Federal Court of Appeal | Cour d'appel fédérale

**Date: 20100720**

**Docket: A-220-10**

**Citation: 2010 FCA 194**

**Present:** **SHARLOW J.A.**
**LAYDEN-STEVENSON J.A.**
**TRUDEL J.A.**

**BETWEEN:**

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

**Appellant**

**and**

**GARFORD PTY LTD.**

**Respondent**

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on , July 20, 2010.

REASONS FOR JUDGMENT BY: **LAYDEN-STEVENSON J.A.**

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**REASONS FOR JUDGMENT**

**LAYDEN-STEVENSON J.A.**

[1] The appellant, Dywidag Systems International, Canada Ltd. (DSI) seeks an order quashing a notice of cross-appeal filed by the respondent Garford Pty Ltd. (Garford) in A-220-10.

[2] This appeal arises in relation to an interlocutory order in an action in which Garford, as plaintiff, is suing DSI, defendant, for patent infringement and breach of the *Competition Act*, R.S.C., 1985, c. C-34. DSI sought an order bifurcating the liability phase of the action from the damages or accounting for profits phase. The case management Prothonotary granted the bifurcation order. A Federal Court judge allowed Garford's appeal and ordered as follows:

> 1. This appeal is allowed and the order of the Prothonotary dated February 5, 2010 is set aside; and
>
> 4. The plaintiff is entitled to its costs of this appeal fixed at $5,000, inclusive of fees, disbursements and taxes, and is also awarded its costs of the motion before the Prothonotary, in an amount to be agreed upon by the parties, or failing such agreement within 10 days, to be fixed by the Prothonotary.

[3] DSI filed a notice of appeal from the Federal Court order. Garford filed a notice of cross-appeal, the grounds for which provide:

- The Learned Prothonotary ordered the proceeding be bifurcated.
- Justice Zinn (the "Trial Judge") set aside the Order of the Learned Prothonotary.
- The Plaintiff Garford agrees with the disposition of the matter by the Trial Judge.
- However, Garford asks that the Reasons for the Order be varied.
- The Plaintiff further traverses or contests all allegations and grounds made in the Defendant's Notice of Appeal.

[4] DSI, on its motion to quash the notice of cross-appeal relies on Rule 341(1) of the *Federal Courts Rules*, SOR/98-106. It states:

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| **341.** (1) A respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file | **341.** (1) L'intimé qui entend participer à l'appel signifie et dépose, dans les 10 jours suivant la signification de l'avis d'appel : |

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| (*a*) a notice of appearance in Form 341A; or<br>(*b*) where the respondent seeks a different disposition of the order appealed from, a notice of cross-appeal in Form 341B. | *a*) soit un avis de comparution établi selon la formule 341A ;<br>*b*) soit, s'il entend demander la réformation de l'ordonnance portée en appel, un avis d'appel incident établi selon la formule 341B. |

[5] It is evident that, on its face, the notice of cross appeal does not seek a different disposition of the order under appeal. Garford submits that its cross-appeal relates to an issue that was determined separately from the issues on the appeal, namely the relevance of evidence of commercial success and the procedure to be followed in electing damages or profits. Its quarrel is with the Federal Court judge's statements at paragraph 14 of the reasons for order, specifically:

> The plaintiff's submission that the financial information is required with respect to the defence of obviousness is unconvincing. "Commercial success" is no longer a central component of the test for obviousness: *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, [2008] SCC 61 (CanLII), 2008 SCC 61, therefore, the financial information which is clearly relevant to the remedy phase is not relevant to the assessment of the obviousness invalidity attack. It is true that complete financial information may be necessary for the plaintiff, if successful in proving liability, to properly elect between damages or an accounting of profits as a remedy; however, there is no reason that this election cannot come after the liability phase is completed…

[6] Garford submits that because it takes issue with both of these determinations, it should be permitted to cross-appeal with respect to them. It points to Rule 61.07 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 where a cross-appeal is required in circumstances where a respondent seeks to set aside or vary the order appealed from, or will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from. According to Garford, the *Federal Courts Rules* are unintentionally silent as to whether a notice of cross-appeal is required in a case where the appeal is allowed in whole or in part. Therefore, in accordance with

Rule 4 of the *Federal Courts Rules* (reproduced below), Rule 341(1) should be read in the same manner as the analogous Ontario rule.

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| **4.** On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates. | **4.** En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce. |

[7] First, I am not persuaded that the Ontario rule is substantively different than Rule 341(1). Even if it is, as Garford suggests, the application of Rule 4 depends upon there being a "gap" in the *Federal Courts Rules*. Where they provide for a particular matter, but in a different fashion than the provincial procedural rules, there is no gap: *Condux International Inc. v. Smith*, [1989] F.C.J. No. 1056 (F.C.A.); *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1995] 1 F.C. 588 (F.C.A.).

[8] Second, it is evident, on its face, that the cross-appeal does not seek a different disposition of the order under appeal. Rather, it is an attempt to challenge part of the reasons for the Federal Court judge's decision, not the decision itself. A cross-appeal is neither necessary nor appropriate in such circumstances: *Froom v. Canada (Minister of Justice*), [2005] 2 F.C.R. 195 (F.C.A.). It is open to Garford to make its submissions, without a notice of cross-appeal, as an alternative basis upon which the Federal Court judge could have dismissed DSI's appeal of the prothonotary's order: *MTS*

*Allstream Inc. v. Toronto* (*City*), 2006 FCA 89, 348 N.R.143. See also: *Air Canada v. Canada* (*Commissioner of Competition*), [2002] 4 F.C. 598 (F.C.A.).

[9] The motion to quash the notice of cross-appeal will be granted, with costs.

"Carolyn Layden-Stevenson"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Johanne Trudel J.A."