

Federal Court



Cour fédérale

Date: 20210108

Docket: T-898-20

Citation: 2021 FC 30

Ottawa, Ontario, January 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**THE TORONTO REGIONAL REAL ESTATE
BOARD**

Plaintiff

and

**RE STATS INC. operating as REDATUM, KENNETH
DECENA and GABRIEL STEFANESCU**

Defendants

ORDER AND REASONS

I. Overview

[1] This Order and Reasons relate to a motion by the Plaintiff, seeking an interlocutory injunction against the Defendants, restraining them from carrying on certain activities alleged to infringe the Plaintiff's copyright interests.

[2] As explained in greater detail below, this motion is dismissed, because the Plaintiff has not established that it would suffer irreparable harm if the injunction is not granted, and the balance of convenience in this matter favours the Defendants.

II. **Background**

[3] The Plaintiff, The Toronto Regional Real Estate Board [TRREB], is a not-for-profit entity incorporated under the laws of the Province of Ontario. It is Canada's largest real estate Board and operates as a trade association on behalf of its members, more than 56,000 licensed real estate brokers and salespersons, the majority of whom are concentrated in the Greater Toronto Area [GTA]. TRREB also has reciprocal agreements with other real estate boards across Canada. One of TRREB's principal activities relates to its development and operation of the TRREB Multiple Listing Service [TRREB MLS], which it describes as a curated online system for access by its real estate professional members and partner real estate boards.

[4] The corporate Defendant, R E Stats Inc., operating as REDATUM [RE Stats], is a company based in Toronto, Ontario, which provides services to parties involved in the real estate industry. The individual Defendants, Gabriel Stefanescu and Kenneth Decena, are alleged by TRREB to be the individuals directing the operations of RE Stats.

[5] TRREB describes the information available through the TRREB MLS as including access to active real estate sales listings, with detailed information related to the sale of real property, and containing archival information, unique photography, detailed neighbourhood descriptions listing schools and community features, and other information related to real

property in the GTA and other jurisdictions, including information as to the amounts paid to purchase properties. TRREB Further describes the TRREB MLS, including its design, layout, presentation, manner of access, type and form of information, software application and design, as well as the information contained therein, as proprietary to TRREB and representing a copyrightable work.

[6] Members of TRREB provide information involving real estate listings and sales of real property to TRREB for input into the TRREB MLS. The members' input of such information, and their access to information contained in the TRREB MLS, is governed by Authorized User Agreements [AUAs] between TRREB and its members. TRREB also obtains information about real property from third parties, pursuant to agreements therewith, and makes that information available to TRREB members through the TRREB MLS.

[7] TRREB explains that, in addition to the terms of the AUA, all use of the TRREB MLS is subject to and requires compliance with TRREB MLS Rules and Policies. It also employs what it describes as technological protection measures [TPMs] to safeguard the TRREB MLS from technological attacks as well as theft of the proprietary information that makes up the system. TRREB also states that its members provide to it information that is subject to the terms of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA], which mandates informed consent to the use of personal information.

[8] The Defendants are not members of TRREB and, according to TRREB, are not eligible to be members, because they are not real estate brokers or salespersons. TRREB describes RE Stats' business as follows:

Redatum advertises and markets itself to real estate professionals and managers as being able to provide detailed reports related to activities involving general and specific market information related to residential real estate, including as it relates to the performance of real estate professionals and brokerages, so as to be able to generate various reports and statistical analysis for use by its clients. Redatum further indicates that it can provide this information to its customers to assist them in recruiting, as well as to differentiate their client activities within the marketplace from those of others in the market place, including other TRREB members.

[9] TRREB alleges that, in the conduct of this business, the Defendants have obtained unauthorized and illegal access to the TRREB MLS system and its proprietary contents, including by circumventing and bypassing its TPMs, and have downloaded, copied and retransmitted the contents of the system, including personal information contained therein. TRREB describes this conduct as data scraping the TRREB MLS system to monetize its contents for commercial gain and alleges this conduct represents infringement of TRREB's rights, including copyright interests.

[10] On October 19, 2018, TRREB's counsel wrote to RE Stats, to the attention of Kenneth Decena, advising that TRREB had received complaints from its members that RE Stats was publishing reports for realtors using data about them and others based on information derived from the TRREB MLS system. This letter advised that RE Stats was not permitted to access or use data derived from the TRREB MLS system, without license or authorization from TRREB,

and asked that RE Stats advise by October 25, 2018 as to the source of its information about realtors and their transactions on the TRREB MLS system.

[11] After a follow-up letter from TRREB's counsel, Gabriel Stefanescu responded by email dated November 7, 2018, stating among other things that RE Stats does not publish any reports with any data from TRREB and that all data RE Stats employs comes from its clients, which are TRREB members.

[12] There were no more communications between the parties until August 7, 2020, when TRREB's counsel again wrote to RE Stats, this time to the attention of Mr. Stefanescu, explaining that, because of confusion between RE Stats and another entity operating as "ReStats" that conducted business in a similar manner, Mr. Stefanescu's email dated November 7, 2018 had previously been overlooked.

[13] Among other things, TRREB's counsel's letter described Mr. Stefanescu's email as confirming that RE Stats had been accessing the TRREB MLS system as part of the commercial services that it provides to its clients. TRREB's counsel stated that RE Stats' activities represent an infringement of TRREB's proprietary rights in the TRREB MLS system and its contents. Counsel demanded various categories of information related to RE Stats' access to the TRREB MLS system, the use of data and information thereby obtained, and resulting fees and revenues.

[14] TRREB's counsel advised that, in the absence of a positive response by August 14, 2020, TRREB would commence legal action including seeking injunctive relief and orders for the

production of the requested information. Counsel also advised RE Stats to immediately cease and desist its activities accessing the TRREB MLS system and using TRREB's proprietary data and information for an unauthorized commercial purpose.

[15] On August 11, 2020, TRREB filed a Statement of Claim initiating the within action, claiming various categories of declaratory relief, including in relation to its proprietary rights and copyright interests and infringements thereof by the Defendants, injunctive relief against the Defendants, a mandatory order requiring the provision of certain information, damages, an accounting, and alternatively a statutory award under the *Copyright Act*, RSC 1985, c C-42 [the Act].

[16] On November 17, 2020, TRREB filed the within motion, seeking an interlocutory injunction restraining the Defendants from conducting certain alleged infringing activities and a preservation order requiring the provision of certain information, representing relief similar to that claimed in the action. Its motion is supported by an affidavit sworn by John DiMichele, the Chief Executive Officer of TRREB, which explains TRREB's operations and provides the evidence surrounding the TRREB MLS system and the Defendants' alleged infringement upon which TRREB relies.

[17] The Defendants, RE Stats and Mr. Stefanescu, filed a responding Motion Record, which includes an affidavit sworn by a law clerk in their counsel's office. That affidavit is confined to attaching certain correspondence between counsel leading up to the hearing of this motion, in

support of a request for an adjournment of the hearing. However, at the hearing, counsel for RE Stats and Mr. Stefanescu advised that he preferred that the hearing proceed.

[18] The other Defendant, Mr. Decena, has not entered an appearance in this matter and was not represented at the hearing. TRREB's counsel confirmed that, in the present motion, TRREB is seeking the requested injunctive relief against only RE Stats and Mr. Stefanescu. He also confirmed that TRREB is not pursuing the request for a preservation order set out in the notice of motion. The requested relief is now confined to the following:

An interlocutory injunction against the Defendants, RE Stats and Mr. Stefanescu, restraining each of them, their officers, directors, employees, agents, assigns, servants, or any person acting under their direction, or any person having knowledge thereof:

- i. from accessing, copying, data scraping, downloading, displaying, distributing, accessing to make available for distribution, streaming for public display, any and all information obtained in any manner from the TRREB MLS and any of the systems or services operated by TRREB in relation to the TRREB MLS and from implementing any means or method to avoid, bypass, remove, deactivate, impair or circumvent any TPMs put in place to protect or

limit access to the TRREB MLS and TRREB's online systems and services;

- ii. from operating, conducting or having any involvement in or providing or offering any means to access the TRREB MLS and TRREB's online systems and services, or assisting in the collection, display and distribution of any information obtained from the TRREB MLS and TRREB's online systems and services;
- iii. from maintaining, operating, implementing, marketing or having any involvement with any business or enterprise used in any manner or form for the purpose of providing or offering a means to access the TRREB MLS and TRREB's online systems and services by any means or method, including any Internet-based technology, without the express written permission of TRREB.

III. **Issue**

[19] TRREB's motion raises the sole issue of whether it has satisfied the test to obtain an interlocutory injunction.

IV. **Analysis**

A. *Test for an Interlocutory Injunction*

[20] The test for obtaining an interlocutory injunction is well settled. The party seeking the injunction is required to establish the following (see *RJR MacDonald Inc v Canada (Attorney General)*, 1994 SCC 117 [*RJR MacDonald*] at paras 48, 81-85):

- A. There is a serious issue to be tried;
- B. The party seeking the injunction will suffer irreparable harm, which cannot be compensated by an award of damages, if the injunction is not granted; and
- C. The balance of convenience favours the party seeking the injunction.

B. *Serious Issue*

[21] The threshold for satisfying the first element of the test to obtain an interlocutory injunction is low. The party seeking the injunction must convince the Court only that the case on its merits is neither frivolous nor vexatious (see *RJR MacDonald* at para 83).

[22] In broad strokes, TRREB alleges that the TRREB MLS is a copyrightable work, that it is the owner of the copyright, and that the Defendants have infringed that copyright by accessing that work illegally and without authorization from TRREB, circumventing TPMs to do so, and monetizing the contents of that work through the information, analysis and reports the Defendants provide to real estate professionals who are the Defendants' clients.

[23] The Defendants dispute that the TRREB MLS is a copyrightable work, that they have illegally accessed TRREB MLS, and that their activities represent an infringement of copyright interests protected by the Act. They argue that the limited evidence available in this motion indicates that the data employed by the Defendants, in providing services to their clients, is obtained from those clients. The Defendants submit there is no evidence they have accessed the TRREB MLS system, let alone unlawfully.

[24] Moreover, the Defendants argue that TRREB has not adduced sufficient evidence to establish that the TRREB MLS is a copyrightable work or that the Defendants' alleged unlawful activities would represent copyright infringement. The Defendants note the frequent references in TRREB's allegations to infringement of TRREB's proprietary rights to the information in the TRREB MLS system. The Defendants argue that, even if their activities constituted infringement of such rights, they are not intellectual property interests protected by federal law and within the jurisdiction of the Federal Court (see, e.g., *Netbored Inc v Avery Holdings Inc*, 2005 FC 490 at paras 22-24).

[25] The Defendants rely in particular on the decision in *The Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*Toronto Real Estate Board*] at paras 183-196, which considered the availability of copyright protection for the database of the Plaintiff that was under consideration in that appeal from the Competition Tribunal. The Federal Court of Appeal concluded that the Plaintiff had not put forward persuasive evidence that demonstrated the degree of skill, judgment or labour, employed in compiling the database, necessary to show originality and therefore the availability of copyright.

[26] In response, TRREB submits that *Toronto Real Estate Board* considered only a subset of the TRREB MLS system, which was the subject of the Competition Tribunal order under appeal, and submits that the conclusion of the Federal Court of Appeal, that the Plaintiff could not avail itself of a position based on copyright, was based on insufficiency of evidence adduced in that proceeding. I note that, perhaps in anticipation of being confronted with *Toronto Real Estate Board*, Mr. DiMichele's affidavit refers on multiple occasions to skill and judgment exercised by TRREB in the design of the TRREB MLS.

[27] In response to the Defendants' argument that TRREB has not adduced sufficient evidence that the Defendants' alleged unlawful activities would represent copyright infringement, TRREB recognizes that it has been unable to determine the exact means used by the Defendants to obtain access to the TRREB MLS system. However, it submits that the Defendants have acknowledged, through Mr. Stefanescu's November 7, 2018 email, that their business employs data from the TRREB MLS system, and TRREB emphasizes that the Defendants have chosen not to adduce, in

response to this motion, any evidence establishing the details as to how they obtain or use such data.

[28] TRREB also relies on particular provisions of the Act, including the presumption in favour of copyright contained in s 34.1(1) and the prohibition against circumvention of TPMs set out in s 41.1. TRREB argues that, even if the Defendants are accessing the data in the TRREB MLS system through the TRREB members that are also the Defendants' clients, as opposed to a more technical method of achieving such access, this still represents a contravention of s 41.1 for which TRREB can seek relief under the Act.

[29] My decision on this first element of the *RJR MacDonald* test turns on the low threshold applicable to satisfaction of this element. The arguments raised by the Defendants, both as to whether the interests asserted by TRREB are subject to copyright protection and as to whether the Defendants' activities represent an infringement of such interests, will have to be addressed as this litigation proceeds, with the benefit of a more fulsome evidentiary record than is presently before the Court. I will therefore refrain from providing any detailed analysis of the merits of the parties' respective positions on these issues. For present purposes, having considered the parties' respective arguments, I find only that TRREB's case is neither frivolous nor vexatious. TRREB satisfies the first element of the test, and I must consider the other two elements.

C. Irreparable Harm

[30] In support of TRREB's position that it will suffer irreparable harm if the requested injunction is not granted, Mr. DiMichele deposes as follows:

74. TRREB has suffered and continues to suffer irreparable harm as a result of the conduct of the defendants and their blatant unauthorized actions which threatens the integrity of the TRREB MLS system and TRREB's entire service operated on behalf of its members and their clients. The entire TRREB MLS system and cooperative, in partnership with other real estate boards, has been developed and maintained at great cost and expense. It is premised on being able to maintain the security of the TRREB MLS system and the information contained thereon for the benefit of its members who collectively pay for it through their membership fees, and benefit from its use and continued development in relation to their real estate brokerage businesses to their clients.

75. Additionally, the content of the TRREB MLS is based upon the collective input from TRREB's partners, members and their clients who entrust that their information will be protected and only used in accordance with the agreements entered into with TRREB, as well as information which has been provided to TRREB under license by parties subject to specific terms of use which were breached by the Defendants. If TRREB cannot stop the misuse of that information entrusted to it and breaches of the obligation owed to it, it will have a significant and irreparable impact on TRREB, the integrity of the TRREB MLS system and the services that TRREB offers to its members as well as safeguard members' personal information.

[31] The Defendants submit that this evidence is little more than a bald, unsubstantiated assertion that TRREB will suffer irreparable harm if this motion is dismissed. The Defendants argue that TRREB has adduced no evidence of any harm, let alone irreparable harm, that would result from the Defendants continuing to carry on business pending adjudication of this action on its merits.

[32] I agree with the Defendants' position on this issue. An applicant for an injunction must satisfy the second element of the test on a balance of probabilities, based on clear and compelling evidence (see, e.g., *Haché c Canada (Ministre des Pêches & des Océans)*, 2006 FCA 424 at para 11). I appreciate that TRREB's evidence explains the considerable cost and efforts expended to

safeguard the TRREB MLS system and its contents. The evidence also speaks to risk that unauthorized access to the system could result in disclosure of information that was provided by third parties, in breach of agreements between TRREB and those parties and/or contrary to PIPEDA. However, the evidence adduced on this motion (including Mr. Stefanescu's November 7, 2018 email and screenshots from RE Stats' website upon which TRREB relies) provides very little detail as to the information employed by the Defendants in their business model. That evidence does not establish whether, or to what extent, third-party information is used, and it is insufficient to establish whether, based on disclosure of third-party information or otherwise, TRREB would suffer the harm it alleges.

[33] Mr. DiMichele states that, in the absence of an injunction, TRREB will suffer a significant and irreparable impact on the integrity of the TRREB MLS system. However, the Defendants make the compelling point that they have continued conducting business since TRREB became aware of their activities in 2018. TRREB's evidence is that it became aware of the Defendants' business activities in 2018 as a result of members' complaints. I recognize TRREB's explanation that it did not act upon this information for two years because it mistakenly believed that RE Stats was the same as another business with a very similar name. However, to the extent that TRREB is concerned about attrition in its membership or other harm resulting from an impact on the integrity of the TRREB MLS system, there is no evidence that such harm has been identified over this two year period. In my view, these facts militate significantly against TRREB's ability to establish irreparable harm.

[34] I conclude that TRREB has not satisfied the second element of the *RJR MacDonald* test. The test is conjunctive and, strictly speaking, it is therefore unnecessary for me to consider the third element. However, I will briefly turn my attention to this element.

D. Balance of Convenience

[35] This element of the test considers which party will suffer the greater harm from granting or refusing the injunction pending a decision on the merits. In my view, this element clearly favours the Defendants. Consistent with my above analysis of irreparable harm, there is little evidence that TRREB will suffer significant harm pending adjudication of this action on the merits. If TRREB prevails at trial, it can then seek appropriate remedies against the Defendants.

[36] On the other hand, the Defendants submit that granting the injunction could bring RE Stats' business to a halt while this litigation proceeds. I note TRREB's response that this submission by the Defendants is tantamount to an admission that they are carrying on infringing activity. However, I agree with the Defendants that this argument by TRREB is not particularly responsive to the question of which party is favoured by the balance of convenience. I have already found that TRREB's allegations raise a serious issue to be tried. The balance of convenience considers which party will suffer the most harm, pending adjudication on the merits, if it is unsuccessful on the injunction motion. That analysis favours permitting the Defendants to continue to conduct their business during the period prior to trial.

[37] As TRREB has not satisfied the test for injunctive relief, this motion will be dismissed.

V. Costs

[38] Each of the parties seeks costs in the event of its success in this motion. TRREB submits that it is appropriate that costs be in the cause. The Defendants argue that costs should follow the event of this motion, in any event of the cause. They also argue that they should receive elevated costs, because TRREB's approach to this motion represents an abuse of process. The Defendants submit that it was abusive for TRREB to set this motion down for a one hour hearing during General Sittings, anticipating the Defendants requesting an adjournment, and that TRREB's objective was to force the Defendants to agree to interim injunctive relief pending later adjudication of the motion for interlocutory relief.

[39] I agree with the Defendants that costs should follow their success in this motion. However, I disagree that the record demonstrates abusive conduct by TRREB warranting an elevated costs award. The Defendants (RE Stats and Mr. Stefanescu) shall have their costs of this motion, calculated based on Column III of Tariff B, plus reasonable provable disbursements. This calculation will account for the fact the hearing of the motion proceeded on two separate days, with an adjournment in between to address an exhibit that had inadvertently been omitted from the Plaintiff's affidavit.

[40] My Order will reflect that the parties should make an effort to agree on the calculation of costs, failing which they can be assessed.

ORDER IN T-898-20

THIS COURT ORDERS that:

- a. The Plaintiff's motion for an interlocutory injunction is dismissed.
- b. The Defendants, Re Stats Inc. and Gabriel Stefanescu, are awarded costs of this motion, payable in any event of the cause. Costs shall be calculated based on Column III of Tariff B, plus reasonable provable disbursements, to be assessed if the parties cannot agree on their quantification.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-898-20

STYLE OF CAUSE: THE TORONTO REGIONAL REAL ESTATE BOARD
v RE STATS INC. operating as REDATUM, KENNETH
DECENA and GABRIEL STEFANESCU

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE WITH OTTAWA
AND HALIFAX

DATE OF HEARING: DECEMBER 1, 2020

ORDER AND REASONS: SOUTHCOTT J.

DATED: JANUARY 8, 2021

APPEARANCES:

Kevin Fisher FOR THE PLAINTIFF

John Simpson FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Gardiner Roberts LLP FOR THE PLAINTIFF

Toronto, Ontario

Shift Law Professional Association FOR THE DEFENDANTS

Toronto, Ontario