

Case Name:

Duckman v. Jelian Distributors Inc.

Between

Lloyd Duckman and Les Cafes Filtres Rombouts Inc. and Rombouts
Coffee Ontario Ltd., plaintiffs, and
Jelian Distributors Inc. and Jerry Streisfield also known as
Jerry Field, defendants

[2002] O.J. No. 871
Court File No. 43571/97

Ontario Superior Court of Justice
Newmarket, Ontario
Stinson J.

Heard: February 11 and 12, 2002.
Judgment: February 28, 2002.
(64 paras.)

Business law — Sale of a business — Conditions and warranties — Restitution — Unjust enrichment — Benefit acquired from the plaintiff — Recovery of money — Contracts — Performance or breach — Breach — What constitutes a breach — Evidence — Special modes of proof — Admissions — Judicial admissions — Pleadings — Bailment — Liability of bailee — Burden of proof.

Action by Duckman, Les Cafes Filtres Rombouts, and Rombouts Coffee Ontario against Jelian Distributors for payment of commissions and on account of certain goods, arising out of the sale of a business. Duckman was the principal of a business which he operated through Les Cafes Filtres and Rombouts Coffee. Duckman made an oral agreement to sell the business to Jelian. Jelian was to pay a commission to Duckman from its sales of products manufactured by a Belgian company, Koffee F. Rombouts N.V. However, the agreement was conditional upon Jelian obtaining an exclusive distributorship agreement from Koffee. Duckman transferred the assets of the business to Jelian. Jelian also agreed to take certain goods on consignment. Duckman sought payment of commissions owing from the sale of the Koffee products, as well as payment for the consignment items. Jelian argued that the distributorship agreement was never obtained and therefore the contract with Duckman never became effective. In other proceedings, Koffee claimed against Jelian for payment for goods supplied to Jelian. In its statement of defence and counterclaim in that action, Jelian pleaded that Koffee had granted it exclusive distribution rights to market and sell its products.

HELD: Action allowed. The contract was enforceable and Jelian was liable to Duckman for the commissions. The distributorship agreement between Jelian and Koffee had come into existence, which satisfied the contract's condition. Jelian's pleading in the action by Koffee was admissible and the admission contained therein was accorded great weight. The pleading was prepared by the brother of the president of Jelian, who must have been aware that the distributorship agreement was a live issue in the action by Duckman. An adverse inference was drawn from Jelian's failure to call evidence to explain the admission. Alternatively, Duckman was entitled to the payment of the same amount on the basis of unjust enrichment. Jelian received a benefit in retaining the commission amount which would otherwise have been payable. Duckman suffered a corresponding deprivation, as he had transferred the assets of the business without receiving commission. There was no juristic reason for the enrichment. Jelian was obliged to pay for the consignment items. Jelian failed to discharge its onus as a bailee, of proving that the loss of the goods was not due to its negligence or improper conduct.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 25.06(1), 31.11(6).

Counsel:

James F. Diamond, for the plaintiffs.

Jeffrey Streisfield, for the defendant.

1 **STINSON J.:**— This action concerns a claim for payment of commission said to be owing to the plaintiffs arising from the sale of their business to the defendant Jelian Distributors Inc. In the alternative, the plaintiffs assert a claim founded on the concept unjust enrichment. In addition, the plaintiffs claim payment on account of certain goods that were allegedly delivered by them to Jelian on consignment.

FACTS

2 The plaintiff Lloyd Duckman is a businessman and a non-practising chartered accountant. He is the principal of and controls the two corporate plaintiffs. For the most part, during the course of the trial before me, little distinction was made among the plaintiffs. It would appear, based on the evidence, that Les Cafes Filtres Rombouts Inc. ("LCFR") controlled certain distribution rights and relationships, as I will discuss in more detail presently, while Rombouts Coffee Ontario Ltd. ("RCOL") owned inventory and certain other physical assets. At the material times Mr. Duckman operated the business in question through one or both of the two plaintiff corporations.

3 The defendant Jelian Distributors Inc. carries on business as a distributor of food products to the retail and food services industry. At the material times, Jelian was operated by members of the Streisfield family. The president of Jelian was and is Craig Streisfield, also known as Craig Field. The defendant Jerry Streisfield, also known as Jerry Field, now deceased, was Craig Field's father. The action was discontinued as against Jerry Field in 2001, leaving Jelian as the sole defendant at trial.

4 In the mid 1980s Mr. Duckman became interested in the idea of bringing to North

America a coffee product that was manufactured by a Belgian company known as Koffie F. Rombouts N.V. ("Rombouts"). In essence, the Rombouts product was a single serving disposable coffee filter system that allowed the user to create a freshly-brewed cup of coffee. Mr. Duckman saw the potential for marketing this product in North America, and he approached Rombouts for that purpose. As it turned out, Rombouts had just made arrangements with a proposed American distributor. In due course, however, Mr. Duckman joined forces with that individual.

5 By the late 1980s Mr. Duckman had achieved some success in establishing Rombouts products in North America. By that time, the sales and distribution business was being handled through the two plaintiff companies, LCFR and RCOL, which Mr. Duckman controlled. Mr. Duckman had a variety of customers, including Air Canada. The relationship with Air Canada was particularly lucrative.

6 In early 1991 Mr. Duckman decided that he would sell the business. Among other factors, he was motivated to do so by the failing health of his wife who, sadly, died in June of that year. Mr. Duckman looked around for potential purchasers and began discussions with Jerry Field on behalf of Jelian. According to Mr. Duckman, those discussions culminated in a meeting at Yitz's restaurant in Toronto, in mid-June of 1991. That meeting was attended by Mr. Duckman, Jerry Field, Craig Field and his brother Jeffrey Streisfield. It took place a few days before Mr. Duckman's wife died.

7 According to Mr. Duckman's evidence, at this meeting, an oral agreement was reached for the sale of the business from the plaintiffs to Jelian. Jeffrey Streisfield is a lawyer, and subsequent to the meeting he prepared a draft document incorporating the terms that the parties had agreed to. The parties to that document were LCFR, Mr. Duckman and Jelian. Among other things, it provided for the sale by LCFR and Mr. Duckman to Jelian of certain promotional material, stationery, invoices, contracts, customer accounts and customer lists and LCFR's toll free telephone number. In exchange, Jelian was to pay a commission to Mr. Duckman of 5 percent of its net sales of Rombouts products over a specified period, to a maximum of \$36,000. As events unfolded, however, the document never came to be executed.

8 No evidence was called by the defence to contradict Mr. Duckman's assertion that the parties had an agreement. Nor was there any dispute before me concerning the terms of the parties' agreement or that they were accurately reflected in the draft document. Rather, the dispute centered on whether or not a certain condition contained in the agreement was ever fulfilled.

9 More specifically, there was no dispute between the parties that Article 10.01 of the draft document accurately reflected the fact that their agreement was conditional. That provision stated as follows:

10.01 This Agreement and provisions herein are conditional upon Jelian obtaining an exclusive distributorship agreement from Rombouts on terms satisfactory to Jelian. This condition is for the benefit of Jelian and may be waived by Jelian by notice in writing to [Mr. Duckman].

10 Simply stated, it is the position of the plaintiffs that the condition reflected in

Article 10.01 of the draft agreement was satisfied, and thus the agreement between the parties became binding and enforceable. By contrast, it is the position of the defendants that Jelian did not obtain an exclusive distributorship agreement from Rombouts and thus Jelian's agreement with the plaintiffs never came into force.

11 The determination of the foregoing issue is central to this case. As I have noted above, under the terms of the parties' agreement, Mr. Duckman was entitled to be paid commission on sales of Rombouts products made by Jelian after the acquisition by Jelian of the plaintiffs' business. Rombouts was a product line that Jelian had not previously carried. Subsequent to June 1991 Jelian began to sell Rombouts products for the first time. By agreement of the parties, commissions on sales of Rombouts products by Jelian over the relevant period have been calculated to be \$10,687.01. During the course of argument, both counsel agreed that if I were to find that an exclusive distributorship agreement had been made between Jelian and Rombouts, then the condition contained in the agreement between the plaintiffs and Jelian would be satisfied, and the commissions would be payable.

12 As I have mentioned previously, the draft document prepared by Jeffrey Streisfield never came to be executed by the parties. Nevertheless, subsequent to the mid-June, 1991 meeting and following his wife's death, Mr. Duckman proceeded to transfer the assets of the business to Jelian. It is important to note that, because it was essentially an importing and distribution operation, the plaintiffs' business did not include many hard assets. Indeed, what was transferred appears to have consisted of some inventory, promotional material, stationery and invoices, but more importantly lists of customer accounts and customer lists and contacts, and in particular the contact with Air Canada. Mr. Duckman travelled to Montreal personally to arrange the successful transfer of the Air Canada account to Jelian.

13 During the time that the plaintiffs operated the business, they stored their inventory at a third party warehouse. By the end of August 1991, Mr. Duckman was anxious to terminate those warehousing arrangements. He therefore arranged with Jerry Field to have the remainder of the plaintiffs' goods, promotional products and other items that remained at the warehouse to be shipped to Jelian's warehouse. These items were received by Jelian, which agreed to purchase some of them. Jelian was invoiced by RCOL and paid for those goods that it had agreed to purchase. Jelian was not interested in purchasing some of the other items. The plaintiffs contend, however, that in relation to certain specific goods that were part of this shipment, Jerry Field agreed with Mr. Duckman that Jelian would take these particular items on consignment. An invoice was sent by ROCL to Jelian on account of the items that were allegedly subject to this consignment arrangement, but that invoice was not paid. It forms the balance of the plaintiffs' claim in this proceeding. Before me, neither the plaintiffs nor the defendant was able to prove what happened to the consigned items.

ISSUES AND ANALYSIS

14 Based upon the evidence and submissions before me, three main issues arise for consideration in this case, as follows:

Issue 1: Was the condition in the sale agreement relating to the creation of a

Issue 2: If the answer to Issue 1 is no, are the plaintiffs entitled to be compensated on account of the transfer of the business to the defendants based on the principles of unjust enrichment?

Issue 3: Are the plaintiffs entitled to be paid for the goods allegedly consigned to the defendants?

15 I will consider each of these issues in turn.

Issue 1: Was the condition in the sale agreement relating to the creation of a Rombouts-Jelian exclusive distributorship agreement satisfied?

16 The answer to this question comes down to a finding of fact. The evidence relating to this crucial finding of fact is relatively thin. The only witness who testified at trial was Mr. Duckman. He said that he did not know whether the Rombouts-Jelian exclusive distributorship ever came into being.

17 The only other testimony that was placed before me consisted of excerpts from the transcript of the examination for discovery of Jerry Field. Unhappily, Mr. Field died prior to the trial. On consent of the parties, excerpts from his discovery transcript were read in as part of the defendant's case, pursuant to rule 31.11(6).

18 In those excerpts of his discovery testimony that were read into evidence by the defendant, Jerry Field stated that Rombouts and Jelian never reached an exclusive distributorship agreement. As well, he identified two letters from Rombouts to Craig Field in which the subject of a distribution agreement was discussed and draft agreements were attached, which indicate that, as of March 1992, negotiations between the parties were continuing.

19 If there was nothing more before me relating to the question whether a Rombouts-Jelian exclusive distributorship agreement came into being, then Jerry Field's discovery evidence would obviously carry the day. Subsequent to Mr. Field's examination, however, and apparently in response to undertakings given and answered, other evidence came into the plaintiffs' hands. Specifically, the plaintiffs were made aware of certain litigation between Rombouts and Jelian, in which Rombouts claimed payment for coffee products sold and supplied by Rombouts to Jelian (the "Rombouts Action"). Jelian defended the Rombouts Action and advanced a counterclaim. The plaintiffs obtained copies of the pleadings in that action.

20 Of particular significance is paragraph 6 of the statement of defence and counterclaim filed by Jelian in the Rombouts Action. In that paragraph Jelian pleaded the following facts:

6. In March of 1992, [Rombouts] granted Jelian exclusive distribution rights to market and sell [Rombouts'] products in the Provinces of Ontario, Quebec and British Columbia Pursuant to the appointment, [Rombouts] agreed to sell its products to Jelian and Jelian agreed to purchase [Rombouts'] products based on purchase orders issued by Jelian to [Rombouts] from time to time

Jelian's statement of defence and counterclaim in the Rombouts Action went on to allege that Rombouts had breached the parties' agreement causing damage to Jelian, in respect of which Jelian claimed against Rombouts damages for breach of contract in the amount of \$50,000.

21 The statement of defence and counterclaim filed by Jelian in the Rombouts Action was dated August 5, 1997. It was prepared by solicitor Jeffery Streisfield, the son of Jerry Field and brother of the president of Jelian, Craig Streisfield. The statement of claim in the present action was issued and served prior to April of 1997, well before Jelian served its statement of defence and counterclaim in the Rombouts Action. Although Jerry Field was examined for discovery in this action in May of 1999, the pleadings from the Rombouts Action were not produced by Jelian at the time of that examination. Counsel for the plaintiffs was therefore unaware of and unable to question Jerry Field about the contents of paragraph 6 of the Jelian statement of defence and counterclaim in the Rombouts Action.

22 At the trial before me, counsel for Jelian objected to the admissibility of the Jelian statement of defence and counterclaim in the Rombouts Action, on the ground of relevance. I heard extensive argument on this issue, in which counsel for the plaintiffs asserted that the content of paragraph 6 of the Jelian statement of defence and counterclaim in the Rombouts Action was an admission upon which the plaintiffs could rely in the case before me to prove that the Rombouts-Jelian exclusive distributorship agreement did indeed come into being.

23 I ruled that the statement of defence and counterclaim filed by Jelian in the Rombouts Action was admissible. I agreed with the approach taken by Allan J. of the British Columbia Supreme Court in *Caviglia v. Tenorio* (1992), 71 B.C.L.R. (2d) 255 and specifically with the conclusion (at p. 262) that "... an admission of liability in a proceeding is admissible in separate proceedings, but not conclusive. The weight to be given to such an admission must be determined in the particular circumstances in which it was made." The question I must now address is: what weight should be given to the admission before me?

24 So that the record before me would be complete, I directed counsel for the plaintiffs to tender in evidence all of the pleadings exchanged in the Rombouts Action. I note that in its reply Rombouts denied the allegations contained in Jelian's statement of defence and counterclaim.

25 In *Caviglia v. Tenorio*, supra, two separate actions had been commenced by two different injured parties, against the same driver arising from the same car accident. The defences in both actions were conducted by a common insurer. In one proceeding liability was admitted. In the other proceeding, in which a different lawyer acted for the defendant driver, liability was disputed. At the trial of the action in which liability was disputed, plaintiff's counsel sought to rely upon the admission of liability that had been made in the other action. The evidence at the trial indicated that the insurer had a practice of admitting liability on behalf of its insured without the latter's knowledge or consent. As well, the defendant testified with respect to the admission and stated that she did not instruct her lawyer to make an admission of liability. Allan J. concluded that in these circumstances the weight to be given in the case being tried to the admission made in the other case was negligible.

26 Another case that considered the same issue was *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.*, [1998] A.J. No. 918, a decision of Romaine

J. of the Alberta Court of Queen's Bench. Romaine J. followed the decision in Caviglia and agreed that the weight to be given to the admission is to be determined in the particular circumstances in which it was made. In Gerling Global, the admission sought to be relied upon was contained in a Statement of Uncontested Material Facts that had been submitted to a court in the State of Louisiana for the purpose of obtaining summary judgment. Romaine J. found this to be (at para. 42) "a document which was prepared carefully and with the expectation that the [parties] would be bound by its words. ... I find it is appropriate to admit [this document] as an informal admission and to accord it great weight as representing the truth of its contents."

27 In the present case, I consider several factors to be relevant in assessing the weight to attach to the admission contained in paragraph 6 of the statement of defence and counterclaim filed by Jelian in the Rombouts Action. Firstly, the pleading was prepared in accordance with rule 25.06(1) of the Rules of Civil Procedure, which provides as follows:

25.06(1) Material facts - Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Accordingly, when Jelian made the allegations that it did in paragraph 6 of its statement of defence and counterclaim in the Rombouts action, it was asserting and relying on these allegations as statements of fact.

28 Second, the pleading was prepared and filed on behalf of Jelian by Jeffrey Streisfield. Although I am mindful of the fact that Jeffrey Streisfield appeared before me as counsel for Jelian in this action (pursuant to leave previously granted to him), I cannot ignore his very close ties with Jelian and the other members of the Streisfield family. As I have previously noted, Jeffrey Streisfield is the son of Jerry Field and the brother of the president of Jelian, Craig Field. Jeffrey Streisfield attended the meeting at which the agreement was struck for Mr. Duckman to sell his business to Jelian. Jeffrey Streisfield was the drafter of the formal agreement of purchase and sale containing the condition that is central to the current dispute. When this litigation was initially commenced in 1997, Jeffrey Streisfield was included as a named defendant. Initially, Jerry Field and Jeffrey Streisfield were defended by a firm of solicitors of which Jeffrey Streisfield was a member.

29 Accordingly, at the time that he drafted Jelian's statement of defence and counterclaim in the Rombouts Action, Jeffrey Streisfield had to be aware that a live issue in the previously-commenced Duckman litigation was whether the condition of the existence of a Rombouts-Jelian exclusive distributorship agreement had been satisfied. There was no suggestion before me otherwise.

30 Third, no evidence was called on behalf of Jelian to explain the circumstances under which the admission in paragraph 6 of the statement of defence and counterclaim of Jelian in the Rombouts Action was made, nor was any evidence called by the defendants concerning the outcome of the Rombouts Action.

31 Finally, in another context, counsel for the plaintiffs urged me to draw an adverse inference due to the failure of Jelian to call its president, Craig Field, as a witness, at trial.

Craig Field was present in court throughout the trial before me, but never testified. As I have previously mentioned, Craig Field was a participant in the June 1991 meeting with Mr. Duckman. He later corresponded with Rombouts concerning the establishment of an exclusive distributorship arrangement between Rombouts and Jelian. His association with Jelian apparently continued during the time that Jelian was engaged in the litigation with Rombouts. He was centrally involved in most of the events that are material to this dispute.

32 As was stated by the Ontario Court of Appeal in *Clairborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 at 77:

It is a well-established principle that the unexplained failure to call a witness who can give relevant evidence leaves open the natural inference that the evidence of that witness would be helpful to the opposite party

In *Goldstein v. Davidson* (1994), 39 R.P.R. (2d) 61 (Ont. Gen. Div.), Ground J. observed at (73):

A witness may be available in the sense that the witness can easily be subpoenaed to come to court and testify by either party, but that is not the test of availability. If, because of the witness's relationship to one party, that witness could reasonably be expected to testify in favour of that party and against the other party, then that witness is not equally available, and an inference may be drawn from the fact that the witness was not called by the first mentioned party.

33 In the present case, plainly Craig Field was available to testify. He was not equally available to both sides, however, because he is the president of the defendant. The only explanation for the defendant's failure to call him as a witness was that the plaintiffs had not proved their case. No motion for a non-suit was brought, however. The defence did tender evidence by reading in excerpts from the discovery transcript of Jerry Field.

34 In relation to the question as to how much weight should be attached to the admission contained in paragraph 6 of Jelian's statement of defence and counterclaim in the Rombouts Action, Craig Field could have testified to explain why Jelian made that statement of fact in that pleading. He did not do so, and I draw the inference that any evidence that he might have given on that subject would not have been favourable to Jelian and would have been helpful to the plaintiffs.

35 In all the circumstances, taking into the account the formal rules relating to the contents of a pleading, the time when this particular pleading was delivered, the close connection between counsel who prepared it and the party on whose behalf it was prepared, the knowledge of the significance of its contents, the absence of any evidence to explain why the admission was made and the failure to call the available witness who could have explained it, I conclude that it is appropriate to accord it great weight as representing the truth of its contents.

36 I turn now to the main question underlying Issue 1, namely, have the plaintiffs satisfied me on a balance of probabilities that the Rombouts-Jelian exclusive distributorship agreement came into being? The late Jerry Field testified at his examination for discovery that there was never an exclusive distributorship agreement.

At the time of that examination for discovery, however, the admission contained in paragraph 6 of Jelian's statement of defence and counterclaim in the Rombouts Action had not yet surfaced. Plaintiffs' counsel was therefore not in a position to question Jerry Field about that admission, nor could he have challenged the reliability of Mr. Field's evidence on the point by putting the admission to him. It may be that Jerry Field was unaware whether an exclusive distributorship arrangement had been reached between Rombouts and Jelian. Alternatively, his evidence on this point at discovery may have been wrong or false.

37 In the face of the contradiction between Jerry Field's discovery evidence and the admission contained in the subsequently-disclosed statement of defence and counterclaim filed by Jelian in the Rombouts Action, it was open to the defendant to call evidence to explain the discrepancy. Once again, the logical person to do so was Craig Field, but he did not testify. On the basis of the authorities that I have previously cited, I draw the inference that his evidence would not have been helpful to Jelian in explaining the contradiction or otherwise supportive of Jelian's case, and would have been helpful to the plaintiffs.

38 Counsel for the defendant submitted that it was incumbent upon the plaintiffs to call a witness from Rombouts to prove the existence of the Rombouts-Jelian exclusive distributorship agreement. I do not accept that submission. First of all, Rombouts is based in Belgium and thus it was not open to the plaintiffs to summon a witness from that company to court. Secondly, even assuming that a Rombouts representative was within the territorial jurisdiction of the court, I would not consider that person to be more available to the plaintiffs than to the defendant. I draw no inference adverse to the plaintiffs by reason of their failure to call a Rombouts representative.

39 As I have previously concluded, it was open to the plaintiffs to rely at the trial before me upon the admission contained in the statement of defence and counterclaim filed by Jelian in the Rombouts action. In my view, by doing so they have discharged the onus imposed upon them to prove the existence of the Rombouts-Jelian relationship.

40 For these reasons I conclude and find as a fact that an exclusive distributorship agreement on terms satisfactory to Jelian came into existence between Rombouts and Jelian. It follows that I find that the condition in the sale agreement between the plaintiffs and the defendant relating to the creation of a Rombouts-Jelian exclusive distributorship agreement was satisfied. I therefore find that the plaintiffs are entitled to be paid the agreed-upon amount for commissions, namely, \$10,687.01.

Issue 2: If the answer to Issue 1 is no, are the plaintiffs entitled to be compensated on account of the transfer of the business to the defendants based on the principles of unjust enrichment?

41 Although I have answered Issue 1 in the affirmative, in case another court should reach a different conclusion, I propose to deal with the plaintiffs' claim founded upon the concept of unjust enrichment.

42 For such a claim to succeed, "the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or

disposition of law - for the enrichment." See *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 455 (S.C.C.). Arguably, *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (S.C.C.) imposed a fourth requirement for such a claim to succeed, namely, "that the retention of the benefit would be "unjust" in the circumstances of the case" (see p. 848).

43 A claim founded on unjust enrichment in which the plaintiff seeks to recover a benefit conferred upon the defendant as a result of an ineffective legal transaction, is one that is well-recognized in the law of restitution. In their text *The Law of Restitution*, (Aurora: Canada Law Book, 1990), Maddaugh and McCamus devote nine chapters to the topic of ineffective transactions. As the authors say (at pp. 50-51):

An unjust enrichment may occur where benefits are conferred through performance of obligations imposed by bargains which are ineffective for some reason or in anticipation of an agreement which fails to materialize. Apparent agreements may fail for want of formality, lack of capacity of one of the parties, want of authority on the part of an agent purporting to bind a principal, by reason of mistake, misunderstanding or uncertainty, or by reason of being induced by misrepresentation. As well, contracts validly formed may be discharged by the breach of one of the parties or on grounds of frustration. In all such cases, the general approach taken both at common law and in equity is to grant recovery of benefits conferred through performance of such agreements. Generally, recovery is also allowed of benefits conferred in reasonable anticipation of the creation of an agreement under which the benefits in question will be paid for
[emphasis added]

44 In the present case, the plaintiffs contend that Mr. Duckman dealt with Jelian in the belief and/or expectation that he would be compensated for the value of that which he agreed to transfer to Jelian, that is, his ongoing business enterprise. It is true that there was a condition attached to the parties' agreement, namely, the creation of an exclusive distributorship agreement between Rombouts and Jelian. If, as the defendant contends, that condition was never satisfied, then the agreement between the plaintiffs and the defendant was ineffective. Nevertheless, Mr. Duckman appears to have performed all his obligations thereunder, including achieving the all-important transfer of the Air Canada business relationship from the plaintiffs to Jelian. In addition, the plaintiffs provided to the defendant full particulars of their other business contacts and customer accounts, thereby putting the defendant in a position to exploit the business opportunity that the plaintiffs had created.

45 It is self-evident that, even if a satisfactory exclusive distributorship arrangement was never achieved between Rombouts and Jelian, Jelian was nevertheless able to exploit the business opportunity that the plaintiffs provided to it. Based upon the agreed-upon calculation of the commission claim at more than \$10,000 (based upon 5 percent of sales) I infer that Jelian succeeded in selling over \$200,000 worth of Rombouts products. The evidence before me indicated that the profit margin on these products well exceeded 5 percent of the selling price.

46 Had the contract between the plaintiffs and the defendant been effective, there is no question but that the defendant would have been required to pay a commission of 5% on the sales that it made. Such a payment would have reduced the profit margin that it

otherwise enjoyed on those sales. In light of the fact that it has not paid that commission to the plaintiffs, Jelian has received a benefit. I therefore conclude that the first requirement for a claim in unjust enrichment is present.

47 The second requirement is that the defendant's enrichment must correspond with a deprivation suffered by the plaintiff. In the present case, according to the evidence of Mr. Duckman, he chose not to pursue another possible opportunity to sell his business, choosing instead to deal with the defendant. According to his evidence, the other sale would have resulted in an up front payment; he instead chose the route of a post-sale commission arrangement with the defendant. As I have previously mentioned, the plaintiffs performed their obligations under the parties' putative agreement. Because he transferred the business to the defendant, Mr. Duckman was not in a position to sell it to someone else. As it turned out, he was not compensated by the defendant by way of commission payments. In these circumstances, I have no hesitation in concluding that the defendant's enrichment corresponds with the deprivation suffered by the plaintiffs. The second requirement is accordingly satisfied.

48 The third requirement for a claim in unjust enrichment is "the absence of any juristic reason - such as a contract or disposition of law - for the enrichment." What this means is that there must be no legal reason for the defendant to receive the benefit from the plaintiff, such as a contractual or other legal obligation in the defendant's favour. Here, the entire reason I am considering the concept of unjust enrichment is because of the absence of a contract; after all, it is the defendant's position that the parties' agreement never became effective because the condition was not satisfied. Once again, I have no hesitation in concluding that there was and is no juristic reason for Jelian's enrichment in this case. I therefore conclude that the third requirement is satisfied.

49 I turn now to the final requirement for a successful claim for unjust enrichment, namely, that "the retention of the benefit would be unjust in the circumstances of the case." I consider this additional element to be a reflection of the fact that unjust enrichment is an equitable doctrine. Accordingly, when asked to grant this remedy, the court must examine the circumstances to determine whether any of the traditional grounds upon which equitable relief is denied are present and whether to disallow recovery on that ground. For example a defendant may have altered its position in reliance on the conduct of the plaintiff, with the result that it might not be unjust to permit the defendant to retain the benefit.

50 In the present case, the evidence satisfies me that the retention of the benefit by Jelian would be unjust. There was no suggestion of any conduct on the part of the plaintiffs or other circumstances that would justify retention of the benefit by the defendant. Accordingly, I find that the fourth requirement for a claim in unjust enrichment is satisfied.

51 I accordingly conclude that this is an appropriate case in which to grant a remedy to the plaintiffs based upon the principle of unjust enrichment. With respect to quantum, it would appear that the correct way to calculate the value of the benefit received by the defendant and the appropriate award for the plaintiffs is to apply the same commission calculation that would have been in place had the condition in the parties' agreement been

satisfied. Jelian has benefited by the amount of commission payments that it has not so far paid to the plaintiffs. That sum has been agreed at \$10,687.01. Accordingly, as an alternative to my award in relation to Issue 1, I would order the defendant to pay to the plaintiffs damages of \$10,687.01 on account of unjust enrichment.

Issue 3: Are the plaintiffs entitled to be paid for the goods allegedly consigned to the defendants?

52 As I have previously indicated, this aspect of the plaintiffs' claim relates to certain goods that were delivered to the defendant's warehouse by the plaintiffs at the end of August 1991. On the evidence before me, there is no dispute but that the goods that were the subject of the consignment invoice were actually received by the defendant. There is no evidence, however, concerning what became of these goods, that is, whether they were sold by the defendant, destroyed, given away or, for that matter, whether they still are in the defendant's possession. The defendant offered no oral evidence to explain what may have happened to these goods.

53 In his testimony, Mr. Duckman described the delivery of the goods in question from his warehousing facility to that of the defendant at the end of August 1991. His evidence in this respect was corroborated by several documents, including a bill of lading from the warehouseman, an invoice from the cartage company and a copy of a handwritten note faxed to Jerry Field on October 6, 1991, accompanied by a handwritten summary of inventory. Jerry Field responded by fax dated October 8, 1991 indicating Jelian's interest in purchasing certain of the items that had been shipped. Mr. Duckman and Jerry Field apparently spoke and agreed upon a price for these items. Mr. Duckman then prepared Invoice No. 384 dated October 13, 1991 for the items that Jelian had agreed to purchase. That invoice was apparently submitted to and paid by Jelian.

54 Mr. Duckman testified that he and Jerry Field also discussed certain other goods that had been shipped. According to him, Jerry Field agreed to take these goods on consignment, that is, Jelian would pay for them once it was able to sell them. According to Mr. Duckman, pursuant to that conversation, he prepared Invoice No. 385 dated October 13, 1991 in which he listed these additional goods and their price, totalling \$6,150. In the space on the invoice in which the terms of sale were to be indicated he typed the word "consignment".

55 As I have indicated, the defendant proffered no testimony to dispute Mr. Duckman's account of what transpired in his discussion with Jerry Field. That topic was not addressed in any of the excerpts from the examination for discovery of Jerry Field that were read in as evidence at trial by the defendant. Rather, the defendant's approach on this issue was to challenge Mr. Duckman's credibility and the reliability of his testimony.

56 Defence counsel submitted that there were inconsistencies and gaps in Mr. Duckman's evidence that made it suspect. He also pointed to slight differences between the contents of the two invoices that Mr. Duckman says he submitted to Jelian on October 13, 1991. In my view, any inconsistencies or gaps in Mr. Duckman's evidence were minor and any differences in the two invoices were not material. It is understandable that, after ten years, Mr. Duckman's recollection of some details may be less than 100 percent. The documentary record reflected by the invoice relating to the consignment items, however, was almost certainly prepared at the time and is corroborative of his oral evidence.

57 In the circumstances, and in particular in the absence of any evidence to the contrary, I have little hesitation in accepting Mr. Duckman's testimony that he agreed with Jerry Field that the items listed on Invoice 385 were to be treated by the parties as subject to consignment. In other words, that invoice accurately reflects the agreement between the parties.

58 In light of my conclusion that the goods listed on Invoice 385 were, in fact, delivered to the defendant and were to be treated on a consignment basis and in light of the fact that the defendant has no explanation for what became of those goods, the question becomes: what legal result should follow?

59 As a matter of law, the consignee of goods delivered on consignment is a bailee of them: see *Langley v. Kahnert* (1905), 36 S.C.R. 397 (S.C.C.). "Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to show circumstances negating negligence on his part." See *Phipps v. the New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49; approved in *McCreary v. Therrien Construction Co. Limited*, [1951] O.R. 735. To the same effect is *Ware Chemical of Canada Ltd. v. Cosmo Chemical Ltd.*, [1973] 3 O.R. 255 (H.C.J.).

60 To paraphrase Fraser J. in *Ware Chemical*, supra, (at 261) in the present case Jelian was the bailee of the materials owned by the plaintiffs. As the bailment was one for the benefit of both parties, the onus resting on Jelian as bailee was to prove that the loss of the goods was not due to any negligence or improper conduct on its part.

61 Jelian has been unable to explain what became of the goods that were the subject of Invoice 385. Although there was some evidence that certain of the goods that the plaintiffs had delivered to the defendant were - to Mr. Duckman's knowledge and possibly with his approval - donated to a food bank, there was nothing before me that showed that these were the goods listed on Invoice 385. I conclude that the defendant has failed to discharge the onus that it bore to explain what happened to the consigned items and further that it has failed to prove that they were lost without any negligence or improper conduct on its part.

62 In the circumstances, I conclude that the defendant is obligated to compensate the plaintiffs for the agreed-upon consignment value of the missing items, namely, \$6,150.

CONCLUSION

63 For the foregoing reasons I order the defendant to pay to the plaintiffs \$10,687.01 for unpaid commissions or alternatively for unjust enrichment. In addition, I order the defendant to pay to the plaintiffs the further sum of \$6,150 on account of the consignment goods that were delivered by the plaintiffs to the defendant.

64 If the parties cannot agree on prejudgment interest, they should make written submissions, the plaintiffs within 15 days and the defendant within 10 days thereafter. Once the matter of prejudgment interest is resolved and the final quantum of the plaintiffs' judgment has been determined, I will receive written submissions as to costs. If further directions are required, the parties may arrange for a telephone conference call by contacting my secretary.

STINSON J.

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