COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Enns (Guardian ad Litem) v. Voice of Peace Foundation,*** 2004 BCCA 13

Date: 20040113
Docket: CA031497

Between:

Abram Enns by his Guardian ad Litem the Public Guardian and Trustee in and for the Province of British Columbia

Appellant
(Plaintiff)

And

Voice of Peace Foundation

Respondent
(Defendant)

Before: The Honourable Mr. Justice Donald
(In Chambers)

D.R. Urquhart and S. Yung	Counsel for the Appellant
J.A. Rost and A.H. Northey	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 30 December 2003
Place and Date of Judgment:	Vancouver, British Columbia 13 January 2004

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The appellant applies for leave to appeal the refusal of a *Mareva* injunction by Madam Justice Sinclair Prowse in chambers on 22 December 2003, and if leave is granted, an injunction pending the appeal in the same terms sought below.

[2] The action is brought by the Public Guardian and Trustee as the guardian ad litem for Dr. Abram Enns to recover a debt of $999,000 on a series of promissory notes. The respondent says the appellant represented to its directors that the debt was repaid and on that basis the respondent made commitments to contribute financial aid to a charitable organization working in Eastern Europe. The appellant maintains that the notes were never actually repaid and he is therefore still owed the money.

[3] Because of the urgency of this matter, counsel have agreed on a note of reasons for judgment given orally by the learned chambers judge. She found that the appellant was unable to satisfy the threshold test for a *Mareva* injunction, a strong *prima facie* case, and she dismissed the application for an order freezing the assets of the respondent in two accounts. The note of her reasons conclude as follows:

> 9. With respect to an interim injunction, there is no dispute that the funds in the accounts are

> the only assets of the Defendant. Therefore, the application is in the nature of a mareva injunction.
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> 10. The test set out in *Aetna Financial Services Ltd. v. Feigelman* [1985] 1 S.C.R. 2 requires that the applicant demonstrate a strong prima facie case. I am not satisfied that the applicant meets this test. The Defendant has not established a strong prima facie case. The financial statements show that the debt was no longer owing in 1999. The Plaintiff was the only or one of the only three directors at all material times. Although there may have been a fraud perpetrated on Revenue Canada, there is no evidence of a fraud perpetrated on the Plaintiff. The Plaintiff represented himself as the creditor repaid and the debtor making the payment.
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> 11. Given that the evidence does not establish a strong prima facie case, the application is dismissed. Whatever stay order may be forthcoming should not pertain to the legal fees incurred by the Voice of Peace Foundation for the defence of this application or pending the stay/leave application.
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> 12. This order will not be entered until December 30, 2003 unless otherwise ordered by the court or agreed to by the parties in writing.

[4] Leave to appeal is sought on the ground that the judge wrongly applied the threshold test and in so doing she erred in the exercise of her discretion. The appellant argues that she applied a "strict formalistic approach" rather than one which is more flexible and relaxed in the manner in which the various factors are considered and cites in support of that proposition ***Mooney v. Orr***, [1994] B.C.J. No. 2652 (B.C.S.C.)

and ***Silver Standard Resources Inc. v. Joint Stock Co. Geolog***, [1998] B.C.J. No. 2887 (B.C.C.A.).

[5] The requirement of showing "a strong *prima facie* case" was pronounced by the Supreme Court of Canada in the leading case of ***Aetna Financial Services Ltd. v. Feigelman***, [1985] 1 S.C.R. 2. It is a threshold test. In my respectful opinion, it can be reasonably argued that the judge erred in finding that the appellant did not have a strong *prima facie* case. This is evident from the circumstances which I shall now briefly recite.

[6] Dr. Enns created the Voice of Peace Foundation as a charitable society. He was the mind and will of the foundation and its sole officer and director until 1998 when the Reverend Vincent Price and a Dr. Hunt joined the board of directors. Dr. Enns funded the foundation by depositing $1,000,000, his life savings, in the treasury of the foundation with the idea that the interest earned on the capital would fund various religious endeavours undertaken by Reverend Price through the European Christian Mission. This organization provides financial support to local pastors and evangelists working in Ukraine, Russia and the Baltics. Dr. Enns took back promissory notes for his contributions to the respondent.

[7] In November and December of 1998 Dr. Enns participated in two transactions which, if the facts alleged concerning them are proved, could be said to be cheque kiting. The first involved a lawyer, Blake Bromley, who together with his wife and their two children issued cheques to the respondent totalling $500,000. Dr. Enns then issued charitable tax receipts to the Bromleys and represented on the books of the respondent that he used the money to repay $500,000 on the promissory notes. He caused the respondent to issue him a cheque for $500,000 in payment of promissory notes. What the books do not show, and what was not apparently revealed to the other directors, was that on the same day the Bromleys issued their cheques, Dr. Enns issued two personal cheques payable to Mr. Bromley and his wife each in the sum of $250,000. In the result, no money actually changed hands and the Bromleys obtained charitable tax receipts. It is alleged that there was an understanding that the Bromleys would contribute part of their tax savings to the respondent, but that did not occur.

[8] The December transaction was similar in nature and involved Stan Unger. Mr. Unger issued a cheque for $400,000 to the respondent, Dr. Enns caused the respondent to issue a cheque to him in the same amount for repayment of promissory

notes and then Dr. Enns issued a personal cheque to Mr. Unger for that same amount. The only difference appears to be that Mr. Unger actually paid part of his tax credit, approximately $178,000, to the respondent.

[9] On the evidence before me, the Bromleys did not have the money to cover their cheques amounting to $500,000. Thus Dr. Enns did not receive any money in repayment of his promissory notes.

[10] Dr. Enns suffered a stroke in June of 2001. A certificate of incapability pursuant to the ***Patients Property Act***, R.S.B.C. 1996, c. 349 was issued on 16 August 2001 as a result of which the Public Guardian and Trustee became the committee of Dr. Enns' person and estate.

[11] Canada Customs and Revenue Agency conducted an investigation into the transactions which it suspected were fraudulent. As a result of the investigation, Mr. Bromley has been charged with criminal offences and will proceed to trial in January 2004.

[12] To grant leave I must determine whether there is a reasonable prospect of persuading a division of this Court that the judge was clearly wrong in the exercise of her discretion: ***Mikado Resources Ltd. v. Dragoon Resources Ltd.***

(1990), 46 B.C.L.R. (2d) 354 at 357 (C.A.). The case for the appellant is that Dr. Enns did not obtain repayment of his promissory notes. *Prima facie*, that is true. The cheques he issued to himself on the respondent's account say that they are in payment of the notes, but plainly he got no money from the two transactions. So his claim in debt is strongly based on the facts. I think that may be as far as he needed to go in securing an injunction to freeze the remaining funds in the respondent's accounts, approximately $380,000.

[13] The respondent's defence is that Dr. Enns said he was paid and therefore he waived his right to enforce the notes; or he is estopped from denying he was paid because the respondent relied on his representations in promising to fund Reverend Price's European charitable activities. Furthermore, the respondent asserts that the appellant's action must rely on the cheque kiting scheme, a fraud, to overcome the documentation that would defeat the claim.

[14] It can, in my view, be reasonably argued that ironically it is the respondent who relies on the fraud, if such it is, to prevent Dr. Enns' estate from recovering on the notes. The notes exist and they have not been paid. The respondent calls in aid documents prepared as part of an allegedly dishonest scheme for its defence.

[15] As far as the clean hands doctrine is concerned, a principle invoked by the respondent, the respondent could be said to be fixed with the knowledge of the nature of the scheme because, as I have noted, Dr. Enns was the mind and will of the respondent. The other directors may have been in the dark but that would not affect the imputation of knowledge to the respondent. Moreover, the scheme was intended for the benefit of the respondent. Are the hands of either party clean? That is a question worthy of exploration on an appeal from the refusal of the injunction.

[16] I think, with respect, it may have been an error for the judge to have decided the motion on the basis of the defences proposed by the respondent. In my view, the evidence for the appellant if advanced at a trial would be amply sufficient to require the presentation of a defence. It is by no means clear to me that the respondent is bound to succeed in its defences. If both parties participated in a fraud, why should one be allowed to set up the fraud to defeat the other's claim when the claim does not depend on the fraud?

[17] The foregoing views are expressed tentatively and for the limited purpose of deciding whether leave to appeal should be granted. I go no further than to say that there is a reasonable prospect that the appellant may be able to

demonstrate an error in principle in the judge's ruling on the threshold requirement or that she was clearly wrong in her decision: ***Silver Standard Resources Inc.***, *supra* at para. 23. Accordingly, I grant leave to appeal.

[18] It follows that there should be an injunction pending the appeal. The appeal will be nugatory without it. Reverend Price has expressed an intention to spend a large portion of the respondent's money if lawfully permitted to do so. The respondent has made no disbursements since the Public Trustee became Dr. Enns' committee. Reverend Price deposed that he thought when the Public Trustee requested the respondent not to make any disbursements he was bound by law to comply. He is now aware that the appellant requires a freezing order. Nevertheless, the respondent has not been active for a significant period of time and I think the status quo should remain until the appeal is decided.

[19] I have not been persuaded that the respondent should be permitted to make expenditures said to be in the ordinary course of its business. The injunction shall be in the terms requested in para. 3 of the appellant's notice of motion for leave and stay pending appeal, to which should be added para. 2 of the learned chambers judge's interim stay pronounced 22

December 2003 giving the defendant liberty to pay its legal expenses in defending the appeal.

"The Honourable Mr. Justice Donald"