Date:19980929 Docket: C.A 147173

NOVA SCOTIA COURT OF APPEAL

Cite as: Re-Track USA, Inc. v. FX International Ltd., 1998 NSCA 177

Freeman, Hart, Roscoe, JJ.A.

BETWEEN:

RE-TRACK USA, INC.	)	
	)	Gavin Giles
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Douglas W. Lutz
	)	for the Respondent
FX INTERNATIONAL LIMITED	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	September 29, 1998
	)	
	)	
	)	Judgment Delivered:
	)	September 29, 1998
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

THE COURT: Appeal dismissed per oral reasons for judgment of Freeman, J.A.; Hart and Roscoe, JJ.A., concurring.

FREEMAN, J.A.: (Orally)

The appellant Re-Track USA Inc. has appealed from the dismissal of its application for a mandatory injunction to enforce an agreement it entered into on June 27, 1997, with FX International Limited, the Nova Scotia subsidiary of FX UK Limited, the British manufacturer of two specialized lubrication products, FX1 and FASTEX.

The agreement gave the American company exclusive rights to distribute the products in the United States . Before FX International terminated the agreement January 27, 1998, the territory had been increased to include South America.

The grounds of appeal are that Associate Chief Justice Kennedy of the Supreme Court of Nova Scotia, as he then was, set the threshold test for mandatory injunctions too high, erred in determining that the appellant failed to meet the applicable test, and in determining that any harm suffered by the appellant could be addressed by damages.

Kennedy A.C.J. correctly stated the three-prong test for injunctions:

> (a) that the case is sufficiently strong to justify the court's immediate intervention (the threshold test);
>
> (b) that the applicant will suffer "irreparable harm" that cannot be addressed by an award of damages; and
>
> (c) that the balance of convenience favours the applicant.

The affidavit evidence of Martin Kelly, President of Re-Track, suggests that vigorous efforts were made during the remainder of 1997 and early 1998 to develop markets, including redesign of technical literature, labeling, packaging, recruitment of sales

representatives, attendance at trade shows and the identification of retailers, distributors and catalogue houses, all at considerable expense. On January 28, 1998, Mr. Kelly received written notice from FX International terminating the agreement. Mr. Kelly said he had received no prior inkling that FX International or FX UK were dissatisfied, but he complained that FX International was not supplying the product he ordered.

An affidavit by Brian Glover of Bedford, N.S., Managing Director of FX International, complained that Re-Track was slow meeting its obligations and suggested concerns with the company's financial stability that peaked just before termination of the agreement. The affidavit listed numerous other concerns, including third party efforts to obtain court orders against FX trademarks; that the entire sales and marketing staff of Re-Track had left, apparently due to non-payment; potential distributors and customers were either abandoned or not followed up with; Re Track had breached the agreement by not obtaining confidentiality agreements with all employees; Re-Track was making unauthorized changes to labels and artwork without permission and in breach of copyright. FX International argued that there is a substantial issue whether Re-Track performed any of its duties and obligations under the agreement, which it characterized as essentially a contract for the sale of goods.

The appellant had objected to the form of the respondent's affidavit and to the admissibility of some of the evidence it contained. What is clear, however, is that substantial issues divide the parties and the outcome of litigation between them cannot be

predicted with any confidence at this interlocutory stage.

Kennedy of the Supreme A.C.J. found:

> ...that after considering the totality of the relevant and admissible evidence put forward, that the applicant, Re-Track, has not succeeded in the admittedly formidable task of demonstrating a strong **prima facie** case which has the virtual certainty of success, and I believe and I find, that is the test that this dramatic and intrusive remedy requires this applicant to meet.

The appellant asserts that “virtual certainty of success” is too high a test for mandatory injunctions. However there is support for a high standard in the authority he cited, including **Burnside Industrial Packaging Ltd.** 131 N.S.R. (2d) at p. 181; **Toronto Brewing and Malting Co. v. Blake; Gallant v. Casino Taxi Ltd.** (1996), S.H. 133664.

Given the serious issues between the parties, it is not clear that Kennedy A.C.J. actually held Re-Track to a "virtual certainty of success" test, nor is it necessary to decide that language accurately describes the test to be met. We are of the opinion that Re-Track could not have met a test that was set considerably lower, for a mandatory injunction would have required FX International to ship the product with no certainty that payment would be received. Kennedy A.C.J. did not err in finding the threshold test was not met.

In any event, Re-Track failed the second prong of the test as well. We are satisfied that Kennedy A.C.J. was not in error in deciding it had failed to establish it would suffer irreparable harm because "a creative trial judge could fashion a remedy in damages

that would be equitable". It was, therefore, unnecessary for him, or for us, to consider the balance of convenience.

This appeal is from a discretionary decision at an interlocutory stage which is not determinative of the outcome of the issues. This court has repeatedly expressed its reluctance to interfere in such matters in the absence of error of law or clear injustice. The appeal is dismissed.

Freeman, J.A.

Concurred in:

Hart, J.A.

Roscoe, J.A.

C.A. No. 147173

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

RE-TRACK USA, INC.

Appellant

- and -

FX-INTERNATIONAL LIMITED

Respondent

REASONS FOR JUDGMENT BY:

Freeman, J.A.
(Orally)