SUPREME COURT OF NOVA SCOTIA

Citation: Boudreau v. Darnoc Investments Inc, 2014 NSSC 98

Date: 20140311
Docket: Halifax No. 275528
Registry: Halifax

Between:

Donald Boudreau

Plaintiff
and Defendant by Counterclaim

v.

Darnoc Investments Inc., and Lawrence Conrad

Defendants
and Plaintiffs by Counterclaim

Judge: The Honourable Justice Allan P. Boudreau

Heard: January 13, 14, 15, 16, 20, 21, 22, 23, 27 and 28, 2014 in Halifax, Nova Scotia

Counsel: Peter L. Coulthard, Q.C., for the Plaintiff
Tim Hill, Q.C., for the Defendants

By the Court:

Introduction:

[1] This case involves the rather intriguing and sometimes bizarre workings of what has been referred to as the "White Label" Automatic Teller/Cash Machine ("ATM") business. These ATMs are owned privately. They are not owned by large financial institutions such as Chartered Banks, Credit Unions, etc. In fact, it appears that practically anyone can own one of these "White Label" machines.

[2] In 2005 Donald Boudreau ("Mr. Boudreau") and Lawrence Conrad ("Mr. Conrad") were joint owners and equal shareholders in two companies, Independent Armored Transport Atlantic Inc. ("IATA") and Independent Security Services Atlantic Inc. ("ISSA"). IATA was in the business of providing services for certain owners of "White Label" ATMs. Those services included installation, maintenance and repair, and by 2005 had progressed to transporting cash in armoured vehicles and filling these ATMs with cash, usually the cash belonging to the various customers of IATA.

[3] ISSA was in the business of providing security guard services apart from the ATM business and its operations are not part of the disputes in this proceeding

[4] On August 21, 2006, Mr. Boudreau entered into an Agreement of Purchase and Sale ("the Agreement") whereby he agreed to sell his 50% share interests in IATA and ISSA to Mr. Conrad for the total price of $300,000. Mr. Conrad has paid $250,000 of the sale price to Mr. Boudreau, but Mr. Conrad has deposited the final $50,000 in trust with the law firm which acted for both parties on instructions not to release it to Mr. Boudreau. Mr. Conrad alleges breaches of the Agreement and a resulting setoff and counterclaim.

[5] Mr. Conrad alleges that Mr. Boudreau failed to warn him that monies owned by a customer of IATA, Bullion Investments Limited, ("Bullion"), and its principal, Richard Morse ("Mr. Morse"), were not adequately documented and that the collection of this debt of approximately $62,000 was questionable.

[6] Mr. Conrad also alleges that Mr. Boudreau failed to take over, as agreed, a small portion of IATA business referred to as the Ontario operation, and claims a loss of $21,000.

[7] The non-payment of Mr. Boudreau's remaining $50,000 of the sale price is admitted, and it is the Defendant's claim of a setoff and counterclaim of some $83,000 which is in dispute.

Issues:

[8] It should be noted that the purchaser of Mr. Boudreau's shares in IATA and ISSA under the Agreement was a numbered company which has now changed its name to the defendant, Darnoc Investments Inc. ("Darnoc"). Mr. Conrad is the owner of Darnoc and the Guarantor on the transaction. Therefore, the first issue raised is question No. 1:

1. Are amounts paid by or losses claimed by IATA captured by the Agreement?
2. If the answer to question 1) is yes, then have the defendants proven that Mr. Boudreau breached any covenants or warranties which he made in the Agreement?
3. If the answer to question 2) is also yes, then have the defendants proven that Mr. Boudreau's breaches caused the losses?
4. If the answer to question 3) is also yes, are the defendants partially or contributorily responsible for any of the losses?
5. And, finally, have the defendants proven the amount of the alleged losses?

Background:

[9] I should first describe how the various witnesses testified that the "White Label" ATM systems work. In this there is no dispute. I will use the three "loops" which were said to exist in Nova Scotia, PEI and New Brunswick in 2006 as an

example. It would be helpful to refer to Exhibit - 12 which graphically portrays these three loops. The loops are entitled as follows:

1. IATTA Loop
2. Bullion Loop
3. “Invested in Bullion”

Ideally, the loops would all operate as intended in loops 1) & 2). This means that cash that came from one source, IATA or Vencash, would get placed in ATMs that re-deposited that money back into the same account from which it came when customers use the ATM’s to withdraw money from their individual personal accounts. (Customers like you or I). If that was always the case, this proceeding would probably not have been necessary; however, there was a third loop, “Invested in Bullion” (loop 3), in which that was not the case.

[10] In the case of loop 3), IATA, at times, put its own cash in those ATMs because it appears that Bullion did not have sufficient cash to meet those needs. As can be seen from the diagram for loop 3), in that case the cash did not return to IATA’s account, but it circulated back to an account owned by Vencash. The amount of IATA money supposedly in loop 3) described as “Invested in Bullion” and allegedly not recovered by IATA is the basis for its setoff claim in the amount of $62,054.95. I will explain this allegation in more detail later in this decision.

[11] Prior to June 30, 2006, Mr. Boudreau and Mr. Conrad were equal shareholders in the two companies, IATA and ISSA. As previously stated, IATA was involved in the ATM business and ISSA in the security guard services business. Mr. Boudreau was running IATA and Mr. Conrad was running ISSA. Neither of them were actively involved in the day-to-day operation of the other business. IATA's ATM service business was primarily located in Nova Scotia, PEI and southeastern New Brunswick. Mr. Boudreau, on behalf of IATA had also started a small ATM service operation in Ontario, around Toronto. Mr. Boudreau's sister, Carol Denomme ("Ms. Denomme"), (a.k.a. Carol Boudreau), was running the Ontario operation for Mr. Boudreau. There appears to have been very little control or supervision of Ms. Denomme's management of the Ontario operation.

[12] Also, prior to June 30, 2006, several rather bizarre events are alleged by Ms. Denomme to have occurred in Ontario. The details of these events as testified to by Ms. Denomme are either contradicted or brought into question by Mr. Boudreau. I should say at the outset that I do not have to decide or make any findings of fact regarding those events, only to recount them as far as they may impact on the credibility of the witnesses, Ms. Denomme and Mr. Boudreau. Mr. Boudreau has testified that he kept close tabs on the operations and cash flow of

IATA, both here in Nova Scotia and in Ontario; however, the alleged events in Ontario cast doubts on that claim.

[13] Ms. Denomme has testified that, after a brief initial period when she had a student working with her, she operated the IATA leased armoured vehicle around Toronto by herself. Her only safeguard being the 38 caliber revolver which she carried. At one point she had her infant child with her in the armoured vehicle because she did not have day care. She testified that during the tenure of the Ontario operation, which was 2005 to the fall of 2006, she had some two to three "White Label" ATM customers totalling between 20 and 30 machines. One was a Korean individual with approximately 10 ATMs and another was an organization which was called Speed-I-Com Inc. ("SIC"). The latter operated some 20 ATMs.

[14] Ms. Denomme testified that, on one of her cash delivery runs for SIC, she had obtained $110,000 from SIC's bank. She said she had used approximately $60,000 to fill some of SIC's ATMs when she received notice that SIC was in receivership and that she should cease any further deliveries. She said she had approximately $50,000 cash left and called Mr. Boudreau to see what should be done with the money. She testified that Mr. Boudreau told her to put it in IATA's vault in Ontario and see what happens. This money has been referred to as the

"Mystery Money". Ms. Denomme said that some time later she had contacted Mr. Boudreau because she needed cash for some IATA deliveries in Ontario and that Mr. Boudreau said he did not have time to deal with the bank that day and told her to use the "Mystery Money" (See Exhibit 1 – Tab I, Page 195). The Receiver for SIC has requested information from Mr. Boudreau regarding the dealings with SIC but the "Mystery Money" has never been accounted for by anyone as far as I can ascertain from the very sketchy evidence on that point. Mr. Boudreau testified that he co-operated with SIC's Receiver by providing documentation but we have seen none.

[15] Ms. Denomme also testified that around June 28, 2006, she had picked up approximately $67,500 from a bank in Ontario to fill one of IATA's customers' ATMs. She said that when she arrived at her first stop and opened the door to the armoured vehicle, a man stuck a gun in her face and took all the cash. She said she called Mr. Boudreau to advise him and that he said not to call the police, that he would handle it internally. She said Mr. Boudreau was concerned about the ramifications for his future business requirements as far as insurance was concerned. The matter was never reported to the police. Mr. Boudreau testified that he doubts there was an actual robbery as opposed to Ms. Denomme using the

money for herself over time. There is really no clear or credible explanation of how this alleged cash shortfall was resolved.

[16] It is also worth noting that one of the Ontario customers of IATA had its ATM cash “looping” back to an account at CIBC on which Ms. Denomme was an authorized signatory. The records showed that in excess of $50,000 was withdrawn by Ms. Denomme for personal expenses. There is no clear or credible evidence as to how that was accounted for or resolved.

[17] At one point in 2005-2006, Ms. Denomme had opened an account at the same institution, Credit Union Atlantic, where the IATA cash treasury account was located. Mr. Boudreau had authorized the “linking” of these accounts permitting transfers between the two. IATA’s accountants found a $30,000 transfer or withdrawal for which they could not account.

[18] As I stated earlier, I do not have to decide the actual facts of these events. They were brought in evidence by the defendants for the purpose of questioning Mr. Boudreau’s credibility and his assertion that he had good financial control of IATA’s affairs and cash flow before the sale of his shares to Mr. Conrad, effective June 30, 2006.

[19] It is also important to note that Mr. Boudreau, when managing IATA, had significant difficulties dealing with Mr. Morse and his company, Bullion, during the spring of 2006, before he sold his shares to Mr. Conrad. It became quite clear during the trial that Mr. Morse approached dealing with tens of thousands of dollars in cash in a rather cavalier and haphazard manner. He must be described as disorganized and not paying attention to detail, which is actually an understatement. This was apparent in his failure to be able to answer questions about his and Bullion's dealings with Mr. Boudreau and IATA, or he was being intentionally vague. I suspect it was a mixture of both.

[20] Mr. Morse's cavalier attitude and lack of attention to detail was something of which Mr. Boudreau was well aware and it had become a source of annoyance and concern to Mr. Boudreau. This is apparent from Mr. Boudreau's lengthy e-mail to Mr. Morse on April 19, 2006 (See Exhibit-1- Tab-I – pages 196, 197, 198). In that e-mail Mr. Boudreau raises numerous issues about Mr. Morse and Bullion's operations which were of concern to him. It appears clear that dealings between Bullion and IATA were "off track" as far as Mr. Boudreau was concerned. Mr. Boudreau goes so far as to give Mr. Morse an ultimatum in the second last paragraph of that e-mail where he says the following:

> "In any event, we have to get things back online and going forward if this is going to continue to be a viable opportunity for IATA and Bullion".

There is no evidence that things ever "got back online".

The Agreement:

[21] In June of 2006 Mr. Boudreau and Mr. Conrad reached agreement whereby the former would sell to the latter all of his shares in IATA and ISSA for the total price of $300,000. They had retained John Dillon of Crowe Dillon Robinson to act for both of them in preparing the documentation which would culminate in the closing of the transaction.

[22] The first document prepared appears to have been a Letter of Intent dated June 30, 2006 (Exhibit-3-Tab-3); however, that document does not appear to have been executed. Nevertheless, the document contemplated an effective purchase date of June 30, 2006 with formal documents completed by July 30, 2006. Clause 8 of that document acknowledged the fact that time periods were short and they agreed "to assist each other in an attempt to have a smooth transition".

[23] The second document is the Agreement itself. It has been said to be effective as of June 30, 2006 but the Agreement states July 1, 2006. The documents were executed on August 21, 2006 in front of Mr. Dillon; thus the note

on the front page. It is agreed that the "Purchaser" numbered company is now the first defendant, Darnoc. The Agreement was signed by Mr. Boudreau, the Purchaser and IATA and ISSA.

[24] The Agreement called for $50,000 to be paid on closing and $250,000 to be paid within 60 days of closing, which date was to be October 21, 2006. The first $50,000 was duly paid by the closing date and a promissory note for the remaining $250,000 was signed by the Purchaser on that date, with a due date of October 21, 2006. Mr. Conrad signed as guarantor to the promissory note. During August of 2006 and after, Mr. Conrad was busy securing the financing of the $250,000 remainder of the purchase price. Mr. Conrad obtained financing from the Business Development Bank, as he had always understood was available, but he found the rate of interest to be too high, so he sought an alternate source of financing. He secured $200,000 financing from Credit Union Atlantic and had a private investor to finance the remaining $50,000.

[25] During July, August and September 2006, the Purchaser was to carry out its due diligence inspections of the books and records and the operation of IATA. The financial statements of IATA for the year ended June 30, 2006 took, of necessity, until approximately mid-September to complete; however, the main concern for

the Purchaser was the amount of IATA money floating around ATMs. Ron Arsenault ("Mr. Arsenault") who had been an employee of Mr. Boudreau at IATA and who was running most of the day to day operation had abruptly left the company on June 28, 2006. Mr. Arsenault said this was because Mr. Boudreau showed him a document which indicated Mr. Arsenault's employment was to be terminated on June 30 by Mr. Conrad. Such a document was not produced. Mr. Arsenault immediately went to work for Mr. Boudreau in the latter's continuing ATM business outside the 200 mile radius from Halifax, as permitted by the Agreement.

[26] In any event, a Treasury Make Up and Reconciliation of IATA's funds was required as of June 30, 2006 for Mr. Conrad's take over on July 1, 2006. Mr. Arsenault prepared one from his home computer after he had left IATA. He apparently still had access to certain IATA ATM computer data. This data was kept by an automated system called "Calypso" which tracks the in and out transactions of individual and/or groups of ATMs. The Treasury Make Up and Breakdown dated June 30, 2006, prepared by Mr. Arsenault can be found at Exhibit–3, Tab–20. The accuracy of this document could not be verified and it was decided to have a new Treasury Reconciliation prepared as of July 31, 2006. This latter document can be found at Exhibit–3, Tab–22. The purpose of this

Treasury Reconciliation was to have all parties, including Mr. Morse, agree as to the amount of IATA cash and coin in its vault, the amount of IATA cash circulating in ATM's and in settlement as well as the amount of IATA cash "Invested in Bullion". The latter is meant to reflect the amount of IATA money circulating in Bullion ATMs. The words "Invested in" are somewhat of a misnomer, they should more appropriately be "advanced to" or "owed by".

[27] The July 31, 2006 Treasury Reconciliation was prepared by Mr. Boudreau and Mr. Morse and a meeting was called to have all parties confirm and agree to the amounts shown on that document. The meeting took place on August 4, 2006 at which were present Mr. Boudreau, Mr. Morse, Mr. Conrad and Peter Wilde ("Mr. Wilde"), IATA's chartered accountant. Mr. Boudreau, Mr. Morse and Mr. Conrad all signed the document indicating their agreement with the various amounts indicated. The amounts of coin and cash were in IATA's vault and could be counted. The "Cash in ATMs", and "Cash in Settlement" amounts were apparently obtained from the "Calypso" system computer data for the ATMs. The "Cash in Account" and "Transferred to IAT cheq", amounts were verified from bank records. The "Invested in Bullion" amount was agreed to be the sum required to balance the Treasury and which represented the IATA cash circulating in Bullion ATMs. It is this latter amount of $90,054.95 which forms the basis for

IATA's setoff and counterclaim regarding its Nova Scotia operation. This portion of the setoff and counterclaim is separate from the claim regarding the Ontario operation and I shall deal with that portion later in my decision.

[28] It is important to note that IATA's claim does not relate to nor include any unpaid trade debts or the amount of some $44,186.65 which the accountants concluded was a shortfall of cash in the IATA loop, which is loop 1) on Exhibit – 12. The counterclaim relates solely to the alleged unpaid amount designated as "Invested in Bullion".

[29] Mr. Wilde, as IATA's chartered accountant, was asked to ascertain the net amount owing by Bullion to IATA, after some necessary adjustments from the agreed upon starting amount of $90,054.95 from the July 31, 2006 Treasure Reconciliation. Mr. Wilde's calculations appear on another copy of the July 31, 2006 Treasury Reconciliation which is found in Exhibit – 1, Tab – F at page 22. Mr. Wilde has deducted three amounts from the starting number of $90,054.95. They are the following:

J.B. Technologies	$40,000
Denomme	$ 4,000
Investors	$24,000
Total =	$68,000

[30] At the time Mr. Wilde performed his calculation, it was assumed that all three adjusting amounts listed above as part of IATA's "Treasury Make Up" had been repaid by Bullion; however, the evidence at trial confirmed that J.B. Technologies $40,000 had not been repaid and should not have been deducted as part of Mr. Wilde's adjustments. Therefore, this amount should be added back to the net sum of $22,054.95, making the total owing by Bullion to be $62,054.95. It will be noted that Mr. Wilde had also added some trade expenses of Bullion of $7,443.71; however, this latter amount does not form part of IATA's setoff and counterclaim because it was not part of the debt of $90,054.95 indicated on the Treasury Reconciliation of July 31, 2006.

[31] IATA therefore claims the net sum of $62,054.95 as a setoff and counter-claim against Mr. Boudreau on the basis of non-disclosure by him and non-payment by Bullion. The Defendants contend that Mr. Boudreau was well aware of the questionable and doubtful ability of Bullion and/or Mr. Morse to respond to this debt at the time he sold his shares to Mr. Conrad, and during the ensuing due diligence period and that Mr. Boudreau kept this information from them.

The Transition:

[32] The transition from Mr. Boudreau operating IATA to Darnoc and Mr. Conrad operating the ATM business was somewhat haphazard. Mr. Conrad's operation began on July 1, 2006; however, we will recall that Mr. Arsenault, the apparent day-to day operations manages of IATA's ATM business, had abruptly quit on June 28, 2006, and several of the armed guard employees running the armoured vehicles and filling the ATMs with cash did not continue with Mr. Conrad. Mr. Conrad was running the ISSA business and he was left with Andrew Lantz ("Mr. Lantz") and Adam Francis ("Mr. Francis") trying to run the IATA ATM business. Although both Mr. Lantz and Mr. Francis had some experience with IATA's ATM business, they were not familiar or even aware of the loops depicted on Exhibit - 12. They had no understanding whatsoever of the workings of these three loops and only became aware of them through this litigation.

[33] More importantly, Mr. Conrad was not made aware of the various loops and how they worked. He had no knowledge of how IATA or Vencash monies were circulating in the loops. He also only became aware of the workings of these loops many months after taking over the IATA ATM operation.

[34] Both Mr. Lantz, who was attempting to manage the day-to-day ATM business, and Mr. Conrad, have testified that when questions were asked of Mr. Boudreau about the operation, he would not provide any answers but that he would

simply say that it was Mr. Arsenault who would know. However, Mr. Boudreau testified that he had daily "hands on" involvement in tracking IATA funds. He would have known the intricacies of IATA's ATM operation. Mr. Boudreau has denied that he was asked for information by Mr. Conrad or his employees, or that he declined to help. However, for reasons which should be obvious from Mr. Boudreau's actions regarding the Ontario operations, where the evidence of the other witnesses is inconsistent with Mr. Boudreau's, I reject his evidence and accept that of the witnesses such as Mr. Lantz and Mr. Conrad.

[35] Mr. Conrad testified that each time he expressed concern about IATA recovering enough cash to repay a line of credit, which was hovering around $70,000, Mr. Boudreau would simply say that when he received payment of the $250,000 owing on the sale of his shares, he would inject some of that money to circulate in ATMs and IATA would have its debt paid. He kept reassuring Mr. Conrad that there was no need to be concerned. As we now know, that did not materialize; and Bullion, which is now bankrupt, never paid its cash infusion debt to IATA.

[36] In the final analysis, Mr. Boudreau left Mr. Conrad and his employees in the dark about Boullion and Mr. Morse's activities and about their reliability. Mr. Conrad and his employees and IATA were left to their own devices. It was not

until November of 2006, when Mr. Conrad became so concerned that something was amiss because IATA money was not coming back to the ATM business as he had been reassured by Mr. Boudreau, that he paid his last $50,000 payment under protest to the law firm of Crowe Dillon Robinson in trust, to be held until the matter could be sorted out through an accounting. And we are today, many years later, still trying to sort it all out.

The Ontario Operation:

[37] As stated previously, Mr. Boudreau had commenced a small ATM service business for IATA around Toronto during 2005, and it was continuing, although precariously, during 2006. The Agreement, in part, was understood to be to the effect that Mr. Boudreau would take over the IATA Ontario operation and assume the obligations associated with that business. Mr. Boudreau could continue that business or wind it up; however, he would be responsible for the financial consequences of following either course of action.

[38] The primary financial consequences, as far as Mr. Conrad was aware, were leases for IATA's Toronto office and vault space and for on armoured vehicle. Mr. Conrad was not aware of the other rather bizarre events which I have alluded to earlier.

[39] Ultimately, Mr. Boudreau closed the Ontario operation without assuming responsibility for or paying the financial consequences of the two leases referred to above. Mr. Boudreau claims he did not assume those liabilities or obligations because Mr. Conrad, on or about November 20, 2006, did not release the final $50,000 payment for his shares to him, but instead paid the amount to their legal counsel in trust. This final payment was to be held in trust pending the sorting out of what Mr. Conrad believed to be serious financial irregularities regarding IATA funds. The money which Mr. Conrad had been assured by Mr. Boudreau would circulate back to IATA did not appear to be occurring. It appears that IATA had a line of credit of around $70,000 pending the circulation of ATM money back to IATA but there were no funds coming back to reduce this line of credit. However, I should make it clear that IATA's line of credit does not form part of its counterclaim, but was testified to as corroboration of the allegation that it was short of funds and that no money to address this shortfall was coming in from any of the three loops depicted on Exhibit – 12 to address this shortfall. That was the concern which prompted Mr. Conrad to impose conditions on his payment of the last $50,000 due Mr. Boudreau.

[40] Mr. Boudreau has denied that he had decided to abandon the Ontario operation before November 20, 2006; however, there are several e-mails which

contradict this assertion. On November 6, 2006, Ms. Denomme, as IATA's Ontario Branch Manager, e-mailed the landlord of the Ontario leased premises and advised that;

> "In reference to IAT closing its offices. I have been notified that the armored operation of IAT is finishing up the contracts within the next two weeks. I have made arrangements to have everything cleared from this space for November 25th." (Exhibit -1, Tab H, Page 192).

[41] Mr. Boudreau contends that Ms. Denomme did this on her own. This assertion is contradicted by Ms. Denomme's testimony and I do not accept Mr. Boudreau's recount of those events. Mr. Boudreau did not disclose to Mr. Conrad the problems with the Ontario operation, as previously mentioned, which we know were significant. Moreover, the Ontario business was dwindling and Ms. Denomme was in the process of leaving for British Columbia.

[42] Mr. Boudreau was pressing Mr. Dillon for the release of the last $50,000 in his e-mail of November 10, 2006 (Exhibit – 4, Tab – 40) and mentions that he is in the process of discussing the takeover of the Ontario lease with the landlord. This is four days after the landlord had been advised by Ms. Denomme's e-mail of November 6, 2006 that the Ontario operation was winding up. Mr. Boudreau attempted the same tactic with IATA's accountant, Mr. Wilde, in his e-mail of November 14, 2006 (See Exhibit – 4, Tab – 41), all the while knowing that the

Ontario operation was being abandoned by him. I find that Mr. Boudreau had made up his mind to abandon the Ontario operation before Mr. Conrad paid the last $50,000 in trust to the parties' legal counsel, pending an accounting. This is not surprising considering the "shenanigans" and problems with the Ontario operation.

The Legal Principles:

[43] The first issue raised in this proceeding concerns the fundamental legal principle of "Privity of Contract". Mr. Boudreau contends that the indemnity clauses contained in the Agreement apply to the "Purchaser", Darnoc, only; and that only Darnoc's losses are potentially recoverable. The Agreement can be found in Exhibit – 3, Tab – 3 and at Tab – 3 of Exhibit – 22. The relevant indemnity clauses are the following;

> INDEMNITIES
>
> 4.01 The Vendor agrees to indemnify and save harmless the Purchaser from and against any claims, demand, actions, causes of action, damages, loss, deficiency, liability and expense, which may be made or brought against the Purchaser or the Companies as a result of, and in respect of, or arising out of:
>
> > (a) any non-performance or non-fulfilment of any covenant or representation or warranty of the Vendor contained in this Agreement, or on any document given in order to carry out the transaction contemplated;

> (b) any misrepresentations, inaccuracies, incorrectness, or breach of any representation or warranty made by the Vendor contained in this Agreement or contained in any document or certificate given in order to carry out the transaction contemplated hereby;
>
> (c) all costs and expenses, including without limitation, legal fees on a solicitor/client basis, incident to or in respect of the foregoing;
>
> … [Emphasis added]

[44] The related clause which also applies to the allegation of non-disclosure or misrepresentation regarding the Bullion debt is the following:

> WARRANTIES & REPRESENTATIONS
>
> 3.01 The Vendor warrants that as of the date hereof and as at the Closing Date:
>
> (a) The books and records of the Companies fairly and accurately set out and disclose in all material respect and in accordance with generally accepted accounting principles, the financial position of the Companies;
>
> [Emphasis added]

[45] The signatories to the Agreement are the vendor, Mr. Boudreau, the Purchaser, Darnoc, and the Companies, IATA and ISSA. Mr. Conrad is the sole shareholder of Darnoc which is the sole shareholder of both IATA and ISSA. The question is whether Darnoc can claim indemnity for the alleged Bullion loss and

the $21,000 payment which IATA was required to make to settle the landlord's claim regarding the Ontario lease obligations.

[46] The question raised by issues No. 2 and No. 3 are basically questions of fact which in large part involve the credibility of the various witnesses.

[47] The question raised by issue No. 4 concerns the alleged fault or negligence on the part of the Purchaser in not doing a thorough or reasonable due diligence assessment regarding the workings of IATA's ATM operation. Mr. Boudreau contends that Mr. Conrad did not investigate the working relationship between IATA and Bullion, but relied on Mr. Morse to keep track of that end of the business. Mr. Boudreau contends that the Defendants should be found 100% negligent, or at least contributorily negligent or partially responsible for the losses? This raises the question whether negligence, which is primarily a tort issue, has any application in a contractual relationship. There is no question that negligent performance of a contract has long been litigated as a cause of action; however, simple negligence may also give rise to a remedy.

[48] This latter question was discussed by me in *Dexter Construction Co. v. Nova Scotia (Attorney General),* 2004 NSSC 160 at paras. 28, 29 and 30:

28 If Dexter was aware of an apparent or probable problem in the tender documents with regard to the two items in question, did it have any obligation or duty to bring it to DTPW's attention? In this case, I find that the parties owed a duty to each other by virtue of the direct contractual relationship between them. There can be no closer proximity than that in business dealings.

29 On the other hand, did Dexter owe a duty to DTPW to bring any apparent or potential problems of which it was aware to the attention of DTPW. Recent cases in Nova Scotia have interpreted duty very broadly, to include acting reasonably in one's own interest. In Sydney Co-Op Society v. Coopers and Lylerand 2003 NSSC 35 (CanLII), (2002), 213 N.S.R. (2nd) 115 Justice LeBlanc of this Court said the following at paragraph 171:

> [171] I accept the defendant's arguments that in assessing whether or not the plaintiff's are contributorily negligent for the loss they sustained, it is not a question of a standard of care test but whether they acted reasonably for their own safety.

In the above noted quote, the word "interest" could be substituted for the word "safety". The interests of Dexter obviously include the finalization of a bid or contract on terms which are mutually understood and accepted by the parties. Surely the tendering process should not be allowed to degenerate to something less.

30 In Hustins Enterprises v. Byrne Architects, [2003] N.S.J. No. 32, [2002] N.S.R. (2nd) Uned. 96, our Court of Appeal appears to also adopt the broader concept of fault when Hamilton, J.A. stated the following at paragraph 56:

> [56] …It is trite to say that the doctrine of causation requires that Hustins only receive damages from Byrne for the loss caused by Byrne's breach of contract. If Hustins suffered a loss due to its own unreasonable conduct it must bear the cost itself of its contributory fault.
>
> [Emphasis added]

[42] Although the words "potential problems of which it was aware" are used in the first line of paragraph 29 cited above, those words could be supplemented with the words "or potential problems of which it reasonably ought to have been aware."

[43] Therefore, the alleged negligence of one or both parties is relevant and a factor which can be considered in deciding the appropriate and just remedies in this case.

[49] I find that the above noted principle is applicable to the case at bar.

Analysis:

Issue No. 1

1. Are amounts paid by or losses claimed by IATA captured by the Agreement?

[50] The pertinent provisions of the Agreement which deal with this issue are clauses 4.01 (a), (b) and (c) which I have quoted above. Mr. Boudreau contends that the opening paragraph of clause 4.01 provides for indemnity to the Purchaser only, and for losses of the Purchaser only. I find that such a position is too restrictive an interpretation of that paragraph. The Defendants contend that such an interpretation would in effect render the indemnity clause meaningless. The paragraph clearly states that it applies to a claim, demand, loss, liability or expense not only of the Purchaser, but of the Companies as well. The Companies are defined in the Agreement as IATA and ISSA and they are signatories to the document. The only reasonable interpretation of the opening paragraph of clause 4.01 is that the Purchaser is empowered to advance claims for indemnity regarding losses of IATA and ISSA (the Companies) if they result from breaches of clauses 4.01 (a), (b) or (c) or clause 3.01 of the Agreement. I agree with the Defendants

that to rule otherwise would render the Warranty and Indemnity Clauses of the Agreement meaningless.

[51] I find that the answer to the question posed in issue No. 1 is clearly yes.

Issue No. 2.

> **2. If the answer to question 1) is yes, then have the defendants proven that Mr. Boudreau breached any covenants or warranties which he made in the Agreement.?**

The Ontario office space lease:

[52] I will deal first with the counterclaim by the Defendants that Mr. Boudreau breached the Agreement by not assuming and paying the liability regarding the lease for IATA's Ontario office space. It is common ground that that was a term of the transaction; however, Mr. Boudreau contends that he was relieved of that obligation because the Purchaser did not release the final $50,000 payment to him, but instead paid it in trust to their lawyer pending an accounting for the alleged shortfall in IATA's funds. Mr. Boudreau labeled this as an anticipatory breach of the Agreement by the Purchaser which relieved him of any obligation pursuant to the Agreement.

[53] Firstly, the Purchaser paying the last $50,000 in trust on conditions of an accounting did not amount to anticipatory breach, or a breach of any kind for that matter. The payment was only subject to a sorting out of the suspected breaches of the Agreement by Mr. Boudreau.

[54] Secondly, I find that Mr. Boudreau had decided to renig on his promises to assume the obligations of the Ontario business in early November of 2006, at least two weeks before the conditional payment of the last $50,000. This is evident from the November 6, 2006 email from his Ontario Manager, Ms. Denomme, which was cited previously. It was, by early November of 2006, apparent to Mr. Boudreau that the Ontario business operation had fallen apart. That fact is also obvious to this Court. Moreover, Ms. Denomme was in the process of moving to British Columbia, leaving no one in place to run the Ontario operation, what little was left of it.

[55] I therefore find that Mr. Boudreau breached his contractual obligation to the Purchaser by not assuming responsibility for the liabilities associated with that operation. This failure on the part of Mr. Boudreau caused IATA to settle the claim of the Ontario landlord for the all-inclusive sum of $21,000.

The Debt "Invested in Bullion":

[56] The Purchaser claims that Mr. Boudreau breached his obligations to it by not disclosing the doubtful nature of the amount of money owed to IATA by Bullion. Mr. Boudreau has pointed to the fact that IATA's financial statements were accurate and that its receivables were appropriately aged as far as their due dates were concerned. However, that contention overlooks the fact that the amount "Invested in Bullion" does not appear on IATA's conventional financial statements because it is not a "trade debt", and that Bullion's trade debts do not form part of the counterclaim.

[57] The amount "Invested in Bullion" appears on IATA's Treasury Reconciliation dated July 31, 2006, to which I have already referred. This Treasury Reconciliation was probably the most crucial document of the entire transaction and it dealt with the agreed upon residual amount of the $90,054.95 "Invested in Bullion" as at July 31, 2006. It is this amount which forms the basis for the calculation of IATA's alleged ultimate loss of $62,054.95. The July 31, 2006 Treasury Reconciliation would clearly be a document referred to in Clause 4.01 (b) of the Agreement because it was the most important document "given in order to carry out the transaction contemplated hereby".

[58] AT the time the July 31, 2006 Treasury Reconciliation was completed and signed by all the parties, plus Mr. Morse of Bullion, it was clear to Mr. Boudreau, that the reimbursement of the debt by Bullion was extremely doubtful. Mr. Boudreau had been having trouble with Mr. Morse of Bullion for quite some time, as evidenced by the e-mail of April 19, 2006 cited earlier. (See Exhibit – 1, Tab I, Pages 196-198). Not only did Mr. Boudreau fail to disclose the precarious nature of this debt to Mr. Conrad, he left Mr. Conrad in the dark as to how the mechanisms of its collection or reimbursement would work. Each time Mr. Conrad questioned the apparent lack of money coming back to IATA, Mr. Boudreau kept reassuring him that, once the purchase price for his shares was paid, funds would be injected into the ATM system and IATA would receive its money. This never happened.

[59] Moreover, Mr. Boudreau never informed Mr. Conrad about the three loops depicted on Exhibit – 12. He left Mr. Conrad to his own device, and at the mercy of Mr. Morse, whom he knew to be unreliable. Mr. Boudreau did not deal with Mr. Conrad in a forthright or *bona fide* manner.

[60] In the final analysis, for the reasons stated above, I find Mr. Boudreau breached his obligations to the Purchaser as provided for in clauses 4.01 and 3.01 of the Agreement.

Issues No. 3 & No. 4:

[61] I will deal with issues No. 3 and No. 4 together, because they are related.

> **3. If the answer to question 2) is also yes, then have the defendants proven that Mr. Boudreau's breaches caused the losses?**
>
> **4. If the answer to question 3) is also yes, are the defendants partially or contributorily, responsible for any of the losses?**

[62] It is clear to me that Mr. Boudreau's breaches of clauses 4.01 and 3.01 of the Agreement caused, at least in part, the loss incurred by IATA due to the non-payment by Bullion of its "Invested in Bullion" debt, as described on the July 31, 2006 Treasury Reconciliation. Mr. Boudreau not only failed to disclose the precarious nature of that debt to Mr. Conrad, but he left Mr. Conrad to continue dealing with Mr. Morse of Bullion. Mr. Boudreau was fully aware that Mr. Morse and Bullion could not be relied upon. By not disclosing those known facts and the existence of the three loops depicted on Exhibit - 12, Mr. Conrad, Darnoc, and IATA were deprived of the opportunity to collect this debt in a timely fashion after

the closing of the transaction. It should also be noted that, at all material times, Mr. Boudreau was an officer and director of Bullion.

[63] Mr. Conrad did not find out about Mr. Boudreau's involvement with Bullion or the workings of Bullion, Mr. Morse and the three loops until it was too late to collect on the Bullion debt. In fact, Mr. Boudreau appears to have intentionally put Mr. Conrad off the "scent" by continually reinforcing the notion that everything would work out once the transaction was fully paid for by Darnoc. That was a misleading statement. In short, Mr. Conrad was led down the "garden path" until it was too late.

[64] Nevertheless, in spite of what I have said above, Mr. Conrad must bear some responsibility for IATA's loss. He did not take reasonable steps to protect Darnoc by informing himself of the workings of IATA, particularly, the three loops depicted on Exhibit – 12. He let his employees, Mr. Lantz and Mr. Francis, who themselves were not aware of the situation, to manage IATA's ATM operations. They continued to deal with Mr. Morse, in complete reliance on the latter, handing over tens of thousands of dollars in cash to Mr. Morse without knowing where it was going. Mr. Conrad did not take reasonable steps to inform himself of the workings of those transactions.

[65] In the end, IATA's accountant's found that there was a cash shortfall in IATA's ATM loop of some $44,185.65 (see Exhibit 1 – Tab F and Exhibit – 4, Tab – 27) mentioned previously. This shortfall apparently occurred during the period July 31 to November 24, 2006; however, it does not form part of the Defendants' counterclaim. The accountants could not ascertain the reasons for the shortfall, how it occurred, or where bit went. Therefore, the documents prepared by the accountants to calculate this shortfall and the experts report prepared by Aaron Wright questioning the validity or accuracy of the accountants' calculations do not impact on the decision this Court has to make regarding the setoff and counterclaims.

[66] In the final analysis, I find that Darnoc and Mr. Conrad were contributorily negligent by not acting reasonably to protect IATA's interests and by not attempting to deal with the Bullion debt in a timely manner. This failure also significantly and materially contributed to the Bullion debt not being recovered.

[67] In the circumstances it is not possible to determine the relative responsibility of the parties or apportion liability with any degree of accuracy. I therefore find that both the Plaintiff and the Defendants are equally responsible for the loss caused by the Bullion debt.

<u>Issue No. 5</u>:

5. And, finally, have the defendants proven the amount of the alleged losses?

[68] The amount of $21,000 paid by IATA to settle the claim of the landlord for the Ontario office lease is not in dispute.

[69] The amount of the Bullion debt not recovered by IATA is not as straight forward; however, once one cuts through all the extraneous and non-pertinent financial evidence and financial dealings; such as the Ontario capers, the dealings of Ms. Denomme with various linked bank accounts with all of their transfers and withdrawals, the "mystery money" and the $44,185.65 shortfall in IATA's loop 1), what we are dealing with becomes much clearer. We are only dealing with the starting amount of $90,054.95 found on the original Treasury Reconciliation as of July 31, 2006. This amount was agreed to by all the parties, plus Bullion. We then have the adjustments made to that amount by the accountant, Mr. Wilde. Those adjustments totalled $68,000 and are noted at Exhibit – 1, Tab – F, page 32 and at Exhibit – 4, Tab – 27, second page. The evidence at the trial revealed that $40,000 of the $68,000 adjustments should not in fact have been made because that amount remained owing. Mr. Wilde agreed with the revised adjustments, as did Mr.

Morse. Therefore, the total remaining debt of Bullion ("Invested in Bullion"), as of July 31, 2006, was $62,054.95.

[70] Mr. Boudreau contends that, because of IATA's poor recordkeeping, it is impossible to know where that amount ultimately stood; however, there is not one shred of evidence which would indicate there was any reduction of that amount. The fact that IATA's line of credit, which was to be eliminated when the ATM funds returned to its Treasury, remained around the $70,000 mark, offers some corroboration to the claim that the debt of $62, 054.95 was never paid. However, as I have said, IATA's line of credit does not form part of the counter-claim itself. It is simply a piece of corroborative evidence. Moreover, Mr. Morse testified that he did not believe any monies had been paid toward Bullion's debt after July 31, 2006. This concession by Mr. Morse is corroborated somewhat by his e-mail to Mr. Conrad dated November 13, 2006 (See Exhibit – 1, Tab – I, pages 212 and 213), in particular at page 213, where he acknowledges the starting point for Bullion's debt remains at $90,054.95. If one takes Mr. Morse's alleged payment of $24,000 to investors, as also noted on Mr. Wilde's calculation, and deducts the further $4,000 repaid to Ms. Denomme, the remaining balance of Bullion's debt would be $62,054.95.

[71] In the final analysis, I am satisfied, on a balance of probabilities that Bullion's debt remained at $62,054.95 throughout the relevant period and that it was never repaid. I therefore, find the amount of Bullion's debt for the purpose of the setoff and counterclaim is $62,054.95.

Conclusion:

[72] In view of the above findings, I find that Mr. Boudreau, as agreed, is owed that last $50,000 payment for his shares in IATA and ISSA,

[73] With regard to the setoff and counterclaim, I find that the Defendants are entitled to a setoff or counterclaim as follows; $21,000.00 for the Ontario office space lease plus one half of the Bullion debt, which is the sum of $31,027.47, for a total of $52,027.47.

[74] In the result, the Defendants shall have judgement against Mr. Boudreau in the total sum of $2,027.47, plus prejudgement interest at the rate of 4% for a period of four years only, because this matter should not have taken this long to get to trial.

Costs:

[75] If the parties cannot agree on the question of costs, I will hear them in chambers at a mutually convenient time; however, in view of the divided success, this may be an appropriate case for each party to bear their own costs.

[76] I will issue an order accordingly, prepared by counsel for the Defendants and consented as to form on behalf of all parties.

Boudreau, J.