

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120213

Docket: A-220-10

Citation: 2012 FCA 50

**CORAM: LAYDEN-STEVENSON J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

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

Appellants

and

GARFORD PTY LTD.

Respondent

Heard at Toronto, Ontario, on February 13, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on February 13, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 13, 2012)

LAYDEN-STEVENSON J.A.

[1] Dywidag Systems International, Canada Ltd. (DSI), Mr. Bob Bishop and Mr. Kenneth R. Sostek (collectively the appellants) appeal from the order of Justice Zinn of the Federal Court (the judge), dated May 28, 2010, setting aside a bifurcation order of Prothonotary Milczynski (the prothonotary) dated February 5, 2010. In accordance with the order of Mainville J.A., dated September 21, 2011, this appeal was heard immediately following the appeal of Garford Pty Ltd.

(Garford) in Court File Number A-421-10 (the Garford appeal). This Court dismissed the Garford appeal by judgment of today's date.

[2] The factual background is briefly described in the Garford appeal and need not be repeated. Suffice it to say that the prothonotary (in case management) granted DSI's request for a bifurcation order. The prothonotary addressed the applicable principles, the relevant factors and specifically noted any prejudice suffered by Garford would be outweighed by efficiency gains. She found that in this case, "bifurcation is not only appropriate, but it is necessary."

[3] The judge set aside the prothonotary's order. His reasons, reported as 2010 FC 581, show that he did so on only one basis. At paragraph 16 of his reasons, the judge held that the prothonotary had failed to explicitly consider whether the financial information usually associated with the damages phase would also be essential to establishing Garford's claim for damages under the *Competition Act*, R.S.C., 1985, c. C-34 (the Competition Act).

[4] The judge accepted Garford's submission that the financial information necessary to establish its alleged breaches of the Competition Act was relevant and critical (judge's reasons at para. 21). Consequently, he found, "the whole rationale for bifurcation is undercut" and the order would not result in the just determination of the proceeding notwithstanding that it may result in a more expeditious and cost-effective proceeding (judge's reasons at paras. 19 and 21). The judge held that the bifurcation order would be proper only if there was no claim under the Competition

Act (judge's reasons at para. 21). He rejected all other arguments by Garford regarding the propriety of the prothonotary's order.

[5] Subsequent to the judge's order, DSI's motion for summary judgment with respect to Garford's Competition Act claims was granted (2010 FC 996). Garford's appeal from the Federal Court judgment allowing DSI's motion for summary judgment was dismissed by the judgment of this Court referred to earlier. As a result, the basis upon which the prothonotary's order was set aside no longer exists. The judge's reasons leave no doubt that, but for the existence of the Competition Act claims, he would not have set aside the bifurcation order.

[6] Garford nevertheless argues that the judge erred in concluding that the bifurcation order ought not be set aside due to overlap with respect to the substantive issues such as commercial success and the election of remedy. The judge considered these arguments and rejected them. We are not persuaded that there was any reviewable error here. It is not this Court's function to examine the matter *de novo*.

[7] Last, during argument, we were invited to interpret and clarify paragraph 14 of the judge's reasons and the extent to which financial information would be disclosable during the liability phase of the proceedings. We decline to do so except to say that neither the prothonotary nor the judge ruled out the disclosure of any financial information during the liability phase of the proceedings. As a result of our disposition of this appeal, it will be for the prothonotary to rule on any future disclosure issues that arise under her order.

[8] In light of current circumstances, it cannot be said that the prothonotary's order was wrong.

[9] For these reasons, the appeal will be allowed, with costs. The judge's order will be set aside and the prothonotary's order will be restored. In the circumstances, the costs award from the Federal Court proceedings will not be disturbed.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-220-10

(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE ZINN OF THE FEDERAL COURT DATED MAY 28, 2010, DOCKET NO. T-1270-08)

STYLE OF CAUSE: DYWIDAG SYSTEMS INTERNATIONAL,
CANADA, LTD., MR. BOB BISHOP AND MR.
KENNETH SOSTEK v. GARFORD PTY LTD.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 13, 2012

REASONS FOR JUDGMENT OF THE COURT BY: (LAYDEN-STEVENSON, GAUTHIER &
STRATAS JJ.A.)

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

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