CITATION: College of Optometrists of Ontario v. SHS Optical Ltd., 2009 ONCA 19
DATE: 20090113
DOCKET: C47973

COURT OF APPEAL FOR ONTARIO

Doherty, Weiler and MacFarland JJ.A.

BETWEEN

The College of Optometrists of Ontario

Applicant (Respondent in Appeal)

and

SHS Optical Ltd., Dundurn Optical Ltd., and John Doe, all carrying on business under the name Great Glasses, Joanne Marie Bergez and Bruce Bergez

Respondents (Appellants in Appeal)

and

The College of Opticians of Ontario

Intervenor

Heather C. Devine for the appellants, SHS Optical Ltd. *et al.*

Roy E. Stephenson and Brian P.F. Moher for the respondents, the College of Optometrists of Ontario

Robert W. Cosman and Melisse L. Willems for the intervenor, the College of Opticians of Ontario

Heard: January 6, 2009

On appeal from the judgment of Justice E.B. Fedak of the Superior Court of Justice dated

October 10, 2007.

ENDORSEMENT

[1] On June 24, 2003, Harris J. found that the appellants were operating businesses in violation of the *Regulated Health Professions Act*, R.S.O. 1991, c. 18 ("*RHPA*") by dispensing prescription eyewear to customers without valid prescriptions (the "Harris Judgment"). He ordered them to stop.

[2] On November 24, 2006, Crane J. found the appellants in contempt of the Harris Judgment (the "Crane Judgment"). Crane J. made a series of mandatory orders to ensure compliance with the Harris Judgment and granted leave to the College of Optometrists ("COM") to motion the court for further orders as may be necessary to ensure compliance. One of the terms of the Crane Judgment was that the appellants should be liable to pay a fine of $50,000 per day for each and every day that they were not in compliance with the order of Crane J.

[3] The appellant appealed the order of Crane J.

[4] COM subsequently brought a motion before Fedak J. seeking enforcement of the mandatory terms of the order of Crane J. The College of Opticians ("COO") intervened. The motion judge found that the appellants had failed to purge their contempt. Pursuant to the terms of the Crane Judgment, Fedak J. (the "Fedak Judgment") ordered the appellants to pay a fine of $50,000 per day from the date of the Crane Judgment to the date of his judgment. The fine totalled $16,000,000.

[5] Following the hearing of the motion before Fedak J., this Court on October 10, 2008, for reasons written by Watt J.A., dismissed the appeal from the order of Crane J. The background of this protracted litigation is fully set out in the reasons of Watt J.A. and we do not propose to repeat it here.

[6] The appellants appealed from the judgment of Fedak J. on numerous grounds. Many of the issues raised on this appeal, particularly certain *Charter* related arguments, were addressed by Watt J. in his reasons on the appeal from the judgment of Crane J. We will not reconsider those issues. The court called on the respondents on three issues raised by the appellants, namely:

- were the appellants given a fair opportunity to address the allegations of non-compliance with the Crane Judgment and to advance any mitigating factors in respect of sentence in the proceedings before Fedak J.?; and

- was the evidence relied on by Fedak J. in finding non-compliance with the Crane Judgment affected by the order and reasons of Perell J. arising out of an application brought by COO against the operators of the franchised stores?; and
- the fitness of the penalty.

[7] We reject both arguments.

The Fairness of the Proceedings Before Fedak J.

[8] The appellants submitted that the motion before Fedak J. was a new contempt motion to which rule 60.05 applied. It is clear from the Notice of Motion that the motion before Fedak J. was brought under Rule 37 of the Rules of Civil Procedure. The proceeding was not a new contempt motion but a hearing to determine whether the appellants had complied with the Crane Judgment and, if not, whether the fine contemplated by Crane J. for further violations of his order should be imposed. Accordingly, the motion was not brought under 60.05.

[9] The appellants' assertion that they were denied a fair opportunity to address the allegations of non-compliance with the Crane order in the proceedings before Fedak J. requires reference to the chronology of events leading up to the motion. In December 2006, counsel for COM put the appellants on notice that COM took the position that the appeal from the order of Crane J. stayed only the requirement that the appellants pay the one million dollar fine. COM advised the appellants that it took the position that the rest of the Crane order remained in full force and effect and must be complied with pending appeal. COM did not receive any response from the appellants.

[10] Five months later in April 2007, COM commenced the motion that was eventually heard by Fedak J. over several days in August 2007. In their notice, COM sought "orders to carry out the mandatory terms of the order of Crane J." COM expressly alleged that the appellants were not complying with the order of Crane J. in several respects. COM sought an order rendering the appellants liable for fines of $50,000 per day from the date of the Crane order. Detailed affidavit evidence accompanied the motion. Based on the Notice of Motion and the affidavits, the appellants must have been fully aware of the nature of the allegations made against them and the relief sought against them by COM.

[11] The motion was case managed and certain time limits were set for the filing of material. The Appellants chose to file no material until the last day permitted under those time limits. On that day they filed a cross-motion but did not file any response to the allegations in the material served on them four months earlier.

[12] The cross-motion sought to stay COM's motion, strike certain paragraphs of the motion and strike certain parts of the affidavits filed by COM. A host of arguments was advanced in support of these claims. None addressed the question of whether the

appellants were in compliance with the order of Crane J. and none responded to the factual allegations made in the College's material.

[13] At the outset of the motion before Fedak J., counsel and the motion judge engaged in a lengthy discussion as to the order in which the motion and the cross-motion should be addressed, and as to the nature of COM's motions. We need not resolve the issues raised in that debate any further than to repeat our earlier observation that the motion was clearly brought under rule 37 and not rule 60.05. More to the point of this ground of appeal, we are satisfied that nothing said or done by the motion judge in the course of those discussions precluded the appellants in any way from answering the allegations of COM on the merits had the appellants wished to do so.

[14] Three factors support our conclusion. First, the appellants had ample opportunity between April and August to place material before the court answering the allegations made in the material of COM. They also had ample time to cross-examine the affiants relied on by COM. If counsel for the appellants saw any real prejudice in presenting the appellants' affidavits before cross-examining on COM's affidavits, counsel could have moved before the case management judge for an order directing that the cross-examination precede the filing of the appellants' affidavits.

[15] As the motion judge observed, the appellants made a tactical decision not to produce any evidence whatsoever that they had complied or attempted to comply with the terms of the Crane Judgment. This tactical approach is consistent with the approach taken in the proceedings before Crane J. where the appellants did not challenge the evidence offered by COM. Nothing in the conduct of the proceedings violated any *Charter* right that may have been engaged.

[16] Second, nothing said or done by the motion judge in the course of the discussion at the outset of the motion precluded the appellants from specifically asking the motion judge for an adjournment to permit the appellants to place material before him. The motion judge may or may not have granted the adjournment had it been sought. We have reviewed the transcript. If anything, the transcript suggests that counsel, after being informed by the motion judge of the manner in which he proposed to proceed and after consulting with the appellants during a brief adjournment, decided to proceed without requesting an adjournment to adduce evidence or to cross-examine the affiants.

[17] Third, counsel, when pressed on the appeal, could not describe any affirmative evidence that she could have proffered before Fedak J. to challenge the allegations of COM.

[18] There is no merit to the appellants' allegation that that they were denied a fair opportunity to challenge the allegations or present evidence to mitigate their contempt.

Nor were there any procedural or constitutional errors that warrant setting aside the Fedak Judgment.

The Effect of the Judgment of Perell J.

[19] The appellants submit that Fedak J. erred in using evidence of the conduct of certain franchisees as a basis for holding that the appellants were in breach of the order of Crane J. The basis for this submission lies in the reasons of Perell J. given in the course of a proceeding involving COO and certain of the franchisees. The appellants contend that in the course of his reasons, Perell J. held that the franchisees were distinct legal entities from the appellants. The appellant submits that it follows that the conduct of the franchisees in the operation of their stores could not be used as a basis for a finding that the appellants were in breach of the order of Crane J.

[20] It is unnecessary to decide whether the appellants accurately describe the effect of the reasons of Perell J. Although, some of the respondents' evidence of non-compliance related to stores operated by the franchisees, the motion judge had ample evidence that the company stores controlled by the individual complainants were not complying with the Crane Judgment. The material before Fedak J. established that the Great Glasses operation had not changed and that the company's Great Glasses stores continued to dispense eyeglasses without a prescription.

[21] In any event, Fedak J. did not impute the conduct of the franchisees to the appellants. Rather, at para. 67 of his reasons, he used the evidence relating to the operation of the franchised stores to draw the inference that Mr. Bergez was not complying with certain provisions of the Crane Judgment which required him to take steps to ensure that the franchisees complied with appropriate business practices. That inference was open to Fedak J. on the evidence.

The Penalty

[22] The appellants argue that a fine of $50,000 a day leading to a total penalty of $16,000,000 was excessive and far beyond the penalty justified in the circumstances. The appellants suggest a fine of $25,000.

[23] Obviously, the fine imposed is a very significant one. However, the brazen nature of the appellants' contempt, its lengthy and ongoing nature, and the risk to the public health and safety posed by the appellants' conduct demanded a substantial fine that would act as a strong disincentive to the continuation of this kind of conduct.

[24] The appellants were fully aware, given the terms of the order of Crane J., of the financial risk they ran if they chose to continue to operate in violation of court orders. Knowledge that they faced a fine of up to $50,000 a day did not deter the appellants from

continuing to operate their business in violation of court orders. The $1,000,000 fine imposed by Crane J. was similarly ineffective. The appellants are business people. One can only assume that they judged the financial risk associated with non-compliance and deemed that risk worth the potential financial gain occasioned by continued operation in violation of the court order. The fact that the appellants, having been fined $1,000,000, carried on their operation in violation of an order knowing that they faced potentially huge penalties, speaks loudly to the need for a very significant penalty.

[25] Ultimately, the quantum of the fine was a question for the motion judge and considerable deference is owed to his determination. We see no error in principle in his decision to impose the maximum fine contemplated by the order of Crane J.

Conclusion

[26] The appeal is dismissed. The respondents are entitled to their costs on a partial indemnity basis. Counsel agree that those costs should be fixed at $ 42,000, inclusive of GST and disbursements.

"Doherty J.A."
"K.M. Weiler J.A."
"J. MacFarland J.A."