COURT OF APPEAL FOR ONTARIO

CITATION: Downey v. Ecore International Inc., 2012 ONCA 480
DATE: 20120706
DOCKET: C54648

Feldman, Simmons and Cronk JJ.A.

BETWEEN

Paul Downey

Plaintiff
(Respondent/Cross-Appellant)

and

Ecore International Inc.

Defendant
(Appellant/Respondent to Cross-Appeal)

L. David Roebuck and Mark Hines, for the appellant/respondent to cross-appeal

Timothy M. Lowman and Patrick J. Cotter, for the respondent/cross-appellant

Heard: April 12, 2012

On appeal and cross-appeal from the order of Justice John S. Fregeau of the Superior Court of Justice, dated November 8, 2011, with reasons reported at 2011 ONSC 6617.

Cronk J.A.:

I. Overview

[1] Ecore International Inc. (“Ecore”) appeals from the dismissal of its motion for an order staying or dismissing an Ontario action commenced against it by the

respondent, Paul Downey ("Downey"). Ecore requested that the action be dismissed for want of jurisdiction of the Ontario Superior Court of Justice based on a forum selection clause ("FSC") in favour of the Pennsylvania courts, as found in a written confidentiality agreement between the parties ("Confidentiality Agreement").

[2] The narrow issue on appeal is whether the motion judge erred by concluding that the Confidentiality Agreement fails to bind Downey for lack of consideration. Should Ecore succeed on its appeal, Downey cross-appeals, contending that the Confidentiality Agreement is unenforceable because it applied only "during or after" his employment with Ecore. As Downey was never an employee of Ecore, he argues that a necessary precondition to the operation of the Confidentiality Agreement was not satisfied.

[3] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

II. Facts

[4] Ecore, formerly known as Dodge-Regupol Inc. ("DRI"),[1] is a Pennsylvania-based manufacturer of recycled rubber and a wide array of rubber-related products. Downey is a professional engineer licensed and resident in Ontario.

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[1] Prior to 2008, Ecore carried on business under the name of DRI. For convenience, DRI is treated in these reasons as being one and the same as Ecore.

(1) Genesis of the Contracts

[5] In the 1990s, Downey was employed by one of Ecore's competitors in Toronto. By 1999, he was seeking a new position in a senior business development or sales and marketing position, with the hope of a later transition to general management.

[6] In August and September 1999, Downey had discussions with the President of Ecore, Art Dodge, regarding a potential role for him with Ecore. On September 9, 1999, Dodge wrote to Downey, enclosing an "employment proposal" and offering him employment with Ecore in the position of "Business Development Manager – Industrial Products". The letter indicates that Dodge anticipated Downey relocating to Pennsylvania in early 2001 or sooner. The letter states: "given your history and industry knowledge, coincident with your joining the company and as a condition of your employment, we will require you to sign an Employee Confidentiality Agreement."

[7] Downey responded to Dodge on September 10, 1999 with a counter-proposal. He suggested various changes to the compensation arrangements outlined by Dodge and proposed that the parties operate, "albeit temporarily for the next 12 – 18 months as a business-to-business relationship rather than an employer-employee one". Downey described this arrangement as "necessary given Canadian tax law". He included a draft consulting agreement prepared by

his lawyer, which contemplated that Downey's services would be provided to Ecore through his company, CSR Industries Inc. ("CSR"). The draft agreement provided that CSR would execute a copy of Ecore's standard confidentiality agreement.

[8] Dodge replied to Downey on the same day with a modified proposal that accepted some, but not all, of Downey's suggested compensation arrangements, and that accepted all other terms and conditions in Downey's counter-proposal.

(2) Consulting Agreement

[9] CSR and Ecore executed a consulting agreement on September 14, 1999 ("Consulting Agreement"). The agreement is between Ecore as the "Client" and CSR as the "Consultant". Downey is not a named party to the Consulting Agreement. However, as will be discussed below, he is described in the terms of the agreement as "a Key Person of the Consultant".

[10] The Consulting Agreement provides that CSR will provide defined "Services", including acting as Ecore's "Manager Business Development – Industrial Products" and sitting as a member of Ecore's management team. Additional services to be provided by CSR include "the investigation and development of new business opportunities within industrial market segments".

[11] Section 3 requires Ecore to pay CSR an annual fee of $132,000 CDN, payable in weekly amounts, for the Services provided under the Agreement, as

well as various bonuses in 2000. After 2000, CSR would be considered for participation in all company-wide bonus distributions.

[12] Section 5 of the Consulting Agreement describes the relationship between Ecore and CSR as follows:

> The Consultant's relationship with the Client as created by this Agreement is that of an independent contractor for the purposes of the *Income Tax Act* (Canada) and any similar provincial taxing legislation. It is intended that the Consultant shall have general control and direction over the manner in which its services are to be provided to the Client under this Agreement. Nothing contained in this Agreement shall be regarded or construed as creating any relationship (whether by way of employer/employee, agency, joint venture, association or partnership) between the parties other than as an independent contractor as set forth herein.

[13] Section 7 recognizes Downey's role as CSR's "Key Person":

> 7. Key Person
>
> (a) The parties acknowledge that Paul Downey is a Key Person of the Consultant and is integral to the successful performance of the Services by the Consultant under this Agreement. It is acknowledged by the Consultant that Paul Downey will perform all services of the Services, unless the Client otherwise consents in writing.

[14] Section 8 requires CSR to execute a confidentiality agreement:

> 8. Confidential Information
>
> The Consultant will execute a copy of the Client's standard confidentiality agreement, and said confidentiality agreement, upon execution, will form part of this agreement.

(3) Confidentiality Agreement

[15] On Downey's first day of work with Ecore on October 4, 1999, Ecore asked him to sign its standard form confidentiality agreement, backdated to October 1, 1999. Downey executed the agreement in his personal capacity on or about October 4, 1999.

[16] The Confidentiality Agreement is between Ecore, which is referred to as "Company", and Downey, who is referred to as "Employee". CSR is not a named party to the agreement and is not referenced in the document.

[17] The preambles to the Confidentiality Agreement include this clause :

> BACKGROUND: Company is prepared to engage Employee for employment with Company. Employee will be granted access to confidential and proprietary information of the Company as part of his employment. Employee is entering into this Agreement to grant to the Company protections regarding the Company's proprietary information. The parties of [sic] this Agreement agree and intend to be legally bound by the covenants as set forth in this Agreement.

[18] Section 1 of the Confidentiality Agreement defines "Proprietary Information", while s. 2 obliges Downey to accept and hold all Proprietary Information as secret and confidential and not to use it for his own benefit, but only for the benefit of Ecore.

[19] Section 3 of the Confidentiality Agreement contains the FSC at issue in this proceeding. The pertinent part of the FSC states:

> Employee hereby consents to the exclusive jurisdiction in the courts of the Commonwealth of Pennsylvania and of the United States situate in the Commonwealth of Pennsylvania, in connection with any action or suit to enforce this Agreement, that relates to this Agreement, that arises out of or in any way relates to the Company's business relations with Employee.

[20] Section 4 of the Confidentiality Agreement provides that "[a]ll inventions or discoveries which relate to [Ecore's] Proprietary Information shall be the exclusive property of the Company." This section obliges Downey to execute any instruments that Ecore deems necessary to confirm its exclusive rights to any invention or discovery under applicable intellectual property law.

[21] Section 5 of the Confidentiality Agreement states:

> This Agreement shall not constitute an employment agreement between Company and Employee, and, in the absence of written agreement to the contrary, Employee shall, at all times, be considered an employee at will. This Agreement shall apply during and after the Employee's employment with Employer.

(4) Assignment Agreement

[22] Sometime in 2000, Downey invented a new form of impact sound insulation for use in the construction of flooring systems. He disclosed the inventions to Ecore in 2000. Downey believed that his inventions could lead to a new Ecore product line.

[23] In a written agreement, dated October 10, 2001, Downey assigned all his rights, title and interest in the inventions to Ecore ("Assignment Agreement").

Downey acknowledged in the Assignment Agreement that he received “valuable consideration” from Ecore.

(5) Subsequent Events

[24] In 2008, Ecore asked Downey to sign an “Amended and Restated Confidentiality Agreement” that sought to create joint and several obligations on the part of Downey and CSR. Downey declined to do so.

[25] In February 2011, Downey commenced an action in Ontario against Ecore, alleging that it failed to honour an oral promise to “reasonably compensate” him for his assignment of the insulation inventions. Downey alleges in his claim that the inventions were made by him alone using public source materials information and without the use of any Proprietary Information of Ecore. Downey seeks damages or, in the alternative, rescission of his assignment of the inventions and an accounting of profits by Ecore.

[26] In response to this action, Ecore terminated the Consulting Agreement effective July 2011. Ecore also moved under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to stay or dismiss Downey’s action on the ground that the Pennsylvania courts have exclusive jurisdiction over it pursuant to the FSC in the Confidentiality Agreement.

III. Motion Judge's Decision

[27] The motion judge reviewed the circumstances leading to the execution of the Consulting and Confidentiality Agreements and the terms of both contracts. He found that, at Downey's request, the Consulting Agreement was between CSR and Ecore, rather than Ecore and Downey, because this structure was "advantageous to [Downey] from a Canadian tax perspective" and was "for his advantage" (at para. 30). He also found that while it was contemplated that "Downey's position or status might change to that of an employee of Ecore", this never happened.

[28] As for the Confidentiality Agreement, the motion judge found that while CSR was obliged under the Consulting Agreement to execute the agreement, it did not do so. Instead, as requested by Ecore, Downey signed the Confidentiality Agreement in his personal capacity. The motion judge correctly held that Downey was bound by the FSC in the Confidentiality Agreement only if that agreement was a valid contract to which Downey was personally bound. He concluded, at para. 34, that the Confidentiality Agreement "fails for lack of consideration". The motion judge found that "it is CSR, not Downey, who is the party to the Consulting Agreement. The confidential information is provided to CSR, and the compensation, pursuant to the terms of the agreement, was to flow to CSR".

[29] The motion judge summarized his conclusion this way, at para. 37:

> Downey never received consideration for executing the Confidentiality Agreement and is not personally bound by its terms, including the FSC contained therein. The jurisdiction of this court to hear Downey's action against Ecore is therefore not ousted by the FSC contained in the Confidentiality Agreement dated October 1, 1999.

[30] Although this conclusion was dispositive of Ecore's motion, the motion judge went on to consider the other issues raised by the parties concerning the enforceability of the Confidentiality Agreement against Downey. He held that: (1) the subject matter of Downey's action against Ecore falls within the scope of the FSC in the Confidentiality Agreement since the action arises out of and relates to Ecore's business relations with Downey (at paras. 38-41); and (2) Downey failed to show sufficient strong cause to avoid the enforcement of the FSC in the Confidentiality Agreement (at paras. 42-45). Downey did not challenge these additional findings before this court.

[31] The motion judge's reasons for dismissing Ecore's motion are summarized in this succinct passage from his reasons, at para. 46:

> The FSC in the Confidentiality Agreement should be enforced, and the stay of proceedings would be granted, but for the finding that the Confidentiality Agreement fails to bind Downey personally for lack of consideration.

IV. Issues

[32] There is one issue on the appeal: did the motion judge err by concluding that the Confidentiality Agreement, including the FSC, is unenforceable against Downey for lack of consideration?

[33] If the motion judge so erred, the only issue on the cross-appeal is whether the Confidentiality Agreement is unenforceable against Downey on the alternative basis that a necessary precondition to its operation – Downey's employment with Ecore – was never satisfied.

V. Analysis

(1) The Appeal

[34] Ecore's basic position is that the motion judge erred by concluding that the Confidentiality Agreement is unenforceable against Downey by reason of a failure of consideration.

[35] Ecore submits that s. 8 of the Consulting Agreement evidences the parties' intentions that Ecore was to receive a confidentiality covenant that bound Downey personally as the Key Person. In addition, Ecore argues that the consideration for signing the Confidentiality Agreement was provided by the monies and benefits that flowed through CSR to Downey. Ecore also submits that consideration is found in the expressed premise of the Confidentiality Agreement that Downey would be granted access to Ecore's confidential

information and that he was entering into the agreement to grant Ecore protection in respect of that information.

[36] For the reasons that follow, I agree with Ecore that the motion judge erred by holding that the Confidentiality Agreement "fails" and is unenforceable against Downey due to a lack of consideration.

(i) Principles of Contractual Interpretation

[37] I begin with the well-established principles of contractual interpretation. As the courts have repeatedly affirmed, the aim of contractual interpretation is to determine the intentions of the parties in accordance with the language used in the written document, having regard to the context in which the contract was signed: see *Dumbrell v. Regional Group of Companies* (2007), 85 O.R. (3d) 616 (C.A.), at paras. 47-56; *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 673, at para. 16; and *SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc.*, 2011 ONCA 616, 282 O.A.C. 339, at para. 16.

[38] The contours of the exact bargain between the parties may sometimes require consideration of more than one contract. Nonetheless, the same principles of contractual interpretation apply. In *Salah*, at para. 16, Winkler C.J.O. provided this instructive overview of the applicable principles:

> When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have

> said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. *Where a transaction involves the execution of several documents that form parts of a larger composite whole – like a complex commercial transaction – and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements.* [Citations omitted; Emphasis added.]

(ii) The Wording of the Agreements and the Factual Matrix in this Case

[39] The motion judge's factual finding that CSR was the recipient of Ecore's Proprietary Information led to his conclusion that the Confidentiality Agreement fails for lack of consideration. In my view, this finding is not consistent with the wording of the Consulting and Confidentiality Agreements, having regard to the factual matrix in which these agreements were made. Nor, with respect, does the motion judge's interpretation of the effect of these agreements accord with sound commercial principles or good business sense.

[40] From the outset of the parties' dealings, as revealed by Dodge's initial letter to Downey dated September 9, 1999, Ecore contemplated that Downey,

personally, would join its “team” and sit as a member of its management group. Consistent with that view, Ecore’s position was that Downey would be required to personally commit to protect Ecore’s Proprietary Information as a condition of his relationship with Ecore.

[41] There was no evidence on the motion to suggest that Ecore resiled from its initial position after Downey and his lawyer converted the original employment proposal into a proposed consulting arrangement with CSR. Indeed, both the wording of s. 5 of the Consulting Agreement and the motion judge’s findings confirm that Downey proposed this arrangement solely as a means of advantaging his Canadian income tax position. The arrangement with CSR was simply a tax device that, in the motion judge’s words, was implemented “at Downey’s request and for his advantage” (at para. 30). This business reality is a critical component of the factual context in which the Consulting and Confidentiality Agreements were signed.

[42] Moreover, the transaction between the parties was effected by the execution of both contracts. The Consulting Agreement was entered on the faith of the Confidentiality Agreement being executed. Consequently, these related contracts must be read together and, as Winkler C.J.O. explained in *Salah*, assistance in the interpretation of each agreement may be drawn from the other.

[43] That the two agreements together constitute a composite whole is suggested by the language of the agreements themselves. Section 8 of the Consulting Agreement provides for the execution of Ecore's standard form confidentiality agreement by the Consultant. It further states that, upon execution, the confidentiality agreement would form part of the Consulting Agreement.

[44] The Consulting Agreement does not specifically address the provision or protection of Ecore's Proprietary Information, nor does it refer to the intended recipient of that information. Instead, it confirms that Downey, in his personal capacity, is a "Key Person of the Consultant and is integral to the successful performance of the Services by the Consultant under this Agreement". CSR explicitly acknowledged that Downey would perform all Services, as defined in the Consulting Agreement, unless Ecore otherwise consented in writing.

[45] The Confidentiality Agreement fills in the gaps in the Consulting Agreement about the provision and protection of Ecore's Proprietary Information. It specifically addresses the disclosure of this information, providing not only that Downey "will be granted access to [Ecore's] confidential and proprietary information" but, also, that Downey was entering into the Confidentiality Agreement to "grant to [Ecore] protections regarding [Ecore's] proprietary information". It confirms that Downey intended "to be legally bound by the covenants as set forth in this Agreement", which include the confidentiality covenants and acknowledgements set out in the body of the agreement.

[46] It is true, as the motion judge recognized, that CSR never signed a confidentiality agreement and that it was not a named party to the Confidentiality Agreement signed by Downey. However, when the Consulting Agreement and Confidentiality Agreement are read together, the terms of these agreements reveal the parties' intentions that Ecore's Proprietary Information was to be protected in the hands of the person who was to actually receive that information – Downey. It was only reasonable for the parties to intend that Downey – who was then employed by a known competitor of Ecore – would be subject to the terms of the Confidentiality Agreement. He was the person defined in s. 7 of the Consulting Agreement as the actual provider of all the consulting services to Ecore. Indeed, Downey admitted in cross-examination that he was the person who would get Ecore's information if a contract was entered into with Ecore.

[47] The motion judge erred in finding that Ecore accepted that CSR would receive both the Proprietary Information and the benefits flowing from Downey's relationship with Ecore. The wording of the agreements and the overall factual matrix reveals that the *de facto* relationship between the parties was between Ecore and Downey. It was Downey, not CSR, who committed to perform the consulting services. And it was Downey who would receive the benefits arising from the relationship with Ecore, whether directly or through the corporate vehicle of CSR.

[48] Two further comments by the motion judge require mention. The motion judge observed, at para. 32, that the Consulting Agreement could have required that both CSR and Downey sign the Confidentiality Agreement. He also commented that it was "[o]f significance" that, in 2008, Ecore asked Downey to sign an amended Confidentiality Agreement that would have bound both CSR and Downey.

[49] In my view, with respect, these observations are beside the point. The fact that the Consulting Agreement did not require both CSR and Downey to sign the Confidentiality Agreement is explained by the factual matrix in which the agreements were made. At least for the purposes of the Confidentiality Agreement, the parties understood and intended that CSR and Downey were one and the same.

[50] In addition, I view the 2008 effort to restate the Confidentiality Agreement as nothing more than a failed attempt by Ecore to formally commit CSR to the contractual protections it already enjoyed with Downey under the Confidentiality Agreement.

[51] An additional point telling against the motion judge's interpretation of the interaction between the Consulting Agreement and the Confidentiality Agreement is that it fails "to accord with sound commercial principles and good business sense, and [to] avoid commercial absurdity": *Salah*, at para. 16. On the motion

judge's approach to the interpretation of the two agreements, the Confidentiality Agreement serves no meaningful purpose. The motion judge viewed CSR as the recipient of Ecore's Proprietary Information. If this were the case, it would have served no logical purpose for Ecore to ask Downey to personally commit to protect Proprietary Information that he never received.

[52] Moreover, on the motion judge's findings, neither Downey nor CSR is bound by the Confidentiality Agreement. Downey is not bound because, in the motion judge's view, there was no consideration for the agreement. And CSR is not bound because it is not a party to the agreement. On this interpretation, Ecore is deprived of the very protection of its intellectual property for which it bargained.

[53] Such a result is inconsistent with the parties' demonstrated intentions at the time they entered into the Consulting and Confidentiality Agreements. It is also inconsistent with sound commercial principles and good business sense. An interpretation of the Consulting and Confidentiality Agreements that occasions such a commercially absurd result is to be avoided: *Salah*, at para. 16.

[54] I therefore conclude that, properly interpreted, the intent of the parties in entering into their contractual arrangements was to require the execution of a confidentiality agreement that bound Downey personally. That s. 8 of the Consulting Agreement required CSR to execute such a confidentiality agreement

does not relieve against the parties' joint objective. To conclude otherwise, as the motion judge did, would deprive Ecore of any protection of its Proprietary Information from the intended and actual recipient of that information. This unjust result would permit form to triumph over substance.

(iii) Confidentiality Agreement is Supported by Valid Consideration

[55] It follows from this analysis that the motion judge erred by concluding that Downey's execution of the Confidentiality Agreement was unsupported by valid consideration. The motion judge rejected Ecore's suggestion that "the consideration received by Downey for executing the Confidentiality Agreement is the provision of confidential information by Ecore to the consultant, allowing the 'services' of the Consulting Agreement to be provided, thereby allowing the compensation contemplated in that agreement to flow" (at para. 34). According to the motion judge, at para. 35:

> [T]his submission overlooks the fact that it is CSR, not Downey, who is the party to the Consulting Agreement. The confidential information is provided to CSR, and the compensation ... was to flow to CSR. I am mindful that some of the funds owing to CSR pursuant to the Consulting Agreement were paid to Downey personally. However, [Ecore] cannot unilaterally change the parties to the Consulting Agreement by choosing who they pay. Further, the record suggests that these funds were treated by Downey as revenue of CSR.

[56] In my opinion, the motion judge's conclusion that the Confidentiality Agreement fails for lack of consideration ignores the mutual promises contained

in the Confidentiality Agreement. In particular, the motion judge failed to consider the "BACKGROUND" preamble to the Confidentiality Agreement, which reads:

> Employee will be granted access to confidential and proprietary information of the Company as part of his employment. Employee is entering into this Agreement to grant to the Company protections regarding the Company's proprietary information. The parties of [*sic*] this Agreement agree and intend to be legally bound by the covenants as set forth in this Agreement.

[57] The mutual promises contained in this provision constitute a *quid pro quo* that formed the basis for the Confidentiality Agreement: Downey would be granted access to Ecore's Proprietary Information, which was necessary to allow him to perform the Services under the Consulting Agreement, and the information so disclosed would be subject to confidentiality protections in favour of Ecore. Contrary to the parties' original expectations, Downey never became an Ecore employee but instead continued to use his corporate vehicle for income tax purposes. However, the fact remains that Downey received Ecore's Proprietary Information.

[58] In my view, the mutual promises contained in the Confidentiality Agreement afford good and valid consideration for Downey's execution of that agreement. This is sufficient to legally bind the parties in accordance with their express intentions as set out in the preamble to the agreement, quoted above. It was these promises and their fulfillment that permitted Downey, both personally and through CSR, to realize the benefits of the Consulting Agreement – benefits

he would not have received without executing the Confidentiality Agreement to which he was personally bound.

(iv) Conclusion

[59] I therefore conclude, contrary to the motion judge's ruling, that Downey's execution of the Confidentiality Agreement was supported by valid consideration. It follows that the Confidentiality Agreement, including the FSC, is fully enforceable against Downey.

(2) The Cross-Appeal

[60] On his cross-appeal, Downey invokes s. 5 of the Confidentiality Agreement, which provides in part: "This Agreement shall apply *during and after* the Employee's employment with Employer" (emphasis added). Downey submits that even if he did receive valid consideration for entering into the Confidentiality Agreement, it is nonetheless unenforceable against him since he never became an Ecore employee. The motion judge did not need to consider this alternative argument, having accepted that the Confidentiality Agreement was unenforceable against Downey due to a lack of consideration.

[61] I do not read s. 5 of the Confidentiality Agreement in the manner urged by Downey. The material language of this provision – that the Confidentiality Agreement was to apply "during and after" Downey's employment with Ecore – simply confirms that Downey's confidentiality obligations were to survive the

termination of his relationship with Ecore. This makes commercial sense given the purpose of the agreed protections for Ecore's Proprietary Information. It was precisely when Downey's relationship with Ecore fell apart, that those protections would be needed by Ecore.

[62] It is telling, in this regard, that the relevant language in s. 5 does not provide that the Confidentiality Agreement or Downey's confidentiality covenants were to apply *only* if Downey was an employee of Ecore or that his employment by Ecore was a condition precedent to the triggering of those covenants. This language also accords with common and business sense. If Ecore's Proprietary Information was disclosed to Downey – in any capacity – the protection of that information was of vital concern to Ecore.

VI. Disposition

[63] For the reasons given, I am persuaded that the motion judge erred in his interpretation of the Confidentiality Agreement. That agreement forms part of a single transaction between Ecore, Downey and CSR, constituted by both the Consulting and the Confidentiality Agreements. The interpretation of each agreement is informed by the other. It is only when the two agreements are read together, in accordance with the principles of contractual interpretation referenced above, that the intentions of the parties and the true business reality of their relationship emerge.

[64] Accordingly, I would allow the appeal, dismiss the cross-appeal, set aside the motion judge's order and substitute in its stead an order staying Downey's Ontario action on the basis of the FSC in the Confidentiality Agreement.

[65] Ecore is entitled to its costs of the appeal and the cross-appeal, in the agreed amount of $13,000, inclusive of all disbursements and taxes.

Released:

"JUL -6 2012"
"KF"

"E.A. Cronk J.A."
"I agree K. Feldman J.A."
"I agree Janet Simmons J.A."