COURT OF APPEAL FOR ONTARIO

CITATION: MJL Enterprises Inc. v. SAL Marketing Inc., 2025 ONCA 120
DATE: 20250220
DOCKET: COA-24-CV-0440

Tulloch C.J.O., Paciocco and Nordheimer JJ.A.

BETWEEN

MJL Enterprises Inc.

Appellant

and

SAL Marketing Inc.

Respondent

J. Gardner Hodder, Yixin Wang, Jia Wang and Louis Liu, for the appellant

Christopher Stanek, Valérie Pelchat and Marc Crandall, for the respondent

Heard: January 30, 2025

On appeal from the judgment of Justice Carole J. Brown of the Superior Court of Justice, dated April 3, 2024.

Paciocco J.A.:

OVERVIEW

[1] The appellant, MJL Enterprises Inc. ("MJL"), a small software company, developed a platform, called "iSTAR", designed to assist in the marketing by automotive dealerships of financing and insurance products for vehicles. On August 13, 2013, MJL entered into a distribution agreement with the respondent,

SAL Marketing Inc ("SMI") that gave SMI exclusive distribution rights for iSTAR ("the "Distribution Agreement"). Problems soon developed in their business relationship and by the fall of 2014, the agreement was terminated, and litigation ensued. The only issues on this appeal arising from that litigation relate to article 4.6 of the agreement,[1] which provides in relevant part:

> 4.6 **Restrictions**. Subject to the rights granted under Article 2, SMI, including its agents and distributors, will not modify, translate, decompile, nor create or attempt to create, by reverse engineering or otherwise, the Software Source Code from the object code of any software supplied hereunder, or adapt the software in any way or for use to create a derivative work.

[2] MJL argues that the trial judge erred in finding that SMI did not breach article 4.6. It raises several grounds of appeal. For reasons that follow, I would dismiss the appeal.

MATERIAL FACTS

[3] MJL does not contend that SMI used the Software Source Code contrary to the terms of article 4.6 but claims that SMI breached the last clause of that provision by adapting the software to create a derivative work by copying the "features and functionality" of iSTAR, described by MJL counsel before us as "the things that the program could do". MJL points specifically to two software products:

[1] The appellant identified article 4.7 in their written submission, but article 4.7 is the remedies provision for breaches of article 4.6.

(1) CustomConnect/SimpliFI, developed by Birchwood, a non-associated company, and (2) UniFI 2.0, which is owned by Industrial Alliance Financial Services ("iA"), SMI's parent company, that it claims contain features and functionalities copied from iSTAR. It argues pursuant to article 4.7, that because SMI breached article 4.6 it must disgorge to MJL "all profits and proceeds from such unauthorized activity".

[4] The trial judge denied MJL's multi-million dollars claim finding that MJL had failed to establish that SMI breached the Distribution Agreement or that SMI copied MJL's software features and functionality.

[5] Although she did not engage in her decision in an interpretive analysis of article 4.6, it is evident that the trial judge concluded that this clause did not extend protection to iSTAR's "features and functionality". She reasoned that: (1) it is trite law that there is no ownership over ideas, concepts and functionality as these things are not subject to copyright protection, and no patent claim was advanced; (2) the features and functionality of software are not confidential; and (3) the defendant SMI had, in fact, suggested some of the features and functionalities that it is now being accused of copying, such as the "menu selling feature".

[6] After excluding some of the evidence that MJL attempted to admit, the trial judge went on to conclude that MJL had failed to prove that SMI had copied any of the features and functionality from iSTAR, or the source code. She noted that

MJL produced no “concrete” evidence of copying and had not produced the software to provide a foundation for its claim that aspects of the iSTAR software had been copied. She was unpersuaded by the circumstantial evidence MJL presented to prove copying. In that evidence, MJL attempted to show that SMI had motive to copy iSTAR because it was enthusiastically received within SMI as “cutting edge software” making it a “very high priority project”; that Mr. Luc Samson who was in charge of SMI at the relevant time wanted SMI to develop and market its own software product to the Honda Motor Company to the exclusion of MJL, and had taken steps to “suppress” iSTAR; that SMI modified a PowerPoint presentation MJL had developed to assist SMI in marketing iSTAR to Honda by expunging references to iSTAR and MJL and then using it to market its own products; and it pointed to similarities between iSTAR and CustomConnect/SimpliFI and UniFI 2.0 that MJL argued confirmed copying.

[7] The trial judge was not only left unpersuaded that this evidence proved MJL’s copying allegations, she affirmatively accepted evidence from developers of CustomConnect/SimpliFI and UniFI 2.0 that they did not copy the features and functionalities from iSTAR, and that the targeted features and functionalities were not only common to many platforms but those features and functions were developed prior to MJL’s relationship with SMI. She rejected the claim that SMI made unauthorized use of the PowerPoint after finding that MJL knowingly and willingly supplied the slides for the Honda presentation.

ISSUES AND ANALYSIS

[8] MJL argues that the trial judge erred in finding that article 4.6 of the Distribution Agreement does not protect iSTAR's features and functions. It submits that the trial judge (1) "erred in law in her finding that a contract may not govern the copying of features and functionalities of software which are not subject to copyright"; (2) failed to consider other contractual provisions which show that article 4.6 addressed copying other than by breach of copyright; and (3) erred by relying on her own incomplete precis of article 4.6, which omitted mention of the key clause in that article that MJL is relying upon. MJL submits that the trial judge went wrong by relying inappropriately on the inapplicable American doctrine of pre-emption, which limits intellectual property claims that are not grounded in copyright. (I note in passing that the trial judge did not mention the doctrine of pre-emption or the American authority in her decision.)

[9] SMI responds that article 4.6 is nothing more than a standard form provision protecting copyrighted material from reverse engineering, and that the trial judge made no error in finding that article 4.6 does not protect iSTAR's non-copyrighted features and functionalities.

[10] As interesting as this debate may be, I need not consider whether the trial judge committed errors of interpretation relating to article 4.6. Even if that article did prohibit the copying of the software's non-copyrighted features and

functionalities, MJL's appeal must fail because of the trial judge's finding that, in any event, no such copying occurred. I will therefore turn my attention to the grounds of appeal relating to that finding.

[11] I do not accept MJL's general submission that the trial judge did not consider whether features and functionalities of the software had been copied because her mistakenly narrow interpretation of article 4.6 caused her to focus only on whether the copyrighted source codes were copied. This submission does not reflect the trial judge's decision. She noted explicitly that MJL refined its allegations to allege that SMI "had copied the features and functionality of its software" and that it was arguing that both SimpliFI and UniFL 2.0 included copied "features"'. She described the evidence to the contrary that she was accepting and concluded, "I am of the view that MJL has failed to establish that SMI … copied MJL's software features and functionality." With respect to MJL's appeal counsel, it could not be clearer that the trial judge found that MJL did not meet its onus of proof of establishing that SMI copied iSTAR's features and functionalities.

[12] I would also dismiss each of the other grounds of appeal MJL raised relating to the trial judge's factual findings.

[13] First, I do not accept MJL's submission that SMI breached article 4.6 by copying the PowerPoint presentation. I see no palpable and overriding error in the trial judge's factual finding that SMI had authorization to use the PowerPoint

presentation. This ground of appeal fails on this basis alone, even if MJL was right about the PowerPoint presentation itself being protected from copying under clause 4.6, as “related documentation”.

[14] I also reject MJL’s argument that the trial judge erred by not admitting documents pursuant to the “party admissions” exception to the hearsay rule (also commonly referred to as the “admissions by opposing party litigant” exception). This issue emerged with respect to an omnibus compilation of documents that MJL had received on production through one of its witnesses that it wished to file as evidence (the “omnibus package”). An unknown number of these documents appear to have been generated by individuals linked to SMI in some way, so MJL argued in reliance on the Supreme Court of Canada decision in *R. v. Schneider*, 2022 SCC 34, 474 D.L.R. (4th) 1, that they were admissible pursuant to the party admissions exception.

[15] In its submissions during the admissibility *voir dire*, MJL focused solely on one of the documents, an email by Cathy Kawchuk, who MJL claimed was involved in software development, in which Ms. Kawchuk expressed the opinion that iSTAR had “limitless potential” (the “Kawchuk statement”). MJL argued that if this document is admissible under the party admissions exception, so too are the other documents in its omnibus package.

[16] Counsel for SMI objected to the admission of this evidence. It argued that the party admissions exception does not apply because *Schneider* is a criminal case, and during the colloquy the trial judge appeared to agree with this. She also expressed doubt that the statement was an "admission", commenting, "where's the party admission?" She permitted the documents to be filed as "narrative" without explaining what the admissible "narrative" use would be.

[17] It is true that the party admissions exception to the hearsay rule is rarely referenced in civil cases, as it was in *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2018 BCSC 514, aff'd 2022 BCCA 245, 87 B.C.L.R. (6th) 38, leave to appeal refused, [2022] S.C.C.A. No. 354, a case that was put before the trial judge. However, this exception "is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases": *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 664. The availability of this exception in both criminal and civil cases can be understood by examining the scope and rationale of the rule. It permits a party to litigation to prove any statement shown to have been made by the opposing party to be admitted for the truth of its contents, notwithstanding the hearsay rule: *Schneider*, at para. 52. Although this rule is referred to as the "party admissions" exception, the name of the exception can be misleading. It permits a party to prove any relevant statement that it can show was made by the opposing party, whether the opposing party knew at the time they were making that statement that it could help the opposing party litigant: *Evans*, at

p. 668; *Schneider*, at para. 78. The rationale for this broad exception is simple. The hearsay rule exists because of the unfairness in a party advancing its case by relying on an out of court statement made by another person, who the opposing party cannot question to test the statement's reliability and credibility. However, when it is the opposing party that has made the statement, they can hardly be heard to complain that they do not have the opportunity to cross-examine themselves. They are entirely equipped to make a tactical decision to testify and to put the statement in context, or to explain why it should not be relied upon if that is their position, or to even deny making the statement. As explained in *Schneider*, at para. 56, citing *Evans*, at p. 664, "what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements". Since the hearsay mischief does not apply, some have expressed the view that statements made by opposing party litigants are not even hearsay: see *Evans*, at p. 664, per Sopinka J. However, this rule is more commonly referred to as a hearsay exception. Be that as it may, the underlying rationale for the rule applies as readily in civil cases as it does in criminal cases. Hence the availability of the exception in criminal and civil cases alike.

[18] Notwithstanding the evident confusion during the trial over the application of the party admissions exception, I am not persuaded that the trial judge erred by failing to admit the omnibus documents pursuant to this exception. With respect to the Kawchuk statement, although MJL's trial counsel initially expressed reliance

on this exception, as the submissions developed, he told the trial judge that he was not seeking to establish the truth of the Kawchuk statement, but rather to prove that she made the statement. The trial judge seized on this and found that she did not have to rule on the party admissions exception as the document was not being presented as hearsay. With respect to the Kawchuk email, MJL can hardly complain on appeal that the trial judge failed to apply a hearsay exception to evidence it was not offering as hearsay.

[19] As for the balance of the documents in the omnibus package, MJL failed to establish their admissibility. Absent an agreement by opposing counsel on admissibility, the party seeking to present evidence pursuant to the party admissions exception to the hearsay rule has the burden of demonstrating that the statement was made by the opposing party litigant: *Evans*, at p. 668. MJL did not do so. It simply bound documents received in production together and argued that all the documents could come in based on the arguments it made about the Kawchuk statement. This is not adequate. Moreover, to use the party admissions exception to admit statements made by persons other than the named opposing party litigant, the party tendering the evidence must establish that the person who made the statement was authorized by the opposing party litigant to speak about the issue: *R. v. Strand Electric Ltd.*, [1969] 1 O.R. 190 (C.A.). MJL did not do this, either. The trial judge did not err in excluding the omnibus package of documents as admissible hearsay.

[20] I digress briefly to remark on the trial judge's decision to permit the omnibus package to be filed as an exhibit in the trial for "narrative" purposes. With respect, the trial judge should not have done so. The doctrine of "narrative" developed to permit evidence that is not relevant to a material issue in the case and therefore not technically admissible to nonetheless be presented where it is necessary to do so to permit the admissible evidence to be understood or effectively presented: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 47; and see *R. v. Reimer*, 2024 ONCA 519, 440 C.C.C. (3d) 520, at paras. 62–64, leave to appeal requested, [2024] S.C.C.A. No. 392, [2024] S.C.C.A. No. 397. For example, when a witness narrates relevant events, they will invariably include details in their testimony that have no bearing on the outcome of the case. It is natural, and indeed unavoidable when communicating to situate our accounts in time and place, or to add insignificant detail. The law of evidence allows those irrelevant features to be narrated because this cannot be prevented without making effective communication impossible, but those irrelevant facts are not to be used in resolving the case. They are simply narrative, not evidence. Similarly, it is not uncommon to permit a witness to offer background information explaining their relevant conduct, or to recount the circumstances that led to the involvement of the police in a criminal case, for example, but this form of "narrative" information is not evidence that is permitted to influence the outcome, either, as it does not meet the legal standards of relevance and materiality: see, for example, *R. v. Iyeke*, 2016

ONCA 349, at paras. 6–10. It is simply background information presented to enable the evidence to be followed.

[21] As necessary as it is, the narrative doctrine comes with its risk. Some jurists mistakenly treat narrative evidence as if it was admissible evidence. Even when the judge is alive to its limits, when a document is received and put before the trier of fact under the doctrine of narrative it can unwittingly have an influence on the case: see *R. v. Taweel*, 2015 NSCA 107, 330 C.C.C. (3d) 368, at paras. 95, 98. Therefore, the doctrine of narrative should not be used unless necessary, and its limits must be understood. It should not be used as a repository for evidence that does not satisfy the rules of admissibility, and it is not a fallback position available to litigants who cannot identify or establish avenues of admissibility.

[22] With respect, the trial judge in this case should not have admitted the omnibus package as “narrative”. She should have excluded the documents entirely because they were not shown to be admissible. The proper procedure would have been to have the omnibus package marked as *voir dire* exhibits, or as lettered trial exhibits so that they would be available for consideration in the event of an appeal, but they should not have been marked as a trial exhibit by assigning it a number. Not surprisingly, MJL does not raise the misuse of the narrative doctrine as a ground of appeal, since MJL is the party that wanted the documents in as part of the evidentiary record. I have addressed this issue simply because the misuse of

the doctrine of narrative is not uncommon, and I hope to encourage trial judges to be vigilant in preventing this.

[23] MJL also argued that the trial judge erred in excluding the bulk of the expert report of Nikolaus Baer that it attempted to put into evidence. This report purported to provide Mr. Baer's opinion that SMI had created derivative work by copying from MJL. However, his report was not based on a technical analysis of the software but was grounded instead on non-technical information, including emails obtained on production, PowerPoint presentations, user manuals and the Distribution Agreement. This report was rightly excluded for several reasons. It is not the proper function of an expert to engage in a fact-finding exercise by deciding what factual conclusions should be drawn from non-technical evidence. That is a function that the trial judge is capable of, so the report that Mr. Baer prepared does not meet the threshold admissibility requirement for expert evidence of "necessity": see *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 23. I see no error in the trial judge's decision to exclude the expert report.

[24] And I also see no palpable and overriding error in the trial judge's finding that MJL failed to prove that the features and functions of iSTAR had been copied. The evidence of copying MJL provided was not as concrete as MJL contends. It was circumstantial and thin, and the trial judge was entitled to accept the direct evidence to the contrary.

[25] Finally, the trial judge did not err by failing to refer to the evidence of Mr. Leclerc from the Honda Motor Company. Trial judges are not required to address all the evidence that is before them, and it is evident in light of the trial judge's acceptance of the direct evidence of the software developers that they did not copy from iSTAR and her findings that SMI's use of the PowerPoint was authorized, that Mr. Leclerc's evidence could do nothing to alter the outcome of the case. There was no need for her to address it.

CONCLUSION

[26] The appeal is therefore dismissed. The appellants are directed to pay costs to the respondents in the amount of $50,000 inclusive of HST and disbursements, as agreed between them.

Released: February 20, 2025 "M.T."

"David M. Paciocco J.A."
"I agree. M. Tulloch C.J.O."
"I agree. I.V.B. Nordheimer J.A."