

COURT OF APPEAL FOR ONTARIO

DATE: 20150213  
DOCKET: M44695

Benotto J.A. (In Chambers)

BETWEEN

Globalive Wireless Management Corp.

Plaintiff/Respondent

and

Selectcore Ltd.

Defendant/Appellant/Moving Party

Tariq Muinuddin, for Selectcore Ltd.

Jeremy Schwatz, for Globalive Wireless Management Corp.

Heard: February 12, 2015

ENDORSEMENT

**Background**

[1] This is motion for a stay pending appeal of a Divisional Court Order which in turn dismissed an appeal from the summary judgment granted by the Master.

[2] The action involved a claim by the respondent for invoices rendered to the appellant in connection with the supply of PIN access cards. The invoices produced totalled \$1,026,067.95. Although the appellant claimed to contest the amount owing, it refused to say what amount was, in fact, owed.

[3] Master Dash, in a carefully reasoned decision, concluded that the documentary evidence alone established the respondent's claim. He indicated that he was able to determine that there was no genuine issue to be tried without exercising any of the powers reserved to a judge under r.20.

[4] Justice Kruzick, sitting in Divisional Court dismissed the appeal. He agreed with the Master and added that on the appellant's own material, the amount owing was "at least" \$977,895.00.

[5] The appellant must now show a serious issue to be tried, irreparable harm and that the balance of convenience favours granting the stay.

[6] I find that there is not a serious issue to be tried. The invoices were not disputed. The appellant did nothing to – as the Master noted – "put his best foot forward" or raise a defence to the claims. Kruzick J. was correct to uphold the decision. The Master had the evidence before him to grant the summary judgment. Based on the record, it will be difficult to show a reversible error.

[7] The appellant has not established irreparable harm if the stay is not granted. The appellant relies on the fact that the financial statements of the company show the assets are less than the liabilities. The harm suggested here is that the company is in a precarious position and cannot afford to pay the judgment. This is clearly speculative. The company is still operating.

[8] The balance of convenience does not favour the appellant. It has made only bald assertions, unsupported by evidence. Meanwhile the respondent has paid tax and HST on the invoice for which it has not received payment.

[9] For these reasons the appeal is dismissed.

[10] My decision on costs is affected by the argument raised by the appellant that brought the professionalism of opposing counsel and the integrity of the court into question. The appellant raised an argument of “reasonable apprehension of bias” in connection with the decision in the Divisional Court.

[11] Counsel for the appellant told the judge that the appellant was listed on the TSX-V (Toronto Stock Market Venture Exchange) and had done upwards of \$6,000,000.00 business with the respondent. The respondent’s counsel commented in reply that was contrary to what she had been led to believe. She was then accused of divulging privileged information and causing the judge to decide the case against the appellant.

[12] Of significance is the appellant counsel’s sworn statement on the motion before me. He said:

I am not imputing actual bias in the decision of the learned Judge or that the case would have been decided differently if those submissions were not made by my learned friend (*sic*). However, I am stating that, to an ordinary observer, this had the reasonable apprehension of influencing the Judge about the merits of the appeal.

[13] There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption. An allegation of bias engages the very foundation of our judicial system. It calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. It is not an allegation to be lightly made.

[14] The law is clear that an apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly." (see: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, endorsed by *R. v. S. (R. D.)*, [1997] 3 S.C.R. 484.)

[15] The bias was allegedly created by respondent's counsel who, with her remark, somehow led the judge to decide unfairly. There were no facts or law cited to support this allegation. The allegation added significantly to the respondent's preparation for the appeal. Divisional Court counsel's conduct had been called into question and it was necessary to respond. For these reasons, the costs of the respondent are higher than might be expected on a motion such as this.

[16] Therefore, in dismissing the motion, I order costs on a partial indemnity basis payable to the respondent, fixed at \$17,000 inclusive of interest and HST.

*M. L. Benetto J.A.*