Date: 19981229 Docket: C.A. 147621

NOVA SCOTIA COURT OF APPEAL
Cite as: Data General (Canada) Inc. v. Polem, 1998 NSCA 207

Flinn, Hallett and Cromwell, JJ.A.

BETWEEN:

DATA GENERAL (CANADA) INC.	)	William L. Ryan, Q.C. and
	)	Dionysia (Dennise) Mack
Appellant	)	for the Appellant
	)	
- and -	)	
	)	John H. Graham
	)	for the Respondent
A. WAYNE POLEM	)	
	)	
Respondent	)	Appeal Heard:
	)	November 12, 1998
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	)	
	)	Judgment Delivered:
	)	December 29, 1998
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THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Flinn, J.A. concurring; Cromwell, J.A. dissenting.

HALLETT, J.A.:

Introduction:

The respondent was employed as a sales representative of the appellant. In late 1993 he was advised that the appellant was planning to terminate his employment because it needed to downsize the Atlantic Provinces' office. The appellant was also considering changing sales representatives in Canada to agents. In a number of cases this was done. However, the appellant and the respondent could not come to terms on an agency contract for the respondent. These negotiations took place in early 1994. During this period the respondent was close to obtaining a $1.2 million dollar contract for the appellant to supply and install a computerized data imaging system for the Department of Finance of the Government of New Brunswick.

Failing to have reached a consensus on the terms of an agency agreement with the respondent, the President of the appellant decided in late April, 1994, to terminate the respondent as a sales representative. However, the respondent's immediate superior, Patrick Guest, did not communicate this to the respondent.

On May 5th, 1994, the respondent was officially notified by the Government of New Brunswick that the appellant would be awarded the contract for the imaging system.

The respondent pressed the appellant for finalization of the agency agreement.

On May 9th, 1994, in a telephone conversation with the President of the appellant, the respondent was advised that he had been terminated as a sales representative. This came as a surprise to him. The respondent was advised that he could not attend the meetings with the Finance Department officials scheduled for Fredericton on May 11th to May 13th as he was no longer a sales representative and that an agency agreement had not been put in place. The respondent and the President of the appellant, Mr. Nicoletti, discussed the terms of an agreement to protect him for a commission on the NB Finance Department deal. It is apparent that the appellant wished to have the respondent at the Fredericton meetings. The purpose of the meetings was to negotiate the final terms of the contract between the appellant and the NB Government.

In the telephone conversations between the President and the respondent, the President advised him that a letter to deal with the commission situation would be sent to him on the evening of May 9th, 1994. The letter was sent to him at his hotel in Fredericton. The letter stated:

> This letter will serve to confirm our discussions that you are no longer a full time employee of Data General Canada and that you are in negotiation with Data General to sign an Agent Agreement for Atlantic Canada. In the meantime, it is my intention to ensure that you have a letter covering you for payment of commissions on New Brunswick Finance which I understand is imminent business.
>
> This is to confirm our intention to pay you commission for the New

> Brunswick Finance opportunity (recent RFP) at a rate to be agreed between the parties but not to exceed 10% of net invoiced value of the equipment and service provided. The commission will be based upon cumulative Total Net Revenue and will be paid as follows: Commission for 50% of order value will be advanced upon shipment of customer's order. After receipt by Data General, of full payment for the applicable End User order, the remaining 50% commission will be paid.
>
> If Data General Canada is required to discount the products and services to New Brunswick Finance beyond Data General Canada standards, then Data General Canada reserves the right to reduce the commission rate mentioned above.
>
> Kindly acknowledge your acceptance of this offer by executing this letter and returning it to my attention.

The next day the respondent attempted to have the appellant agree that the commission to be paid on the NB sale would be at 10%. He wanted the letter amended to delete that portion of the letter stating that the commission to be paid would be "at a rate to be agreed between the parties". The appellant's Mr. Guest would not agree. The respondent signed the letter accepting its terms.

The respondent was cross-examined on the events surrounding his signing of the May 9th letter. He was asked the following questions and gave the following answers which are clearly relevant to the intention of the parties with respect to their relationship on May 9th, 1994:

> Q. So that you could have continued your discussions with Patrick Guest or DG [Data General], and I'm going to suggest to you the reason you didn't was that Mr. Guest had made it perfectly clear to you that there was no movement from DG with respect to the wording of this letter and the 10 percent.
> A. Yes, sir.
> Q. And you signed this letter freely, voluntarily. Correct?
> A. Yes, I did.
> Q. Knowing the consequences and the ramifications that stem from signing that letter. You knew the wording that was in it, didn't you?

A. Yes, I did.
Q. And sir, as far as the wording is concerned, it says, "... at a rate to be agreed upon between the parties, but not to exceed 10 percent of the net invoiced value of the equipment and services provided." So you knew when you signed this that, one, you had to reach an agreement. An agreement reached meant mutual satisfaction to both parties.
A. Yes.
Q. And the whole reason that we're here today is that that agreement was never reached, was it?
A. No, sir, it was not.
Q. And your position throughout from May 9th onward was that you wanted 10 percent.
A. Yes, sir.
Q. Not up to, but 10 percent.
A. Yes, sir.
Q. And that's still your position today, isn't it, sir?
A. Yes, sir, it is.
Q. And you were aware that the company never, ever agreed to pay 10 percent with respect to this deal.
A. Yes.
Q. Thank you.
A. Well, I can qualify that.
Q. By all means, sir.
A. They never agreed not to pay 10 percent either.
Q. That's not the question I asked. The company --
A. I -- I --
Q. -- never agreed to pay 10 percent, did it, sir?
A. This is accurate, yes, sir.

It is to be noted that as of May 9th, 1994, there was no binding contract between the appellant and the NB Government. The terms of that contract were negotiated at the Fredericton meetings.

At the negotiations in Fredericton the respondent played a very minor role as the parties were principally dealing with technical matters which were not within the expertise of the respondent.

The respondent was formally terminated on May 13th, 1994. He signed

a general release of claims but the right to be paid for the NB Finance sale was specifically excluded from the release. The respondent immediately went on holidays returning on June 7th.

The respondent had been in discussions for several months with Sun Microsystems, a competitor of the appellant, with respect to the possibility of his going to work with that company.

The respondent pressed the appellant to finalize an agency agreement by June 10th. The appellant did not respond.

On June 13th, 1994, the respondent became an account executive with Sun.

On November 1, 1994, the appellant sent the respondent a cheque for $8,810.25 to be in full settlement of commissions on the New Brunswick Finance deal. This sum was calculated in accordance with the terms of the respondent's sales representative agreement in that it paid him one-half of the commission he was entitled to based on the equipment sold and delivered in the 60 day period following his termination. He did not accept the cheque.

The respondent commenced an action claiming that he had a contract with the appellant that he would be paid a commission of 10% on the NB

Finance deal. He claimed in the alternative that he should be paid on a *quantum meruit* basis if the May 9, 1994, letter was not an enforceable contract.

In its defence the appellant asserted that the May 9th letter was not an enforceable contract and that $8,810.25 was reasonable remuneration in the circumstances.

The Trial Judge's Decision:

The trial judge, in his decision, carefully reviewed the evidence. He then set out his "findings" as follows:

> **1.** As of May 9, 1994, the plaintiff was no longer a full time employee of the defendant and therefore, except only to the extent incorporated into any new contractual relationship and to the extent by its terms it provided for a post-employment relationship between the parties, the sales representative compensation plan was no longer applicable as between the plaintiff and the defendant.
>
> This finding is evident from the evidence of both the plaintiff and Mr. Turchyn concerning the telephone call with Mr. Nicoletti on May 9 as well as the letter of that date signed by them and in which it is acknowledged the plaintiff was no longer "a full-time employee of Data General Canada".
>
> **2.** As at May 9, 1994, no agency agreement had been negotiated between the plaintiff and the defendant.
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> On all the evidence, it is clear the parties had not come to a consensus on a new agency agreement. Although, as recognized in the letter of May 9, 1994, the parties were then negotiating to sign an agent agreement, these negotiations were not successful and there never was an agent agreement either verbally or in writing. Evidence, particularly by the plaintiff, as to what he says was agreed as to terms and conditions or understandings were no more than negotiation positions in respect to particular terms and conditions and on the evidence as a whole, it is clear a consensus ad idem was never reached between the parties.
>
> **3.** The attendance by Mr. Polem at the negotiation meetings in Fredericton, as one of the representatives on behalf of the defendant, was pursuant to the letter of understanding and the prior terms of employment are only applicable insofar as they are either implicitly or

> explicitly, or by operation of law, incorporated into this letter of understanding. On the evidence of both Mr. Turchyn and Mr. Polem it is clear each recognized as of May 9, 1994, and prior to execution to the letter of understanding of that date, Mr. Polem was neither obligated nor entitled to attend the meetings as a representative on behalf of the defendant.

In my opinion, these findings are supported by the evidence.

The trial judge then correctly identified the issues before him, reviewed the arguments of the parties and the law relative to whether the parties had entered into an enforceable contract, that is, whether the May 9th letter contained all the essential terms for a contract. He then stated:

> I am satisfied, therefore, that the letter of May 9 contains the essential terms in respect to price and, as well, contains the essential terms in respect to when the commission is to be paid, namely, for 50% of order value upon shipment and upon full payment for the order, the remaining 50% commission. The contract on which the commission is to be calculated is the total of the orders placed pursuant to the contract negotiated with the Department on May 13, 1994. It is not to include nor incorporate any add-ons nor is it to be limited to any 60-day period.
>
> In its pre-hearing submission, the plaintiff, in respect to the interpretation and application of the May 9 letter suggests the position of the defendant would result in an interpretation that is "absurd and unjust". It is, in the submission of counsel, absurd and unjust because the parties clearly could not have intended the employer would be permitted a unilateral discretion to reduce the commission rates to a fraction of the 10% set out in the letter. In this context, counsel refers to Fridman, The Law of Contracts, (3rd), The Carswell Company Limited, 1994), on the principles or rules of contractual interpretation where one interpretation would lead to an absurd result. He notes at p. 442-443:
>
> > For it is the duty of the Court to avoid any interpretation that would result in a commercial absurdity. In such a situation, there is a patent ambiguity, and the court can go beyond the words and look at the surrounding circumstances and the course of dealing between the parties, if any, to see what the parties intended. Departure from the plain ordinary meaning or words may also be allowed where adherence to the rule would involve inconsistency or repugnancy between different parts of the contract.

> The point here is that, since the parties obviously did not intend to contract in such a manner as to produce an absurd result, that interpretation must be placed upon their language as will give it most effect. If there are two possible interpretations, one of which is absurd or unjust, and the other of which rational, the latter must be taken as the correct one, on the basis of giving effect to the general contractual intentions of the parties.

Also, in **Consolidated-Bathurst Export v. Mutual Boiler Ins.** (1979), 112 D.L.R. (3d) 49 at p. 58, Justice Estey said:

> Even apart from the doctrine of *contra preferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.

In the present context, at least to the extent spoken during the telephone conference on May 9 and as reflected in the letter of May 9, the intent of the parties as expressed to each other was that the plaintiff would receive a commission of 10%, subject to a possible reduction in the event the defendant was required to discount the price of the goods and services. There is, in our view, no ambiguity and on the clear meaning of the words used in the May 9 letter, the intent of the parties as expressed therein is clear and entitles the plaintiff to the rate of commission therein stipulated. If, on the other hand, there was ambiguity, then in order to express the true intent of the parties and in view of the comments by Fridman in The Law of Contracts, supra, and the comments by Justice Estey in **Consolidated-Bathurst Export v. Mutual Boiler Ins.**, supra, there would be a similar result.

A third argument advanced by the plaintiff is the application of the *contra proferentem* rule and in this respect, counsel refers to the further comments by Fridman, at pp. 444-445:

> In cases of doubt, as a last resort, language should always be construed against the grantor or promisor under the contract.
>
> . . .
>
> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exception, exclusion or limitation of liability.
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> . . .
>
> The rule is also of great relevance where the contract being construed is *contra d'adhesion*, that is, where the signatory does not really have the opportunity to negotiate its terms but is obligated either to agree and sign, or forego whatever advantages such a contract

> might bring him.
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensured that the meaning least favourable to the author of the document prevailed.
>
> On any interpretation, I am satisfied the plaintiff is entitled to a commission of 10% on the basis herein before noted. (emphasis added)

It is clear from a reading of the whole decision that where the trial judge uses the term “our view” (which I have highlighted), he means “his view”, that is, the trial judge’s view rather than the view of counsel for the respondent.

The trial judge then dealt with the claim of *quantum meruit*. He made reference to the leading cases and correctly identified his task as requiring him to determine what was reasonable remuneration for the respondent’s services under all of the circumstances.

The trial judge concluded:

> In respect to the New Brunswick Finance deal, defence counsel suggests the product ordered and installed was leading edge and required on an inordinate amount of support, including technical support, product support, configuration, design, pricing, costing and delivery. Counsel suggests Mr. Polem was involved only to the point of bringing the deal to the table and all other aspects of the salesperson’s duties were performed by others, after Mr. Polem left the defendant to work for a competitor.
>
> Although pursuant to the sales representative compensation plan, commission at the rate of 10% appears to have only been applicable to revenue generated in excess of $1,000,000, this was the figure used during the negotiations and, more importantly, was the number included in the May 9 letter of understanding under which Mr. Polem acted in attending at the Fredericton meeting as part of the negotiation team on behalf of the defendant. Any failure to perform the remaining duties outlined by the defendant was not his failure, but arose because of the termination on May 9 of his status as an employee of the company. Nowhere in the May 9 letter is there any reference to the performance of

> duties and responsibilities beyond ensuring the defendant was successful in obtaining the imminent business referred to in the letter, namely, the successful conclusion of the negotiations for the New Brunswick Finance deal. Even if the contract had anticipated the continued involvement of the plaintiff in performing a role similar to that of a sales representative, then it was the defendant that terminated his involvement and the opportunity to complete this contractual obligation. It is not now for the defendant to say the plaintiff has not performed since it was the defendant that removed his opportunity to so perform. Any suggestion he could have continued to perform this responsibility, in view of the May 9 letter is, on the circumstance of this case, also untenable. Also, at no time following the meeting at the Fredericton airport on May 13 did the defendant ever suggest to the plaintiff he was not performing his duties and responsibilities in accordance with the May 9 agreement and as such, it is not now for the defendant to say the plaintiff breached the agreement in that he did not perform these additional duties.
>
> A reasonable remuneration is, in these circumstances, commission at the rate of 10% on the total of the Orders placed under the contract negotiated on May 13, 1994.

The trial judge dismissed the respondent's claim for punitive and exemplary damages.

The order issued following the trial required the appellant to pay the respondent $120,000.00 and costs of $11,962.50 "pursuant to a letter from Justice MacAdam dated March 11, 1998," plus the respondent's disbursements which were assessed by the taxing master in the amount of $6,602.69. The Order also required that the appellant pay the defendant pre-judgment interest at 6.5% commencing November 1, 1994, until the date of the order.

Issues on Appeal:

The appellant asserts that the trial judge erred in finding that the May 9, 1994, letter was an enforceable contract and erred in fixing reasonable

remuneration on a *quantum meruit* basis at $120,000.00 being 10% of the value of the contract with the NB Government.

Disposition of the Appeal:

Justice MacAdam erred in finding that there was an enforceable contract to pay the respondent 10% of the value of the contract with the NB Finance Department. He ignored the plain meaning of the words used in the letter of May 9, 1994, that the parties agreed that a commission was to be paid "at a rate to be agreed upon between the parties, but not to exceed 10%".

In a commission contract the most essential term is the rate of commission. The very essence of the May 9, 1994, letter is that the rate would have to be agreed upon between the parties. In my opinion, the trial judge misinterpreted the letter which is clear on its terms. Absent agreement on the most essential term of a sales agency contract, the May 9th, 1994, letter was not an enforceable contract.

Alternatively, if one were to interpret the letter as being ambiguous then one can look beyond the terms of the writing to see the true intention of the parties. The respondent's evidence which I have previously quoted makes it abundantly clear that he knew that the appellant was not agreeing to pay him a commission of 10% on the NB Finance deal.

The interpretation of the May 9th, 1994, letter, as lacking an essential term, and, therefore, not an enforceable agreement, does not lead to a commercial absurdity given the circumstances that existed on May 9th, 1994. The respondent had been terminated as an employee and consensus on an agency agreement had not been achieved. The respondent was not obliged to perform any follow-up services following the start-up of the installation phase of the contract as would normally be required of a sales representative. The evidence discloses that as this was leading edge technology, there would be a great deal of technical support services required from the head office and from project partners of the appellant during the installation phase. I would infer that this work would have a negative impact on the degree of profitability on the sale. As it was leading edge technology it would have been difficult to measure in advance how extensive the technical head office support would have to be to complete the contract. Co-ordination of this work would normally be done by the sales representative who made the sale. However, if there was a project manager involved, as there was in this contract (a Mr. Regan), who had overall supervision of the installation, the sales representative duties in the installation phase would not be so extensive. As there was no employer/employee relationship and no agency agreement in place, there was no relationship between the appellant and the respondent other than as provided in the May 9th letter. Therefore, there was nothing in place that would require the respondent to perform any additional duties normally required of a sales representative in fulfilling the appellant's contractual obligations. Accordingly, there was no

reason why the appellant would have agreed in the May 9th, 1994, letter to pay a commission of 10% to the respondent not knowing whether the respondent would be seeing the project through to its completion which, due to its complexity, took approximately one year and involved a great deal of head office support. The parties were in unchartered waters. Under the circumstances, it is not absurd to interpret the May 9th letter as leaving the rate of commission to be determined by agreement between the parties.

In my opinion, the *contra proferentem* rule, has no application on the facts of this case, as the true intent of the parties was clear from the evidence of the respondent and from the terms of the letter of May 9th. The respondent knew that the appellant would not amend the letter to provide that he would be paid a 10% commission.

I am satisfied the trial judge erred when he concluded that there was an enforceable contract between the appellant and the respondent which required the appellant to pay a commission of 10% on the sum of $1.2 million dollars.

Quantum Meruit:

The appellant asserts that the trial judge, in his reasoning, took irrelevant matters into consideration in deciding that reasonable remuneration in all the circumstances would be a 10% commission on the total orders placed

under the contract negotiated on May 13th, 1994.

In paragraph 45 of the respondents factum it is submitted that 10% is reasonable remuneration because:

(a) the rate of 10% was the basis of all negotiations between the parties in respect to a generic Agent's Agreement;

(b) Polem was instrumental in identifying the NB Finance opportunity and convincing Data General to continue to pursue it notwithstanding reluctance and scepticism by many officials of Data General at various times in the process;

(c) the NB Finance deal represented the largest and most profitable deal for the Data General in Atlantic Canada and one of the largest and most profitable for Data General in the country;

(d) Data General was not required to discount any products or services to NB Finance beyond its normal standards, which can amount to a discount of up to 30%. Instead, the products and services were sold at full price, which is highly unusual;

(e) Polem was never advised that he was required to provide any further services in order to obtain the maximum commission rate;

(f) Polem was never advised by officials of Data General that he was required to meet any other contractual commitments or conditions in order to receive the maximum commission rate;

(g) following May 9, 1994, the Data General did not offer Polem an Agency Agreement or any other type of contract under which he could continue to work for Data General; and

(h) Steven Oliver received a commission of 10% on all of the add-ons to this particular contract.

Before dealing with the submissions of counsel we must determine what is the appropriate standard of appellate review in an appeal from a *quantum meruit* award.

I have concluded that our approach should be similar to an appeal court's general approach in reviewing damage awards.

This approach was identified by Clarke, C.J.N.S. in **Higgins v. Naugler et al** (1995), 142 N.S.R. (2d) 104. In that appeal it was asserted that the trial judge erred in his award of damages for negligence and breach of contract by a solicitor in acting for a party in a business transaction. Clarke, C.J.N.S. stated at paragraphs 7, 8 and 9 as follows:

> It is our unanimous opinion the appeal fails for the following principal reasons.
>
> > 1) There is no cause for this court to interfere with the conclusions reached by the trial judge. We refer to the words of McLachlin, J., in **Toneguzzo-Norvell et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114; 162 N.R. 161; 38 B.C.A.C. 193; 62 W.A.C. 193, at p. 121.
> >
> > 2) Upon concluding that the appellant Moore breached

> both his retainer and his duty of care to the respondent Higgins the trial judge, as was the court in **Wilson v. Rowswell** (1970), 11 D.L.R.(3d) 737 (S.C.C.), confronted with the "practical difficulty of assessing damages".

According to the Judicial Committee of the Privy Council in **Nance v. British Columbia Electric Railway Co.**, [1951] A.C. 601 (P.C.), the principles to be followed by this court are not in doubt. At p. 613 Viscount Simon wrote:

> "Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ..."

While we do not endorse the methodology adopted by the trial judge in his assessment of damages, Justice Nathanson did not arrive at a wholly erroneous estimate.

In a *quantum meruit claim* determining what would be reasonable remuneration in all the circumstances, by the very nature of the task, requires a judgment call by a trial judge. Appeal courts should be slow to interfere with a trial judge's award unless he erred in law (as described in **Nance**) or the award is so inordinately high or low as to be a completely erroneous estimate of the value of the work or services in question.

In my opinion Justice MacAdam erred in law in that his reasons for determining that the respondent was entitled to be paid a commission of 10% were in the main based on irrelevant considerations and a failure to consider

relevant matters.

I am further of the opinion that Justice MacAdam's decision on the *quantum meruit* issue was affected by his having already determined that there was an enforceable contract pursuant to which the appellant was bound to pay a commission of 10% on the $1.2 million dollar order.

While the drawing of evidentiary conclusions is primarily within the domain of a trial judge, that is not to say that trial judge's findings are immune from interference on appellate review.

This is an appeal which demands a review and re-weighing of the evidence and which, in my opinion, demands that this Court exercise its own judgment. This is particularly so where the issue as to what is reasonable remuneration does not turn so much on the credibility of the witnesses but rather, a determination of what are the appropriate conclusions to draw from all of the evidence in determining the remuneration issue.

I have quoted the relevant paragraphs from Justice MacAdam's decision as to how he concluded that 10% commission was reasonable remuneration.

In my opinion he erred in putting far too much emphasis on the fact

that 10% was the rate mentioned in the May 9th, 1994, letter. That was, in the main, an irrelevant consideration because the rate of commission that would be paid on a *quantum meruit* basis would depend on what services the respondent performed for the appellant and the value of those services not on the fact that 10% was mentioned in the May 9th letter. The 10% mentioned in the letter was the maximum commission that the parties might have agreed upon had they been able to come to an mutual agreement subsequent to the signing of that letter.

The balance of the trial judge's reasons for awarding a 10% commission all relate to the trial judge's view that the appellant cannot complain about the failure of the respondent to perform the normal post-sales duties as the appellant had terminated the respondent's employment. That reasoning does not address the issue before the trial judge. The issue being, what would be reasonable remuneration to pay to the respondent under all the circumstances?

The evidence clearly shows the relationship between the parties was in a state of transition from November, 1993, until May, 1994. Neither party knew whether an agency agreement could be worked out but it was unlikely as the appellant's position and that of the respondent respecting the terms of such an agreement were poles apart. The respondent was not prepared to sign the appellant's standard agreement but wanted many benefits in addition to a 10% commission. The benefits included the requirement that the appellant pay for

many of the expenses normally paid for by an independent agent including expenses of travel, secretarial staff, etc. Under the standard agreement proposed by the appellant, the independent contractor would pay for most of these expenses. In my opinion, the learned trial judge erred in concluding, in effect, that the failure of the respondent to perform the remaining duties of a sales person arose solely because of the termination, by the appellant, of the respondent's employment on May 9th. It can be equally said that the respondent's failure to perform duties following the signing of the contract arose out of the failure to reach an agency agreement. One cannot lay the fault for the respondent's inability to perform the follow-up duties of a sales person at the feet of either of the parties to the exclusion of the other.

With respect to the appellant's position respecting the relationship between the appellant and the respondent after May 13th; in my opinion, it was totally unrealistic for Roman Turchyn, the appellant's vice-president, Human Resources, who is no longer employed by the appellant, to have testified that he had expected the respondent would service the NB Finance Department contract until its completion a year or more later. Such servicing would only have been required if the parties had come to an agreement on the agency relationship. Nor can the appellant successfully argue that the respondent's failure to perform the duties normally performed by a sales representative was because he took employment with Sun Microsystems. It was not unreasonable for the respondent to have been in discussions with Sun Microsystems in May and June, 1994,

towards accepting a position with that company given the state of uncertainty of his status with the appellant.

One cannot, as did the trial judge, lay on the appellant the sole responsibility for the respondent not being in a position to perform the duties normally expected of the sales person subsequent to May 13th, 1994. The parties were in the process of going their own separate ways unless they could reach agreement on an agency relationship. Termination of the respondent as an employee, to the knowledge of the respondent, had been in the works for months. The subsequent failure of the respondent to be in a position to perform the services normally required of the sales person following a sale until the contract price is paid in full was, in effect, caused by the inability of the respondent and the appellant to come to an agreement as to how they would continue their relationship. In my opinion, neither party should be blamed for that failure; they simply could not agree.

In summary, the reasons expressed by the trial judge for awarding the respondent a commission of 10% were based in the main on irrelevant or marginally relevant considerations and as a result, he failed to properly consider what was the value of the services rendered by the respondent. In so doing the learned trial judge erred in law.

I have previously quoted the reasons counsel for the respondent

submits that 10% provides reasonable remuneration to the respondent under all the circumstances. I will deal with these in the following paragraphs.

I do not agree that the fact that the respondent and the appellant considered a rate of 10% for commissions as a basis of their negotiations with respect to the proposed agent's agreement has any substantial relevance to the issue of determining what is reasonable remuneration in *quantum meruit*. The 10% was to be a maximum commission. Therefore, something less than 10% was also contemplated. It must be remembered that under the so-called agent's agreement the respondent would be an independent contractor and would bear all the expenses of operating his own business with possibly some financial relief from the appellant for a few months in the transition period. Obviously a commission higher than that which would be paid to a sales person must be paid in such circumstances as an independent would normally pay for his expenses of doing business whereas an employee in sales has no overhead for office, travel, sickness and health benefits, etc.

Having determined that the trial judge erred in law in quantifying the claim, the issue before us boils down to determine what, under all the circumstances, would be reasonable remuneration for the respondent's services in connection with the contract with the Government of New Brunswick.

I agree with counsel for the respondent that it is extremely relevant to

consider that the respondent was instrumental in identifying the NB Finance opportunity and convincing the appellant to continue to pursue it.

It is also relevant that this deal was the largest for the appellant in Atlantic Canada and that it had great strategic advantage to the appellant. These are important considerations in assessing the quantum of the award to be made. I have some question as to the extent of the contract's profitability.

Counsel for the respondent, after much prodding in cross-examination, was able to drag out of Mr. Roman Turchyn after referring him to his discovery testimony, that in September, 1995, a few months before the installation was completed, the appellant was projecting a profit of approximately 40% based on revenue from the project of approximately $1.4 million dollars and costs of $837,000.00 up to that point in time. It was also brought out in evidence that the cost figures did not include labour, travel, telephone expenses and appreciation on equipment charges. Most significantly, the appellant, having undertaken to produce at trial a statement that would indicate what was the net profit on the project, failed to do so. The only evidence adduced by the appellant on this issue is that of Mr. Turchyn. Mr. Turchyn testified as follows:

> Q. Can you indicate to the Court please -- we talked about the cost. You know what the margin of profit was at the end of the day after implementation of this particular project?
> A. My understanding at the end of the day, that Data General's financial records are that this implementation was a loss because of the amount of effort put into it.
> Q. How did the amount of effort to this particular project compare to the amount of effort put in by the company in other large projects that you

> were aware of?
> A. I'd been with the company for about eight and a half years. This was, I would think, probably the most intricate installations, one of the largest deals that yet -- that Data General Canada has been involved in.
> Q. And did all the extra support staff and so on come from just the Canadian office?
> A. No, sir.
> Q. Where else did it come from?
> a. A lot of people were sent up from Westborough, Massachusetts, corporate head office. Certainly I know for a fact that there were quite a few people from there. I'm not sure how many people came from RTP in Raleigh Durham, but certainly from Westborough, Massachusetts there were quite a number of people that were sent up. There were a lot of people that were sent up for long periods of time as well.

The appellant did not put forward any witness from the accounting or finance departments that could have testified as to the net profit on the contract. In short, there is no credible evidence to support the appellant's contention that despite the gross profit of 40% that the project overall was not profitable. I would conclude from the evidence that the sale was profitable. However, knowing the margin of gross profit does not help a lot in determining how profitable the sale eventually proved to be after deducting the other expenses identified and incurred by the appellant relative to the installation.

Mr. John Lawrence, is a sales representative with the appellant. He services the health field and was employed with the appellant at the time the NB Finance deal was made. He testified that it was a tremendous piece of business for the appellant and the price, not having been discounted, made it that much better. He also confirmed that the contract was highly strategic because it gave the company a foot hold into the government sector in Atlantic Canada. He testified that the technology involved in the NB Finance deal was leading edge

but that it was not working as well as it should have been. That accounted for the extensive post-sale work that had to be done by the appellant's forces. Steven Oliver also testified that there were major problems that had to be resolved during the implementation stage to satisfy the customer's needs. In the period June, 1994, to December, 1995, Mr. Oliver testified that he worked constantly and was spending as much as two weeks per month in Fredericton. He was doing both technical and sales management work, the latter being the work that would have been done by the respondent had he remained in the employ of the appellant. The fact that there was a significant sales management role to be played is significant in determining the *quantum meruit* issue.

Even if there was an absence of a significant net profit on the contract, it is far from being a paramount consideration in determining reasonable remuneration for the respondent as a sales person. A salesperson is paid for selling, not for guaranteeing a profit.

In **Palethorpe v. Bogner** [1997], 8 W.W.R. 147; (1997), 35 B.C.L.R. (3d) 128 , the British Columbia Court of Appeal, in fixing reasonable remuneration in a *quantum meruit* claim, in which the party against whom the claim was made took the position that the award should reflect the fact that the acquisition for which the commission was claimed was not ultimately profitable, stated in paragraph 21:

> ..... If the value of the appellant's services is tied to profit or the ultimate

> success of the project and not simply to acquisition, then it appears his services had very little value. The authorities indicate, however, that little if any regard should be paid to the subsequent turn of events.

(See also **Way v. Latilla**, [1937] 3 All E.R. 759 (H.L.))

I agree with counsel for the respondent that it is significant that the appellant was not required to discount the price of any products or services supplied under the contract. Under normal standards, prices can be discounted up to 30%. It is clear that it is highly unusual for products and services to be sold at full list price.

I agree with the respondent's counsel that the respondent was never advised that he was required to provide further services. However, as I previously indicated this is not of any particular relevance as both parties ought to have been well aware that he would not be providing any further services at the time they executed the May 9th letter unless the respondent became an independent agent.

The same comments apply with respect to submissions contained in paragraph 45(f) of the respondent's factum.

I agree with counsel for the respondent that following May 9th the appellant did not offer the respondent an agency agreement or any other

contract under which the respondent could continue to work for the appellant. While that is indicative that the appellant was no longer interested in an agent's agreement with the respondent, it is not particularly relevant in assessing the value of the respondent's services.

I agree with the respondent's counsel that it is clear from the evidence that Mr. Steven Oliver received a 10% commission on all add-ons on this particular contract. I would note that the add-ons were significant. It is highly relevant that had it not been for the initial contract having been signed with the NB Government, the appellant would never have had the benefit of the sale of these add-ons. A review of the invoices submitted by Mr. Oliver to the appellant shows that there were add-ons of $292,887.00. It would appear that the last add-ons were put in place in August of 1995. The contract was finally completed in December, 1995 or early 1996.

I find that the key aspect of the respondent's services for which he is entitled to be remunerated were essentially completed by May 5th, 1994, when the New Brunswick Government finally advised him that the appellant had been selected over the competition to supply and install the imaging system. During this period the respondent had been employed as a sales representative. The duties of a sales representative included finding the customer, as well as selling the system. This included: (i) identifying the customer's needs; (ii) assessing the project the potential customer was considering; (iii) budgeting for supplying the

product and installation; (iv) determining whether the appellant could satisfy the potential customer's needs; (v) bringing resources and partners together to demonstrate that the appellant could provide a satisfactory system; and, (vi) putting together the documentation and co-ordinating preparation of a bid. With the appropriate support and input from other personnel involved in the project, the respondent performed these services.

It is clear from the evidence that if a sale was eventually made by a sales representative of the appellant and a contract entered into, the responsibility of the sales person continued. He or she was the principal contact person with the appellant's customer. The sales representative was required to ensure that the hardware has been installed and operating satisfactorily with the appropriate software. Steven Oliver's evidence shows that on this project these duties were extensive. The sales representative had complete responsibility with respect to the servicing of the account, including co-ordinating the necessary personnel to correct problems that arose during the implementation phase. The sales representative's duties also included the responsibility for collecting the account.

It is clear from the evidence that the transaction with NB Finance Department involved leading edge technology and required an inordinate amount of technical support and design to meet the customer's needs and the requirements of the contract. This work was performed over the year or so

needed to complete the installation. The work was performed in the main by Mr. Steven Oliver.

Apart from bringing the deal to the table on May 11, 1994, the respondent had no further involvement. The fact that the respondent had no further involvement is a fact for which blame ought not to be assigned to either the appellant or the respondent. It is simply a result of the parties having failed to reach a consensus on a continuing relationship.

Roman Turchyn agreed under cross-examination that had the respondent continued as a sales representative with the appellant to the final conclusion of the May 13th contract for $1.2 million dollars and the collection of the account, he would have been entitled to a commission under his sales representative agreement of $87,000.00. In addition he would have earned a trip valued at approximately $6,000.00 and a $5,000.00 bonus. I do not overlook the fact that under the sales representative agreement that had been in place prior to the respondent's termination, the president had a wide discretion to reduce commissions payable to the respondent. This is set out in Section B(f) of the Sales Representative Compensation Plan that the respondent had with the appellant. Under this power the appropriate director or president of the appellant was authorized to apply non-standard compensation rates if there was an extraordinary amount of headquarters or technical or administrative support required and that at the contract's acceptance and at its completion, the

president could determine the compensation rate to be applied. The sales representative's agreement provided that the non-standard commission rate would factor in all pertinent variables and that such non-standard compensation arrangement superceded the compensation rate provided for in the plan and further provided that the adjustments could be made at any time before, during or after the sale has been executed.

I mention this merely because it would appear that the appellant was acting under the impression that this particular aspect of the sales representative agreement continued in force. It did not; these clauses in the sales representative agreement were irrelevant in assessing the *quantum meruit* claim. Other than as a guide to the valuation of the respondents services, the sales representative agreement that had bound him as an employee did not apply as the respondent was no longer employed with the appellant when the sale to the NB Government was finalized on May 13th.

It should also be noted that had the respondent not been terminated he, no doubt, would have sold the add-ons and thus earned additional commissions. Furthermore, his salary of $50,000.00 per year would likely have continued. But, of course, his employment had been terminated; he was, therefore, not required to perform any further duties and had received his severance package. He was free to seek work in the industry. Within days of returning from his vacation he took employment with the competitor of the

appellant with whom he had informal discussions prior to being terminated. The terms of his new employment appear to have been more favourable than those he was working under with the appellant. The reality is that after May 9th, 1994, the relationship of the parties was governed by the May 9th letter.

In my opinion, the respondent successfully performed the essential role of a salesman: he sold the Department of Finance on dealing with the appellant rather than a competitor. He had worked on the sale for many months and had performed the duties required of him up to that point in time. The respondent's role at the Fredericton meetings, while minimal, was perceived by the appellant to be valuable as the appellant definitely wanted him at these meetings.

Any work that would have been performed by him after May 13th had he remained with the company would have been of much less value to the company than obtaining the sale. I recognize that there is the evidence of Ms. Ann Hale, the principal negotiator for the Department of Finance, that the appellant's technology was what sold her on dealing with the appellant. In my opinion that would invariably be the case in any sale of a sophisticated technological system. But some one has to make the sale and that is why salespersons are so vital to a business and are paid for their services as a percentage of the value of the sale. Sales persons' remuneration is primarily related to achieving sales.

The appellant takes the view that with respect to all of the work done on the project, that is, the work up to the point where their bid was accepted and the work thereafter until the account was paid would break down to show that Stephen Oliver did 85% of the work while the respondent did 15%. While that might appear to be the case, measured in hours of work, that is not how you measure the value of salesperson's services to a company.

Mr. Oliver was an independent contractor at the time he performed the bulk of his services on the NB Finance Department contract from December, 1993, to July, 1995. He had been terminated as an employee in late 1993. Mr. Oliver had technical expertise relevant to the implementation phase of the contract. He did both the follow-up work of a sales representative and was a major player from the technical side respecting this phase of the sale.

This was an important sale for the appellant. It was the largest commercial sale the appellant had made in the Atlantic Provinces. The price was not discounted. It was perceived to be opening doors to them in Atlantic Canada with other potential commercial and government accounts. It was anticipated that it would be a profitable sale in itself. The evidence points to the conclusion that it was profitable. No one in the appellant's employ, who was in a position to have accurate financial information, testified otherwise.

In my opinion, the respondent's successful performance of his major

role (making the sale) was completed by May 5th, 1994. He must be reasonably remunerated for winning the bid over the competition.

The fact that Steven Oliver spent a lot of time providing services in the implementation phase that would have been performed by the respondent were he still involved in the project has relevance in assessing the value of the respondent's services. This was overlooked by the trial judge. The respondent did not perform this role and this must be recognized in valuing his services. I have concluded from the evidence that a great deal of Mr. Oliver's work would have been on either the technical side or in connection with the sale of the add-ons during the implementation phase of the contract. He was an independent contractor operating his own agency at the time and was paid a commission of $29,288.00, being 10% on all add-ons with one exception, of a relatively small commission at 15% with respect to a two year warranty. In the period from December, 1993 to August, 1995, he was also paid $63,583.00 for his technical services. In connection with the supply of these technical services, his travel expenses were paid for by the appellant. After August, 1995, Mr. Oliver reverted to being an employee of the appellant with both technical and sales responsibilities. He has a gentleman's agreement with the appellant that he will be paid for his sales representative services rendered in connection with the original $1.2 million dollar contract. However, the amount of his remuneration will turn, to some extent, on the outcome of the dispute between the appellant and the respondent.

Mr. Oliver also testified that he was intensely involved in the sales management activities of resolving the complex problems that arose during the implementation phase. This is work that would have been done by Mr. Polem had he remained an employee.

The respondent had virtually no expenses in relation to the work he did on the NB Finance sale as it was done while he was still an employee. Furthermore, he had no involvement in the extensive and necessary post sale work on this complex and problem plagued sale.

It is of considerable significance that, were it not for the sale in the first instance, the appellant would not have had the opportunity to sell the add-ons.

Most significantly, the appellant made the original $1.2 million dollar sale and, therefore, performed the essential role of a sales representative: the sale was profitable to the appellant both in financial terms and in strategic terms. Had the appellant continued as an employee, in addition to his salary, he would have made a commission with bonuses, etc. in the range of $100,000.00 unless the commission was reduced pursuant to the terms of the sales representative agreement with the appellant. Other than as a guide to the valuation of the respondent's services that agreement is not relevant.

Considering all the matters to which I have referred in this decision as being relevant, it is my opinion that reasonable remuneration for the

respondent's services would be $80,000.00. Remuneration of $120,000.00 is not reasonable given the complexity of this project which would have required considerable effort on the respondent's part over a period of one and a half years in order to earn a maximum commission of 10% on the $1.2 million dollar contract. He did not do this work and, therefore, did not earn a maximum commission.

I would allow the appeal and reduce the award of $120,000.00 to $80,000.00. I would adjust the costs awarded at trial to reflect the reduction in the award. I would otherwise confirm the trial judge's order with respect to costs and disbursements. I do so because the parties were poles apart prior to trial. The appellant took the view that there was no contract and that reasonable remuneration was the amount that they had paid to the respondent. On the other hand, the respondent claimed $120,000.00 in commission plus commission on add-ons to the contract. The respondent succeeded on trial in proving that he was entitled to a commission based on a *quantum meruit* basis. Therefore, the cost award other than adjusted to reflect the reduction in the award should stand.

On appeal, the appellant succeeded in having the award reduced from $120,000.00 to $80,000.00. On appeal, the appellant's position was that the remuneration based on *quantum meruit* should have been $18,000.00. The respondent took the position that this Court should not interfere with either the finding that there was an enforceable contract or, if not, that on a *quantum meruit*

basis $120,000.00 was reasonable remuneration. Obviously the success on appeal was divided. As a consequence, I would not make an order for any costs on the appeal.

The terms of the order of the trial judge with respect to pre-judgment interest ought to be adjusted so that interest will be calculated on the reduced award.

Hallett, J.A.

Concurred in:

Flinn, J.A.

CROMWELL, J.A.: (Dissenting)

I. Introduction:

The principal issue on this appeal is whether the trial judge erred in making the *quantum meruit* award.

II. Facts and Issues:

Hallett J.A. has provided an overview of the facts. The crux of the appeal is whether the trial judge committed errors which justify this Court in substituting its view for that of the trial judge as to what constitutes reasonable compensation for the respondent's services. This requires consideration of two questions. The first is the appropriate role of this Court in reviewing a *quantum meruit* award. The

second concerns the factors relevant to arriving at a just and reasonable amount.

The appellant argues that the trial judge erred with respect to the *quantum meruit* claim in the following ways:

(i) In adopting a 10% rate of commission;

(ii) in awarding a "full" commission of 10% even though the respondent did not carry out all of the duties of a sales representative or an agent in relation to the contract; and

(iii) in failing to take into account the evidence of Hale and Oliver concerning the nature of the respondent's contribution to obtaining the New Brunswick Finance deal.

III. General Principles:

It is helpful to recall the basic principles. I adopt the following from the judgment of Reed, J. in **Jesionowski v. Wa-Yas (LE)**, [1993] 1 F.C. 36 (T.D.) at 51 and 52-3; affirmed (1993), 159 N.R. 238 (C.A.):

> *"Quantum meruit"* literally translates "as much as he deserves". It is an equitable doctrine based on the principle that one who benefits from the labour and materials supplied by another should not be unjustly enriched thereby. Under circumstances where contracts are not enforceable because of uncertainty or where there has been no contract (e.g., the voluntary provision of goods and services under certain circumstances), the law implies a promise to pay a reasonable amount for the materials and labour which have been furnished. .....
>
> .... As I understand the law an award based on *quantum meruit* is assessed by reference to all the circumstances surrounding the situation under which the obligation arose.

This judgment was cited with approval by the British Columbia Court of

Appeal in **Palethorpe v. Bogner**, [1997] 8 W.W.R. 147; (1997), 35 B.C.L.R. (3d) 128 where Cumming, J.A. repeated at p. 151 (W.W.R.) that “Any award based on *quantum meruit* must be assessed by examining all the circumstances surrounding the particular situation.” (emphasis added) Cumming, J.A. at p. 152 (W.W.R.) also referred, with approval, to these comments of Lord Wright in **Way v. Latilla**, [1937] 3 All E.R. 759 at p. 766: “...the court must do the best it can to arrive at a figure which seems to it fair and reasonable to both parties, on all the facts of the case.” (emphasis added)

The amount of money to be awarded on a *quantum meruit* claim is, generally, the market value of the services rendered. In considering what that market value is, attention must be paid to all the circumstances of the particular work in question.

In summary, *quantum meruit* is an equitable doctrine to be applied in light of principles of justice and reasonableness in all of the circumstances of the case. Given the nature of this exercise, appellate courts should be particularly reluctant to interfere with the trial judge’s award. The breadth of the circumstances to be considered makes it especially difficult to dismiss certain factors as “irrelevant” and the equitable nature of the award means that it is most appropriately determined by the trier of fact who is alive to all the factual nuances of the case. This Court should not interfere unless there are findings by the trial judge that are clearly wrong or the award is unreasonable.

IV. Analysis:

In this case, involving payment by commission, the judgment in **Palethorpe, supra**, is instructive. The Court, without attempting to be exhaustive, set out, at para 18, four matters of particular relevance:

1. The extent of the agent's efforts in locating and arranging for the acquisition of the project;
2. The extent to which the agent's special expertise, reputation and personal connections aided in the discovery and acquisition of the project;
3. The reasonable value of such services in the marketplace; and
4. The actual value of such services to the beneficiary of them.

In the case of a commissioned agent, it also necessary to remember that, as Andrews, J. put it in **Christie v. Dongen** (1980), 24 B.C.L.R. 61 (S.C.) at para 63:

> In assessing the value of the plaintiff's efforts, regard should be had to the potential he generated rather than merely the time he spent. In other words the plaintiff's contribution to the project was his ability to recognize and take advantage of a very attractive land deal on behalf of the defendant. (emphasis added)

It is helpful to consider this case under the headings suggested in **Palethorpe**.

(i) the extent of the respondent's efforts in locating and arranging for the acquisition of the project:

There was a good deal of evidence before the trial judge that the

respondent was the key person in identifying and pursuing the New Brunswick Finance opportunity. It is not unfair to say that he was instrumental in identifying the opportunity and convincing Data General to pursue it notwithstanding reluctance and scepticism within the company. There was evidence that there were months of work involved in pulling the bid together and co-ordinating the necessary players both in and outside the company.

(ii) the extent to which the respondent's special expertise, reputation and personal connections aided in the discovery and acquisition of the project:

Not surprisingly, there was conflicting evidence relevant to this consideration. However, there can be no doubt on the record that the respondent was, in fact, and was perceived by the appellant as being, the key to the New Brunswick opportunity.

The most persuasive evidence of this is found in the actions of the appellant. The appellant wanted the respondent at the contract negotiations in May of 1994, although after the fact it has tried to suggest otherwise. The company's witness, Mr. Turchyn, stated in his direct evidence that the company developed the May 9 letter to cover the respondent's attendance at the negotiations "... given that we didn't want to jeopardize the deal or — not necessarily jeopardize the deal, but to maintain Wayne's [i.e., Mr. Polem's] involvement..." Mr. Polem's immediate superior, Mr Guest, had held off terminating Mr. Polem because he did not want to jeopardize the New Brunswick Finance opportunity. There was also evidence that

Mr. Guest was of the view that Mr. Polem's contacts in New Brunswick were important to the N.B. Finance deal and for future opportunities for the company.

It is convenient here to consider the appellant's argument that the trial judge erred in failing to give weight to the evidence at trial of the appellant's witnesses, Mrs. Hale and Mr. Oliver. Mrs. Hale was an official with the New Brunswick government and her evidence, simply put, was to the effect that salesmen make no difference. The trial judge considered this evidence. He was not in error of giving it little weight. The appellant did not employ and pay its sales representatives because they did nothing. As for the evidence of Mr. Oliver, he testified extensively about the role of a sales representative and his own involvement. While not referred to by name, the substance of this evidence is summarized and considered in the trial judge's reasons. There was no reviewable error in the trial judge's treatment of the evidence of Mrs. Hale and Mr. Oliver.

The third and fourth considerations may be discussed together.

(iii) the reasonable value of such services in the marketplace:

(iv) the actual value of the services to the beneficiary of them;

This is the crux of the case. The appellant's position, in essence, is that the maximum value of the services would be a 10% commission on the $1.2 million initial contract signed in May of 1994; that this maximum amount is not recoverable because the respondent performed much less than the required services to earn a "full" commission; and that the trial judge erred in finding that the appellant's

dismissal of the respondent was, in effect, an excuse for his failure to perform the full range of services necessary to recovery the "full" commission. In my respectful view, the appellant's position rests on two premises, both of which are wrong.

First, the appellant's position is that 10% of the $1.2 million initial contract is the ceiling of the *quantum meruit* claim. But that is not so. The problem with this premise is that it assumes the validity of the May 9 letter as a contract, which is, of course, contrary to the appellant's position on the appeal. Where a contract is invalid, as the appellant submits this one to be, it cannot be relied upon to limit the *quantum meruit* claim. An analogous situation was addressed by the English Court of Appeal in **Rover International v. Cannon Film Sales**, [1989] 1 W.L.R. 912 (C.A.). Without going into the very different fact situation in that case, the following quotations from the reasons of Kerr, L.J. make the point at pp. 927-928:

> ... But where the contract was void ab initio or has come to an end without breach, e.g., by frustration, all remedies must necessarily lie in the area of restitution. .....
>
> In these circumstances it does not appear unjust that Cannon cannot have the best of both words: reliance on the invalidity of the contract ab initio as well as upon a subsequent breach on the part of Rover. .....
>
> Secondly, I do not think that the contention in favour of a "ceiling" is in accordance with principle. It would involve the application of provisions of a void contract to the assessment of a quantum meruit which only arises due to the non-existence of the supposed contract. .....
>
> ... in deciding on the equities of restitution the court could then always be called upon to analyse or attempt to forecast the relative position of the parties under a contract which is ex hypothesi non-existent. This is not an attractive proposition, and I can see no justification for it in principle or upon any authority. (emphasis added)

There is no reason of principle or authority that the *quantum meruit* claim

should be restricted by the ineffective terms of the May 9 letter or to the initial $1.2 million contract. The evidence was clear that the company perceived the value of this initial contract to be considerably more than its face value. It had strategic importance and the potential for significant other new business. It generated about $300,000 in add-ons which are not factored in by the trial judge's calculation of the *quantum meruit* claim.

I conclude, therefore, that the appellant's approach to the assessment by starting with a maximum of 10% on the $1.2 million contract and reducing it for services not rendered is fundamentally wrong. The so-called maximum set out in the May 9 letter does not provide a ceiling for the *quantum meruit* claim once it is decided that the letter is not a contract. The *quantum meruit* claim must be considered in light of all the circumstances, not those circumscribed by the May 9 letter.

The second premise of the appellant's position is also incorrect. The appellant assumes that the failure to carry out all of the duties of a sales representative or an agent inevitably leads to a reduction of the remuneration below the rate of 10% applied to the initial contract. A related erroneous assumption is that the trial judge did not take the unperformed services into account in arriving at his award.

As noted, the starting point of the assessment is not limited by a ceiling of 10% on the $1.2 million initial contract. Neither is it correct to simply reduce the

remuneration on account of the respondent's inability, due to his dismissal, to perform all of the required duties of a sales representative or agent. For the purposes of his remuneration on this opportunity, the respondent was not a sales representative or an agent. While the evidence about the duties and remuneration of such persons is relevant to the market value of the services, it is not dispositive given the distinct situation of the respondent. In brief, the failure to perform all the duties of a sales representative or agent is not conclusive as regards the compensation of someone, like the respondent, who is neither.

Moreover, the inability to perform the services arose from the respondent's dismissal of the appellant. In cases of dismissed commissioned salespersons, compensation may be payable to reflect the fact that the dismissal takes away opportunities to earn commissions: see **Prozak v. Bell Telephone** (1984), 10 D.L.R. (4th) 382 (Ont C.A.). While we are not here concerned with a case of wrongful dismissal, this principle seems to me to be relevant to consideration of a *quantum meruit* claim where, as here, the dismissal deprived the respondent of the opportunity to complete his duties. The remuneration for the N.B. Finance opportunity was specifically excepted from the termination arrangements between the parties. The trial judge, in my view, did not err in considering that the appellant's dismissal of the respondent did not prevent compensation for loss of the opportunity to complete his duties.

The appellant's argument also assumes that the trial judge did not take into account the unperformed services in reaching his conclusion. On the contrary,

the effect of the trial judge's award recognizes this in at least two ways. That the respondent did not perform these duties is at least, in part, taken into account by the fact that he would not be collecting his salary as he would have been had he remained a sales representative. Moreover, the trial judge's award, being restricted to the initial contract, favoured the appellant by not recognizing any claim by the respondent to remuneration based on the full value of the New Brunswick opportunity including add-ons and its general strategic value.

It is suggested that the trial judge attached too much weight to the 10% commission rate and that this is either an irrelevant consideration or, at best, a consideration of marginal relevance.

While the trial judge's reasons on this point are sketchy, the evidence before him makes it clear that a 10% commission rate was at the centre of this case, not simply because it was the "maximum" mentioned in the May 9 letter, but because it figured in all the evidence about the market value of the respondent's services.

Although there was virtually no evidence about the value of the services in the general marketplace, there was a great deal of evidence about the company's view of the value of sales representatives' and agents' services.

I will briefly review that evidence. At the outset, however, it is important to note again that the arrangement between the parties for this transaction is

completely different than any of the other arrangements described in the evidence. As far as the parties were concerned, there was a stand alone arrangement between them for the N.B. Finance opportunity. For this one opportunity, Mr. Polem was not being paid as a sales representative or as an agent; for the purposes of this opportunity he was neither and that was clear to both parties. This fact is significant in considering evidence of the remuneration paid to sales representatives and agents. While such evidence provides insight into the marketplace value of the services, it does not directly address the distinct situation of Mr. Polem as regards this transaction.

The compensation plan applicable to the company's sales representatives was in evidence. The commissions payable under it are only one part of the compensation of a sales representative. Mr. Polem, while he was a sales representative, was paid a salary as well as commission. There was evidence that had Mr. Polem, as a sales representative, seen through to the end the initial contract negotiated in May of 1994, he would have earned roughly $87,000 in commissions on this contract alone and received, as well, other incentive awards. He would also have received commissions on add-ons and all sales to the customer for the next two years would have earned commission at the "new business" rates. He would also, of course, have continued to earn his base salary. It is also significant that the rate of commission varied depending on the type of product or service sold. For example, Steve Oliver, who took over the account from Mr. Polem, received commission at the rate of 15% on an add-on to the original contract.

The company's "standard" agent agreement was also in evidence. It would have provided for commissions ranging from 1% to 15% depending on the product or service sold. There is no serious dispute that the 10% rate specified in the agent agreement would have been applicable to the New Brunswick deal. Although many of the other terms of the agreement were changed in the several drafts prepared during the abortive negotiations of the agency agreement, the rates applicable here did not. In fact, in the handwritten draft version of the May 9 letter prepared by the company that was in evidence, it appears that the commission rates initially were drawn from the standard agent's agreement.

The 10% rate also figured prominently in the dealings between the parties after the May 9 letter. The appellant's initial offer to the respondent was based on a 10% rate of commission which was then applied in accordance with the termination provisions of the sales representative's agreement. Those provisions, of course, had no application, but the starting point of 10% is instructive. Even the "offer" made to the respondent by the appellant in its factum on this appeal is premised on a commission rate of 10% although the amount the appellant says is payable is reduced having regard to the fact that the respondent did not carry out all of the duties required to earn the full commission. It is also clear on the evidence that Mr. Oliver, who took over the contract, was paid commissions of 10% and in one instance 15% on the add-ons arising from the contract.

A claim in *quantum meruit* is to be assessed in light of all of the circumstances and should consider the market value of the services. A 10%

commission rate permeated the evidence in this regard. It was not an error of law for the trial judge to consider this rate of commission. In my respectful view, far from being an irrelevant consideration, it was a central consideration on the evidence adduced at trial. While the trial judge could have articulated the true significance of this rate of commission more fully, he did not err in considering it a relevant circumstance in his assessment of the *quantum meruit* claim.

While it is relevant to the market value of the services that the respondent did not complete all of the duties required of a sales representative or agent, it is also relevant to consider the loss of base salary flowing from the dismissal, the foregone opportunities for future commissions, and the value of the opportunity as opposed to the face value of the initial contract. Taking all of these considerations into account, I am not at all persuaded the trial judge erred in the overall result he reached.

V. Disposition:

I conclude that the trial judge did not err in law and did not assess an unreasonable amount for *quantum meruit*. The fact that different assessments may also be reasonable does not make the trial judge's unreasonable. In my respectful view, there is no basis for appellate intervention in this case. I would dismiss the appeal with costs.

Having concluded that the trial judge's result is justified on the basis of *quantum meruit*, I do not need to consider whether he erred in reaching the same

result by his holding that the May 9 letter was a binding contract.

Cromwell, J.A.

C.A.. No.147621

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DATA GENERAL (CANADA) INC.

Appellant

- and -

A. WAYNE POLEM

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.

CROMWELL, J.A. (Dissenting)