NOVA SCOTIA COURT OF APPEAL

Citation: ***E.B.F. Manufacturing Ltd. v. White***, 2005 NSCA 167

Date: 20051230
Docket: CA 238176
Registry: Halifax

Between:

E.B.F. Manufacturing Limited

Appellant/Respondent
by Cross-Appeal

- and -

Eric White

Respondent/Appellant
by Cross-Appeal

- and -

ElectroBraid Fence Ltd.

Intervenor

Judge(s): Bateman, Freeman & Saunders, JJ.A.

Appeal Heard: September 29, 2005, in Halifax, Nova Scotia

Held: Appeal and Cross-Appeal dismissed, as per reasons for judgment of Saunders, J.A.; Bateman & Freeman, JJ.A. concurring.

Counsel: George W. MacDonald, Q.C. & C. Peter McLellan, Q.C., Solicitors for the Appellant/Respondent by Cross-Appeal, and the Intervenor
David P. S. Farrar, Q.C. & Colin D. Piercey, Solicitors for the Respondent/Appellant by Cross-Appeal

Reasons for judgment:

[1] This appeal calls into question a trial judge's interpretation of certain contractual terms which resulted in the payment of royalties for a very profitable invention, and a finding that because the contract had not been repudiated, it remains valid and enforceable.

Background

[2] The case arises out of a contract and business dispute between the parties to this appeal. EBF Manufacturing Limited (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.

[3] 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. This dispute centres mainly upon the method of calculating royalties to White on sales of Electrobraid and related products.

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

[5] E. David Bryson ("Bryson") is the sole shareholder, officer and director of EBF and FENCE. Initially Bryson, White and White's wife Jennifer Fried, were all shareholders in EBF. Subsequently, White exercised a shotgun provision in EBF's shareholder agreement, and Bryson bought all of the shares held by White and Fried. White commenced an action against EBF claiming unpaid royalties and seeking a declaration that the licence agreement had been repudiated. McDougall, J. dismissed the claim for repudiation but found that royalties were due to White based on the sales of both FENCE and EBF.

[6] 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 owed White a total of $241,255.87.

[7] On January 6, 2005 EBF appealed the trial judge's decision. On January 20, 2005 EBF applied for a stay of that decision until this appeal could be heard. That application for a stay was dismissed by a member of this court in chambers on January 26, 2005.

[8] After discovering that White had incorporated a new company known as White Rhino Inc. and had begun to compete with EBF and FENCE, those latter two companies applied for a further stay of McDougall, J.'s decision pending the hearing of this appeal. That application for a stay was dismissed by another member of this court in chambers on June 29, 2005.

[9] In addition to the matters leading to the within appeal, the parties have commenced other proceedings, both in the Nova Scotia Supreme Court against White and White Rhino Inc. seeking damages and a permanent injunction with respect to that competition, and in the Federal Court of Canada. The issues complained of, and the status of those other proceedings need not concern us here.

[10] In appealing Justice McDougall's decision, EBF submits that he was wrong to involve FENCE by forcing that company to open its books to inspection, or requiring it to include its gross revenue when calculating royalty payments to White.

Issues

[11] The grounds of appeal in the main appeal may be succinctly stated:

> ***(i) Did the trial judge err in finding that in calculating the royalty payments owed to White by EBF, the gross revenue of FENCE was to be included?***

> (ii) ***Did the trial judge err in ordering FENCE to make its books and records available for review by an accounting professional for the purposes of calculating the royalty payments owing to White by EBF?***

[12] For his part White has cross-appealed claiming that the trial judge seriously erred in finding that the agreement had not been repudiated by the actions and conduct of the appellants, and that as a consequence their agreement continues to bind them to it.

[13] The single ground of appeal advanced in the cross-appeal may be simply stated:

> (i) ***Did the trial judge err in determining that the Licence Agreement was not repudiated, and remains "valid and enforceable"?***

[14] Whereas, to a certain extent, the issues on appeal and cross-appeal involve different matters arising from the evidence, different legal principles, and different standards of review, I propose to deal with the appeal and the cross-appeal separately in this judgment.

<u>THE APPEAL</u>

<u>Standard of Review</u>

[15] In **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, the Supreme Court of Canada considered the standard of review on appeal from a trial court. Iacobucci and Major J.J., writing for the majority, summarized the standard as follows:

> (a) The standard of review for a question of law is one of correctness (¶ 8);
>
> (b) The standard of review for findings of fact is one of "palpable and overriding error," meaning that the error must be readily or plainly seen (¶ 10);

(c) Factual inferences from underlying findings of fact are subject to a "palpably wrong" test as well (¶ 25);

(d) The standard of review for mixed questions of fact and law can vary depending on the circumstances. An incorrect application of the legal standard can expose the mixed question of fact and law to a correctness standard of review (¶ 31).

[16] The interpretation of an agreement is a matter of law. The standard for appellate review is one of correctness. Here the trial judge was obliged to apply proper legal principles when interpreting the contract between the parties. However, contractual agreements are not examined in a vacuum. As part of the exercise, the trial judge was required to carefully review the evidence and make certain findings of fact. When considering the trial judge's reasons while he was in the fact finding mode, the standard for appellate review is one of "palpable and overriding error." The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice McDougall's findings of fact, and the inferences he drew from those facts. **Housen**, supra; **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401, 2005 S.C.C. 25; and **McPhee v. Gwynne-Timothy** (2005) N.S.C.A. 80.

[17] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, **Housen**, supra, at ¶ 1 - 5. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but be "overriding and determinative." **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at ¶ 78 and 80.

Issue No. 1

(i) Did the trial judge err in finding that in calculating the royalty payments owed to White by EBF, the gross revenue of FENCE is to be included?

[18] At the hearing before us counsel for EBF characterized the Licence Agreement as "fundamentally important to the case," the principal document that "had to be interpreted" by the trial judge, and that it was the "very reason for this lawsuit" since it "forms the basis of the royalties payable to White." EBF says the entire agreement between the parties is contained in the Licence Agreement and therefore it was improper for McDougall, J. to look outside the document in deciding its meaning.

[19] In complaining that the judge erred when he referred to extrinsic evidence in order to interpret the agreement between the parties, EBF was especially critical of Justice McDougall for relying upon the evidence of Mr. Douglas Reid, FCA, the regional managing partner of the accounting firm KPMG, and an opinion Mr. Reid had prepared for Bryson at Bryson's request dated November 12, 1999. Counsel criticized what they described as the "musings of Mr. Reid" and says his evidence ought not to have been received, let alone relied upon, since no attempt had been made to qualify Mr. Reid to present expert evidence at trial.

[20] The thrust of EBF's complaint is that the License Agreement was clear on its face and that it ought to have been given its plain meaning by the trial judge. The appellant says there was no need for the trial judge to stray beyond the text of the document in order to interpret its terms. Specifically, counsel for the appellant state in their factum:

> 28. The plain words of the License Agreement provide that a royalty is to be paid to White equal to 2% of the Company's gross revenues. The recitals to the License Agreement refer to the Shareholders Agreement and in particular article 4.02 which refers to the granting by White of an exclusive license to the Company. The Company is clearly EBF.

. . .

> 30. The Learned Trial Judge relied on a letter written by Mr. Reid some two years after the License Agreement was executed to amend the unambiguous provisions of the License Agreement. [Underlining mine]

Counsel then refer to leading authorities for what are said to be the rare and special circumstances which limit the application of the parol evidence rule and the admittance of extrinsic evidence, none of which - it is argued - arose here.

[21] With respect, it does not behoove the appellant to now allege, on appeal, that the trial judge erred in applying the parol evidence rule or in looking to extrinsic evidence to interpret the agreement between the parties, or in considering and attaching some weight to the evidence of Mr. Reid, when he was invited by EBF's trial lawyer to do precisely that during final arguments at the end of the trial.

[22] While not part of the appeal book, we as a panel or any member of the public for that matter, have access to submissions made by counsel in open court as part of the public record. Often considerable insight is gleaned by comparing the manner in which the theories of the parties were presented at trial or the way in which particular issues were (if at all) put before the trial judge for resolution, to the way in which the case is argued on appeal. This exercise can be especially illuminating where, as here, different counsel take the matter on appeal than those who acted at trial.

[23] In his final arguments following trial, EBF's then lawyer, properly, I would suggest, acknowledged ambiguity in the License Agreement by encouraging Justice McDougall to look beyond the document in order to interpret the agreement and ascertain what the parties to it had decided. In that same submission EBF's trial counsel specifically referred to Mr. Reid and his *viva voce* and documentary evidence, commending it to the attention of the trial judge as being credible and independent and - so counsel argued - tending to corroborate Bryson's version of events. For example, at one point in his submissions, counsel said in part:

> . . . The first question which I think is one of the most important questions is when was the royalty payment to commence and as you know, Mr. Bryson's testimony is that it was to commence at the time that the patent was issued. Mr. White's testimony was that it was to start being payable as a monthly payment on

> a monthly basis starting in October of 1997. Now if you look at the License Agreement itself . . . what does this agreement say about timing of payment? Well, Ms. Brennan in her letter to the parties when she sent the draft, the agreement doesn't have a date. Mr. Bryson says . . . that clearly royalty payments are not to start until there's a patent because there is to be a royalty in respect of each patent. And Mr. White, of course, takes the view that notwithstanding the silence of the agreement, there were discussions between the parties to say it was going to be on a monthly basis. Well, I think, My Lord, that the licensing agreement is vague on the point . . . if it was specific it would have had a clause that says royalty payments are to be made on a monthly basis . . . It could have said royalty payments are to be commenced upon the issuance of a patent . . . <u>So the licensing agreement is vague on the point which means that you do need to look beyond the licensing agreement to see what the parties had decided</u>. And I think when you look at what was happening, you look at the objective evidence, you try to assess what the reasonable parties would have been thinking at the time. . . . <u>this interpretation that royalties were not to be paid until after the patent was issued, it wasn't something new that Mr. Bryson came up with this legal maneuvering that started occurring in 2000. This wasn't a change in position. This was the view that he held throughout and I can illustrate that for you by talking about the evidence of Doug Reid. Mr. Reid is obviously a professional. He is independent of the parties. His evidence is certainly credible and it is also supported by documentation</u> . . .

> (Underlining mine)

[24] Having been urged by the appellant's trial counsel to look beyond the four corners of the License Agreement, and in interpreting the document take into account extrinsic evidence in order to fathom what the parties had decided, the appellant cannot now suggest that the same trial judge erred by applying the parol evidence rule and by looking to other extrinsic evidence so as to give meaning to any ambiguity in the same agreement.

[25] In any event - and quite apart from this background to the appellant's contradictory submissions - I see no error in the manner in which he interpreted the agreement between the parties. It is vague, in certain respects. As Ms. Brennan, the lawyer who drafted it in the first place acknowledged in her file materials and correspondence to her clients, she was not a patent lawyer, and the date for commencement of royalty payments had not been stipulated. This was one of the principal questions put before the trial judge in this litigation to resolve. He had no choice but to look beyond the document. To interpret the agreement he

had every reason to consider evidence beyond its text. He made no error in principle in deciding to do so. That decision was correct.

[26] The question then becomes whether any of the factual findings made by the trial judge reveal palpable and overriding error, such that his determinations with respect to the calculation of royalties, and authorizing a review of FENCE's accounting records for the purposes of calculating royalties, ought to be reversed.

[27] In his decision, McDougall, J. was certainly alert to the issues that now give rise to this appeal. He carefully reviewed and summarized the material evidence that had been presented over the course of the eight day trial and then, as he was bound to do, made certain critical findings leading ultimately to his disposition and order. He said in part:

> [15] This license agreement dated the 29th day of January, 1998 was signed by White, Fried and Bryson both in their personal capacity and on behalf of EBFML It is interesting to note that the exclusive license was granted only to EBFML. However, on the same day the shareholders' agreement was signed -- September 4, 1997 -- White, Fried and Bryson had also signed another one-page agreement that made reference to clause 4.02 of the shareholders' agreement. In the second paragraph of this one-page agreement it was stated:
>
> > In that event we agree promptly to form another company, with identical voting common shares as EBF Manufacturing Limited, to which Eric White will grant a similar exclusive license.
>
> The event referred to was the insolvency of EBFML or any other company that might possibly be granted such an exclusive license in the event EBFML actually did become insolvent.
>
> [16] The license agreement was drafted by a lawyer retained by EBFML. In the cover letter sent to the three principals of EBFML enclosing a draft of the license agreement counsel wisely suggested two things:
>
> > ... As discussed with you, I do not have experience with patents and it would be prudent to have the document reviewed by your patent lawyer. Also, you may want to add further details - for

> example, paragraph 4 does not specify when royalty payments are to be made, including the commencement date for such payments.

One other interesting comment in this letter (which was tendered as an exhibit without calling the author) is:

> My understanding is that all of the equipment is to be owned by E.B.F. (by E.B.F. she meant E.B.F. Manufacturing Limited - my comment) and that Electrobraid (by Electrobraid she meant ElectroBraid Fence Limited - my comment) simply acts as an agent on behalf of E.B.F. I have prepared the document on this basis.

[17] The manner in which royalty payments were to be calculated and the timing of those payments, formed the basis of this law suit.

. . .

ISSUES TO BE DECIDED

. . .

(2) Based on the agreements between the parties (both the shareholders' agreement and the license agreement) when and how should royalties be calculated?

. . .

[23] Although the term "gross revenues" was not defined, there is nothing to suggest that it should not be given its ordinary accounting definition. This was even suggested to Mr. E.C. Harris, Q.C. in correspondence sent to him by Mr. Douglas Reid, C.A. on the 12th day of November 1999. That definition states:

> 'Gross revenues' represents the total sales, net of sales discounts, of the Company. They will be reported on the financial statements of the Company as 'sales', or 'revenue'.
>
> The corporate structure that the Company currently operates within raises an issue. In our view it is reasonable that the agreements contemplated 'gross revenues' to be sales to the consumer, or third party sales. <u>The current management structure sees the Company selling the product to Electrobraid Fence Limited, a company with identical ownership to the Company, at a price that may not be representative of the sales made to the third party purchaser</u>.
>
> <u>Therefore, we believe the parties to the agreement should clarify that 'gross revenues' be the gross sales, net of sales discounts, as reported by Electrobraid Fence Limited, using generally accepted accounting principles</u>.

[24] Both Messrs. Harris and Reid had been called upon at one time or another to provide professional legal and/or accounting advice to the companies and its shareholders.

[25] It is interesting to note that the <u>lawyer who had previously drafted the license agreement identified some shortcomings in the agreement</u> related to the timing of royalty payments but she did not express any concerns about the method of calculation. <u>It is 2% of gross revenues defined as the total sales or revenue to third party buyers. If the sale was made either by EBFML or ElectroBraid Fence directly to the end user or discounted to an agent of the companies then that is the amount that should be used in calculating gross revenues. It should not be some potentially arbitrary transfer price from EBFML to ElectroBraid Fence. Sales to end-users or the discounted price offered to company agents, as long as it reflects fair market value, should not be open to manipulation that could potentially harm the patent(s) owner</u>.

[26] . . . <u>In order to determine the gross revenues of the companies for purposes of calculating the total amount of royalties owing to Mr. White, EBFML and ElectroBraid Fence will be required to hire a qualified accounting professional</u> to review the financial records of the companies since they began operations in or about September of 1997. <u>All sales of the companies products to end users or the discounted prices given to agents of the companies, for both</u>

> patented and patent pending products, should be included in the calculation of this amount.
>
> . . .
>
> [41] I also earlier indicated that a proper review of the companies' financial records should be conducted in order to calculate total gross revenues from the time the companies first began operations. If the parties cannot agree on who to appoint for this purpose, the court will select a qualified individual or firm after hearing further submissions from counsel. The process of selecting the appropriate individual or firm should be completed within 60 days of the date of this decision. White is also entitled to interest on all unpaid royalties at a rate equal to the average interest that EBFML would have had to pay on any monies borrowed from its bank during the period from its inception in September, 1997 up to the present day. Interest is not to be compounded.
>
> . . .
>
> [43] All future royalty payments should be paid by EBFML/ElectroBraid Fence to White on a monthly basis in the manner described herein unless the parties mutually agree to some other arrangement.

(Underlining mine)

[28] There was ample evidence to support the interpretation and disposition of the trial judge. In no way can it be said that his findings are the result of palpable and overriding error. I will review, in some detail, the evidence supportive of the judge's interpretation.

[29] The first formal written contract that makes reference to royalties is the Shareholders' Agreement of September 4, 1997. The preamble specifically states that EBF was incorporated for the purpose of manufacturing and marketing ElectroBraid Fence products. A second company, FENCE, was incorporated simultaneously and with the same share ownership structure as EBF, to market the

products. As the business developed, EBF did not “market” products to third parties but “transferred” ElectroBraid to FENCE at a wholesale price.

[30] Clause 4.01 of the Shareholders’ Agreement states that the nature of the business of the company shall consist of manufacturing and selling braided fencing and associated products. FENCE was to be responsible for selling associated products.

[31] In September 1997, for whatever reason, the parties never turned their minds to drafting a separate shareholders’ agreement for FENCE. Therefore, by preparing the Shareholders’ Agreement, it cannot be said that the parties intended to clearly delineate the roles of EBF as manufacturer and FENCE as marketer. At the time the Shareholders’ Agreement was prepared, as I have already pointed out, the parties were dealing, generally, with the manufacturing and distribution of ElectroBraid. As matters developed they incorporated FENCE to do the end selling. For whatever reason the parties never turned their minds to drafting a separate shareholders’ agreement for FENCE. The fact that the agreement that was prepared does not refer to FENCE, cannot be interpreted to mean that the royalties were payable only on EBF’s “sales.”

[32] In the fall of 1998, more than one year after the preparation of the Shareholders’ Agreement, the parties signed a letter agreement indicating that the Shareholders’ Agreement for EBF applied equally to FENCE. A separate formal written contract with distinct terms was not prepared for FENCE.

[33] White argued that royalties should be calculated based on sales to arm’s length third parties, whether they be wholesalers, end users, fence installers, sales agents, sales partners or whatever. This strikes me as a commercially reasonable position to have taken. Evidently, so did the trial judge.

[34] Bryson argued that royalties should be calculated based on a wholesale transfer price between two companies with the same sole shareholder, officer and director. Obviously the potential exists to manipulate the transfer price between the two, thereby disentitling White from a royalty at fair market value. In my view

this is not commercially reasonable nor, according to the trial judge's assessment of the evidence, in accordance with what the parties intended. As he determined, the royalty should be based upon sales to third parties thereby subject to the demands of the marketplace and "not open to manipulation that could potentially harm the patent(s) owner."

[35] The behaviour of EBF, FENCE and Bryson subsequent to the executing of the Agreement clearly support the trial judge's finding that Bryson's understanding (as well as White's) was that the royalties be based on sales to third parties by FENCE. For example, the fiscal years ended September 30, 1999 and September 30, 2000 show the royalties were carried on the books of FENCE, not EBF. The two royalty cheques of May and June of 1999, in the amount of $10,000 each, (signed by Bryson well before the involvement of KPMG) were both drawn on the account of FENCE. If FENCE had no responsibility to pay royalties, why were cheques for royalties being drawn on the account of FENCE?

[36] Similarly, the January 25, 2002 letter from the appellant's trial counsel enclosed two cheques for royalties, drawn on the account of FENCE, not EBF.

[37] The management and ownership structure of both EBF and FENCE is identical. EBF sells *exclusively* to FENCE. Bryson sets the price at which EBF sells ElectroBriad to FENCE. Surely the parties did not intend that White would receive royalties based only on the sales from EBF to FENCE. For example, Bryson could sell ElectroBriad FENCE to FENCE for $1, and yet set the price for the consumer at $200. White would only receive royalties on that $1. This is not only inconsistent with the evidence of the parties' intention, it is not commercially reasonable.

[38] The appellant argues that "Company" in the License Agreement is clearly EBF. There is no definition of the term "Company" in the January 29, 1998 License Agreement. "Company" is defined in the September 4, 1997 Shareholders' Agreement to mean EBF. At no time was a separate shareholders' agreement prepared with respect to FENCE. Again the parties subsequently

agreed in September 1998 that the Shareholders' Agreement for EBF would apply equally to FENCE.

[39] EBF emphasizes that the License Agreement does not name FENCE as a party thereto. However, one cannot ignore the fact that Bryson is personally named as a party to the document. In other words, Bryson is bound thereby, and cannot circumvent the terms of the License Agreement. Bryson has 100% control of both companies, and as the trial judge inferred, he cannot be permitted to circumvent a commercially reasonable interpretation of the License Agreement by paying royalties only on a wholesale transfer price between EBF and FENCE, a price which is entirely within his control.

[40] Further, all parties testified that the basic agreement between them with respect to royalties had been concluded by June 30, 1997. In particular, Bryson agreed on cross-examination that the Shareholders' Agreement and License Agreement did not change any of the terms of the agreement on royalties that had been concluded by the parties by June 30, 1997. In June 1997, the parties were only premising their discussions on the February 1997 Business Plan of EBF as prepared by White and Fried without reference or regard to the existence of FENCE.

[41] In summary, there was ample evidence in the record to support the trial judge's findings that although FENCE:

> . . . never became party to the shareholders' agreement, nor was a separate shareholders' agreement even created for it, its share structure mirrored that of EBF . . . FENCE would be used to sell the product and act as a buffer between "EBF and its customers". This would be particularly important when the company began marketing its products in the United States . . . as a shield against any law suits that might arise in what the shareholders perceive to be a more litigious market. Although sales of "EBF" products were made by both companies most of the sale to end-users were eventually funneled through "FENCE".

[42] In **Investors Compensation Scheme Ltd. v. West Bromwich Building Society**, [1998] 1 W.L.R. 896 (H.L.), at page 913, Lord Hoffman summarises the principles of interpretation of a written contract. He says:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> . . .
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

[43] In **Kentucky Fried Chicken Canada v. Scott's Food Services Inc.**, 1998 CarswellOnt 4170 (C.A.) at ¶ 27, the Court states:

> Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity [FN1]. Rather, the document should be construed in accordance with sound commercial principles and good business sense [FN2]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

[44] I concur with those observations and statement of principles. In my view they were clearly in the mind of the trial judge in disposing of this aspect of the case as he did. I see no error in the manner in which he handled it, and would dismiss this ground of appeal.

<u>Issue No. 2</u>

(ii) Did the trial judge err in ordering FENCE to make its books and records available for review by an accounting professional for the purposes of calculating the royalty payments owing to White by EBF?

[45] Here EBF and FENCE argue that in ordering that FENCE's gross revenue be included in the calculation of royalties to be paid to White, the judge erred in law by not recognizing that FENCE was not a party to the agreement, or the litigation, and that being a separate and distinct legal entity, the judge was wrong to lift the corporate veil so as to grant White the relief he sought.

[46] I disagree. First, I do not accept the appellant's characterization that FENCE is not a party to either the Shareholders' Agreement or the License Agreement. As previously noted, "Company" is defined in the Shareholders' Agreement to be EBF, which in turn is incorporated into the License Agreement. However, the parties confirmed by way of a letter agreement dated September 29, 1998 that the Shareholders' Agreement applied equally to FENCE. Thus, on these facts, FENCE ought to be considered a party to both the Shareholders' Agreement and the License Agreement.

[47] In any event and even assuming that FENCE is not a party, nor intended to be a party to the agreements, it is my opinion that it was appropriate for the trial judge in these unique circumstances to lift the corporate veil, and make the order he did.

[48] The concept that corporations are separate legal entities, despite the fact they may have the same shareholders, has been fundamental to the common law since the House of Lords decision in **Salomon v. Salomon & Co.**, [1897] A.C. 22 (H.L.). A more recent commentary on this principle can be found in the Supreme Court of Canada decision in **Kosmopoulos v. Constitution Insurance Co. of Canada**, [1987] 1 S.C.R. 2, where Wilson, J. stated at ¶ 12:

> As a general rule a corporation is a legal entity distinct from its shareholders: Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. <u>The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue</u>": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in American Indemnity Co. v. Southern Missionary College *supra,* cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.

[Underlining mine]

[49] At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law.

[50] In **Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners**, [1969] 1 W.L.R. 1241 (C.A.) Lord Denning declared at page 1255:

> . . . The doctrine laid down in Salomon v. Salomon & Co. [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. . . .

[51] In **Le Car GmbH v. Dusty Roads Holdings Ltd.**, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:

(a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";

(b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and

(c) where the corporation is merely acting as the controlling shareholder's agent.

[52] Courts will often pierce the corporate veil where the company is an agent or the mere alter-ego of the controlling shareholder or parent company. There was certainly evidence before McDougall, J. to support a conclusion that FENCE was merely the alter-ego of Bryson and EBF. In **Aluminum Co. of Canada v. Toronto (City)**, 1944 CarswellOnt 71 (S.C.C.), at ¶ 15-16, Rand, J., referred to the Court's earlier decision in the case of **Toronto v. Famous Players Canadian Corp.**, [1936] 2 D.L.R. 129 as having:

> 15 . . . settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency.
>
> . . .
>
> 16 The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can

> be said that the latter has, in the true sense of the expression, no independent functioning of its own.

[53] EBF and FENCE are inextricably linked. EBF is the manufacturing arm of the enterprise and FENCE is the distributing arm. In his testimony Bryson agreed that FENCE was a “mere sales station.” He agreed it had no employees, very little assets other than its inventory, and limited capitalization.

[54] The evidence at trial established that Bryson is the sole shareholder, director and officer of both companies. When FENCE was created, it was decided that EBF would own all the business assets and FENCE would be used to sell the product and act as a buffer between EBF and its customers. FENCE has no independent functioning. The directing mind of EBF (Bryson) penetrates the corporate facade so that FENCE becomes the agent of EBF. Indeed in her covering letter referring to the License Agreement, Ms. Marcia Brennan, the parties’ corporate lawyer who drafted the documentation, states that FENCE is an agent of EBF and that she drafted the License Agreement on that basis.

[55] EBF manufactures ElectroBraid Fence. Its only customer is FENCE, a company controlled and operated by the same individual. Though FENCE does sell other products other than ElectroBraid, these products are all part of the ElectroBraid fencing system. Without ElectroBraid, FENCE would not be able to function. FENCE is a mere agent of EBF.

[56] In my opinion all of these unique circumstances confirm the soundness of the trial judge’s decision. I see no error in his treating EBF and FENCE - for the purpose of calculating the royalties to which White was entitled - as being, essentially, one and the same thing. More fundamentally, however, the appellant’s and intervenor’s submission that the judge erred in failing to separate the two corporate entities ignores the position asserted on their behalves at trial. A key issue is whether the royalties would be calculated on the “sales” to EBF or those of FENCE. At no time did the appellant suggest to the trial judge that FENCE should be made a formal party to the action, or that FENCE was not properly before the court, or that he was not entitled to conclude that royalties be calculated

on the sales of FENCE. Throughout the trial all parties conducted the proceeding as if FENCE and EBF were parties to the litigation.

[57] Lastly, the appellant has argued that the trial judge erred by considering Mr. Reid's interpretation of gross revenues. Whether or not Mr. Reid was qualified as an "expert" at trial is irrelevant, as Mr. Reid's "opinion" is a commercially reasonable interpretation that the agreements between the parties can bear.

[58] The appellant now seeks to distance itself from the opinion of Mr. Reid, when that opinion was sought at the behest of Bryson. Bryson was apparently satisfied with Mr. Reid's opinion for a period of time, since - as I have already explained - he reflected royalties on the financial statements of FENCE, and drew the payments from the accounts of FENCE. In these circumstances I see no error on the part of the trial judge in directing that EBF and FENCE make their corporate financial records available for inspection "in order to calculate total gross revenues from the time the companies first began operations" and thereby determine the amount of royalties to which White was entitled. I would dismiss this ground of appeal.

Disposition: The Appeal

[59] For all of these reasons I see no error on the part of the trial judge in finding that in order to calculate the royalties owed to White by EBF the gross revenue of FENCE ought to be included, or in compelling FENCE to make its records available for review to complete that calculation. I would dismiss the appeal with costs to the respondent, White.

THE CROSS-APPEAL

Standard of Review

[60] Here too there are mixed standards of review to be applied. When deciding, as he did, that the License Agreement had not been repudiated, the trial judge was

obliged to apply proper legal principles. In that sense the standard for our review on appeal, to that segment of his decision making, is one of correctness. However, in arriving at that conclusion he was also obliged to carefully consider the evidence and make certain key findings. Such findings are reviewable on a palpable and overriding error basis, as discussed earlier.

Analysis

Issue No. 1: ***Did the trial judge err in determining that the License Agreement was not repudiated?***

[61] White contends that the refusal of EBF to pay royalties resulted in a repudiation of the licence agreement. He attacks the trial judge's dismissal of his cross-appeal on a number of fronts. Owing to their variety and specificity I feel obliged to address them in some detail.

[62] White says the trial judge erred in finding that there had never been a denial by EBF of his entitlement to receipt of eventual royalties. In his decision McDougall, J. said:

> [35] Based on the evidence presented before me I do not find that there has been a repudiation of the agreement. The parties might not have agreed on exactly when royalty payments should have begun but clearly there has never been a denial of White's entitlement to receipt of eventual payment.
>
> [Underlining mine]

[63] White argues that EBF took the position, on February 7, 2000, in a letter from its lawyer on that date, that royalties were not yet due and owing. This - so it is argued - constituted a denial of White's entitlement to the receipt of eventual royalties and it is at this point that White says the repudiation of the agreement "crystalized."

[64] I share the trial judge's view that some significance ought to be attached to the fact that White's plea that EBF had repudiated the contract was not advanced in his first statement of claim filed in May, 2000. At that point in the litigation - notwithstanding the fact that this pleading was filed some three months after the repudiation is said to have taken place - the claim was restricted to royalties said to be owing for patents and patents pending invented by White and utilized by EBF.

[65] In the alternative White says that "the repudiation crystalized when EBF defended the action in its first defence filed May 30, 2000." I note parenthetically that the words "repudiate" or "repudiation" do not appear in either pleading at this stage of the litigation.

[66] The defence put forward by EBF at that time was that under the terms of their agreements, royalties to White would not commence unless and until he was granted a patent related to the technologies described in those agreements. Thus, EBF pled that since White had not obtained any such patents, he was not entitled to any royalty payments. EBF counterclaimed for damages said to have been caused by White's conduct in delaying and frustrating all attempts to secure patent protection.

[67] It wasn't until White filed an amended statement of claim on March 28, 2001 that any relief for repudiation was asserted. White alleged, *inter alia*:

> 13. As a result of the failure of EBF Manufacturing Limited to make payments pursuant to the Licence Agreement, EBF Manufacturing Limited has repudiated the agreement and, as of May 3, 2000, was no longer entitled to a licence for the use of certain patents and patents pending owned by White. EBF Manufacturing Limited has continued to manufacture and distribute its products using White's patents and patents pending without permission to use White's intellectual property.
>
> . . .
>
> 15. White therefore claims:

. . .

iv. a declaration that the Licence Agreement has been repudiated by EBF Manufacturing Limited, is now null and void and White is relieved from any further obligations thereunder;

[Underlining in original]

[68] EBF filed an amended defence and counterclaim on June 6, 2001. In response to White's claim of repudiation, EBF responded in particular as follows:

6. The Plaintiff knew or ought to have known that the Defendant interpreted the Agreements as not requiring payment to the Plaintiff prior to granting of a patent. The Plaintiff was in agreement or acquiesced to the non-payment by the Defendant pursuant to the Agreements. In the alternative, the Plaintiff engaged in conduct which reasonably led the Defendant to believe that he was acquiescing to the non-payment of royalties pursuant to the Agreements. In the event that the Agreements entitled the Plaintiff to payment prior to granting of a patent, which is not admitted but specifically denied, then the Plaintiff is estopped from relying on such non-payment as a breach of the Agreements.

[Underlining in original]

[69] White also complains that the judge erred in finding that White "did very little to demand payment of what he claims is being withheld from him." On the contrary, the appellant by cross-appeal says he asked for his first royalty payment in December 1997 (not December 1998 as found by the judge). He argues that the evidence of both Bryson and himself was that a $5,000 payment was made to him in December 1997, and that Bryson simply disagreed that this sum constituted a royalty payment. White argues that the evidence given by Mr. Currie, a CGA hired by Bryson as the company's accountant provided independent corroboration of White's claim. In conducting his review of the books to reconcile business expenses and royalty payments Mr. Currie prepared a memo dated April 21, 1999 in which he identified one royalty payment of *$5,000 from April 30, 1998 or before*. Mr. Currie testified that he ascertained this to be a royalty payment from his review of the books of the companies. Mr. Currie's evidence was not challenged at trial. Thus, in the circumstances, White argues that the trial judge

made a palpable and overriding error of fact in concluding that White's first demand for royalties occurred in December 1998 as opposed to 1997.

[70] Further, while it is true that he did not place his demands in writing, White testified that he continually made verbal demands throughout late 1998 and early 1999 for payment of his royalties. The constant excuse he received from Bryson was that royalties could not be paid as the books had not been brought up to date.

[71] White says his actions in first demanding royalty payments in December 1997 and then continuously throughout 1999 cannot be fairly characterized (as did the judge) as doing "very little to demand payment."

[72] White says the judge's finding that a "misunderstanding" had developed is seriously in error. The evidence is compelling - White argues - that this is not a case where there had been a misunderstanding or confusion between the parties. Rather, Bryson knew that royalties were due and owing, but simply conjured up excuses to avoid paying.

[73] Whatever the interpretation - whether a failure to demand, or a refusal to pay - it is clear that EBF failed to pay any royalties between June 1999 and March 2001. Although not put forward as an alternative argument, White says that this non-payment constituted a fundamental breach entitling him to terminate the agreement. **Anne of Green Gables Licencing Authority Inc. v. Avonlea Traditions Inc.**, [2000] O.J. No. 740 (S.C.); and **Neostyle Envelope Co. v. Barber-Ellis Ltd.**, [1914] O.J. No. 598 (S.C.A.D.).

[74] Repudiation has two parts: an unambiguous demonstration by one party that it intends to default, and a clearly communicated acceptance of that default by the innocent party. If either element is missing, repudiation has not been made out. It is a well recognized principle that if a repudiation has occurred, the non-defaulting party must indicate acceptance of that repudiation in order to treat the contract as at an end. Thus, if there had been a repudiation of the agreement by EBF, White was required to indicate his acceptance of that repudiation in order to treat their

contract as terminated. **Canada Egg Products Ltd. v. Canadian Doughnut Co.**, [1955] S.C.R. 398.

[75] White argues that if one were to conclude that the correspondence between the parties or subsequently between their counsel was insufficient to declare White's acceptance of the repudiation by EBF, then relying upon the Supreme Court of Canada's decision in **Canada Egg**, supra, service of the statement of claim may be sufficient notice of the election to treat the contract as at an end. White argues that the trial judge erred in failing to consider **Canada Egg**, supra, and whether service of the statement of claim in this case constituted sufficient notice of White's election to treat the contract as at an end.

[76] Finally, White says the trial judge seriously erred in looking at factors said to be entirely irrelevant when concluding that Bryson's actions did not constitute repudiation. McDougall, J. said:

> [40] To order the declarative relief now being sought by White would, in effect, put EBF . . . and . . . Fence out of business. This would strip Bryson of any benefit he should have received under the shot-gun provisions of the shareholders' agreement which was used to buy out White and Fried's shares in the companies. . . . If EBF . . . could not rely on the exclusive license it held over White's patent(s), what would it manufacture and sell? For the reasons previously stated I do not think the actions of Bryson as president of EBF . . . amounted to a repudiation of the license agreement. It is therefore still valid and enforceable.

These factors clearly motivated the judge in his conclusion that Bryson's actions as president of EBF did not amount to a repudiation. However, White argues that such considerations were entirely irrelevant to decide - as a matter of law, whether a repudiation had occurred, and if it had, with what consequence.

[77] In summary, and regardless of how one characterizes his actions in 1999, White says formal demands for payment were clearly made in writing once his counsel had been retained, as early as February 2000. Whatever the case, White says a formal demand for payment of royalties was not required. White says the judge erred in faulting him for a "failure" to adequately demand payment. The

agreement stipulated that future royalties should be paid on a monthly basis - and that in fact is what the trial judge found. Consequently it was not necessary for White to demand payment of his royalties, and the non-payment thereof was sufficient to effect a repudiation.

[78] In support of his submissions White refers to ***The Law of Contracts, S. M. Waddams, 4th ed. (1999, Canada Law Book: Toronto)*** the following appears:

> [599] Another question is whether the party not in breach is required to warn the other before terminating. As a general rule performance is due without request. The debtor must seek out the creditor.[73] Consequently, if performance is substantially defective, the other party may terminate, even if ignorant of the deficiency at the time of termination.[74] It may, however, be a harsh result for a party in breach to lose the whole benefit of the contract, and in some cases a duty to warn has evolved. A buyer of goods is obliged, if no delivery date is fixed, to take delivery within a reasonable time, but a seller is not allowed quietly to let a reasonable time elapse and then terminate without warning.[75] The seller must give notice requiring the buyer to take delivery before terminating. Where, under a land sale agreement, no closing date is fixed, or the original date has passed, either party may fix a new closing date by giving reasonable notice.[76] Where a condition is waived, the party waiving it may resume strict rights, but only on reasonable notice.[77] Similarly, where an employee might not realize that work is seriously deficient, an employer must give a warning before summary dismissal.[78] These cases appear to be instances of a limited right to "cure" defective performance, a right more widely recognized in American jurisdictions.[79]

(Citations omitted)

[79] In response, EBF says there is no merit to White's plethora of complaints. The trial judge referred to and properly applied the leading jurisprudence on the subject of repudiation and recognized the heavy burden upon a party claiming such a result. White is really attempting to retry the case and replace the judge's finding that the licence agreement remains "valid and unenforceable," with a finding that EBF's conduct was so egregious that it amounted to a repudiation of the agreement by conduct as of May 3, 2000.

[80] In my opinion the cases relied upon by White are distinguishable in that there, the breaching party evinced a clear and continuing unwillingness to be bound by the terms of their agreements, whereas in this case, nothing in the factual findings of McDougall, J. suggest that EBF or Bryson ever reached that level of non-compliance. In fact the trial judge found that the areas which gave rise to the various disputes between Messrs. White and Bryson were largely unprovided for in the agreement between them, and that there was a legitimate dispute as to interpretation. The trial judge found as a fact that the timing and calculation of royalties were left unprovided for in the agreement, and that they were topics of legitimate dispute between the parties. To find that a contract had been repudiated, owing to a legitimate disagreement over interpretation would, in my opinion, be a wholly erroneous conclusion.

[81] Further, as White acknowledges in his submissions, even if there had been such a serious breach as to justify repudiation, that would also require a finding that White had signalled his adoption or acceptance of a repudiation. Relying upon **Canada Egg**, supra, White argues that such an "acceptance" ought to be inferred as found in the service of the originating notice (action) and statement of claim he filed in May, 2000. In my opinion, **Canada Egg**, supra, does not help the cross-appellant's position.

[82] The circumstances in that case were entirely different. The matter arose following a dispute between the parties under a contract providing for the delivery of a substantial quantity of powdered egg yolk and powdered egg albumen. The respondent brought an action against the appellant for a declaration that a valid contract had been entered into between the parties, and claiming damages for an anticipatory repudiation thereof. In February 1951 the appellant agreed to sell and the respondent agreed to buy one hundred thousand pounds of powdered egg yolk to be delivered on July 15, 1951 and July 31, 1951, and ten thousand pounds of powdered egg albumen, delivery to be made as required to March 31, 1952. About the middle of April, the appellant, either because of an inability to buy sufficient eggs, or because it could not purchase eggs at a suitable price, decided it would not carry out its obligations under the contract. The appellant's representatives intimated this likelihood to the respondent during some preliminary discussions and finally on May 7, 1951 declared to the respondent that a valid contract had not been concluded, and that in any event the appellant could

not make its deliveries as required. The parties continued to hold without prejudice discussions in May and June 1951 in an attempt to reach an amicable settlement. Ultimately the respondent determined that future negotiations with the appellant would be futile and that it would, as in fact it did, go to the marketplace and buy whatever egg products it could find. However, the respondent did not make known to the appellant, either expressly or by appropriate conduct, that it did not intend to negotiate further, or to go into the market. The respondent issued its statement of claim on June 25, 1951.

[83] Among the several issues to be determined by the Court, the one most central to this case, was whether on June 25, 1951, when the respondent issued its writ, it was open to the respondent to adopt the appellant's repudiation; and if so, did the issuance of the writ on that date constitute an adoption? When Kerwin, C.J.C., declared at ¶ 6:

> Once it is found that the repudiation was still alive, the respondent was not obliged to say in so many words, orally or in writing, that it treated the repudiation as putting an end to the contract, but it was sufficient to bring this action while the matter remained in that position.

the phrase "this action" must surely have been intended to refer to an action alleging repudiation of the contract, by conduct. In this case there was neither an allegation of repudiation by conduct, nor an acceptance of repudiation, pleaded in the original statement of claim filed on May 9, 2000. As noted earlier in these reasons, there was no reference to either circumstance in the defence filed a few weeks later.

[84] White's alternative submission that correspondence mentioning potential litigation can somehow amount to a repudiation just as effectively (even as counsel prepares, files and serves a statement of claim which pointedly <u>omits</u> to allege repudiation) is unsupported by any authority of which I am aware.

[85] In this case there was no action alleging repudiation until <u>after</u> the issuance of the patent on March 28, 2001, and the amended statement of claim which followed. As is noted in the concurring opinion of Estey, J., in **Canada Egg**,

supra, the acceptance of the repudiation must be made "with every reasonable dispatch." In my view, alleging and purporting to accept repudiation in March 2001 in respect of breaches said to have occurred and continued since 1997 or 1998 does not meet such a standard.

[86] Certain scholars treat repudiation as a *type* of anticipatory breach, or discuss fundamental breach, anticipatory breach, and repudiation as being synonymous terms. See, for example, **Chitty on Contracts**, 28th ed. (London: Suite & Maxwell, 1999), Vol. 1; and **G.H.L. Fridman**, ***The Law of Contract in Canada,*** 4th ed. (Toronto: Carswell, 1999). See, as well, the dissenting opinion of MacKeigan, C.J.N.S. in **Canso Chemicals Ltd. v. Canadian Westinghouse Co.** (1974), 54 D.L.R. (3d) 517. This conjunction, as it were, of terms is how it was pitched to the trial judge during counsel's final arguments. For example, EBF's trial counsel said this when dealing with this issue in his final submissions:

> Now, my lord, the next area I was going to get into dealt with the law on fundamental breach . . . Repudiation, my lord, really is a question, as we indicated in our brief, of fundamental breach . . . If you decide that royalty payments were due at some point before the issuance of the patent, then what Mr. White will say to you is you then (sic) to say that EBF has demonstrated an intention not to be bound by the terms of that agreement such that they have repudiated and I have elected to treat the contract at an end. That's the contract language for what the issue is before you. On the issue of the calculation of payment . . . that can't possibly be an issue of fundamental breach . . . The only question that is material at all to that is the timing in our submission . . . but not a question of fundamental difference that would justify terminating the contract. So when you look at the time periods during 1997, 1998, 1999 and the year 2000, was EBF, you have to ask yourself, engaged in practice that would demonstrate an intention not to be bound by the contract. Clearly not. They were continuing to move ahead . . . They were making advances to Mr. White. Is that the actions of someone who is snubbing their nose at a contract and saying I'm not going to be bound by this license? No. . . . That's not a fundamental breach. Mr. Bryson has been consistent in his interpretation of when royalties were to be paid. Maybe he was wrong. Does that mean it's a fundamental breach? No. You have to take the next step and say well, if there's something that demonstrates that EBF had no intention to be bound by the terms of that licence agreement as evidenced by the non-payment. No. There is nothing to demonstrate an intention on them, in fact, just the contrary. Clearly this is a company that intended to live up to obligations under the contract and the only issue, only issue when the payment was to be made . . .

[87] I do not believe McDougall, J. was led astray by the way in which the point was argued. I prefer to deal with repudiation as a different side to the same coin, that being a specific circumstance in law whereby the conduct of the defaulting party will permit the innocent party to treat the contract as discharged, before performance is due or before it has been fully performed. This distinguishes it from a situation where the defaulting party commits what may be termed a fundamental breach. In the former circumstance the conduct of the parties is key. In the latter circumstance the nature of the promise that has been violated and its consequence take on much more significance. See, for example, **M.P. Furmston, Cheshire, Fifoot & Furmston's *Law of Contract*, 11th ed. (London: Butterworths, 1986)**.

[88] Repudiation occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due. Repudiation can be either explicit or implicit. It is implicit "where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract." **Furmston**, supra, at p. 522.

[89] What has to be established is that the defaulting party has made his intention clear beyond a reasonable doubt that he no longer intends to perform his side of the bargain. Proof of such an intention requires an investigation into the nature of the contract, the attendant circumstances, and the motives which prompted the breach. **Furmston**, supra, at p. 523. **Furmston** quotes from the case of **Mersey Steel and Iron Co. v. Naylor Benzon & Co.**, (1884) 9 App Cas 434 at 438-439:

> You have to look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract . . .and whether the other party may accept it as a reason for not performing his part.

(Underlining mine)

[90] In order for repudiation to be established there must be acceptance. As Fridman points out in **The Law of Contract in Canada**, supra, at pp. 647-648:

> "An unaccepted repudiation" said Asquit L.J. in one English case, "is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind." Although this graphic expression has said to be limited by the facts of the case in which it occurred, the phrase does have some merit, and does put succinctly an important aspect of the law relating to discharge by repudiation or anticipatory breach. Such repudiation will not effectively terminate the contract unless the innocent party does accept the repudiation, and is prepared to treat the contract as ended. The innocent party, in effect, has an election whether or not to treat the contract as continuing or as ended, once the party has committed an act which, in accordance with what has been said above, can be regarded as repudiating the contract.

[91] As to what constitutes "acceptance" of repudiation, the learned authors of **Chitty on Contracts**, supra, observe at 25-012:

> Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation." It is usually done by communicating the decision to terminate the party in default although it may be sufficient to lead evidence of an "unequivocal overt act which is inconsistent with the subsistence of the contract...without any concurrent manifestation of intent directed to the other party." Unless and until the repudiation is accepted the contract continues in existence for "an unaccepted repudiation is a thing writ in water." <u>Acceptance of a repudiation must be clear and unequivocal</u> and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case."
>
> (Underlining mine)

[92] While a more detailed enunciation of the principles that guided him would have been helpful, I am satisfied after reviewing the entire record as well as the submissions made by trial counsel that McDougall, J.'s analysis and application of

the law was correct. **Children's Aid Society of Cape Breton-Victoria v. J.C. & A.C.**, 2005 NSCA 161.

[93] It appears to me that McDougall, J. had these principles in mind when reviewing the conduct of both Bryson and White, their motives, the nature of the agreement between the parties, and all of the attendant circumstances. I am not persuaded that he erred in his analysis or his ultimate conclusion that a repudiation had not in fact occurred.

[94] His strong findings that there "was never a refusal to pay;" that "White's own approach to payment might have influenced" Bryson's "position that royalties would only be payable once the patent(s) had been granted"; that "White had ample opportunity to demand payment of royalties he felt he was owed but chose not to"; that the parties "might not have agreed on exactly when royalty payments should have begun but clearly there has never been a denial of White's entitlement to receipt of eventual payment"; that White's "conduct in allowing this to continue was tacit acceptance of the timing of payments . . ."; that Bryson "never denied that royalties would eventually be paid"; that White's own conduct contributed to the misunderstanding that developed"; leading to the judge's conclusion that he did "not think the actions of Bryson as president of EBF amounted to a repudiation" are entirely inconsistent with White's submission that a repudiation had occurred and that he had effectively communicated his acceptance thereof. In light of the trial judge's strong findings, which find support in the record, I see no merit to the cross-appeal and would dismiss it.

[95] While my own view of the evidence may have led me to a different conclusion with respect to whether or not the contract had been repudiated, that is not the test. Rather, the question is: has the cross-appellant shown that Justice McDougall's determination that the contract was not repudiated and is therefore enforceable, the result of palpable and overriding error? I am not persuaded that it was. This judge had the distinct advantage of seeing and hearing the parties and their witnesses over the course of an eight day trial. Evidently he was not prepared to characterize Bryson's behaviour in the manner White has suggested, and thereby conclude that Bryson's conduct amounted to repudiation. I am unable to find that the trial judge's conclusions that Bryson "never denied that royalties

would eventually be paid," that White's "own conduct contributed to the misunderstanding that developed," or declaring "I do not think the actions of Bryson as president of EBF . . . amounted to a repudiation of the licence agreement" arose from an error in principle or a material and obvious error of fact. Consequently I would not disturb the trial judge's finding that the agreement between the parties is still valid and enforceable.

Disposition: The Cross-Appeal

[96] I would therefore dismiss the cross-appeal with costs to the respondent by cross-appeal, EBF, only. I am not persuaded that there were significant added steps taken, nor independent participation on the part of the intervenor FENCE that would warrant its entitlement to separate costs on the cross-appeal.

Conclusion

[97] For all of these reasons I would dismiss the appeal with costs of $10,000 to the respondent White (40% of the costs he was awarded at trial), together with disbursements as taxed or agreed. I would dismiss the cross-appeal with costs of $6,000 to the respondent by cross-appeal, EBF only, together with disbursements as taxed or agreed.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Freeman, J.A.