

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Amos & Andy v. Henneberry, 2003 NSSC 144

Date: 030506
Docket: SH 179867
Registry: Halifax

Amos and Andy Fisheries Limited

Plaintiff

v.

Robert Henneberry

Respondent

DECISION

Judge: The Honourable Justice John D. Murphy

Heard: May 6, 2003 in Halifax, Nova Scotia

Written Decision: July 4, 2003

Counsel: Thomas E. Hart, for the Plaintiff
Charles D. Lienaux, for the Respondent

By the Court:

[1] This is a claim by the Defendant, Robert Henneberry, against the Plaintiff, Amos and Andy Fisheries Limited, seeking damages as a result of the issuance by this Court of an injunction which prevented conveyance by the Defendant of snowcrab fishing rights back to Department of Fisheries and Oceans (“DFO”) during 2002. The Plaintiff obtained the injunction when it claimed an interest in those fishing rights; it was subsequently determined by an arbitrator that the fishing rights belonged to the Defendant and not to the Plaintiff.

[2] The main claim for damages relates to the Defendant’s losing the \$72,846.66 sale price which DFO had agreed to pay for the crab rights, less \$15,503.90 earned by the Defendant during 2002 in the crab fishery when it exercised the rights which were not conveyed.

[3] The Defendant also claims fees and disbursements paid to counsel in the amount of \$18,412.32, fees and disbursements paid to the arbitrator in the amount of \$4,205.00, funds paid to Verbatim Inc. in the amount of \$222.00, and also

interest with respect to monies which were not received as a result of the conveyance of the license to DFO not being concluded.

[4] Two preliminary matters are not in dispute - the parties agree that the sale was lost as a result of the injunction, and that if the Defendant has suffered damages as a result of the sale being interfered with by the injunction, then those damages are recoverable. The bond which the Plaintiff filed in support of the injunction includes the following:

Amos and Andy Fisheries Limited as Principal and Andrew Henneberry as surety, bind themselves jointly and severally to the Defendant, his executors, administrators or assigns to pay them the penal sum of \$100,000.00 upon breach of the following condition, namely that the Applicant shall pay such damages, interest and costs awarded by the Court against the Applicant as a result of the issuance of the Injunction herein referred to.

[5] In order for the Defendant to recover damages, I must be satisfied on the balance of probabilities that the Defendant has suffered a loss, i.e. that the Defendant is left with something of lesser value than he had prior to the issuance of the injunction. At the time the injunction was granted, the Defendant had a right attached to the crab fishery which he claims was worth \$72,846.00, and that is not

contested by the Plaintiff. The burden is on the Defendant to establish that he now has something of less value.

[6] The Defendant's claim for \$57,000.00 damages resulting from the loss of the sale, being the \$72,000.00 less the \$15,000.00 earned in the crab fishery in 2002, assumes that any right the Defendant now has with respect to the crab fishery is worthless. I have to consider what the evidence is in support of that position.

[7] The asset in question is whatever right the Defendant has to engage in the crab fishery. We have no independent appraisal or expert evidence of the value of the right the Defendant holds as a member of the Association which allows him to participate in that fishery. We have no evidence concerning DFO's intention with respect to the crab fishery in the relevant area in this year or future years. We do not have any evidence of any efforts by the Defendant since the aborted sale to deal with the fishing right he retains by attempting to sell to someone else, or otherwise. We do not know whether, independently of this dispute, the Defendant has tried to sell the license - I use the term "license" loosely, meaning his interest in the crab fishery. There is no evidence with respect to value in that context. Similarly, there is no evidence of price associated with any other party's crab

fishery interest or right being conveyed or appraised since the sale of the Defendant's right to DFO was aborted as a result of the injunction. We do not know what other people in the industry have received or have tried to obtain or recover with respect to similar fishing interests.

[8] The Defendant is requesting, in the absence of that evidence, that I assume that whatever he retains is of no value. Only if I were to find that what was not sold to DFO is now worthless could I justify a damage award based on loss of the total anticipated sale price.

[9] The burden is on the Defendant to establish that his position is worse than it would be had the injunction not been issued.

[10] The Defendant has not only failed to show that the interest he continues to hold is worthless, he has not established its current value or that it is worth any less now than it was when the injunction stopped the sale.

[11] In order for me to fix damages, the Defendant must establish an amount which he has lost, or by which his asset has diminished in value, because of the

aborted conveyance of D.F.O. We do not have any evidence in that regard from the Defendant, other than an indication or suggestion that it may be worth nothing. But it may be worth more than that, we do not know.

[12] The Plaintiff has introduced some evidence of value. It is not the Plaintiff's obligation to establish the asset's value, or the amount of the Defendant's loss. Although that is the Defendant's obligation in this case, I have allowed into evidence the information provided by the Plaintiff concerning the offer which it has made to purchase the Defendant's remaining crab fishery rights, and I have also admitted Mr. Veinot's statement that as a member of the industry, he would be prepared to pay a certain amount for the license, i.e. for the right the Defendant continues to have.

[13] The information provided by the Plaintiff is in the context of litigation and I do not use it to determine the value of what the Defendant presently has. However, if I were to rely on it, it would place a present value in the range of or higher than, the sale price lost as a result of the injunction.

[14] In the circumstances, I have decided that the Defendant is not entitled to recover damages from the Plaintiff for loss of the sale of the crab rights as a result of the injunction. There is simply insufficient evidence upon which I can conclude that the Defendant's position is worse now than it was before the transaction with D.F.O. was aborted. At that time, the Defendant had a certain right in the crab fishery which was worth, by D.F.O. and the Defendant's estimate, \$72,000.00. The Defendant may still have access to the crab fishery...it hasn't been established that the Defendant does not have or will not have the right to participate in the crab fishery, and there is just simply not sufficient evidence for me to conclude that the Defendant's position now is worse than it was before the injunction was issued. So the claim for damages arising from the loss of the sale is dismissed.

[15] With respect to the other bases of claim, the primary one being the fees and disbursements paid to Mr. Lienaux and paid to the arbitrator, I am also dismissing the Defendant's claim for damages under those heads. I am not satisfied on a balance of probabilities that the arbitration and the monies paid to Mr. Lienaux were a consequence of the injunction.

[16] I note that I am dismissing those claims in the context of this assessment of damages, which is to determine what, if any, losses result from the issuance of the injunction, and my finding is that those costs have not been established as resulting from the issuance of the injunction. That is not to preclude the parties addressing those costs in another forum, and my ruling today is confined solely to whether those damages arise from the injunction.

[17] The parties agreed to pay the arbitrator's cost 50/50, and reserved their rights to pursue recovery in another forum, and I am not making any ruling concerning arbitrator's costs except that there is no right of recovery in this forum. By this forum, I do not mean this court - I mean this particular action dealing with any damages resulting from the injunction. To say a little bit more on that, it is apparent to me that there was an issue between the parties with respect to the effect upon the Defendant's CORE rights arising from their Agreement of December 15, 2000, and also whether the crab allocation was an included or an excluded item under that Agreement. However, I am not satisfied on the balance of probabilities that the need to resolve those issues by arbitration is so tied to the injunction that the costs associated with it are the result of the issuance of the injunction. That dispute existed and the parties would have had to address it at some point in some

context. The Defendant now has the benefit of knowing its license position and its CORE position as a result of the arbitration, and has gained some benefit from the arbitration.

[18] I also dismiss the claim for interest as such a claim must be based on the accrual of damages, and having found that no damages have been established resulting from the issuance of the injunction, then the claim for interest with respect to such damages is dismissed.

[19] I order costs of \$1,000.00 payable by the Defendant to the Plaintiff.

J.