IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Warlord Games Ltd. UK v. Gavel, 2017 NSSM 65

Claim: SCY No.462452
Registry: Yarmouth

Between:

WARLORD GAMES LTD. UK

CLAIMANT

– and –

BRAD GAVEL

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: July 27, 2017

Decision: August, 8, 2017

Appearances: The Claimant, represented by Stephen Howatt
The Defendant, self-represented

DECISION

FACTS

Stephen Howatt at the present time operates a business in Yarmouth Nova Scotia known as Toots Convenience Store and Mythic Games and Hobbies. At the time this action arose he was a commission representative for the claimant. He produced a letter from the claimant addressed to the clerk of this court authorizing Mr. Stephen Howatt to act as the claimant's agent.

He says that he approached the defendant at his place of business and offered to provide various games supplied by the claimant. He says that included in what the defendant agreed to purchase was a type of wargame involving small soldier characters and what he referred to as a "retail starter bundle". The latter included a display rack as well as inventory. He says that the goods ordered by the defendant had a value of $1158.96 in US funds. In cross-examination he

stated that he told the defendant if no product sold then he would take it all back. When questioned whether he had made the statement "I will personally pay for the product that does not sell" he denied that he had made such a statement. He said that the only condition under which he would take it back is if no product whatsoever had sold. Mr. Howatt did not have a copy of the invoice of the claimant. He produced confirmation of delivery of some package via UPS to the defendant's place of business as well as a collection email from the credit controller of the claimant which does reference what presumably is an invoice as follows: "INV – 11411 08/02/16 $1158.96".

The defendant testified that he is the owner of East Coast Cards and Collectibles which operates on Main Street in Yarmouth. He says that he and Mr. Howatt met in January 2016 and Mr. Howatt was seeking employment as a manager with his company and also was attempting to sell various games to him. The defendant says that he was not interested but that Mr. Howatt came back on several occasions offering various deals with respect to games. He says that he eventually agreed to stock some product on the basis that Mr. Howatt represented to him that he would personally pay for any product that did not sell. After this the defendant provided a credit card number to a representative of the claimant who called to obtain it. Payment on this credit card was not processed.

The defendant acknowledged that he sold approximately $288.00 Canadian which consisted of four boxed sets and some bottles of paint. He said that the markup was approximately 25%, thus making his costs 75% of $288 or $216. He said that the defendant did come to his store and do a couple of demonstrations which were not well attended. He had received approximately 20 sets initially. Of the remaining 16 sets, after being in his store for an excess of three months, he said he sold about half at 10% of retail value. The figures already given indicate that each set had a retail value of approximately $72. He sold eight of these at 10% of this unit figure. Eight units at $7.20 amounts to $57.60.

The defendant states that he approached Mr. Howatt for payment of the unsellable inventory and Mr. Howatt refused.

LAW

[29] I am obliged to make a credibility finding in this case. I have instructed myself as to the correct method of approaching and accomplishing that task. In the cases of **Nova Scotia**

Community College v. Nova Scotia Teachers Union, 2006 NSCA 22, **Sable Mary Seismic Inc. v. Geophysical Services Inc., 2012 NSCA 33,** and **R. v. D.D.S., 2006 NSCA 34** the Nova Scotia Court of Appeal adopted as correct law in this province the approach set out in **Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.).** This case addressed the assessment of witnesses with an interest in the outcome and provides my fundamental and overriding guide in approaching my task**.**

[30] An excellent summary of the **Faryna** case and other relevant jurisprudence is provided in the decision of Justice Margaret Stewart in **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253** as follows:

> [20] ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:
>
>> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
>
> [21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:
>
>> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the

> particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> [22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

[31] I also take instruction from the words of Justice Stewart.

Although no court can be absolutely certain of the conversations between witnesses, in this particular case I favour the evidence of the defendant. It appeared to me that the defendant clearly was quite anxious to make a sale and returned to the defendant's place of business on a number of occasions. I am satisfied that it was likely that he was increasingly offering incentives for the defendant to purchase and it is logically probable that he could have made the representation that he would repurchase any unsold inventory. I also find it disturbing that the original invoice has never been produced. I found the defendant to give his evidence in a logical way and I found no inconsistencies in his evidence. I am satisfied that he most likely did agreed to take the product on the basis of the representation that any unsold product would be either purchased by Mr. Howatt or returned for credit. In short I found his explanations to be more logically probable than the assertions of Mr. Howatt. My assessment is based on "the

harmony with the preponderance of the probabilities" after considering the whole of the evidence.

However the defendant must pay for the product which in fact did sell. I find that the defendant is liable to pay for the product which he did sell at its wholesale cost of $216.00 and I also find that he should pay something for the 10 sets which he sold at a discounted value. In my view he should pay the $57.60 which he received for the set sold at a discounted value. I will give judgment to the claimant in the amount of $273.60.

There has been divided success in this matter and therefore I am not prepared to award costs to either party.

Dated at Yarmouth this 8th day of August, 2017.

Andrew S. Nickerson Q.C., Adjudicator