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SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Enterprise Brokerage Inc. v. Neary, 2009 NSSM 52

BETWEEN:

ENTERPRISE BROKERAGE INC.

Claimant

- and -

JOHN ROBERT NEARY, S. DOUGLAS NEARY and NEARY MANUFACTURING CORPORATION

Defendants

DECISION AND ORDER

Heard: May 15TH, 2009

Place of Hearing: Halifax, Nova Scotia

Heard Before: **Gavin Giles, Q.C.**
Chief Adjudicator

Date of Last Written Submission: September 22nd, 2009

Counsel: **For the Claimant:**
John D. O'Neill

For the Defendants:
Jonathan G. Cuming

Date of Decision: November 4th, 2009

Gavin Giles, Q.C., Chief Adjudicator

INTRODUCTION:

[1] This matter was heard before the Small Claims Court of Nova Scotia, at Halifax, on Friday, May 15th, 2009.

[2] At the conclusion of the evidentiary hearing, I invited counsel to consider written submissions. Both indicated that written submissions were their preferences.

[3] Mr. Cuming, having called evidence on behalf of the Defendants, was required to submit first. He did so on June 5th, 2009. Mr. O'Neill, on behalf of the Claimant, was somewhat delayed in the submission of his rebuttal. It arrived only on August 26th, 2009. Mr. Cuming was then invited to reply (as was his right). He did so on September 22nd, 2009.

[4] It was agreed amongst counsel and me that the date of Mr. O'Neill's rebuttal (August 26th, 2009) or the date of any reply by Mr. Cuming (September 22nd, 2009), would mark the commencement of the 60-day period within which I am required to render my decision pursuant to the provisions of Section 29(1) of the *Small Claims Court Act*.

BACKGROUND:

(a) The Hoot Extreme ATV

[2] Though not named in the pleadings, the companies essentially at the root of this action are Hoot International Inc. ("Hoot International") and Hoot ATV Manufacturing Limited ("Hoot ATV").

[3] At various times, both Hoot International and Hoot ATV were engaged in the conception, design, manufacturing and sale of an amphibious all-terrain vehicle which has come to be known as the "Hoot Extreme ATV" ("the Hoot Extreme").

[4] Hoot International was related to the Defendants. The precise relationship of Hoot International to the Defendants was not in evidence.

[5] Hoot International owned certain rights to the Hoot Extreme and it appeared from very limited evidence that Hoot International permitted the Defendant, Neary Manufacturing Corporation ("Neary Manufacturing") to produce and market the Hoot Extreme pursuant to some sort of loose bilateral agreement.

[6] As the Defendants sought financing and capital for the production of the Hoot Extreme they eventually ceded responsibility for the design, manufacture, improvement, marketing and sale of the Hoot Extreme to Hoot ATV.

[7] Put in the simplest terms, the Hoot Extreme looks and functions as do most other all-terrain vehicle ("ATVs"). The main differences between the Hoot Extreme and other ATVs are that the Hoot Extreme has six wheels instead of four, all six wheels "drive" and steering is by way of a "skid steer" mechanism instead of a normal handlebar type of steering assembly.

[8] Skid steering is related to a vehicle's brakes. When the brakes are applied to the wheels of one side of a skid-steered vehicle, it turns towards or around that side. The advantage is not only general manoeuvrability, but very quick steering action and the ability of the vehicle to turn itself around fully in literally its own length.

[9] Additionally, and unlike normal ATVs, the Hoot Extreme offers the advantage of being fully amphibious. It can therefore go from mixed terrain into and through the water and back onto mixed terrain without any delay or any form of floatation or adaption.

(j) Development of Prototypes

[11] The Hoot Extreme is (or at least was) the brainchild of the Defendants, John Robert Neary ("JRN") and S. Douglas Neary ("SDN"). JRN and SDN are brothers. They are the ones who conceived the design and commenced production of the earliest Hoot Extreme(s). They did so through their principal operating and holding company, Neary Manufacturing.

[12] Neary Manufacturing was solely owned or all but solely owned by JRN and SDN. Important to note is that JRN was the technical and design force behind the Hoot Extreme.

SDN tended more towards the business aspects of production financing and the marketing and sale of the Hoot Extreme.

[13] As do the initial promoters of many new and innovative products, JRN, SDN and Neary Manufacturing faced a number of challenges in their development of the Hoot Extreme. Many were technical in nature. Others, and the ones which were decidedly more troublesome, were financial in nature. It was those financial challenges which led indirectly to this action.

[14] At various times, JRN, SDN and Neary Manufacturing suffered from under-capitalization and the lack of sufficient cash flow. They backstopped their production of the Hoot Extreme with their own resources (particularly the personal resources of JRN and SDN), with various loans and with attempts to sell equity positions in the Hoot Extreme concept to raise additional capital. In all such efforts undertaken themselves, JRN, SDN and Neary Manufacturing were only marginally successful.

(o) Angels

[16] Through the efforts of the Claimant, JRN and SDN were introduced to one Daly Snow ("Snow"). Snow is a businessman. At the time of the introductions of JRN and SDN to him, Snow was the outright owner of Fabco Industries Limited ("Fabco").

[17] Fabco's principal business was in welding, metal work and metal fabrication, machining, industrial and offshore construction and mechanical installations of various sorts. Fabco carried on its business all over the world. In two words, it had been "very successful".

[18] Notwithstanding his success with Fabco, Snow was seeking some forms of business diversification. He was interested in machinery, vehicles, motorbikes and ATVs. He liked the outdoors. Upon being introduced to the Hoot Extreme, he immediately saw its potential as both a recreational vehicle and as a light industrial vehicle.

[19] Snow made the early decision, as a result of representations made to him first by the Claimant and later by JRN and SDN, that he wanted to become involved in the future of the Hoot Extreme.

[20] To facilitate his interest in an involvement with the Hoot Extreme, Snow eventually incorporated Hoot ATV. That was only one of the corporate vehicles by which Snow came to infuse what he described as approximately three quarters of a million dollars, both directly and indirectly, into the manufacturing, improvement, promotion and sale of the Hoot Extreme. These infusions were allegedly summarized in three documents led into evidence by Snow as Exhibits 1, 2 and 3. All three exhibits made references to sum totalling more than three quarters of a million dollars.

[21] In addition to Fabco and Hoot ATV, Snow also owned and operated JAG Investments Limited ("JAG"). JAG's precise purpose was not in evidence. That said, it appeared from the testimony of various witnesses that JAG was a holding or capital company by which or through which Snow sought investment and business opportunities somewhat removed from Fabco.

(v) The Basic Claims

[23] Despite the paucity of its pleading, the Claimant seeks a commission on the funds which it says were provided to the Defendants and Hoot International by Snow, Fabco, JAG and Hoot ATV subsequent to and as result of its introduction of Snow to JRN and SDN and to the Hoot Extreme.

[24] The commissions the Claimant seeks are roughly equal to five percent (5%) (or a combination of five percent (5%) and four percent (4%)) of the approximately three quarters of a million dollars referred to above. For jurisdictional reasons, the Claimant has "capped" its claim at $25,000, pursuant to the Court's maximum monetary jurisdiction.

[25] The Claimant's claim to its commission is not set out with any greater precision even at this late stage and even given some substantial question over what should be included in its calculation.

[26] The Defendants, by their pleadings, generally deny the Claimant's right to any such commission. Despite their general denials, the Defendants have fleshed out in their testimony and in their arguments that any commission due to the Claimant should be substantially less than that claimed and should be payable only by Neary Manufacturing in any event.

FACTS:

(a) Other Parties

[2] C. James Enman ("Enman") is a lawyer practicing in Halifax. He is a corporate, commercial and commercial property lawyer. He owns and operates the Claimant as a sideline to his legal practice. The Claimant is engaged primarily in business brokerage and in some business consulting.

[3] Amongst other things, the Claimant earns fees, so-called "finder's fees" and commissions on the sums of non-conventional funding it arranges from outside sources for struggling business initiatives such at the Hoot Extreme. Occasionally, and sometimes in combination with fees or commissions, the Claimant will take a "stake" or an equity position in a new venture in exchange for the sums of funding it arranges for that venture. There is no issue as to an equity stake in this case.

[4] Enman received a call from one Peter Fortsun ("Fortsun") (this spelling may not be correct) of the ACF Venture Fund. Enman and Fortsun had had past dealings. Fortsun knew of Enman's sideline, undertaken through the Claimant, in business brokerage and business consulting. Fortsun seemed also to know or know of JRN, SDN, Neary manufacturing, Hoot International and the Hoot Extreme.

[5] Fortsun wanted to give Enman's name to what were described generally as a number of people in the Annapolis Valley who were said to be engaged in the development of a good, interesting product but who needed financing and general business acumen to help them get them get their product "off the ground". Enman did not know immediately that what Fortsun was referring to was the Hoot Extreme and the individuals and companies surrounding it.

[6] Soon after Enman had given his consent to the use of his name to Fortsun, Enman received a call back from SDN. SDN invited Enman to Kentville, Nova Scotia, for a meeting with himself and with JRN. The Claimant did not appear to have any precise or succinct involvement at that time.

[7] At the initial meeting, Enman "tried out" the Hoot Extreme, he looked over a number of the vehicle's promotional materials, he reviewed the expressions of interest which had been received from a number of recreational vehicle dealers and he undertook a very brief analysis of Neary Manufacturing's financial position at the time. According to Enman, Neary Manufacturing's financial position at the time was "dismal".

[8] The main message conveyed by JRN and SDN to Enman at the initial meeting was that they (and Neary Manufacturing) were all but out of money. Without some form of grant, an operating loan or the infusion of equity capital, the production of the Hoot Extreme could not advance. JRN and SDN were hopeful that Enman could help. There was no doubt of that fact.

(i) The Principal Agreement

[10] At the initial meeting, Enman generally discussed his terms (or the Claimant's terms – they were then essentially one and the same) with JRN and SDN. JRN and SDN "seemed interested". Soon afterwards, Enman provided JRN and SDN with a form of agreement.

[11] The form of agreement sought by Enman was to be between the Claimant and Hoot International. The form of agreement generally provided that in exchange for financial support to be provided to Hoot International by new outside sources arranged by Enman, acting through the Claimant, the Claimant would earn a commission or a stake.

[12] In the course of his discussions on the form of agreement with JRN and SDN, Enman mentioned that they may wish to engage a solicitor. SDN demurred. He told Enman that he had operated a real estate brokerage in the past, that he was familiar with commercial agreements and that he and JRN did not require a solicitor for their (or for Neary Manufacturing's) dealings with the Claimant.

[13] The form of agreement was introduced into evidence as Exhibit 5. It was dated May 13th, 2002 and, as required by Enman, was between the Claimant and Hoot International ("the 2002 Agreement").

[14] The 2002 Agreement was executed by Enman on behalf of the Claimant and by SDN on behalf of Hoot International. It was also executed by JRN and by SDN personally; and by SDN on behalf of Neary Manufacturing.

[15] The 2002 Agreement was not extensive. Its salient provisions are as follows:

> 3. As compensation for the services described above, Hoot shall pay to Enterprise a fee of 5% of monies received and an option to acquire from the treasury of Hoot or any new company formed to commercialize and market the ATV (whichever company receives the financing moneys) for the sum of One Dollar, shares in an amount equal to 5% of the number of shares receivable by the investor(s). The parties mutually agree that this formula applies to monies raised up to $500,000. Above $500,000 the formula will be on the basis of 4% of the next $500,000; 3% on the following $500,000; and 2% beyond that. Hoot will reimburse Enterprise for reasonable pre-approved out-of-pocket expense.
>
> 4.
>
> ...
>
> Should an agreement be reached and monies received with any person, company, fund or other investor [sic] with whom Enterprise had communications with on behalf of Hoot, under the terms of this agreement, <u>within six months following termination of this agreement</u>, then the compensation as outlined in Clause 3 above shall become due and payable to Enterprise. <u>This agreement will be for a period of six months unless terminated by either party upon 14 days' written notice to the other</u>. It is clearly understood that Hoot among other sources has been (and is) in touch with different levels of government and their Crown Corporations both federally and provincially and that any funds arising from these sources are not part of this agreement and as such Enterprise is not entitled to compensation for monies raised from these sources. [underlining added]

[16] The 2002 Agreement also contained the following additional provision:

> It is agreed & understood that if <u>JRN, SDN, Neary Manufacturing or any other entity</u> either owned by or controlled by any of the

> foregoing (all referred to as Receivers) receives monies as a result of the above contract (for which Enterprise would be entitled to compensation) then the Receivers must pay Enterprise the commissions as outlined in Clause 3 of the above contract. [underlining added]

[17] It was this additional provision to the 2002 Agreement to which JRN, SDN and Neary Manufacturing agreed through their executions referred to above.

(r) The Parties' Intentions

[19] Enman explained the provisions of Clause 4 of the 2002 Agreement as a prophylactic measure to ensure that available capital was not merely withheld by financing sources until such time as the 2002 Agreement had been terminated or had lapsed. In other words, Enman wanted to ensure that he not arrange a source of financial support for the Hoot Extreme initiative through the Claimant only to learn that the actual advance of that financial support was withheld until, arguably, the commission called for in Clause 3 of the 2002 Agreement was no longer payable.

[20] Enman testified further that he specified six months for what he referred to as the "overholding provision" in the 2002 Agreement as he had only two potential sources of financial support for the Hoot Extreme initiative and if either one of them was to come to fruition, it would do so quickly.

[21] Either on or shortly after the entry into the 2002 Agreement, Enman advised JRN and SDN that they would likely have to establish a new company once a firm source of financial support for the Hoot Extreme initiative had been identified.

[22] JRN, SDN, Neary Manufacturing and Hoot International were at the time producing the Hoot Extreme one unit at a time. Though the vehicle continued to be improved from one unit to the next, JRN and SDN knew that they required an assembly line and a standardized manufacturing process. They also knew according to Enman's testimony that they could not continue with the Hoot Extreme initiative in any commercially-viable manner without additional financial support. SDN generally conceded these points in his own testimony.

[23] When Enman first started to deal with JRN and SDN, he described their initiatives with respect of the Hoot Extreme as “very modest”. Their business premises were small and only very basically equipped. They were in debt to the Atlantic Canada Opportunities Agency ("ACOA"). They were in debt to a local Annapolis Valley regional development agency. They were in debt to their bankers. They had amassed some past due trade payables though their extent was not clear from the evidence.

[24] Enman also described the added provision in the 2002 Agreement as "tying in" all potential beneficiaries of the Claimant's work. According to Enman, JRN and SDN knew the position being taken on the 2002 Agreement by the Claimant. In short, Enman testified that JRN and SDN knew that they were taking on personal liability for any sums due to be paid to the Claimant by virtue of the provisions of the additional provision in the 2002 Agreement. That is something which JRN and SDN denied.

[25] Reference has already been made to Snow.

[26] Enman knew Snow. He knew generally of Snow's business and other interests. He took Snow and a Snow colleague, a Mr. Stevens (“Stevens”) to Kentville to meet with JRN and SDN. That was in the late spring or early summer of 2002. According to Enman, Snow and Stevens "liked what they saw" with respect to the Hoot Extreme.

[27] Primarily for Snow's benefit, Enman outlined the general terms of a potential arrangement between Snow, Fabco and JAG (and later, Hoot ATV), on the one hand and JRN, SDN, Neary Manufacturing and Hoot International, on the other hand (“the Financing Agreement”). According to Enman, he mapped out his proposal for the Financing Agreement on a whiteboard for Snow, JRN and SDN to see.

[28] Despite Enman's efforts to ensure the existence of the Financing Agreement before any new money started to flow to JRN, SDN, Neary manufacturing and Hoot International, Snow indicated to Enman, JRN and SDN that he was "happy with a handshake" and was "prepared to start writing cheques".

[29] This indication by Snow was veritable music to the ears of JRN and SDN as at the time, Neary Manufacturing and Hoot International had all but ceased, for financial reasons, to carry on business.

[30] As for the Financing Agreement envisaged by Enman, Snow, JRN and SDN all thought that it could come (or be finalized) later. It never did come and it never was finalized. As a monument to his folly, Snow (and Fabco, JAG and Hoot ATV) invested at least some of the sums noted above into the Hoot Extreme initiative with little or nothing to show for it.

(ee) The Financing

[32] Enman had commenced his work on the Financing Agreement between and amongst Snow, Fabco, JAG, JRN, SDN, Neary Manufacturing and Hoot International almost immediately upon Snow's indication of his interest in the Hoot Extreme initiative. Enman learned later that even without such a Financing Agreement in place, JRN had very quickly gone to see Snow seeking money immediately. According to Enman's recollections of the time, JRN reported to him that "the project needed money". At the time, Hoot ATV had not yet been incorporated.

[33] Enman was disturbed, or unhappy to say the least, over the initial turn of events relative to Snow's financing of the Hoot Extreme initiative. Enman was of the view that the Financing Agreement or at least some other form of agreement should have been in place before money started to flow.

[34] Enman's concerns were not totally altruistic. Though there is no question that he sought to protect Snow for whatever advances he was to make (both directly and indirectly) to the Hoot Extreme initiative, Enman also wanted to make sure that the Claimant was paid on the 2002 Agreement.

[35] As such, it was Enman's intention that the Financing Agreement would be in place between and amongst all of the affected parties prior to any funding flowing from Snow, Fabco and JAG to JRN, SDN, Neary Manufacturing and Hoot International.

[36] Despite the Financing Agreement remaining in a state of flux, Snow responded positively to SDN's initial request for money and he continued thereafter, and on "the handshake", to finance JRN, SDN, Neary Manufacturing and Hoot International for an extended period.

[37] The basis (or bases) upon which Snow contributed money to the JRN, SDN, Neary Manufacturing and Hoot International was/were never entirely clear. What was clear, at

least to Enman, was that Snow had become distracted over the sale of Fabco which was being negotiated at the time (and which was completed in the early part of 2004) and that Snow was therefore ignoring the formal (and prudent) contractual elements of his financial support of the Hoot Extreme initiative. Moreover, it appeared from the evidence that JRN, SDN, Neary Manufacturing and Hoot International had no particular use for the Financial Agreement which Enman had been advocating. All they really wanted was money; and they were getting it from Snow on the most casual and unregulated of bases.

[38] In addition to providing funding directly to JRN, SDN, Neary Manufacturing and Hoot International, Snow also provided other assistance to the Hoot Extreme initiative. Amongst other things, Snow appears to have dedicated Stevens to the project, at least in part. At one point, Snow even appears to have sent Stevens to the State of Tennessee to deal with local officials in an effort to establish a Hoot Extreme manufacturing plant there. Snow also produced parts used in the manufacturing of the Hoot Extreme through either Fabco or JAG or both, though the extent of that effort is not clear.

(mm) The 2003 Agreement

[40] After about a year of *ad hoc* financing by Snow (or by Snow, Fabco and JAG) of JRN, SDN, Neary Manufacturing and Hoot International, a degree of discord amongst those principal "players" set in.

[41] It appears from the evidence that, as some sort of afterthought, it had became clearer to Snow exactly how much money he (and Fabco and JAG) had actually contributed to the development of the Hoot Extreme. Snow was particularly concerned about how his advances had been made without an appropriate agreement being in place.

[42] In that regard, Snow was not blaming anyone but himself. Enman, by this time, had been effectively sidelined by those central to the Hoot Extreme initiative. He was only drawn back in to the matter as a result of Snow's concerns. At the time, the Claimant had not been paid anything. Moreover, there was no form of accounting of anything by way of commission to which the Claimant might have been entitled to that point.

[43] The net result of Snow's concern was the adoption, in May of 2003, of some form of written agreement ("the 2003 Agreement"). The 2003 Agreement was led into evidence as Exhibit 4. It comprised a little less than a page and one-half of detail. It was produced on JAG

letterhead. It appeared from the evidence to have been drafted by a Len McNeil, C.A. ("McNeil"), Snow's Chief Financial Officer at the time.

[44] Although referred to for the purposes of these reasons as the 2003 Agreement, McNeil's effort was not really an agreement at all. It was instead a form of Memorandum of Understanding (or "term sheet") which described how the relationship between and amongst the principal players <u>would be</u> regulated in the future.

[45] Enman and the Claimant were not intimately involved with the structuring of the 2003 Agreement and it bore no real resemblance to the Financing Agreement which Enman had earlier proposed and had mapped out for Snow, JRN and SDN.

[46] Enman nevertheless witnessed the signatures of Snow, on behalf of JAG and the signatures of JRN and SDN on behalf of Neary Manufacturing on the 2003 Agreement. For whatever reason, the 2003 Agreement did not refer to Hoot International as a party.

[47] The 2003 Agreement described itself in the following terms:

> The following <u>outline</u> is <u>the essence</u> of a <u>proposal</u> by JAG Investments Limited (JAG) to Neary Manufacturing Corp. (NMC), and to NMC's shareholders, Robert & Douglas Neary. JAG is <u>proposing</u> to arrange the release of all secured and unsecured corporate debts of NMC, as detailed on NMC's balance sheet, dated March 28/03 and as prepared and presented by Douglas Neary. In addition, JAG will arrange to have Robert and Douglas Neary released of all personal guarantees and securities given in relation to secured debts of NMC as per March 28/03 balance sheet [sic]. (underlining added)

[48] From there, the 2003 Agreement went on detail how JAG would incorporate Hoot ATV and how Hoot ATV, with the consent of JRN, SDN and Neary Manufacturing, would own all rights to the Hoot Extreme. Additionally, the 2003 Agreement provided that Hoot ATV would own all of the assets of Hoot Manufacturing. Included amongst those assets would be any patents resulting from the conceptual and design work relative to the Hoot Extreme.

[49] The 2003 Agreement also provided that Hoot ATV would effectively be owned 50% by JAG and 50% by JRN and SDN in equal

proportions. JAG would own 50,000 of Hoot ATV’s authorized common shares. JRN and SDN would each own 25,000 of those shares.

[50] The 2003 Agreement went on to refer to the maintenance of the then current 50/50 share ratios, the *pro rata* investment of future capital, the appointment of a president and secretary/treasurer (respectively Snow and SDN) with other officers and directors to be considered later and the employment of JRN and SDN by Hoot ATV.

[51] It was Enman's view – not expressed at the time but rather much later – that the 2003 Agreement was really nothing more than "an agreement to agree" and was therefore not binding. Why in such circumstances he witnessed the signatures on it is unclear. There is no evidence that he advised any of the parties as to any limitations he had concluded with respect to the 2003 Agreement. There is no suggestion either that he had any obligation to provide any such advice.

[52] One can thus at best conclude from the evidence that Enman saw the 2003 Agreement, despite it warts, as a move by Snow, JRN and SDN towards the form of Financial Agreement which Enman has been urging. As things unfolded thereafter, however, there never was any form of binding agreement between Snow (and one or some of his companies) and JRN and SDN (or one or some of their companies). This factor has served to erode in some small way the Claimant’s right to the recovery it seeks in this action.

(aaa) Payment to the Claimant

[54] Beyond the "terms" contained in the 2003 Agreement, there were on-going discussions between the various players as well. Amongst them was the suggestion that the Claimant's commission on the advances to JRN, SDN, Neary Manufacturing and Hoot International would be paid by Snow. Though that was something which might well have been discussed, it was clear on the evidence that it was never settled. Like many aspects of the various dealing between and amongst the players with respect to the Hoot Extreme, this one was simply never documented or defined.

[55] Enman eventually approached JRN and SDN and told them something to the effect of "you guys owe me money". According to Enman, JRN and SDN said they would pay but only when they obtained some more money.

[56] Exactly what JRN and SDN would pay, when, why and on what terms was not succinctly set out in the evidence. That said, I can safely conclude from the broad context of this evidence – and do so – that Enman was referring to the Claimant's commission.

[57] By the time of Enman's approach to JRN and SDN about them owing him (or the Claimant) "money", significant disagreements had developed between Snow, JAG and Hoot ATV (which by then had been incorporated by Snow and which by then had started to finance the Hoot Extreme initiative) and JRN, SDN, Neary Manufacturing and Hoot International.

[58] Amongst other things, Stevens' efforts in the State of Tennessee had not been successful. The marketability of and consumer interest in the Hoot Extreme had waned. Part of that was the apparent inability to produce and distribute the Hoot Extreme in manners which were other than haphazard.

[59] Snow also appeared on the evidence to have come to the conclusion that he had invested more than enough money into the Hoot Extreme. He was to content to accept his losses and "walk away". Other sources of financing being sought by JRN and SDN for the Hoot Extreme had not come to fruition. They had also exhausted all of their own financial resources.

[60] Notwithstanding this very negative turn of events, RJN and SDN returned to Enman in early 2004 and asked him to do more financial prospecting work for them. Enman demurred on the basis that he would not do additional work whilst the Claimant was owed its commission on the sums which had been infused broadly into the Hoot Extreme by and through Snow.

[61] According to Enman, there were then numerous e-mail messages back and forth between himself and JRN and SDN (but primarily SDN) wherein

they pledged to honour the Claimant's claims to its commission. According to Enman, JRN and SDN never denied by way of this e-mail exchange owing the Claimant's commission as defined by the 2002 Agreement. For whatever reason, these numerous e-mail messages were not led into evidence and I am essentially left to guess as to their actual content and context. I decline to do that.

[62] A single example of the e-mail messages back and forth to which Enman had referred in his testimony was led into evidence as Exhibit 9. This was an email message from SDN to Enman dated December 7th, 2006. Though this e-mail message is far from definitive, it does make reference to "our agreement" and to "the point when we can start to plan to get our debts back on track". In that regard, SDN noted to Enman that he appreciated "your patients [sic] & the Email you sent me regarding the hearing."

[63] The Claimant has argued a very broad inference to be drawn from SDN's e-mailed comment noted above. The Claimant's argument is that I infer from the comment the Defendants' acknowledgement of their joint and several liabilities for the Claimant's commission.

[64] The Defendants have responded that no such inference is possible in that SDN's e-mailed comment, in its broad context, is capable of many meanings.

[65] Enman was cross-examined on his recollections but not with much effect. His cross-examination centred on the exchanges between himself and SDN regarding the completion of the 2002 Agreement.

[66] There were versions of the 2002 Agreement, which Enman conceded, which did not suggest any personal liability on the parts of JRN and SDN to the Claimant for the subject commission. But those were versions only. Beyond doubt is that JRN and SDN bound themselves to the additional provision in *the* 2002 Agreement referred to above.

[67] Only SDN testified for the Defendants. He recalled the establishment of Neary Manufacturing as of June 22nd, 1998, and the

establishment of Hoot International Incorporated as of March 20th, 2002. He recalled himself as "probably" the president of both companies. He acknowledged that funding was required to permit the development of the Hoot Extreme to proceed. He testified that he and JRN were prepared to sign an agreement in that regard but that they did not want to assume any personal liability relative to that funding.

[68] SDN did not dispute the signatures at the foot of the second page of the 2002 Agreement. His position was that "whoever got the money would pay the commission". It was on that basis that SDN testified he "never gave a thought" to the added provision to the 2002 Agreement. SDN's only dispute with the Claimant's claim was that no money was received within the terms of the 2002 Agreement by other than Neary Manufacturing.

[69] According to SDN, Snow "kept paying us to pay the bills". As noted, there was no early form of agreement surrounding the infusion of cash by Snow as he was busy with respect to the sale of Fabco.

[70] Eventually Snow took over the Hoot Extreme initiative through Hoot ATV. According to SDN, he and JRN were in no position to argue with Snow. They not only needed money to permit the further design and fabrication of the Hoot Extreme to proceed, they were being paid directly by Snow for their own work and Snow was their only real source of income.

[71] In response to questioning by Mr. O’Neill on behalf of the Claimant, SDN conceded that a minimum of $143,556.32 had gone into Neary Manufacturing from Snow. According to SDN, Neary Manufacturing therefore owed the Claimant a 5% commission on at least $143,556.32.

[72] As to any suggestion of personal liability, either his own or that of JRN, SDN denied it. He testified that all of the exchanges leading up to the 2002 Agreement with the Claimant and all subsequent e-mail messages were restricted to the liability of Neary Manufacturing for any commission owed.

[73] Insofar as the assumption of any personal liability, SDN also testified that there was none. As for monies advanced directly to SDN and JRN, the former testified that they were not capital but were wages only. At the time, SDN testified that he and JRN were being paid by Snow through Hoot ATV for their work for that company.

[74] SDN agreed in cross-examination that Snow – both directly and through JAG and Hoot ATV – had made numerous direct and indirect advances to the Hoot Extreme initiative. SDN testified that at the time of these advances commenced, the Neary Manufacturing balance sheet showed "negative equity" and almost no assets. At the time, SDN regarded Neary Manufacturing as "being behind the 8 ball" by more than $700,000.

[75] SDN would not concede the total of $783,038.05 appearing on Snow's summary in Exhibit 3. SDN testified that it was difficult, if not impossible, to determine from Exhibit 3 which of the digested expenses were accurately-stated and which of those had actually served to advance the Hoot Extreme initiative. Moreover, SDN testified from the perspective of what he referred to clumsily as an alleged "time limitation" set out in Clause 3 of the 2002 Agreement that it was impossible to know from the summary in Exhibit 3 the timing of each of the purported advances.

[76] SDN did not dispute the advances by Snow, Fabco, JAG and Hoot ATV set out in Exhibit 1. What SDN did dispute was that he and JRN were liable to pay any commission to the Claimant on those advances.

[77] Put to SDN squarely in cross-examination was the additional provision of the 2002 Agreement. When asked for his reasoning for suggesting that the obligations set out in that additional provision were not personal to him and JRN, SDN referred only to an e-mail message which he thought he sent to Enman. SDN was no more specific than that. Noteworthy is that the e-mail message SDN thought he sent to Enman was not led into evidence.

[78] SDN also referred in response to the proposition put to him on cross-examination to his handwritten note dated May 8th, 2002, which had been faxed to Enman. A copy of this handwritten note had been led into evidence as

Exhibit 8. This note purports to amend one of the initial versions of the 2002 Agreement.

[79] In the note, SDN appears to have suggested to Enman that Clause 3 of the 2002 Agreement be amended to reflect that only the parties receiving financial support as a result of the Claimant's efforts would be responsible for paying the Claimant's commission. SDN contended, of course, that he had not received any money (other than wages) as a result of the Claimant's efforts.

[80] SDN agreed further in cross-examination that the additional provision in the 2002 Agreement was not reflective of his May 8th, 2002, handwritten note to Enman. He nevertheless testified that the additional provision in the 2002 Agreement be interpreted against the backdrop of the limitation on the liability for the payment of the Claimant's condition set out in the handwritten note.

[81] Pressed by Mr. O’Neill in cross examination, SDN conceded that but for Enman’s efforts through the Claimant, the Hoot Extreme initiative would likely have failed. Snow’s direct and indirect funding was a life-line which permitted the initiative to continue for another two years or so.

<u>ISSUES FOR RESOLUTION</u>:

[82] In the pleadings and in counsels’ written briefs, the issues for resolution have been stated variously. Regardless, there are only three seminal issues for resolution:

(1) What is the total amount advanced cumulatively by Snow, Fabco, JAG and Hoot ATV to JRN, SDN, Neary Manufacturing and Hoot International Inc.?

(2) To what extent, if at all, is the Claimant entitled to a commission on any of the advanced sums?

(3) If the Claimant is entitled to a commission on any of the advanced sums, are JRN or SDN or both of them personally liable to pay that commission?

[4] In addition to the above principal issues for resolution, there are also several subsidiary issues. They are likely best framed as follows:

(1) Are the Claimant's claims fully or partly statute barred in that they were commenced only on March 26th, 2009, more than six years following from the 2002 Agreement or more than six years following from any advances referred to therein?

(2) Does the legal doctrine of *contra proferentum* apply to the interpretation of Clause 4 and the additional provision of the 2002 Agreement?

(3) Is an adverse inference to be drawn from the failure of JRN to testify as to his understanding of the personal liabilities which flowed (or which potentially flowed) from the 2002 Agreement?

(4) Is the Claimant entitled to any form of recovery on the basis of *quantum meruit*?

ANALYSIS:

(a) Are The Claimant's Claims Statute Barred

[2] The short answer is "no", the Claimant's claims are not statute barred. There is ample evidence that the Claimant pursued its alleged entitlement to its commission earned as a result of the advances made to the Hoot Extreme initiative by Snow, Fabco, JAG and Hoot ATV at various times between the very first of those advances and the date its formal claim was advanced in this Court.

[3] Additionally, the 2002 Agreement is silent on the subject of when the alleged commission was to have become due and payable to the Claimant.

[4] One interpretation is that a commission could become due and payable with each advance to which that particular commission related. Another interpretation is that no commissions would become due and payable until the entirety of the advances had been determined.

[5] In the instant case, advances out of which potential commission could have been earned by the Claimant were being made by Snow, Fabco, JAG and Hoot ATV to the Hoot Extreme initiative as late as January of 2004. In those circumstances, I am not prepared to rule in favour of the Defendants' argument that any portions of the Claimant's claims against them are statute barred.

[6] In the event I am later found to have been incorrect in that conclusion, I have considered whether or not the Claimant would be entitled to an extension of the normal six year limitation period applicable to contractual claims pursuant to the provisions of s. 3 of the *Limitations of Actions Act.* The section provides (in part) that:

> ...
>
> (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents;
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.
>
> (3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
>
> (a) the length of and the reasons for the delay on the part of the plaintiff;
>
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
>
> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> ...
>
> ...
>
> ...

[7] The difficulty I face in the application of any of these provisions is that the Defendants' limitations issues have only arisen in the course of its closing written submissions. Though the Defendants are not to be faulted for that necessarily, having been self-represented at the outset of their responses to the Claimant's claims, their late references to their current position on limitations is something which I must nevertheless consider.

[8] In that regard, the application of limitations principles to any given claim is always highly dependent on the facts. Of particular importance is how any alleged breach of a limitation period has affected a defending party's overall ability to mount its defence effectively.

[9] Only raising a limitations issue as a sidebar to other defensive arguments effectively prevents an affected claimant from responding. In such circumstances, the court is left with conjecture, supposition and assumption as to how – and even if – an alleged limitations defence should apply.

[10] In that regard, I refer to one of the obligations which might devolve to the Defendants in such circumstances: a motion pursuant to the provisions of s. 3(3) of the *Act* for an order terminating the Claimant's right of action on prescriptive grounds.

[11] In this case, the Defendants have not advanced any such motion nor have they, through their pleadings, advanced any sort of limitations defence. In failing to do so, the Defendants have not raised any issues of prejudice negatively affecting their abilities to lead their defence(s). In fact, it is difficult – if not impossible – to glean from the manner in which the Defendants' led their case how they would have done so differently even if the Claimant had commenced its claim earlier.

[12] Though the Defendants have argued, through counsel, that they might have been better able to lead their defences had they been permitted the opportunity to do so earlier, such argument is not tantamount to the required proof of prejudice. Thus, if the Defendants were truly serious with respect to their late limitations plea, I would have expected them to motion for an amendment to their defence pleadings and a further motion to permit them to lead evidence thereon. Having done neither, their current position is somewhat suspect.

[13] The parenthetical question which might arise in these circumstances is whether this Court enjoys sufficient discretion to apply the provisions of s. 3(2) of the *Act* to equitably extend any limitation period applicable to the Claimant's claims. It is a reasonable question given how this Court's inclusive and exclusive jurisdictions have been defined pursuant to the provisions of ss. 9, 9A, 10 and 11 of the *Small Claims Court Act*.

[14] The question is more than hypothetical, of course, in that the invitation implied by Mr. O'Neill's closing written submissions on behalf of the Claimant is that the Court extend any applicable limitations period on the equitable basis afforded by the provisions of s. 3 of the *Limitations of Actions Act*.

[15] In responding to the question positively, I cannot do better than refer to the decision of Adjudicator David T. R. Parker in *Cote v. Scott*, [2005] NSSM 27. I refer also to the decision of the County Court (per: Haliburton, JCC (as he was)) in *Trimper v. McClement, et al.* (1989), 19 N.S.R. (2d) 104 wherein it was held the provisions of s. 2 of the *Small Claims Court Act* militated in favour of the resolution of proceedings before the Court on their evidentiary merits and not on the basis of narrow technical legal arguments.

[16] In the circumstances, if required to exercise the jurisdiction set out in s. 3(2) and s. 3(4) of the *Limitations of Actions Act* in order to ensure that the Claimant's claim is resolved on its merits, I do so without hesitation.

(q) Contra Proferentum

[18] To be recalled from above is that Clause 4 of the 2002 Agreement, regulating as it did the alleged obligations on the parts of the Defendants to pay the commissions claimed by the Claimant, provided as follows:

> ...
>
> Should an agreement be reached and monies received with any person, company, fund or other investor [sic] with whom Enterprise had communications with on behalf of Hoot, under the terms of this agreement, <u>within six months following termination of this agreement</u>, then the compensation as outlined in Clause 3 above shall become due and payable to Enterprise. <u>This agreement will be for a period of six months unless terminated by either party upon 14 days' written notice to the other</u>. It is clearly understood that Hoot among other sources has been (and is) in touch with different levels of government and their Crown Corporations both federally and provincially and that any funds arising from these sources are not part of this agreement and as such Enterprise is not entitled to compensation for monies raised from these sources. [underlining added]

[19] Much has been made by the respective parties with respect to the proper interpretation to be given to this Clause.

[20] The interpretation argued by Mr. O'Neill on behalf of the Claimant is that the words "within six months" only modify the words "with whom Enterprise had communications with on behalf of Hoot".

[21] The interpretation argued by Mr. Cuming on behalf of the Defendants is that the words "within six months" modify the words "agreement be reached and monies received".

[22] Added to his interpretation of the effect of Clause 4 of the 2002 Agreement was the veiled suggestion by Mr. Cuming, on behalf of the Defendants, without particular

development, that ambiguous clauses should always be construed against the drafter; in this case, Enman (or the Claimant).

[23] It is trite law that a party which drafts a contract will have any ambiguity within the contract construed against it. The proposition has been put forward in a number of seminal authorities.

[24] Perhaps chief amongst those authorities is the decision of the Supreme Court of Canada (Per: Estey, J. (as he was)) in *Consolidated-Bathurst Export Limited v. Mutual Boiler & Machinery Insurance Company* (1980), 112 D.L.R. (3d) 49. There (at p. 58) Estey, J. held as follows:

> Even apart from the doctrine of *contra proferentum* as it may be applied in this construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. <u>Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties</u>. Similarly, an interpretation which defeats the intention of the parties and their object in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. <u>It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insured to pocket the premium without risk or the insured to achieve recovery which could neither be sensibly sought nor anticipated at the time of the contract</u> … . [underlining added]

[25] Taking the whole of Clause 4 of the 2002 Agreement into consideration, it is impossible to arrive at any proper conclusion without considering what previous part of the Clause the words "within six months" modify. When one considers the testimony of Enman on behalf of the Claimant that the Clause was prophylactic in nature and was aimed at ensuring that the whole Agreement continued to be operative for the period following either its natural lapse or its formal termination, it is difficult to see how the words "within six months" could modify only the words "agreement be reached and monies received".

[26] Rather, it seems to me, and I so find, that the words "within six months following termination of this agreement" modify the words "with whom Enterprise had communications with on behalf of Hoot, under the terms of this agreement …".

[27] As such, the actual date or timing upon which the Defendants (or some of them) received financing becomes irrelevant. The governing factor, instead, is the timing of the decision made by "any person, company, fund or other investor with whom Enterprise had communications with on behalf of Hoot …".

[28] Once again looking at the 2002 Agreement as a whole, it seems clear that the intention of the Claimant, on the one hand, and the Defendants, on the other hand, was to enter into an arrangement through which it was hoped that money would flow into the latter in order to advance the Hoot Extreme initiative. Moreover, the 2002 Agreement, itself, appeared on the whole to contemplate that funds flowing through to the Defendants for the purposes of the Hoot Extreme initiative could, and likely would, flow over time. In other words, it does not appear from the 2002 Agreement that either the Claimant or the Defendants contemplated the funding of the latter in one fell swoop, or, for that matter, within a relatively compressed period of time.

[29] Instead, it appears from all of the evidence that the intention of the parties, and in particular the intention of the Defendants, was that if Enman, acting through the Claimant, was successful in attracting investment to the Hoot Extreme initiative, it would be a form of investment which would be paid in over time. Proof enough of that fact was JRN’s almost immediate approach to Snow after the two were introduced for the initial $10,000 which was advanced.

[30] It could not have been JRN’s expectation at the time that the total to be advanced to support the Hoot Extreme initiative by Snow would be limited to that $10,000. Such an advance would have been all but irrelevant in the great scheme of things and would have done virtually nothing to support the Hoot Extreme initiative.

[31] As such, whatever else he was expecting, JRN knew that the broad intention at the time was for the support of the Hoot Extreme project arranged by the Clamant would be infused more-or-less as required and certainly over time.

[32] From that time onward, SDN, JRN and Neary Manufacturing appeared to have obtained funding from (or through) Snow more or less when they required it. There is no evidence that they ever objected to this piecemeal funding approach or that they did not consider at least

Neary Manufacturing to continue to be bound to the Claimant merely because of it. As such, the Defendants cannot now argue on the narrowest interpretation on the Clause 4 of the 2002 Agreement when they have already obtained the benefits of a broader and more liberal interpretation.

[33] Even more to the point, there was the Financing Agreement mapped out by Enman on behalf of both Snow (and his companies) and the Defendants which led to what has been referred to above as the 2003 Agreement. As that "agreement", too, contemplated the funding of the Defendants over time, there can be little doubt that Clause 4 of the 2002 Agreement cannot be so construed as limiting the Claimant's collection of its commission to funds advanced to the Defendant only within the currency of that agreement or within the currency of the six month period thereafter.

[34] Simply put, there is no ambiguity in Clause 4 of the 2002 Agreement to which I could fasten an interpretation contrary to the Claimant’s interests.

[35] On the basis of all of the above, I find the Claimant to be entitled to its commission on the whole of the provable advances from Snow (and his companies) to the Defendants regardless of when those advances were made. My assessment of those advances (and of their value to the Defendants) will be discussed and determined below.

(jj) Adverse Inference

[37] Given the extent to which "matters of interpretation and personal liability" arise in this case, credibility is an important issue. As in most cases involving credibility, more evidence is usually better than less evidence.

[38] In that regard, JRN was not called to testify either on his own behalf or on behalf of the other Defendants. That struck me as strange, especially given the fact that he and SDN really appeared to conduct themselves with respect to the Hoot Extreme Initiative as "partners".

[39] In circumstances wherein a potential witness, who can be reasonably expected to possess information touching or concerning the matters in issue, fails to testify, the law is clear that an adverse inference can be drawn against either the potential witness or the party (or parties) who could reasonably be expected to have called him.

[40] A good précis on the basis for drawing adverse inference is set out by the learned authors, Sopinka and Lederman, in "*The Law of Evidence in Civil Cases*" (Butterworth & Co. Canada Limited, Toronto, 1974). There it was stated, on the authority of Lord Manfield's decision in *Blatch v. Archer* (1774), 1 Cowp. 63 that:

> The application of this maxim has lead to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.

[41] This principle was applied by the Supreme Court of Canada (Per: Pigeon, J.) in *Levesque, et al. v. Comeau, et al.*, [1970] S.C.R. 1010.

[42] There, the plaintiff had alleged in a personal injury action that she had become deaf as a result of injuries she had sustained in a motor vehicle collision.

[43] The only medical witness called by the plaintiff at her trial was the physician who had examined her about a year after the accident in which she said she had been injured. Prior to that examination, she had been seen by several other physicians who were not called as witnesses.

[44] Holding that only the plaintiff could have produced the evidence of the other physicians' examinations at trial, the absence of that evidence was held to presume "that such evidence would adversely affect [the plaintiff's] case".

[45] Much more recently, however, Coughlan, J., writing for the Supreme Court of Nova Scotia in *Nassim v. Perth Insurance Company*, [2009] N.S.J. No. 389 urged some caution in drawing adverse inferences on the basis of the failure of a prospective witness to testify at trial. Coughlan, J. based his conclusions partly on *Levesque* (*supra*) and on the decision of Saunders, J. (as he then was) in *Scotia Fuels Limited v. Lewis* (1991), 102 N.S.R. (2d) 12.

[46] The issue in *Nassim* was an insurer's alleged failure to call its restoration contractor to testify as to the condition of the basement of the insured's house between specific

dates. Coughlan, J. refused to draw the adverse inference on the basis that the impugned witness could have been called by the insured and on the basis that there was already ample evidence before the court as to the condition of the subject basement at the relevant time.

[47] In drawing an adverse inference against the Defendants in the instant case on the basis of JRN's failure to testify, I would have to conclude that he would have something specific to say, either different from or in corroboration to the testimony adduced from SDN. I would also have to conclude that there was some reason why the Claimant could not have called JRN and have moved to have had him declared adverse. I decline to do that.

[48] In the course of SDN's testimony, he made it very clear that he was the businessman engaged in the Hoot Extreme initiative. Only the technical and manufacturing elements of the initiative were attended to by JRN. This evidence was not controverted. In the result, it seems to me to be highly unlikely that JRN could have shed any light on the dealings ongoing as between the Defendants, generally, and the Claimant. Rather, it appears that all of those dealings, from the Defendants' side, were being attended to by SDN.

(ww) Decision

[50] Notwithstanding SDN's position that "whoever got the money would pay the commission", the Defendants' payment obligations are governed by the additional provision of the 2002 Agreement. Though a little crude, the additional provision states that:

> It is agreed & understood that if Robert Neary, Douglas Neary, Neary Manufacturing or any other entity either owned by or controlled by any of the foregoing (all referred to as Receivers) receives monies as a result of the above contract, for which Enterprise would be entitled to compensation, then the Receivers must pay Enterprise the commissions as outlined in Clause 3 of the above contract.

[51] JRN, SDN and Neary Manufacturing all received money as a result of the Claimant's efforts. Hoot International also received money as a result of the Claimant's efforts. Hoot International cannot help but fall under the rubric of "any other entity either owned or controlled by any of the foregoing" from the perspective of the other Defendants.

[52] The Defendants have argued, through counsel, that the additional provision in the 2002 Agreement be parsed such that each of JRN, SDN, Neary Manufacturing (or any other entity) be treated separately as being a repository (or potential repository) of money produced as a result of the Claimant's efforts. That, however, is not the way the additional provision reads.

[53] Instead, the plain and ordinary meaning of the words is that if the Receivers, as a collective, received money "for which Enterprise would be entitled to compensation", then the Receivers, again as a collective, must pay the Claimant the subject commission.

[54] General credibility is a significant issue in the resolution of disputes such as the instant one. Not only did SDN strike me as a decent man, I was persuaded that he was an honest witness. He seemed to me to do his best to recall and testify to salient issues. He never denied the obvious – as so many deceptive witnesses tend to do – and he generally – and reasonably – conceded points which were not necessarily in the Defendants' favours.

[55] That said, SDN's protestations with respect to the assumption of personal liability by himself and JRN for the payments due to the Claimant as set out in the 2002 Agreement lacked the ring of credibility. SDN's comments about the exchange of e-mail messages confirming that only those "getting the money" would be responsible for the Claimant's commission is seriously at odds with his and with JRN's execution of the additional provision in the 2002 Agreement.

[56] Though the nub of SDN's position on the issue of his and JRN's personal liability to the Claimant is that he didn't think the additional provision in the 2002 Agreement governed, its plain reading confirms the opposite. Noteworthy also in that regard is that the Defendants have pleaded neither *non est factum* nor duress.

[57] As held by Lord Denning in *Lloyd's Bank v. Bundy*, [1975] Q.B. 376:

> Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor

> gives his bond and gets nothing in return. The common law will not interfere. (underlining and double underlining added)

[58] In the instant case, the Defendants were desperate or all but desperate for the financing received for the Hoot Extreme initiative through the Claimant's efforts. Their execution of the additional provision in the 2002 Agreement was tantamount to their personal guarantee that they would personally pay the commission due on the financing received.

[59] Having now seen to it that financing was extended to the Hoot Extreme initiative through the efforts of the Claimant, as was their intent; JRN and SDN cannot be heard to complaint that *they* didn't receive it directly. In short, the law cannot interfere with the bargain they freely made with the Claimant. Accordingly, where SDN's testimony has conflicted with Enman's testimony on the seminal issue of the intent, purpose and effect of the additional provision in the 2002 Agreement, it is the latter testimony which I prefer and adopt for the purposes of these reasons.

[60] That said, determining the subject commission is far from easy.

[61] According to the Claimant, it is entitled to a commission equal to five percent (5%) of $500,000 and equal to four percent (4%) of $283,038.05; the total of $783,038.05 having been said by Snow to have been advanced variously to the Defendants for the Hoot Extreme initiative. The Claimant makes that argument on the basis of Snow's analysis, lead into evidence as Exhibit 3.

[62] The difficulty from Snow's perspective (and therefore from the Claimant's perspective) is that many of the individual sums referred to in his Exhibit 3 were not the subject of any particular proof.

[63] For example, Snow refers in Exhibit 3 to parts and components manufactured by Fabco at a cost of $36,267. One assumes that these parts and components were for the individual Hoot Extremes under construction. Beyond that assumption, there is no proof.

[64] Snow also refers in Exhibit 3 to an estimate of accrued legal fees of $20,000. Not only is an estimate not telling for the purposes of proof, there is no indication of what the accrued legal fees were for. One assumes that they were for the purposes of advancing the Hoot Extreme initiative. Beyond that assumption as well, there is also no proof.

[65] Next, Snow has attributed $117,000 in salary, benefits, business expenses and services to a J. Bellefontaine and a C. Hollett. These people, he testified, were his employees who were tasked, from time-to-time, to the Hoot Extreme initiative.

[66] How their time and effort was attributed to the Hoot Extreme initiative as opposed to any other job-related functions they served, was not in evidence. In the result, I could not so much as make an assumption that the figures were correct. To do so would be gravely prejudicial to the Defendants.

[67] Under the heading in Exhibit 3 "Other Personnel Services", Snow also attributes $172,000 in “other personal services” to management services ($125,000), salary and travel for Stevens ($25,000), non-specific consulting ($7,000) and a payment to a Blair Natskiu ($15,000).

[68] Beyond that, Snow has calculated $28,700 in interest on loans without reference to what the loans are, their terms of repayment, their interest terms or their status. He has also claimed recovery of some $13,250 for projectors and a video presentation. Finally, he has indicated an expense of $4,500 for the production of a brochure.

[69] Once again, these amounts do not come before the Court with any specific proof. To that extent, they are not allowable. Though there is no suggestion, at least by me, that Snow, Fabco, JAG and Hoot ATV did not pay these amounts (or purchase the physical assets in issue), they have not been proved from the perspective of the advance of the Hoot Extreme initiative generally or from the perspective of any approval (or any form of “say”) by JRN and SDN.

[70] While I remain cognizant that the matter proceeds only before the Small Claims Court and that the standards of acceptable evidence are lower here than they are in some other forums, it proceeds before a Court in any event. Courts require proof. Even at the limited level applicable to proof in the Small Claims Court, the Claimant has fallen well short.

[71] With obvious respect to the Claimant (and Snow for that matter), the funds set out on Exhibit 2 are not much more persuasive than were many of the funds set out on Exhibit 3.

[72] The $13,831.67 said to have been advanced to JRN and the $18,642.26 said to have been advanced to SDN are much clearer. There are the copies of the individual cheques made payable to those Defendants. All of those cheques were led into evidence.

[73] More problematic is the Exhibit 2 entry of $189,409.60 said to have been advanced to Neary Manufacturing. How that relates to the advances stipulated in Exhibit 1, for which there is ample evidentiary backup, is not clear. One assumes that the former sum ($189,409.60) subsumes the latter. Again, that is not clear.

[74] What is clear is that Snow advanced the sums set out on Exhibit 1 to a combination of JRN, SDN and Neary Manufacturing (and maybe even to Hoot International). The sums were captured by a series of cheques which were written between July 8, 2002, and September 23, 2002. The sums were therefore received by the affected Defendants during the currency of or as a result of the 2002 Agreement.

[75] I make the same comment about cheque 306 signed by Snow and made payable to Neary Manufacturing in the sum of $35,000 on March 3, 2003. I make the same comment with respect to the so-called "Hoot Cheques Breakdown to Neary Manufacturing" on page 3 of Exhibit 1.

[76] Accordingly, properly before the Court, and subject to a standard of proof which is acceptable, is a total of $221,949.86. That total is

comprised of individual amounts of $108,056.32, $35,000, $45,853.28, $13,831.67 and $18,642.26.

[77] As the $221,949.86 falls within the initial threshold of the five percent (5%) commission to which the Claimant is entitled pursuant to the provisions of Clause 3 of the 2002 Agreement, the Claimant has thereby earned the sum of $11,097.49 in commission.

[78] Given the prophylactic nature of Clause 4 and the additional provision of the 2002 Agreement, the Claimant could have done a much better job in protecting itself. Additionally, it could have moved expeditiously to control the advance of funds by Snow (and by Fabco, JAG and Hoot ATV) to the Defendants. Though one can (and I do) appreciate the pressures being brought to bear on the Claimant which resulted in the Financing Agreement never having been executed, it cannot be held up as creating rights beyond those created by the 2002 Agreement and by the totality of the evidence as it unfolded before me.

[79] Accordingly, the Defendant shall pay the Claimant the sum of $11,097.49.

[80] Neither of the parties addressed the issue of pre-judgment interest in either their evidence or in their closing submissions. Though the 2002 Agreement does not specifically call for interest on any outstanding commissions, the commercial reality is that interest should be payable on the sum determined to be outstanding.

[81] Though I would conclude that interest should be in the range of 4% and would apply that rate without submissions, I will leave it to the parties, through counsel, to consider whether they wish to submit on that issue. If I hear nothing from them resulting in the varying my Order to follow, the four percent (4%) interest rate will be confirmed.

(dddd) Quantum Meruit

[83] Given all of the above, my assessment of whether or not the Claimant is entitled to recovery from the Defendants – or some of them – of

the basis of *quantum meruit* is unnecessary. That said, and in the event that my analysis above is found on appeal to be incorrect, I will provisionally assess whatever rights the Claimant might otherwise have on the basis of *quantum meruit*. In my respectful view, there are none.

[84] The leading authority in this province on the application of the concept of quantum meruit is the decision of our Court of Appeal (per: Chipman, J.A. (as he was)) in *Turf Masters Landscaping Limited v. T.A.G. Developments Limited*, [1995] N.S.J. No. 339. The facts of that case are not nearly as important as the principles to be drawn from the decision.

[85] In Turf Masters, the concept – sometimes referred to as the doctrine – of quantum meruit was described (commencing at para. 38) as follows:

> Quantum meruit has come to be regarded not only as a contractual doctrine but also as a quasi contractual or restitutional one. Its modern development in Canada has its genesis in the decision of the Supreme Court of Canada in Deglman v. Guarantee Trust Company and Constantinau, [1954] S.C.R. 725.
>
> ...
>
> [para. 42] In cases <u>where there is a fundamental breach or the contract is otherwise terminated, the wrongred party may elect to treat the contract as at an end and recover damages for work done on a quantum meruit</u>. These cases deal with claims between parties to a contract. <u>Before one is entitled to recover from the other on the basis of a quantum meruit it must be shown that the contract between them has been rescinded or discharged or otherwise has come to an end.</u> <u>While it continues to exist the parties are limited to relief thereunder</u>. The remedy of restitution is not available to one who has fully performed his part of the contract.
>
> At no time did Turf Masters elect to treat its contract with TAG as at an end. Nor did it establish that prior to the completion of the work the contract was fundamentally breached, frustrated or otherwise terminated between the parties. Goldsmith, supra, says at p. 4-26:
>
> > In order to determine whether a change of so fundamental a nature has taken place it is necessary to look, on the one hand, at the contract in the light of the circumstances that existed at the time when it was entered into, and, on the other, at the events which have occurred and which are alleged to have brought about

> such a change of circumstances. It cannot, however, be emphasized too strongly that hardship, inconvenience or material loss, whether caused by unforeseen difficulties or by some other reason beyond the control of the parties, or the fact that the work has become more onerous than originally anticipated, are not sufficient to entitle the contractor to regard the contract as terminated. It is equally clear that as long as the contractor continues to work under the contract and recognizes its existence, however much he may complain about the hardship which it is causing him, he cannot substantiate a claim on a quantum meruit basis. Before being entitled to do so he must clearly indicate that he regards the contract as being inapplicable; ... (underlining and double underlining added}

[86] In support of its many claims, the Claimant has made a number of submissions under the heading of “Quantum Meruit”. It is as if the Claimant views the doctrine as an alternative – or “catch all” – remedy applicable to claims rooted in contract when all else fails. That is not the proper application of the doctrine, as Chipman, J.A. has made clear in *Turf Masters* (*supra*).

[87] Rather, the proper application of the doctrine is in circumstances where a contract has been abandoned, impliedly rescinded through an unexpected change in underlying conditions or otherwise discharged. In those circumstances, but only in those circumstances, the claiming party cannot seek a contractual consideration as there is no longer any contract out of which any such consideration can flow. It is then that the claiming party turns to the doctrine of *contra proferentum*, seeking the court’s equitable or fairness-based assessment of what its recovery should be for whatever work or other undertaking it has performed.

[88] Here, of course, there is no suggestion, even by the Claimant, that the 2002 Agreement had for any reason come to an end. Instead, the 2002 Agreement was argued strenuously by the Claimant as the very basis for its claims to commission. As such, the Claimant’s entitlement to commission stands or falls only on the basis of the 2002 Agreement and on the interpretation of it set out above.

ORDER

[89] On the basis of all of the above, the Defendants, jointly and severally, shall pay to the Claimant the sum of $11,097.49 together with pre-judgment interest at the rate of four percent (4%) commencing on April 12, 2003 (the mid-point in the extension of funding by Snow and his companies to the Defendants).

[90] Interest will therefore total $1,651.55 ($11,097.49 x .04 ÷ 365 x 358). I limit the interest to December 31, 2006, as it should not have taken the Claimant longer than that to get this matter before this Court. In total, the Defendants shall, jointly and severally, pay to the Claimant the sum of $12,749.04 (subject to whatever submissions on interest there might be).

[91] As success has been mixed, there will be no costs.

DATED at Halifax, Nova Scotia, this 4th day of November, 2009.

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

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