

Specific fund must still exist for payments to be made to court

Ruling clarifies limited use of preservation order

BY JENNIFER MCPHEE
Law Times

In *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.*, Ontario Superior Court Justice Laurence Pattillo clarified and limited the application of Rule 45.02 of the Rules of Civil Procedure by deciding that an interim preservation order requiring a defendant to pay money into the court cannot be granted when a specific fund no longer exists.

In this case, automobile gear rotor manufacturer American Axle & Manufacturing Inc. brought a motion for *inter alia* interim preservation of property pursuant to Rule 45.02 requiring the defendant, Durable Release Coaters Ltd., to pay roughly \$600,000 into the court.

Rule 45.02 states: "Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms

as are just."

The rule is one of the rare exceptions to the general rule that there can be no execution before judgment, and the courts have said this extreme remedy should be exercised with caution.

In February 2000, American Axle contracted with Durable Release. The deal was that American Axle would ship rotors across the border from its Buffalo, N.Y.-based facility so that Durable Release could coat them in its Bramalea, Ont., facility and send them back.

Since American Axle was named the importer of record, it had to pay GST to the Canadian government. After paying more than \$600,000 in GST, American Axle found out it wouldn't have to pay this tax if Durable Release was named the importer of record because the rotors did not originate in Canada. So Durable Release became the importer of record.

But then the relationship between the companies soured.



Durable Release lawyer Gregory Sidlofsky says interim preservation motions could have become more common.

And when Durable Release received a \$697,537 GST refund, it didn't tell American Axle about the cheque, and deposited it into its own operating account. The bank automatically applied the

cash to its line of credit.

Sometime later, American Axle found out about the refund.

Durable Release claimed it kept the money because of unpaid invoices and losses that occurred because of American Axle's breaches of contract.

American Axle disagreed and started an action claiming *inter alia* payment of the refund plus interest, a declaration that the plaintiff is the legal and equitable owner of the refund, unjust enrichment, breach of fiduciary duty and constructive trust. It also alleged that it was a breach of contract for the defendant to keep the money.

Durable Release, in turn, alleged breach of contract in relation to the gear rotors, pleaded set-off with respect to the amount claimed in the statement of claim, and counterclaimed for damages. It denied that it owned a fiduciary duty to the plaintiff or that it had been unjustly enriched.

On Aug. 25, 2006, case management Master Thomas Hawkins

ordered the defendant to pay \$623,000 into the court. On appeal, Durable Release argued that Hawkins erred in law when he decided that a specific fund existed within the meaning of Rule 45.02.

By the time of the motion, the money was long gone and so no fund existed, says Durable Release's lawyer Gregory Sidlofsky, a partner at Kramer Henderson LLP in Markham, Ont.

"What we were saying was that, in those circumstances, there was nothing to preserve," he says. "You can't preserve something that doesn't exist."

In his June 1 ruling, Pattillo agreed that a fund must exist and that the fund no longer existed, and found that requiring the defendant to recreate the fund amounted to injunctive relief, and so it was not within Hawkins' jurisdiction to make the order.

"In coming to the decision he did in this case, the Master stated that the order he was asked to make was not injunctive in nature.

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While that is the case in respect of an order pursuant to rule 45.02, in the absence of a specific fund, the order which the Master made is clearly injunctive and accordingly not within the Master's jurisdiction," wrote Patillo.

If the decision had gone the other way, the rule could be used to allow execution before judgment, regardless of whether the money is still there, says Sidlofsky.

Interim preservation motions would become more common, and that would significantly impact both defendants and the litigation process.

"The plaintiff would have a very powerful remedy where it could force a defendant to post money before there has been a hearing on the merits," he says.

"The impact it would have on a defendant is huge because posting this money means it's not available. In the case of a business, it's not available to run the business. And it's not available to fund the defence to what might be a meritorious defence."

Plaintiffs would also be less likely to settle because they wouldn't be concerned about enforcing a judgment, he says. **LT**

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