

SUPREME COURT OF NOVA SCOTIA

Citation: E.B.F. Manufacturing Ltd. v. White, 2009 NSSC 280

Date: 2009/09/21

Docket: Hfx 247580

Registry: Halifax

Between:

E.B.F. Manufacturing Limited and ElectroBraid Fence Limited

Plaintiffs

v.

Eric White and White Rhino Inc.

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: 22, 23, 24, 27, 28, 28, 29, 30 April 2009

**Last
Submission:** May 12, 2009

Counsel: Ms. Jane O'Neill
and Mr. Daniel Watt, Articled Clerk, for the plaintiffs

Mr. Colin Piercey
and Mr. Nathan Sutherland, for the defendants

By the Court:

Mr. White's ElectroBraid Idea

[1] Electrified fences posed problems for animals, especially horses, who, by combination of temperament and thinner skin, are more prone to be cut after being jolted by a thin wire. Some advances had been made by combining electrified wire with rope, but the art needed improvement.

[2] In the mid 1990's, Eric White developed an unique idea for electrified rope fencing. By braiding conduit, at least two strands, in soft strands of plastic, a rope could be created that would be more resilient, more likely to deliver the required jolt, and much less likely to cut into the flesh of a horse.

[3] This idea occurred to Mr. White after he moved into the home, and horse farm, of his spouse, Ms. Jennifer Fried, at Upper Nine Mile River in Hants. He decided to apply for a patent protecting what he named "ElectroBraid" fencing. He made claims in November of 1996 in Canada and March of 1997 in the United States.

ElectroBraid Business Agreements

[4] Ms. Fried is an experienced business person. She and Mr. White decided to raise capital for the manufacture and marketing of ElectroBraid by selling one of her businesses.

[5] Mr. David Bryson is also an experienced business person, and his many businesses ventures included some manufacturing experience. He became very interested in the ElectroBraid concept, after he was approached to discuss purchasing Ms. Fried's business. The discussion turned, instead, to Mr. Bryson becoming an investor in ElectroBraid and taking a role in the operation of a business that would establish, manufacture, and market ElectroBraid.

[6] E.B.F. Manufacturing Limited had been incorporated by Ms. Fried and Mr. White in 1996. Its shares were reorganized so one hundred shares were issued, fifty to Bryson and twenty-five each to Fried and White. The company and its three shareholders signed a shareholders' agreement in September of 1997.

[7] The shareholders' agreement provided for the three shareholders to be the only directors, with White as chair, Bryson as president, and Fried as secretary-treasurer. Bryson and White were to have veto powers.

[8] The agreement provided that the company would carry on a business of "manufacturing and selling braided fencing and associated products."

[9] Article 4.02, on the "Ownership of Patents", is material:

White shall acquire and retain ownership of any patent or patents that are to be used by the Company in connection with its business. By agreement to be approved by the directors of the Company, White shall grant to the Company an exclusive licence, for one day less than the legal lifetime of the patent or until the Company sooner becomes insolvent, of any such patent as acquired by him in exchange for a royalty payment, in respect of all such patents, equal to Two Per Cent (2%) of the Company's gross revenues, which shall continue in the event of White's insolvency.

[10] The agreement also contained a shotgun clause, under which White and Fried could require Bryson, and *visa versa*, to sell his half of the shares to them at a price or to purchase their half of the shares at the same price.

[11] In November of 1997, Mr. White filed an application with the Canadian Intellectual Property Office, to date, for priority purposes, from the times the

claims were made by Mr. White, November of 1996 in Canada and March of 1997 in the United States. This included an international application under the Patent Cooperation Treaty.

[12] The actual production of ElectroBraid was contracted to Novatec Braids Limited in Yarmouth. ElectroBraid Fence Limited was incorporated, with the same shareholdings as E.B.F. Manufacturing, to acquire the product from E.B.F. and do the actual selling. ElectroBraid Fence thus insulated E.B.F. from contractual liabilities.

[13] The licence agreement called for in Article 4.02 of the shareholders' agreement was signed by the three shareholders and the company in January, 1998. White granted to E.B.F. Manufacturing "an irrevocable and exclusive licence to all patents and patents pending relating to the manufacture of braided electrical fencing". The licence expires one day before the day the patent expires. Article 4 provides for royalty payments to Mr. White: "E.B.F. shall pay a royalty to White in respect of each Patent in an amount equal to two per cent (2%) of the Company's gross revenues."

Establishment of ElectroBraid Business

[14] According to Mr. Bryson, E.B.F. Manufacturing and ElectroBraid Fence moved quickly to establish business after the September, 1997 shareholders' agreement. He found that he and Mr. White enjoyed working together and that many issues were quickly agreed on.

[15] The manufacturing contract was concluded. Marketing began at various trade shows in Canada and the United States. This was followed by promotions to numerous retail chains and wholesalers in both countries, including Co-op Atlantic and Southwestern Farmers Coop locally. Retailers wanted ElectroBraid to develop name brand recognition.

[16] In 1998, the companies only sold \$300,000 worth of product. Mr. Bryson and Ms. Fried each put up \$100,000 to \$200,000.

[17] Although the first year involved a tough struggle, farmers who bought ElectroBraid were well impressed . An advertizing campaign in which a free video

was offered brought about a deluge of calls. By March, 1999 the business was attaining \$4,000,000 in annualized sales.

[18] At that time, the companies had manufacturing in Yarmouth and, at a property owned by Ms. Fried in Fletcher's Lake, call centre staff hired by White or Fried, and a systems manager and accounting staff hired by Bryson.

[19] It was about then that the relationship of Bryson with White and Fried began to deteriorate. I do not have a clear understanding of all of the causes, but it is necessary to summarize what Mr. Bryson and Mr. White said on the stand.

[20] Mr. White agrees that, in the beginning, there was a good working relationship. As time went on, it happened that Mr. White was more on the road promoting ElectroBraid, and Mr. Bryson was working more at home in Nova Scotia with Ms. Fried. Disputes developed between Mr. Bryson and Ms. Fried.

[21] The books were seldom in order, and Ms. Fried could not get information to see where the business was going. The business failed to reimburse her for

leasehold improvements she made so it could operate at her property at Fletcher's Lake. Rent was not being paid.

[22] Mr. White says that, although he was easy and did not like conflict, he would ask when his royalties would be paid. He was answered with excuses, as far as he was concerned. We do not know how much we owe you. The books need to be worked on. "And on and on and on."

[23] Mr. Bryson says that an ACOA loan had almost been secured to help with marketing, which was the business' biggest challenge. To break into the huge American market, name brand recognition was required. The retail chains demanded it. Mr. Bryson saw March of 1999 as the business' turning point, when the advertizing and video promotion bore fruit and the ACOA loan was on the horizon.

[24] Despite his optimistic view, management stalled. Decisions were vetoed or put off. Sales levelled off at \$4,000,000. A lot of money was tied up in advertizing, and that caused financial stress.

[25] Mr. Bryson felt that Ms. Fried was not putting up a proportionate share of required capital. There was tension also at Fletcher's Lake, where the call centre staff were seen as loyal to White and Fried and the systems manager and accounting staff were seen as Bryson loyalists. By the beginning of the 1999/2000 winter, cash was slow (who puts up a fence in the winter?), bills remained unpaid, Mr. White was not co-signing required cheques.

Dissolution of Relationship

[26] Mr. Bryson met with Mr. White and his lawyer, Mr. David Farrar, in January, 2000. Mr. Bryson then retained his own counsel, Mr. Bruce Clarke. Mr. Farrar explained his client's position to Mr. Clarke in a letter delivered in February, 2000. No royalties had been paid and "Mr. White takes the position that the Licencing Agreement is at an end". Also, the business had paid no rent to Ms. Fried for over a year. "It is clear that the company is insolvent."

[27] Mr. Farrar said his clients had been deprived of financial information despite demands. He alleged that there had been unauthorized loans to a company related to Mr. Bryson and that Mr. Bryson had hired relatives without approval.

[28] Mr. Farrar proposed that a monitor be appointed while the issues were resolved.

[29] Through Mr. Clarke, Mr. Bryson took, for the first time, a position that royalties were not due when a patent was pending. Royalties would be payable only when patents were approved. He offered to cause the disputed rent to be paid in trust.

[30] Mr. Bryson denied insolvency, loans to a related company, and jobs to relatives. (No evidence has been produced to support these accusations.) He maintained that Mr. White and Ms. Fried had received reliable financial information and could access the latest with ease.

[31] Mr. Clarke agreed to the appointment of a monitor on the condition that the costs be split and not paid with company funds.

[32] In April of 2000, Mr. White, having learned of instructions by Mr. Bryson to the patent attorney who handled ElectroBraid to file the U.S. application, issued

contrary instructions and said that he would not sign required documents. He also fired the attorney and instructed him to send all files to another patent attorney.

[33] ACOA learned about the dispute, and it stopped making advances on the marketing loan.

[34] Although Mr. White had alleged that the business was insolvent, he and Ms. Fried made an offer to purchase Mr. Bryson's shares under the shotgun clause. Mr. Bryson opted to purchase their shares at the price they had chosen.

[35] The purchase and sale closed about August, 2000. Mr. White had already sued for royalties due under the licence agreement. E.B.F. Manufacturing counterclaimed for a declaration against the repudiation asserted by Mr. White through Mr. Farrar. Some years later, Mr. White amended his pleadings to include a claim for a declaration that the licence agreement was repudiated because of the failure to pay royalties.

White v. E.B.F. Manufacturing

[36] Mr. Bryson's acquisition of the other half of the shares did not occasion an agreement on the issues in dispute in Mr. White's action. Mr. White claimed outstanding royalties, and Mr. Bryson said they were not due while a patent was pending. They disagreed on how the royalties were to be calculated, if they were due. And, of course, they were opposed on the question of repudiation.

[37] These issues were tried before Justice Glen McDougall in October, 2003. A decision was released the next September.

[38] Justice McDougall rejected Mr. Bryson's argument that royalties were not payable on patent pending product. He found that royalties were due and he was prepared to order a review of ElectroBraid records from inception in 1997 to the present, a period of seven years.

[39] E.B.F. Manufacturing had contended that the agreements provided for the royalties to be calculated on the gross revenues from sales by it to its closely held sales agent, ElectroBraid Fence. Justice McDougall referred to this as leading to a "potentially arbitrary transfer price". He interpreted the contract as requiring a calculation based on the consolidated gross revenue of both companies, "All sales

of the companies products to end users or the discounted prices given to agents of the companies, for both patented and patent pending products”.

[40] Justice McDougall was prepared to grant judgment in favour of Mr. White for the outstanding royalties, once determined, and interest at E.B.F.

Manufacturing’s borrowing rate. He also provided that royalties would be payable monthly in the future.

[41] The claim for a declaration that the agreements had been repudiated was dismissed. Justice McDougall said:

Although I do not accept Bryson’s interpretation of the licence agreement as it relates to the timing of payments, he never denied that royalties would eventually be paid. And, as stated earlier, I find that White’s own conduct contributed to the misunderstanding that developed. ... For the reasons previously stated I do not think the actions of Bryson as president of EBFML amounted to repudiation of the licence agreement. It is therefore still valid and enforceable.

[42] Justice McDougall’s decision required clarification on one point. On that subject, Mr. White’s position prevailed. He thinks the answer was obvious, and he refers to the delay associated with getting the clarification in support of his position

that Mr. Bryson took pains to avoid paying royalties and fundamentally breached the agreements.

[43] The interpretation adopted by Justice McDougall avoided an absurdity. Otherwise, the party who owes royalty could control the amount of the royalty. The difficulty with this solution was that ElectroBraid Fence sold more than electric fencing. A good part of its gross revenues came from selling accessories, which were not manufactured by E.B.F. Manufacturing and were not manufactured under any patent or patent pending of Mr. White.

[44] Ms. Sue MacMillan, C.A., who was one of the E.B.F. Manufacturing's proposed reviewers and who was eventually accepted by Mr. White, found that Justice McDougall's decision was unclear as to whether the calculation of royalties was to be on "gross revenues" or on "sales of patented product". She required clarification if she was to carry out the review.

[45] In my assessment, there was a solid argument for restricting Justice McDougall's interpretation to gross revenues from product sold under Mr. White's patents or patents pending. Indeed, Justice McDougall had provided for a royalty

calculation “for both patented and patent pending products”. And, it was certainly arguable that sales of the accessories did not need to be included in an interpretation that avoided the absurdity of one party setting the amount of the royalties on product sold under Mr. White’s patents. In any case, Justice McDougall’s decision did not resolve this issue and it was necessary for the parties to agreed or get clarification.

[46] A hearing was schedule for early November, 2004. Justice McDougall said:

...where I was coming from when I gave my decision was 2% gross revenue of all sales, regardless of patented products. That’s any products, whatever the company was selling that was associated with (inaudible).

The transcript contains far too many blanks that purport to be “inaudible”. It is clear that the transcriber failed to consult Justice McDougall about the parts that reflect decisions he made and the reasons he gave. I take the purported “inaudible” in the quote to be a reference to the ElectroBraid business.

[47] Other subjects were discussed at the November, 2004 hearing. The court was advised that Mr. White finally accepted Ms. MacMillan as the accountant to conduct the review. A problem with settling on E.B.F. Manufacturing’s borrowing

rate was explained. And, the time frame for conclusion of Mr. MacMillan's work was discussed.

[48] It took a month to finalize Justice McDougall's order, and a further order was issued in early January of 2005 to give effect to the judge's directions on the time limits for reporting and payment. Ms. MacMillan was required to report by March 31, 2004, and E.B.F. Manufacturing was required to pay the arrears no later than sixty days after the day the report is delivered.

[49] E.B.F. Manufacturing appealed the decision on the payment dates and calculation of royalties. Mr. White cross-appealed on the repudiation issue. ElectroBraid Fence joined in the appeals as an intervenor because it had not been a party to the action. The appeals were heard in September, 2005. A decision was released three months later.

[50] Justice Saunders wrote the decision, and Justices Bateman and Freeman concurred. The court dismissed E.B.F. Manufacturing's appeal with costs and it dismissed Mr. White's cross-appeal with costs.

[51] The reasons delivered by Justice Saunders dealt with these issues:

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?

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?

Did the trial judge err in determining that the License Agreement was not repudiated?

Justice McDougall's reasoning on the third issue, and Justice Saunders' review of it, may be of some assistance for the resolution of the counterclaim in this action, which raises the same issue on similar facts, and even overlapping facts.

[52] Justice Saunders felt obliged to address Mr. White's arguments "in some detail" because of "their variety and specificity". That detailed treatment is found at para. 62 to para. 90 of his decision.

[53] At para.72, Justice Saunders records a position that is similarly advanced by Mr. White in this case, both in his testimony and in the submissions on his behalf:

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.

[54] Here is Justice Saunders' assessment, at para. 80, of the factual basis for Mr. White's assertion that Mr. Bryson's failures founded, in fact, a repudiation:

In my opinion 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.

[55] Justice Saunders provides the following summary of Justice McDougall's fact finding at para. 94, before concluding with a statement about the deferential standard that applies on review of fact findings:

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 the 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.

Breaches by E.B.F. Between September, 2004 and June, 2005

[56] Mr. White asserts that further breaches by E.B.F. Manufacturing after Justice McDougall found its earlier breaches not to be repudiations, cumulate in a fundamental breach or a repudiation that entitles him to put an end to the exclusive licence agreement. There were further breaches, both in E.B.F.’s failure to make royalty payments on time and in its failure to correctly calculate the royalties.

[57] Some payments were made even though E.B.F. Manufacturing adopted the position in the White action that none were due until patents were approved. No one knew how much was owed until the review ordered by Justice McDougall was carried out. About \$230,000 had been paid to Mr. White by that time. The shortfall to September, 2004 was in the order of \$185,000.

[58] Shortly after Justice McDougall's decision was released, Mr. White, through counsel, demanded payment of the arrears. Mr. Bryson conceded that he then knew that, if Justice McDougall's decision was not varied on appeal, the amount would be over one hundred thousand dollars. Mr. Bryson's counsel responded to the demand by saying that arrears of royalties would be paid when the accountant's report is delivered, and that, in the meantime, accruing royalties would be calculated and paid monthly.

[59] Mr. White's counsel responded by writing, "If royalties are not properly calculated and paid on a timely basis, again it would be our client's position that this constitutes ... a breach of the licence agreement ...".

[60] Not long after Justice McDougall's decision was released, Mr. Bryson hired two accounting clerks to analyze all of ElectroBraid's invoices, a task he expected to take three months. He also solicited three CAs to provide proposals for conducting the review described in the decision. The three names were provided to Mr. White less than two weeks after the decision was released, and more than two months before an order for the review was issued. As noted, Mr. White approved

the retention of Ms. Sue MacMillan, CA at the time of the November, 2004 hearing.

[61] A month after the November hearing, Mr. White's counsel complained that "contrary to the decision of Justice McDougall" royalties had not yet been paid for the quarter ended September 30 or for the month of October and November. Counsel said that E.B.F. "is in breach of the Royalties Agreement".

[62] A week later, cheques were delivered for \$8,546.82 and \$11,796.82. Since the method of calculation was still to be settled by Ms. MacMillan, counsel for Mr. Bryson wrote:

I confirm that acceptance of this payment by Mr. White is without prejudice to any claim he may have for outstanding royalties. In other words, this payment simply represents an advance towards his ultimate entitlement once that has been calculated.

[63] Mr. Bryson authorized Ms. MacMillan to proceed with her review early in January, 2005 after Justice McDougall set the deadlines, but this happened a month after the review had been ordered. Mr. Bryson explains the one month delay on the basis that he had retained new counsel to handle the appeal, and counsel was

looking into the effectiveness of the order to bind ElectroBraid Fence even though that corporation had never been a party in the action.

[64] Despite the delivery of the cheques and the acknowledgement that there would be adjustments when the method of calculation was settled by Ms. MacMillan, Mr. White's counsel continued to point out, to Mr. Bryson's original counsel, and to his appeal counsel, that E.B.F. was in breach of the exclusive licence agreement.

[65] Early in Ms. MacMillan's review, she advised Mr. White that the work of his two accounting clerks was on the wrong track. He instructed them to stop analyzing the invoices until Ms. MacMillan clarified "2% of gross revenues". Monthly advances were paid to Mr. White. They were based on E.B.F. Manufacturing's gross sales. This was known to be wrong. On the other hand, there was the assurance of an adjustment after the review.

[66] Ms. MacMillan's report is dated March 29, 2005 and it was delivered on the deadline of March 31, 2005. Thus Justice McDougall's sixty day deadline for

payment of the royalties was up on May 31, 2005. The payment was not made on time.

[67] Ms. McMillan determined that the total royalties payable from September, 1997 to and including September, 2004 was \$416,607.23 and that \$239,903.31 had actually been paid to Mr. White. \$176,703.92 was owing to him from that period.

[68] Mr. Bryson later decided that the payment made in October, 2004 for \$11,796.82 should be attributed to liabilities arising after September, 2004 rather than to royalties outstanding at the time of Justice McDougall's decision. This is one of many points about credibility made by Mr. White's counsel against Mr. Bryson. I have taken it, and the other points, into consideration.

[69] The cheque was tendered as "representing payment of royalties for the quarter ended September 30, 2004". It served Mr. Bryson's purpose of showing he had not entirely ignored the new royalties to attribute these funds differently. However, there is an argument for the shift. At the time of Justice McDougall's decision, the August, 2004 royalties were only coming due in light of the

determination for monthly payments and the September, 2004 royalties were not yet due. So, the bulk of the credit would be to new royalties.

[70] In the period between Justice McDougall's decision and Ms. MacMillan's report, E.B.F. calculated royalties on the basis that Mr. Bryson's interpretation of Justice McDougall's decision was the correct one. This did not change after Justice McDougall provided clarification in November. Thus, as stated on numerous occasions by Mr. White's counsel to E.B.F.'s regular counsel and its appeal counsel, E.B.F. continuously breached the exclusive licence agreement.

[71] In fact, E.B.F. was in breach in several ways. It had been found to have underpaid the royalties for the period to September, 2004. In cross-examination, Mr. Bryson conceded that he knew the arrears to be in the order of one hundred thousand dollars before Ms. MacMillan made her study. As I said, E.B.F. continued calculating the monthly royalties according to Mr. Bryson's theory. So, in most months after September, 2004 a further breach occurred. Two motions by E.B.F. for a stay were refused by appeal court judges in chambers, and, yet, E.B.F. ignored Justice McDougall's order.

[72] On the other hand, E.B.F. had been found not to be in fundamental breach and Justice McDougall had given E.B.F. until May 31, 2005 to pay the arrears and interest. Further, it was only through Justice McDougall's clarification and Ms. MacMillan's work that E.B.F. could reasonably have been expected to learn how to make the calculations and, in the meantime, it paid some inadequate advances and promised adjustments.

[73] Mr. Bryson learned about Mr. White's competition not long after the first motion for a stay pending appeal was refused. After some delay, E.B.F. made a second motion for a stay. This one was premised on the competition. E.B.F. refused to pay the arrears until the second motion was determined.

[74] Justice Saunders heard that motion on June 23, 2005, and he released a decision dismissing the motion on June 29, 2005. Then E.B.F. Manufacturing paid \$241,255.87 to Mr. White, a month after the deadline ordered by Justice McDougall.

[75] The \$241,255.87 payment was meant to cover arrears before October of 2004, interest on those arrears, and costs. As I said, Mr. Bryson decided that about \$12,000 of payments made had been credited to this period when it was actually paid afterward

against accruing royalties. He provided a cheque and produced a chart to reconcile properly calculated royalties and actual payments during the period starting in October, 2004. Starting in July, 2005 E.B.F. made monthly payments that were supposed to follow Ms. MacMillan's method of calculation.

[76] Mr. Bryson calculated the 2% of ElectroBraid Fence's gross revenues for the months after September, 2004 as follows:

October, 2004	\$ 6,179.91
November, 2004	2,596.76
December, 2004	2,169.42
January, 2005	769.55
February, 2005	2,116.07
March, 2005	3,331.93
April, 2005	4,058.42
May, 2005	2,435.23.

Each came due in the next month. Against these liabilities, E.B.F. made the \$11,796.82 payment in October and another \$1,634.19 in February.

[77] I find that Mr. Bryson believed he had correctly calculated the royalties in accordance with Ms. MacMillan's method. Assuming they were correct, E.B.F. did not fall into arrears of the post-September, 2004 liabilities until after April, 2005.

These accumulated to over ten thousand dollars by the end of June, 2005, when Justice Saunders gave his decision.

[78] The excuse offered by Mr. Bryson is that the further arrears were allowed to accumulate after he learned that Mr. White had gone into competition. Although I find that Mr. White was in breach of the exclusive licence agreement, and although I find his breach had serious consequences, both actual and potential, for the ElectroBraid business, the competition was not an excuse for failing to pay the accruing liabilities, or the arrears from October of 2004. These were liabilities owing under an agreement breached very seriously by Mr. White, but which E.B.F. Manufacturing wished to keep alive.

[79] Justice Saunders was very critical of E.B.F. for its continuing breaches. Mr. Bryson explains that his side of the story was not fully told after some last minute filing of affidavits. I am deciding the facts of this case on the trial evidence, not on Justice Saunders' interlocutory findings, which were extensively referred to by Mr. White's counsel. However, I shall make some comment because of the extensive references.

[80] I find that E.B.F. deliberately stopping paying royalties, although I allow that the duration and magnitude may have been less serious than the interlocutory evidence suggested. I also see that the newly accumulating arrears and the one month delay past Justice McDougall's deadline constituted breaches of court orders. Those facts could be compelling on a motion for a stay. They are relevant, but perhaps less important, for determining whether a fundamental breach occurred.

[81] I have, unlike Justice Saunders, conclusive evidence of repudiatory conduct by Mr. White, which he concealed from E.B.F. Manufacturing until he unleashed a very harmful marketing campaign in breach of his promise for exclusivity. Also, Justice Saunders was sceptical about Mr. Bryson's evidence of when he first learned of the competition and when he fully appreciated the harm it would do. On my assessment, the evidence before me leaves no doubt that Mr. White's activities were concealed from E.B.F. until January, 2005 and Mr. Bryson began to see the enormity of the consequences only in April, 2005.

[82] At this juncture, let me say that I found Mr. Bryson to be a truthful witness. I am critical of some of the decisions he made between September of 2004 and June of

2005, but I am confident that, allowing for the sway interest has on perception and memory, he told me the truth about those events and all others.

[83] I do not credit everything Mr. White said. Some of his answers were clearly untrue. He has a blinding animosity toward Mr. Bryson, an animosity that was never fully explained. His animosity drives him to the worst conclusions about errors or reasonable disagreements, it affects Mr. White's perceptions and memory, and it allows him to bend the truth.

Breaches by E.B.F. Manufacturing after June, 2005

[84] Mr. White claimed breaches in September, 2005 when E.B.F. Manufacturing's former banker refused to honour cheques that had been delivered some time before they were presented. In fact, Mr. Bryson instructed E.B.F.'s accounting clerk, Laurce Deveaux, to pay royalties in accordance with Ms. McMillan's method, E.B.F. had changed banks and provided a replacement cheque, an explanation, and Ms. Deveaux's telephone number. Mr. White attempted to cash the old cheques anyway. There was no breach, although Mr. White seems most anxious to find one.

[85] Ms. Kimberly Acheson was hired in July, 2006 to be comptroller of E.B.F. Manufacturing and to perform similar duties for ElectroBraid Fence. She reports to Mr. Bryson. She replaced Ms. Deveaux, with whom she worked transitionally for over a month.

[86] In September of 2006, Ms. Acheson took over Ms. Deveaux's duties for calculation and payment of royalties. Monthly transactions had to be entered before the payment could be calculated. The royalty amount was the second to last entry required to close the books each month.

[87] In April of 2007, Ms. Acheson became aware of Ms. McMillan's formula. As a result of year-end audits, she became aware, in January 2008, that there had been a sale worth \$9,101.17 that was not accounted on the books of ElectroBraid Fence and that, therefore, was left out of the royalty calculations.

[88] She informed Mr. Bryson, who instructed her to do a review of all sales since 2004 to determine whether there had been a similar error. This was an onerous task that required much time.

[89] Other errors were found. Ms. Deveaux had taken figures from the general ledger for revenues that, contrary to the MacMillan formula, did not include recoveries from customers for the cost of freight.

[90] A third company had been incorporated, ElectroBraid Fence Inc. of Delaware. It contracted for the installation of ElectroBraid Fences to keep wildlife out, usually away from highways. ElectroBraid fencing and accessories were required for performance of the contract, but they were included in the general price. Some inventory that had been transferred was left out of the royalty calculations.

[91] Finally, much of the ElectroBraid business was in the United States, and payments in American funds were accounted with a currency exchange differential. This cost was included by Ms. Deveaux in the calculation of gross revenues, but that was wrong because Mr. White was paid in Canadian funds.

[92] As these discrepancies came to light, Mr. Bryson instructed Ms. Acheson to review all royalty calculations since 2004. This work was finalized by early May of 2008.

[93] Ms. Acheson drafted a letter for Mr. Bryson's signature. It explained the discrepancies, and enclosed statements of Ms. Acheson's re-calculations. The letter was delivered to Mr. White's counsel along with a cheque for \$30,206.40 representing the shortfall, interest, and tax.

[94] The May, 2008 letter closed with this:

I believe Kim Acheson has followed Sue MacMillan's instructions as accurately as she reasonably can, but I would be pleased if Eric White would appoint his own auditor to visit with Ms. Acheson to review the Companies' original accounting records and to confirm her calculations.

This invitation was not accepted. I understand it remains open.

[95] I find that Ms. Deveaux was instructed to calculate royalties monthly following Ms. McMillan's method. I also find that, over a long period, she made errors in the calculations that resulted in underpayments. Also, I find that Mr. Bryson was unaware of the errors until after Ms. Deveaux left the employ of E.B.F. Manufacturing and ElectroBraid Fence.

[96] Ms. Acheson and Mr. Bryson were cross-examined closely on the timing of their discovery of these errors and on the time it took to correct them. I am satisfied that E.B.F. Manufacturing handled these issues reasonably. It recognized an error, then further errors, which amounted to breaches of the exclusive licence agreement. It undertook a thorough review and corrected the errors in a reasonable time. So far as anyone can tell, the royalties have been calculated accurately since then.

Fundamental Breach and Repudiation

[97] In the written submissions on behalf of Mr. White, arguments are made that E.B.F. is in fundamental breach of the exclusive license agreement and that the agreement is repudiated. The oral submissions emphasized repudiation.

[98] As Justice Saunders observed at para.86 and 87 of *E.B.F. Manufacturing Limited v. White*, [2005] N.S.J. 518 (C.A.), fundamental breach and repudiation are different sides of the same coin, although some scholars treat them as synonymous terms. Fundamental breach pertains to a failure to perform when performance is due, and repudiation pertains to conduct “before performance is due or before it has been fully performed.” (para.87)

[99] Consistent with Justice Saunderson's analogy to the sides of a coin, fundamental breach and repudiation have a similar factual foundation and they lead to an identical right. I reject Mr. White's submission on both the foundation and the right.

[100] Mr. Piercey referred to the classic formulation of the test for fundamental breach by Lord Diplock in *Hong Kong Fir Shipping Co. Limited v. Kawasaki Kisen Kaisha Limited*, [1962] 2 Q.B. 26 (C.A.):

Does the.. [breach] deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

This formulation remains the law in Canada to this day. See, for example, *Spirent Communications of Ottawa v. Quake Technologies (Canada) Inc.*, [2008] O.J. 444 (C.A.).

[101] The first difficulty with Mr. White's assertion of fundamental breach is that he is bound by Justice McDougall's findings in the first case, findings which were

attacked by Mr. White on appeal, but which went undisturbed. Those findings stand in the way of a finding of fundamental breach before October, 2003.

[102] The evidence does not disclose that the breaches by E.B.F. Manufacturing after October, 2003 deprived Mr. White of substantially the whole benefit due to him under the exclusive license agreement. On the contrary, although E.B.F. remained in breach of the agreement after Justice McDougall's decision, E.B.F. moved quickly to hire accounting clerks and to suggest a chartered accountant to conduct the required review. I have already rejected Mr. White's view that the clarification hearing, the appeal, and so on were delay tactics. The report was delivered on Justice McDougall's deadline and payment was one month late.

[103] The one-month delay cannot be taken as a deprivation of substantially the whole benefit of the contract.. After that, E.B.F. Manufacturing made regular royalty payments. They turned out to be underpayments, but E.B.F. discovered, and corrected, what I find to have been innocent mistakes. The innocent, corrected mistakes cannot have deprived Mr. White of substantially the whole benefit of the contract.

[104] The factual foundation for repudiation is discussed by Justice Saunders at para.88 and 89 of *White*. At para.88 he says:

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.” **Formston**, *supra*, at p. 522.

The reference is to M. P. Formston, *Cheshire, Fiboot and Formston’s Law of Contract*, 11th Ed. (London: Butterworths, 1986). Justice Saunders elaborates at para.89:

What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt that he no longer intends to perform his side of the bargain.

[105] Even if it was for me to revisit Justice McDougall’s finding that there had been no repudiation before October, 2003, I would reach the same conclusion. Reasonable disagreements about the calculation of royalties and when they had to be paid would not, on my assessment of all of the circumstances, lead to an inference that E.B.F. had made it clear that it no longer intended to pay the royalties.

[106] The events after the trial before Justice McDougall in October, 2003 do not culminate with those before the trial to support an inference of repudiation. Indeed, the actual payment of royalties and the unilateral correction of underpayments show just the opposite. (In making that finding, I do bear in mind that E.B.F. dragged its feet until it got disciplined through Justice Saunders' interlocutory decision refusing the motion for a stay.)

[107] So the facts do not support a finding of fundamental breach or repudiation. On the contrary, I find the breaches were not, alone or taken together, fundamental and there never was a repudiation. Had the breaches been fundamental or had there been repudiation, Mr. White still would not have succeeded because he never exercised the right that arises on fundamental breach or the right that arises on repudiation.

[108] These rights are almost identical. Fundamental breach gives rise to a right to terminate the contract and sue for damages. Otherwise, the party who is not in default may keep the contract open for performance and sue for damages. Repudiation without acceptance is "writ in water": *White*, para.91. The party who is not in default may accept the repudiation clearly and unequivocally, treat the contract as at an end,

and sue for damages. Otherwise, the contract remains open for performance, and the innocent party may sue for damages.

[109] It was not until February, 2006, long after this action was started, that Mr. White suggested repudiation had occurred. His counsel wrote:

Repudiation of the License Agreement by EBF and ElectroBraid. The failure to pay royalties in accordance with the License Agreement and the Decision and Order of Justice McDougall constitute a repudiation of the License Agreement. If your clients are intent on proceeding with litigation, our instructions are to amend the pleadings to include a counterclaim for repudiation.

The amendment was made.

[110] Sometimes the commencement of an action can amount to acceptance of repudiation. I suppose that, in some circumstances, an amendment could do the same. Only with artificiality, could one find an election to terminate, or an acceptance of repudiation, in words written on behalf of Mr. White. There was no known breach at the time of this purported acceptance. Further, the acceptance is made equivocal by Mr. White's conduct.

[111] Mr. White continued to accept royalties, he accepted the corrected payments, he demanded payment of royalties, and, as will be seen, he demanded reimbursement of patent expenses. Either he had terminated the exclusive license agreement for fundamental breach and monthly royalties had ceased to be the measure of his further damages, or the agreement remained in effect and he was entitled to the correctly calculated royalties but he was also bound by his promise of exclusivity.

[112] There was one thing Mr. White did that was consistent with termination, but he concealed it from Mr. Bryson until it became public. All the days Mr. White and Mr. Bryson were together for the first trial, while they waited for the decision about repudiation and other issues, when they read Justice McDougall's decision, when they sought clarification and finalized the trial order, Mr. White neglected to mention that he was having similar fencing manufactured and was going into competition. Keeping this to himself is also inconsistent with his assertion of an election for termination, or an acceptance of repudiation.

Mr. White's Breach

[113] When he testified, Mr. White referred to the shareholder's agreement and the exclusive license agreement as "all this legal stuff". For him, there had been an underlying meeting of minds based on "word and handshake". The written agreements were put in place only because a lender required them. The oral agreement, or, to be more accurate, his memory and interpretation of it, "stands today, in my belief".

[114] As we have seen, the agreement giving E.B.F. Manufacturing an exclusive license to sell the patented product was signed in 1998. The business relationship between Mr. Bryson and Mr. White became estranged in 1999. Mr. White and Ms. Fried sold their shares in E.B.F. to Mr. Bryson in 2000, and, within months of accepting Mr. Bryson's money, Mr. White made plans to start producing an infringing product.

[115] Mr. White developed a relationship with Mr. Alan Boyd and Mr. Michael Townsley of International Net and Twine Ltd. in Northern Ireland, which had the capacity to produce ElectroBraid. In April of 2003, Mr. Boyd's firm produced a first sample and he wrote, "Looking forward to our business venture together." In

May of 2003, Mr. Boyd wrote to Mr. White, “At last all samples prepared.” He couriered over:

1. 14 plaits white polyester with 2 plaits tinned copper (still using 5 strands x 0.25mm dia instead of 1 heavy strand)
2. 13 plaits white polyester with 3 plaits tinned copper.
3. 12 plaits white polyester with 1 plait black polypropylene and 3 plaits tinned copper.
4. 11 plaits white polyester with 2 plaits polypropylene and 3 plaits tinned copper.

Mr. Boyd referred to these as “the ‘new’ ElectroBraid”. Various correspondence, and Mr. White’s own testimony, show that Mr. Boyd accepted that Mr. White held a valid patent covering ElectroBraid, later trade marked as ElectroPlus.

[116] Justice McDougall’s decision was released just as the ElectroPlus business was starting in earnest. Despite the findings that there had been no repudiation and that the exclusive license agreement was valid and enforceable, Mr. White and Mr. Boyd decided to carry on with the patent-infringing competition.

[117] Mr. Boyd's firm manufactured three kinds of electric braided fencing, ElectroPlus Gold, ElectroPlus Silver and ElectroPlus Bronze. Gold was a 1/4 inch thick braid of polyester fibre and six strands of copper wire crossing six or more times an inch. Silver was 1/4 inch polypropylene, and crossed at least three times an inch. Bronze was 1/8 inch polypropylene with three crossings. Black plastic strands of plastic were bound with white and the conduit to make the fence more visible. ElectroPlus was produced in rolls of 1320, 1200, and 660 feet except no 1200 foot rolls were produced of the Bronze grade. The grades were guaranteed for twenty-five, fifteen, and four years.

[118] The closeness of the names shows an intent to invade ElectroBraid's market. The similar design shows the same intent. In addition to those strategies, or tactics, Mr. White decided upon and implemented marketing strategies including:

He advertised in trade journals, as did ElectroBraid Fence.

He established a telephone ordering system, as had ElectroBraid, and even hired his nephew, who had worked in the ElectroBraid call centre before the estrangement.

He established a website to market ElectroBraid.

In his advertising materials, he portrayed ElectroPlus as a new and improved ElectroBraid created by the inventor himself.

He solicited one time customers of ElectroBraid.

He solicited, in a much more aggressive way than had ElectroBraid, retailers and wholesalers of farm supplies, such as Co-op Atlantic.

He set his prices below ElectroBraid and, accepting Mr. Bryson's evidence, prices that ElectroBraid Fence could not match.

[119] The production and marketing of ElectroPlus was a violation of the exclusive license agreement. The violation started in August of 2003, it continued into September of 2004 when Justice MacAdam issued an interlocutory injunction, and, I find, its adverse affects continued after that.

[120] I find that Mr. White succeeded in capturing a share of the market, taking a significant share away from ElectroBraid. The competition did not end with Justice MacAdam's injunction in September, 2005. Mr. White was caught with a significant inventory of ElectroPlus. He turned it over to Terry Hepditch, and it got sold.

[121] Mr. White, or his company White Rhino Inc., sold over two thousand reels (averaging the lengths into twelve hundred feet) of ElectroPlus Gold and ElectroPlus Silver, which are similar to ElectroBraid. When the interlocutory injunction was issued they were caught with almost a thousand further reels.

[122] Mr. White claims that the reels actually belonged to Mr. Boyd's firm. He said he took them on consignment and returned them because they could no longer be sold.

[123] There was no consignment agreement. On the contrary, Mr. Boyd's firm invoiced for payment when a shipment was delivered, payments were never made according to sales, and when Mr. Boyd agreed to take the stock he wrote, "We will...issue a credit note ...". Clearly, the seller stipulated for payment on delivery and carried an account receivable on its books.

[124] Boyd or Hepditch, or both of them, incorporated a company. Hepditch, lately an employee of White, or White Rhyno, was hired by the newly-incorporated company, and it took delivery of the inventory in January of 2006.

[125] We do not know a great deal about what happened to the inventory. I have no doubt that Mr. Hepditch put it on the market. Exactly when and where all of it was sold, even whether some remains in Mr. Hepditch's control, is not in evidence. Mr. White denies ever discussing the subject with his nephew and former employee.

ElectroBraid's Loss of Profits

[126] E.B.F. Manufacturing's expert was Mr. Michael Casey, CA, CBV, and Mr. White's expert was Mr. Brian Keough, CA, CBV, CMC. Mr. Casey provided his opinion to the parties first, and Mr. Keough was retained to comment on the Casey opinion and to provide his own opinion. As a result of the Keough opinion and further information, Mr. Casey was permitted to deliver an amended opinion during trial.

[127] One of Mr. Casey's corrections concerned sales by E.B.F. Manufacturing of reels in the six hundred length category. On cross-examination, Mr. Bryson acknowledged the error, but he diminished its significance, using the phrase "rounding errors". (He did not mean that the amount that was left out in the process of rounding sales, but that it was an amount only in the magnitude of a rounding error.) The next day, Mr. Bryson corrected himself, and provided new figures for Mr. Casey. The error amounted to about \$80,000.

[128] It is argued that I should not credit Mr. Casey's opinion. It is said that he was provided information that was too selective. He failed, it is said, to investigate other causes for E.B.F.'s declining sales, such as the presence of other competition. It is said he follows Mr. Bryson's method of qualifying damages, and it is pointed out that he made note of Mr. Bryson's calculation of the amount he could recover by set off against royalties. He accepted Mr. Bryson's statement that the remaining inventory had been sold in the market.

[129] I do not know why Mr. Bryson spoke about the limits for recovery on a judgment. That information has nothing to do with Mr. Casey's work, and its disclosure and notation could be taken as an indication that the expert lacked

independence, that he set about to give an opinion on losses that suited the retaining parties' purposes. That is not what happened. The information does not appear to have influenced the expert's work.

[130] I found both experts to be most helpful. It is not an easy task to determine what would have happened if competing product had not entered the market, and I am much assisted by the work of both accountants, although they do not agree. As will be seen, this is not a case for choosing between one or the other. Some of what each provided is accepted, and some is not.

[131] Mr. Casey is of the opinion that E.B.F. Manufacturing's loss on account of Mr. White's competition is between \$616,666 and \$762,265. Mr. Keough is of the opinion that the loss is between \$290,000 and \$352,000 or, if the inventory Mr. White was stuck with after the interlocutory injunction is excluded, \$194,000 and \$234,000.

[132] The opinions, and the underlying facts, are to be assessed in light of the law on damages for patent infringement. I am grateful to Mr. Piercey for references he provided to decisions of the Federal Court of Canada, a court much experienced in assessing damages for patent infringement.

[133] One of the references was *Allied Signal Inc. v. duPont Canada Inc.*, [1998] F.C.J. 190. This was a report of a referee, Justice Heald, who was then a deputy judge of the court. Justice Heald referred, at paragraph 19, to long established principles "that the plaintiffs have the burden of proving their loss" and "that the defendants being wrongdoers, damages should be liberally assessed but the object is to compensate the plaintiffs not punish the defendants". At paragraph 34 he said: "The process of examining the hypothetical situation where one assumes that the infringing product never entered the market is an uncertain one".

[134] However, he listed factors "considered in various cases:

- (a) Presence of competing products in the market;
- (b) Advantages of the patented product over competing products;
- (c) Advantages of the infringing product over the patented product;
- (d) Market position of the patentee;
- (e) Market position of the infringer;

- (f) Market share of the patentee before and after the infringing product entered the market;
- (g) Size of the market before and after the infringing product entered the market; and
- (h) Capacity of the patentee to produce additional products.

[135] Reference was also made to *Jay-Lor International Inc. v. Penta Farm Systems Ltd.*, [2007] F.C.J. 688, a decision by Justice Snider. At para. 118, she expressed the burden this way:

The onus rests on the plaintiff to establish the amount of loss. That is, the plaintiff bears the burden of demonstrating that it would have made the sales of its patented product had the infringing product not been on the market.

[136] She also explained the alternatives of an award based on lost profits or a reasonable royalty:

Where the patentee actually engages in the sale of its patented product and does not normally license use of its invention, it is entitled to the profits on the sales it would have made but for the presence of the infringing product in the market. For those sales made by the infringer that the patentee would not have made, the patentee is entitled to a reasonable royalty (*Colonial Fastener Co. v. Lightning Fastener Co.*, [1937] S.C.R. 36 at 45, [1937] 1 D.L.R. 21; *AlliedSignal Inc. v. Du Pont Canada Inc.* (1998), CanLII 7464 (F.C.), (1998), 78 C.P.R. (3d) 129 at 138 (F.C.T.D.), 77 A.C.W.S. (3d) 1056, aff'd (1999), CanLII 7409 (F.C.A.), (1999), 86 C.P.R. (3d) 324 (F.C.A.)). The award of a royalty, where the plaintiff cannot prove a lost sale, is recognition of the fact that every sale by an infringing party is an illegal transaction.

[137] Mr. Casey began by attempting to determine the sales reduction suffered by E.B.F. Manufacturing and ElectroBraid Fence. He took the number of reels sold by ElectroBraid Fence in each year from 2002 until 2007, and backed out those sold in markets in which Mr. Bryson instructed him ElectroPlus had not competed. The results were:

2002	10,522
2003	10,565
2004	10,110
2005	9,688
2006	9,353
2007	9,636.

Assuming ElectroBraid would have continued sales at the 2003 level, he calculated these shortfalls after the competition began:

2004	455
2005	877
2006	1,212

2007 929.

Here, and elsewhere, reels are 1200 foot reels with other sizes calculated to a 1200 foot equivalency.

[138] Mr. Casey then made an alternative calculation of Mr. White's actual sales. As mentioned, he included the inventory delivered to Mr. Hepditch after the interlocutory injunction. He found that no more than 251 reels were manufactured, but could not be accounted. He concluded that Mr. White sold 4,293 reels.

[139] So, on one calculation, the lost sales is 3,473 reels and, on the other, it is 4,293 reels.

[140] Next, Mr. Casey calculated the lost financial contribution by establishing the adjusted gross margin of E.B.F. Manufacturing and ElectroBraid Fence combined, and dividing the total of reels sold in 2003. Each reel contributed \$177.56 to the gross margin, according to Mr. Casey. (He excluded advertising costs from cost of goods sold, a subject taken up by Mr. Keough.)

[141] Applying the \$177.56 per reel contribution to the lost sales of 3,473 or 4,293 reels, the losses are \$616,666 or \$762,265.

[142] Mr. Keough's approach differs in these ways:

He formed the opinion that ElectroPlus Bronze did not compete with ElectroBraid, and removed the Bronze reels from the calculation.

He formed the opinion that Mr. White's use of retailers and wholesalers to market ElectroPlus attracted sales that were not available to ElectroBraid. He removed all sales of ElectroBraid Gold and Silver by retailers and wholesalers, except for one that regularly did business with ElectroBraid.

He was of the opinion that advertising costs are an above the line, variable expenditure. He provided a calculation of adjusted gross profit per reel with for those expenditures included in cost of sales.

He disagreed with using the 2003 gross profit in each of the following years. He provided calculations based on yearly gross profit per reel in each of 2004 to 2007.

He observed that Canadian businesses in a heavy American market saw gross profits decline in the mid-2000s when the Canadian dollar improved in relative value. He concentrated on sales by White.

[143] Except for the issue about advertising costs, Mr. Casey and Mr. Keough reach the same conclusion for adjusted gross profit per reel in 2003. Mr. Keough calculated gross profit per reel, with advertising above the line and, then, below it:

2003	\$138.97	\$178.12
2004	151.75	179.83
2005	131.38	157.17
2006	107.84	133.76
2007	92.55	113.93

[144] With advertising above the line, the loss is \$290,102. With it below, the loss is \$352,452. Excluding the inventory of ElectroPlus Gold and ElectroPlus Silver held

by Mr. White when the injunction was issued, the loss would be \$194,338 or \$233,673 depending on the treatment of advertising costs.

[145] I will deal with the accounting issues in this order:

exclusion of the September 2004 inventory;

exclusion of ElectroPlus Bronze;

exclusion of sales to retail and wholesale customers;

exclusion of advertising costs; and

use of the 2003 gross profit in each subsequent year or the actual for each year.

[146] I have already expressed my finding that ElectroPlus remained in the market after the September, 2005 injunction. It is an inference I draw from these facts:

The manufacturer agreed to issue a credit note on delivery.

The inventory was delivered to a nephew who had worked for Mr. White in marketing ElectroPlus.

The inventory was delivered to the marketer in Nova Scotia, not the manufacturer in Northern Ireland.

Mr. Hepditch's new employer is called Electro Fencing Systems Limited, it is in Nova Scotia, and we know it markets an ElectroPlus accessory, a horsehead insulator.

As late as 2007, Mr. Bryson saw ElectroPlus with a new label on sale at the Truro Co-op.

[147] Therefore, losses should included an allowance for sales into the market place of the inventory Mr. White had on hand when the injunction was issued. He breached the exclusive license agreement by having it manufactured, and the continued sales would not have occurred without that breach.

[148] ElectroBraid Fence occasionally sells 1/4 " electric fencing. That is so rare that ElectroPlus Bronze cannot have had an impact on ElectroBraid. The evidence supports Mr. Keough's reasoning that ElectroPlus Bronze was directed at a different market, cattle and sheep farming, than ElectroBraid's market.

[149] The total exclusion of sales made through wholesalers and retailers assumes that they do not cover any of the same market as is exposed to ElectroBraid's preferred approach: advertising in trade journals and on the internet, with direct sales through a call centre and a website. ElectroBraid is not bought on impulse. It requires some planning and a substantial outlay. Often the customer is a serious business person. In my assessment, sales to the ultimate consumer through retail marketing would displace sales through the call centre and the website.

[150] Surely, there would have been some expansion of the market because of the more aggressive pursuit of retailers and wholesalers, but I do not find it likely was significant. There is the consumer who would know of the call centre and website but who was putting off the purchase for now. There is the consumer who would research new technologies and make the purchase some day, if the product was not on the shelf

at the local Co-op. In the context of a large purchase, I would find a large number of those kinds of purchasers.

[151] I accept that advertising costs are sometimes deducted from revenues to establish gross profit. The experts seem to be agreed that there is some flexibility here. Mr. Keough said that these costs are in between fixed and variable. Mr. Casey said that advertising is sometimes hit and miss. Sometimes it does not increase sales.

[152] E.B.F. Manufacturing and ElectroBraid Fence profit and loss statements treat "advertising and promotion" or "marketing" below the line.

[153] Mr. Bryson said, and I accept, that his marketing costs are not affected by sales. Each year he contracts with four major trade journals. He pays \$10,000 to \$12,000 per issue for four pages of colour ads. A million and a half subscribers are exposed to this advertising.

[154] In my assessment, ElectroBraid's advertising is integrated with its call centre and website. It has as much to do with completing sales, as it has to do with promoting sales.

[155] My obligation is to assess the loss to ElectroBraid on the basis of where it would have stood had the competition not have taken place. In my view, the competition had an impact on gross revenues and not on advertising costs. Those costs did not vary with sales. Therefore, they should be excluded from the calculation of gross profits.

[156] In my view, the actual gross profit per unit sold in the same years as the unlawful competition took place better measures the loss than the figure for 2003. The competition affected gross revenues, but the cost of goods sold varies with the sales. So, the competition should not affect gross profit per unit. I find Mr. Keough's approach gives a more accurate measurement.

[157] In the end, I think Justice Heald's factors are subsumed in the work of the two accountants, and, in the circumstances of this case, there is no need to explore much beyond the basic calculation of lost profits or, perhaps more precisely, lost contribution. In my view, the most accurate measurement of the loss treats a sale of ElectroPlus Gold or Silver as displacing an ElectroBraid sale.

[158] On "presence of competing products", there were knock-offs in competition although ElectroBraid had a legal right to a market free of direct competition. Over the years, it made efforts to prevent this competition but knock-offs remain a fact of the business.

[159] The presence of competing knock-off products is not important here. Firstly, they were a force before, during, and after ElectroPlus. Secondly, they did not present the serious threat that ElectroPlus presented. One compares a lower quality, knock-off with a lower priced, similarly named, new and improved ElectroBraid, by the man who invented ElectroBraid. It was not a knock-off, it could even be described as a pass-off.

[160] As for market positions, arguments were made that ElectroBraid's market would have shrunk anyway. It spent less on marketing and promotion just as its gross revenues declined. It chose to stick with the advertising, call centre, and internet strategy (which Mr. White also exploited) without seeking an expansion through more aggressive approaches to wholesalers and retailers.

[161] I find that ElectroBraid marketed heavily in the early years, identified direct sales as its best and most profitable strategy, refined the advertising to four publications it found to be most profitable, and, after that, was able to pay lower advertising costs while remaining well known in the market. I find that its market was not shrinking.

[162] ElectroPlus occupied a significant share of the market for a short period of time. The market may have increased slightly because of the aggressive solicitation of wholesalers and retailers, but I have found that there was not much change in it when larger term sales are considered.

[163] The answers for Justice Heald's question "What would have happened?" are fairly simple in this case. Sooner or later, ElectroBraid would have made the sales that, instead, went to ElectroPlus Gold and ElectroPlus Silver. On the other hand, ElectroBraid was not in an expansive mode and it cannot be said that the unlawful competition took more away than the actual sales. Therefore, the work of both accountants is sufficient to provide an accurate picture of the loss.

[164] I find that \$352,000 accurately reflects ElectroBraid's loss of profits due to Mr. White's breach of the exclusive license agreement. Based on the evidence as it stands, and subject to any further submissions from counsel, I would be inclined to order prejudgment interest at a rate agreed or to be set from the 13th of September in the following years, on the following amounts:

2003	\$ 17,800
2005	215,900
2006	118,800

Patent Fees

[165] Mr. White incurred expenses to apply for patents and to maintain patents. Mr. Bryson gave assurances for reimbursements, and he submits that more than \$25,000 would be unjust.

[166] I agree that to require payment of more than \$25,000 would be outside the spirit of the assurance. Mr. White seeks to have the assurance cover expenditures that he made unilaterally for patents in places, or for purposes, that were never authorized, explicitly or implicitly, by the plaintiffs and that were of no benefit to them.

[167] The amount of \$25,000 will be set-off from the judgment against the defendants.

Punitive Damages

[168] Ms. O'Neill makes a strong argument for punitive damages in the event that the award is insufficient to deter Mr. White from breaching the exclusive license agreement. In my view, the award and the lost investments of labour and money are enough.

Conclusion

[169] The plaintiffs will have judgment against Mr. White for \$352,000, plus prejudgment interest and costs, less a set-off of \$25,000. I am prepared to declare that the judgment may be enforced in the usual ways and by set-off against royalties as they come due.

[170] A permanent injunction will issue against both defendants. I will order that the bond in support of the interim injunction may be cancelled after the end of the appeal period or as the Court of Appeal may direct if there is an appeal.

[171] As the plaintiffs consent to it, I will order that they open their books to auditors appointed by and paid by Mr. White if the auditors give reasonable notice and undertake in writing to keep the plaintiff's financial information confidential, except as is necessary to report their conclusions.

[172] Counsel may provide written submissions on costs, a rate for prejudgment interest, and any other outstanding issues.

J.