C.A. No. 106484

NOVA SCOTIA COURT OF APPEAL

**Cite as: Sklar-Peppler Furniture Corporation v. George C. Sweet Agencies Ltd., 1995 NSCA 125**

**Hallett, Chipman and Freeman, JJ.A.**

**BETWEEN:**

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| SKLAR-PEPPLER FURNITURE CORPORATION, a body corporate<br>Appellant | Jonathan C.K. Stobie and Virve Sandstrom for the Appellant |
| - and - | |
| GEORGE C. SWEET AGENCIES LIMITED, a body corporate<br>Respondent | Thomas P. Donovan and Marc J. Belliveau for the Respondent |
| | Appeal Heard: December 5, 1994 |
| | Judgment Delivered: January 3rd, 1995 |

**THE COURT:** Appeal allowed and damage award reduced from $216,000 to $94,500 per reasons for judgment of Hallett, J.A.; Chipman and Freeman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from an order awarding the respondent $250,632 following a civil jury trial. The jury found that the appellant manufacturer did not have just cause to terminate its sales agency relationship with the respondent. The jury assessed damages on the basis of gross commissions paid to the respondent over a five year period - 1987-1991 - which preceded the termination of the agency relationship on July 20th, 1992.

The average monthly commissions for this five year period were $12,000. The jury determined that a reasonable notice period for termination of the sales agency was 18 months. Therefore, the jury awarded damages of $216,000; pre-judgment interest and costs brought the award up to $250,632.

The appellant asserts that the learned trial judge erred by instructing the jury that it could determine the amount of the damages either on the basis of gross commissions or net commissions, the latter being the gross commissions paid to the respondent by the appellant less expenses incurred by the respondent to earn the commissions. The annual financial statements show it incurred normal expenses for travel, etc. in connection with the operation of its business in the Atlantic region as sales agent for the appellant.

On the issue of damages the trial judge's critical instruction was in the following words:

> " Members of the jury, just before we broke I was saying that after you decide what period of history you choose to use as being truly representative, you will have to then go on to consider whether to use gross commission revenue or net income after deducting expenses. The plaintiff asks you to apply the gross commission revenue approach. The defendant says that that would ignore the reality of what happened here and would amount to a windfall to the plaintiff. The defendant points quite properly to the evidence that from gross commission revenue Mr. Sweet paid out all expenses it incurred in the earning of that income. Sklar-Peppler says that it would be wrong to make an award based on gross commissions, as that would then compensate for more than anything that may have been actually lost

> by the plaintiff. There is good authority for the position advanced by the defendant, Sklar-Peppler. The plaintiff, on the other hand, argues that where, as here, the plaintiff is paid strictly as a commissioned salesman choosing himself how he incurs and classifies his expenses, that he ought be awarded that measure of damages which he would have earned under the contract for the period until the employer could have ended it subject only to the amount by way of deduction that he could reasonably be expected to earn in some other form of work. And, so, the approach advanced by the plaintiff that you should look at gross commission revenue is also supported by good authority in law. And the choice of which approach to take is entirely in your capable hands. You must remember, however, that the guiding principle is always to put the plaintiff, so far as many can do it, in the position he would have occupied if the wrong had not occurred."

The guiding principle of law in assessing damages was correctly stated by the learned trial judge. However, he committed a serious error when he specifically instructed the jury that they could calculate the award on gross commissions without deductions for expenses. This instruction flies in the face of the guiding principle because the respondent did incur significant expenses to earn commissions; to calculate the award using gross commissions is to put the respondent in a much better position than he would have been had the wrongful termination not occurred. The learned trial judge erred when he concluded that there was good authority for the calculation of an award based on gross commissions. The respondent's counsel at trial was able to persuade the learned trial judge that this was a proper approach to the award of damages. The trial judge rejected the arguments put forward by the appellant's counsel at trial that this was an improper basis upon which to award the damages. The trial judge ended up leaving it to the jury to determine which method they would apply if they determined there was a wrongful termination of the sales agency relationship.

The respondent relies on an unreported decision of Galligan, J. in **Tom Servinis Enterprises Limited v. Smerling Imports Canada Limited** (1982), 14 A.C.W.S. (2d) 416 as authority for using gross commissions as the basis for calculating a damage award in these circumstances. In that case Justice Galligan dismissed the plaintiff's claim for wrongful

dismissal. Justice Galligan was satisfied the defendant had made out its defence of cause. He then went on to state that it was necessary for him to express his opinion on the issue of damages in the event an appeal court took a different view of the cause issue. He determined that a six month notice would have been appropriate. He then stated:

> " I have decided that the fair way to assess his loss is to take the average of his four full years with the defendant and the year 1981, to arrive at an average estimate (and I make no bones about saying that perhaps a more accurate word is "guestimate") of what his loss would have been on an annual basis."

He then came up with an average of commissions for the years 1977 to 1980 of $69,430. He then made certain calculations which are difficult to follow but they do not involve any reduction for expenses incurred in earning the commissions. There is absolutely nothing in the judgment which would indicate that the plaintiff in that case had expenses or what they were. The plaintiff was described by the trial judge as "an experienced salesman in the wholesale part of the retail shoe industry". The question of expenses does not appear to have been raised. Whether expenses were paid by the employer or the employee is not discussed. If paid by the employer then clearly gross commissions would be a proper basis for calculation of the damage award in that case. Had he not dismissed the action, Galligan J. would have made an award of $23,215. In my opinion, the case is weak authority, if any at all, for the proposition that damages should be calculated on gross income rather than net income in a sales agency relationship where the agent is responsible for expenses incurred to earn the commissions. This question does not appear to have been an issue in the **Servinis** case.

On the other hand there is strong authority to support the position taken by the appellant at the trial and on this appeal. First, the general principle that damages for a breach of contract are to be calculated so as to put the wronged party in the position he would have

been had the breach not occurred. In **The Law of Damages**, **Waddams**, 1983, in dealing with damages to economic interest the author has a section entitled "Loss of Earnings" which starts with the following introductory sentence at paragraph 640:

> " This section is concerned with compensation for loss by the plaintiff of the opportunity to earn money by his services. "

At paragraph 647 **Waddams** states:

> " The basic principle of compensation is that the plaintiff is entitled to be put, so far as money can do it, in the position he would have occupied if the wrong had not been done. This principle in a case where the plaintiff is deprived of opportunities to render services and earn a reward, suggests as a starting point the amount of the reward (wages, commission or price), that would have been earned. From this, however, must be deducted, as Anglin, J., said in a building case: "the time, labour and expense which the plaintiffs have been saved through being relieved of their obligation to carry out the contract under which they would have earned it. Thus, out-of-pocket expenses that have been saved, such as the cost to a builder of materials, must be deducted. This is merely to say that the plaintiff is entitled to his expected net profit, not to gross revenues."

Secondly, the decision of the Ontario Court of Appeal in **Jaremko v. A.E. LePage Real Estate Services Limited** (1989), 60 D.L.R. (4th) 762 addresses this issue directly. The court stated at p. 765:

> " Counsel for the defendant submitted that the plaintiff's damages should have been calculated not on the basis of his gross commissions but rather on the basis of his net commissions after deduction of his expenses. We agree in principle with this submission."

The principle that expenses incurred to earn commissions must be deducted in calculating a loss following a wrongful termination of the sales relationship in circumstances where the sales agent pays all expenses was applied in **Bell v. Trail-Mate Products of Canada Ltd.** (1986), 15 CCEL 39. In that case the plaintiff was an employee paid by commissions. The trial judge made reference to the fact that the plaintiff was to pay for all

gas and oil and other expenses and stated:

> " Where the plaintiff pays her own expenses, it is only on the net income that damages are calculated and not the gross, so that the expenses of the plaintiff will also have to be deducted."

Likewise in **Smith v. Undercover Wear Ltd.** (1993), 51 C.P.R. (3d) 409, the plaintiff, a commissioned sales agent, in that case had put forth her damage claim on the basis of gross commissions and not commissions after payment of business expenses. Justice Granger, who tried the case, disagreed and cited the decision of the Ontario Court of Appeal in **Jaremko**. He stated at p. 429:

> " In my opinion, it would be wrong to award the plaintiff damages based upon her gross commission. If she was awarded damages on this basis, she would be unjustly enriched as she would be in a better financial position than she would have been if she had continued her contractual arrangement with Undercover Wear. . ."

In summary, the general principles for damage assessment and the case law supports the position taken by the appellant before the learned trial judge that the proper basis for calculating a damage award would be gross commissions less expenses. The learned trial judge left it to the jury to choose which method they would apply. The jury obviously chose to fix the damage award the gross commissions without any deductions for expenses.

On the facts of this case the learned trial judge erred in failing to instruct the jury that in determining the respondent's loss that they would have to deduct expenses incurred to earn the commissions.

In **Electrical Distributors Ltd. v. W.C.I. Canada Inc.** (1992), 116 N.S.R. (2d) 338 this Court restated the well-known principle that it is the duty of the trial judge to determine the legal principles to be applied in a case at trial and to instruct the jury on those principles. If the trial judge has failed to do so the verdict will be set aside if it is shown to the appeal court that the misdirection <u>may</u> have affected the verdict.

Did this error affect the verdict? In the course of his summation to the jury, counsel for the respondent, after stating that "it is open to you to find that gross commission income is the most appropriate measure to use", in calculating the damages then pointed out to the jury that the respondent's average annual commissions for the five year period, 1987 to 1991, were $144,000. Then, in making reference to what he would consider to be a reasonable notice period, stated:

> " ..if you use 18 months, that the arithmetic calculation based on a 5-year average becomes $216,844 . . . "

That the jury was influenced by the instruction that they could base the damages award on gross commissions without deduction of expenses incurred to earn the commissions is clearly reflected in the award of $216,000 made by the jury. How to calculate the damage award was a question of law for the trial judge. His misdirection in leaving it open to the jury to choose the gross commission method without deduction of expenses was an error in law which clearly affected the jury award of damages. The award is inordinately higher than any award that could have been made applying the proper principles for the assessment of damages for terminating the sales agent's relationship based on a finding that 18 months was a reasonable notice period. Therefore, the appeal ought to be allowed.

Both counsel have invited us to assess the damages rather than order a new trial. We have the power to do this. I would approach the task in this manner. As the jury decided that an 18 month notice period was required and apparently decided that average annual earnings for the five year period 1987 to 1991 inclusive was an appropriate period to determine what would be the respondent's annual loss in the period following the termination of the sales agent's relationship and as there was evidence to support these findings I would not disturb them and will apply the findings in assessing the damages.

At trial the appellant called Karen Cramm, a chartered accountant and financial consultant, as its expert witness to give opinion evidence as to the respondent's loss arising out of the termination based on her review of the respondent financial statements for the five year period 1987 to 1991. She testified in direct that, in effect, the respondent suffered no loss based on certain assumptions she made with respect to the serious down turn in the Canadian furniture industry as a result of free trade with the United States which came into effect January 1st, 1990, the recession and the exchange rate on the Canadian dollar. In cross-examination she was questioned as to what Mr. George Sweet's annual benefit from the operations of the respondent agency had been over the five year period 1987 to 1991, that is, his personal benefit including both his salary and profits as opposed to the profit of the agency itself. She made the necessary calculations and concluded that his average personal benefit for that period was $63,000.

Considering the long term (31 years) personal relationship between George Sweet and the appellant the proper approach to the calculation of the respondent's damages is to determine what was the personal benefit lost to George Sweet, arising out of the termination of the agency relationship by the appellant. To base the loss calculation as if it was merely a corporate loss would be to distort the reality of the relationship between George Sweet and the appellant. Therefore, applying the jury findings which I have referred to, I would calculate the loss to the respondent at $94,500 ($63,000 x 1.5 years). I would therefore vary the damage award from $216,000 to $94,500.

A number of the issues raised by the appellant have been subsumed in my finding that the learned trial judge did not properly instruct the jury and in my finding that there was evidence to support the jury's finding that an 18 month notice period was reasonable and that the award should be based on average earnings for the five year period 1987 to 1991. I will deal with the other issues that are still outstanding.

The appellant asserts that the jury erred in failing to deduct a so-called "charge back" of $8,969 from the damages as assessed. The respondent had made substantial sales of the appellant's products to Bailey's Furniture (1990) Limited. In his testimony Mr. Gerry Modjeski acknowledged on cross-examination that he was aware that the Bailey account was in difficulty as early as the summer of 1991. Mr. Robert Tweedy, the chief executive officer of the appellant company, testified that it had always been the policy of the company to try to recover commissions that had been paid to sales agents if the account receivable related to the sale on which the commission was paid went bad. The charge back in question related solely to the Bailey Furniture account. The following events in chronological order would appear relevant to the issue:

**Summer 1991** - The appellant aware that Bailey's Furniture account was doubtful.

**June 19th, 1992** - All sales representatives of the appellant were advised in writing of the policy and procedure with respect to "commission charge back on doubtful accounts". The expressed purpose on the written policy was to relieve the company of a portion of losses resulting from bad debts and to involve the sales agents in improving collections. The policy stated that, at the time an account is determined to be doubtful, commission based on the outstanding balance will be charged back to the sales agent. The procedure outlined in the policy was that the next period's commissions to the agent would be reduced by an appropriate amount. A note to the written memorandum stated: "In the past by the time commission was to be charged back the agent may have left the company and there was nothing to charge against."

**July 20th, 1992** - The respondent sales agency was terminated by the appellant.

**September 25, 1992** - The respondent commenced an action for damages for wrongful termination of the sales agency.

**December 9th, 1992** - A defence was filed. No claim for set off for the charge back

on the Bailey Furniture account was included in the defence.

**March 1993** - There was an exchange of faxes and memos between George Sweet and D. Stuart, a senior Credit Department official, with the appellant re the Bailey's Furniture account. Specifically on March 4th, 1993, an ad appeared in the Halifax Mail Star that Bailey's Furniture was closing out. George Sweet forwarded this to Diane Stuart. On March 5th she thanked him for the information. On March 26th George Sweet sent a memo to Diane Stuart forwarding a copy of a foreclosure sale advertisement which had appeared in a Halifax paper advertising the sale of the residence of the principals of Bailey's Furniture for default on a mortgage. The Memo from Mr. George Sweet stated "I thought you were covered here by personal guarantees, including the house. His line of credit with the bank was only $125,000. Kindly advise." On March 26, 1993 Ms. Stuart faxed George Sweet "We are covered by personal guarantee. Will call lawyer immediately."

**May, 1994** - At the trial the appellant claimed a set off for this charge back relating to the commission payable on the sales to Bailey's Furniture, the charge back being in the amount of $8,969.

George Sweet did not testify that he was not aware of the charge back policy. The exchange of correspondence between himself and Diane Stuart in March of 1993, after his agency had been terminated, would indicate that he had some concern over the collectability of the Bailey Furniture account. It would be a reasonable speculation if not an inference that he would not be concerned about the well-being of the appellant considering he had already been terminated unless he was concerned about his own potential liability for a charge back.

It would appear from the evidence that a charge back against an agent was not normally made until a decision was made by the appellant that the account was bad. The appellant did not make a demand for payment of the charge back on the Bailey's Furniture account until raised at the trial in May of 1994 notwithstanding that Bailey's went out of business in March of 1993.

The charge back was a relatively minor issue at trial which may explain why the evidence is somewhat scant on the issue as to whether or not there was a contractual term between the appellant and the respondent that commissions that had been paid on pre-June 20, 1992 accounts that became uncollectible would be charged back by the appellant to the respondent. The evidence of Mr. Tweedy was that the appellant had always had a policy of trying to recover these commissions from the agents. The policy was put in writing and tightened up by the policy memo issued on June 19th, 1992, about one month before the appellant terminated the respondent's sales agency.

The appellant argues on this appeal that the evidence was uncontradicted; that there was the practice of charging back commissions and that it was not until the bankruptcy of Bailey's Furniture in March of 1993 that the amount owing by that company in excess of $200,000 was classified as a bad debt. Counsel for the appellant asserts that although the learned trial judge in his instructions raised a question as to whether or not the appellant had established that George Sweet was aware of the practice of charge backs, Mr. Sweet did not testify that he was not aware of the practice and accordingly, in the opinion of the appellant's counsel, there is no foundation in the evidence that he was not aware of the policy. He submits that the only reasonable inference is that he was aware of the practice that this charge back provision is a valid term of the contract and that the amount of the charge back should be deducted from any damage award.

Counsel for the respondent asserts that the charge back policy was premised upon the

deduction from future commissions of past commissions paid to sales representatives for sales which were not collected and furthermore that there was no evidence that the policy of June 19th, 1992 was ever communicated to the respondent. The respondent's counsel asserts that the instruction of the learned trial judge was satisfactory to address the question of the legitimacy of the appellant's entitlement to set off the charge back and that the jury's consideration of this factual issue, based on the credibility of witnesses, is subject to the usual limited appellate review on questions of fact. He submits that the appellant failed to establish its claim of set off and that the jury properly rejected it.

The trial judge's instructions to the jury on this issue were as follows:

> " There are two final subjects that I wish to briefly review. The first is the defendant, Sklar-Peppler's claim for a set-off, as it's been described, or, on the documents themselves, a commission charge-back on doubtful accounts.

. . . . .

After referring the jury to certain exhibits the learned trial judge continued:

> " Now, in assessing the viability of that claim of set-off or charge-back, you will want to, I think, recall the admissions of Mr. Modjeski on cross-examination where he admitted knowing that that account was in trouble back in the summer of 1991 when he vacationed here and took those business trips with Michael Sweet and yet, as it was put, that old account wasn't activated against the plaintiff until 1993, a full year after his agency had been terminated. And, so, you will, I think, reach your own conclusion as to the legitimacy of the defendant's entitlement to set-off. And in doing that, you would, I suppose, ask yourselves these questions -- has the defendant proved its claim of set-off to your satisfaction? Was there in place here such a policy? If there were, did the plaintiff know about it? If there were, did it apply in 1992 before his termination? If there were, is it a proper debt against the plaintiff agency."

I would note that there was not a specific question the jury was asked to answer with respect to the appellant's claim to set off the charge back.

The issue as expressed by the appellant is that the jury, acting judiciously, could not have found the appellant was not entitled to the set off of $8,969. The appellant does not take issue with the trial judge's instruction.

The standard of appellate court review with respect to findings of fact by a jury has been considered by this court in a number of decisions including **Mansour, et al v. Sun Alliance Insurance Co.** (1982), 55 N.S.R. (2d) 600 at p. 602:

> " At the hearing of this appeal counsel for the appellant reviewed the evidence very thoroughly and has pointed out the many inconsistent stories told by Mr. Mansour, the contradictions in his evidence by other witnesses at the scene and the uncontested expert evidence as to the origin of the fire. This court has been asked to say that in the light of such evidence the jury was clearly wrong in its findings and that the judgment at trial should be reversed. The appellant has chosen a formidable task as it is well-known that an appeal court will not lightly interfere with factual findings of a jury at the trial level. The role that an appeal court should play in this circumstance has been clearly set forth by the Supreme Court of Canada in *McCannell v. McLean*, [1937] S.C.R. 341, where Duff, C.J., said at p. 643:
>
>> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it....."

See also **Cameron v. Excelsior Life Insurance** (1981), 35 N.R. 213; 44 N.S.R. (2d) 91: 83 A.P.R. 91. In **Cameron v. Excelsior Life Insurance**, supra, the majority of the Supreme Court of Canada, per Laskin, C.J.C., approved the dissenting opinion of Hart, J.A., (32 N.S.R. (2d) 668 at pp. 704-705):

> " In my opinion it is not for this Court to disagree with their findings when there is some evidence upon which they could have reached the conclusion that they did.
>
> Even though we as judges might reach a different conclusion than the jury did at this trial it would not be proper for us to set aside this verdict as being against the weight of evidence because it cannot be said that it was so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it."

The question that must be asked is whether the jury's decision not to make a deduction for the charge back is so plainly unreasonable and unjust as to satisfy this Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. It is clear from the evidence that the policy, as it existed prior to June 19th, 1992, and for that matter, even after, did not appear to be aggressively pursued by the appellant. The account in question was in difficulty in 1991. The matter of the charge back was not formally raised until the trial in May of 1994. I have concluded that it was open to the jury to find that it was not a contractual term between the appellant and the respondent that it would have to reimburse the appellant for commissions that had been paid on sales prior to June 19th, 1992, if the account subsequently went bad. As Mr. Tweedy testified, the policy had been to try to get reimbursement although the new policy made it clear that the appellant would be charging back commissions on bad accounts. The sales to Bailey's Furniture had taken place long before the policy memo of June 19th, 1992. Apparently the jury decided the policy did not have the status of a contractual term between the parties at the time commissions were paid on the sales to Bailey's Furniture. That finding is not so unreasonable that would warrant this Court altering the jury's finding on this issue.

**Conclusion**

The appeal ought to be allowed and the damage award be reduced from $216,000 to $94,500. If the parties cannot agree on the issues of pre-judgment interests and costs and present an order to the court to give effect to this decision within two weeks from the date of filing we will advise counsel of our wishes with respect to receiving submissions.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.

C.A. No.106484

NOVA SCOTIA COURT OF APPEAL

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- and - ) R E A S O N S
FOR
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GEORGE C. SWEET AGENCIES )
LIMITED, a body corporate )
HALLETT, J.A.
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Respondent )
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