Case Name:

Siemens Canada Ltd. (c.o.b. Siemens IT Solutions and Services) v. Sapient Canada Inc.

RE: Siemens Canada Limited, carrying on business as Siemens IT Solutions and Services, and Sapient Canada Inc.

[2009] O.J. No. 3739

Court File No. cv-09-382780

Ontario Superior Court of Justice

M.A. Code J.

Heard: July 24, 2009.
Judgment: July 24, 2009.

(16 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Balance of convenience -- Sufficiency of damages in lieu of injunction -- Motion by Siemens for an interlocutory injunction pending trial in an action for breach of contract dismissed -- Siemens was a subcontractor for Sapient for the installation of a computerized management system -- Sapient locked Siemens out of the project facility -- There was little or no evidence of irreparable harm and the risk of harm to Siemens was compensable in damages -- Furthermore, the risk of harm to Sapient caused by the disruption of reintroducing Siemens to the project at such a late date was greater than any risk of harm to Siemens.

Contracts -- Remedies -- Equitable remedies -- Injunction -- Motion by Siemens for an interlocutory injunction pending trial in an action for breach of contract dismissed -- Siemens was a subcontractor for Sapient for the installation of a computerized management system -- Sapient locked Siemens out of the project facility -- There was little or no evidence of irreparable harm and the risk of harm to Siemens was compensable in damages -- Furthermore, the risk of harm to Sapient caused by the disruption of reintroducing Siemens to the project at such a late date was greater than any risk of harm to Siemens.

Counsel:

Frederick .W. Chenoweth and *Rorbert.A. **Betts,*** for the Plaintiffs.

Mark. A. Gelowitz and *Alex. Cobb,* for the Defendants.

ENDORSEMENT

1 **M.A. CODE J.**:-- This is a Motion seeking an interlocutory injunction pending trial in an action for breach of contract. The alleged breach of contract occurred on June 29, 2009 when Sapient formally terminated its contract with Siemens, allegedly for cause. Siemens was a subcontractor for Sapient under a very large contract that Sapient has with Enbridge for the installation of a computerized management system known as SAP. Enbridge is not a party to these proceedings.

2 Sapient locked Siemens out of the project facility at Enbridge's premises and terminated Siemens access to the computer system. It has now been almost 4 weeks since these events.

3 Siemens issued a Notice of Action on July 10, 2009 and issued the present Notice of Motion that same day, seeking an interlocutory injunction. An extensive record of affidavits, documents and cross-examinations has been filed. The Motion was argued this morning and the parties have asked that judgment issue today. If there are any delays the injunction request will become academic.

4 In these circumstances, I can only prepare these brief reasons which will not do justice to the excellent arguments and materials filed by counsel.

5 The preliminary issue is whether the injunction sought is mandatory or prohibitive. The relief sought is framed in prohibitive terms, in part, seeking to restrain Sapient's "purported termination of the contract." However, some of the other relief sought is clearly framed in mandatory terms, "requiring the defendant to deliver" certain documents and "requiring the defendant to allow the plaintiff access to the project site at the premises of Enbridge" and "to deliver to the plaintiff all systems access codes". Siemens relies on *TDL Group Ltd.*, [2001] O.J. No. 3614 (Div. Ct.), holding that "An order preventing the denial of a right previously agreed to is very different from an order establishing a new right never agreed to and requiring a party to act accordingly. In our view, this order was not a mandatory injunction. Its essence is the prohibition of what is alleged to be a breach of contract."

6 In that case, a franchisor was attempting to evict a "Tim Horton's" franchisee due to alleged breaches of contract. The injunction restrained the franchisor from evicting the franchisee or from interfering with its business. In other words, the threatened breaches of contract being enjoined were in the future. There are a number of subsequent cases, applying the principle in *TDL*, that are equally relied on by Siemens.

7 Sapient, on the other hand, relies on cases like *Barton-Reid Canada Ltd.*, [2003] O.J. No. 4116 (S.C.J.), *Axia Supemet Ltd.*, [2003] A.J. No. 283 (Alta. Q.B.) and *Ticketnet Corp.* (1987), 21 C.P.C. (2d) 38 (Ont. H.C.J.) where injunctions seeking to restore contractual relations already terminated or breached in the past have been held to be mandatory.

8 I am inclined to agree with counsel for Sapient that the injunction sought in the present case is mandatory and that the higher standard for such injunctions cannot be met in the case at bar.

9 However, it is not necessary to decide this question. Assuming that Siemens meets the lower threshold in *RJR-MacDonald*, [1994] 1 SCR 311, of "serious issue for trial", I am nevertheless satisfied that an interlocutory injunction should not issue.

10 Siemens' claim of "irreparable harm" is weak. It is based on three forms of alleged harm. First, it is said that the contract with Sapient contains a clause limiting damages and that this is a form of "irreparable harm." I cannot accept that when two large sophisticated entities negotiate a commercial contract, and mutually agree to limit any award of damages for breach, that this signals easier access to injunctive relief. The equitable remedy of an injunction was developed because the remedy at law of damages was seen to be inadequate in some cases. It was not designed to compensate for cases where the

remedy of damages is appropriate but where the parties have mutually agreed to place certain limits on that remedy. I agree on this point with the decisions of Sachs J. in *Healthy Body Services Inc.*, [2001] O.J. No. 3257 at paras. 10 and 19 (S.C.J.) and with the decision of Cumming J. in *Bell Canada*, [2004] O.J. No. 2319 at para. 73 (S.C.J.). The decision of Newbould J. in *Thales v.* TTC, [2009] O.J. No. 1797 at paras. 29-31 (S.C.J.), relied on by Siemens, does not deal with a limited liability clause mutually agreed to by contracting parties. The case is distinguishable.

11 The second form of "irreparable harm" relied on by Siemens is potential loss of future business in the form of possible contracts with Enbridge that might have developed, had the relationship continued. This claim is too speculative to amount to "irreparable harm" and, in any event, if there was some concrete basis for the claim Siemens would be able to quantify the loss in damages. See: *Henry Co. Canada,* [2007] O.J. No. 5253 at para. 74 (S.C.J.).

12 The third form of "irreparable harm" claimed by Siemens is its potential future liability under a "Joint Liability Letter Agreement" that it signed with Enbridge. Siemens submits that it is now "exposed, prior to trial, to unknown and incalculable damages which may be sought by Enbridge" while, at the same time, being shut out of the ongoing contract and its benefits. This potential liability is unknown and speculative at present. If it arises, it can be quantified in damages and Siemens can seek to be indemnified by Sapient.

13 Accordingly, there is little or no evidence of "irreparable harm."

14 As to the third factor, namely, the "balance of convenience", I am satisfied that it favours denying injunctive relief. Siemens has been shut out of the project for almost 4 weeks. Meanwhile, Sapient must deliver the start up of the SAP computerized management system to its client Enbridge within 3 weeks, by August 15, 2009. Sapient has taken steps to replace Siemens and is working at an intense pace to complete the first phase of the contract on time for the start up of the next phase. The risks of harm to Sapient are greater, if this work was to be disrupted by an injunction introducing Siemens back into the project at the eleventh hour, than the risks involved in denying interlocutory relief prior to trial. In this regard, the risk of harm to Siemens if an injunction is denied is compensable in damages, should they ultimately succeed at trial. As Justice Sharpe points out in his leading text, *Injunctions and Specific Performance* (Looseleaf Edition; Canada Law Book, 2008) at p. 1-22, one of the main distinctions between mandatory and prohibitive injunctions is that the former comes after an alleged wrong and, therefore, imposes a greater burden on the defendant who must undo a past wrong as opposed to merely restraining an alleged wrong that has not yet happened.

15 For all these reasons, I am satisfied that Siemens has not met the test for an interlocutory injunction in *RJR-MacDonald, supra.*

16 Sapient is entitled to its costs in the cause on a partial indemnity basis.

M.A. CODE J.

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