
CANADA / JUDGMENT

Desnoes & Geddes Ltd. v. Hart Breweries Ltd.

2002 FCT 632

COURT

Federal Court

DECIDED

3 June 2002

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Decision Content

Date: 20020603

Docket: T-1656-00

Neutral citation: 2002 FCT 632

Ottawa, Ontario, Monday the 3rd day of June 2002

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

DESNOES & GEDDES LIMITED

Plaintiff

- and -

HART BREWERIES LIMITED

Defendant

REASONS FOR ORDER AND ORDER

DAWSON J.

- [1] On January 31, 2002, reasons for order issued finding certain allegations of contempt to be made out against Mr. Lorne Hart and Hart Robinson Breweries Ltd. ("HRBL"), but not to be made out against Mr. Ron Robinson. Those reasons directed that the contempt hearing be resumed at a later date, at which time further submissions would be received with respect to the appropriate penalty to be imposed against Mr. Hart and HRBL, and also with respect to costs, including the costs to be awarded in favour of Mr. Robinson.
- [2] At the resumption of the hearing, the Court received a written apology from Mr. Hart, together with further documents relevant to the issue of penalty, and heard submissions from counsel for Messrs. Hart and Robinson and counsel for the plaintiff.
- [3] HRBL did not appear at all with respect to the contempt proceedings but, after the issuance of the Court's Reasons on January 31, 2002 and before the resumed hearing, the Court received correspondence from the solicitors for the Trustee in bankruptcy of HRBL. The solicitors advised that the Trustee in bankruptcy was not in control of HRBL at the time the acts found to constitute contempt were committed. The solicitors further advised that, as there will be no dividend to any creditor of the estate of the bankrupt HRBL, there was, they said, no reason for the Trustee of HRBL to appear, "as the quantum of any Order will be irrelevant".
- [4] After receiving the apology, further evidence and the submissions of counsel at the resumed hearing, Mr. Hart was advised that a fine would be imposed upon him in the amount of \$2,000 as a result of the findings of contempt of Court. The issues of costs and the disposition to be made in respect of HRBL were reserved. What follows are the reasons, delivered orally, in respect of the fine imposed on Mr. Hart, together with the Court's reasons and disposition with respect to HRBL and the issue of costs.
- [5] As Mr. Hart was advised orally in Court, a democratic society rests upon the respect that its citizens show for the rule of law. This requires that all Court process be obeyed, and is the reason that any failure to obey a Court order or judgment is such a serious matter. It is for this reason that the Court is required to punish disobedience of its orders.
- [6] The imposition of a penalty for contempt of Court is not an easy task. I have proceeded on the basis of the factors noted by the Federal Court of Appeal in *Cutter (Canada), Ltd. v. Baxter Travenol Laboratories of Canada, Limited*, [1987] 2 F.C. 557. In *Cutter*, the Court noted that, when assessing the amount of the fine to be imposed, the amount of the fine should reflect the severity of the law "and yet [be] sufficiently moderate to show the temperance of justice".

- [7] Moreover, the fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine.
- [8] I accepted, for the Court, the written apology which Mr. Hart tendered and consider it to be an unqualified apology.
- [9] I accepted Mr. Hart's assurance that he did not consciously act with intent to disobey an order of this Court, and his advice that he believed that the lawsuit was in the hands of the company's chairman and the company lawyer.
- [10] While I accepted that assurance, Mr. Hart's conduct in ignoring a judgment served upon him was, at best, foolish and was culpable. The judgment had to be taken by Mr. Hart to mean something and he could not blindly rely upon others while acting contrary to the terms of judgment.
- [11] I was also satisfied that Mr. Hart had no prior record of ignoring Court process and that there was and is no reason to fear that this conduct will be repeated.
- [12] Finally, I also took into account his counsel's submissions as to Mr. Hart's financial circumstance.
- [13] Taking all of those factors into consideration, a fine in the amount of \$2,000, with some time provided for payment, was, in my view, appropriate. The specific details regarding payment are set out in the attached order.
- [14] With respect to HRBL, while any fine imposed may not be paid, the need to deter others from similar acts of contempt remains. The contemptuous acts that HRBL was found to have committed included continuing to distribute ale through the Liquor Control Board of Ontario ("LCBO") and Brewers Retail Inc. in association with the trademarks DRAGON'S BREATH, SOUFFLE DE DRAGON and the dragon design, as expressly enjoined by this Court. This was done for a commercial purpose and over an extended period of time, from December 15, 2000 to April 15, 2001. While I have found Mr. Hart to have directly or indirectly caused HRBL to have committed the acts of contempt, his position differs from that of HRBL in that there was no evidence of direct financial benefit to Mr. Hart as a result of HRBL's sale of its product. Mr. Hart's position differs as well in that he tendered his apology to the Court. HRBL did not.
- [15] In these circumstances, and having regard to prior dispositions of this Court, including Coca-Cola Ltd. v. Pardhan (2000), 5 C.P.R. (4th) 333 (F.C.T.D.), I consider a fine in the amount of \$4,000 to be appropriate.

- [16] With respect to the issue of costs, where an application for an order finding contempt of Court is successful, the normal practice is to award reasonable costs on a solicitor-client basis to the plaintiff. This reflects the policy of the Court that a person who assists the Court in the enforcement of its orders and in ensuring respect for its orders should not be put out of pocket: see, for example, *Coca-Cola*, *supra* and the authorities reviewed therein by Associate Chief Justice Lutfy.
- [17] In this proceeding, the plaintiff put before the Court a bill of costs in the total amount of \$52,652.85, representing fees (including GST) of \$42,648.60 and disbursements (including GST) of \$10,004.25. The plaintiff asked that the Court either order an assessment of its costs, or fix an award of costs in the amount of \$45,000 as a lump sum in lieu of an assessment on a solicitor-client basis.
- [18] In response, counsel for Mr. Hart submitted that those costs reflect the plaintiff's inflexibility and an intent to punish. He said that, because of the making of a settlement offer, and because unnecessary steps were taken as a result of the plaintiff's failure to properly particularize the alleged acts of contempt, the plaintiff's costs should be limited to \$3,000. At the same time, he sought costs in the amount of \$6,000 on behalf of Mr. Robinson.
- [19] The plaintiff stated that an award of costs to Mr. Robinson of \$2,500 would be reasonable.
- [20] The settlement offer referred to by counsel for Mr. Hart and Mr. Robinson was one made one week before the initial contempt hearing, and following the issuance of the show cause order. In that offer, both Messrs. Hart and Robinson agreed to be personally bound by the Court's injunction and to consent to an order dismissing the application without costs.
- [21] This offer made by the respondents was, with respect to Mr. Hart, less favourable than the result obtained by the plaintiff. With regard to Mr. Robinson, because the allegations of contempt were not established and he is therefore entitled to costs against the plaintiff, the offer was more favourable than the result obtained by the plaintiff.
- [22] It is true, as counsel for Mr. Hart and Mr. Robinson submit, that the show cause order did not properly particularize the alleged acts of contempt. As a result, the contempt hearing had to be adjourned so that particulars could be provided. Thereafter, one day was required to hear the evidence and submissions with respect the allegations of contempt, and a further half day was required to receive evidence and submissions with respect to the issues of fine and costs.
- [23] Turning then to the plaintiff's bill of costs, that bill was short on detail and not broken down into assessable services. No evidence was provided as to the fees and disbursements actually billed to the plaintiff.

- [24] In the exercise of my discretion, I consider it to be in the interests of the parties to avoid the costs associated with an assessment of costs. Therefore, the costs will be fixed, between the plaintiff, on one hand, and Mr. Hart and HRBL on the other, in an amount in lieu of reasonable costs on a solicitor and client basis.
- [25] In the absence of evidence as to the fees and disbursements charged to the plaintiff, and considering that the bill of costs is not broken down by services, includes a reference to "researching legal basis of contempt", which I am not satisfied should be the responsibility of Mr. Hart and HRBL, includes a second counsel fee that I do not consider to be warranted in view of the relative lack of complexity of the facts and legal issues, includes charges for unspecified services by students, law clerks and summer law students in addition to the approximately 92 recorded hours charged by the plaintiff's counsel and senior counsel, and that the issues were not complex and that, after the show cause proceedings, only one and a half days of Court time should have been required, I have determined that the plaintiff should be entitled to costs fixed in the amount of \$40,000 in lieu of an assessment of reasonable costs on a solicitor and client basis.
- [26] A fundamental issue remains whether responsibility for those costs should be joint or several between Mr. Hart and HRBL.
- [27] After giving careful consideration to the submissions of counsel, it does not seem either equitable or reasonable to me that the costs be payable jointly and severally. Rather, responsibility should be apportioned on the basis of \$13,000 to Mr. Hart and \$27,000 to HRBL.
- [28] I reach this decision on the basis of the lack of evidence of financial benefit to Mr. Hart, and because the plaintiff, after the show cause hearing on March 19, 2001, chose to proceed against HRBL despite it having filed a notice of intention to make a proposal under the Bankruptcy and Insolvency Act on April 18, 2001. Correspondence on the Court's file reflects that this situation was communicated to plaintiff's counsel by a letter from the Trustee in bankruptcy of HRBL dated May 7, 2001. This apportionment of costs also reflects the extent of the culpability of the respondents as reflected in the fine imposed upon them.
- [29] Turning now to the costs to be awarded in favour of Mr. Robinson, his counsel did not provide any bill of costs.
- [30] I am satisfied that Mr. Robinson should, as he was successful in the defence of the allegations, receive his costs, and I see no reason to depart from the general principle found in Rule 407 when considering the level of cost to be awarded.
- [31] Given that one counsel represented both Mr. Hart and Mr. Robinson and that the defence was presented as a common defence with no costs apparently relating solely to Mr. Robinson (no evidence was called on behalf of either Mr. Hart or Mr. Robinson individually), it would, in the normal course, be reasonable to order that the plaintiff pay to Mr. Robinson one half of party-and-party costs.

- [32] However, Rule 420(2) provides that where a defendant makes a written offer to settle that is not revoked, and the plaintiff obtains a judgment less favourable than the offer to settle, unless the Court otherwise orders, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant is entitled to double such costs from the date of the offer to the date of judgment. Rule 419 provides that Rule 420 applies with such modifications as are necessary to applicants and respondents in an application.
- [33] Applying these principles, and looking to the time expended in respect of taxable services as they appear before me, I consider an award of costs in Mr. Robinson's favour in the lump sum amount of \$6,000, in lieu of assessment under Rule 407, to be reasonable. This reflects my conclusion that half of the party-and-party costs would be about \$3,000. In the exercise of my discretion, considering the award of costs to which the plaintiff is entitled to against Mr. Hart and HRBL, I see no need to award to the plaintiff costs against Mr. Robinson up to the time of the making of the offer of settlement.
- [34] This award of costs also takes into account the absence of evidence adduced by the plaintiff against Mr. Robinson at the hearing. I therefore have doubts as to whether or not the matter should have been pursued against him at all.

ORDER

[35] THEREFORE, FOR THESE REASONS, IT IS HEREBY ORDERED THAT:

1. The respondent Lorne Hart shall pay a fine in the amount of \$2,000.00 to be paid within 90 days of the date of this order.
2. The respondent Lorne Hart shall pay to the plaintiff costs fixed in the amount of \$13,000.00 to be paid within 90 days of the date of this order.
3. The respondent Hart Robinson Breweries Ltd. shall pay a fine in the amount of \$4,000.00.
4. The respondent Hart Robinson Breweries Ltd. shall pay to the plaintiff costs fixed in the amount of \$27,000.00.
5. The plaintiff shall pay to the respondent Ron Robinson costs fixed in the amount of \$6,000.00 to be paid within 30 days of the date of this order.

"Eleanor R. Dawson"

Judge

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-1656-00

STYLE OF CAUSE: DESNOES & GEDDES LIMITED -AND- HART BREWERIES LIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 2, 2002

REASONS FOR ORDER BY THE HONOURABLE MADAM. JUSTICE DAWSON

DATED: June 3, 2002

APPEARANCES:

Mr. Adam Bobker FOR PLAINTIFF

Mr. Serge Anissimoff FOR DEFENDANT

SOLICITORS OF RECORD:

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Toronto, Ontario

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