IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Carter v. Andy's Tire Shop et al.*, 2023 NSSM 69

Date: 20231103
Claim: No. 525546
Registry: Pictou

Between:

Francis Alexander Carter

Claimant

v.

Andy's Tire Shop, A-1 Tires Limited, Scotia Tire Service Ltd., and Wheel Store It

Defendants

Adjudicator:	Raffi A. Balmanoukian
Heard:	October 17 and November 1, 2023 via Teams
Appearances:	Francis Carter, for himself personally John MacDonald, Human Resources Manager, for the Defendants

By the Court:

[1] The Claimant succeeded in proving that the Defendants, or some of them, owe him money. But he did not prove how much. The Defendant(s) admitted verbally that they had run these calculations but although that calculation matrix was available, it was not introduced into evidence. It says that this amount is because the contract it drafted was "written wrong" and if the Court awards anything, it should be reduced. In this Court, where the rules of evidence are sometimes – indeed often - more akin to suggestions, and the parties are self-represented, what should I do in order to deliver justice?

[2] The Claimant is a former commercial sales representative for the Defendants. Although only Andy's Tire was served, Mr. MacDonald confirmed representing named Defendants and attorning to the Court's jurisdiction. The Claimant alleges that other entities, as well, owe him money in their capacities as businesses purchased or taken over by the named Defendants during his tenure.

[3] In January 2021 (mistakenly referenced in the letter of offer as January 4, 2020), the contract between the Claimant and Andy's Tire, Scotia Tire, and A-1

Tires took effect[1]. The Claimant was told to hit the road after a short relationship, some nine months; although the reasons for termination were not in evidence (the Claimant says "for no reason"), I am under the distinct impression the parting was not amiable.

[4] This is not a wrongful dismissal action; instead, it is an action for commissions the Claimant says are due to him.

[5] He was paid a base salary, plus certain benefits, which are not in dispute and are not alleged to be owing. The contract, which was apparently written in-house by Mr. MacDonald's predecessor in HR and approved by Mr. MacKenzie (general manager), was a first for them in this position.

[6] In addition to the base salary and benefits, Mr. Carter was to be paid a commission. The crucial section reads:

> You will be paid a commission of 10% of gross profit of all new commercial accounts and 2% of gross profit on all existing commercial accounts. The bonus will be paid out following the completion of month end statements[2]. A list of exiting accounts will be provided to you during your onboarding.

[1] Wheel Store It, an additional defendant, was not named in the contract. This appears to be a business name of Andy's Tire, rather than a separate legal entity. As such, commercial sales under the contract in that name would appear properly to be caught by the contract.

[2] It is worth noting that the original draft provided for an annual payout. This was revised during negotiation; clearly, the parties paid direct attention to this aspect of the remuneration package.

[7] A list of approximately 135 accounts was so provided, and was introduced in evidence. By contrast, over the nine months the parties spent together, the Claimant was paid a 2% commission on 21 accounts. The Defendants say no new accounts were opened that would trigger a 10% commission.

[8] The Claimant asserts that it is inconceivable that the Defendants only dealt with 21 commercial accounts during this period. As well, says he, in June 2021, Andy's Tire purchased three additional entities – MRT, Miller Tire, and Tirecraft. He says that these constitute "new accounts," to which he is entitled to a 10% commission for commercial customers. He argues that the contract "doesn't say anything about how I got [new accounts]."

[9] Lastly, he says that there is a symbiotic relationship between or among the defendants (and the new acquisitions), in which a commercial customer who needs service in an area where that particular store is located, can receive it at an affiliate, and as such any gross profit as a result is commissionable.

[10] Put together, the Claimant says that these additional transactions would entitle him to "close to the $25,000" jurisdictional limit for which he sues, based on his experience in the industry and with competitors. He also points to accounts that were ready to open at the time of his termination. He could not be more

specific than that. The Defendants refer to this not only as a past experience of no probative value, but as nothing more than a "gut feeling."

[11] There was no dispute as to the Defendants' calculation of "gross profit." The dispute is whether all commissionable transactions are captured in the 21-account printout presented in evidence (which generated a commission of $1,797.62, which is further acknowledged as having been paid).

Analysis and application

[12] The Defendants say – and I accept in the absence of evidence to the contrary – that Miller Tire, MRT, and Tirecraft are and remain separate entities and remain uncaptured by the contract at issue. It was unclear to me whether these were even legally under common control.

[13] I also accept the Defendants' denial that "a customer of one is a customer of all" for commercial customers in need outside their local area. I accept their evidence that if local service was unavailable to a customer, they would refer that customer to someone who could help, possibly a competitor. To the extent those referrals would be to a co-defendant (but not entities such as MRT, Miller Tire, or Tirecraft), commission would be capturable under the scope of the contract, and this decision, if during the employment period.

[14] However, I also accept the Claimant's argument that all commercial accounts with the named Defendants are commissionable for the employment period, not just the ones he had occasion to service or on whom he made sales or service calls. Although the contract appears to have been prepared without counsel (perhaps from a template) and was the Defendants' first incursion into this specific job posting, the parties clearly turned their minds to the commission structure and payment regime, and any ambiguity is to be construed against the drafter (the Defendants) under the principle of *contra proferentum*. There was no evidence that this is a case of mistake to which rectification might apply – the Defendants drafted it to include all commercial accounts, and turned its mind to how those would work. Although I disagree that new but distinctly separate legal entities are captured by the contract, I do agree with the Claimant that his interaction with commercial customers of Andy's, A-1 and Scotia is irrelevant for the commission to be triggered under the contract for the employment period. The only relevancy is whether the account existed as of January 4, 2021 or was newly activated during the employment period.

[15] On the second evening of hearing, the Defendant admitted that, under this interpretation, the commission payable would be $3,885, less the amount already paid. As stated, this was presented to me without documentation, although it was

apparently available to be generated with little effort. The Claimant, predictably, views this with circumspection and in his closing submissions asked for an "audit."

[16] The burden is on the Claimant to prove his case to a civil standard of a balance of probabilities. This would usually include proof of both entitlement and quantum. However, in this Court in which documentary production and discovery is a loose and sometimes non-existent process, the Claimant should not be prejudiced for information that is not available to him but is available to the Defendant(s), particularly where he is a self-represented layperson and unfamiliar with the (limited) means of compelling production, such as through the subpoena process.

[17] This is not to say that in every case – or even most cases – a Claimant should be told "you're right, but you haven't proven how right you are" and still succeed. Liability and quantum are both the burden of the Claimant, to a civil standard. Conversely, however and to repeat, a Defendant should not be allowed to skate away by virtue of information it has (and the Claimant does not) and which it has not produced.

[18] It is for this reason, among others, that the Civil Procedure Rules have provisions for accounting – and is a recognition that even in Supreme Court

proceedings, subsequent or parallel steps are sometimes needed to "crunch the numbers." It is well established that the Rules can provide "guidance and even direction" to this Court when its own (usually informal) process and procedure is silent or inadequate to do justice to the parties: *Malloy v. Atton*, 2004 NSSC 110 at para. 14; *Brown v. Newton*, 2009 NSSC 388 at para. 27.

[19] Rules 66.03 and 66.04 read:

> 66.03 Accounting before or after judgment
>
> (1) A judge who is satisfied on both of the following may order an accounting before or during the trial of an action or the hearing of an application:
>
> (a) the accounting is necessary for the adjudication of a claim;
>
> (b) it is just to order the accounting although claims are not finally adjudicated.
>
> (2) A judge who is satisfied that taking accounts is necessary to give effect to a final order, such as an order for a money judgment, may order an accounting.
>
> 66.04 Content of order
>
> (1) An order for an accounting must direct an account to be taken and may provide for an inquiry to be made into an account.
>
> (2) The order must require the following parties to prepare and file the following kinds of statements:
>
> (a) the party required to account, a detailed statement of receipts and disbursements and an accurate statement of assets and liabilities relevant to the accounting;
>
> (b) the other party, a statement of acknowledgements and disputes including the party's reasons for disputing a receipt or disbursement.
>
> (3) The order may include terms or directions on any of the following subjects:

> (a) a deadline for the party required to account to file financial statements;
>
> (b) a deadline for the other party to file a statement of acknowledgements and disputes;
>
> (c) disclosure of documents, such as books of account, receipts, and vouchers relevant to the disputed accounts;
>
> (d) discovery by the other party of the party required to account on the disputed accounts;
>
> (e) joining a person under Rule 35 - Parties, or appointing a person to represent an unascertained person under Rule 36 - Representative Party;
>
> (f) appointing a referee to take the account and inquire into disputed accounts, in accordance with Rule 11 - Reference;
>
> (g) appointing a time, date, and place for the account to be taken and inquiry to be conducted, if it is to proceed before a judge rather than a referee;
>
> (h) anything the judge considers reasonable or necessary.

[20] I am satisfied that Rule 66.03(2) provides a remedy, and should be applied here. This order for an accounting extends to the commercial accounts – I will return to its meaning in a moment – who did any business (either for cash or credit) with Andy's Tire, Scotia tire, or A-1 Tires between January 4, 2021 and October 4, 2021 both dates inclusive.

[21] These entities shall file with the Court, and provide to the Claimant, a statement of receipts and disbursements (that is to say, sales and returns and whether COD or on account) for this period no later than December 31, 2023, together with its assertion of gross profit on those transactions, calculated in a manner consistent with its prior practice (that is, the undisputed margins used in

the calculation of the commission statement previously provided). For clarity, this shall include all commercial accounts existing as of January 4, 2021 (and if there were no transactions for an account, such is to be stated), and existing and new accounts thereafter to and including October 4, 2021. This shall include all COD accounts or transactions which could reasonably be construed as commercial accounts; in the event a Defendant submits an account should not be counted as commercial, it is to so indicate and why. In the event that transactions do not have a customer name for whatever reason (such as a COD purchase without attribution, commonly if loosely referred to as "cash sales") these are to be identified together with gross profit calculation and why they should or should not be included in whole or in part as commissionable.

[22] They shall also provide the dates of opening of any commercial accounts, so that it can be determined whether the 2% or 10% commission applies. This includes but is not limited to the accounts claimed (and disputed) by the Claimant as being "new accounts," namely Hodson, CF Construction, Paul Davis, and at least one unnamed account in Truro. I will review and decide which (if any) commission applies, with opportunity for submissions noted below.

[23] It is unfortunate that "commercial accounts" is not defined in the contract. Again, *contra proferentum* applies, as does business common sense. The Claimant

says that “commercial” means anything that can be charged to an account (which I take as including anything in which the customer had an option between running a “tab” and paying up front, whichever they chose to do). I agree with the Claimant that “commercial” can include persons and entities with which a Defendant could have an ongoing relationship, including COD transactions. In other words, it excludes the consumer who is purchasing or installing tires on a personal use vehicle, but it does not need to be a corporation, fleet, or government. It implies an ongoing, but more than seasonal or personal wear-and-tear relationship. In case of ambiguity, again it is to be resolved in favour of the Claimant. I remain seized to resolve any disputes such as classification of commercial/non commercial, gross profit, or new/existing business.

[24] Pursuant to Rule 66.04(2)(b) and 66.04(3)(b), the Claimant shall have until February 29, 2024 to acknowledge or dispute the Defendants’ disclosure, and calculations. If there is such a dispute as communicated to the Court before that time, I remain seized to appoint a date and time for resolution of such dispute(s), and whether it shall proceed virtually or in person. I will settle the matter pursuant to Rule 66.05, to the extent applicable to the jurisdiction of this Court.

[25] I order that the Claimant shall recover his costs of filing, and costs of service.

[26] I will, with this decision, file with the Court the form of order giving effect to it, for distribution to the parties.

Balmanoukian, R., Small Claims Court Adjudicator