C.A. No. 02843

NOVA SCOTIA COURT OF APPEAL

Jones, Matthews and Chipman, JJ.A.
Cite as: Lewis-Choi Enterprises Ltd. v. Western Glove Works Ltd., 1993 NSCA 168

BETWEEN:		
LEWIS-CHOI ENTERPRISES LIMITED		Jonathan C.K. Stobie
		for the Appellant
	Appellant	
- and -		
WESTERN GLOVE WORKS LIMITED		Reginald A. Cluney, Q.C.
		and
	Respondent	Christopher C. Robinson
		for the Respondent
		Appeal Heard:
		September 22, 1993
		Judgment Delivered:
		October 7, 1993

THE COURT: The appeal is allowed and damages and costs are awarded to the appellant as per reasons for judgment of Chipman, J.A.; Jones and Matthews, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant appeals from the dismissal in the Supreme Court of its action for damages for breach of a contract under which the appellant acted as a sales agent for the respondent.

The respondent is a clothing manufacturer based in Winnipeg. Robert Silver is its

President. All dealings between the parties relating to the contract were between Silver on behalf of the respondent and Edward Lewis the president of the appellant.

Lewis, and subsequently the appellant after its incorporation, had represented the respondent as its exclusive sales agents in the Atlantic Provinces under a verbal agreement ever since the 1960's. Commission rates paid on the different product lines varied - 7% for adults' clothing, 5% for children's clothing and 2% for clearances. The commissions were paid on the basis of actual sales made by the respondent.

Over time, Lewis became discontented with the arrangements. He had expressed some dissatisfaction to Silver and on one occasion the appellant received some additional payment. In June of 1982, Lewis telephoned Silver and discussed proposed changes. He opened the conversation by saying that he wanted a written contract. He also said he wanted a change in the commission rates. He wanted "guaranteed delivery".

Lewis was a member of the National Garment Sales Association (NGSA) and had attended trade shows of NGSA outside the Atlantic Provinces. The first show he had attended within the Atlantic Provinces was hosted in Halifax in the fall of 1982.

When Lewis spoke to Silver in June of 1982 he told Silver he would require a written contract in order to gain entry to trade shows upcoming in the Atlantic Region. Among his findings, the trial judge said of this statement:

> "15. His statement was a reason but not the sole reason he gave to Silver for seeking a signed contract. Lewis' other reasons including wanting a change in commission, and guaranteed deliveries;"

Silver's reaction was to suggest to Lewis that he send along a form of written contract for his consideration.

Following the telephone conversation, Lewis sent Silver a contract in the form provided by NGSA. The form invited the parties to make changes. A note at the foot thereof read:

> "Note:
>
> The terms of this contract may be altered to suit individual circumstances. All changes should be initialed by parties entering into the contract.

+ Any additional clauses may be written on the following page."

The contract provided for a commission at 10% of sales, for commissions to be paid on all orders received and accepted by the respondent, even if not shipped where non-shipment was due to the fault or negligence of the respondent. As to other non-shipped goods, commissions were to be paid on at least 85% of the orders received and accepted by the respondent. An order was considered accepted unless the respondent notified the appellant of its rejection within 10 days. Commissions were also payable on all orders shipped into the territory (the Atlantic Provinces), whatever their source. Either party could terminate the agreement on one complete selling season's notice in writing. There were two selling seasons: February 1 to July 31 and August 1 to January 31.

Silver and Lewis subsequently discussed certain aspects of the contract on the telephone and as a result Silver made two handwritten changes: (1) providing for a commission rate of 7% on boys and girls items; and, (2) increasing the time within which the respondent could notify a rejection of orders to 20 days. The parties subsequently executed the written agreement, the effective date being September 15, 1982.

After execution of the contract, the respondent paid the higher commission rates, but in the judgement of the appellant, did not pay commission on orders directly received from retailers and paid commissions only on sales rather than on orders booked. The appellant claimed that the respondent wrongly debited its account and paid lower commissions from time to time. Lewis complained verbally, and correspondence from the appellant making complaint commenced in 1987 and continued until 1989 when, on May 19 of that year, the respondent wrote the appellant purporting to terminate their relationship effective the end of 1989. The appellant commenced its action for damages in the Supreme Court on January 7, 1990.

In his decision, the trial judge rejected defences: (1) that the contract applied only to regular paid garments shipped from Winnipeg; and, (2) that the appellant was estopped by its conduct throughout from claiming commissions other than those based on goods shipped and

commissions on orders placed by the appellant.

The trial judge made strong findings of credibility against the respondent with respect to the common theme running through its case that the parties, in effect, acted on the same basis after the contract as they had before with respect to the goods on which commissions were to be paid.

The trial judge dismissed the action on the ground that Lewis had, prior to the parties entering into the written contract, made an innocent misrepresentation which entitled the appellant to rescind the contract. That representation was that Lewis would require a written contract in order to gain entry to the trade shows. The trial judge said:

> "In assessing the facts which I have found to be proved, one can say with certainty what Lewis did know, when he spoke to Silver. He was aware - but never told the defendant - that the "policy" of the NGSA had never been adopted by his region for application in Atlantic Canada, and that the NGSA was simply **endeavouring** to implement it in other regions, which would include the Atlantic Provinces. To say that this was a rule by which all sales persons would be **required** to obtain written contracts from manufacturers in order to gain entry to trade shows was an assertion which Lewis knew did not apply to his agency when he approached Silver about the contract in the spring and summer of 1982. Would the fact that this policy had never been adopted in Lewis' territory and/or the fact that the national association was simply attempting to implement it here, have made any difference to the defendant? It may well have. I cannot infer that it would not.
>
> On direct examination Silver was asked why he signed the contract:
>
> **Q. And the date appears to be July 22nd, 1982, opposite your signature.**
>
> **A. Yes.**
>
> **Q. Would that be the date when you executed the document?**
>
> **A. Yes, it would.**
>
> **Q. Now, did you seek any legal advice concerning the content of this document?**
>
> **A. No, I did not.**
>
> **Q. Okay. What was the reason, Mr. Silver, that you signed this contract on behalf of Western?**

A. I signed this contract in order to enable Mr. Lewis to participate in regional shows.

While I found the evidence of Silver and his colleagues to be unreliable in many respects, (for reasons already provided in considerable detail earlier in this judgment) I am not prepared to conclude that he was lying on this critical point. Mr. Stobie argues that Silver's response (just quoted) is an altogether too convenient explanation and simply tailored to meet the last minute amendment to their defence. That suggestion is answered, I think, by the consistency of the defendant's position. This statement is found at the top of page 2 of the pre-trial brief dated November 26, 1992 filed by Messrs. Cluney and Robinson on behalf of the defendant:

> **'It was Mr. Silver's understanding from Mr. Lewis that the Agreement needed execution by Western to permit Mr. Lewis to be given access to various garment trade shows.'**

The amendment seeking to plead misrepresentation was only launched when it became apparent to counsel after Lewis' direct examination that the accuracy of his representations was suspect.

I find no merit in Mr. Stobie's suggestion that Lewis' statements, if they were representations, did not induce Silver to enter into the contract, but merely opened the door to discussions; that Silver was still free to set whatever terms he wished; and that, he made subsequent alterations to the contract. That begs the question whether Silver would have even entertained Lewis' approach (recalling that some manufacturers had rejected the plaintiff) had he been given the full story.

In the result the defendant is entitled to repudiate its original consent and rescind this contract. The plaintiff's action fails."

The statement above that Lewis was aware but never told the defendant that the "policy" of the NGSA had never been adopted by his region for application in Atlantic Canada and that the NGSA was simply endeavouring to implement it in other regions which would include the Atlantic Provinces is inconsistent with the following express findings of the trial judge:

"8. Although Lewis was asked (Trans. Vol. 3, p. 546 Q. 158) when he first attended a show which was sponsored by the NGSA and replied that the first show he attended was in the fall of '82, that response must be read in light of his answers to Questions 154, 155 and 157. Clearly Lewis had attended other NGSA sponsored shows, but which were held elsewhere in Canada. It was during such meetings and in other discussions with people he knew that he became aware of the

NGSA policy;

9. The first trade show he attended in Atlantic Canada was hosted in Halifax in the fall of 1982;

10. Nobody asked him to produce a written contract in order to gain entry to that show, but it was still his understanding that such contracts were required;

11. He understood it to be a national policy which he knew had been adopted by at least two regions - which had hosted trade shows - those being Quebec and Ontario;

12. He assumed it was going to be a requirement to gain entry to the Halifax show in the fall of 1982;

. . .

14. When he said that, he believed it to be true;

. . .

16. Lewis thought his national association's policy gave him the opening to begin contract discussions with Silver. Many manufacturers would not sign contracts with their sales force and this was a way to enable salesmen to open up contract discussions with manufacturers;"

The trial judge provisionally assessed the appellant's damages at $508,995.65 with prejudgment interest at the rate of 10%.

The appellant contends that the trial judge erred in granting rescission of the contract, basing its argument on a number of grounds. The respondent filed a notice of contention claiming that the trial judge erred: (1) in failing to find that the appellant waived claims prior to 1987; (2) in finding that the appellant insisted at all times that the terms of the written contract be complied with and; (3) in not accepting the evidence of the respondent's witnesses, that the appellant failed to complain about lack of compliance with the terms of payment fixed by the written agreement.

I am of the opinion that in granting rescission the learned trial judge erred. In **Trietel, Law of Contract** (8th Edition), 1991, p. 301 the author states:

> "A misrepresentation generally has no effect unless it is material. That is, it must be one that would affect the judgment of a reasonable man in deciding whether, or on what terms, to enter into the contract;

> or one that would induce him to enter into the contract without making such inquiries as he would otherwise make."

The key elements here are materiality and inducement. The existence of one generally implies the existence of the other. Whether the test has been met is determined by the application of the standard of the reasonable person. That is an exercise which this court is fully capable of performing here - within, of course, the limits of the facts as found by the trial judge.

The burden of proving a material misrepresentation rests with the party seeking rescission of the contract. In his response to the question whether the adoption of the policy in Lewis' territory and/or the fact that NGSA was simply attempting to implement it in that territory would have made any difference, the trial judge leaves the distinct impression that he failed to keep this in mind. There is no clear finding on his part that the respondent proved that the misrepresentation was material other than an acceptance of the truth of Silver's subjective assertion:

> "I signed the contract in order to enable Mr. Lewis to participate in regional shows."

Assuming without deciding that an innocent misrepresentation was made and relied on, it related only to the form and not to the substance of the agreement. The most that can be gleaned from the evidence is that if the representation by Lewis constituted an inducement, it was not a material inducement respecting the obligations undertaken in the contract and which gave rise to the claims for the damages assessed by the trial judge. Silver reviewed the printed contract. He made changes. The representation which had been made would not induce a reasonable person in his position to accept the additional burdens under the written contract. If it were operating as an inducement at all, it would not operate to prevent such reasonable person from amending the contract to conform with the terms of the existing arrangements or such other arrangements as might be acceptable. Silver did, in fact, make changes as he had been invited to do. The evidence simply fails to disclose any relationship between the alleged misrepresentation and the respondent's agreement to the substantive changes. The representation that Lewis required a contract in writing did not affect

Silver's judgement with respect to those changes in the relationship between the parties which formed the basis of the trial judge's provisional assessment of damages.

It is not necessary to address the other reasons advanced by the appellant for setting aside the trial judge's decision.

There is no merit in the respondent's notice of contention. These issues were resolved by the trial judge on the basis of findings of fact based on credibility of witnesses. No error has been shown on his part in carrying out this process.

I would allow the appeal and order that the appellant recover from the respondent the sum of $508,995.65 with prejudgment interest at 10% to run with respect to each of the component items in Schedule "A" to the trial judge's decision from June 30 of the year to which it is related in the schedule to the date of judgment. The appellant should recover costs at trial based on Scale 3 applied to the sum of $508,995.65, together with costs of the appeal in the amount of 40% of the trial costs and disbursements to be taxed in each case.

The formal order giving effect to this decision should be withheld for one week in case the parties have representation to make respecting costs pursuant to Rule 41 or Rule 41(a) of the Civil Procedure Rules.

J.A.

Concurred in:

Jones, J.A.

Matthews, J.A.