Federal Court of Appeal | Cour d'appel fédérale

Date: 20120213

Docket: A-421-10

Citation: 2012 FCA 48

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

BETWEEN:

GARFORD PTY LTD.

Appellant

and

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

Respondents

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] Garford Pty Ltd. (Garford) is an Australian company. It commenced an action against Dywidag Systems International (DSI), Mr. Bob Bishop and Mr. Kenneth R. Sostek (collectively the defendants) claiming profits or damages arising from the defendants' alleged infringement of certain of Garford's Canadian patents as well as loss or damages arising from alleged breaches of

the *Competition Act*, R.S.C., 1985, c. C-34 (the Act). DSI moved for summary judgment with respect to Garford's claims under the Act.

[2] Justice Russell of the Federal Court (the judge) granted summary judgment and dismissed Garford's claim under the Act on the basis that it was out of time. The judge's reasons are reported at 2010 FC 996. Garford appeals from that judgment.

[3] We are of the view that the appeal must be dismissed. For ease of reference, the relevant provisions of the Act are attached to these reasons as Schedule "A".

[4] Briefly, Garford owns Canadian patents related to rock anchors and rock bolts (referred to as cablebolts) used primarily in underground mines. Garford granted a license to a Canadian company, Camada Technology International Pty. Ltd. (Camada), to manufacture, use and sell Garford's cablebolts throughout Canada. The Garford cablebolts were commercialized through a joint venture between Camada and Thiessen Equipment Ltd.

[5] DSI, also a Canadian company, manufactures and distributes cablebolts. Through three transactions, which I will refer to as the purchase agreements, DSI acquired the assets of a number of entities in the cablebolt market:

- Thiessen Equipment Ltd. in November, 2003;
- Stewart Mining Products Ltd. in February, 2005; and
- Ground Control Sudbury Ltd. in March, 2006.

[6] Garford alleged DSI was in breach of subsection 45(1) of the Act and claimed "loss and damages" under subsection 36(1) of the Act. Section 36 provides a private right of action where anticompetitive conduct has caused any person to suffer a loss. Its scope is limited to conduct that is contrary to Part VI of the Act and breaches of Court or Competition Tribunal orders. Part VI of the Act includes subsection 45(1), upon which Garford relies, and relates to conspiracies, agreements and arrangements that unduly lesson competition. Subsection 36(4) of the Act prescribes a two-prong limitation period. It is common ground that the applicable limitation period in this matter is found in subparagraph 36(4)(*a*)(i), which requires a claim to be brought within two years of the relevant conduct.

[7] The judge summarized the principles in relation to summary judgment and noted that it should be granted "only in the clearest cases where the Court is entirely satisfied that a trial is unnecessary" (judge's reasons at para.10). After reviewing the pleadings and Garford's particulars, he concluded that the "negotiations and discussions leading up to and including the three purchase agreements and related transactional documents recorded in those agreements" constituted the conduct for purposes of the relevant limitation period (judge's reasons at para.14). Having regard to the dates of the purchase agreements (as noted earlier), he specified the dates upon which the limitation periods expired as follows:

- Thiessen Acquisition – November, 2005;
- Stewart Acquisition – February, 2007; and
- Ground Control Acquisition – March, 2008.

[8] The judge observed that, even if the agreement or arrangement were the sum total of the three separate agreements, the limitation period expired in March, 2008, at the latest. Since the action was not commenced until August 15, 2008, it is "time-barred and so discloses no reasonable cause of action" (judge's reasons at para.12).

[9] We can detect no error in the judge's enunciation or application of the law or any palpable and overriding error with respect to his factual findings. We are in substantial agreement with his reasoning with respect to the limitation period.

[10] The crux of Garford's argument is that the judge erred in failing to find that the "discoverability principle" applied to extend the limitation period. In our view, the issue of discoverability does not arise on the facts of this case.

[11] First, in response to Garford's contention that it was not in a position to commence its subsection 36(1) claim until it had access to the documentation or contents of the purchase agreements to determine what kind of problem and damages it was facing, the judge correctly observed that Garford commenced its action before it had access to the documents and before it began the discovery process.

[12] Second, Garford was aware generally that losing access to its distributors would cause damage (appeal book, vol. 4, p. 1295 – cross examination of Neville Hedrick). An agreement and the potential for harm are the required elements under section 45 of the Act.

[13] Third, on April 10, 2006, Garford's solicitors sent a cease and desist letter to the directors of DSI. The letter explains Garford's knowledge of DSI's activities and threatens legal action against DSI and each of its directors personally for patent and trademark infringement "and breach of the *Competition Act*."

[14] Fourth, and most importantly, between April 10, 2006 and the date upon which the action was commenced, there were no new facts relevant to the alleged breach of the Act. The information available to Garford on April 10, 2006 was essentially the same information it had when it commenced the action. DSI's response of April 19, 2006 to the cease and desist letter simply crystallized the need for an action and made clear that it would be opposed.

[15] Fifth, the judge made a factual determination at paragraph 37 of his reasons that "clearly, by April 10, 2006, [Garford] was fully aware of…what it saw as a breach of the [Act] by the defendants." In our view, he made no palpable and overriding error in so finding.

[16] For these reasons, the judge's findings of fact, which on the applicable standard of review cannot be set aside in this case, preclude any argument based on discoverability, assuming without deciding, it is legally available.

[17] Last, Garford argues that the judge erred in finding that any ongoing effects of the conspiracy do not extend the time period established by subsection 36(4) of the Act. The judge thoroughly canvassed this issue at paragraphs 39-46 of his reasons. We are in substantial agreement with his analysis in this respect.

[18] *Eli Lilly & Co. v. Apotex*, 2005 FCA 361 (*Eli Lilly*) does not assist Garford because the evidentiary issues at play in *Eli Lilly* are not present in this case. Here, it is common ground that the basis of Garford's claim under the Act is the purchase agreements. Similarly, *351694 Ontario Ltd. v. Paccar of Canada Ltd.*, 2004 FC 1764 (*Paccar*) is of no benefit to Garford. Significantly, *Paccar* was not a section 45 case. Rather, it involved vertical restraints between a manufacturer/distributor and a retail dealer. The action was founded on resale price maintenance, refusal to supply and price discrimination. I note peripherally that these offences are no longer contained in the Act and thus cannot found a section 36 action. In *Paccar*, the court found ongoing conduct for the purpose of the limitation period on the basis that the prohibited conduct was discriminatory sales.

[19] In this case, as the judge explained, the alleged offence under section 45 was complete at the time of the conclusion of the purchase agreements. Ongoing effects do not extend the time period established in subsection 36(4). Garford's position is tantamount to saying that the conduct prohibited by section 45 is only an agreement which, in fact, injured the market. That is not the law. At the relevant time (section 45 has since been amended), the offence was complete upon the finalization of an agreement that, if carried into effect, would unduly limit competition.

[20] For these reasons, the appeal will be dismissed with costs.

"Carolyn Layden-Stevenson"

J.A.

SCHEDULE A

Competition Act, R.S.C., 1985, c. C-34	*Loi sur la concurrence*, LRC 1985, c C-34
36. (1) Any person who has suffered loss or damage as a result of	**36.** (1) Toute personne qui a subi une perte ou des dommages par suite :
(*a*) conduct that is contrary to any provision of Part VI, or	*a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,	*b*) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.
[…]	[…]
(4) No action may be brought under subsection (1),	(4) Les actions visées au paragraphe (1) se prescrivent :
(*a*) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from	(*a*) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :
(i) a day on which the conduct was engaged in, or	(i) soit la date du comportement en question,
(ii) the day on which any criminal proceedings relating thereto were finally disposed of,	(ii) soit la date où il est statué de façon définitive sur la poursuite;
Prior to March 12, 2010:	**Avant le 12 mars 2010:**
45. (1) Every one who conspires, combines, agrees or arranges with	**45.** (1) Commet un acte criminel et

another person

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(*d*) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-421-10
(APPEAL FROM A JUDGMENT OF THE HONOURABEL MR. JUSTICE RUSSELL, DATED OCTOBER 6, 2010, IN FEDERAL COURT DOCKET NO. T-1270-08)	
STYLE OF CAUSE:	GARFORD PTY LTD. v. DYWIDAG SYSTEMS INTERNATIONAL, CANADA, LTD., MR. BOB BISHOP AND MR. KENNETH R. SOSTEK
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DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

APPEARANCES:

Bradley Limpert Mala Joshi	FOR THE APPELLANT
Robert Deane Kirsten Crain	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Ridout & Maybee LLP Toronto, Ontario	FOR THE APPELLANT
Borden Ladner Gervais LLP Ottawa, Ontario	FOR THE RESPONDENTS