IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Camelot Homes Inc. v. Cochrane, 2011 NSSM 57

2011 Claim No. 347619

BETWEEN:

Name: **CAMELOT HOMES INCORPORATED**

Claimant

- and -

Name: **JEFFREY CRAIG COCHRANE and KAREN ANNE COCHRANE**

Defendants

Hearing Date June 7, 2011; Last Written Submission on September 2, 2011
Appearances: Claimant - Matthew Conrad, Barrister and Solicitor
Defendants - Self Represented

DECISION and ORDER

[1] This case involves a claim for 30% of the contract price on a signed agreement, terminated the day following the signing of the agreement.

[2] The main issue in this case is whether the *Direct Sellers Licensing Act,* R.S.N.S. 1989, c. 129, applies to the transaction. On August 15th, I wrote to the parties requesting submissions on that question.

[3] A further issue is whether the 30% claimed is a penalty clause or a genuine pre-estimate of damages, or is otherwise unconscionable.

Background Facts

[4] The Claimant sells and installs steel roofing systems in Nova Scotia. The Claimant has an office and warehouse facility in Halifax. It advertises in the newspaper and does direct mailings to attract potential customers.

[5] According to Mr. Colin Brothers, President of the Claimant company, in this case there was a mailing to the New Germany area, which resulted in a call coming into the office from the Defendants. As a result of that, Mr. Jesse Brothers, met with the Defendant in their home on February 14, 2011, and at that meeting the written contract was prepared and signed by Mr. Brothers on behalf of the Claimant and by both of the Defendants. A copy of that was entered as Exhibit 2.

[6] The very next day, Ms. Cochrane called the office to cancel the contract. The Claimant acknowledges the call and that, as a result, the contract was terminated.

[7] The claim is based on the following provision in the contract which reads:

> *In the event the Buyer breaches the Contract the Buyer agrees to pay the Contractor thirty percent (30%) of the Total Contract Price as liquidated damages.*

[8] The Total Contract Price was $ 12,075.00 and 30% of that figure yields the claim amount of $3,622.50.

[9] Counsel for the Claimant submits that it is a simple case of contract, and the Court should uphold the contract and order payment based on the clear language of the contract. Further, he indicates that the 30% is, on the evidence, a genuine pre-estimate of damages and, accordingly, the amount is due and owing.

[10] The Defendants say that all they really wanted was an estimate. The salesman was “pushy” and after he left they checked with some competitors and, based on that information, were uncomfortable with the Claimant company. They stated that they have received nothing.

Direct Sellers Regulation Act, R.S.N.S. 1989, c. 129

[11] By letter dated August 15th, I invited written submissions as to the potential application of this Act. In part, my letter stated:

> *In reviewing the file and potential law applicable to this case, I have reviewed the provisions of the Direct Sellers' Regulation Act, R.S.N.S. 1989, c. 129 as well as the Direct Sellers Regulation, N.S. Reg 93/76. As I recall, I had mentioned the possible application of this Act at the hearing and was told by counsel for the Claimant that it not apply. On review, I am of the opinion that it may well apply.*
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> *However, before making any firm conclusions on the issue, natural justice and procedural fairness require that I first raise the issue with the parties so that they may make comment if they wish. That is the purpose of this letter. I recognize and note that it is somewhat unusual to be raising this at this stage and I regret that I had not earlier raised it for the parties' consideration. However, if the Act applies it is a significant legal issue which I have a duty to recognize and deal with.*
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> *As a starting point, I would refer you each to s.2(d) of the Direct Sellers' Regulation Act, which defines "direct selling" as follows:*
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> > *2 (d) "direct selling" means selling or offering for sale or soliciting orders for future delivery of goods or services* ***where the first person-to-person contact is made by the salesperson outside of a retail outlet****... and includes sales resulting from a solicitation by a non-retailer to attend a place where selling, offering for sale or the solicitation of orders for the future delivery of goods or services occurs and sales conducted by a multi-level marketing wholesaler, a multi-level marketing distributor and the sale of hearing aids regardless of the circumstances of the sale;*
> >
> > [Emphasis supplied]

[12] The Defendants' position is that the transaction here does fall under the Act. Therefore they were entitled to cancel.

[13] The Claimant takes the position that the first person to person meeting (which took place in the Defendants' home) took place as a result of the Defendants' request. This was done through the first person to person contact being made by the Defendants when they called the Claimant and requested the meeting. The phone call requesting a meeting is, in this, argument to be viewed as a "person to person contact" and, that call was initiated by the Defendants.

[14] I note that this view appears to be supported by a letter dated March 31, 2003, from Service Nova Scotia to Mr. Colin Brothers of Camelot Homes Inc. While such a letter may well support a defence of officially induced error, it is my view that it cannot bind a court in its consideration of whether or not a piece of legislation applies to a transaction.

[15] I turn then to the central question of whether the activities here fall under the definition of “direct selling”. If the Claimant’s activities fall under the definition, and there is no exemption, the Act applies. For convenience, I again set out the definition of “direct selling” found in s. 2(d) of the Act:

> *2 (d) "direct selling" means selling or offering for sale or soliciting orders for future delivery of goods or services where the first person-to-person contact is made by the salesperson outside of a retail outlet and includes sales resulting from a solicitation by a non-retailer to attend a place where selling, offering for sale or the solicitation of orders for the future delivery of goods or services occurs and sales conducted by a multi-level marketing wholesaler, a multi-level marketing distributor and the sale of hearing aids regardless of the circumstances of the sale;*

[16] Only the first part of this definition that concerns us here; that is:

> *“direct selling" means selling or offering for sale or soliciting orders for future delivery of goods or services where the first person-to-person contact is made by the salesperson outside of a retail outlet*…

[17] The question then is what is contemplated by the phrase “person to person contact”? Does that necessarily mean physical, in person contact? The alternative view, as asserted by the Claimant here, is that “person to person” can mean a phone call. In my view that does not accord to what I perceive to be the legislative intent of the Act.

[18] The simple intent of the Act is to regulate sellers of goods or services who do not operate through a retail outlet. Its application is clearly broader than just door to door sales. Otherwise, it would merely have been so defined.

[19] The mischief this Act would seem intended to address is what may have been perceived historically as overly aggressive sales tactics conducted outside of retail establishments, whether that be in customers homes, hotel rooms, or other places.

And, in many cases, such vendors, not having a fixed retail outlet, would have been perceived as lacking a stable or permanent business operation. None of this is meant to reflect on the Claimant but is intended as a basic explication of the mischief presumably to be remedied by the legislation in question. That such considerations are relevant to my mandate is made clear by the *Interpretation Act*, RSNS 1989, c. 235:

> *s.9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters*
>
> *(a) the occasion and necessity for the enactment;*
>
> *(b) the circumstances existing at the time it was passed;*
>
> *(c) the mischief to be remedied;*
>
> *(d) the object to be attained;*
>
> *(e) the former law, including other enactments upon the same or similar subjects;*
>
> *(f) the consequences of a particular interpretation; and*
>
> *(g) the history of legislation on the subject.*

[20] The critical elements that bring the activity under the scope of the Act is that (1) there is person-to-person contact made by the salesperson with the customer, and (2) the person-to-person contact takes place outside of retail outlet.

[21] There was evidence that Mr. Jesse Brothers had full authority to take orders and write up sales contracts for the Claimant company. He therefore meets the definition of "salesperson" in s. 2(l) of the Act:

> "salesperson means a person who sells or offers to sell or solicits orders for the future delivery of goods or services for or on behalf of a direct seller"

[22] Mr. Brother made person-to-person contact with the Defendants in their home, outside of a retail outlet. And, significantly, this was the first "person-to-person" contact which, in my view, means face to face contact. The question of who

initiates or requests the initial face to face contact is not dealt with in the Act, and is immaterial, when one considers the objects and apparent mischief to be remedied. What is central is that the first in person contact take place in a non-retail setting.

[23] I conclude therefore that the activities here are captured by the definition of “direct selling” and, accordingly, the *Direct Sellers’ Regulation Act* apples.

[24] Like counsel for the Claimant, I have been unable to find any Nova Scotia cases directly on point. The one case he refers to is *Cleary v. Nova Scotia, [1999]. N.S.J. No. 316.* In that case, Justice Gruchy considered whether the *Real Estate Brokers Licensing Act,* R.S.N.S. 1989, c. 384 applied to unique real estate sales services as opposed to the *Direct Sellers’ Regulation Act* and concluded that the former applied. The analysis is that case is not on point or helpful to what is before us here.

[25] Other provinces have similar legislation to Nova Scotia’s *Direct Sellers’ Regulation Act*. Of course in considering other legislation one must be mindful of the differences in statutory wording. Nevertheless, with that caveat, judicial comments and analysis of similar legislation can he helpful.

[26] In *Levasseur v. Whitney Canada Inc.*, 2002 BCSC 286 (CanLII), the British Columbia Supreme Court considered the direct sale provisions in the B.C. *Consumer Protection Act.* The Court states:

[11] The respondent argued that the transaction was not a direct sale because it did not involve face to face contact, and because the situation was similar to a trade show and hence exempted under the Regulations. He submitted that the transaction was not of the type contemplated by the legislation, which was directed, in his submission, at door-to-door sellers.

[12] The appellant submitted that there was face to face contact, both in the form of the presentation and in the interaction between himself and the seller at the table after the presentation. In his submission, the matter falls within the ambit of the definition.

[13] I was not directed to any judicial commentary on the interpretation of the section. Counsel for the respondent did refer me to certain passages from Hansard in support of his submissions with respect to the purpose of the ***Act****. I did not find these to be helpful in resolving the issue before me.*

[14] While a door-to-door sale is no doubt the most common form of direct sale, it is clear, in my view that the scope of the definition is not limited to door to door transactions.

[15] As noted in Canadian Commercial Law Guide, Vol. 1 (Toronto: CCH Canadian Ltd., 1997) at para. 12-705:

> *Another example is where a seller requests a person, through direct mail or other advertising, to contact the seller by telephone or present themselves at a hotel room or other non-business premises, and then sells that person goods or services.*

[16] In my view, on a plain reading of the definition section, this transaction falls within the scope of a direct sale. I find that the contract was:

(a) a contract for the sale of goods or services;

(b) made in the ordinary course of business;

(c) made at a place other that the seller''s permanent place of business; and

(d) made by face to face contact.

[17] In short, the elements of the definition are all made out in the case at bar.

[27] The **Levasseur** case was cited in the later British Columbia case of ***Pro Gas & Heating v. Hayes***, 2004 BCPC 225 (CanLII) where the Court found that the Act applied. The Court states:

> *[11] If the Sales Agreement was signed during the first visit, Pro Gas concedes it would be a direct sale as it is a contract for the sale of goods made, face to face, by a seller in the ordinary course of business and at a place other than the seller's permanent place of business. "Direct sale" is defined in the Act to mean:*
>
> *"a contract for the sale of goods or services, or both, made by a seller*
>
> *a) in the ordinary course of business, and*
>
> *b) at a place other than the seller's permanent place of business,*
>
> *but does not include a contract where the sale, offering for sale or soliciting of orders is made by telephone, mail, fax or any other method that does not involve face to face contact with the intended purchaser."*
>
> *[12] Pro Gas attended the Hayes home for a routine furnace maintenance not to arrange a contract for the sale of a new boiler. The Ministry of Public Safety and Solicitor General describes 'direct sales' as door to door sales on its website. The Act, however, is not so limited although door-to-door sale is the most common form of direct sale.* ***Levasseur v. Whitney Canada Inc****., [2002] B.C.J. No. 361 (Q.L.) (B.C.S.C.) When Bains and Hayes arranged the sale of a boiler rather than the repair of the boiler, the transaction changed to a 'direct sale'. The Sales Agreement was made face-to-face at the residence and was different than the one arranged over the phone.*

[28] These cases support my conclusion that the transaction here is governed by the Act.

[29] As such, the claim is not enforceable by virtue s. 30 of the Act or, alternatively, notice of cancellation was made and accepted the next day or, further, the written defence filed here is a written notice for cancellation under s. 21(1)(b).

Penalty Clause or Unconscionable?

[30] While it is not necessary to do so, I also find that the 30% amount is in the nature of a penalty or, alternatively, is in all the circumstances here, is an unconscionable amount and should be set aside by the Court. I refer to the case of *Peachtree Associates v. 857486 Ontario,* 2005 CanLII 232216 (On CA) where Sharpe, J.A. discusses the traditional law regarding liquidated damages/penalty clauses as well as equity's approach to unconscionable transactions and suggests a merger of the two concepts.

[31] The evidence provided here was far from satisfactory as to establish what the actual costs were and what would be the profit margin. The amount claimed is a substantial amount and in seeking such a substantial sum, the Claimant has the burden of showing the Court, through cogent and compelling evidence that the amount claimed is a genuine pre-estimate of its losses, Here, the contract in question was cancelled the very next day. There were no out of pocket losses. That leaves the anticipated profit margin on the

contract. A profit margin of 30% should be proven and, as I have said, in this type of a case at least, I believe the Claimant bears the burden for that.

[32] Therefore, in addition to the first issue, I would have dismissed the claim on this basis.

Order

[33] It is hereby ordered that the claim is hereby dismissed.

[34] There will be no costs

DATED at Halifax, Nova Scotia, this 3 day of October, 2011.

Michael J. O'Hara
Adjudicator