NOVA SCOTIA COURT OF APPEAL

Citation: *E.B.F. Manufacturing Ltd. v. White*, 2005 NSCA 103

Date: 20050629
Docket: CA 238176
Registry: Halifax

Between:

E.B.F. Manufacturing Limited

Appellant

v.

Eric White

Respondent

- and -

ElectroBraid Fence Limited

Intervenor

Judge:	The Honourable Justice Jamie W. S. Saunders
Application Heard:	June 23, 2005, in Halifax, Nova Scotia, In Chambers
Held:	Application for a stay of payment of royalties dismissed with costs
Counsel:	Peter McLellan, Q.C., of counsel for the appellant, EBF Manufacturing Limited and the intervenor, ElectroBraid Fence Limited David P. S. Farrar, Q.C., & Margaret Blackmore, Articled Clerk, for the respondent, Eric White

Decision:

[1] The appellant, E.B.F. Manufacturing Limited ("EBF") applied in chambers for an order pursuant to **Civil Procedure Rule** 62.10, staying both payment of the royalties at issue in EBF's appeal and the execution of the orders of Nova Scotia Supreme Court Justice Glen G. McDougall, in proceedings bearing S. H. No. 163572 dated December 7, 2004; January 7, 2005; and April 11, 2005.

[2] The appeal from the decision and various orders of McDougall, J. is scheduled to be heard before a panel of this court on Thursday, September 29, 2005.

[3] This is the second stay sought by the appellant. Its first application came on for hearing in chambers before Cromwell, J.A. on January 20, 2005. Justice Cromwell dismissed the application, with conditions, reported at 2005 NSCA 17.

[4] Other, serious developments are said to have occurred since that time, forcing the appellant to once again seek this court's protection by imposing a stay until the appeal can be heard in three months' time.

[5] By way of background I will summarize the material facts.

Background

[6] This matter arises out of a contract and business dispute between the parties to this appeal. EBF is a Nova Scotia company which manufactures and markets braided electrical fencing. ElectroBraid Fence Limited ("FENCE") is a Nova Scotia Company which markets and sells EBF's product.

[7] The respondent, Eric White, ("White") is the inventor, and holder of a patent in a product known commercially as "ElectroBraid," a braided polyester rope interwoven with conductive copper wire that is used for the rail component of a fence. When an electric current is applied to ElectroBraid, it becomes a charged electrical fence, designed to pen or contain animals.

[8] On January 29, 1988, White granted to EBF an irrevocable and exclusive licence to all patents and patents pending related to the manufacture of "braided electrical fencing."

[9] E. David Bryson ("Bryson") is the sole shareholder, officer and director of EBF and FENCE. Initially, White, White's wife Jennifer Fried, and Bryson were all shareholders in EBF. Subsequently, White exercised a shotgun provision in the shareholder agreement of EBF, and Bryson bought all of the shares of White and Fried. White commenced an action against EBF claiming unpaid royalties and seeking recission of the licence agreement. McDougall, J. dismissed the claim for recission but found that royalties were due to White on the sales of FENCE, not EBF.

[10] Following trial, by order dated January 7, 2005, McDougall, J. ordered EBF to have an independent accountant calculate the past royalties due and owing to White. EBF was obliged to make payment within 60 days of receipt of the accountant's report. The accountant's report was received March 29, 2005. Calculations revealed that with past royalties, together with additional amounts of interest, costs and disbursements, EBF owes (or will shortly owe) White a total of $241,255.87.

[11] To respond to these liabilities in the face of Justice McDougall's decision, Bryson arranged for a $200,000 line of credit, from which $176,000 has been deposited to his counsel's trust account.

[12] On January 6, 2005 EBF appealed Justice McDougall's decision. As noted, on January 20, EBF applied for a stay of that decision until the appeal could be heard. The application for a stay was dismissed by Justice Cromwell.

[13] Bryson says that at the time he launched the appeal of McDougall, J.'s decision, and brought the stay application before Justice Cromwell, neither he (nor therefore EBF or FENCE) was aware that White had incorporated a new company known as White Rhino Inc., and had begun to compete aggressively with EBF and FENCE, offering to sell a braided electrical fencing product substantially similar to or the same as ElectroBraid, in "direct and open competition" with EBF and FENCE.

[14] EBF then commenced new legal proceedings against White and White Rhino Inc. seeking damages and a permanent injunction with respect to that competition. Counsel advise that the application for injunctive relief will be heard in the Nova Scotia Supreme Court, Special Chambers, on July 15, 2005.

The Law

[15] The appellant seeks a stay of execution pursuant to **CPR** 62.10 (2), the relevant parts of which provide:

> (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rule 56 or 58 or otherwise.
>
> (3) An order under rule 61.10(2) may be granted on such terms as the Judge deems just.

[16] The jurisprudence relating to stays of execution in this province is well known. See, for example, **Ingham v. District of West Hants (Municipality)**, 2005 N.S.C.A. 90. I need not set out any extensive review of the authorities. Filing a notice of appeal does not operate as a stay of execution of the judgment from which an appeal is taken (**CPR** 62.10(1)). Whether to grant a stay is within the court's discretion (**CPR** 62.10(3)). There is a heavy burden upon the appellant to demonstrate that a stay is warranted. Justice Hallett, in the seminal case of **Purdy v. Fulton Insurance Agencies Ltd**. (1990), 100 N.S.R. (2d) 341 (C.A.) said:

> [28] In my opinion, stays of execution of judgment pending disposition of appeal should only be granted if the appeal can either:
>
> [29] (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in

> damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that he appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> [30] (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[17] Those principles have been repeatedly applied by the courts of this province. See, for example, **Westminer Canada Ltd. v. Amirault** (1993), 125 N.S.R. (2d) 173 (C.A.).

[18] As explained by the court in **Westminer** at ¶ 12:

> . . . Establishment of an arguable issue is therefore merely a threshold for consideration of the issue of irreparable harm, which is the substantive basis for granting a stay. Even if irreparable harm is established, a stay may not follow unless the applicant is able to show further that the harm a stay causes to the respondent is less than the harm the applicant would suffer upon execution of the judgment: the balance of convenience. This test can only arise after irreparable harm has been shown.

Analysis

[19] As a preliminary matter, I refused Mr. Farrar's request for leave to cross-examine the applicant Bryson on his three affidavits filed in support of the application for a stay. Counsel conceded that such would be a most unusual procedure for chambers in this court. Upon further questioning of counsel to determine the purpose and particulars of the proposed cross-examination, I declined the request, not being satisfied that it would assist me in disposing of the issues in dispute.

[20] It is common ground that the first stage in the primary test from **Fulton** has been satisfied.

[21] The respondent has filed a cross-appeal alleging error in at least nine respects. For the purposes of this decision these grounds may be generally

characterized as error in construing and applying the law of repudiation; and palpable and overriding error in assessing the facts regarding the timing of, and entitlement to royalty payments.

[22] In its appeal, EBF alleges error on the part of the trial judge in two material respects: first, by finding that in calculating the royalty payments owed by EBF to White, the gross revenue of FENCE (neither a party to the licence agreement, nor a party to the law suit) ought to be included in the calculation; and second, by ordering FENCE to make its books and records available for review by an accounting professional for the purpose of calculating the royalty payments owing to White, when FENCE was not a party to these proceedings.

[23] I am satisfied that arguable issues arise in both the appeal and the cross-appeal, which will be fully developed at the hearing on September 29, 2005.

[24] As a consequence, this application falls to be determined on either the second and third elements of the primary test, or the secondary, so-called "exceptional circumstances" test from **Fulton**.

[25] Notwithstanding the powerful arguments advanced by Mr. McLellan for the appellant, I am not persuaded that I ought to exercise my discretion by granting a stay pending the appeal.

[26] The remedy sought by the appellant is an equitable one. To be accorded such equitable relief, the applicant must come to the court with clean hands. In my opinion it has not.

[27] The rancour spawned by this bitter litigation is evident from both the tone and substance of their competing affidavits. As Mr. McLellan acknowledged in argument at the hearing, "the sad fact is that these men . . . former partners . . . are at war." This case was tried over the course of eight days in 2003. The trial judge heard numerous witnesses and was presented with voluminous documentation with respect to the relationship between the parties.

[28] In his decision filed September 10, 2004, McDougall, J. ordered that all royalty payments by EBF to White pursuant to their licence agreement were to be calculated based upon two percent of gross revenues, defined as the total sales or

revenues of all the companies' products to third party buyers. Ongoing royalty payments were to be made on a monthly basis, together with accompanying royalty statements. The royalties were to be paid within 30 days of each month's end.

[29] EBF has failed to abide by the terms of Justice McDougall's decision and orders, including the repeated failure to make royalty payments on a monthly basis and to provide a statement in connection with those payments.

[30] EBF was continually warned that it was in breach of the court's orders, and in breach of the licence agreement between the parties. Despite these repeated warnings, EBF failed to abide by the trial judge's ruling.

[31] Some five months after McDougall, J.'s decision, EBF first applied for a stay of execution, seeking an order that it not be required to proceed with a review of its books to determine the past amount of royalties owing to White. Cromwell, J.A. dismissed EBF's application.

[32] The review of the books of EBF and FENCE by Ms. Susan MacMillan of Grant Thornton proceeded in February and March, 2005. Her review determined that EBF owed White $176,703.92 for the period from September 1997 to September 30, 2004.

[33] Now the appellant again applies for a stay of proceedings, alleging that unknown to EBF at the time of the appeal and the first stay application, White had begun competing with EBF. The evidence before me shows that EBF knew of White's alleged "competition" by the end of January, 2005 at the very latest.

[34] Notwithstanding the independent accountancy review showing royalties of more than $176,000 owing to White as at September 30, 2004, the respondent has only yet received - as EBF's counsel acknowledged to me under questioning at the hearing - $22,549.

[35] It was not until late May, 2005 that counsel for the appellant wrote to White demanding that he cease and desist his alleged "illegal competition." If EBF were seriously troubled by a threat of competition from the respondent, one would think they would have voiced an immediate and vigorous protest and launched

retaliatory or pre-emptive legal action at least four months earlier. I find the appellant's assertion that its delay in reacting was prompted, by a "wait and see" strategy to assess the impact of the respondent's "competition" on FENCE'S sales, to be hardly convincing.

[36] FENCE was added as an intervenor by order of Cromwell, J.A., on February 17, 2005. In his affidavit deposed to on February 7, 2005 in support of the application to add FENCE as an intervenor, Bryson swore:

> [7] . . . I believe that all of these products provide FENCE with a competitive advantage in the marketplace.

Bryson further deposed:

> [13] FENCE is concerned that should (EBF's) appeal not be successful, its business operations will be severely affected.

[37] It was not until June 1, 2005 that counsel for the appellant were instructed to file this application for a stay, and at the same time being a new action against White and White Rhino Inc. claiming, *inter alia*, special, general, aggravated and punitive damages; an accounting of all profits; and a permanent injunction.

[38] On this record it appears to me that the appellant, at every turn, has attempted to avoid and delay the royalty payments it was ordered to make back in September, 2004. Such conduct has dirtied its hands. On that basis alone EBF's request for a stay of execution is refused.

[39] I will, however, add a few other points by way of elaboration.

[40] The appellant says it will suffer irreparable harm if it is required to pay the royalties as ordered by McDougall, J. In **R.J.R. MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311, Justices Sopinka and Cory say this about irreparable harm:

> . . . It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

> . . . The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration . . .

[41] The appellant currently owes White a total of $241,255.87 including past royalties, prejudgment interest and costs. If it pays that money and the appeal is subsequently allowed, then the harm suffered by the appellant is capable of being quantified - the harm is precisely $241,255.87.

[42] EBF makes much of the assertion that White is in breach of the licence agreement and is improperly competing with EBF. The appellant argues that if it pays White the royalties owed him, then he will use that money to fund his new company, thus further fuelling the competition which it says may ultimately force EBF out business. It will then be impossible to determine the financial consequences of the alleged breach and as such EBF claims it will sustain irreparable harm on account of the respondent's actions. In this, EBF does not limit its argument to the amount of Justice McDougall's order(s). In his affidavit Bryson refers to "damages" that EBF will suffer if White continues this competition, saying they could be as much as "$7,000,000." Bryson swears his belief that White does not have the resources to pay substantial damages.

[43] However, the damages referred to by Bryson are not those that will result from my refusing to grant a stay. The damages Bryson refers to might arise (assuming he has the evidence to prove it) on account of White's alleged breach of the licence agreement. Those potential damages are not connected to the question of irreparable harm. Those damages will be decided by a court of first instance when the new law suit commenced by EBF on June 1, 2005 is heard. Further, in swearing his belief that White does not have the resources to pay substantial damages, much of the evidence Bryson presents is comprised of old financial figures from 2001. The remaining evidence is purely speculative. In the result I am not at all persuaded that the applicant has made out a case for irreparable harm.

[44] The third essential element from the primary test in **Fulton**, requires the court to consider whether the appellant will suffer greater harm if the stay is refused, than would the respondent if the stay were granted. On this branch too, the so-called balance of convenience, EBF has failed to muster a case. The harm it alleges is not connected to its request for a stay. EBF asserts that White's competition has seriously affected the appellant's financial situation. But forcing

White's company to stop "competing" should properly be addressed in EBF's suit for damages and permanent injunctive relief.

[45] White should not be denied the royalties he earned over the seven year period from September 1997 to September 2004, simply because EBF now complains that the respondent has breached the licence agreement within the last four months. I am satisfied that the balance of convenience favours the respondent who should not be denied the fruits of his litigation at this stage in the proceedings.

[46] Finally, in the alternative, the appellant claims this court's protection under the secondary or "exceptional circumstances" branch of **Fulton**. EBF claims that the "improper competition" by White and White Rhino Inc. constitutes an "exceptional" circumstance and that it would be unjust to refuse the stay, thereby effectively funding White's improper competition which in turn then impairs EBF's capacity to pay royalties, while at the same time White continues to collect royalties from EBF. With respect, I do not agree. The overarching principle in the exercise of this court's discretionary power to grant a stay of execution must always be to seek to do justice between the parties. See, for example, **Fulton**, supra; **Amirault v. Westminer Canada Limited** [1993] N.S.J. No. 329, (C.A.); **MacPhail v. Desrosiers** [1998] N.S.J. No. 37 (C.A); and **Brown v. Brown** [1999] N.S.J. No. 20 (C.A.).

[47] It does not lie in the appellant's mouth to say that it expected to pay the royalty payments owing from 1997 - 2004, out of revenues generated over the last four months. It is now approaching five years since the action was commenced and seven and one-half years since the companies began operations. White has held a judgment obliging the appellant to account for unpaid royalties, together with prejudgment interest since September 1997. EBF currently owes the respondent $241,255.87. White is entitled to the fruits of his litigation, without delay. There is no evidence as to what he intends to do with his damages. He should not be fettered in his choices. It would not be just to allow the appellant to continue to avoid paying White his due.

[48] For all of these reasons the application for an order staying both the payment of the royalties at issue in this appeal and the execution of the orders of

Justice McDougall in proceedings bearing S. H. No. 163572, dated December 7, 2004; January 7, 2005; and April 11, 2005, is dismissed.

[49] This was a vigorously fought application with multiple affidavits and detailed written briefs filed by both parties. I award the respondent his costs of the application in the amount of $1,650 plus disbursements, in any event of the cause, and which shall be payable on or before 12:00 noon, Halifax time, Friday, September 2, 2005.

Saunders, J.A.