Court File No. CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BOOK OF AUTHORITIES OF THE MONITOR
(Appeal of Thorneloe University)

November 9, 2022

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Case Law

1. *Target Canada Co. (Re)*, 2017 ONSC 2595

2. *Tiercon Industries Inc.* (2009) 62 C.B.R. (5th) 90 (ONSC) *aff'd* 2010 ONCA 666

3. *J&B Engineering v. Smith*, 2007 CarswellOnt 8633 (ONSC)

4. *Indu Craft v Bank of Baroda*, 47 F3d 490, 1995 US App LEXIS 2193 at 7

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5. Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3

6. Ephraim Stulberg, "Adding up the Damage: Lost Profits vs. Business Value", *The Lawyer's Weekly* 34:35 (30 January 2015) (QL)

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Target Canada Co. (Re)

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In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

G.B. Morawetz R.S.J.

Judgment: May 19, 2017
Docket: CV-15-10832-00CL

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Jeremy Dacks, Shawn T. Irving, for Target Canada Entities

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications

Contracts
XVI Franchising contracts
XVI.4 Construction and interpretation
XVI.4.e Default and termination provisions

Headnote

Contracts --- Franchising contracts — Construction and interpretation — Default and termination provisions

Franchisor was chain of retail department stores that had pharmacies in its stores — Franchisees owned and/or operated franchise pharmacies within stores pursuant to franchise agreements with five-year term — Agreements provided franchisor could terminate agreements after three years without cause by giving 60 days' notice — Franchisor was granted protection under Companies' Creditors Arrangement Act, and claims procedure order was made — Claims officer determined franchisees' damages were limited to three-year period, that 60-day notice period could occur before end of three-year period, that franchisees had some duty to mitigate despite agreements providing for contractual damages, and that franchisees were responsible for relocation and shut-down costs without contributions from franchisor — Franchisees brought motion pursuant to claims procedure order appealing from officer's rulings — Motion dismissed — There were no palpable and overriding errors of fact nor clear errors of law — Fact that franchisor had committed to providing support program to all franchisees for entire five-year term did not preclude franchisor from relying on termination provision — Officer was correct in applying prior authority and assuming none of franchisee agreements would have remained in effect past earliest dates on which franchisor could have terminated them — There was no palpable and overriding error in determination that franchisor could deliver notice of termination 60 days before three-year anniversary of agreements, such that termination would occur on third anniversary — There was no reviewable error in determination that franchisees continued to have some duty to mitigate even though agreements provided for contractual damages and that franchisees were responsible for relocation and shut-down costs without contributions from franchisor.

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Cases considered by *G.B. Morawetz R.S.J.*:

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Bank of America Canada v. Mutual Trust Co. (2002), 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 287 N.R. 171, 159 O.A.C. 1, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — considered
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General Motors Corp. v. Tiercon Industries Inc. (2009), 2009 CarswellOnt 8164, 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to
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Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — followed
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MOTION by franchisees pursuant to claims procedure order appealing from common issues rulings of claims officer.

***G.B. Morawetz R.S.J.*:**

1 Sutts Strosberg LLP, in its capacity as Court Appointed Pharmacist Representative Counsel ("Rep Counsel") brought this motion pursuant to the Claims Procedure Order dated June 11, 2015 [2015 CarswellOnt 9199 (Ont. S.C.J. [Commercial List])] ("CPO") appealing the Common Issues Rulings of the Claims Officer, the Honourable Dennis R. O'Connor Q.C. (the "Claims Officer"), dated, respectively, June 28, 2016, August 19, 2016 and October 15, 2016 (the "Rulings"). T. Pharmacy Ltd. also brought a motion appealing the Rulings.

2 This endorsement relates to both motions.

3 At issue is the Claims Officer's determinations regarding certain common issues relating to the claims of a number of former pharmacist franchisee claimants who owned and/or operated franchise pharmacies within Target Canada Co.'s ("TCC") former retail outlets (such claimants collectively, the "Pharmacist Franchisees").

4 The list of common issues is set out in the Order of the Claims Officer dated May 3, 2016, attached as Schedule "A".

5 Seventy-five of the eighty originally disputing Pharmacist Franchisees have previously accepted offers made by the Monitor. These appeals were brought by the five remaining unsettled Pharmacist Franchisee claimants.

6 In this appeal, Rep Counsel raises three issues dealt with in the Rulings:

(a) EBIT Support Program. Is the Pharmacist Franchisee's period of loss resulting from the disclaimer of its Franchise Agreement the full remainder of the five (5) year period from the opening date of its Pharmacy?

(b) Effective Immediately clause. Properly interpreted, does Section 12.1 of the Franchise Agreement permit delivery of the sixty (60) day notice of termination prior to the third anniversary of the opening of the Pharmacy?

(c) Duty to mitigate. Are the Pharmacist Franchisees under a legal duty to mitigate under the principles set out in *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 (Ont. C.A.), given that the Franchise Agreements are found to be contracts of adhesion unilaterally terminable without cause by the Franchisor and the amount payable on termination limited by contract formula?

7 The Monitor conceded that the Pharmacist Franchisees are entitled to the assessment of the value of their claims and mitigation on an individual basis. Accordingly, a fourth ground of appeal respecting the uniform mitigation approach earlier used by the Monitor is not required to be pursued.

8 In addition to the issues raised by Rep Counsel, the following issues have also been identified by the appellant, T. Pharmacy Ltd.:

(d) Did the Claims Officer err in determining that the Pharmacist Franchisees are not entitled to any additional recovery in respect of the termination and relocation expenses incurred in winding down their Target pharmacy operations?

(e) Did the Claims Officer err in determining that the Pharmacist Franchisees are not entitled to any additional recovery in respect of generic drug rebates other than as set out in Franchise Agreement?

(f) Was the Monitor's methodology appropriate for assessing the Pharmacist Franchisees' lost future profits claim?

(This final issue was not addressed by reasons from the Claims Officer, having been resolved on consent of the parties (including then counsel for T. Pharmacy Ltd.) in the June 24 Order.)

9 The jurisdiction and standard of review applicable to this appeal are not in dispute.

10 The court has jurisdiction to hear the appeal pursuant to paragraph 44 of the Claims Procedure Order.

11 The applicable standard of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 8 and 25, which dictates that on appeal, findings of fact and factual inferences are not to be reversed absent a "palpable and overriding error". On a question of law, the standard is one of correctness.

12 *Housen*, *supra* relates to the review of decisions of a trial judge. This court has held that the same standard of review is to apply on an appeal of a Claims Officer's Ruling in an insolvency proceeding (see: *General Motors Corp. v. Tiercon Industries Inc.* (2009), 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) at para. 12, aff'd 2010 ONCA 666 (Ont. C.A.).

13 Counsel to the Monitor also noted that the Supreme Court of Canada has recently determined that the standard of review to be applied to a question of contractual interpretation is the same as for a question of fact, namely, a palpable and overriding error, holding:

> Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. See *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para. 50.

14 In the hearings before the Claims Officer, the record included documentary and affidavit evidence, expert reports, written and oral submissions from the Monitor, the appellants and the Target Canada entities.

Issue I: EBIT Support Program

15 One of the issues before the Claims Officer was with respect to the determination of the period of time for which the Franchisees should be entitled to damage to cover their loss of profit. Section 12.1 of the Franchise Agreement states:

> At any time following the third anniversary of the opening date of the Pharmacy, Franchisor may, at its option, terminate this Agreement without cause and all rights granted herein effective immediately, upon sixty (60) days prior written notice.

16 Accordingly, the Monitor based its assessment of damages on the assumption that the Franchisor would terminate each of the Franchise Agreements three years from the opening of the pharmacy. The Franchisees disputed the Monitor's interpretation of Section 12.1 and argued that Section 12.1 should be interpreted in light of the surrounding circumstances. One of those surrounding circumstances was the Franchisor's commitment to provide an EBIT Support Program to all Franchisees for the entire 5 year initial term of their Franchise Agreements. The Franchisees argued that in light of that commitment, it would have been a breach of the duty of good faith for the Franchisor to exercise its right of early termination under Section 12.1 of the Franchise Agreement.

17 The Claims Officer noted that the Franchisees did not put forward a competing interpretation to that found in the clear language of Section 12.1 and applied by the Monitor. He concluded that evidence of surrounding circumstances was not needed and would not be helpful in interpreting Section 12.1. The only exception was that evidence of the surrounding circumstances might be relevant to the Effective Immediately issue.

18 Rep Counsel submitted that the Claims Officer erred in determining that it was not a breach of a Franchisor's common law and statutory duties of good faith and fair dealing owed to each of these Franchisees to renege on the EBIT Support Program commitment by early termination in the third year of the Initial Term.

19 Rep Counsel further submitted that in the measurement of their damages, the Pharmacist Franchisees are legally entitled to be put in the same position they would have been in had the Franchise Agreements been performed by the Franchisor. Rep Counsel points out that a ruling in favour of the Pharmacist Franchisees on this issue would increase their Future Loss of Profits claim by two years to coincide with the Initial Term of five years, which they submit was the promised period of extended and enhanced financial benefits under the EBIT Support Program.

20 Rep Counsel submitted that applying the good faith obligation (referenced in Rep Counsel factum at paras. 42-49) to the facts that inform the EBIT Support Program, the Program requires consideration of three components - base guarantee, guest experience and prescription/script growth - which require ongoing pharmacy operations. Further, counsel submitted that the EBIT Support Program requires the continuation of pharmacy operations under the Franchise Agreement for the full five year Initial Term. Rep Counsel also submitted that the unqualified commitments by the Franchisor to enhance and extend the EBIT Support Program in June 2014 throughout the full Initial Term necessarily incorporates the commitment to operate throughout the Initial Term.

21 Rep Counsel further submitted that the Franchisor could not, under any circumstances, exercise early termination of the Franchise Agreements during the Initial Term without breaching the commitments made under the EBIT Support Program. In such circumstances, it would be a breach of the Franchisor's duty of good faith to exercise early termination under Section 12.1 of the Franchise Agreement.

22 The Claims Officer was alive to all the issues raised by Rep Counsel. The issue is referenced in the Ruling of June 28, 2016 in paragraphs 10, 16 and 23. However, it is in the Ruling of October 25, 2016, where this issue is extensively reviewed by the Claims Officer commencing at paragraph 35. The Claims Officer reviews the evidence at paragraphs 35-39.

23 The analysis commences at paragraph 40 and paragraph 41 is especially relevant:

> I find, as a matter of fact, that the evidence does not establish the "clear and unequivocal commitments" upon which the Franchisees' argument is premised. There can be no doubt that the Franchisor's representations and the various documents surrounding the EBIT Support Program demonstrated a clear intention, on the part of the Franchisor, to continue EBIT Support payments during the "initial five year term" of each Franchise Agreement. The issue, however, is whether those commitments could reasonably be read as superseding the Franchisor's right to terminate the Franchise Agreements under Section 12.1.1 find that they cannot. In my view, the only reasonable way to interpret the various statements and doctrines is that the Franchisor undertook to make EBIT Support payments during the initial five year term, under those Franchise agreements that remained in effect during that period. As I explained in My Previous Ruling, under the *Open Window* principle, I am required to assume that none of the Franchisee Agreements would have remained in effect past the earliest dates on which the Franchisor could have terminated them pursuant to Section 12.1.

24 For clarity, the *Open Window* principle is fully described in the Ruling of June 28, 2016, commencing at paragraph 40. The principle was formulated in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) *("Open Window")* and stands for the proposition that where an agreement has multiple modes of performance, the expectation damages assume the mode of performance that is the least burdensome to the defendant.

25 The Claims Officer based his conclusions upon eight specific findings, all of which are set out in paragraph 42 of the October 25, 2016 Ruling.

26 At paragraph 43, the Claims Officer summarizes the issue:

> In summary, I conclude that the Franchisees have failed to establish that there were no circumstances under which the Franchisor could have exercised its right of early termination under Section 12.1 of the Franchise Agreements while acting in good faith. As a result, I am required by the principle in *Open Window* to assume when calculating damages that the Franchisor was entitled to exercise the right of early termination on the earliest possible date. The answer to Common Issues 2 and 3 therefore remains, "no".

27 The Claims Officer's findings of fact and mixed fact and law attract substantial deference. I see no palpable and overriding error. On legal issues, the Claims Officer's reliance on the principle in *Open Window* is, in my view, correct. I give no effect to this ground of appeal.

Issue 2: Effective Immediately Issue

28 Rep Counsel submitted that the Effectively Immediately part of Section 12.1 of the Franchise Agreement is the ambiguous. Given than a franchise agreement is a contract of adhesion, any ambiguity must be read *contra proferentem* to the Franchisor. Rep Counsel submitted that properly read, Section 12.1 provides that notice of early termination may only be delivered "on or after the third anniversary of the opening date of the pharmacy". The Franchise Agreements and all Pharmacist Franchisees' rights would then terminate sixty days after delivery of the written notice. Given my conclusion with respect to the EBIT Support Program issue, a ruling in favour of the Pharmacist Franchisees on the Effectively Immediately issue will increase their Future Loss of Profit Claims by sixty days.

29 In the June 28, 2016 Ruling, the issue is clearly set out as follows:

> Issue No. 1: Based on ordinary contractual interpretation and damages assessment principles, does Section 12.1 of the Franchise Agreement operate to limit the Franchisees' recoverable losses under the Franchise Agreement to a period of three years from the opening of such Franchisees' pharmacy? Can the question be answered "Yes" without further evidence?

30 In his extensive analysis, the Claims Officer reviewed the legal principles governing contractual damages. He referenced the decision of the Supreme Court of Canada in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 (S.C.C.), and *Open Window*. He also noted that the Court of Appeal for Ontario specifically applied the *Open Window* principle to contracts of adhesion. See *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.).

31 The Claims Officer then addressed the Franchisees' unconscionability argument commencing at paragraph 53 of the Ruling. He rejected all arguments put forth by the Franchisees. He also noted that the Franchisees had, in any event, failed to point to any evidence that they might call that could lead the Claims Officer to conclude that Section 12.1 is unenforceable because of unconscionability.

32 The Claims Officer then addressed the Franchisees' argument that in order to properly interpret the Franchise Agreements, including Section 12.1, he must consider evidence of the surrounding circumstances, even if there is no ambiguity in the provisions of the contract. The Claims Officer agreed that he should hear all the evidence of surrounding circumstances that could possibly assist him in interpreting Section 12.1. However, the question was whether there was any relevant evidence, in addition to what was already in the record.

33 The Claims Officer did permit the parties to adduce additional evidence and make additional submissions with respect to the correct interpretation of the words "Effective Immediately", as used in Section 12.1 of the Franchise Agreements. This aspect of the Issue was addressed in the Ruling dated October 25, 2016.

34 At paragraphs 12 - 15, the additional evidence was reviewed.

35 The Claims Officer determined that Section 12.1 of the Franchise Agreements permitted the Franchisor to deliver a Notice of Termination sixty days *before* the three year anniversary of the relevant Franchise Agreement, such that the termination would occur on the third anniversary of the pharmacy's opening.

36 In his previous Ruling, the Claims Officer held that the language of Section 12.1 was clear and capable of only one interpretation. Specifically, he found that the effect of this section was to limit each Franchisee's recoverable losses under the Franchise Agreements to a period of three years from the opening of such Franchisee's pharmacy.

37 This finding was subject to one caveat. This related to the interpretation of the words "Effective Immediately", as used in Section 12.1. The Franchisees argued that these words should be interpreted so that the Franchisor could only deliver notice after the third anniversary of the opening of the Franchise, with the sixty day period running from that date.

38 The Monitor submitted that the Franchisor could deliver notice sixty days before the anniversary, so that the termination would occur on the third anniversary of the pharmacy's opening. The difference is that on the Franchisees interpretation, the relevant period for calculating their lost profits would be sixty days longer than that assessed by the Monitor. Counsel to the Monitor submitted that there was no basis for the court to interfere with the Claims Officer's conclusions.

39 The analysis of the Claims Officer is set out at paragraphs 16-29.

40 The Claims Officer concludes that the plain and ordinary meaning of the language in Section 12.1 must prevail and as he was able to interpret the section on the basis of ordinary principles of contractual interpretation, it was neither necessary nor appropriate to resort to the *contra proferentem* principle.

41 The Claims Officer concluded that for the purposes of assessing damages, the Monitor was correct in using a termination date on the third anniversary of the Franchise Agreements and not sixty days thereafter.

42 In my view, a complete answer to all arguments submitted by Rep Counsel on this issue has been provided by the Claims Officer, as summarized in the factum submitted by counsel for the Monitor. Paragraph 86 states:

> The Claims Officer applied well established law and principles and interpretation to reach a predictable conclusion, and the Monitor respectfully submits that this finding should be upheld by this Court. His interpretation of the contract was a mixed question of fact and law and cannot be set aside absent some palpable and overriding error, which there is not.

43 This issue was exhaustively reviewed by the Claims Officer. I accept the submissions of counsel to the Monitor. There is no palpable and overriding error on this issue. I give no effect to this ground of appeal.

Issue 3: Duty to Mitigate

44 On the Duty to Mitigate issue, the Claims Officer determined that the Pharmacist Franchisees further losses are temporally limited by the Franchisor's early termination rights, with their damages limited by the compensation formula set out in Section 12.8(b) of the Franchise Agreement.

45 The appellants argued that having determined that the Franchisor has replaced the uncertainty of common law assessment of contract damages with the certainty of a contract formula for lost recovery, there is no legal duty to mitigate under the principles set out *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 (Ont. C.A.).

46 The issue for determination is whether the Claims Officer erred in determining that the Pharmacist Franchisees are obligated to mitigate their losses with respect to their claims for lost future profits.

47 The appellants take the position that liquidated damages are not usually subject to an obligation to mitigate, and that all of the damages sustained are properly claimed as liquidated damages.

48 The Claims Officer addresses this issue in the August 19, 2016 Ruling commencing at paragraph 2. He rejects the argument put forth by the appellants. The Claims Officer fully addressed the argument based on *Bowes*, *supra*, noting that the problem with the argument put forth by the appellants is that in addressing the Franchisees claims, the Monitor did not apply mitigation to the payments required under Section 12.8(b) (Gross Sales Payout) of the Franchise Agreements. The Claims Officer notes that those are liquidated payments and as such, are not subject to mitigation. The Claims Officer adds that the Monitor, quite properly, has allowed the two percent (2%) payment in full for each of the Franchisees with no reduction for mitigation.

49 The Claims Officer also referenced the argument put forth by the appellants that because one of their claims is for contractually provided liquidated amounts (the 2%) their loss of future profit claims should be subject to the same principled that mitigation does not apply to liquidated contractually provided for damages.

50 The Claims Officer did not accept the argument of the appellants. He added that the Franchisees did not provide any authority for this approach and as he was not surprised that there does not appear to be any principled reason why because one claim is for a liquidated amount, other claims that are for non-liquidated damages should, for mitigation purposes, be treated as liquidated claims.

51 A second argument was put forward by the Franchisees as to why there is no duty to mitigate. The Franchisees took the position that, as a result of the June 28, 2016 Ruling, the Franchise Agreement should be treated as fixed-term contracts.

52 The Franchisees relied on *Bowes*, *supra* and *Howard v. Benson Group Inc.*, 2016 ONCA 256 (Ont. C.A.).

53 The Claims Officer addressed this argument at paragraphs 14-21 and concluded that the Franchisees were under a duty to mitigate the damage resulting from their claims for future loss of profits. The Claims Officer specifically refused to extend the principles narrowly applied to employment law (*Bowes* and *Howard*) to the franchisee context and that there was no precedent for any such extension. I agree with this conclusion.

54 On this issue, I conclude that the appellants have not demonstrated any error committed by the Claims Officer that would attract any type of appellate review. I give no effect to this ground of appeal.

T. Pharmacy

55 I now turn to additional T. Pharmacy appeals issues.

56 The issues raised in the Initial Factum, are more clearly restated in the Addendum to the Factum dated January 31, 2017.

57 Mr. Gavrilidis indicated that he supported the positions put forward by Rep Counsel.

Issue 4: Methodology for Assessing Lost Future Profits Claim

58 T. Pharmacy raised issues with respect to the methodology used by the Monitor for determining lost future profits.

59 This issue was resolved on consent in the Claims Officer's June 24, 2016 Order.

60 Paragraph 1-2 of the June 24 Order provides:

> This Court orders that Issues 4(i) and 4(ii) on the Common Issues List shall be answered in the affirmative such that Issue 4 is hereby fully and finally resolved without the need for any further adjudication.
>
> This Court orders that the Monitor shall not be required to file any evidence in respect of Issue 4.

61 Section 133(a) of the *Courts of Justice Act* provides that no appeal may be taken from an order made with the consent of the parties, without leave of the court.

62 I am in agreement with the submission of counsel to the Monitor to the effect that since T. Pharmacy Ltd. has not sought leave of the court to reopen the consensual resolution of Common Issues 4 set out in the June 24 Order, it is improper to include this issue in the appeal.

63 In my view, the issue has not been properly put before me and it is not necessary for me to consider same.

Issue 5: Recoverability of Termination Expenses

64 The position of the Franchisees is that they are entitled to recovery in respect of the types of expenses listed in Issue 5. Issue 5 reads as follows:

> Are the Franchisees also entitled to any recovery on account of any of the following:
>
> (i) any amounts paid for employees' salaries, fees, expenses, notices of termination, payment to employees in lieu of notice and severance pay?
>
> (ii) any amounts paid to contractors during the shut-down?
>
> (iii) any costs of complying with regulatory requirements to shut down and/or to continue operation as an independent pharmacy?
>
> (iv) any loss in value of inventory and other assets? and
>
> (v) any costs incurred in respect of relocation of its pharmacies?

65 On this issue, I accept the submissions of counsel to the Monitor to the effect that these expenses are not recoverable. Under the Franchise Agreement, whenever and however the Franchise Agreement is terminated, the Pharmacist Franchisee is responsible for relocation and shut-down costs without contributions from the Franchisor. The Claims Officer extensively reviewed this issue in the June 28, 2016 Ruling commencing at paragraph 122.

66 The Claims Officer made reference to principles developed earlier in his Ruling to the effect that the proper approach to determine whether any of the Franchisees are entitled to recovery in respect of termination expenses is to ask whether they would have incurred such expenses if the Franchisor had terminated the Franchise Agreement after three years, pursuant to Section 12.1.

67 The Claims Officer again referenced the *Open Window* principle, and carefully reviewed the scheme of the Franchise Agreements with respect to termination. At paragraph 139 of his Ruling, he again stated the question that he had to answer, namely, whether there is anything in the Franchise Agreements that would entitle the Franchisees to recover the termination expenses, not whether there are sections that expressly preclude such recovery. He found that nothing in the Franchise Agreements would have entitled the Franchisees to recover any portion of the termination expenses, in the event that the Franchise Agreements had been terminated pursuant to Section 12.1 of the Franchise Agreements.

68 At paragraph 147, the Claims Officer concluded:

> ... I conclude that there was no contractual bargain between the parties that the Franchisees would receive upon termination anything other than the 2% Payment. I am satisfied that the overall intent of Franchise Agreements was that the Franchisees, independent contractors, should bear their own costs of doing business, including any costs associated with the termination of the Franchise Agreements, whether that be at the end of a five year term, or after three years, pursuant to Section 12.1.

69 I am satisfied that the Claims Officer's conclusion are correct as a matter of fact and law and that no reason has been provided that would cause me to interfere with those determinations.

70 The Claims Officer did provide the Franchisees with an opportunity to adduce evidence establishing what he referred to as "non-Section 12.1 expenses", that is, expenses that would not have been incurred if the Franchise Agreements had been terminated pursuant to Section 12.1 in the normal course, rather than disclaimed in the CCAA proceedings.

71 T. Pharmacy advanced the argument that patient files, which were given to the Pharmacist Franchisees by TCC Pharmacy Post Disclaimer so that the Pharmacist Franchisees could carry on business if they so choose, somehow force the Pharmacist Franchisees to relocate, which they would not have done as these unwelcomed patient files had not been forced upon them.

72 This argument was rejected by the Claims Officer in the August 19 Ruling at paragraphs 52-60.

73 The Addendum Factum also sets out on page 24 that T. Pharmacy should receive a recovery in respect of the bank debt it incurred in opening a new pharmacy operation.

74 This argument was rejected by the Claims Officer in the June 28 Ruling at paragraphs 138-139. The Claims Officer noted that it is inherent in the Franchisees status as independent contractors that the Franchisees be responsible for their own costs and expenses. The Claims Officer found nothing in the Franchise Agreements that would have entitled the Franchisees to recover any portion of the termination expenses, in the event that the Franchise Agreements had been terminated pursuant to Section 12.1 of the Franchise Agreements.

75 I am satisfied that the Claims Officer's conclusions are correct statements of fact and law, and there is no basis on which to interfere with these conclusions. I give no effect to this ground of appeal.

Issue 6: Generic Drug Rebates

76 T. Pharmacy also submits that it should receive a recovery based on rebates received by TCC Pharmacy, above what is provided in the Franchise Agreements at Section 5.3. T. Pharmacy takes the position that TCC Pharmacy breached paragraph 5.2 of the Franchise Agreement by not sharing rebate allowances in Ontario, which are not prohibited by law.

77 Counsel to the Monitor submitted that the Monitor's assessment of the Pharmacist Franchisees claim included the contemplated recovery of respective generic drug rebates, based on a percentage of each Pharmacist Franchisees historical

rebate payment received from TCC Pharmacy. Specifically, the Monitor's lost profit calculation issued included a recovery line item for "discounts and rebates" under the "other operating income" heading. The Monitor contended that the lost profit calculation did recognize the only form of rebates required under the Franchise Agreements that could be shared with the Pharmacist Franchisees and that there was no basis for T. Pharmacy assertion that the Monitor did not recognize any recovery on account of rebates.

78 The Claims Officer addressed this issue in the June 28 Ruling at paragraphs 162-164. The Claims Officer was satisfied that the language of Section 5.3 of the Franchise Agreements was clear and that the first and fourth paragraphs indicate that the Franchisor is entitled to receive and retain rebates for its own use without accounting or sharing with the Franchisees. As such, there is no duty to account or to disclose the Franchisees in the amount of such rebates. The Claims Officer also referenced the third paragraph as being an exception to the general approach found in the first and fourth paragraphs and that viewed objectively, the language provides for a scheme where there is no contractual obligation on the part of the Franchisor to share or to account for rebates.

79 I am satisfied that the Claims Officer reached a correct conclusion of fact and law in this finding and that there is no basis for appellate intervention. I give no effect to this ground of appeal.

Disposition

80 In the result, the appeals brought by the five remaining unsettled Pharmacist Franchisees claimants do not establish any palpable and overriding error of fact, nor a clear error of law. There is no basis to interfere with the Claims Officer's Ruling. Accordingly, the appeals are dismissed.

81 If the parties are unable to agree on the issue of costs, a 9:30 a.m. appointment should be scheduled through the Commercial List Office.

Schedule"A"

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (the *"Applicants")*

FINAL LIST OF COMMON ISSUES AS DETERMINED MAY 3, 2016

Target Canada Pharmacy Franchising LP *("TCC Pharmacy")*, was franchisor to 94 separate franchisees (individually a *"Franchisee"*, and collectively, the *"Franchisees")* operating in-store Target-branded pharmacies across Canada, outside of Quebec. The in-store pharmacies were operated pursuant to franchise agreements between each Franchisee and TCC Pharmacy, as franchisor, and related documents and agreements, Each Target Canada Pharmacy Franchise Agreement (each, a *"Franchise Agreement")*, each Target Pharmacy Franchise Disclosure Document (including any applicable Statements of Material Change), franchise amending agreements entered into by certain of the Franchisees (for example, conversion bonus agreements), and the Financial Support Package 2014 as amended by the letter from Jeff May dated June 13, 2014 outlining the details of the EBIT Top Up Support Program are collectively, and as applicable to each Franchisee, referred to herein with the Franchise Agreement as the *"Franchise Documents"* [1] The Franchise Agreement granted each Franchisee a license to operate the Target-branded pharmacy using certain Target Pharmacy trade-marks. The Franchisees were typically independent corporations which, in the majority of cases, were wholly-owned by a licensed pharmacist (individually, a *"Pharmacist"*, and collectively, the *"Pharmacists").* Both the Franchisee and the Pharmacist is a party to the Franchise Agreement because, among other things, in order to operate a pharmacy franchise, a licensed pharmacist is required under applicable regulations to be present at the

premises during operating hours. The Franchisees and Pharmacists are hereinafter collectively referred to as the *"Pharmacist Franchisees"*. In addition to the entitlements set out in the express terms of the Franchise Agreement, TCC Pharmacy introduced and implemented the EBIT Top Up Support Program in February 2014 to provide financial support to eligible Franchisees, which support program was modified and enhanced for the benefit of eligible Franchisees in June 2014.

The Monitor and Pharmacist Representative Counsel agree that the appropriate measure of the damages arising from the disclaimer of each Franchise Agreement is that the Franchisee should be put in the same position in which it would have been had the Franchise Agreement been performed by TCC Pharmacy.

The common issues of the Pharmacist Franchisees are as follows:

DISCLAIMER OF FRANCHISE AGREEMENTS

1. Based on ordinary contractual interpretation and damages assessment principles, does Section 12.1 of the Franchise Agreement operate to limit the Franchisee's recoverable losses under the Franchise Agreement to a period of three years from the opening of such Franchisee's pharmacy? Can the question be answered 'Yes' without further evidence?

2. If the answer to Issue 1 is yes, does the common law duty of good faith and/or the statutory duty of good faith and fair dealing under applicable franchise legislation [2] in the Regulated Provinces [3] impact TCC Pharmacy's ability to rely on such provision to limit the recoverable losses of Franchisees? Can the question be answered 'No' without further evidence?

3. If the answer to Issue 1 is yes, does the common law duty of honest performance impact TCC Pharmacy's ability to rely on Section 12.1 of the Franchise Agreement to limit the recoverable losses of Franchisees? Can the question be answered 'No' without further evidence?

4. Is the methodology set out in each Notice of Revision or Disallowance issued by the Monitor to each Franchisee a correct approach to measure:

(i) Joss of future profits (including treatment of the OTC Royalty Payment and EBIT Top Up Support Program) in connection with the Franchise Agreement; and

(ii) Gross Sales Payout, as set out in section 12.8(b) of the Franchise Agreement?

With respect to Common Issue #4, it is agreed that the Monitor will justify its approach to the determination of damages with evidence. The Monitor will not assert its methodology is entitled to deference,

5. Are the Franchisees also entitled to any recovery on account of any of the following:

(i) Any amounts paid for employees' salaries, fees, expenses, notices of termination, payment to employees in lieu of notice, and severance pay?

(ii) Any amounts paid to contractors during shut down?

(iii) Any costs of complying with regulatory requirements to shut down and/or to continue operation as an independent pharmacy?

(iv) Any loss in value of inventory and other assets?

(v) Any costs incurred in respect of relocation of its pharmacy?

(vi) Any other obligations upon shut down? *[NTD: To be identified by Pharmacist Representative Counsel by May 24, otherwise to be removed.]*

Can the question be answered 'No' for any of these categories without further evidence?

6. If the answer to any of the items under Issue 5 is yes;

(i) Does the aggregate amount of such entitlements exceed the $25,000 amount allowed by the Monitor "to compensate [each Franchisee] for certain costs incurred and other miscellaneous items"?

(ii) If the answer to Issue 6(i) is yes, what additional amount would be reasonable?

MITIGATION

7. The claimants acknowledge that they had a duty to mitigate in the circumstances of this case. The common issue to be determined, if possible, is whether a uniform approach or approaches to mitigation should be adopted.

OTHER ISSUES

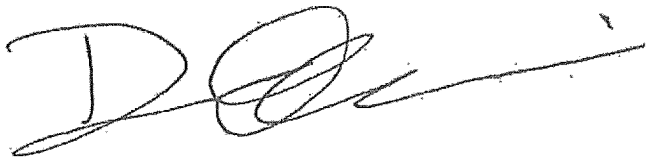
8. Are the Franchisees entitled to any revenues received by the Franchisor or its Affiliates before or after the Initial Order based on the sale of products and services to the Franchisees other than as provided for in the Franchise Agreement? Can this question he answered 'No' without further evidence?

If the answer to 8 is 'Yes', should there be an accounting?

CONFIRMATION OF ISSUES

Pharmacist Representative Counsel hereby confirms that the above list is an exhaustive list of the common issues of the Pharmacist Franchisees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2016.



Graphic 1

Footnotes

1 Unless otherwise stated, references to a particular section of the Franchise Agreement herein shall refer to the Target Canada Pharmacy Franchise Agreement among each Pharmacist Franchisee and TCC Pharmacy.

2 Specifically, *Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000*, c 3; *Franchises Act, RSA 2000*, c F-23; *Franchises Act*, RSPEI 1988, c F-14.1; *Franchises Act*, SNB 2014, c; *The Franchises Act*, CCSM c F156.

3 Specifically, Ontario, *Alberta*, New Brunswick, Prince Edward Island and Manitoba (collectively, the "*Regulated Provinces")*.

End of Document

2009 CarswellOnt 8164
Ontario Superior Court of Justice [Commercial List]

General Motors Corp. v. Tiercon Industries Inc.

2009 CarswellOnt 8164, [2009] O.J. No. 5580, 183 A.C.W.S. (3d) 1110, 62 C.B.R. (5th) 90

GENERAL MOTORS CORPORATION (Plaintiff) and TIERCON INDUSTRIES INC. (Defendant)

Morawetz J.

Judgment: December 23, 2009
Docket: 05-CL-5854

Counsel: R.B. Moldaver, Q.C. for Appellant Landlord, Galanda Properties Inc.
D.V. MacDonald for Royal Bank of Canada, as Agent for itself
S. Aggarwal, R. Moncur for General Motors Corporation
M. R. Sims for Zeifman Partners Inc., in its capacity as the court appointed Receivers and Manager of Tiercon Industries Inc.

Subject: Corporate and Commercial; Civil Practice and Procedure; Property; Insolvency

Headnote

Debtors and creditors --- Receivers — Possession of receiver — General principles

Landlord filed post-filing claim of $4,390,452 for repair, maintenance, replacement and restoration of plant leased by defendant and for realty tax arrears — Receiver disallowed claim except for $7,000 — On appeal, claims officer determined that issues relating to scope of liability should be separated from issues relating to quantification of damages — In his interim ruling, claims officer found receiver was not liable for damages caused to premises by defendant, was responsible for damages caused while receiver was in occupation, but was not responsible for cost of restoring premises back nor for removing fixtures — Claims officer issued ruling disallowing landlord's claim against receiver for $34,829.76 in tax arrears — Judge upheld interim ruling and ruling — In his final ruling, claims officer found landlord suffered $53,283.72 damages for receiver's failure to fulfil occupation obligations, $112,978 damages for receiver's failure to fulfil receiver repair obligations, $513,526 damages for defendant's failure to fulfil end-of-lease restoration obligations, and found that since none of listed assets or other assets removed by receiver were tenant's fixtures, receiver did not incur receiver restoration obligations — Landlord brought motion to appeal claims officer's decision — Motion dismissed — Principles set out by claims officer with respect to whether equipment constituted fixtures or chattels were correct — Claims officer's determination that specific claims were end of term obligations of defendant with no liability to receiver should not be interfered with, absent palpable and overriding error, and his determinations were supported by record — Claims officer made no error in his findings with respect to occupation obligations — There was no error in principle in assessing damages and allocating those items as set out by claims officer on basis of his assessment of evidence — Claims officer was correct in concluding that party who was entitled to compensatory damages for repairs was not entitled to profit earned in conducting repairs itself or through entity which was alter ego of claimant — There was no error in principle in claims officer's costs award.

MOTION by landlord to appeal claims officer's decision.

***Morawetz J.*:**

Background

1 The landlord, Galanda Properties Inc. ("Galanda" or the "Landlord") brought this motion to appeal the decision of David E. Baird, Q.C., Claims Officer (the "Claims Officer") dated February 25, 2009 including his decision with respect to costs (the "Final Ruling").

2 Galanda seeks an order that the decision of the Claims Officer be reversed and that in its place judgment issue awarding Galanda the amounts claimed including its costs.

3 The Claims Officer was appointed pursuant to the Order of Cameron J. of July 11, 2006 (the "Claims Procedure Order"), to determine the amounts, if any, owing by Zeifman Partners Inc. (the "Receiver") to Post-Filing Claimants (as defined in the Claims Procedure Order).

4 Galanda filed a Post-Filing Claim in the amount of $4,390,452 for repair, maintenance, replacement and restoration of the plant leased by Tiercon Industries Inc. ("Tiercon") located at 950 Service Road in Stoney Creek, Ontario (the "Premises") and for realty tax arrears (the "Landlord's Claim"). The Receiver disallowed the claim except for the sum of $7,000 and the landlord appealed. The Claims Officer heard the appeal. The Claims Officer determined that the issues relating to the scope of liability should be separated from the issues relating to quantification of damages.

5 In an Interim Ruling dated March 7, 2009 dealing with the issues relating to the scope of liability, the Claims Officer held:

> (a) The Receiver was not liable for damages caused to the premises by Tiercon as a result of the failure of Tiercon to repair, or lack of maintenance by Tiercon, or as a result of modifications to the Premises by Tiercon.
>
> (b) The Receiver was responsible for any damages that it or its agents caused during the period the Receiver occupied the Premises as a result of its obligation to repair and maintain the Premises during the period that they were occupied by the Receiver or its agents.
>
> (c) The Receiver was not responsible for the cost of restoring the Premises back to and consistent with the requirements of the Plant Lease as a result of modifications to the Premises made by Tiercon, including the cost of removing such modifications.
>
> (d) The Receiver was not required to remove any of the equipment included in certain assets listed in the Endorsement of Lederman J. dated October 31, 2005, which are described in Schedule "A" to his ruling (the "Listed Assets"). However, if the Receiver elected to remove any of the Listed Assets which constituted fixtures, the Receiver was responsible for repairing any damage occasioned to the Premises by the installation or removal of the fixtures and to restore the demised Premises to the state that existed prior to such installation, reasonable wear and tear, excepted.

6 On March 9, 2007, the Claims Officer issued his ruling disallowing the Landlord's Claim against the Receiver for arrears of taxes in the amount of $34,829.76 plus interest.

7 Both the Interim Ruling and the Ruling of March 9, 2007 were upheld on appeal by Siegel J.

8 The Claims Officer stated that the remaining portion of the Landlord's Claim in the amount of $4,330,653 related to damages arising from the alleged failure of the Receiver to maintain and repair the Premises during the period that the Receiver occupied the Premises and to repair and restore the Premises after the Receiver removed equipment owned by Tiercon and vacated the Premises.

9 At paragraph 8 of the Final Ruling, the Claims Officer stated that the final stage of adjudication of the Landlord's Claim had been completed and the following issues had been considered:

> (a) Did the Receiver, or its agents, fulfill its obligation to maintain and repair the Premises during the period that the Receiver occupied the Premises (the "Occupation Obligation") and, if not, what was the measure of any damages suffered by the Landlord?
>
> (b) Did the Receiver fulfill its obligation to repair any damage caused to the Premises by the removal of equipment which constituted chattels (a "Receiver Repair Obligation"), and if not, what was the measure of any damages suffered by the Landlord?

(c) If any of the equipment removed by the Receiver was a fixture, did the Receiver fulfill its obligation to repair any damage occasioned to the Premises by the installation or removal of the fixture and to restore the Premises to the state that existed prior to such installation, reasonable wear and tear accepted (a "Receiver Restoration Obligation"), and if not, what the measure of damages suffered by the Landlord?

(d) What portion of the Landlord's Claim constituted a claim against Tiercon as a result of its failure to honour its end-of-lease restoration obligations under the plant lease (an "End-of-Lease Restoration Obligation")?

(e) What amount, if any, should be payable by the Receiver to the Landlord for project management and engineering fees?

(f) What amount, if any, should be payable by the Receiver to the Landlord for rental income, taxes, maintenance, insurance and utility costs, such as water, electricity and heating?

(g) Costs of these proceedings.

(h) The award of pre-ruling and/or post-ruling interest.

10 In his Final Ruling, the Claims Officer concluded:

(a) The Landlord suffered damages in the amount of $53,283.72 as a result of the failure of the Receiver to fulfill Occupation Obligations.

(b) The Landlord suffered damages in the amount of $112,978 as a result of the failure of the Receiver to fulfill the Receiver Repair Obligations.

(c) Since none of the listed assets or any other assets of Tiercon removed by the Receiver were "tenant's fixtures" (as legally defined), the Receiver did not incur a Receiver Restoration Obligation.

(d) The Landlord suffered damages in the amount of $513,526 as a result of the failure of Tiercon to fulfill the End-of-Lease Restoration Obligations.

(e) The Landlord is entitled to a 6% project management fee in the amount of $9,975.70 in addition to the damage claims set out in sub-paragraphs (a) and (b) above.

(f) The Landlord's Claim for four months of rental income, taxes, maintenance, insurance, utility, electric and heating costs for the period after April 1, 2006 was dismissed on the basis that insufficient evidence was introduced to support the basis for the Receiver's obligation to pay the claim for that period and the quantum of the claim.

(g) Each party was responsible for its own legal costs of the proceedings.

(h) The costs of the Receiver were to be paid as part of the expenses of the receivership.

(i) The responsibility for the costs of the Claims Officer were to be borne equally between the Receiver and the Landlord.

The Standard of Review

11 The Claims Procedure Order provides that a party may appeal a final determination of the Claims Officer.

12 The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:

(a) With respect to pure questions of law, the standard of review is correctness.

(b) With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.

(c) With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.

(d) With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.

(e) With respect to the appeal of the cost award, a high degree of deference is accorded to discretionary decisions with respect to an award of costs assessed following a hearing and the decision should be respected unless the decision maker failed to consider relevant factors, reached an unreasonable conclusion, made an error in principle or if the costs award is plainly wrong. [1]

1 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at paras. 8, 10, 26 - 37; *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, 2002 CarswellOnt 1624 (Ont. S.C.J.); *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), leave to appeal to the S.C.C. refused 186 D.L.R. (4th) vii (note); *Padfield v. Martin* (2003), 64 O.R. (3d) 577 (Ont. C.A.); *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 (Ont. C.A.); *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.)

The Issues

13 The issues raised in the factum delivered by the Landlord in respect of the Final Ruling (as recognized by counsel to the Receiver) are as follows:

(a) Issue 1 - Whether the Claims Officer erred in not finding that all assets were fixtures.

(b) Issue 2 - Whether the Claims Officer erred in not finding that all of the Listed Assets were fixtures.

(c) Issue 3 - Whether the Claims Officer erred in not finding that the equipment at the Plant constituted fixtures, removal of which engaged repair and restoration obligations set out paragraph 5 of the Plant Lease.

(d) Issue 4 - Whether the Claims Officer erred in dismissing the claims referenced in Schedule "D" of the Final Ruling as claims for which the Receiver had no liability as end of term obligations of the tenant.

(e) Issue 5 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations on the basis of 15% to the Receiver and 85% Tiercon.

(f) Issue 6 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations (allocated between the Receiver and Tiercon) and the Receiver's Repair Obligations.

(g) Issue 7 - Whether the Claims Officer erred in denying the claim for profit in assessing damages with respect the Receiver repair and maintenance claims.

(h) Issue 8 - Whether the Claims Officer erred in determining that each party should bear its own costs and requiring the Receiver and the Landlord to each pay one-half of the Claims Officer's costs.

Determination of Whether Equipment Constituted Fixtures or Chattels

14 On this appeal counsel to the Landlord raised fundamental arguments relating to the status of the fixture issue.

15 Mr. Moldaver submits that the question as to whether the Listed Assets/Genres were fixtures had already been determined prior to the hearing which resulted in the Final Ruling.

16 Mr. Moldaver submits that the Claims Officer erred in that he failed to confirm or find that the "Listed Assets" or "Genres", identified in the Endorsement of Lederman J. of October 31, 2005 were in themselves fixtures, as recorded in the reasons of Siegel J. dated September 29, 2007.

17 At paragraph 8 of his factum, Mr. Moldaver stated that, "The Genres/Listed Assets received their designations, as such, because it was asserted at the time of the Maynard's auction agreement with the Receiver that they were not just fixtures, but actually more; namely, part of the Premises - building materials, as it were. Eventually when the Receiver backed off the right to remove or sell *genre* 1, the electrical, the debate resolved itself to the issues heard by Mr. Baird, but there was never any doubt going in that the Listed Assets were fixtures and it was just a question, in respect of them, as to how much."

18 At paragraph 10, Mr. Moldaver stated that "the parties had agreed that the Genres/Listed Assets were fixtures and this is recorded and confirmed in the reasons of Siegel J. This means that the silos, the 20 Ton crane, the Compressors and the Chillers were agreed to be fixtures. It was an error to consider or decide otherwise".

19 I have reviewed the Order of Greer J. dated April 15, 2005, the Order of Lederman J. dated October 31, 2005, the Endorsement of Hoy J. dated November 15, 2005, the Order of Hoy J. dated November 15, 2005, the Order of Hoy J. dated November 22, 2005, the Endorsement of Mesbur J. dated May 18, 2006, the Order of Mesbur J. dated May 18, 2006 and the Endorsement of Siegel J. dated September 11, 2007.

20 The issue of whether certain assets were Listed Assets or were true fixtures was identified early in the proceedings, but, in my view, prior to the Final Ruling, the issue had not been determined.

21 Early identification of the issue is referenced in the Endorsement of Hoy J. dated November 15, 2005. At paragraph 1, Hoy J. stated:

> The Landlord opposed the inclusion of the five "genres" of assets described at paragraph 12 of the Receiver's 7th Report (Bulk storage silos; Cranes; chillers and cooling towers; compressed air system; transformers) in the auction sale by Maynard's because it says they are not "tenant fixtures" or "trade fixtures"; rather, it says, they are true fixtures.

22 At paragraph 3, Hoy J. stated:

> It became apparent that the real issue, and the Landlord's real concern, is the extent of the Receiver's obligation to repair damage occasioned to the Premises by the removal of the fixtures, and whether the Receiver is obligated to restore the demised Premises to the state that existed prior to the installation of the trade fixtures (paragraph 5 of the Lease) or to remove all of the trade fixtures, if it removes any, as the tenant is required to do upon termination of the lease.
>
> The parties were in agreement that the extent of the Receiver's repair obligations in connection with the removal of the assets in issue (including the issue of whether all trade fixtures must be removed) should be left for another day.

23 The Endorsement of Siegel J. dated September 11, 2007 was in respect of the appeals from interim rulings of the Claims Officer.

24 The Receiver appealed the Interim Ruling with respect to the repair and restoration obligations of the Receiver. Starting at paragraph [4] Siegel J. stated:

> The issue before the claims officer was the standard of the repair and restoration obligations of the Receiver in respect of that part of the plant of Tiercon affected by the removal of certain assets (the "Listed Assets") contemplated by an order and endorsements dated November 17, 2005 and November 22, 2005 of Hoy J. (collectively, the "Order") authorizing the sale of the Listed Assets. The relevant facts are set out in the Ruling. The claims officer held that the applicable standard

> of repair and restoration was set out in paragraph 5 of the lease dated July 27, 2000 between Galanda Properties Inc. ("Galanda") and Tiercon (the "Lease").
>
> The issue arises because the Order did not specify a standard of repair to be met by the Receiver notwithstanding that the parties were aware that the Listed Assets were tenant fixtures and that their removal would entail non-negligible repair costs. Instead, the Order provides that the parties agreed to defer determination of the scope of the Receiver's repair obligations to a further hearing.
>
> The decision of the claims officer is based on the conclusion that the power of the Receiver to remove and sell the Listed Assets is located in paragraph 5 of the lease. The claims officer reasoned that, by electing to exercise this right under the Lease, the Receiver was also bound by the obligations of Tiercon under the same provision. This principle is most clearly set out in paragraphs 47 and 48 of his Ruling.
>
> In paragraph 42 of the Ruling, the claims officer goes on to draw an important distinction. He states that the Order permitted the removal and sale of the Listed Assets but that the adjudication of whether the Receiver had the legal right to do so was not addressed in the Order and therefore fell to be determined by the claims officer. He determined that the Receiver had the legal right to remove and sell the Listed Assets pursuant to, and subject to, the provisions of paragraph 5 of the Lease rather than pursuant to the Order, which only approved the exercise of this right.
>
> [Emphasis added]
>
> Siegel J. agreed with this conclusion.

25 In the Interim Ruling, the Claims Officer also determined that, for Listed Assets, which were removed by the Receiver from the Premises and which were fixtures, the Receiver was responsible for repairing any damage occasioned to the Premises by the installation or removal of the fixtures and to restore the Premises to the state that existed prior to such installation, reasonable wear and tear excepted. This ruling was appealed and the appeal was dismissed.

26 In the Interim Ruling, the Claims Officer explicitly stated at paragraph 43; "Since there was no dispute as to the scope of liability of the Receiver if the Listed Assets constituted chattels, I am assuming for the purposes of this ruling that all the Listed Assets constituted tenant's fixtures. He went on to determine that an issue for the final phase of the hearing was "whether any of the Listed Assets are fixtures" (see Interim Ruling, paragraphs 43 and 55)." This determination was not reversed on the appeal heard by Siegel J.

27 As a consequence, one of the issues for the final stage of the adjudication before the Claims Officer was whether any of the equipment removed was a fixture or a chattel. Furthermore, the Claims Officer directed that the parties set out their position on the issue of whether the Listed Assets were fixtures or chattels as part of his December 7, 2007 procedural order.

28 The issue was squarely addressed by Ms. Sims in her responding factum at paragraph 15 which reads as follows:

> Contrary to what is alleged in Galanda's Factum at paragraphs 2(a), 8 and 10, by implication elsewhere in Galanda's Factum what is inaccurately inferred from out of context passages quoted at paragraph 23 of Galanda's factum, there was no agreement or prior determination that the Listed Assets were fixtures. Galanda raises this position for the first time in its factum filed on this appeal. That Galanda has the temerity to raise this contention in appeal is all the more disturbing given that Galanda made submissions (written and oral) with respect to the issue of whether Listed Assets constituted fixtures or chattels before the Claims Officer. For example, at page 2, paragraph 7 of Galanda's costs submissions dated January 16, 2009, Galanda submitted that "[o]n one of the major legal issues that of fixtures or not, the law has been easy to state and hard to apply for decades and a detailed examination of the evidence is necessary no matter the quantum".

29 I am in agreement with this submission. In my view, the decisions of Lederman J., Hoy J. and Siegel J., as well as the Interim Ruling of the Claims Officer, do not reflect a determination that the Genres/Listed Assets were in themselves fixtures,

nor do I see where this is recorded and confirmed by Siegel J. The determination of this issue was made by the Claims Officer on the Final Ruling.

30 It follows that any submissions made by counsel to the Landlord that are based on the assumption that a prior finding had been made that the Listed Assets were in themselves fixtures, are misguided. In my view, it is not necessary to consider the arguments of counsel to the Landlord in these points.

31 At the hearing that gave rise to the Final Ruling, the Claims Officer had available to him the affidavits and reports filed as evidence-in-chief, he heard *viva voce* evidence from the witnesses who were cross-examined at the hearing on January 28, 2008 to February 1, 2008 and from June 23, 2008 to June 27, 2008, he had the transcripts of the cross-examinations of witnesses, and he received both written and oral arguments from the parties.

32 The Final Ruling is 30 pages in length and is supported by four detailed schedules.

The Issues

33 At paragraph [13] above, I set out the issues raised by the Landlord, as recognized by counsel to the Landlord.

Issue 1 - Whether the Claims Officer erred in not finding that all assets were fixtures

34 This issue is thoroughly canvassed in the Final Ruling.

35 The Claims Officer set out the principles which he applied in making a determination of whether equipment constituted a fixture or a chattel. The principles considered are set out at paragraphs 52 to 54 of the Final Ruling. Specific reference is made to *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335 (Ont. Div. Ct.) at page 338 and *B.D.N. Mechanical Ltd. v. British Columbia*, 2006 BCSC 78 (B.C. S.C.).

36 In my view, the principles set out by the Claims Officer with respect to whether equipment constitutes fixtures or chattels are correct.

37 I am in full agreement with the submission of counsel to the Receiver at paragraph 27 of her factum where Ms. Sims states: "Having correctly set out the principles for consideration of whether equipment constituted a fixture or a chattel, the Claims Officer's determinations with respect to whether equipment located at the Plant constituted a fixture is effectively a decision of fact. It should only be interfered with if it is shown that the Claims Officer made a palpable and overriding error."

38 In my view, the Claims Officer's findings are supported by the record. I see no palpable and overriding error in the Claims Officer's assessment of the evidence. It follows that, the appeal with respect to the Claims Officer's determinations regarding whether equipment constituted fixtures or chattels is dismissed.

Issue 2 - Whether the Claims Officer Erred in not Finding that all of the Listed Assets Were Fixtures

39 The Listed Assets are set out on Schedule "A" to the Final Ruling. The Listed Assets can be grouped as:

(i) the Nine Bulk Storage Silos;

(ii) the Cooling equipment;

(iii) one Quincy "50" Air Compressor;

(iv) one Munk 20 Ton Bridge Crane

40 The Claims Officer addresses the issue of Listed Assets at paragraphs 55 - 67 of the Final Ruling. These findings have been summarized on Schedule D to the factum submitted by the Receiver which sets out the applicable references to the Claims Officer's reasons and to the evidence with respect to the Listed Assets.

41 In my view, the Claims Officer's findings that each of the Listed Assets constituted chattels are supported by the record and should not be interfered with. I am of the view that the Claims Officers made no extricable legal error and no palpable and overriding error in his determination that the Listed Assets were not fixtures.

Issue 3 - Whether the Claims Officer erred in not finding that equipment at the Plant constituted a fixture or fixtures, removal of which engaged repair and restoration obligations set out in paragraph 5 of the Plant Lease

42 This issue has been addressed at paragraphs 32 - 35 of the factum submitted by counsel to the Receiver.

43 Galanda argues that equipment located at the Plant constituted one large fixture and that all of the equipment (other than Listed Assets) constituted fixtures.

44 The Claims Officer determined that the equipment (other than the Listed Assets) removed by the Receiver were not fixtures.

45 I am in agreement with the submissions set out at 32 - 34 as well as the conclusion that there was no palpable and overriding error, or error at all, in the assessment of the evidence. In my view, the Claims Officer's findings that the assets removed constituted chattels should not be interfered with.

Issue 4 - Whether the Claims Officer erred in dismissing the caims referenced in Schedule D of the Final Ruling as claims for which the Receiver had no liability as end of term obligations of the tenant

46 This issue is addressed in Part VI of the Final Ruling at paragraph 68.

47 In reviewing this issue, I can do no better than to restate the comments of the Claims Officer:

> 68. The fourth group of heads of claim are those claims which I have found to be the responsibility of Tiercon and for which the Receiver has no responsibility since they are End of Lease Restoration Obligations. They are set out in Schedule "D" of this ruling. Generally, they are claims arising from the failure of Tiercon to honour its obligations set out in paragraph 4(j) of the Plant Lease which provides that upon termination of the Plant Lease, Tiercon had the obligation to remove from the premises all of its trade fixtures, including equipment and personal property and all improvements made by it to the demised premises, save and except for non-manufacturing improvements, such as the construction of the office, lunch room and washrooms. That paragraph also provided that Tiercon had the obligation to:
>
> > (a) restore and repair any damage caused to the building or the demised premises by the acts or omissions of the Lessee, its employees, agents, customers or others for which the Lessee was responsible at law;
> >
> > (b) to repair any damage caused by the removal of any of its trade fixtures, equipment, personal property and improvements other than Approval Lessee Improvements and to restore the portion of the building affected by such removal in accordance with the provisions of the Lease.

48 In this respect, it is necessary to consider the role of the Receiver. The Receiver does not assume the debtor's obligations but, instead, is in place for a limited period of time as an officer of the court to take possession of and secure assets and to assist with the exercise of stakeholders' rights, including asset liquidation. The Receiver pays rent only for its actual occupation and use of the property. The Receiver does not pay rent (including tax or other obligations of the tenant) for the period before it occupies the premises or after it ceases occupying the premises. Payment of such claims are subject to the relative priorities of all of the creditors of the debtor's estate. Further, if a Receiver damages premises while in occupation it may be liable for such damages. However, it is not responsible for damage done by the debtor prior to it occupying or for obligations which arise after it occupies. See *Consultoka Services Inc. v. Peat Marwick Ltd.*, [2000] O.J. No. 2736 (Ont. S.C.J.) at paras 38 - 44 and 50; *Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488 (N.S. C.A.) and s. 14.06 (1.2) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3.

49 The Claims Officer concluded that there was no evidence that the Receiver caused damage to the Plant with respect to the end of term claims. The claim of the Landlord for "end of term" obligations is against Tiercon as tenant. "End of term" claims are not properly claimed against the Receiver.

50 In my view, the determination by the Claims Officer that specific claims were end of term Obligations of Tiercon with no liability to the Receiver, should not be interfered with, absent a palpable and overriding error. His determinations were supported by the record. A summary with respect to the "end of term" claims referenced by the Landlord in its factum is set out in Schedule "E" to the factum submitted by counsel to the Receiver.

Issue 5 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations on the basis of 15% to the receiver and 85% to Tiercon

51 With respect to the allocation of responsibility of certain occupation obligations, the Claims Officer set out his findings at paragraphs 44 - 48 of the Final Ruling.

52 Counsel to the Landlord takes exception to these conclusions, submitting that the Claims Officer erred when he apportioned the obligations between the Receiver and Tiercon on a 15%/85% basis instead of all or substantially all as against the Receiver in respect the of duty to repair and maintain while in occupation. Counsel to the Landlord submits that the Claims Officer should have charged all damages to the Receiver on the Record before him and having regard to the guidelines set forth in *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004 CarswellOnt 2065 (Ont. C.A.)], 2004 CanLII 9852.

53 Counsel to the Landlord further submits that as to maintenance and repair standards to which the Receiver was bound while in occupation, the Lease provides, in respect of repair obligations, for such an obligation in paragraphs 4(f)(i), 4(f)(ii), 4(g) - (j), 4(o), 4(r), 5 and 10(b) and in respect of maintenance in paragraphs 4(k), 4(m), 4(s)(i) and (ii). Counsel submits that generally the Receiver had to maintain what it found and repair damage occurring on its watch and if there was a state of disrepair, which it inherited, it could not let any situation get worse. The maintenance and repair intent, counsel submits, is captured in 4(f)(i). These obligations, he submits, are obligations at law were to be effected by the Receiver while in occupation/possession and that the Receiver failed to do so prior to giving up possession, which meant that it escaped not only the costs of repair and restoration, including supervision, but also the rent payable during such work, including Additional Rent such as taxes, insurance and utilities.

54 Counsel to the Landlord further submitted that the Claims Officer simply guessed or assumed the apportionment rate based on relative time of occupancy and use; and arguably, even if, like the Trial Judge in *Stellarbridge*, *supra*, his "objective in fixing the rate of the discount for "betterment" was clearly to arrive at what [s]he regarded as a fair assessment of Stellarbridge's damages", he erred. Counsel further submits that the evidence shows that the lack of repair and maintenance condition of the Premises at the end of the Receiver's occupation was attributable to the default of the Receiver; and, to apply the words of the Court of Appeal for Ontario in *Stellarbridge*, *supra*, the Receiver "bore the burden...of establishing *both* their entitlement to a "betterment" discount under the Lease *and* the rate of the discount that they claimed".

55 The portion of the Landlord's factum that deals with this issue commences at paragraph 157.

56 The Claims Officer determined in the Interim Ruling that the Receiver was not responsible for damages caused to the Premises by Tiercon as a result of the failure of Tiercon to repair, lack of maintenance by Tiercon or as a result of modifications to the Premises by Tiercon. The Claims Officer assessed damages against the Receiver with respect to the Receiver's occupation period. I am satisfied that in arriving at the allocation of 15% liability to the Receiver for the occupation obligation, the Claims Officer made an assessment of the evidence before him with respect to the claim and made the determination that this allocation of liability was appropriate in the circumstances.

57 The general burden to prove its damages as against the Receiver rests with the Landlord as the claimant. If the burden is not satisfied, then the issues related to betterment do not arise.

58 Counsel to the Receiver makes submissions at paragraph 49 of her factum to distinguish *Stellarbridge*, *supra*. Counsel submits that in *Stellarbridge*, *supra*, the Court of Appeal was assessing damages as against the tenant (and not as against a receiver), and the Court of Appeal found that there was uncontroverted evidence that the building was a brand new building at the beginning of the lease (which was the beginning of the tenant's occupation) and that it was the tenant who was asserting that it should receive a credit for "betterment" of the building to reduce damages assessed for its end-of-term obligations. As a result, counsel submits that the Court of Appeal found that the onus was on the tenant to prove betterment since:

> (a) the subject-matter of the allocation of betterment and reasonable wear and tear lay within the particular knowledge of the tenant and the tenant had had possession of the leased premises throughout the term, and
>
> (b) the tenant was claiming an exception to the general rule in seeking betterment discount which was consequent on the tenant's "knowing and admitted failure to honour repair and restoration obligation under the lease".

Stellarbridge, *supra*, at paragraphs 60, 66 and 68.

59 In contrast to the facts in *Stellarbridge*, in this case, counsel to the Receiver submitted that it was noteworthy that: (a) the Receiver is a Court appointed officer and not the tenant; (b) damages are being assessed with respect to the Receiver's occupation and not the end of a tenant's tenancy; (c) the Plant was not in a new and pristine state at commencement of the Receiver's occupation under the Appointment Order; (d) the Interim Ruling determined that the Receiver was not liable for any outstanding pre-appointment obligations of Tiercon (e.g. wear or tear or damage pre-receivership); (e) the Receiver is not bound by the end of term obligations Tiercon; and (f) unlike the tenant in *Stellarbridge*, the Receiver was not in possession of the Plant for the entire term of the Plant Lease and is not in the position of a tenant with particular knowledge of the Premises for the entire term of a lease.

60 I am in agreement with the submissions of counsel to the Receiver on this issue. I am satisfied that the Claims Officer made no error in his finding with respect to the Occupation Obligations. There was no error in principle in assessing damages and allocating these items as set out by the Claims Officer on the basis of his assessment of the evidence.

Issue 6 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations (allocated between the receiver and Tiercon) and the Receiver's Repair Obligations

61 The Claims Officer found that the standard of repair and maintenance applicable to the Receiver is to repair and maintain the building to the standard of a well-maintained heavy industrial building. The Claims Officer set out his determination with respect to assessment of damages in Part VII of the Final Ruling commencing at paragraph 69 and in Schedules "B", "C" and "D" with respect to particular items.

62 The Claims Officer determined that if there are two ways of performing a contract then the measure of damages for breach of the contract is the cost of the minimum performance. See *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303, 235 D.L.R. (4th) 193 (S.C.C.), at 198 -199.

63 Counsel to the Landlord submits that the Claims Officer slavishly chose the low bid in assessing damages.

64 Counsel to the Receiver addressed this issue commencing at paragraph 52 of her factum. I agree with the submissions set out by counsel to the Receiver on this issue. I am satisfied that the Claims Officer's finding with respect to Occupation Obligations (allocated between the Receiver and Tiercon) as set out in Schedule "B" of the Final Ruling and with respect to the Receiver's Repair Obligations as set out in Schedule "C" of the Final Ruling are correct. In my view, there was no error in principle in assessing damages and allocating these issues as set out by the Claims Officer on the basis of his assessment of the evidence.

Issue 7 - Whether the Claims Officer erred in denying the claim for profit in assessing damages with respect to the Receiver repair and maintenance claims

65 The ARG quote information and spreadsheets related to particular claims include a mark-up by ARG for profit and a mark-up on any work performed by trades for ARG.

66 The Claims Officer found that ARG Group Inc. was the alter ego of Galanda and as a result the Claims Officer denied the profit portion of the claim on the basis that an injured party is entitled to compensation for damages and not entitled to profits.

67 In my view, the Claims Officer was correct in concluding that a party who was entitled to compensatory damages for repairs is not entitled to profit earned in conducting the repairs itself or through an entity which is the alter ego of the claimant. See *Moore's Taxi (1961) Ltd. v. Shore* (1968), 73 W.W.R. 558 (Man. Co. Ct.) and S.M. Waddams, *The Law of Damages*, Looseleaf Edition. (Toronto: Canada Law Book, 2007) at para. 1.2339.

Issue 8 - Whether the Claims Officer erred in determining that each party should bear its own costs and requiring the Receiver and Galanda to each pay one-half of the Claims Officer's costs

68 The determination of a costs award is discretionary in nature. I am satisfied that the Claims Officer's decision in respect of costs was made after he considered relevant factors and I see no error in principle in his determination of the costs award.

Disposition

69 The role of the court on this appeal is to review the decision of the Claims Officer. It is not to conduct a trial *de novo*. In my view, there was ample evidence to support to support the findings of the Claims Officer and he was correct in his application of the law.

70 The appeal of Galanda of the Final Ruling is dismissed with costs. If the parties are unable to agree on quantum, brief written submissions (maximum 3 pages each) may be filed within 30 days.

Motion dismissed.

2007 CarswellOnt 8633
Ontario Superior Court of Justice

J & B Engineering Inc. v. Smith

2007 CarswellOnt 8633, 163 A.C.W.S. (3d) 392

J and B Engineering Inc., (Plaintiff) and Brett Smith, (Defendant)

M.O. Mungovan D.J.

Heard: May 11 - October 10, 2007
Judgment: October 31, 2007
Docket: Toronto SC-06-00039742-0000

Counsel: Antony Niksich, for Plaintiff
Brett Smith, for himself

Subject: Contracts; Civil Practice and Procedure; Public

Headnote

Contracts --- Parties to contract — General principles

Defendant and counterclaimant S contracted with corporate plaintiff and counterclaim defendant J Inc. to have site plan developed for land he was going to purchase through his company, N Inc. — S met with J Inc. and insisted on taking site plan with him even though J Inc. told him it was not completed — When S received J Inc.'s invoice for preparing plan, he refused to pay — J Inc. brought action against S for damages for breach of contract; S counterclaimed for breach of contract — Action allowed; counterclaim dismissed — J Inc. entered into contract with S personally — When parties met to finalize agreement, there was probably no mention of N Inc. — Although N Inc.'s name surfaced later, it was after contract had already been made between J Inc. and S — Reference to N Inc. in site plan itself or to to invoice being to S's attention did not change legal conclusion that J Inc. had already made contract with S personally.

Contracts --- Performance or breach — Breach — General principles

Defendant and counterclaimant S contracted with corporate plaintiff and counterclaim defendant, J Inc. to have site plan developed for land he was going to purchase — S needed plan in 24 hours and although J Inc. told him it was not completed, insisted on taking plan with him and declined offer of further assistance — When S received J Inc.'s invoice for preparing plan, he refused to pay — S expected J Inc. to turn over to him what he called "privileged information" about fill situate on vendor's lands, but that did not happen, for J Inc. had no report on matter — J Inc. brought action against S for damages for breach of contract; S counterclaimed for breach of contract — Action allowed; counterclaim dismissed — J Inc. had twofold contractual obligation to S: first, to produce site plan with information about perimetres of vendor's land; and secondly, to assist S by opening file involving construction of vendor's gas station on adjacent land and delivering to S documents relevant to development of vendor's surplus lands — Evidence did not show that J Inc.'s drafting of site plan was below expected standard — J Inc. was neither remiss or dishonest in failing to disclose problem involving fill on surplus lands — Representatives of J Inc. subcontracted out soil inquiries to those engineers who specialized in field — J Inc. did as asked, pursuant to contract with S.

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — General principles

Defendant and counterclaimant S contracted with corporate plaintiff and counterclaim defendant J Inc. to have site plan developed for land he was going to purchase — S met with J Inc. and insisted on taking site plan with him even though J Inc. told him it was not completed — When S received J Inc.'s invoice for preparing plan, he refused to pay — J Inc. brought action against S for damages for breach of contract; S counterclaimed for breach of contract — As part of his defence, S claimed that settlement had already been reached between him and J Inc. — Action allowed; counterclaim dismissed — Burden of proof for existence of actual settlement, as far as plaintiff's claim is concerned, is placed squarely on shoulders of party that asserted that there was settlement — S made assertion but did not show on balance of probabilities that parties actually achieved settlement.

ACTION for breach of contract; COUNTERCLAIM for breach of contract.

***M.O. Mungovan D.J.*:**

I. Causes of Action

1 The plaintiff, J and B Engineering Inc. ("J and B"), is suing the defendant, Brett Smith, on an outstanding account for services rendered. The cause of action sounds in breach of contract. The defendant counterclaims for damages for breach of contract on the ground that the plaintiff failed to exercise its contractual duty of care by not supplying documents that revealed a problem with the soil.

II. Issues

2

1. J and B contracted with whom, Brett Smith or Newmarket Herald Developments Inc.?

2. What was J and B retained to do?

3. Did J and B breach their contract?

4. What damages, if any, did Mr. Smith suffer?

5. Did the parties agree to settle their differences?

III. Facts

3 On or about January 4th, 2005 the manager of the real estate department of Shell Canada Products Limited ("Shell") contacted David Reid, professional engineer and a project manager with J and B, to tell him that Mr. Smith, a developer, would be calling him about some work that he, Mr. Smith, wanted done in relation to Shell's surplus lands, which were adjacent to Shell's gas station at the corner of Leslie Street and Green Lane in the Town of East Gwillimbury (the "Town"). J and B acted as construction managers in the construction of Shell's gas station at that location. Shell's real estate manager told Mr. Reid to "cooperate" with Mr. Smith, as he had agreed to buy Shell's surplus lands. Cooperation was to take the form of disclosing documents relating to those lands.

4 Mr. Reid (a J and B project manager) then telephoned Mr. Smith on the same date, January 4th, 2005. Mr. Smith wanted J and B to draft a site plan with respect to the proposed development of the surplus lands. The two met the following day at J and B's offices. Mr. Smith informed Mr. Reid that he needed the site plan for a meeting with the Town's mayor and director of planning. The meeting with the mayor and his director was to take place on January 7th, so Mr. Smith needed the finished product the next day, January 6th. At this meeting with Mr. Smith Mr. Reid testified that he did inform Mr. Smith about the fee structure employed by J and B. I accept that testimony.

5 At some point before Mr. Smith left J and B with his site plan, J and B had supplied Mr. Smith with a "detailed drawing and engineering calculations regarding the sanitary line that crosses the subject land [the surplus lands]" [1] and with "surveys of Shell's property" [2] . At a later date, at Mr. Smith's request, J and B "located an as-built survey at Shell's contractor's offices" [3] and forwarded it to Mr. Smith.

1 Exhibit 4, p. 1, #4

2 ibid. #5

3 ibid. p. 2, #7

6 On January 6th when Mr. Smith arrived at J and B's premises, the site plan was not ready for collection. Mr. Smith sat with J and B's draughtsman for approximately two hours. Finally, Mr. Smith at his insistence left J and B with an incomplete copy of the site plan[4] . However, it could be used for purposes of discussion at his upcoming meeting.

4 Exhibit 2. The part, outlined in pink, is the surplus lands.

7 When the meeting with the mayor had concluded, Mr. Reid telephoned Mr. Smith on January 7th, 2005 to inquire whether J and B could be of any further service. Mr. Smith advised Mr. Reid that he required no further services. Then, on January 31st, 2005 Mr. Reid sent to Mr. Smith J and B's invoice for preparing the site plan. The actual fees were $1,812.75. GST and disbursements increased them to *$1,950.88*.

8 Mr. Smith refused to pay the fees for preparation of the site plan. He was dissatisfied with it, because it could not be used for planning purposes such as an application for a severance before a Committee of Adjustment. On January 31st, 2005 he retained an Ontario land surveyor, Sexton McKay Limited, to prepare a severance sketch, which cost him $738.25 inclusive of GST.

9 Mr. Smith was also dissatisfied with J and B, because he did not receive from them "privileged information" in relation to the fill that lay on Shell's surplus lands. Without that information he was unable to have Shell reduce its price for the surplus lands. Through his company, Newmarket Herald Developments Inc. ("Newmarket Herald"), he had entered into a conditional agreement with Shell to buy those lands for commercial development.

10 Mr. Smith later changed his mind about being the commercial developer for these surplus lands. Instead, on June 13, 2006 he sold his shares in his company, Newmarket Herald, to Sora Construction Ltd.

IV. Analysis

Issue #1: With whom did J and B contract, Brett Smith or his corporation, Newmarket Herald Developments Inc.?

11 The above question is a common one and never easy to answer. J and B's position is that, when their project manager, Mr. Reid, telephoned Mr. Smith to find out what his firm could do for him, the subject of Mr. Smith's corporation, Newmarket Herald, was never discussed. At their meeting on the following day (January 5th, 2005), when they discussed the site plan, once again the corporation was never mentioned. Furthermore, Mr. Reid testified that at the January 5th meeting Mr. Smith instructed him to send the bill to him (Mr. Smith) personally, again with no mention of Newmarket Herald or any corporation for that matter. The first time that Mr. Reid knew about the existence of a corporation belonging to Mr. Smith was around January 31st, 2005 when J and B's invoice was sent to Mr. Smith.

12 Finally, Mr. Reid's letters of January 7th, 2005 setting forth J and B's fee proposal and of February 24th, 2005 wherein he explained the tasks performed by J and B and finished by requiring compensation, are all addressed to Mr. Smith himself.

13 Mr. Smith, on the other hand, countered with a number of arguments to support his case that the contract for the site plan was made with his corporation. First, when Mr. Reid asked Mr. Smith whom should he bill, the latter answered "to my attention, but not me personally". Secondly, Mr. Reid knew that Mr. Smith's corporation, Newmarket Herald, had agreed to buy the surplus lands from Shell. Why then would Mr. Reid not think that Mr. Smith was acting in a representative capacity when he requested a site plan? Thirdly, J and B's clients were corporations. The norm was for an individual to have a "holding company", and Mr. Reid agreed with that norm.

14 Fourthly, Mr. Smith pointed to J and B's invoice for the site plan as supporting the conclusion that J and B contracted with Mr. Smith's corporation and not with Mr. Smith himself. For this invoice was directed to "Independent", followed by an

address, and then, there appeared: "Attn: Mr. Brett Smith". Fifthly, the site plan shows in the rectangle marked "Project" the full legal name of the corporation, Newmarket Herald Developments Inc., followed by "Site Plan", and then the location of the project, "Leslie Street and Green Lane, East Gwillimbury, On.".

15 I find that the answer to this question lies with what happened when the parties met on January 6th, 2005 to finalize an agreement whose contours would have just been touched upon during the initial conversation of the day before. At their meeting they discussed the site plan. There was probably no express mention of a corporation. Newmarket Herald's name surfaced the following day, when Mr. Smith collected from J and B his incomplete site plan. However, in my view the receipt of the site plan exhibiting the corporate name happened *after* the agreement or contract between the parties had already been made. The reference to "Newmarket Herald Developments Inc." in the site plan itself or to "Independent" and "Attn: Mr. Brett Smith" in the invoice do not change the legal conclusion that J and B had already made a contract with Mr. Smith personally.

Issue #2: What did Mr. Smith retain J and B to do?

16 According to J and B, their task was to produce a site plan for commercial development purposes to be presented to the mayor and director of planning for the Town of East Gwillimbury. They had twenty-four hours to complete it. Mr. Smith spent approximately two hours with J and B's draughtsman to ensure that it met with his (Mr. Smith's) requirements. Even though J and B had not completed the site plan by the time Mr. Smith wanted to leave with it, it could still be used for purposes of discussing development of Shell's piece of land with the mayor and his director of planning.

17 J and B also understood through Shell's manager of real estate that they (J and B) were to cooperate with Mr. Smith by delivering to him from their file any documents relevant to the development of these surplus lands. For J and B had managed in 2002 the construction of Shell's gas station at the north end of Shell's lands. Hence, this authorization to produce relevant documents had to, and did, emanate from Shell.

18 Mr. Smith, on the other hand, contended that J and B's contractual obligation was twofold, viz. first, to draw a plan of Shell's surplus lands that could be used for purposes of an application for severance before a Committee of Adjustment, and secondly, to produce to Mr. Smith whatever they had in their file relevant to the development of Shell's surplus lands. Because J and B had acted before in the construction of Shell's gas station, located on lands adjacent to Shell's surplus lands, Mr. Smith expected J and B to have in their possession "privileged information" relating to the surplus lands.

19 I find, on the balance of probabilities, based on the evidence before me including documentary and oral testimony, that the J and B's contractual obligation owed to Mr. Smith was indeed twofold: first, to produce a site plan showing the perimeters of Shell's surplus lands and, in addition, the outlines of prospective buildings, as opposed to a severance plan, dividing the lands into parts for use at the Committee of Adjustment; and secondly, to assist Mr. Smith by opening the file involving the construction of Shell's gas station on the adjacent land and delivering to Mr. Smith documents relevant to the development of Shell's surplus lands. At the meeting of January 6th, 2005 between Messrs. Reid and Smith, the latter was silent as to the kind of information in which he was interested. For instance, he did not say that he wanted all that J and B had about soil conditions in relation to the entire Shell lands including the surplus lands.

Issue #3: Did J and B breach their contract?

20 As regards the *drafting of the site plan*, I do not find on the evidence that J and B's draughtsman did a job that was below expected standards. Mr. Smith testified that the mayor expressed disappointment at the meeting. Was he disappointed with the quality of the drawing? We are not told. The work was done after all on a "rush basis". He had only twenty-four hours to finish it. Moreover, Mr. Smith did not allow him to complete it in view of his pending meeting the following day. So, as far as the workmanship of the site plan is concerned, I find no evidence to contradict that J and B's draughtsman did the work in a good and workmanlike manner. It must be remembered that on the day of the meeting Mr. Reid did telephone Mr. Smith to find out if he needed anything more to be done. At that time he could have brought the plan back to J and B to allow them to finish it, but that demand or request was not made. I note that J and B did not charge Mr. Smith a lump sum for the site plan, but rather they charged for the time they spent doing the job.

21 As regards the *delivery of relevant documents*, J and B did give to Mr. Smith a drawing and engineering calculations concerning the sanitary line crossing the Shell lands. In his testimony Mr. Reid said that he advised Mr. Smith about the limited capacity of that line in the event further construction was embarked upon. It was satisfactory for the gas station only. In addition, J and B provided Mr. Smith with surveys of Shell's property. Later, they found an "as-built" survey at Shell's contractor's offices, which they forwarded onto him.

22 However, the bone of contention between the parties relates to the fill that was on the surplus lands. Mr. Smith expected J and B to turn over to him what he called "privileged information" about the fill situate on Shell's lands, but that did not happen, for, according to Mr. Reid, J and B had no report on the matter.

23 However, what came to the surface during these proceedings was a geotechnical or environmental report, dated November 28th, *1991*, and prepared by Jacques Whitford Environment Limited, a firm of consulting engineers and scientists [5] . Shell had commissioned this study. It did show in 1991 a problem involving fill on Shell's lands encompassing both the part on which the gas station was built and the surplus lands. On page 2 under the heading, "Stratigraphy", there is this statement derived from the results of the consulting engineers' investigation: "The stratigraphic information recorded during excavation is presented on the test hole logs in Appendix A. As indicated, the soil profile generally consisted of an organic silt *fill* overlying a silt till. The thickness of the *fill layer* ranged from *0.3 m to 1.2 m*." [Emphasis is mine.] This report was not in J and B's files. Mr. Smith produced it in this litigation. The evidence did not explain where Mr. Smith got this report.

5 Exhibits 8 and 13

24 Mr. Fisher, a professional engineer and principal of Fisher Environmental Ltd., testified at the trial. He stated that a visual inspection of the trench, built to encompass the sanitary pipe stretching across Shell's lands, would disclose that there was a problem involving fill on Shell's surplus lands. He stated too, based on a geotechnical report prepared by Chih S. Huang & Associates Inc., consulting geotechnical inspection and testing engineers, which he had commissioned, that it would cost in excess of a million dollars to remove the fill and replace it with soil that could support commercial development.

25 Does it necessarily follow that J and B, who in 2002 managed the construction of Shell's gas station together with the laying of the sanitary pipe line across Shell's lands, were remiss in not relaying to Mr. Smith the existence of a problem with fill on Shell's lands? J and B through Mr. Reid (project manager for the Shell gas station) and Mr. Machan (general manager of J and B) testified that they were not geotechical engineers. They commissioned others to undertake that kind of study. Mr. Reid stated that his file did not disclose a problem with fill.

26 Mr. Smith countered their point that J and B were not geotechnical engineers by referring me to their website [6] . On page 1 entitled "About Us", J and B state that "[o]ur expertise permits complete handling of a variety of projects from conception, initial planning and budgeting, through project management, commissioning and startup of completed facilities". I agree with Mr. Smith that the scope of J and B's expertise might very well encompass what a geotechnical engineer might do. However, the fact of the matter is that J and B do not themselves do geotechnical inspection no matter what their website says. They contract out that kind of work to others. However, more importantly is the fact that they did not have in their files any report on the fill present on the surplus lands.

6 Exhibit 10, tab 10

27 I find that J and B did what they were asked to do pursuant to their contract with Mr. Smith. They were not remiss nor were they dishonest in failing to disclose a problem involving fill on the surplus lands. I take J and B's representatives at their word: they are not environmental or geotechnical experts; for soil inquiries they subcontract out to those engineers who specialize in this field. In addition, Mr. Smith had in his possession this 1991 report from Jacques Whitford, which told him that the land, he wished to purchase, had a problem concerning fill.

Issue #4: What damages, if any, did Mr. Smith suffer?

28 I have already concluded that J and B were not in breach of contract, and therefore, the subject of damages is not a real issue. However, if I am wrong in my conclusion, the plaintiff were found to be guilty of a breach of contract because they did not forewarn the defendant of a problem with the fill on the surplus lands, when they had it in their power to do so, and the 1991 report did not alert Mr. Smith to the soil problem, then what damages, if any, did he indeed suffer?

29 Mr. Smith testified that, if he had known of this problem involving fill at the time he contracted with J and B in early January of 2005, he would have approached Shell, the owner of the surplus lands, with a view to negotiating a decrease in the purchase price. That would have benefited him when he came to sell his shares in Newmarket Herald (the purchaser from Shell of its surplus lands), for, due to the decrease in the purchase price, his shares would have increased in value above the $725,000.00 that he actually received.

30 However, this scenario is all too speculative for a court to arrive at a figure representing loss. For one thing, one does not know the likelihood of Shell acceding to Mr. Smith's request for a decrease in the purchase price for its lands. In this respect it would have been helpful to have seen a copy of the agreement of purchase and sale between Shell and Newmarket Herald, because, as I understand, the agreement was conditional, and the condition or conditions might be germane to this discussion. As well, one does not know how deep the decrease in purchase price must be to affect Sora's willingness to pay above $725,000.00. Accordingly, the case has not been established for damages, assuming the plaintiff actually breached its contract with Mr. Smith.

31 I did not consider Newmarket Herald's alleged damages because, while it counterclaimed by way of a Defendant's Claim for damages against J and B, it did not have that right under the Rules of the Small Claims Court [7] . For it was not a defendant in the Plaintiff's Claim. Only defendants in the Plaintiff's Claim may use the Defendants Claim. The corporation really should have commenced its own action through a separate Plaintiff's Claim. However, I do not think much turns on this in view of my decision that J and B did not breach its contract.

7 Rule 10.01(1)

Issue #5: Did the parties agree to settle their differences?

32 One of Mr. Smith's defences is that the parties, so far as the Plaintiff's Claim is concerned, have already settled their differences. According to their settlement agreement, Mr. Smith need only pay J and B $500.00. Mr. Machan, General Manager of J and B, testified that the payment was to be made "by the end of the week", which according to my understanding of the evidence, was Friday, January 14 th , 2005. However, no payment was made, so the agreement ended.

33 Mr. Smith's understanding of how the settlement agreement was to be completed was very different. He did not believe that there was a time limit of a week for his payment. He sent by e-mail a message that reflected the parties' agreement, and then asked in the same e-mail for confirmation from J and B, whereupon he would then make payment. However, his e-mail appeared to go astray due to a failure on Mr. Smith's part to add a hyphen between J and B in the address. Mr. Smith's reply was that he should not be penalysed for using the e-mail address, given to him by J and B.

34 The burden of proof for the existence of an actual settlement, as far as the Plaintiff's Claim is concerned, is placed squarely on the shoulders of the party that asserted that there was a settlement. Mr. Smith, who made that assertion, has not convinced me on the balance of probabilities that the parties actually achieved such a settlement.

V. Disposition

35 *A. The Plaintiff's Claim*: There shall be judgment in favour of the plaintiff, J and B Engineering Inc., against the defendant, Brett Smith, for *$1,950.88*.

36 The plaintiff shall also be entitled to (a) *pre-judgment interest* per Courts of Justice Act [8] at *4.5%* per annum from March 1st, 2005 (30 days after J and B mailed their invoice), (b) *costs* of *$325.00* consisting of (i) $75.00 for issuing Plaintiff's Claim; (ii) $100.00 for a trial fee; (iii) $50.00 for preparation and filing of pleadings; and (iv) $1,000.00 for counsel fee. The plaintiff, finally, shall be entitled to *post-judgment interest* in accordance with the Courts of Justice Act at *6%* per annum.

8 R.S.O. 1990, c. C.43

37 *B. The Defendant's Claim*: This Claim shall be dismissed with costs to J and B of *$90.00* consisting of (i) $40.00 for filing a Defence; and (ii) $50.00 for preparation and filing of pleadings.

38 *C*. If the parties wish to make submissions concerning my *costs* order, they may do so by asking the trial coordinator to return this action to my trial list.

Action allowed; counterclaim dismissed.

End of Document

Indu Craft v. Bank of Baroda

United States Court of Appeals for the Second Circuit

September 2, 1994, Argued ; February 3, 1995, Decided

Docket Nos. 94-7089, 94-7127

Reporter
47 F.3d 490 *; 1995 U.S. App. LEXIS 2193 **

INDU CRAFT, INC., Plaintiff-Appellant-Cross-Appellee, v. BANK OF BARODA, Defendant-Appellee-Cross-Appellant, Counterclaim-Plaintiff, KRISHNAKANT C. CHOKSHI, Defendant-Appellee.

Prior History: [1]** Plaintiff Indu Craft, Inc. appeals from the grant in part, and defendant Bank of Baroda cross-appeals from the denial in part, of a judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* entered in the United States District Court for the Southern District of New York (Bernikow, M.J.) following a four-week jury trial.

Disposition: Reversed and remanded.

Core Terms

damages, prima facie tort, matter of law, lost profits, counterclaim, cause of action, jury award, earnings, letter of credit, magistrate judge, fixed cost, garments, breach of contract, line of credit, arrive, jury verdict, calculate, valuation, fiscal, costs, contract claim, good faith, manufacturers, duplicative, multiplier, suppliers, offset, sales

Case Summary

Procedural Posture

Plaintiff bank customer and defendant bank both appealed the judgment of the United States District Court for the Southern District of New York, which granted in part and denied in part defendant's motion for judgment as a matter of law, pursuant to *Fed. R. Civ. P. 50*, in plaintiff's contract and tort action based on a revolving credit agreement between plaintiff and defendants, bank and a bank official.

Overview
Plaintiff bank customer brought a breach of contract and tort action against defendants, bank and a bank official, based on a revolving credit agreement between the parties. Defendant bank counterclaimed to recover money that plaintiff owed defendant bank on plaintiff's line of credit. A jury verdict awarded plaintiff damages on the contract and tort claims, and denied damages to defendant bank on its counterclaim. A magistrate judge granted defendant bank's motion for judgment as a matter of law, vacating plaintiff's damage award and further denying defendant bank damages on its counterclaim. Plaintiff and defendant bank both sought review. On appeal, the court reversed the rulings on the motion for judgment as a matter of law and remanded. On remand, the court ordered the district court to reinstate plaintiff's damage award, and to reduce the award by the amount due to defendant bank on plaintiff's line of credit because plaintiff was fully compensated by its damage award. The court held that plaintiff's award was based on sufficient evidence to prove lost value and that the jury's verdict was not duplicative because it allocated damages between the two causes of action.

Outcome
The court reversed and remanded the ruling on defendant bank's motion for judgment as a matter of law, which vacated plaintiff bank customer's damage award and further denied defendant bank's counterclaim, in plaintiff's contract and tort action against defendants, bank and a bank official. The court held that plaintiff's damage award was based on sufficient evidence of its loss of value due to defendants' actions.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of

Review > De Novo Review

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

The court's scope of review from a grant or denial of judgment as a matter of law is the same standard as the trial court applies, determining whether viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons could reach. The court's review is de novo.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Breach > General Overview

HN2[] **Types of Damages, Compensatory Damages**

The general rule for measuring damages for breach of contract is the amount necessary to put the plaintiff in the same economic position he would be in had the defendant fulfilled his contract. When computing damages for a defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Breach > General Overview

HN3[] **Types of Damages, Compensatory Damages**

Revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach. In the typical contract action such an offset usually consists of variable costs, that is, those costs that would be incurred solely as a result of performance under the contract. But when the breach brings an end to a plaintiff's business the sums to be offset may often include, in addition, fixed costs. Fixed costs are those expenses that would be incurred as a result of the overall operation of a business, including overhead such as rent, utilities, insurance, salaries and the like.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Business Torts > General Overview

HN4[] **Types of Damages, Compensatory Damages**

Where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN5[] **Types of Damages, Compensatory Damages**

If a plaintiff shows it more likely than not that it suffers damages, the amount of damages need only be proved with reasonable certainty.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN6[] **Types of Damages, Compensatory Damages**

The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages.

Torts > Intentional Torts > Prima Facie Tort > Defenses

Torts > Intentional Torts > Prima Facie Tort > General Overview

HN7[] **Prima Facie Tort, Defenses**

Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts, which would otherwise be lawful.

Torts > Remedies > Damages > General Overview

HN8[] **Remedies, Damages**

A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery.

Civil Procedure > ... > Jury Trials > Verdicts > Inconsistent Verdicts

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

HN9[] **Verdicts, Inconsistent Verdicts**

A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > Remedies > Damages > General Overview

HN10[] **Multiple Defendants, Distinct & Divisible Harms**

A jury's award is not duplicative simply because it allocates damages under two distinct causes of action.

Counsel: PETER J. SCHMERGE, New York, New York (Jonathan A. Chase, Michele C. Petitt, Eaton & Van Winkle, New York, New York, of counsel), for Appellant Indu Craft, Inc.

FRANK H. PENSKI, New York, New York (Nixon, Hargrave, Devans & Doyle, New York, New York, of counsel), for Appellees Bank of Baroda and Krishnakant C. Chokshi.

Judges: Before: KEARSE, CARDAMONE, and PIERCE, Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*492] CARDAMONE, *Circuit Judge*:

Plaintiff Indu Craft, Inc. appeals and defendant Bank of Baroda cross-appeals from a judgment of the United States District Court for the Southern District of New York, Bernikow, Magistrate Judge, granting in part and denying in part the Bank's motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* after a four-week jury trial in an action based on a revolving credit agreement between Indu Craft and the Bank. Krishnakant **[**2]** C. Chokshi, an officer of the Bank, was also named as a defendant. Under the agreement the Bank would make advances to and issue letters of credit on behalf of Indu Craft for the purpose of financing its business. When Indu Craft refused to make an investment for the benefit of Chokshi's son, the Bank reduced Indu Craft's line of credit and took other steps that effectively drove it out of business.

Plaintiff filed suit against the Bank in October 1987, alleging three causes of action, only two of which are relevant to this appeal. The first of these causes of action was that the Bank breached its covenant of good faith and fair dealing implied in the revolving credit agreement; the second cause of action alleged that the Bank and Chokshi committed a *prima facie* tort against plaintiff. The Bank counterclaimed for approximately $ 1.7 million that Indu Craft still owed it under the line of credit loan. The action was referred for all purposes to the magistrate judge, where a jury trial was held. The jury returned a $ 3.25 million verdict in plaintiff's favor on the contract and *prima facie* tort causes and a verdict also in its favor on the Bank's $ 1.7 million counterclaim. The **[**3]** Bank then moved for judgment as a matter of law or, in the alternative, for a new trial with respect to both verdicts.

The magistrate judge, in a ruling that is the subject of this appeal, held that neither of Indu Craft's contract and tort causes of action could stand. While it found Indu Craft had shown a breach of the implied covenant of good faith, it also believed plaintiff had failed to prove

damages and that the tort damages returned by the jury were duplicative of the contract damages. This ruling wiped out plaintiff's $ 3.25 million jury verdict. The magistrate judge at the same time denied the Bank's motion for judgment on its $ 1.7 million counterclaim against plaintiff because, as it stated, the Bank had prevented Indu Craft from performing under the note.

In our view the magistrate judge wrongly deprived plaintiff of its $ 3.25 million jury verdict on its contract and tort causes of action, and also wrongly denied the Bank's motion for judgment on its $ 1.7 million counterclaim, perfectly illustrating the accuracy of the proverb that "two wrongs don't make a right."

BACKGROUND

Indu Craft is a New York corporation that imported ladies' sportswear from the Far East and **[**4]** sold those goods at wholesale in the United States. Its founder, president and sole shareholder was Hemant C. Mehta. The business involved placing orders for garments with plaintiff's foreign suppliers and promptly arranging for the issuance of letters of credit in their favor. The letter of credit guaranteed the manufacturer of the goods that it would be paid when the garments were shipped. In those foreign countries **[*493]** where Indu Craft's suppliers were located, letters of credit were needed by manufacturers to ensure compliance with quota restrictions on exports. Normally, suppliers will not ship -- and sometimes will not even begin to manufacture -- garments until they receive a letter of credit. Because the garment industry is, by its very nature, seasonal, delay is very detrimental in selling a line of clothes. Due to this time factor, a delay in the issuance of a letter of credit inevitably results in a slowdown of production or a holding up of the shipment of merchandise, causing a concomitant loss of business.

As a result of the good relationships between Indu Craft and its suppliers, and contrary to industry practice, its manufacturers often began production of garments relying **[**5]** on the assurance that a letter of credit would be speedily forthcoming. Swift delivery was a critical element in Indu Craft's success, enabling its merchandise to appear in American retail stores earlier than its competitors' garments. The benefit of timeliness increased initial sales and created generally more profitable reorders.

Indu Craft's relationship with the Bank began in 1983 when it was granted a $ 500,000 line of credit. The line of credit was periodically increased, reaching $ 2.7 million in December 1986. The line then included an overdraft facility of $ 1.2 million. During this period the relationship between plaintiff and defendant was marked by informality. In some instances credit was increased despite a decline in Indu Craft's sales or its failure to realize sales projections. On numerous occasions plaintiff was permitted to exceed its line of credit overdraft limit, sometimes by as much as 40 percent. Further, the Bank typically granted applications for letters of credit within 24 hours of application. This ready access to credit gave Indu Craft an ability to have its merchandise manufactured and shipped quickly to the United States.

The connection between plaintiff **[**6]** and defendant began to wear thin in November 1986 following a discussion in which Chokshi suggested that Mehta invest in a computer business for the benefit of Chokshi's son, Anil. After evaluating this proposal Mehta determined not to invest and informed Chokshi and Anil of his decision in February 1987. A month later the Bank demanded that Indu Craft immediately reduce its $ 1.3 million overdraft to its pre-set limit of $ 1.2 million. Defendant then informed plaintiff, without prior notice, that its line of credit had been reduced from $ 2.7 million to $ 2.3 million and the overdraft sublimit reduced from $ 1.2 million to $ 1.0 million. Chokshi conceded at trial that he had falsely informed Indu Craft that this reduction was directed by the Bank's central office in Bombay, India, when in fact the central office had no knowledge of the reduction.

After Mehta's rejection of the proposal to invest in the computer business for Anil Chokshi, further letters of credit were substantially delayed, if issued at all. The Bank also began to demand that applications for such letters be backed by confirmed orders from 100 percent of Indu Craft's customers. That requirement had never before **[**7]** been imposed, and it was not then imposed on other Bank customers seeking letters of credit. Defendants knew that commercial practices in the garment industry made a requirement of confirmed orders commercially impossible to comply with. No letters of credit were issued to Indu Craft after May 4, 1987.

From April through September 1987 Indu Craft complained to the Bank's central offices about the curtailment of its credit and the difficulties it was experiencing obtaining letters of credit. Numerous Bank officers repeatedly told plaintiff that its credit would be restored and its difficulties solved. Nonetheless, because of the delays and refusal by the Bank to issue

new letters of credit, Indu Craft's suppliers stopped producing goods and delayed shipment of those goods they did produce. Garments arrived late and had to be sold at substantial discounts. As a result, Indu Craft ceased operations in November 1987 and brought the instant action against the Bank.

At trial the jury found the Bank's actions were not taken in good faith but grew out of Mehta's refusal to invest in the computer business for Anil Chokshi and thus violated the covenant of good faith and fair dealing implied **[**8]** in the loan documents. The jury also found the Bank and Chokshi acted with malice **[*494]** to injure Indu Craft and that such action constituted a *prima facie* tort. Plaintiff was found by the jury to have been damaged in the amount of $ 3 million on its contract claim, but it was also found to have failed to mitigate $ 1 million of this amount. In addition, the jury awarded plaintiff $ 1.25 million on its *prima facie* tort claim. Prior to being discharged, the jury was polled and stated it was their intention that the cumulative award to Indu Craft be $ 3.25 million. On the Bank's counterclaim for the $ 1.7 million due on the note, the jury concluded that the Bank had wrongfully interfered and prevented Indu Craft from repaying the loan and thereby denied the Bank any recovery on its counter-claim.

When, as noted earlier, the Bank moved for judgment as a matter of law contending that all the jury verdicts should be overturned as a matter of law, the magistrate judge found that although plaintiff had proven the loss of value of its business as a going concern, it had failed to produce proof of its variable expenses and fixed costs. Thus, the magistrate concluded plaintiff had failed **[**9]** to prove lost profits, requiring a judgment dismissing the jury's contract damages award. The magistrate also vacated the *prima facie* tort award on the grounds that it was duplicative of the contract damages award. The magistrate upheld the jury's verdict on the Bank's counterclaim, observing that the Bank's actions taken in bad faith wrongfully prevented Indu Craft from repaying the note.

Indu Craft appeals the grant of judgment as a matter of law with respect to its contract and tort causes of action and the Bank appeals the denial of judgment with respect to its counterclaim. For the reasons stated below we reverse and remand with directions to the magistrate judge to reinstate the jury verdicts on plaintiff's contract and tort causes of action, and also reverse the denial of defendant's motion for judgment on its counterclaim and remand for the magistrate judge to grant that motion.

DISCUSSION

We discuss briefly at the outset ***HN1***[↑] our scope of review from a grant or denial of judgment as a matter of law. On appeal, we apply the same standard as the trial court, determining whether "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without **[**10]** weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.'" *Samuels v. Air Transport Local 504, 992 F.2d 12, 14 (2d Cir. 1993)* (quoting *Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970))*. Our review is *de novo*. *See Fiataruolo v. United States, 8 F.3d 930, 938 (2d Cir. 1993)*; *Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1046 (2d Cir. 1992)*. We turn to an analysis of the merits.

I Contract Award

The magistrate judge determined that Indu Craft presented sufficient evidence to prove the loss of its value as an ongoing business. It also determined that plaintiff's evidence of lost profits failed to take into account variable and fixed costs and was therefore insufficient as a matter of law. Faced with adequate proof of the lost value of the business and inadequate proof of lost profits, the trial court nonetheless granted judgment as a matter of law in favor of the Bank. While we agree with the magistrate judge's conclusions **[**11]** regarding the sufficiency of the proof regarding loss of value and the insufficiency of the lost profits evidence, we are unable to adopt the trial court's view that the evidence, as a whole, failed to support the jury's damages award.

A. *Proof*

We summarize the evidence presented to support these two methodologies of proving loss. Plaintiff's owner, Mehta, testified at trial regarding the calculation of lost profits, which proof was contained in a four volume document admitted into evidence. It furnished factual information on cost of goods sold and sales prices received to establish gross profits for these same goods. With respect to goods whose delivery was delayed, the document and summary sheets reflected the actual costs and actual sales to arrive at one component of lost profits. With respect **[*495]** to goods never imported, the exhibit projected the costs of the goods and projected sales to arrive at the other component of lost profits. These were added together to arrive at gross lost profits of approximately $ 2.6 million.

Indu Craft's expert witness, Bernard Augen, testified as to a valuation of Indu Craft's business. Valuation began with Indu Craft's stated earnings from **[**12]** its 1986 fiscal year, which were used to project earnings for fiscal 1987. Augen testified that fiscal 1986 earnings were used because earnings in fiscal 1987 were affected by a non-recurring event, an embargo of a country from which Indu Craft imported garments. The exclusion of non-recurring events was referred to as "normalizing." Augen then assumed earnings growth from fiscal 1986 to fiscal 1987 based on Indu Craft's historical earnings growth and multiplied this number by an earnings multiplier -- based on earnings of publicly traded companies in the apparel industry -- to arrive at a range of values for plaintiff's business.

Augen stated that apparel companies had multipliers ranging from 5.2 to 11. Due to Indu Craft's small size relative to publicly traded companies, multipliers at the low end of the range were used. Using this valuation process the expert witness arrived at values for Indu Craft ranging from $ 3.3 million to $ 5 million, with a mid-range of $ 4.3 million.

B. *Law of Damages*

We begin analysis of this proof by noting that "HN2[↑] the general rule for measuring damages for breach of contract has long been settled. It is the amount necessary to put the plaintiff **[**13]** in the same economic position he would have been in had the defendant fulfilled his contract." *Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92 (2d Cir. 1984)*; *see also* 5 Arthur L. Corbin, *Corbin on Contracts*, § 992, at 5 (1964); 11 Samuel Williston, *A Treatise on the Law of Contracts*, § 1338, at 198 (3d ed. 1968). In implementing this general rule, we have stated that when computing damages for a defendant's wrongful conduct, "if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss." *S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 852 (2d Cir. 1987)* (*quoting Stern v. Satra Corp., 539 F.2d 1305, 1311-12 (2d Cir. 1976)*).

These precepts require that HN3[↑] revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach. In the typical contract action such an offset usually consists of variable costs, that is, those costs that would have been incurred solely as a result of performance **[**14]** under the contract. *See*, *e.g.*, *Lindblad Travel, 730 F.2d at 92-93*. But when the breach brings an end to a plaintiff's business the sums to be offset may often include, in addition, fixed costs. Fixed costs are those expenses that would have been incurred as a result of the overall operation of a business, including overhead such as rent, utilities, insurance, salaries and the like.

C. *Resolution of Damages Proof*

Indu Craft concedes that it proffered no evidence with respect to fixed costs. Decisional law analyzing the role of fixed costs in damages calculations is sparse since most breaches of contract in a business setting do not result in the termination of a business. Plaintiff relies on our decision in *Lindblad Travel, 730 F.2d at 93*, for its view that overhead costs need not be deducted from income to calculate damages. That reliance is misplaced. *Lindblad* determined that fixed costs should not have been included in the damages calculation where plaintiff was an ongoing business whose fixed costs were not affected by the breach. *Id*.

In the present case, plaintiff's cessation of business may very **[**15]** well have reduced or eliminated fixed overhead costs. Such savings, resulting from the Bank's breach, are properly offset from lost profits. Hence, the failure to deduct fixed costs when utilizing lost profits to calculate damages renders such measurement too imprecise for judicial use. However, proof of lost profits is but one method of proving the amount necessary to restore plaintiff to the economic position he would have been in absent the breach. An **[*496]** alternative methodology, extrapolating the value of a business as an ongoing entity from the company's past earnings, establishes a plaintiff's damages without suffering the same defect. By resorting to past earnings, this methodology already incorporates the necessary deduction of fixed and variable costs, providing an accurate measurement of plaintiff's loss as adjusted for savings resulting from the breach.

In fact, when the breach of contract results in the complete destruction of a business enterprise and the business is susceptible to valuation methods, such an approach provides the best method of calculating damages. *Cf. Sharma v. Skaarup Ship Management Corp., 916 F.2d 820, 825 (2d Cir. 1990)* **[**16]** ("HN4[↑] where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of

damages"), *cert. denied*, *499 U.S. 907, 113 L. Ed. 2d 218, 111 S. Ct. 1109 (1991)*. The methodology of determining a business's earnings and applying an earnings multiplier to fix the value of a business that was completely terminated is one we have approved. *See* Lamborn v. Dittmer, 873 F.2d 522, 533-34 (2d Cir. 1989).

The Bank attacks various aspects of the testimony offered by the plaintiff's expert. To the extent he departed from general valuation practices or adopted procedures subject to criticism, defendant had ample opportunity to elicit these facts and argue them to the jury. The expert's training and background and the procedures he followed in arriving at a valuation presented the jury with the question of whether or not to accept the expert's opinion and what weight to give it. *See* Enercomp, Inc. v. McCorhill Pub., Inc., 873 F.2d 536, 550 (2d Cir. 1989).

Further, when reviewing the sufficiency of the damages evidence, we are guided by the principle that ***HN5***[↑] if a plaintiff **[**17]** has shown it more likely than not that it has suffered damages, the amount of damages need only be proved with reasonable certainty. *See* W.L. Hailey & Co. v. County of Niagara, 388 F.2d 746, 753 (2d Cir. 1967) (collecting New York cases). New York has long had an established rule that:

> When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain.

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209, 4 N.E. 264 (1886); *see Randall-Smith, Inc. v. 43rd St. Estates Corp., 17 N.Y.2d 99, 105-06, 268 N.Y.S.2d 306, 215 N.E.2d 494 (1966)*. ***HN6***[↑] The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages. *See* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977). Indu Craft's proof of value of its business as a going concern was adequate **[**18]** to meet these tests for sufficiency.

After expressly finding that plaintiff's proof of lost value was sufficient, we are at a loss as to why the trial court then set aside the jury award. The jury's special verdict sheet made no distinction between the two methods of proving damages, and the figures were well within the range testified to by plaintiff's expert who set a low value of $ 3.3 million and a mid-range of $ 4.3 million. The jury found that Indu Craft was damaged in a total amount of $ 4.25 million, less $ 1 million for a failure to mitigate, for net total damages of $ 3.25 million. Had lost profits evidence not been presented, evidence of the lost value of Indu Craft as a going enterprise, standing alone, would have been sufficient to support the jury's award of damages. Hence, the judgment as a matter of law with respect to the contract claim must be reversed and the jury award reinstated, although the award must be modified as we discuss in a moment.

II *Prima Facie* Tort Award

We pass now to discussion of the grant of the motion for judgment as a matter of law setting aside the *prima facie* tort jury award. That award was amply justified by the proof. The Bank **[**19]** and Chokshi engaged in deliberate delay in issuing letters of credit **[*497]** and made an unprecedented demand only on plaintiff that such letters be backed by confirmed orders from all of plaintiff's customers. Their conduct ultimately drove Indu Craft out of business. The jury was entitled to find that this web of wrongdoing was not woven by innocent hands. Clearly the same wrongdoing also served as the basis for the jury finding that defendants intentionally acted with malice and without excuse to injure Indu Craft, thereby committing a *prima facie* tort against plaintiff. *See* Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142, 490 N.Y.S.2d 735, 480 N.E.2d 349 ("***HN7***[↑] Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." (internal quotes omitted)).

As pointed out above, the jury awarded Indu Craft $ 2 million on its breach of contract claim, after adjusting for its failure to mitigate damages, and $ 1.25 million on its *prima facie* tort claim. Upon plaintiff's counsel's request, the trial court asked the jury foreman if the jury meant Indu Craft to receive a total **[**20]** award of $ 3.25 million or if the *prima facie* tort award was meant to be subsumed by the larger contract award. The foreman responded that the intended award was $ 3.25 million, which, upon being polled, the jury confirmed. The magistrate then ruled on the motion for judgment as a matter of law that the awards were duplicative for the same injury and vacated the *prima facie* tort award.

HN8[↑] A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery. *See* Wickham Contracting Co.

v. Board of Educ., 715 F.2d 21, 28 (2d Cir. 1983). The question we must answer was whether this doctrine was violated by the jury's award for defendants' *prima facie* tort. **HN9**[] A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict. *See* Machleder v. Diaz, 801 F.2d 46, 57 (2d Cir. 1986), *cert. denied*, *479 U.S. 1088, 94 L. Ed. 2d 150, 107 S. Ct. 1294 (1987)*; Minpeco, S.A. v. Hunt, 718 F. Supp. 168, 181 (S.D.N.Y. 1989). This role derives from the Seventh Amendment's obligation on courts not to recast factual findings **[**21]** of a jury, *see* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 7 L. Ed. 2d 798, 82 S. Ct. 780 (1962), and is based on the notion that "juries are not bound by what seems inescapable logic to judges." Morissette v. United States, 342 U.S. 246, 276, 96 L. Ed. 288, 72 S. Ct. 240 (1952).

The jury's award of a net total of $ 3.25 million was in accordance with the expert's testimony. While it is possible that the jury impermissibly compensated Indu Craft twice for the same injury, it is equally rational to believe that the jury found that Indu Craft suffered $ 3.25 million worth of injuries and merely allocated that amount between the two different causes of action, one for breach of contract and one for tort. *See* Gentile v. County of Suffolk, 926 F.2d 142, 153-54 (2d Cir. 1991) (where jury awarded $ 75,000 for state malicious prosecution claim and $ 75,000 for federal § 1983 claim, conceivable that jury found $ 150,000 of unduplicated injuries and merely split the amount equally).

That the jury meant the total award to be $ 3.25 million is clearly supported by their responses when being polled after the verdict. **HN10**[] A jury's award **[**22]** is not duplicative simply because it allocates damages under two distinct causes of action. *See* id. at 154. The Bank made no showing other than the allocation of the award. Thus, it failed to establish the jury awards were duplicative. Because of our duty to reconcile a jury's verdict whenever possible, we think this award easily reconcilable and see no impermissible double recovery in the jury contract and tort awards. As a consequence, the judgment must be reversed and the jury's *prima facie* tort award reinstated.

III The Counterclaim

We now consider the remaining issue, which is the denial of the Bank's motion for judgment as a matter of law on its $ 1.7 million contract claim after the jury returned a no cause for action against it. Under its line of credit Indu Craft owed the Bank approximately $ 1.7 million for which the Bank asserted a counterclaim. Plaintiff admits this amount was outstanding, but maintains the Bank's actions in driving it out of **[*498]** business prevented it from performing under the note and thereby excuse performance. This "prevention doctrine" is often viewed as a corollary to the implied covenant of good faith. *See Sharma v. Skaarup Ship Management Corp., 699 F. Supp. 440, 449 (S.D.N.Y. 1988)*, **[**23]** *aff'd*, *916 F.2d 820 (2d Cir. 1990)*, *cert. denied*, *499 U.S. 907, 113 L. Ed. 2d 218, 111 S. Ct. 1109 (1991)*. The jury agreed that the Bank prevented plaintiff's performance and returned a verdict on the counterclaim in favor of Indu Craft. The district court denied the Bank's motion for judgment as a matter of law.

While the parties have exerted much energy disputing the applicability of the prevention defense to the note, we are persuaded by a more compelling rationale urged by the Bank that judgment should have been granted. It is the purpose of damages under a breach of contract action to place the aggrieved party in the same economic position that it would have occupied absent the breach. *See* Lindblad Travel, 730 F.2d at 92. Awarding Indu Craft the value of its business and at the same time relieving it from its obligation under the note actually places Indu Craft in a better economic position than it would otherwise have occupied, a result the law disfavors. To avoid such a windfall and place Indu Craft in the position it would have been in but for the Bank's breach of contract, the debt under the note must be set off from **[**24]** the damages owed Indu Craft.

CONCLUSION

Accordingly, we reverse the magistrate judge's disposition of the motion for judgment as a matter of law and remand to that court for it to reinstate the jury verdicts on Indu Craft's breach of contract and *prima facie* tort causes of action totalling $ 3.25 million, and for it to offset this total by the amount due the Bank under the note amounting to approximately $ 1.7 million, by granting the Bank's motion for judgment under its contract claim.

Reversed and remanded.

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Business value as a measure of loss in litigation contexts: Reflecting business "reality" over hypothetical "fantasy"

FARLEY J. COHEN AND PREM M. LOBO

"Is this the real life? Is this just fantasy? Caught in a landslide, no escape from reality…"

~ Freddie Mercury / Queen, "Bohemian Rhapsody"

In commercial litigation matters, counsel for both plaintiff and defence often find themselves obliged to turn their attention from the initial (and ever important) liability portion of the case to the also-important damages portion. With respect to damages, counsel need to consider, among other things, what damages will be claimed at trial, how to prove damages, what case law may apply with respect to specific damages being claimed, and whether damages-quantification expert witnesses need to be retained to prepare a report and testify at trial.

The purpose of damages is most often to restore a plaintiff to the position he or she would have been in had an alleged wrongful act or breach not occurred. In many commercial litigation contexts, this requires an analysis of the cash flows that would have been earned by a plaintiff "but for" an alleged wrongful act or breach and comparing these with the actual cash flows that were earned by the plaintiff, with the difference representing the quantum of loss.[1]

In some contexts, as an alternative to the "but for" versus actual lost cash flow[2] analysis, a business value approach may be considered to quantify loss. Namely, loss may be quantified as the "fair market value" (or the diminution in fair market value) of a business, contract, stream of income or other specified asset as a result of the wrongful act or breach. For instance, assume that a business has suffered harm as a result of an alleged wrongful act. Instead of quantifying loss as its lost cash flows for a finite period of time, the loss may be calculated as the loss in value of the entire business, indefinitely.

Expert witnesses are usually retained when the quantification of loss is not readily apparent to the court and requires specialized accounting or financial analyses to assist the court in determining what amount of damages to award. Expert witnesses often have to make important decisions with respect to whether a "lost cash flow" versus a "business value" approach is applicable in a particular case. Litigation counsel, in turn, need to understand the rationale for the approach chosen or suggested by the expert and need to play an active role in providing the expert with relevant case law on the subject.

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The choice of "lost cash flow" versus a "business value" approach can have a significant impact on the dollar value of loss being claimed. In addition, the inappropriate use of one or another in a particular context may impact the credibility of the expert witness and jeopardize the claim for damages.

This article addresses the situations in which a "lost cash flow" approach versus a "business value" approach to quantifying loss is appropriate. Although it is written from the perspective of an expert witness who has to decide between the two approaches, it is directed towards litigation counsel who have to understand the approach chosen and its underlying rationale, ensure consistency with relevant case law and, potentially, cross-examine an expert witness on his or her choice of one method over another.

In particular, this article will touch on the following topics:

- What is meant by a "business value" approach to quantifying loss versus a "lost cash flow" approach?
- In what litigation contexts might it be appropriate/inappropriate to use a business value approach to quantifying loss?
- What are the underlying assumptions behind using a business value approach to quantify loss, and when are these assumptions valid?
- What are some of the special issues that need to be considered when applying a business value versus lost cash flow approach to quantify loss?

The theory of loss quantification and the difference between a business value and lost cash flow approach to loss quantification

The purpose of loss quantification

In order to fully understand the business value approach to loss quantification, it is helpful to begin with first principles – namely, by discussing the purpose behind the quantification of loss.

The ultimate objective of loss quantification is to calculate, in an objective and independent manner, with due diligence and consideration of the available facts, assumptions and restrictions of each situation, the financial loss, if any, incurred by a plaintiff as a result of the alleged actions of a defendant. A quantification of loss should normally restore a plaintiff to the position that he or she would have been in had an alleged wrongful act or breach not occurred.

The loss quantification is usually prepared at a particular (current) assessment date. Relative to the current assessment date, loss may have occurred in prior periods (i.e., a "past loss") and may be expected to continue into future periods (i.e., a "future loss"), either for a finite period of time or, sometimes, indefinitely into the future.

"Compensation" or "restitution" is an important characteristic of loss quantification. Eminent Canadian law professor and author Stephen Waddams states that "the object of compensatory damages is to put the party complaining in the position that would have been occupied 'if the wrong had not been done' or 'if his rights had been observed.'"[3] Note that it is ultimately up to a court to decide whether a particular amount (or amounts) quantified by a valuator (or valuators) will restore a particular plaintiff to a position of "wholeness," or whether some alternate amount(s) or other remedy established by the court would be more equitable.

Lost cash flow approach

Often, the quantification of loss requires the determination of the cash flows that a plaintiff business or individual would have earned but for the alleged wrongful actions of another party (the defendant) and comparing these with the actual cash flows that the plaintiff did generate. The difference between the two represents the quantum of loss. As such, this approach will be referred to as the "lost cash flow" approach.

Assume that the plaintiff, Company A, manufactures and sells two models of window blinds to retailers – the "Sunrise" and the "Sunset." Prior to the infringement described below, each model accounted for 50 per cent of total company sales. The mechanical components and operating process of the Sunrise are protected under patents held by Company A, whereas the Sunset is not. Assume that the defendant and competitor, Company B, has replicated the Sunrise blind, which it sells at a lower price and under the name "Eclipse." Company A alleges that the Eclipse blind infringes its patents on the Sunrise, and has initiated legal action against Company B.

Company A has noticed a significant loss in Sunrise sales that corresponds roughly to the time that Company B began selling Eclipse blinds. Sales of Sunset blinds before and during the alleged infringement have remained constant and are expected to continue as such.

If Company A takes Company B to court and successfully proves infringement, then Company A will likely be able to recover its losses arising from its lost Sunrise sales.[4]

Company A would have experienced a *past loss* from the start of the infringement period up to the loss assessment date, represented by the difference between the cash flow that Company A would have earned from the Sunrise blind "but for" the alleged infringement and the cash flow that Company A actually earned from selling the Sunrise blind to the loss assessment date. Company A will also likely experience a *future loss* from the loss assessment date to the date that Company B is ordered by the court to stop selling infringing Eclipse blinds.

Some observations to be made from this example are as follows:

- Company A has experienced lost cash flow, but the loss is *not* expected to continue *indefinitely* into the future.
- The lost cash flow relates to one product, but Company A continues to sell another product, which is unaffected by the infringement.
- Company A has remained and is expected to continue in operation despite the infringement.

Given the above facts and context, in this situation, the use of a lost cash flow approach is appropriate.

Business value approach

In contrast to the "temporary" business loss example presented above, there may be circumstances whereby the loss is more "permanent" in nature, and the quantification of loss may require the valuation, on the basis of fair market value, of a division of or an entire business, contract, stream of income or other specified asset. These circumstances may arise in "tort" or "breach of contract" contexts as discussed in the next section of this article, "The appropriateness of using a business value approach."

Consider, for example, the fact situation outlined in the example above, whereby Company B infringes on Company A's patents on Sunrise blinds. However, this time, assume that the Sunrise is the only line of blinds that Company A manufactures and sells. As a result of the infringement, Company A has experienced a significant decline in Sunrise sales. Company A attempts to recover market share by cutting selling prices but is unsuccessful. Company A encounters financial difficulties, is unable to introduce an alternative product or pursue another course of action to alleviate its difficulties and is forced to cease operations.

If the shareholders/stakeholders of Company A take Company B to court and successfully prove infringement, they may be able to claim lost cash flow from the infringement until the date that Company A ceases operations (the "cessation date") and, more significantly, may be able to claim the business value of Company A as at this date. The business value represents the loss of "permanent"/ongoing future cash flow value as a result of the infringement.

In this case, the lost cash flow is represented by the difference between the cash flow that Company A would have earned from the Sunrise blind "but for" the alleged infringement, and the actual cash flow earned from selling the blind. The lost business value represents the ongoing and permanent loss of future cash flow from the cessation date going forward into perpetuity.

Some observations to be made from this example are as follows:

- Company A has experienced lost cash flow, and the cash flow loss *is* expected to continue indefinitely into the future, representing a loss of business value.
- The cash flow loss relates to the only product Company A manufactures and sells, and has affected its ability to operate as a viable business.
- Company A has ceased its business operations completely as a result of the infringement.

Given the above facts and context, and, in particular, the indefinite duration of the loss in this situation, the use of a lost cash flow approach for the past loss and a business value approach for the future loss is appropriate.

The appropriateness of using a business value approach

Now that the distinctions between the business value and lost cash flow approaches have been discussed, identifying the circumstances in which it is appropriate to use one approach rather than the other can be explored.

Permanent loss of business or cash flow

The *permanence* of the loss in question is an important criterion to justify the use of a business value approach in a loss

quantification context. Permanence can manifest itself in the following scenarios (among others):

- There is a *complete* business shutdown or cash flow loss.
- The business *winds down* initially, and then there is a complete shutdown or cash flow loss (the "slow death" scenario).
- A *portion or segment* of a business shuts down (or there is a *partial* cash flow loss), but the rest of the business carries on operations.

Complete business shut down or cash flow loss

A business value approach is applicable in situations where a business has been permanently and completely shut down or destroyed as a result of the actions of a defendant.

For example, assume that Company A was a successful manufacturing business operating from owned premises. Company A hired Company B to carry out roof and structural repairs at its premises. During the process, some of Company B's staff were negligent in their work. As a result, the roof at the premises collapsed, destroying Company A's equipment and inventory and forcing manufacturing operations to cease. Company A's customers were greatly inconvenienced and chose to purchase from a competitor. Customers have indicated that they have signed contracts with the competitor and will not return to Company A, destroying any hope of Company A rebuilding its business. In this situation, Company A can likely seek to recover its lost business value against Company B.

The concept of quantifying loss using business value where there is a permanent and complete loss of business is cited in a number of Canadian and U.S. legal cases. In *Jim's Hot Shot Service Inc. v. Continental Western Insurance Co. and Sun West Insurance Agency*,[5] the court indicated that "when, as in this case, the claim is that a business was destroyed by negligence, the measure of damages is the difference in fair market value immediately before the negligence caused damage and the fair market value that remained when the business stopped…"

Similarly, in *Taylor v. B. Heller and Co.*[6] the court recognized that "the action for damages for destruction of a business [should be] measured by the difference between the value of the business before and after the injury or destruction."

In either case, the value of the business after a complete business shutdown would either be negligible or represent any net residual proceeds received or recoverable from the liquidation of any remaining assets.

Other notable cases that echo the same concept include *Indu Craft Inc. v. Bank of Baroda*[7] and *Aetna Life & Casualty Co. v. Little*.[8]

Business winds down initially, and then completely shuts down

A business value approach is also applicable in situations where a business has been harmed, carries on operations for a period of time during which it experiences lost cash flows, and then is forced to cease operations as a result of the harm (sometimes described as the "slow death" scenario).

For example, assume that Company A was a food service business involved in supplying meals for airlines. Company A obtained the necessary licences, permits and approvals from government regulators to allow it to operate as a food service business. Company A also obtained comprehensive insurance coverage from Company B, an insurance provider. In January 2009, Company B erroneously filed a statement with government regulators indicating that Company A's insurance coverage had been terminated for non-payment of premiums. Company A's licences were suspended for two months and then reinstated when the erroneous insurance statement was rectified. However, in that time, many of Company A's airline customers stopped purchasing from Company A, and over the course of 2009, others also followed. Company A experienced ever-increasing operating losses as 2009 proceeded, before shutting down operations in December 2009.

In pursuing legal action in a situation in which the alleged action led to a company's demise, the plaintiff can seek to recover lost cash flow for the period during which it attempted to continue to operate, as well as lost business value with respect to lost cash flow beyond January 2010.

The concept of quantifying both lost cash flow during a business wind-down and lost business value for lost future value is cited in *Jim's Hot Shot Service Inc. v. Continental Western Insurance Co. and Sun West Insurance Agency.*[9] In this case, the court indicated that "loss of profits prior to cessation of a damaged business is properly allowable as an element of damages in addition to an allowance for a market value diminution because the interim profit losses experienced prior to liquidation of the business are not reflected or compensated for in the market value determination."

A portion or segment of a business shuts down

A business value approach is also applicable in situations where a segment of a business or a distinct stream of cash flow has been permanently lost as a result of some harm done, but the overall business continues to operate.

For example, assume that Company A sources and sells promotional merchandise such as embossed pens, golf balls, calculators and USB keys to businesses. The company is organized into three geographical divisions – Eastern, Central and Western Canada – each of which is headed by a sales manager. As the head office is in Europe, Company A relies on each manager to effectively run his or her division and manage customer relations. Assume that the manager for Eastern Canada resigns, sets up a competing business and improperly solicits all or most of the Eastern Canada customers away from Company A. Company A is unable to mitigate and as a result is forced to terminate Eastern Canada operations and divest its remaining assets.

In pursuing legal action against the manager arising from a breach of fiduciary duties and solicitation of customers, Company A may be able to claim lost business value due to the permanent loss of Eastern Canada operations.

Inability to fully mitigate loss of business or cash flow

What is implicit in the "permanence" criterion discussed above is the assumption that the business in question is unable to fully mitigate its lost business or cash flow. Stated another way, in order to be able to claim "business value" as a measure of loss, a plaintiff usually needs to demonstrate that it was unable to recapture or replace lost business, or restart business operations, or somehow alleviate its "permanent" loss.

In the above example, in order to successfully claim the business value of its Eastern Canada division as its loss, Company A will likely have to demonstrate that it was unable to recapture the solicited customers or, if it attempted to do so, why its efforts were unsuccessful.

With respect to mitigation, a plaintiff is expected to make "reasonable" attempts to minimize its losses; a plaintiff will usually not be faulted where mitigating would necessitate taking on excessive risks, or pursuing financially or operationally infeasible or uneconomical alternatives.

Breach of contract

The term of a contract and the clauses in a contract are usually very important in determining whether a lost cash flow approach or business value approach is applicable in a particular scenario.

Contract clauses or term of a contract

To illustrate the importance of contract clauses, assume that Company B licenses Company A to manufacture shoes under a designer brand owned by Company B. Company A pays a royalty to Company B but otherwise keeps the profits from sales of licensed apparel. The licence is a "contract" that stipulates various terms, conditions and responsibilities of both parties. It renews automatically every five years but can be terminated at the option of either party with four months' notice. The licence had been renewed continuously since it was awarded 20 years ago.

Assume that Company B is dissatisfied with the marketing and sales performance of Company A and decides to terminate the licence two years into the current five-year term, effective immediately. The licence in question is crucial for Company A's survival, and without it the company is forced to cease operations.

Company A pursues legal action against Company B, alleging breach of contract. If Company A successfully proves a breach of the contract by Company B, the question is whether it will be able to claim lost business value or lost cash flow and, if the latter, over what period of time. Contractual terms indicate that either party could terminate the contract with four months' notice. Notwithstanding the fact that the licence contract was renewed over the past 20 years, Company A may be entitled to receive its lost cash flow for only a four-month period from the date of termination. As an alternative, at most, Company A might be entitled to claim its lost profits for the remainder of the current contract term (i.e., for three years). Given the clear "out" clause in this particular contract or, at most, the remaining three-year contract term, a quantification of lost business value would not seem to be appropriate in this context.

One of the leading Canadian authorities on contractual damages is *Hamilton v. Open Window Bakery Ltd.*[10] In this case the plaintiff, Hamilton, had entered into a 36-month contract with the defendant, Open Window Bakery ("OWB"), to market and sell baked goods in Japan. The contract could be terminated immediately without notice if Hamilton acted in a manner that was "detrimental to the reputation and well-being of OWB," or could be terminated with three months' notice after commencement of the 19th month of the contract.

OWB proceeded to terminate the contract 16 months into its term, effective immediately, alleging that Hamilton had indeed acted in a manner that was detrimental to the reputation and well-being of OWB.

Initially the trial judge held that OWB had wrongfully terminated the contract, and awarded damages representing the remaining payments that would have been made over the remaining 36-month term, less a factor of 25 per cent to reflect the risk that OWB may have exercised its right to terminate at some point before the end of the term of the contract.

The Court of Appeal, however, held that the three-month notice-period clause in the contract represented the "minimum guaranteed benefits" under the contract and, therefore, the maximum amount of damages that could be payable to the plaintiff.

On appeal before the Supreme Court of Canada, the court noted that where a contract has alternate modes of performance (for example, the ability to terminate upon notice or the ability to terminate based on other clauses), the mode that is least burdensome to the defendant should be awarded. Based on this, the Supreme Court dismissed the appeal regarding damages, agreeing with the three-month notice period as the basis for damages.

In *Open Window Bakery* the alternative damages periods that were considered ranged from a contractually stated notice period to the remaining term of the contract in question. Given the clear contractual clauses in this case (and, potentially, contextual factors, such as the lack of past contract renewals), a claim for ongoing contract losses/business value was not advanced or considered.

Exceptions

From the discussion above, it follows that if contractual exit clauses or the contract term are not clearly set out, a claim for business value might be an option, given the particular contextual factors of a loss quantification scenario. For instance, in the example of the shoe manufacturer cited above, assume that the licence in question did not specify a term or did not specify any clear notice period for termination. In this case, a valuator might consider that the contract in question would continue to be valid and enforced by both parties indefinitely into the future, thus supporting the use of a business value approach.

Additionally, in some cases, business value may be claimed if the breach of contract was particularly egregious or in particularly bad faith. For example, in *United Roasters Inc. v. Colgate-Palmolive Co.*[11] the plaintiff was awarded compensation for loss of business value in a breach of contract case. The defendant terminated a contract during a period when its right to do so was unchallenged. However, upon terminating the contract, the defendant refused to return the plaintiff's manufacturing assets, putting the plaintiff out of business. In effect, although the defendant terminated the contract pursuant to the contractual terms, its actions before and after the termination were egregiously harmful to the plaintiff. In this case, awarding the plaintiff its lost cash flow over a normally reasonable notice period was not considered fair.

Methodology and other issues to consider

Methodology

Generally speaking, the methodology behind a business value approach has many similarities to that used in a lost cash flow approach. However, subtle differences should be noted, particularly with respect to the quantum of the discount rate to use, whether or not hindsight can be used, and the inclusion of post-purchase synergies (see table on next page).

Hindsight

The question of whether and how to consider hindsight when quantifying loss using a business value versus lost cash flow approach is an important one. Hindsight in valuation and loss quantification contexts refers to the use of "actual" information

	Lost Cash Flow Approach	*Business Value Approach*
1.	Assumes a "temporary" loss of cash flow.	Assumes a "permanent/perpetual" loss of cash flow.
2.	Often associated with the scenario in which there is a temporary or partial business shutdown or a temporary or partial shutdown of a segment of a business.	Often associated with the scenario in which there is a complete business shutdown or a complete shutdown of a segment of a business.
3.	Actual cash flow assumed to eventually recover to "but for" levels.	Assumes inability of plaintiff to fully mitigate lost cash flow.
4.	Usually applicable in breach of contract contexts with notice periods or contract termination provisions.	Usually applicable in breach of contract contexts where business destroyed or contract termination provision was not specified.
5.	Calculations based on pre-tax cash flow.	Calculations based on after-tax cash flow.
6.	Uses after-tax discount rates.	Uses after-tax discount/capitalization rates.
7.	Discount rates reflect the risks associated with the shorter "lost cash flow" time period in question.	Discount rates used reflect long-term operating, competitive and financing risks.
8.	Hindsight usually is admissible.	Hindsight usually is not admissible; some exceptions do exist.

(financial data, facts, economic data and so on) known after a particular valuation date or loss assessment date.

The general rule is that hindsight is not admissible in business value contexts except to test the reasonability of assumptions or projections made at the valuation date, whereas hindsight *is* normally admissible in loss quantification contexts. However, what is less clear is which approach to take when business valuations and loss quantifications intersect, as in the case of business valuations that are prepared for loss quantification purposes.

It is generally accepted that a valuation is prepared at a specific point in time and, therefore, should reflect facts, information and expectations known at that time. For instance, the court in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*[12] summarized the accepted approach to hindsight when it stated "the established legal principle is that, in the process of valuing shares at a particular date, hindsight information is generally inadmissible." The court went on to note that

> it would appear that two general exceptions to the principle have been recognized in Canadian case law. The first exception would appear to be that factual hindsight information – but not opinions or mixed facts and opinions – may be used for two purposes: firstly, to compare actual results achieved after the valuation date against projected or forecasted corporate results said to be reasonably foreseeable on the valuation date; and secondly, to challenge the reasonableness of assumptions made by the valuators. The second exception to the general principle would appear to be that hindsight information may be used to determine the correct value as of the valuation date of an unchanged component…in existence as of the valuation date.

It is also generally accepted that the objective of loss quantification is to restore an injured party to the position it would have been in had an alleged wrong not been committed or had a contract been fulfilled. In restoring a plaintiff to a condition of "wholeness," an examination of actual facts and events arising after the date of the alleged wrong is needed to forecast what would have happened "but for" the alleged wrong, and to compare it with what actually happened as a result of the alleged wrong.

The challenge arises when valuations are prepared for the purpose of quantifying loss. In most cases, hindsight will not be permissible. However, in some instances, in order to restore a plaintiff to a position of "wholeness," there might be compelling arguments to use hindsight in a valuation. Put another way, in some situations, if hindsight were not to be used, this would result in either a windfall gain or unfair penalization of a plaintiff.

Courts have support the limited use of hindsight in contexts similar to that described above. For example, in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*,[13] in attempting to determine the value of a patent in a breach of contract case the court noted "an imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent." The court noted that when time has elapsed since the valuation date in question, "experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages and forbids us to look within."

In short, while not permissible in most valuation scenarios, hindsight may be permissible in particular contexts in which valuations are prepared for the purpose of quantifying loss in order to make plaintiffs "whole" again.

Conclusion

The decision whether to claim lost cash flow versus business value as damages is an extremely important one for counsel, one that often depends on the facts of a particular legal context. Counsel (and damages quantification experts) need to be able to distinguish between a business value approach and lost cash flow approach to quantifying loss, understand the appropriateness of using a business value versus lost cash flow approach in particular loss quantification contexts, and understand the methodology used for either approach.

What is clear from the analysis in this article are the following:

- There are similarities between a business value and lost cash flow approach; for instance, a projected/estimated stream of "forgone cash flow" is the foundation upon which either calculation is based. Indeed, a lost cash flow approach may

be seen as a subset of the business value approach.

- There are also differences between the two approaches; for example, aside from the fact that the lost cash flow and business value approaches encompass shorter and longer time periods respectively, there may be differing risks and discount rates, and differing treatments of hindsight between the approaches.
- There are specific circumstances in which a business value approach is more appropriate than a lost cash flow approach, and vice versa.

Ultimately, a quantification of loss in a litigation context needs to reflect the facts of the case and "business reality." If a business is permanently shut down with no hope of mitigation, this "reality" may suggest a business value approach, as compared with a situation in which a business suffers a partial loss of cash flow for a finite period of time, a "reality" that may suggest a lost cash flow approach. If counsel or damages quantification experts "force" a business value approach in a context in which it is not applicable, it may take the damages claim into the realm of fantasy and threaten the credibility of the claim for damages.

Perhaps, when deciding the appropriateness of a particular loss quantification approach or considering the reasonability of assumptions used in arriving at a particular quantum of loss, counsel and damages quantification experts may be well served to repeat to themselves the enigmatic yet soul-searching words of the great Freddie Mercury: "Is this the real life? Is this just fantasy?"

The answer to this question may well lead to a better matching of a particular loss-quantification approach with the factual context it is better suited for.

Notes

1. This article uses the terms "loss" and "damages" interchangeably. Technically, "loss" refers to the harm alleged to have been suffered by a plaintiff, whereas "damages" refers to a sum of money that a court decides is reasonably fair compensation for alleged losses.
2. Also referred to as "lost profits."
3. In *The Law of Damages* (Toronto: Canada Law Book, 2009) at section 5.20.
4. Assume also that Company A has elected to claim "damages" against Company B rather than an "accounting of profits" earned by Company B from the infringing product.
5. 353 NW 2d 279 (ND 1984).
6. 364 F 2d 608, 612 (6th Cir 1966).
7. 47 F 3d 490 (2d Cir 1995).
8. 384 So 2d 213 (Fla Dist Ct App 4th Dist 1980).
9. 353 NW 2d 279 (ND 1984).
10. [2004] 1 SCR 303, 2004 SCC 9.
11. 649 F 2d 985 (4th Cir 1980), 454 US 1054, 102 SCt 599, 70 L Ed 2d 590 (1981).
12. 2002 OTC LEXIS 2992 (SCJ).
13. 289 US 689 (1933).

Adding up the Damage: Lost Profits vs. Business Value

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Canada

When a business is destroyed as a result of wrongdoing, there are two commonly used methods by which the plaintiff's damages may be measured. One method is to appraise the value of the plaintiff's business at the date of loss; the loss to the plaintiff is the amount that the plaintiff could have sold the business for at the date of the loss. Another method is to calculate the plaintiff's annual loss of profits.

Under the business valuation method, the remedy applied is to have the defendant "purchase" the destroyed business from the plaintiff at its "fair market value" at the date of the loss. This value will be equal to the present value of the cash flows that would accrue to the owner of the business over its lifetime. A risk-adjusted discount rate is applied to convert these projected annual cash flows to a single "present value" lump sum. In cases where the business is assumed to have been likely to carry on in perpetuity, the annual discount rate may be converted into a single multiplier – for example, if the appropriate discount rate is 20 per cent, the multiplier would be 1 / 0.2 = 5.

Under the lost-profits method, one forecasts the annual profits for the destroyed business based on the actual economic and industry conditions from the date of the damage to the date of trial and on into the future. As with the business valuation method, under the lost-profits method, the plaintiff's lost profits should be discounted to reflect the fact that the projected profits were by no means "riskless."

would have performed absent the wrongdoing. Failure to do so can result in significantly higher damage calculations under the lost-profits method than under the business valuation method, as illustrated in the case of *Agribrands Purina Canada Inc. v. Kasamekas* ([2010] O.J. No. 84; [2011] O.J. No. 2786).

In *Agribrands*, the plaintiffs entered into an agreement which called for them to be exclusive distributors of Purina-branded feed in Halton County, Ont. beginning in 1991. The plaintiffs soon discovered that Agribrands was continuing to supply feed to rival distributors. As a result, the plaintiffs suffered and were forced out of business altogether in early 1992.

The plaintiffs' expert calculated lost profits of between $3.1 million and $4.2 million from the date of breach until the projected retirement of the owners, a period of 28 years. Most of this period fell between the date of the wrongdoing and the date of trial. It appears that the plaintiff's expert did not apply a discount rate to the past loss of profits, resulting in a large damage calculation. The court ruled that a lost-profits calculation over such a lengthy period was too speculative, particularly for a new business. It instead accepted the business valuation method advocated by the defendants' expert, and arrived at a significantly lower damage figure based on a multiple of three times the plaintiff's projected profits.

One key difference between the business valuation methodology and the lost-profits method concerns the issue of hindsight. The business valuation method imagines that the plaintiff would have sold the damaged business immediately prior to the damage occurring; it attempts to estimate the proceeds the plaintiff could have received at that point in time. Such a price would only have been negotiated based on facts known at that date. To the extent that no sale of the business was actually contemplated, a loss calculation based on the value of the business can lead to an amount far different than would have been achieved by the plaintiff but for the loss had they continued to operate the business. In such cases, an analysis of lost profits based on hindsight will prove more realistic.

This issue was addressed in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* [2004] B.C.J. No. 2337. The plaintiff filed suit after almost all of the investment advisers at one of its offices joined a competitor in 2000. The plaintiff's expert estimated the change in the value of the affected branch resulting from the co-ordinated departure; the valuation, being at a point in time, failed to consider the downturn in the financial markets as a result of the bursting of the "tech bubble" shortly following the breach. The court rejected the business valuation method for this reason, noting that to "artificially" ignore these relevant developments in the economy would be to provide a "windfall" for the plaintiff.

the *Agribrands* damages award, noting that the trial judge was not justified in assuming that, but for the breach, the plaintiff would have continued as a Purina dealer for any longer than the original term of the contract.

The business valuation and lost-profits approaches often yield similar damages calculations. When they do not, it is often due to one of the factors noted above. Courts may also subjectively prefer one approach over the other. Experts are therefore well advised to consider calculations under each methodology and adopt the approach that best fits the facts of the case.

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

Court File No. CV-21-656040-00CL

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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