the Federal Court is not bifurcated, the liability and remedial issues are to be dealt with together in the Federal Court, and production and disclosure of documents on all issues related to the action may proceed in that court pending the disposition of this Bifurcation Appeal.

[5] However, in reasons for judgment dated October 6, 2010 and cited as 2010 FC 996, Justice Russell of the Federal Court granted Dywidag's motion for a summary judgment dismissing that part of Garford's claims relating to damages and compensation pursuant to subsection 36(1) of the *Competition Act* on the basis that the relevant limitation periods had expired before the action was commenced. Garford has appealed this judgment to this Court in file A-421-10.

[6] It should be noted that on January 4, 2011 the Court was informed that, in order to facilitate mediation, the parties had entered into a "Litigation Standstill Agreement" concerning the Federal Court proceedings, the Bifurcation Appeal and the *Competition Act* Appeal. It seems that the parties now seek to proceed with both appeals.

[7] Though the proceedings in the Bifurcation Appeal are well advanced (the parties have already filed their respective memorandum of fact and law), the proceedings in the *Competition Act* Appeal are still at a preliminary stage since the Appeal Book has not been filed.

#### Submissions on the motion

[8] Dywidag asserts that the Bifurcation Appeal is inextricably linked to the *Competition Act* Appeal in light of the following comments of Justice Zinn at paragraph 21 of his reasons:

In my view, only if there was no claim under the *Competition Act* would the Prothonotary's order have been proper. Accordingly, I am of the view that this appeal must succeed at this time, as the claims under the *Competition Act* are part of the plaintiff's action and it cannot establish liability without that information.

Consequently, the judgment of Justice Russell dismissing the *Competition Act* claims and the eventual judgment of this Court upholding or dismissing the appeal of that judgment in the

*Competition Act* Appeal are pertinent factors to be taken into account in an eventual decision of this Court concerning the Bifurcation Appeal.

[9] For its part, Garford argues that there are many issues at stake in the Bifurcation Appeal other than the *Competition Act* claims. Garford further argues that the proposed amendment to the Notice of Appeal would be prejudicial since it would not have an opportunity to prepare and submit an amended argument concerning the issues raised by this amendment.

[10] Garford also opposes any order providing that both appeals be heard one after the other since this could delay the hearing of the Bifurcation Appeal. Garford asserts that it “is possible that the case manager [in the Federal Court] will not order discoveries to be heard until the Bifurcation Appeal has been disposed of [...] If hearing the matters together would delay hearing the Bifurcation Appeal, then the Appeals should not be heard together” (par. 23 of Garford’s written representations).

### Analysis

[11] The Court may, on motion, allow a party to amend its Notice of Appeal on such terms and conditions as will protect the rights of all parties. In general, the Court will allow such an amendment if it serves the interest of justice and does not result in an injustice which is not compensable in costs.

[12] The judgement of Russell J. dismissing the *Competition Act* claims before the Federal Court, as well as the eventual decision of this Court in the *Competition Act* Appeal, may affect the determination of the Bifurcation Appeal. Though there may be other reasons to grant or to dismiss the Bifurcation Appeal which could be eventually considered by this Court, the *Competition Act* claims were certainly a factor in Justice Zinn's reasons for refusing bifurcation. The amendment to the Notice of Appeal shall thus be granted. An order will be issued concurrently with these reasons allowing Dywidag to file within ten days an amended Notice of Appeal in the Bifurcation Appeal and an amended memorandum of fact and law. Garford shall have a further ten days to submit an amended memorandum of fact and law addressing the issues raised by the amendment.

[13] Rule 105 of the *Federal Courts Rules* allow the Court to order, in respect of two or more proceedings, that they be (i) consolidated, (ii) heard together, or (iii) heard one immediately after the other. The criteria taken into account to consolidate proceedings are not the same as those taken into account to hear proceedings together or one immediately after another. Though the Bifurcation Appeal and the *Competition Act* Appeal should not be consolidated, it is logical and efficient that they be heard by the same panel of this Court and one after the other in light of the possible impact which the eventual decision of this Court in the *Competition Act* Appeal may have on the Bifurcation Appeal.

[14] I do not accept Garford's claim that the possible additional delays entailed by hearing the appeals one after the other would be prejudicial in that it may further impede the progress of discoveries in the Federal Court. Justice Stratas J.A. refused to stay the order of Justice Zinn

refusing bifurcation, the practical effect of which was to allow the production of documents and the disclosure of information to proceed on all issues in the Federal Court. Following the judgment of Justice Russell dismissing the *Competition Act* claims, there may be practical case management difficulties for producing documents and disclosing information related to these claims, but these difficulties are to be addressed through the case management process in the Federal Court.

[15] I further note that the *Competition Act* Appeal is still at a preliminary stage though it was first initiated by Garford on November 5, 2010, more than ten months ago. Though Garford's inaction in perfecting this appeal may be in part attributable to the "Litigation Standstill Agreement" entered into by the parties, it is now clear that this appeal should be perfected by Garford without further delay. Thus, for the purpose of addressing some of Garford's concerns resulting from Dywidag's motion, and for the purpose of facilitating an expeditious hearing of both appeals, an expedited scheduling order shall be issued in the *Competition Act* Appeal ensuring that the appeal shall be perfected within the next 75 days.

[16] The judgment of Russell J. was issued after the Bifurcation Appeal was initiated. Consequently the amendment to the Notice of Appeal and the requirement that the Bifurcation Appeal be heard immediately after the *Competition Act* Appeal are not the result of any error, mistake or inadvertence of either Dywidag or Garford. Consequently, I see no reasons to order costs on this motion to either party.

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"Robert M. Mainville"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-220-10

**STYLE OF CAUSE:** Dywidag Systems International,  
Canada, Ltd. v. Garford Pty Ltd.

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** Mainville J.A.

**DATED:** September 21, 2011

**WRITTEN REPRESENTATIONS BY:**

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