NOVA SCOTIA COURT OF APPEAL

Citation: Whiman Benn and Associates Ltd. v. AMEC E & C Services Ltd., 2003 NSCA 126

Date: 20031121
Docket: CA 201744
Registry: Halifax

Between:

Whitman Benn and Associates Limited, a body corporate, Whitman Benn Inc., a body corporate, Intrepid Holdings Limited, a body corporate, John Bachynski and Aubrey Palmeter

Appellants

v.

AMEC E&C Services Limited, a body corporate

Respondent

Judges:	Bateman, Oland and Fichaud, JJ.A.
Appeal Heard:	November 21, 2003, in Halifax, Nova Scotia
Written Judgment:	December 1st, 2003
Held:	**Appeal dismissed per oral reasons for judgment of Bateman, J.A.; Oland and Fichaud, JJ.A. concurring.**
Counsel:	Peter Bryson, Q.C. and Kevin Gibson, for the appellants Geoffrey Saunders and James Rossiter, for the respondent

Reasons for judgment:

[1] This is an appeal by Whitman Benn and Associates and others from an interlocutory order and decision of Justice Robert W. Wright of the Supreme Court (reported as **AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.** (2003), 214 N.S.R. (2d) 369; N.S.J. No. 173 (Q.L.)).

[2] The respondent, AMEC E&C Services Limited ("AMEC") successfully applied for an interlocutory injunction restraining the appellants from using the name Whitman Benn and requiring them to withdraw their application to register the name as a trademark. The application was filed concurrently with the commencement of an action in the Supreme Court in which AMEC alleges that the defendants have committed the tort of passing off by their unauthorized use of the name Whitman Benn.

[3] The standard of review on an appeal from an interlocutory injunction was addressed by this Court in **Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1 (CAW/MWF Local 1) et al v. Tardif et al.** (2002), 203 N.S.R. (2d) 362; N.S.J. No. 188 (Q.L.). Cromwell, J.A., writing for the Court, stated:

> **[43]** The order under appeal is both interlocutory and discretionary. It is not disputed by the parties that this Court may only intervene if persuaded that wrong principles of law have been applied, there are clearly erroneous findings of fact or if failure to intervene would give rise to a patent injustice: see for example **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82; 253 A.P.R. 82 (C.A.), at paras. 10 - 13.
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> **[44]** In a leading case on the subject in the House of Lords, which has been followed by both the Supreme Court of Canada and this Court, Lord Diplock, for the unanimous House, emphasized that the role of an appellate court on an appeal from a decision to grant or to refuse an interlocutory injunction is initially one of review. The appellate court is to determine whether the judge at first instance misunderstood either the law or the facts: **Hadmore Production Ltd. v. Hamilton**, [1983] 1 A.C. 191, at 220; **Gateway**, supra at para. 13; **Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.**, supra at 154-156.
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> **[45]** It follows, therefore, that the task of the Court on this appeal is to determine whether the judge at first instance exercised his discretion by applying correct legal principles to a reasonable view of the facts and reached a result that

> is not manifestly unjust. It is only in the event that we determine, applying these tests, that the judge's order must be set aside that we are entitled to exercise an independent discretion to grant or refuse the interlocutory injunctions: see Robert J. Sharpe, **Injunctions and Specific Performance** (looseleaf edition, updated to November, 2001) at para. 2.1310.

[4] Having reviewed Justice Wright's comprehensive and well reasoned decision, we are not persuaded that he misunderstood either the law or the facts nor that the result reached is manifestly unjust.

[5] Accordingly, the appeal is dismissed. Justice Wright fixed costs to be in the cause. This Court has held that where the issue in the interim proceeding is similar to that which will eventually be decided following full trial, costs should be costs in the cause (**Natural Beauty Products Ltd. v. Body Reform Canada Ltd.** (1990), 96 N.S.R. (2d) 330; N.S.J. No. 119 (Q.L.) and **North American Trust Co. v. Salvage Assn.** (1998), 173 N.S.R. (2d) 249; N.S.J. No. 505 (Q.L.)). Accordingly, I would fix costs on the appeal of $2000 inclusive of disbursements, to be in the cause of the main action.

Bateman, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.