

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191001

Docket: A-259-19

Citation: 2019 FCA 243

Present: WEBB J.A.

BETWEEN:

DOUBLE DIAMOND DISTRIBUTION LTD.

Appellant

and

**CROCS CANADA, INC., CROCS INC, CROCS RETAIL, LLC,
WESTERN BRANDS HOLDING COMPANY, LLC.**

Respondents

Heard at Saskatoon, Saskatchewan, on September 26, 2019.

Order delivered at Ottawa, Ontario, on October 1, 2019.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR ORDER

WEBB J.A.

[1] Double Diamond Distribution Ltd. (Double Diamond) brought a motion for an order staying the Order of Norris J. of the Federal Court dated June 27, 2019 (2019 FC 868) (the Order). The Order provided that:

1. The defendants' motion for particulars is granted in part.

2. The defendants' motion for an extension of time to file a Statement of Defence is adjourned to July 11, 2019.
3. The defendants' motion for security for costs is adjourned to July 11, 2019.
4. The plaintiff's motion for default judgment is dismissed.
5. The plaintiff's motion for an Order striking the defendants' Demand for Particulars is dismissed.
6. The plaintiff's motion for an Order requiring the defendants to file a Statement of Defence within seven days is dismissed.
7. Costs are taken under reserve pending a decision on the defendants' motion for security for costs.

[2] Other than the first paragraph, the Order adjourns certain matters, dismisses certain motions and takes the issue of costs under reserve. The only part of the Order to which a stay would be relevant is the first paragraph and Double Diamond, at the commencement of the hearing of the motion, confirmed that this was the only part of the Order for which it was seeking a stay.

[3] Double Diamond commenced an action in the Federal Court by filing a Statement of Claim on March 6, 2019 (and which was issued on March 8, 2019). Crocs Canada, Inc. and the other defendants (who will be referred to herein as Crocs Canada) have not yet filed a Statement of Defence. Crocs Canada had brought a motion under Rule 206 of the *Federal Courts Rules*, SOR/98-106, for an order requiring Double Diamond to provide copies of each document referred to in its Statement of Claim (the Rule 206 Motion). The parties settled the Rule 206 Motion.

[4] On May 13, 2019, Crocs Canada served a Demand for Particulars on Double Diamond which resulted in Double Diamond bringing a motion for default judgment or, in the alternative, striking the Demand for Particulars and requiring Crocs Canada to file a Statement of Defence. Double Diamond argued that the terms under which the Rule 206 Motion was settled prevented Crocs Canada from making a Demand for Particulars. The term in question (which is set out in the e-mail from counsel for Crocs Canada dated May 3, 2019) is:

The Defendants are to serve and file a Statement of Defence, or to make any further preliminary objection, by or on May 13, 2019.

[5] The Federal Court judge did not agree with Double Diamond's interpretation of this term and dismissed Double Diamond's motion for an order for default judgment or to strike the Demand for Particulars. Double Diamond appealed the Order and brought this motion for a stay of the Order.

[6] The Supreme Court of Canada set out a three-stage test in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17 to determine if a stay should be granted:

43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits....

[7] In order to grant the stay, Double Diamond must establish that all three elements of the test support its application for a stay.

[8] The focus of the hearing was on the second element – irreparable harm to Double Diamond if the stay is refused. Double Diamond submitted that it would suffer irreparable harm if the stay is not granted because its appeal would be rendered moot and because the appeal is linked to the agreement reached between counsel related to the settlement of the Rule 206 Motion.

[9] With respect to rendering the appeal moot, the only operative parts of the Order that would be relevant in the appeal to this Court are the parts related to the Demand for Particulars and the dismissal of the motion for default judgment. In effect, either the litigation will proceed before the Federal Court or it will not. During the course of the argument for the stay motion, Double Diamond conceded that it would not be pursuing the appeal in relation to the dismissal of its motion for default judgment. Therefore, Double Diamond acknowledged that the litigation before the Federal Court will continue. The only issue remaining is whether the next step will be:

- (a) compliance with the Demand for Particulars in accordance with the Order and reasons of the Federal Court; or
- (b) the filing of the Statement of Defence.

If the stay is not granted and the particulars are provided, this may render the appeal moot.

[10] Generally, if refusing a stay would render an appeal moot or nugatory, irreparable harm would be established (*O'Connor v. Nova Scotia*, 2001 NSCA 47, [2001] N.S.J. No. 90, at para. 17).

[11] However, as noted by the British Columbia Court of Appeal in *Moore v. British Columbia (Securities Commission)*, 74 B.C.A.C. 136, 22 B.C.L.R. (3d) 277, it does not necessarily follow that a stay will always be granted if refusing the stay would render that appeal moot. In that case, it was noted, in paragraph 9, that “the appellants have failed to show how testimony or the production of documents relevant to the investigation in question can result in any actual prejudice to them”. Therefore, even though refusing the stay would render the appeal moot, the British Columbia Court of Appeal upheld the denial of the stay.

[12] As noted above, Double Diamond acknowledged that the litigation before the Federal Court will continue. As part of the litigation, Crocs Canada will be filing a Statement of Defence. The Demand for Particulars is related to the disclosure of certain information that Crocs Canada indicated it needs to prepare its defence. Double Diamond does not dispute that the particulars to be provided under the Order will be required in order for Crocs Canada to file a defence. Double Diamond also confirmed that none of the information that would be provided to comply with the Order would be confidential and there is no indication that it would be onerous to provide these particulars.

[13] Double Diamond also acknowledged that – sooner or later – the particulars that the Federal Court ordered it to provide would be disclosed to Crocs Canada. Therefore, even if the

stay is granted and Double Diamond is successful in its appeal, the particulars will still be disclosed to Crocs Canada at some point. The only harm or prejudice to Double Diamond is the disclosure of particulars of its claim before it might otherwise be required to do so. This is not irreparable harm or sufficient prejudice to support the requested stay. There is no reason to delay the disclosing of the particulars as ordered by the Federal Court.

[14] Double Diamond also argued that the irreparable harm that it will suffer is linked to the agreement between counsel in relation to the settlement of the Rule 206 Motion. Double Diamond's concern is that it will no longer be able to reach any agreement with opposing counsel. This harm, however, is speculative. Speculative harm is insufficient to support a stay (*Attorney General of Canada v. Oshkosh Defense Canada Inc., et al.*, 2018 FCA 102, [2018] F.C.J. No. 576, at para. 25).

[15] It should be noted that the issue in this case relates to the interpretation of the agreement reached between counsel. Disagreements over the interpretation of agreements arise from time to time and this would include disagreements over agreements reached between counsel. There is nothing to suggest that simply because the parties to an agreement disagree over the terms of that agreement, that either party would suffer irreparable harm in not being able to negotiate or reach any other agreement with the opposing party. To avoid any possible dispute, any subsequent agreement may have more detailed terms.

[16] As a result, I do not accept that Double Diamond would suffer irreparable harm if the stay is not granted. In my view, this litigation should proceed before the Federal Court without

any further delay and, therefore, the motion for a stay of the Order requiring Double Diamond to provide particulars to Crocs Canada is dismissed with costs.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**MOTION FOR A STAY OF THE ORDER OF THE FEDERAL COURT
DATED JUNE 27, 2019 (2019 FC 868)**

DOCKET: A-259-19

STYLE OF CAUSE: DOUBLE DIAMOND
DISTRIBUTION LTD. v.
CROCS CANADA, INC. ET AL.

PLACE OF HEARING: SASKATOON, SASKATCHEWAN

DATE OF HEARING: SEPTEMBER 26, 2019

REASONS FOR JUDGMENT BY: WEBB J.A.

DATED: OCTOBER 1, 2019

APPEARANCES:

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