IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citaton: *Hearn v. Hirsch Precision Inc.*, 2016 NSSM 64

Claim No: SCCH 449413

BETWEEN:

Justin Hearn **Claimant**

v.

Hirsch Precision Inc. **Defendant**

Justin Hearn appeared on his own behalf;

Peter Dobson appeared for the Defendant, Hirsch Precision Inc.

Date of Decision: July 14, 2016

Decision Amended: September 14, 2016

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

DECISION

Justin Hearn lives and works in St. John's, Newfoundland. Professionally, he is an accountant, working in the Eastern Canadian headquarters of a multinational corporation. However, this matter concerns a significant interest of his at an amateur level; Mr. Hearn is an accomplished competitive rifle shooter. He competes at national and international events.

This claim arises from an allegation of a breach of contract, namely the manufacturer's warranty of a rifle and the durability of the gun's action. The rifle was purchased by Mr. Hearn "a number of years ago" from VX Systems Ltd. in Ontario. The rifle was made by Barnard Precision Ltd. ("Barnard"), a rifle manufacturer based in Auckland, New Zealand. The Defendant, Hirsch Precision Inc. ("Hirsch"), is a Nova Scotia based rifle dealer, whose inventory includes those made by Barnard. Hirsch was contacted by Mr. Hearn so he could order a replacement part for a defective action on his rifle. The defective or broken action was to be replaced under the gun's

warranty. The manufacturer refused and Mr. Hearn is now seeking compensation from Hirsch, the Nova Scotia dealer.

At first glance, this would seem a rather straightforward case in law. The original purchase took place in Ontario, not Nova Scotia. The Defendant was neither the seller nor the manufacturer of the original rifle. Hirsch had nothing to do with the initial contract to purchase the rifle. As a result, there is no liability on the Defendant's part arising from the purchase. Furthermore, to establish a breach of the warranty, the onus is on the Claimant to adduce evidence which will satisfy the Court on a balance of probabilities that the damage to the rifle falls under the manufacturer's warranty coverage or some other warranty, such as those found in the *Consumer Protection Act*. Mr. Hearn did not provide a copy of the warranty or enough, if any, evidence to corroborate his belief that the cause of the defective action was the result of a manufacturer's defect or that it breached any other legally imposed warranty. For either of these reasons, the matter would usually be dismissed.

However, Hirsch did more than provide a replacement part and examine the defective action. They dealt with Mr. Hearn in an attempt to determine if the cause of the defective action was a manufacturer's defect, as alleged by Mr. Hearn, or some external cause, as alleged by Barnard and the Defendant. Most significantly, Hirsch made an offer to settle of $660.00 (plus $100 to pay for John Marshall's services), which was accepted by Mr. Hearn. The action had been sent to Barnard in New Zealand and was returned cut in two pieces. Mr. Hearn threatened bad publicity which Hirsch and Barnard describe as defamation. Hirsch then withdrew the offer, effectively triggering this legal action.

There was considerable evidence presented by the Defendant concerning the extent and cause of the damage or defect to the action. Most of this evidence (aside from the opinion of John Marshall), comes from the manufacturer, the original vendor of the gun and Peter Dobson on behalf of Hirsch, witnesses who would benefit from a finding that the damage was caused by an external force on the rifle. Not surprisingly, the Defendant's evidence supports a conclusion that the rifle was dropped or struck. However, in my opinion, how it was damaged or became defective has not been fully proven either. Despite what I am certain is the parties' wish that I make a final determination on the cause of the problem, I will not do so as that is not necessary to determine what remains the final issue in this case, the status of the settlement agreement.

Issues

- Was a settlement agreement negotiated between the parties?

- If so, is the Defendant bound by the settlement?

The Evidence

While these reasons deal solely with the offer to settle and the capacity of the Defendant to make such an offer, a review of the evidence puts this matter into context.

Justin Hearn testified that when he removed the rifle from storage in June 2015, he discovered that the ball would not fit properly into the action of his rifle. A piece of the rifle was cracked and bent outward. He contacted Barnard in Auckland and also dealt with Hirsch Precision in Lake Echo, NS, to have the part reviewed and assessed for "warranty eligibility".

Thus began lengthy and increasingly heated communications over the cause of the damage to the rifle and the responsibility for the same. Barnard alleges it was an impact break while Mr. Hearn believes it is a manufacturing flaw caused by heat or a metallurgical problem.

The action was sent to John Marshall of New Glasgow, Nova Scotia. Mr. Marshall gave evidence in court. He has been a gunsmith for 32 years and worked in the steel industry for 54 years. While employed, he worked in the foundry at Maritime Steel. He is a competitive target shooter as well, which he has been for 61 years. He has repaired Barnard rifles during this time. He identified the steel used in their construction as a similar type used in other rifles, which he has worked on during his 32 years as a gunsmith.

It is clear both parties recognize Mr. Marshall's credentials. I qualified him as an expert to give evidence on the construction and repair of full bore rifles. Mr. Marshall examined the rifle and he is of the opinion that the defect in the rifle is the result of some type of impact, such as dropping or striking it. He removed the broken portion of the action to examine it. He did not believe the action could be repaired at any point when he viewed it. Mr. Marshall's examination of the rifle took place prior to its being sent to New Zealand.

Peter Hirschfield Dobson is the President and Owner of Hirsch Precision Inc. He testified that the Defendant company is a dealer for Barnard and not their agent in Canada. He tendered into evidence a letter from Matthew Bartlett of Barnard Precision where Mr. Bartlett states:

"Hirsch Precision is Barnard Precision Ltd's Canadian dealer and is not an agent or representative of the company."

Mr. Dobson has been equally adamant that there is no agency relationship between Hirsch and Barnard, despite that certain evidence suggests otherwise. There is nothing in evidence to suggest Barnard was aware of the negotiated settlement. As noted later in these reasons, I find there was no agency relationship. Hirsch acted on its own in offering the settlement without authority or knowledge of Barnard.

Mr. Dobson tendered into evidence a report from Ian Robertson, who works at VX Systems Ltd., the original seller of the rifle. Mr. Robertson is of the view the pictures show damage from dropping or striking the rifle.

Mr. Dobson testified that the action had been sent back to Barnard for examination. Their opinion was also that there is nothing wrong with the metal in the action. However, for whatever reason, they "decommissioned" the action by cutting it in two pieces without Mr. Hearn's consent. This served only to frustrate and anger Mr. Hearn who did not understand why that was necessary, particularly without his consent.

Mr. Dobson acknowledges making an offer to Mr. Hearn to settle the matter, namely $660.00 for the refund of the receiver and $100 to cover Mr. Marshall's services. Both parties acknowledge that the offer was accepted in settlement of this matter. Subsequently, Mr. Hearn received the damaged action, which led to some fairly heated e-mails in exchange. Mr. Dobson testified that he withdrew the settlement when he received the following e-mail dated October 1, 2015:

"Moments ago I spoke with Barnard, in particular, Steve Bartlett, and was treated with the upmost (*sic*) disrespect. I was out right called a liar and he doesn't want to hear anything more from an individual that dropped the action and is blaming it on the manufacturer. He then finished the conversation by stating for me to "never f***ing call here ever again" and hung up...

I'm extremely upset now with how this is been dealt with by Barnard. I've made an honest attempt to claim the replacement under warranty and now Barnard has destroyed the action without prior authorization. From the first paragraph you should realize they have been extremely unprofessional in this matter. I cannot believe that this matter has escalated to where we are today. My good faith in the company was shown through purchasing a replacement, and now I am left just an absolute disbelief with what was just said to me.

As the Canadian Barnard dealer I would like you to further discuss this with them. I now require a full refund and then they can keep the action. I will refrain from any negative posts against the company and will continue to shoot with their actions. Factoring in the shipping and testing costs alone, plus the potential future loss of sales, I would just ask them to pay the amount owing and move forward."

Warranty of Authority

Mr. Dobson maintains that the Defendant is not an agent of the manufacturer, Barnard. Instead, Hirsch is a dealer which simply buys and sells Barnard products.

Reference is made to the case of *Alvin's Auto Service Ltd. v. Clew Holdings Ltd.* (1997), 157 Sask. R. 278 (Q.B.), in which the Court stated at paras. 21-22:

> The elements of a breach of warranty of authority cause of action are identified in *Bowstead on Agency*, 13th ed. (London: Sweet & Maxwell, 1968), p. 397:
>
> > (1) Where a person, by words or conduct, represents that he has authority to act on behalf of another, and a third party is induced by such representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third party by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority.

> (2) Every person who professes to act as an agent is deemed by his conduct to represent that he is in fact duly authorized so to act, except where the nature and extent of his authority, or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party, or the professing agent expressly disclaims any present authority.
>
> The plaintiff need not have entered into a contract as a result of the inducement. It is sufficient if he or she acts to his or her detriment because of the warranty.

I find the Defendant, Hirsch, entered into a settlement agreement (as described below) without the knowledge or consent of Barnard. Mr. Hearn would not have contracted without these representations. Through their actions, they represented to Mr. Hearn that they had authority to make such a settlement. Mr. Hearn relied on them. I find the Defendant liable to the Claimant for breach of a warranty of authority.

Settlement Offer

A settlement offer is legally a contract between two parties. In order to be enforceable, at a minimum, all of the usual elements of contract must be present: offer, acceptance, consideration and an intention to be legally bound. In this case, there was an offer by Hirsch to Mr. Hearn, which was accepted. The consideration that is the subject of this contract was the sum of $760 in exchange for the discontinuation of this action. The terms were not made in writing, but all of the elements were present. I find the agreement was a binding settlement.

The question remains is if Mr. Hearn's response after receiving the action cut in two and his reference that he would "refrain from any negative posts against the company and will continue to shoot with their actions", followed by Hirsch's withdrawal of the offer is sufficient to rescind the contract. In my view, it does not.

Having heard the evidence of all witnesses, the original action, which is defective, cannot be used or repaired. I find it is worthless and has been since June 2015. Prior to becoming angry upon receiving the action which was cut in two, I find Mr. Hearn also believed the same thing.

I should point out that the manufacturer took a significant risk in cutting the action in two without further explanation. They destroyed evidence - evidence which may have been relevant in the proceeding. In that situation, a court has a right to draw a negative inference about their position from such actions. If it were relevant to this matter, I would have been prepared to do so.

I think it appropriate that I comment on the words used in the e-mails. First of all, I believe Mr. Hearn is sincere when he says that he does not believe the problem with the action is the result of an impact. Mr. Hearn's frustration in Court was obvious. Despite this, he impressed me as an intelligent and reasonable person. His evidence on the discussions between him, Hirsch and Barnard, is clear and amply supported by the documentation. He has expended a significant

amount of time and expense pursuing this litigation. Now that he is in Court, he has put everything on the table and he is making a larger claim. However, this was initially about a new action, whose value is approximately $1915. It would not make any sense whatsoever for him to pursue this case just to "make a point". He does not strike me as the type to do so.

For their part, faced with what they feel is overwhelming evidence from their experts, Barnard and Hirsch believe it was an impact break. They have good reason for believing that too.

Consequently, if the alleged accusations were made by the representatives of Barnard, it is understandable that he would react angrily. It has now escalated to a point where neither party wanted this to go.

In looking at all of the circumstances, I find the threat of negative posts by Mr. Hearn and his angered response are not seriously negative statements such as are sufficient to consider the agreement rescinded. Indeed, neither party has the right to treat it as ended. In making this finding, I am mindful of the Court's lack of jurisdiction to consider issues of defamation. That is for another Court, on another day, if the parties are so inclined.

Damages

I find the Claimant and Defendant were parties to a binding settlement agreement. The settlement amount was $760.00. This is an all inclusive settlement of any damages arising from the defective action. Thus, it would also include settlement of the claim for the receiver and Mr. Marshall's work. In addition, it includes additional expenses that would have been incurred or other claims made. Thus, I disallow shipping costs to and from Barnard's business in Auckland, any other gunsmith work, world championship team deposit and fax charges. As noted above, the old action is worthless and I disallow any claim for its destruction.

The Claimant seeks expenses for "Administration of Claim", but these are not payable as damages or costs under the *Small Claims Court Act*.

The Claimant's damages are set at $760.00.

Counterclaim

I find the evidence does not support a finding of liability on the part of Mr. Hearn. The counterclaim should be dismissed.

Costs

The general principle with respect to costs is that costs follow the event. Mr. Hearn had negotiated a settlement but has been forced to come to Nova Scotia to enforce it. Consequently, the Defendant should be made to compensate him. On the other hand, Mr. Hearn sought almost

$5025.15 inclusive of costs. He has been successful, but only partly, as the damages awarded are $760.00.

In his submissions, Mr. Hearn claims travel fees in the amount of $629.90. He has provided receipts for only his hotel costs, namely $92.66. The rest of this item is described as "flights, hotel, rental car, fuel and meals." This is not sufficient to substantiate these claims, although I am prepared to allow a reasonable amount for transportation, lodging and meals. In addition, Mr. Hearn is entitled to the filing fee and bailiff charges.

Given all of the above, I am prepared to award the all-inclusive sum of $500 as costs.

Summary

In summary, I find the Defendant, Hirsch Precision Inc., liable to the Claimant, Justin Hearn, as follows:

Amount of Claim:	$760.00
Costs:	$500.00
Total	**$1260.00**

The counterclaim is dismissed.

An order shall issue accordingly.

Dated at Halifax, NS,
on July 14, 2016;
Amended on September 14, 2016

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)