Federal Court of Appeal  Cour d'appel fédérale

Date: 20181022

Docket: A-43-18

Citation: 2018 FCA 192

Toronto, Ontario, October 22, 2018

CORAM: **STRATAS J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

ARKIPELAGO ARCHITECTURE INC.

Appellant

and

ENGHOUSE SYSTEMS LIMITED, ENGHOUSE NETWORKS LIMITED, STEPHEN J. SADLER AND DOUGLAS BRYSON

Respondents

Heard at Toronto, Ontario, on October 22, 2018.
Judgment delivered from the Bench at Toronto, Ontario, on October 22, 2018.

REASONS FOR JUDGMENT OF THE COURT BY: RENNIE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 22, 2018).

RENNIE J.A.

[1] The appellant, Arkipelago Architecture Inc. (Arkipelago), appeals from an order of the Federal Court (2018 FC 37 *per* Roussel J.) dismissing Arkipelago's appeal from a "counsel's and expert's eyes only" protective order (the CEEO Order) granted by Prothonotary Aylen acting as the Case Management Judge. Under the CEEO Order, Arkipelago's president and sole employee,

Mr. O' Hara would not have access to any information designated by the respondents as "counsel's and expert's eyes only – highly confidential information".

[2] We would dismiss the appeal.

[3] The respondents' request for the CEEO Order came in response to a motion by Arkipelago requesting access to certain confidential information, including computer source code, client information and agreements, and financial information.

[4] The Case Management Judge concluded that the information at issue was highly sensitive in nature and warranted protection by way of a CEEO order. She was satisfied that the prospect of Mr. O'Hara subconsciously or inadvertently using the confidential information obtained in the proceeding in future business activities represented a real and substantial risk that was grounded in the evidence.

[5] The Case Management Judge was also unpersuaded by Arkipelago's "bald assertions" that Mr. O'Hara's access to the information was necessary to allow him to effectively instruct counsel, concluding that any disadvantage caused by Arkipelago's lack of in-house counsel was mitigated by Mr. O'Hara's ability to retain experts who would themselves have access to the confidential information. It also remained open to Mr. O'Hara to share information with experts which could assist them in their analysis.

[6] On appeal to the Federal Court, Justice Roussel found that the Case Management Judge had articulated the correct legal principles governing the issuance of CEEO orders and applied them properly. The judge was satisfied that the order and reasons reflected a proper balancing of Arkipelago's ability to conduct its case and the need to protect the respondents' highly confidential information. She saw no palpable and overriding error warranting intervention.

[7] The appellant raised two arguments before us. It contended that he Federal Court adopted the incorrect standard for granting a CEEO order; and, second that it erred in its treatment of the evidence when concluding that the CEEO Order should stand.

[8] The question whether the Federal Court Judge articulated the correct standard in granting a CEEO Order is an extricable question of law reviewable for correctness. The second question whether the evidence satisfies that standard is clearly a question of mixed fact and law reviewable for palpable and overriding error.

[9] Turning to the first question, Arkipelago argues that the Federal Court, in accepting that subconscious or inadvertent misuse is sufficient to justify a CEEO order, adopted a lower standard of risk than is required or alone is insufficient to justify such an order. Rather, the evidence must establish the existence of "unusual circumstances" that would warrant the extraordinary order of disclosure on a "counsel's eyes only" basis: *Bard Peripheral Vascular Inc. v. WL Gore & Associates, Inc.*, 2017 FC 585 at para. 15 [*Bard*].

[10] The respondents, for their part, argue that mere risk can be sufficient provided the evidence establishes that the risk is real and substantial and does not simply amount to generalized concern: *Rivard Instruments Inc. v. Ideal Instruments Inc.*, 2006 FC 1338 at paras. 1-2 [*Rivard*]; *Lundbeck Canada Inc. v. Canada*, 2007 FC 412 at para. 19 [*Lundbeck*].

[11] The case law is clear that such orders should only be granted in unusual circumstances: *Bard* at para 15; *Lundbeck* at para 14; *Rivard* at para 37; *Angelcare Development Inc. v. Munchkin, Inc.*, 2018 FC 447 at 21-22. However, there is no comprehensive definition of what constitutes "unusual circumstances" and each case must be decided on its own merits. In the context of harm to a commercial business interest, a CEEO order is warranted where the disclosure of the confidential information at issue presents a "serious threat" that is "real, substantial, and grounded in the evidence": *Bard* at para. 16; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [2002] S.C.R. 522 at para. 54 [*Sierra Club*]).

[12] Based on the foregoing authorities, we are not persuaded that the decision of the Federal Court Judge can be construed as a departure from earlier case law and as setting a different standard of proof. On the contrary, both the Federal Court and the Case Management Judge independently articulated the correct legal standard applicable to the issuance of a CEEO order.

[13] Furthermore, we also agree with the respondents that the appellant's reliance on *Pharmascience* is misplaced. The appellant submits that this decision stands for the proposition that a "risk of or potential for misuse" is not sufficient. However, the decision stated that a CEEO order should not be granted "simply on the basis of a concern for the risk of or potential

for misuse" (*Pharmascience* at para. 1). When read in its proper context, this decision accords with the respondents' position, and with the above authorities, that mere concern is not enough – the risk must be real and substantial and grounded in the evidence.

[14] We now turn to whether the Court erred in its treatment of the evidence in finding that this standard had been made out. As noted above, this is a question of mixed fact and law reviewable for palpable and overriding error.

[15] The appellant argues that the risk presented by the subconscious or inadvertent misuse of the confidential information is insufficient to warrant a CEEO order. In the appellant's view, such a risk is inherent to virtually all intellectual property litigation and, if deemed sufficient, would open the door to granting CEEO orders in all such cases. The appellant further argues that the Federal Court ignored its evidence on the need for access to the confidential information to allow Mr. O'Hara to make informed decisions and to properly instruct counsel. On this point, the appellant stresses overarching concern for the importance of the solicitor-client relationship and the inherent rights of a party to participate in the litigation process.

[16] We see no palpable and overriding error that would warrant this Court's intervention. The judge's observation that the appellant's failure to particularize why the respondents' confidential information is necessary to instruct counsel supports the conclusion that its assertions are, at this stage, bald and speculative. Similarly, the judge's conclusion that the risk posed by access to the information is real and substantial was both reasonable and open to the judge and the evidence before her. The judge noted that Mr. O'Hara was the sole employee of the appellant and the

driving mind behind its product development and business decisions. The judge had a well-founded concern that it would be difficult, if not altogether artificial, to expect Mr. O'Hara to completely divorce his mind from that information. Given the small and highly competitive market in which the parties both operate, this would have obvious and significant consequences for the respondents.

[17] Finally, there is no merit to the appellant's argument that the orders interferes with the solicitor-client relationship. Taken to its logical conclusion, the appellant's position would mean no CEEO orders would ever be granted. In any event, we are satisfied that any concern for counsel's ability to adequately deal with the confidential information is mitigated by the challenge mechanism included in the CEEO Order in circumstances where counsel believes it necessary to disclose a particular document or information to Mr. O'Hara.

[18] Before concluding, the appellant has raised a new argument before us to the effect that the Federal Court erred by failing to consider that, if successful in the underlying action for copyright infringement, then the respondents will have no legitimate interest in the confidential information at issue as it would no longer compete in the industry. The appellant argues that granting the CEEO Order presupposes that the respondents' computer program is non-infringing, a matter which has yet to be determined. The respondents submit that there is no reason why this Court should accept this presumption, and the appellant advances none.

[19] We agree with the respondents. Indeed, we note that the appellant's argument operates with equal force in the opposite direction – that is, to accept their submission would require this Court to presuppose that the respondents' program *is* infringing.

[20] We would therefore dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-43-18
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE ROUSSEL OF THE FEDERAL COURT DATED JANUARY 15, 2018 IN FILE NO. T-645-16.	
STYLE OF CAUSE:	ARKIPELAGO ARCHITECTURE INC. v. ENGHOUSE SYSTEMS LIMITED, ENGHOUSE NETWORKS LIMITED, STEPHEN J. SADLER AND DOUGLAS BRYSON
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	OCTOBER 22, 2018
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. RENNIE J.A. WOODS J.A.
DELIVERED FROM THE BENCH BY:	RENNIE J.A.

APPEARANCES:

John C. Cotter	FOR THE APPELLANT
John Simpson Shan Arora	FOR THE RESPONDENT

SOLICITORS OF RECORD:

OSLER, HOSKIN & HARCOURT LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPELLANT
SHIFT LAW Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT