SUPREME COURT OF NOVA SCOTIA

Citation: *Winchester's Classic Woman Ltd. v. Getta*, 2017 NSSC 151

Date: 20170602
Docket: Hfx No. 302108
Registry: Halifax

Between:

Winchester's Classic Woman Ltd., a body corporate

Plaintiff

v.

Alexander (aka Sandy) Getta, Burkhart Getta, Marion Getta, Natalia Rey, Marc Podkowik, Glen A. Travers and the Bank of Nova Scotia, a chartered Canadian Bank

Defendants

v.

Taura Publicover

Third Party

v.

Art Core Developments Inc., a body corporation

Third Party

v.

David Jones

Third Party

v.

Karyn McCombe

Third Party

Decision

Judge: The Honourable Justice Denise M. Boudreau

Heard: March 6, 2017, in Halifax, Nova Scotia

Counsel: Christopher I. Robinson, for the Plaintiff and Third party David Jones
Robert Pineo, for the Third Party Taura Publicover

By the Court:

Introduction

[1] The plaintiff seeks a judgment against defendant Alexander (Sandy) Getta, for monies the plaintiff says were inappropriately removed from its bank account, along with various other claims.

[2] This Action was commenced in 2008. The original pleadings involved the defendant Getta; his parents, Burkhart and Marion Getta; his then-girlfriend Natalia Rey; his associate, Marc Podkowlic; the Bank of Nova Scotia; and the bank's manager, Glen Travers.

[3] The defendant Getta filed a defence and counterclaimed. He further commenced Third Party actions against a number of others: Taura Publicover; Glenn Jones; Karyn McCombe; and Art Core Developments Inc.

[4] Since the time these pleadings were filed, most of these claims have resolved, either by way of settlement (defendants Bank of Nova Scotia / Travers / Mr. and Mrs. Getta) or withdrawal (defendants Ray, Podkowlic, and third party McCombe). By the time of the trial, the remaining parties were the plaintiff, the

defendant Getta, and the third parties Publicover and Jones. (I was advised that Art Core, while not formally withdrawn, was a non-entity.)

[5] The defendant Getta was represented through 2008 to 2017 by counsel, starting with Tom Singleton. By the time of the Date Assignment Conference (in August 2016), the defendant Getta was represented by Colin Bryson. At that conference, trial dates were set for March 6 to 16, 2017.

[6] Mr. Bryson filed a motion to be removed as counsel for the defendant Getta in early 2017. His motion was granted January 17, 2017, then rendering the defendant Getta self-represented. The Order provided that the defendant Getta would thereafter be served using his parents' address (24 Glen Eagle Way, Halifax).

[7] To my knowledge, no one has heard from the defendant Getta since that Order was granted. Nothing further has been filed by him. The defendant Getta did not appear at the first scheduled trial date, March 6, 2017. The trial proceeded in his absence.

[8] At the trial, only the plaintiff called evidence: witnesses Margaret Ann Grant; Taura Publicover (now Lee); and David Jones. I was provided with some documentary evidence as well (Exhibits 1 to 7).

[9] It must be noted that Exhibit 1, which is a bound volume of various documents, was not tendered in its entirety. Counsel for the plaintiff explained that the volume had been prepared when more defendants were involved, and there was not time to remove the now unnecessary documents from the volume. Only those documents specifically identified by a witness are tendered as evidence. To be more clear, the documents tendered from Exhibit 1 were:

> Witness Margaret Ann Grant: Tabs 33, 34, 35.
>
> Witness Taura Publicover (Lee): Tabs 1, 2, 3, 4, 5, 6, 7, 30, 33, 36, 38, 51.
>
> Witness David Jones: Tabs 31, 32, 36, 38, 40, 41, 42, 47, 49.

[10] All other documents in Exhibit 1 were not identified by any witness and are not tendered before me. I have not considered them.

Evidence at Trial

[11] The plaintiff is a company incorporated in New Brunswick, but conducting business in Nova Scotia, as a retailer of bridal clothing. This business was owned and run by the Andrews family for approximately 20 years. In April 2006 it was sold to Art Core Developments, a company with two shareholders: the defendant Getta and the third party Publicover.

[12] Ms. Grant was then the general manager of the store. She testified that following the sale of the business, she was introduced to the defendant Getta by Mr. Andrews, at a staff meeting. Ms. Grant was told that the defendant Getta was "the new owner". Ms. Grant was not told that there was any other owner, nor was she introduced to Ms. Publicover.

[13] After that time, according to Ms. Grant, things changed dramatically in the running of the planitiff's business. For example, she testified that when owned by the Andrews, the normal process would be to require a 50 percent deposit at the time a gown was ordered, with full payment due on arrival. In addition, the store would normally pay invoices within ten days. Ms. Grant noted that this was a simple process, which worked well.

[14] Ms. Grant testified that the defendant Getta changed these processes after his arrival. He wanted the gowns paid for 100 percent at time of ordering. Invoices were no longer paid within 10 days, they could be paid in 30, 45, 60, or even 90 days; furthermore, they started using credit cards to pay invoices. Ms. Grant noted that their suppliers started to get concerned.

[15] By 2007, according to Ms. Grant, things had reached a critical point. Suppliers were refusing to send gowns unless payment was made in advance; or,

they were sending gowns COD. As a result, gowns were not arriving on time. Ms. Grant testified that as a result, brides and their families were very upset, emotional, and angry with she and the other staff. Ms. Grant also noted that the public became aware of the upheaval in the business, and stories about the problems were appearing in local media. This affected the plaintiff's reputation (which had previously been very good).

[16] According to the documentary evidence before the court, it would appear that the defendant Getta attended the Bank of Nova Scotia in Halifax on March 20, 2006, and opened a bank account in the name of the plaintiff (account number 403030015016). The address for the account is listed as 24 Glen Eagle Way, Halifax, although handwritten on the document is also the address "1479 Dresden Row, Halifax NS, B3J 2K1" which is the location of the plaintiff's store.

[17] The defendant Getta is the only person listed on this account. The document provides:

> No. of Owners/Partners: 1

[18] Bank statements for this bank account from March 31, 2006, through to June 29, 2007, were put before me (Exhibit 1, Tabs 4 to 7). A number of deposits are made throughout this time. Every deposit references the following number:

016489230011 0001. I was advised by witness Ms. Publicover (now Ms. Lee) that this number is the bank machine operating from the plaintiff's business; that is to say, payments made by credit or debit card at the store. Various withdrawals are also made.

[19] Ms. Lee testified that she was unaware that this specific bank account had been opened and that money was being routed there. In early 2007, when Ms. Lee was seeking business statements in order to complete the company's year-end, she attended the Bank of Nova Scotia in order to obtain account statements. Ms. Lee testified that she questioned some transactions, at which time she was advised of the existence of the account (number 403030015016). Ms. Lee was further told that she was not authorised to access that account, as the defendant Getta was the 100 percent owner.

[20] Ms. Lee disputed this with bank employees, explaining that she was a 50 percent owner of Winchester's. The bank continued to refuse. Ms. Lee thereafter sought assistance from legal counsel and eventually the bank statements were provided to her. Those statements showed amounts continually being removed from the account.

[21] Along with accountant Jim Horwich, Ms. Lee used the bank statements to create a document (entitled “Shareholder’s Loan”; Exhibit 1, Tab 36), in order to itemize the amounts withdrawn by Mr. Getta, up to the end of March 2007.

[22] A court proceeding was then commenced, to remove the defendant Getta from any control of the business. This came into effect in June 2007. Between April and June 2007, the defendant Getta continued to withdraw funds from the account. Withdrawals April to June 2007 were itemized in another document provided to me (“General Ledger – 01/04/2007 – 31/03/2008”, Exhibit 1, Tab 38).

[23] Minutes of Settlement were entered into by the defendant Getta and Ms. Lee on July 11, 2007. Part of that settlement included an agreement for the reconciliation of amounts owing to the plaintiff, which would be done by accountant Horwich. The settlement further provided that either party could challenge Mr. Horwich’s findings, by submission of their challenge to Paul Goodman, of Goodman Rosen. In such a case, Mr. Goodman would provide a written decision in relation to the challenge, to be final and binding.

[24] Ms. Lee testified that Mr. Goodman did an audit of the ledgers that had been prepared by Mr. Horwich, to determine which of the expenses were legitimate and which were not. According to Ms. Lee, the defendant Getta did contest certain

amounts; these were adjudicated by Mr. Goodman, who found the ledgers accurate, and provided a report (Exhibit 1, Tab 30). Since that time, stated Ms. Lee, the defendant Getta has not paid anything back to the company.

[25] Ms. Lee confirmed the chaos described by Ms. Grant at Winchester's in 2006-2007. She described living through a very stressful time at the business: trying to get bridal dresses in time for weddings, dealing with unpaid suppliers, facing angry families. The company was forced to deplete inventory, as well as seek emergency funding and advances against receivables. A $250,000 loan was received from a company called Armshore, along with a high interest loan from Rapid Advance, in order to get dresses in on an urgent basis. Ms. Lee also received money from family and others, and at times forewent her own salary. Ms. Lee had to personally claim bankruptcy in 2008-2009.

[26] David Jones is now the owner of Ms. Lee's shares in Art Core (which she sold at the time of her bankruptcy). Mr. Jones testified that he assisted Ms. Lee and Winchester's through 2008. He was aware of the situation of the misappropriation of funds, and the difficulties that it had created. Ms. Lee approached him to arrange bridge financing. He assisted her in introductions to the Bank of Montreal, and others, for loans.

[27] Mr. Jones referred to the loan from Armshore (which has now been paid), as well as the Rapid Advance Loan. He testified that the property tax bill for the store property went unpaid for some time, causing interest costs and penalties. He also testified that the plaintiff paid the total bill of accountant Horwich, for which the defendant Getta was responsible for half ($25,000).

[28] Mr. Jones also testified that he (or his companies) injected over $550,000 into the plaintiff company, to keep things afloat. Mr. Jones provided a document (Exhibit 3) entitled “A summary of monies advanced in 2008 by me, Dave Mullen or through companies we respectively control to or for the benefit of Winchester’s Classic Woman Limited”. Mr. Jones testified these amounts have not been repaid and remain a debt on the books of the plaintiff. Mr. Jones calculates interest of 6 percent on these amounts since 2008.

[29] Mr. Jones also discussed the effect of these events on the reputation of the Winchester’s business, which according to him, was substantial. He provided a document he had created (Exhibit 4) entitled “Winchester’s Classic Woman Limited – Sales Revenue Continuity Schedule”. He indicated that this document itemized sales from 2004 to 2012 (excluding 2006), and showed sales losses during the relevant time frame.

Third party claims

[30] A number of third parties were brought into this action by the defendant Getta, two of whom were David Jones and Taura Publicover (now Lee).

[31] In relation to David Jones, the claims against him were: directly or indirectly acquiring shares in Winchester's without the approval of the defendant Getta; and illegally taking control of the assets of Winchester's for his own purposes (see Third Party Statement of Claim, paragraphs 25 and 27).

[32] The defendant Getta did not appear at or participate in this hearing, and therefore presented no evidence in support of these claims. Mr. Jones seeks a declaration of non-suit in relation to the action against him. Such a request is pursuant to Rule 51.06:

> 51.06 (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.

[33] The test for non-suit was set out in *Poulin v. Iannetti* 2013 NSCA 10:

> [17] Justice Fichaud in **Johansson** sets out the law applicable to non-suit motions in Nova Scotia:
>
> > [26] In *MacDonell v. M & M Developments Ltd.*, Justice Hallett described the approach:
> >
> > The Law Applicable to Non-Suit Motions

> **38** On a non-suit motion, the trial judge has to consider all of the circumstances, including the issues of fact and law raised by the pleadings (J.W. Cowie Enrg. Ltd. v. Allen (1982), 52 N.S.R. (2d) 321).
>
> **39** The general test for a non-suit motion is whether or not a prima facie case was made out by the plaintiffs. It is sometimes expressed as whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff. If not, the motion will succeed. (Turner-Lienaux v. Nova Scotia A.G. (1993), 122 N.S.R. (2d) 119).

[27] In *Herman v. Woodworth*, Justice Flinn (para 4), more expansively, adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:

> ...If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. [Justice Flinn's emphasis]

[34] I agree that a prima facie case has not been made out as against Mr. Jones. The motion for non-suit in relation to the claims made against Mr. Jones is granted.

[35] In relation to Taura Publicover, the claims of the defendant Getta against her were numerous: *inter alia*, failing to honour the terms of the Minutes of Settlement of July 11, 2007; breaching the terms of the Shareholders' Agreement; issuing

cheques and making payments to herself; refusal to pay accounts; appropriation of funds; fraudulent conveyance of shares; careless management of Art Core Developments.

[36] Counsel for Ms. Publicover (Lee), in his submissions, sought a dismissal of the third party action against Ms. Publicover (Lee), given the failure of the defendant Getta to appear and advance the claim. I did not hear any evidence during this trial that would support the defendant Getta's claims as against Ms. Publicover (Lee). I therefore grant dismissal of the defendant's claims against Ms. Publicover (Lee).

Claims against the defendant Getta by the plaintiff

[37] The claims are all advanced in negligence. There can be no doubt that as a director, officer and president of the plaintiff company, the defendant Getta owed a duty of care to the plaintiff. By taking funds from the plaintiff's account without being entitled to do so, he breached that standard of care. The plaintiff has suffered harm, caused by these actions, which was foreseeable.

[38] The challenging question here is to actually quantify that harm. I note that the plaintiff's total claim, as put before the court, is in excess of one million dollars. I do not find that all of these claims have been made out.

[39] I shall address specific issues related to each claim in turn:

Funds taken from account

[40] The plaintiff seeks, firstly, the amount of $514,702 from the defendant Getta, which it claims represents the amount taken by him from the plaintiff's bank account from March 2006 to June 2007.

[41] Frankly, I found that the evidence put before me (to explain the amount claimed) was, in many ways, unclear. I was required to examine the documentation closely, both for admissibility and for its contents.

[42] The evidence in support of this claim came in different forms: first, the statements from the Bank of Nova Scotia for account number 403030015016 (Winchester's Classic Woman Limited), showed deposits and withdrawals from the account from March 31, 2006 to June 29, 2007 (Exhibit 1, Tabs 4 to 7). Inasmuch as I treat those documents as business records, they stand for what they have recorded.

[43] However, the documents themselves provide, on their face, very little or no evidence of the source of any deposit or withdrawal. As to deposits, I was advised by Ms. Lee (but only after I questioned her on this) that any entry marked

"Deposit" from number "016489230011 0001" was a deposit coming from the Interac/credit card machine located in the Winchester's Store.

[44] In terms of withdrawals, the statements contain various descriptors: "Visa/Scotialine payment"; "Bill Payment"; "Certified Cheque"; "Debit memo"; and so on. Given that the defendant Getta is the sole signing authority for this account, I will assume all withdrawals are his.

[45] Further to these source bank documents, I was provided with two more documents:

1. "Winchester's Classic Women Limited / Shareholders Loan – Sandy Getta / March 31, 2007" (Tab 36 of Exhibit 1);
2. "Winchester's Classic Women Limited / General Ledger / Date: 01/04/2007 to 31/03/2008" (Tab 38 of Exhibit 1).

[46] Ms. Lee and Mr. Jones both advised that Tab 36, prepared by accountant Horwich (and reviewed by Ms. Lee), lists the amounts inappropriately taken by the defendant Getta, up to and including March 2007. I note that Mr. Horwich did not testify. However, most of the amounts noted in Tab 36, can be cross-referenced with the banking records at Tabs 4 to 7. In my view, that is essential in confirming the amounts.

[47] In the case of many of the entries, I am satisfied that they are not expenses related to the running of a bridal gown business (due to the nature of the purchase). In other cases there is no explanation for the withdrawal by the defendant Getta, or it is in cash. In those cases, on the strength of the evidence of Ms. Lee, I am prepared to find that the withdrawals identified in Tab 36 were made by the defendant Getta inappropriately. There is one exception, being one of the last entries at the end of Tab 36:

31-Mar-07	to record summary of personal expenses paid by personal expenses paid for using the corporate MC as per summary	$80, 374.91 (DB)

[48] No one explained this entry to me. It is not found in the source banking records. I discount this amount entirely as being without foundation. There are two further entries for March 31, 2007, both credits to the defendant Getta. They were also unexplained by the plaintiff, but as they are credits to the defendant, I will accept that they were legitimate and accurately recorded by the plaintiff.

[49] Therefore, up to March 30, 2007, I find that the amount that was inappropriately taken from the account by the defendant Getta is $318,258.09.

[50] As to amounts claimed for April to June 2007, I am advised to look to Tab 38. This document is even less clear than Tab 36. Listed therein are more amounts

which are said to be owing by the defendant Getta to the company. However, starting balances noted therein were incorrect, as acknowledged by the plaintiff. All amounts must also be cross-referenced with the source bank statements in order to satisfy me that they constitute true and accurate withdrawals.

[51] I will allow the claims starting on 03/04/2007 (bnkstmt, POS – Martha's Pizza Market = $7.63), up to and including the claim on 22/05/2007 (bnkstmt, ck 1700 – Graham Curnew = $25). The total is $27,918.02.

[52] In relation to June 2007, the last actual entry on the source bank statements is June 15 (although the statement covers up to June 29). I can only conclude from the evidence before me that there was no activity in the account from June 15 to June 29. I have no source documents relating to any transactions during that time. Therefore I disallow any amounts claimed from June 15 to 30, 2007.

[53] As to July claims, the oral evidence was that the defendant Getta was no longer taking funds after June. I also have no source documents after June. I disallow any claims for July 2007.

[54] As I previously noted, the plaintiff provided me with a letter from Paul Goodman of Goodman Rosen, who counsel describes as having performed an "arbitration" of this dispute (Exhibit 1, Tab 30). The letter outlines the work

performed by Mr. Goodman, in particular, his meetings with the defendant Getta to discuss Mr. Getta's objections to the reconciliation prepared by the accountant.

[55] Mr. Goodman did not testify before me and I questioned the admissibility of his letter/report with counsel. It is not a business record. It is replete with hearsay; its actual contents are unconfirmed anywhere else in the evidence. The plaintiff submits that this correspondence is admissible because it is a "decision" resulting from an "arbitration". I have reviewed the provincial *Evidence Act* and I see no allowance for a document such as this to be admitted, without its author introducing it.

[56] Therefore, I do not admit this letter from Mr. Goodman. Having said that, I do accept the evidence of Ms. Lee that Mr. Goodman worked on this case. I also accept her belief that Mr. Goodman met with the defendant Getta.

[57] In conclusion, the total claim I allow against the defendant Getta in relation to the money taken from the bank account is $346,176.11.

Further claims

[58] The plaintiff makes a number of further claims from the defendant Getta. All these claims, according to the plaintiff, flow directly and/or indirectly from the

defendant Getta's unlawful removal of moneys from the working account of the plaintiff.

[59] I agree that it is, generally speaking, foreseeable (as argued by the plaintiff) that where a company's working capital is taken, other losses may reasonably occur. Where those losses are foreseeable, and would not have occurred "but for" the actions of the defendant, those losses may be claimable from the defendant. I shall address each claim independently:

(a) Bill from Dockrill Horwich (accountants) for verification work

[60] The plaintiff seeks reimbursement for a bill paid to Dockrill Horwich, for Mr. Horwich's accounting work. This is based on the evidence of Mr. Jones, who testified that money was paid to Dockrill Horwich by the plaintiff on behalf of the defendant Getta, for his share of Mr. Horwich's work.

[61] The only document submitted in support of this claim is at Exhibit 1, Tab 31. It is a Small Claims "Notice of Claim" from Dockrill Horwich, addressed to the defendant Getta, in the amount of $25,000. The document does not address the reason or basis for this claim.

[62] This might (along with the evidence of Mr. Jones) be some evidence of the fact that $25,000 was, in fact, owed by the defendant Getta to Dockrill Horwich.

However, there is no documentary evidence as to why this money is owed. I have no documentary evidence that this claim was, in fact, ever paid, which should exist. Further, I have no evidence that if it was ever paid, that it was paid by the plaintiff and not some other party. This could have been easily shown, if it is the case. I am not satisfied that the evidence supports this claim. I do not allow it.

(b) Interest on Rapid Advance Loan

[63] The plaintiff seeks $24,220. It submits that as a result of the defendant Getta's actions, it was forced to enter into a high interest loan with Rapid Advance in 2008 in order to keep the plaintiff's business running. The loan was in the amount of $69,200 (see Exhibit 1, Tab 32). The $24,220 claimed represents the cost of obtaining that loan.

[64] In my view, the need for quick bridge financing such as this loan was a foreseeable result of the defendant Getta's actions, in depleting the working account. Interest is to be expected, and unsurprisingly, at a higher than normal rate. I grant this claim.

(c) Interest / financing/ legal fees related to Armshore Investments financing

[65] Both Mr. Jones and Ms. Lee testified as to a loan received from Armshore Investments Limited in the amount of $250,000, in late 2007, again as emergency financing. I was provided with a document in support of that claim as well, in the form of the Financing Agreement (Exhibit 1, Tab 49). The plaintiff seeks $41,010, which they claim as the cost of the borrowed money.

[66] Exhibit 1, Tab 49 shows that the plaintiff actually received a cheque for $227,272.73 (although the document confirms that the loan amount was $250,000). Further, the document provides a repayment schedule at Schedule “A” (page 7). This schedule would add up to a total repayment of $268,287.66. The cost of that loan was the difference in those two numbers, or $41,014.93.

[67] Again, as with the Rapid Advance claim, in my view bridge financing for the plaintiff was a foreseeable result of the defendant Getta’s actions, along with its associated costs. I allow this claim as well.

(d) Interest/financing related to capital loans from David Jones

[68] Mr. Jones testified that during the time the business was in crisis (in 2008) he advanced a number of loans to the plaintiff so that it might stay in business. He totalled those loans as $570,212. Mr. Jones has calculated six percent interest payable by the plaintiff on that amount, for the eight years that have passed ($34,212 x 8 = $273,696). The plaintiff seeks payment of that interest amount.

[69] I have no actual business (or other) records before me to evidence any of these loans, other than Mr. Jones' testimony, and a document he simply created. This is highly unusual in the case of a loan entered into by a company. More importantly for our purposes, I have no evidence to show that the plaintiff agreed to pay Mr. Jones six percent interest for these loans, or agreed to pay any interest, for that matter. Such a document should normally exist, and it should be presented, where the plaintiff (a corporation) is seeking reimbursement for such a loss. I am not satisfied, on the evidence before me, that such a loss has occurred, or that such an obligation has even been entered into.

[70] In the absence of any evidence showing any obligation on the part of the plaintiff to pay interest to Mr. Jones, I disallow this claim.

(e) Interest/penalties relating to unpaid HRM property taxes

[71] Mr. Jones provided a receipt from Halifax Regional Municipality dated October 22, 2008, addressed to the plaintiff, in the amount of $105,795.17 (Exhibit 7). It appears from the attached correspondence, and from the evidence of Mr. Jones, that this was in payment of overdue property taxes for the plaintiff's retail location.

[72] Mr. Jones further testified that the defendant Getta had not paid property taxes for approximately two years. Therefore, he alleged, some of this bill was interest and/or penalties; having said that, he was unable to tell me exactly how much. Mr. Jones estimated interest and penalties at $20,000.

[73] Without more solid evidence as to what portion of that tax payment was principal, as opposed to interest or penalties, I am not prepared to award an amount under this heading.

(f) Loss of profit

[74] It is the plaintiff's position that this crisis resulted in further indirect losses, in the form of a loss of profit. It was described by the witnesses that the plaintiff endured a very serious blow to its previously excellent reputation. Negative articles appeared in Frank magazine and in social media. It was being said that the plaintiff

was failing to provide brides with their dresses on time for their wedding day. It was further noted by the witnesses that the bridal wear industry is a very emotional one; reputation, particularly in respect of reliability, is irreplaceable.

[75] Mr. Jones believes that the negative effect on the plaintiff's reputation continues to the present day. However, the plaintiff's claim for this trend of damage is in an amount which would represent, in their view, the loss of profit they endured for 2009 only.

[76] Mr. Jones' Exhibit 4 purported to show gross margins for Winchester's Classic Woman (sales revenue minus costs of sales) from 2004, 2005, 2007, 2008, 2009, 2010, 2011, and 2012 (Exhibit 4), based on financial statements:

2004	$ 595,024
2005	$ 547,845
2007	$ 753,861
2008	$ 525,520
2009	$ 339,110
2010	$ 454,007
2011	$ 440,965
2012	$ 412,954

[77] 2006 was not included in the figures I was given. That omission was unexplained and unfortunate; it was the year of the transfer of the business.

[78] The year 2007 shows an increase; but the numbers decrease after 2008. Witness David Jones explained that 2007 to 2008 are artificially inflated, in his view, due to the defendant Getta insisting (starting in 2006) upon 100 percent payment for dresses at time of ordering. This practice was confirmed by witness Ann Grant. Numbers for 2009 are significantly lower, and 2010 and forward remain somewhat lower.

[79] As to causation, the plaintiff simply asserts its belief that its loss of profit (in 2009) was entirely due to the defendant Getta's actions. As to quantum, the plaintiff takes the average of 2005 and 2007, which is $650,853, and subtracts the gross margin of 2009, which is $339,110. This represents a loss of $311,743.

[80] Even assuming for the moment that some loss of profit is a legitimate claim for the plaintiff here, I cannot agree with its submissions.

[81] Due to the limited evidence before me, I am not convinced that causation has been entirely made out; that is to say, that 100 percent of any loss of profit for 2009 is attributable to the defendant Getta.

[82] Moreover, I have no framework for knowing how to calculate loss of profit in an active business. Expert evidence would certainly have been helpful in relation to the quantification of such a loss. Without some idea as to how to proceed, I

simply have no degree of confidence that any proposal for doing so would be fair or accurate.

[83] To use the most basic of examples: if the plaintiff's profit margins for 2007 and 2008 are artificially inflated (as witness Jones believes), then it seems completely inappropriate to use those years in any calculations. Is it even appropriate to use "gross" profit margins in calculations, as these purport to be? Furthermore, if some years are artificially inflated, would it not stand to reason that later years are artificially low (as a correction)? Is that what happened in 2009?

[84] I simply have no way of assessing this with any degree of comfort. Given the lack of evidence (or expertise) to guide me in this process, I disallow any claim for loss of profit to the plaintiff.

Conclusion – Claim of plaintiff against defendant Getta

[85] As I have said, I have found the evidence in support of much of this claim incomplete, and at times, confusing. This court was required to undertake much time-consuming reconciliation, comparison, and scrutiny in and of the documents and evidence.

[86] Having said that, I am satisfied that the total amount of $411,411.04 is the liability of the defendant Getta to the plaintiff. However, as I will outline in the next section, this will not be the amount ordered payable by the defendant Getta.

Settlement with other defendants

[87] As I noted early in this decision, the plaintiff's claims against all the other defendants settled prior to trial, notably against Burkhart and Marion Getta, the Bank of Nova Scotia, and Glenn Travers.

[88] At the time of the trial, I sought information from plaintiff's counsel as to amounts received from the settling parties, with the goal of ensuring that the plaintiff was not doubly indemnified. The plaintiff was not inclined to provide me with that information, and asked to defer the issue until after I gave this decision. The Plaintiff requests that if liability is attributed to the defendant Getta, and damages awarded, the agreements would then be presented and adjustments would be made.

[89] The plaintiff relies on the case of *Ashcroft v. Dhaliwal* 2007 BCSC 533 where such a process was deemed acceptable. I note the following from that case:

> ***Rule against Double Compensation***
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> 48 My ruling on the law raises the question of possible double recovery because Mrs. Ashcroft has already received a settlement for the second accident. Here, in my opinion, the common law rule against double recovery comes into play.
>
> 49 The principle against double recovery is stated in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, 69 D.L.R. 94th) 25 (S.C.C.) per McLachlin J. (as she then was) at 962:
>
> > It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more… The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall.
>
> 50 To prevent double recovery in a case such as this, there must be a deduction from the full measure of damages of any extra benefit received by a plaintiff, and judgment given for the net amount only. See *B. (M.) v. British Columbia*, [2003] 2 S.C.R. 477, 230 D.L.R. (4th) 567 (S.C.C.).
>
> 51 Thus, Mrs. Ashcroft must account for any damages (as distinct from costs) she has received in settlement of her claim for the second accident. That amount will be deducted from the full amount of damages assessed in the present action and the judgment will be for the net amount after the deduction.
>
> 52 If counsel cannot agree on the amount of the deduction, they may apply to have the amount set.

[90] Obviously, there is a significant risk of double recovery to the plaintiff here. In my view, the settlements between the plaintiff and the settling defendants should have been disclosed, in advance, to the non-settling parties, and to the court. Having said that, I am loathe to further delay this decision; furthermore, I accept that double recovery will be avoided by seeing the agreement(s) after the fact, and adjusting my order accordingly.

[91] Therefore, upon receipt of this decision, the plaintiff is to provide me with the settlement agreement(s) and amount(s) in relation to each of the settling parties,

along with its submissions as to appropriate deductions. A further decision will then issue, providing the final amount for judgment as against the defendant Getta.

Costs to plaintiff

[92] As the successful party, the plaintiff is clearly entitled to costs from the defendant Getta, and I shall be awarding costs to the plaintiff. I have been provided with written submissions from the plaintiff as to their proposal for an appropriate costs award.

[93] On the other hand, it seems inappropriate to assess costs when the plaintiff's case is not fully completed. As indicated, I require further information from the plaintiff as to settlement amounts from other defendants, and the appropriate deductions to be made. That new information may not be of any relevance in relation to an appropriate costs award for the plaintiff, but it may be. I therefore further reserve the issue of quantum of costs to the plaintiff, until I give my decision in relation to deductions due to settlements.

Costs to third parties

[94] Counsel for Ms. Lee submits that the lawsuit against her was frivolous from the beginning, and as further evidenced by the fact that it was not pursued. The

claim against her was filed November 19, 2008; Ms. Lee would have been required to respond to that claim from that point forward.

[95] Counsel for Ms. Lee sought solicitor/client costs from the defendant Getta. He advised during his submissions that he would be providing me with further evidence in support. As of the date of this decision, I have received nothing further.

[96] There can be no doubt that as the successful party, Ms. Lee is entitled to reasonable costs. I will be assessing her costs on a party/party basis. I have reviewed Rule 77 in its entirety and consider, in particular, Rules 77.02, 77.07, 77.08, 77.13. Tariff A provides for costs allowable to a party on a decision in a proceeding. That scale is dependent on the "amount involved", which in the case of third party Ms. Lee, is undefined. The claim against her provided no particulars as to the amount claimed.

[97] In my view Ms. Lee faced somewhat lesser jeopardy, given the fact that the majority of the claim I have granted (for example, the money taken from the account) could not possibly have been attributed to her. Further, it became clear that the claim against her was not being seriously prosecuted as the trial dates approached, which would have lessened the preparatory work. I have estimated that the "Amount Involved" in the case of Ms. Lee, would be no more than half the

liability I assessed against the defendant Getta ($205,705). Scale 1 for this "amount" is $17,063.

[98] I also note that Ms. Lee was required to attend court for the trial, which lasted ¾ day. I assess a further $2,000 as against the defendant Getta towards Ms. Lee for that cost, pursuant to Tariff A. Therefore, costs payable to third party Ms. Lee by the defendant Getta are assessed at $19,063.

[99] Third party David Jones is in a similar situation, in that he was required to respond to a lawsuit which was not pursued. He is certainly entitled to costs from the defendant Getta as well. I assess similar costs to him, for the same reasons. Costs payable to third party Jones by the defendant Getta are assessed at $19,063.

Boudreau, J.