IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Total E-com Home Delivery Inc. v. Smith, 2008 NSSC 37

Date: 20080205
Docket: S.H. No. 267692
Registry: Halifax

Between:

Total E-com Home Delivery Inc.

Plaintiff

v.

Jeffrey K. Smith, carrying on business as
Smart Moving & Delivery

Defendant

D E C I S I O N

Judge:	The Honourable Justice Gerald R P Moir
Heard:	24 and 25 October 2007 at Halifax
Last Written Submission:	29 October 2007
Counsel:	Mr. James D MacNeil and Kate Darling, Articled Clerk for the plaintiff Mr. Jeffrey K. Smith, on his own behalf

Moir, J.:

Introduction

[1] Mr. Jeff Smith is in the moving business at Fredericton, New Brunswick. He trades under the firm name "Smart Moving and Delivery". In 2003, Mr. Smith became a carrier for "Future Shop" retail product through a brokerage firm, Total E-com Delivery Inc., which operates out of Brampton, Ontario.

[2] As the name suggests, E-com developed out of the demand for home delivery of product ordered over the internet. The owner of the Future Shop chain is an important customer. E-com is exclusively in charge of home delivery for Future Shop in a number of smaller cities and rural areas.

[3] The actual delivery is made by a local carrier on contract, exclusive contract it seems, with E-com. So, E-com contracts with Future Shop to take care of deliveries at agreed rates and according to agreed schedules. It also contracts to pay rates, lower rates to allow for a profit margin, to a local carrier in exchange for the actual delivery. Failures of the carrier are, therefore, E-com's problem. Future Shop will deliver product to the carrier's warehouse or the carrier will go to a store to pick up product for home delivery, but Future Shop otherwise deals with E-com and not directly with the broker.

[4] A schedule of rates and a delivery schedule form the core of the contract between E-com and a carrier. There are rates for each home delivery, which vary to allow for distance. There are minor rates for such services as making an exchange, no one home, more than five pieces, shuttle service, storage, special delivery, remove old appliance, assembly, and deliveries requiring two workers.

A New Carrier for Halifax

[5] In late summer 2005, Future Shop approached E-com to take over deliveries in the Halifax area. Ms. Louise Boulanger, president and owner of E-com, contacted Mr. Smith and another carrier to see if either would be interested in taking up the Halifax work. Mr. Smith was interested in expanding the small amount of business he was already doing in the Halifax area. He would need a warehouse and more workers.

[6] Ms. Boulanger negotiated with Mr. Smith, on the one hand, and with Mr. Ron Wood of Future Shop, on the other. By 1 November 2005, she thought she had settled the rates. It appears the major rates had been agreed and Ms. Boulanger got Future Shop to increase some of the more minor ones. She sent a revised schedule of rates to Mr. Smith on 1 November 2005. On 2 November he submitted a schedule increasing some of these. He wrote, "this is what we are offering".

[7] E-mails passed back and forth. Ms. Boulanger said she could not ask Future Shop to change numerous rates at that stage, and Mr. Smith argued that it was imperative he receive the improved rates "to cover the enormous setup costs".

[8] Ms. Boulanger made an ultimatum on 4 November 2005:

> ...unfortunately I cannot give you more [than] the last ones I sent you. What do you want me to do? Should I contact the other guy I have in Halifax to see what he can do?

Mr. Smith replied:

> Given these circumstances Louise I would say yes. I am on track to set-up but I would need a call from you to stop this from happening.

What was Mr. Smith saying yes to? The rates offered by Ms. Boulanger or her question about the other guy? According to Mr. Smith rates remained unagreed. Ms. Boulanger took it that the schedule of rates she offered was accepted since Mr. Smith was going ahead with the warehouse and staff. Nevertheless, when Mr. Smith's service went into operation in late November at Halifax he charged, and Total E-com paid, the rates Mr. Smith was "offering" in his 2 November 2005 schedule.

[9] Mr. Smith was in operation before the end of November 2005. He had acquired use of a warehouse, had transferred two workers from Fredericton to Halifax, and had hired three others. He was getting an office. He spent about $45,000 on the Halifax operation before closing it down two months later.

[10] Mr. Smith submitted his first billing for Halifax on 9 December 2005. Rates were charged for one day in November, and the first three days of December. As I said, the rates conform with the last rate schedule offered by Mr. Smith. A week

later, Mr. Smith submitted his second invoice. A new rate appeared, cross-dock fees of $5 a unit. There is no mention of cross-dock fees on Mr. Smith's 2 November 2005 schedule.

[11] Sometimes, though rarely, Total E-com and a carrier will include cross-dock fees in an agreed schedule, and the schedule for Future Shop will provide for recovery. A cross-dock fee is a charge paid to the carrier for product delivered to, and taken from, the carrier's warehouse. It is called a cross-dock fee because it is charged when product crosses the warehouse dock.

[12] Normally, Total E-com treats the cost of warehousing as being included in the delivery rates.

[13] As I said, Mr Smith's evidence was that the rates were in flux. He says he submitted a schedule of rates that did not include cross-dock fees, but what the rates would be and what the delivery schedule would require were ongoing issues. He testified that he figured he and Ms. Boulanger would work things out over time. Eventually, the rates and delivery schedule would fall into place. In the meantime, he says he billed according to what was agreed.

[14] It is common ground that discussions about rates continued after Mr. Smith started the Halifax operation. He argued that the delivery rates were to be based on what was paid to him in Fredericton, where he did not have similar warehousing expenses. He claims that Ms. Boulanger agreed that "cross-dock fees would be a factor".

[15] In cross-examination it was established that the delivery rates shown in Mr. Smith's schedule were charged by Smith to E-com and paid by E-com. Mr. Smith agreed that those rates were in place before he made any deliveries. When he offered those rates, he knew a warehouse was required.

[16] Mr. Smith did not include cross-dock fees in his proposed schedule. He did not know about such fees. Rather, after his first billing, he noticed that the invoicing template supplied by E-com had a place for cross-dock fees. He claims that, at some time, Ms. Boulanger agreed to allow those fees.

[17] Ms. Boulanger says that there were discussions about Mr. Smith needing more revenue from his Halifax operation than the agreed rates would produce. She

brought up the concept of cross-dock fees and said there was a possibility they could seek those additional fees from Future Shop in the new year. She said that maybe she "could get it for you". She does not believe that even the amount was discussed. According to Ms. Boulanger the schedule of rates had already been changed for Mr. Smith's benefit.

[18] I accept the testimony of Ms. Boulanger over that of Mr. Smith. Generally, I found her the more credible witness. Mr. Smith's evidence stretches credulity. Why were the rates on the 2 November 2005 schedule consistently charged by Mr. Smith, if they remained "in flux"? Why is there no record of an agreement to add a rate for cross-dock fees? Why were his offered rates subject to further compensation for warehousing when, long before he offered the rates, he knew a warehouse was required?

[19] I find that Mr. Smith offered a complete schedule of rates on 2 November 2005. At first, Ms. Boulanger balked at further charges to negotiated rates, but eventually Total E-com accepted the offer. It did so, at the latest, when it paid the first invoice.

[20] There was a contract between Total E-com and Mr. Smith under which Mr. Smith was obliged to provide the services referred to in the 2 November 2005 schedule of rates and Total E-com was obliged to pay the rates stated in the schedule. I acknowledge that the delivery schedule had to be adjusted or finalized and that there was no formal contract as Total E-com sometimes provides with some carriers. None of that detracts from my finding that, when Mr. Smith's operation set off to make its first Future Shop delivery in Halifax, there was a contract that included all of the terms for the price to be paid by Total E-com for Mr. Smith's services.

[21] I find the contract did not include anything for cross-dock fees, and Total E-com was within its rights to refuse to pay them.

Problems with Performance

[22] Mr. Ron Wood was the National Home Delivery and White Goods Manager for Future Shop. He was the one with whom brokers, such as Total E-com, negotiated their contracts and he represented Future Shop's interests in the delivery system.

[23] Mr. Wood recalled a conference call with Mr. Smith about three weeks before he came on as the Halifax carrier. For Mr. Wood, customer service is critical. If an issue develops it is fixed, and any argument comes later. He expressed concern about Mr. Smith's capacity to take over the Halifax market. He specifically asked Mr. Smith whether he had sufficient resources to make deliveries on time during the busy Christmas season. As a result of Mr. Smith's responses, Mr. Wood had comfort that Mr. Smith knew what was coming and had the capacity to handle it.

[24] The first customers' complaints did not alarm Mr. Wood. Complaints began to increase. Customers claimed that deliveries were not being made. Mr. Wood spoke with Ms. Boulanger.

[25] Ms. Boulanger says she went to Halifax in mid-December for a meeting at Mr. Smith's warehouse in Burnside. There were many complaints and she was not able to get through to Mr. Smith or an employee to discuss the problem. She set up the meeting but Mr. Smith did not accept her request that he attend. He sent employees, a Mr. Ward and Mr. Brian Smith. They assured Ms. Boulanger they would hire more staff. She was not satisfied this would solve the problem and offered to turn some of the work over to another carrier. She told them they needed to improve or she would consider terminating the contract. They discussed Service failures, customer complaints, and store complaints were discussed. So was the overcharging by inserting cross-dock fees. Ms. Boulanger also told the two employees that the warehouse was inadequate.

[26] The problems continued into early January 2006. The Dartmouth store, in particular, made numerous complaints said to be based on problems customers were having with lack of delivery. Ms. Boulanger was unable to get Mr. Smith to communicate with her.

[27] Mr. Smith recalled the conference call with Mr. Wood in the fall of 2005. He said Ms. Boulanger was also a party. He says that Boulanger had misinformed

Wood and Smith had to set him straight, although Ms. Boulanger had asked him earlier not to do so.

[28] Mr. Smith claims his business had a good relationship with the Halifax Future Shop Store, which generated 80 percent of the delivery contracts. The managers of that store were very pleased. The Dartmouth manager, however, was adverse. He decided to concentrate on pleasing the Halifax people and decided to try to work things out with Dartmouth.

[29] I find that Future Shop received numerous complaints that Mr. Smith's operation had failed to make deliveries as promised. I find that Mr. Smith did not communicate with Ms. Boulanger despite her efforts to get him to do so.

Termination

[30] As complaints mounted in early January 2006 and communications did not improve, Ms. Boulanger determined to terminate E-com's contract with Mr. Smith. She gave Mr. Smith thirty days notice. There is no suggestion of a term contract, and I find Total E-com rightly terminated the contract.

Withheld Product

[31] The termination caused Mr. Smith to start communicating. According to Ms. Boulanger, whose evidence I accept, Mr. Smith sought to be reinstated, Ms. Boulanger said it was too late, and Mr. Smith promised to cooperate in the transition to a new carrier.

[32] Mr. Smith submitted invoices weekly while he worked for Total E-com. An invoice is submitted electronically on a template; paper documents are submitted afterwards; Total E-com audits the invoice and pays it.

[33] The December invoices were paid later in January than usual. This was because they contained numerous unfounded claims, the largest amount being for cross-dock fees. Mr. Smith called about the lateness, and Ms. Boulanger quickly delivered a bank draft for the amount to which he was entitled.

[34] Invoices had also been submitted for Halifax and Fredericton during January and early February. Mr. Smith continued to claim cross-dock fees. The required

paper documentation was not supplied. Despite this, Mr. Smith demanded full payment of these invoices when Ms. Boulanger delivered the bank draft for December and the thirty day period was coming to an end.

[35] Just before the last day, in early February, Mr. Smith again demanded full payment although he failed to provide supporting documentation. He said Total E-com was to pay the rest of the invoices, "or else". Ms Boulanger asked what the "or else" would be. Mr. Smith said, "You'll see."

[36] I find that nothing was due by Total E-com to Mr. Smith when this threat was made. The invoices charged amounts that were not contracted and had not been supported by documentation always provided by Mr. Smith in the past.

Disposal of the Product

[37] The unelaborated "or else" turned out to be that Mr. Smith would take nearly $50,000 in product at Halifax and Fredericton that did not belong to him.

[38] The new carrier was ready to make the numerous deliveries Mr. Smith had promised, but failed, to make. However, Mr. Smith closed his office, emptied the warehouse, and took the product into New Brunswick. Demands for return were met with demands for payment of his claims in full. Eventually, he sold Future Shop's property, and realized $20,000 to $25,000.

[39] Future Shop and Total E-com had to contact every customer to whom Mr. Smith was supposed to make a delivery and for whom there was no documentation of the delivery having been made. Future Shop provided new product for each customer who did not receive delivery of the thing the customer had paid for.

[40] Future Shop claimed $47,578 from Total E-com, which was the cost of replacing the product. E-com, who had contracted to arrange delivery, was clearly liable to Future Shop and it paid the claim in installments acceptable to Future Shop.

[41] In his evidence, Mr. Smith said he was "holding onto" the goods because of fear Total E-com would not pay what was due to him under the contract. The fear was unfounded, and this was, in any case, no excuse for taking property belonging to someone else.

[42] I find that Mr. Smith's wrongful act caused havoc for Total E-com. Ms. Boulanger had to fly to Halifax to deal with the situation. Customers, many of whom would have been annoyed, had to be contacted and satisfied. Late deliveries had to be made as quickly as possible.

Contract

[43] The plaintiff contracted with the defendant for delivery of the Future Shop product. The defendant breached the contract by taking the product rather than delivering it. Therefore, the defendant is liable to the plaintiff for losses flowing from the breach.

[44] A breach of contract is compensated by restoring the plaintiff to the position it would have occupied had the contract been performed according to its terms, which measure of damages is controlled by a restriction against recovery of losses that are too remote. Had the contract been performed, Total E-com would not have had to pay anything to Future Shop, but it would have had to pay something to Total E-com for the deliveries it made before termination. Put another way, "what is to be recovered by way of damages is the loss which the plaintiff has suffered, and not the profit which the defendant has made": *Cheshire, Fifoot & Furmston's Law of Contract*, 13th ed. (Butterworth, London, 1996) p. 608.

[45] On behalf of Total E-com, Mr. MacNeil argues that the amount owing for January and February deliveries should not be deducted from damages for the breach of contract. He says:

> It is the Plaintiff's submission that Mr. Smith is not entitled to any form of double recovery and/or being unjustly enriched. That is, he kept the proceeds of the sale to pay his account. Therefore, he should not be entitled to claim setoff unless he can prove a greater amount is owed. It is the Plaintiff's submission that Mr. Smith's evidence was clear that he was seizing the products to secure payment for his account. They were then sold. Mr. Smith subsequently did not invoice the Plaintiff and it is the Plaintiff's submission that an inference can be drawn that there was nothing owing to Mr. Smith after he realized the proceeds of the sale.

[46] I respectfully disagree with this argument. There is no "double recovery". Mr. Smith is paying the $47,578 replacement cost of the product he took. He pays part through setoff against a debt owed to him and the balance in damages. The

compensatory principle does not call for him to also give back the property he is replacing, or the $20,000 or $25,000 he got when he illegally sold it. To ignore the liability Total E-com would have borne had the contract been performed is to stray from the basic principle for measuring damages on a breach of contract. I think that Mr. Smith's behaviour was egregious, but it should not be dealt with in a way that pretends to be compensatory.

[47] Mr. Smith proved no invoices for the weeks of January 14th and February 4, 2006 at Halifax. His failure to furnish evidence leaves me with nothing from which to make a calculation. My calculation of the amount to be offset, subject to being corrected after any further submission, is as follows:

Date/Month	Place	Amount	Less cross-dock	Balance
7 January	Halifax	$ 7,162	$ 1,528	$ 5,637
21 January	Halifax	4,947	595	4,352
28 January	Halifax	6,645	1,075	5,570
January	Fredericton	5,124	-----	5,124
February	Fredericton	1,287	-----	1,287
				$ 21,970

So the damages on that head would be $47,578 less $21,970 for a balance of $25,608.

[48] The plaintiff claims $10,000 for redirection of resources and lost opportunities. The breach of contract caused havoc for Total E-com. No doubt, time devoted by Ms. Boulanger and others to the problems caused by Mr. Smith could have been invested in profitable activity on behalf of Total E-com. The havoc is foreseeable when assessed at the time of contract looking forward to the breach. It is not easily calculated, but it appears that at least a week of Ms. Boulanger's time would have been devoted to her trips to Halifax and staff time was required for tracking down and dealing with customers. In my assessment $10,000 is fair compensation for this loss.

Conversion

[49] On the facts of this case, it is clear to me that Mr. Smith wrongfully converted the Future Shop product. As regards liability to Total E-com, I adopt the following analysis set out by Mr. MacNeil and Ms. Darling in their pretrial brief:

> With respect to the second submission, Total E-com acknowledges that it must establish that it has sufficient possessory rights in the Best Buy products to form an entitlement to sue under the doctrine of conversion. In *Toronto Dominion Bank* v. *Dearborn Motors Ltd.* (1968), 64 W.W.R. 557 (B.C.S.C.) [a copy of which is attached at Tab 4 of the Plaintiff's Book of Authorities], Vechere J. quoted the following explanation out of *Salmond on Torts*, 14th ed. at page 158:
>
> > Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of conversion to the immediate possession of them. It is not necessary for the plaintiff to show that he is the owner of the goods. One who has actual possession or an immediate right to possession at the time of the conversation can sue even though he is not the owner of the property. Hence not merely can a bailee at will sue but also his bailor and one who has a lien over the goods.
>
> The presence of the broker, or Total E-com in the case at bar adds a minor element of complexity when discussing possession in the bailment context. It is helpful to look first at the contractual relationships in order to discern how privity affects the possessory rights and obligations created by the three concurrent contracts. In simple terms, Best Buy is responsible to its customers; Total E-com is responsible to Best Buy; and the Defendant is responsible to Total E-com. All three have an obligation to ensure that the product reaches the purchaser, but each is only responsible to the party with whom they contracted to perform the service if that service is not ultimately rendered.
>
> Looking specifically now at the property issue, when the customer purchased a product that remained in the possession of Best Buy, the latter became the bailee and the customer became the bailor of that product. As between Total E-com and Best buy, Total E-com became the bailee once the Best Buy products were unloaded at the Defendant's warehouse and Best Buy became the bailor who retained an interest that the products ultimately reach the customer who had originally purchased the product.
>
> Simultaneously, as possession passed from the Best Buy personnel to the Defendant's employees, Total E-com became the bailor and the Defendant became the bailee of that product.

> While the goods were never in Total E-com's physical possession, that company acquired a right implied by its bailment contract with Best Buy to the immediate possession of the products. Consequently, Total E-com is entitled to compensation for the full value of the products converted.

[50] However, in this case the measure of damages in tort leads to the same calculation as in contract.

Interference with Economic Relations

[51] The plaintiff says that the elements of this emerging tort have been proven. Mr. Smith's "or else" and his knowledge of Total E-com's relationship with Future Shop led me to find that he formed an intent to inflict harm on Total E-com's business, by wrongfully converting the Future Shop product. The intended harm was not inflicted and the tort is not established unless economic loss is caused by unlawful conduct carried out deliberately to harm the plaintiff's business. In their pretrial brief, counsel for the plaintiff point out

> Total E-com suffered both a loss commensurate with the replacement costs and a loss equal to business opportunities foregone because they were obliged to redirect resources in satisfaction of their contract with Best Buy.

Be that as it may, these losses are covered by damages for breach of contract or for the more established tort.

Punitive Damages

[52] This was not a merely negligent conversion. It was deliberate. Worse still, I find it was malicious.

[53] The evidence of malice begins with the overcharging, and the threat: Mr. Smith saying pay me what I do not deserve or else. Then, came the substance of the threat: Mr. Smith's slipping away with Future Shop's property. Then, a refusal to return what did not belong to him and a threat to accuse E-com of defrauding Future Shop unless the excessive claim is paid:

> Louise I think it is time you pay up so I can, at that time return the product to the stores. If I do not receive my money I will not let this rest. You have much to lose Louise, defrauding future shop of fuel surcharges and cross dock fees and Lord knows what else. If I have any legal precedent concerning your responsibility in this, future shop will as much if not more so, seeing I had no formal contract with you. I will move on and forget this all took place only if I receive my money.

And, finally there is the sale of property he did not own. All of this was done by a man who knew full well the havoc he would cause when customers did not receive Future Shop product they had paid for and, in turn, the damage that could do to E-com's business relationship with Future Shop.

[54] Punitive damages are not recoverable in a case of breach of contract unless the breach is also tortious: *Vorvis* v. *Insurance Corporation of British Columbia*, [1989] S.C.J. 46, or it amounts to a breach of a duty of good faith and fair dealing: *Whiten* v. *Pilot Insurance Co.*, [2002] S.C.J. 19. Here the breach also amounts to conversion and, probably, interference with economic relations.

[55] This breach of contract and commission of a tort is so outrageous as to require retribution and deterrence. In addition to the malice, an award of punitive damages is necessary because the misbehaviour promotes resolution of civil rights by illegal means. Mr. Smith obtained $25,000, I will take his pleaded amount. He obtained this money by taking someone else's property first to extort payment of an inflated claim and then to sell it to pay the claim. Mr. Smith, and others, need to know that they cannot collect debts that way. In this case, that message is not delivered through an award of compensatory damages.

[56] Counsel for Total E-com refer me to the following list of factors provided by Justice Binnie on behalf of the majority, at para. 113 in *Whiten*, to be considered in assessing an amount of punitive damages:

1. Whether the misconduct was planned and deliberate;

2. The intent and motive of the defendant;

3. Whether the defendant persisted in the outrageous conduct over a lengthy period of time;

4. Whether the defendant concealed or attempted to cover up its misconduct;

5. The defendant's awareness that what he or she was doing was wrong;

6. Whether the defendant profited from its misconduct;

7. Whether the interest violated by the misconduct was known to be deeply personal to the plaintiff, or a thing was irreplaceable

The misconduct was planned and deliberate. As for intent and motive, the misconduct was actuated by malice. It lasted long enough to make delivery to customers pointless. The misconduct was not concealed or covered up, but it was covert. Mr. Smith had to know the property was not his, that he was doing damage to Future Shop customers, and that that damage could seriously harm Total E-com's business. The defendant did not profit, but he sold property that did not belong to him in order to realize on an unproved and unsecured claim. All but the last of Justice Binnie's factors weigh in favour of a substantial award in this case.

[57] Total E-com submitted for $10,000 in punitive damages, but they also argued for $21,970 more in compensatory damages. As I said, that argument goes to punitive rather than compensatory damages. I am satisfied that to require Mr. Smith to pay the replacement cost of the property he took will not sufficiently address the need for retribution and deterrence. Taking the factors in *Whiten* into account, I am satisfied that an award of $20,000 in punitive damages responds adequately to the need for retribution against, and deterrence of, the kind of misconduct we see in this instance.

Conclusion

[58] Subject to correction of my calculations, Total E-com will have judgment against Mr. Smith for $31,970 on the breach of contract and conversion. Total E-com will also have judgment for $20,000 in punitive damages.

[59] Written submissions on costs and prejudgment interest may be filed no more than thirty days from the date of this decision. (I am inclined to the view that prejudgment interest may not be payable on the punitive damages and would request the briefs deal with that issue if interest on punitive damages is claimed.)

J.