SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Lukacs v. Dell Canada Inc.*, 2017 NSSM 6

Claim: SCCH No. 460519
Registry: Halifax

Between:

Gabor Lukacs

Claimant

v.

Dell Canada Inc.

Defendant

Decision

Adjudicator:	Augustus Richardson, QC
Heard:	March 21, 2017
Decision:	April 4, 2017
Appearances:	Gabor Lukacs, claimant, for himself Robert Mroz, for the defendant

Reasons:

[1] The Claimant says that he reached a settlement with the defendant. The defendant admits that there were settlement discussions, but denies that any consensus was reached, and so says that there was no settlement.

[2] This dispute arises out of a purchase of a laptop computer. In the spring of 2016 Dr Lukacs was in the market for a new laptop computer. He travelled a lot. As a consequence he needed a laptop with extended battery life. He saw an ad of the defendant Dell Canada Inc ("Dell") that represented one of its laptops as having 13.5 hours of battery life. He called Dell's sales desk. He was again told that the laptop had a battery life of upwards of 13.5 hours. On the strength of that representation he purchased the laptop on or about April 27, 2016 for a total invoice price of $1,289.32: Ex. C1 and C2.

[3] In due course the laptop arrived. Dr Lukacs used it. He discovered that it did not have a battery life of 13.5 hours or anywhere near that. He found that it lasted only about three to five hours while using it on a flight to Europe. He was upset. He contacted Dell about the issue, and was advised that normal battery use was only in the range of three to seven hours, depending on the use: Ex. C3.

[4] Dr Lukacs was upset. He contacted Dell on June 18, 2016. He requested that Dell

a. Provide him with a comparable laptop with a battery capable of providing 13.5 hours use;

b. Compensate him for the loss of use caused by Dell's failure to address the issue in a timely fashion; and

c. Takes steps to correct the false or misleading information it had bee providing its customers regarding the capacity of its batteries: Ex. C4.

[5] There followed some “back and forth” between Dr Lukacs and Dell’s customer service department. Resolution was not reached.

[6] Dr Lukacs grew increasingly frustrated, and in February 2017 he tried to contact Dell’s general counsel. On February 6, 2017 he received a call from “Sanjay” who represented to Dr Lukacs that he was in Dell’s “legal department.” He asked Dr Lukacs if he had received an email from Dell’s legal department. Dr Lukacs had not, so the email was resent. The email stated that Dell would remind its sale’s department that battery life varied with the type of use, and type of programs being run. It then went on as follows:

> “In the meantime, as we said, we value your business and would like to extend our offer to you of a full refund for your system. In addition, we would like to offer you a Cdn$300 as a gesture of goodwill:” Ex. C5

[7] Dr Lukacs responded on February 6th by email. He noted that the issue had been ongoing for nine months, during which time he had not been able to use the laptop. He added that he was concerned “that the amount of the refund plus the $300 that is being offered is not sufficient for purchasing a laptop with similar capabilities that has the battery life that was promised:” Ex. C6. He went on: “I would be happy to explore the possibility of an exchange (without additional expense) to a different Dell laptop, if you can offer a product that is capable of at least 13.5 hours of battery life:” Ex. C6.

[8] Dr Lukacs then received another call from Sanjay. Dr Lukacs repeated the concerns he had expressed in his email of February 6th. He told Sanjay that if he went to court he expected that he would obtain judgment based on Dell’s failure to provide what he said it had contracted to supply—a laptop with a battery life of 13.5 hours. He said he would be happy for forgo the money if Dell would simply supply him with a laptop capable of providing that type of capacity. Sanjay said

that he would take Dr Lukacs' position to the legal department to see what it would say.

[9] On February 7th Sanjay called with a new offer. He told Dr Lukacs that Dell would not provide a replacement laptop due to "legal complications," but was prepared to increase the monetary amount for goodwill to $600. Dr Lukacs told Sanjay that he thought that was reasonable that he "was happy to take it." Sanjay said that he would talk to the legal department and send an email for his acceptance, and that the legal department would then prepare the written settlement agreement.

[10] A short time after that conversation Sanjay sent Dr Lukacs the following email dated February 7th:

> "This email is with reference to the conversation we had earlier regarding your Dell computer.
>
> "As discussed, our Legal Team had agreed to settle matter by providing a full Refund for the computer plus $600 as a Goodwill. Kindly, reply back with your acceptance and our Legal Team will proceed from there:" Ex. C7.

[11] Dr Lukacs then replied on February 8th to that email as follows:

> "As per our telephone conversation, I accept Dell's offer for a full and final settlement of this issue by Dell refunding the price of the computer AND making an additional payment of CAD$600.00.
>
> "Therefore, the total amount payable by Dell shall be CAD$1,889.32.

"I trust that you find this satisfactory:" Ex. C8.

[12] I note that the $1,889.32 represents the invoice price plus $600.00.

[13] On February 9th Sanjay then emailed Dr Lukacs a formal settlement agreement. The agreement was three pages long with 15 clauses. Some related to who bore the cost of returning the laptop; when it should happen; and so on. Some were the usual boilerplate (such as the fact that both parties had read and understood the agreement). It included a release (clause 8.) These Dr Lukacs had no difficulty with. He objected, however, to three of them. Clause 6 made Dell's obligation to pay the settlement amount conditional on inspection by Dell of the laptop for "normal wear and tear." Clause 13 was a confidentiality clause. And clause 14 made the settlement agreement subject to the laws of Ontario: Ex. C9.

[14] Dr Lukacs objected that he had never agreed to those clauses. Clause 6 was too subjective, and would allow Dell to evade the settlement if it thought there had been too much wear and tear. He had not agreed to Ontario law being governing, pointing out that he lived in Nova Scotia. And he had never agreed to confidentiality, nor had it even been discussed: Ex. C11.

[15] At this point one Mary Hong, in Dell's legal department, responded by email. She advised that Dell could agree to amend the formal document by amending clauses 6 and 14. She went on:

> "With respect to section 13, please note that confidentiality is typically not discussed during settlement negotiations as it is a legal industry standard. Further, non-disclosure of settlement terms is Dell's standard policy and non-negotiable.

> "We would remind you that Dell has made a generous financial offer and respectfully requests that you provide us with written acceptance within 24 hours:" Ex. C12.

[16] Dr Lukacs responded to Ms Hong. He was pleased that Dell would modify the draft insofar as clauses 6 and 14 were concerned. He refused to budge on the confidentiality issue. He pointed out that confidentiality had never been discussed, or mentioned in the email correspondence, prior to his acceptance of Dell's offer on February 8th. He said Dell was not entitled to attempt to re-open the settlement by adding something which had not been discussed and to which he had not agreed: Ex. C13.

[17] On February 10th Ms Hong replied by email:

> "The financial agreement you reached by telephone on February 7th, 2017 was <u>on condition</u> that you sign a settlement agreement as prepared by Dell Legal. There is nothing in the settlement agreement that is nonstandard or unusual. Dell does not consider this to be a re-opening of our financial agreement. Kindly reconsider your willingness to sign Dell's agreement. This offer is a gesture of good will and is not an admission of liability and will remain open until the close of business on Tuesday, February 14, 2017, Eastern Time:" Ex. C13.

[18] The position of the parties did not change and as a result Dr Lukacs commenced this action for $1,889.32 plus punitive damages of $1,000.00 plus costs.

The Hearing

[19] Dr Lukacs testified as to the discussions he had had with Sanjay. He recorded them and put the recordings into evidence. He testified that he had not edited, redacted, truncated or altered them in any way. He also put into evidence the email correspondence between him and Sanjay and Ms Hong.

[20] No one was called to give evidence on behalf of Dell. An attempt was made to introduce an email that was purported to be between Sanjay and Ms Hong in order to put evidence of what Dell said was the settlement was before the court. The email had not been cc'd to Dr Lukacs at the time. Counsel for Dell argued that the email could be accepted as hearsay under this court's relaxed rule with respect to evidence. The only issue on such admission would be weight.

[21] I ruled that the email could not be accepted. It was not in my view hearsay evidence. Hearsay evidence is testimony by a witness before the court as to what someone outside of court had told the witness. This email, on the other hand, was evidence about two people, neither of whom were witnesses, had said to each other outside of court. Even if it was hearsay, to admit evidence of what two people, neither of whom were in court to testify as to the conversation, would be highly prejudicial and unfair to the claimant.

[22] In his submissions Dr Lukacs argued that the terms of the settlement that had been reached were set out in the emails from Dell to him, and from him to Dell, on February 7th and 8th. A term or condition respecting confidentiality had not been discussed; it had not been referenced in the emails; and it was something new that Dell was attempting to graft onto the settlement without out his consent.

[23] Dr Lukacs also submitted that punitive damages could be awarded in this court, and that Dell's conduct in attempting to re-negotiate the settlement he said had been reached was so reprehensible as to warrant a punitive damage award.

[24] Counsel for Dell submitted that this was a simple case of contract formation. He submitted that the parties had only agreed to one term, albeit an important term, that being price. Other terms of the settlement had remained open for discussion, as reflected in the comment at the end of Sanjay's email of February 7th as follows: "Kindly, reply back with your acceptance and our Legal Team will proceed from there." Counsel submitted that the reference to Dell's legal team "proceeding from there" represented a term in Dell's offer, such that acceptance of Dell's offer by Dr Lukacs represented an agreement by him that there would be further discussion or negotiation over other terms before a final agreement could be reached. Alternatively, the phrase "proceeding from there" made clear that Dell's offer on February 7th was in effect an offer to agree to some terms but to continue negotiating over other terms. In other words, the email correspondence of February 7th and 8th demonstrated only that there had been agreement on one essential term (price) in a larger, more complicated, deal.

Was there a settlement and, if so, what were the terms?

[25] Parties will be found to have reached an agreement where it would have been clear to an objective, reasonable bystander that the parties had intended to agree, and where the essential terms to that agreement could by that bystander be determined with reasonable certainty. An agreement may be found to include implied terms so long as that bystander would have concluded that such terms formed part of the agreement between those parties: see the discussion in *Halifax Regional Municipality v. Canadian National Railway Company* 2014 NSCA 104 at paras.56-60.

[26] I am satisfied on the evidence that the parties did reach a settlement on February 7th and 8th, 2017; that such settlement is reflected in the emails on that date; and consisted of the following terms and conditions:

a. Dr Lukacs would return the laptop in reasonable working order to Dell;

b. Dell would pay Dr Lukacs a total of $1,889.32, representing a return of the purchase price of $1,289.32 plus $600.00; and

c. Dr Lukacs would release Dell from any and all further claims arising out of his purchase of the laptop.

[27] The first term arises from the discussions and email correspondence as well as what a reasonable bystander would have concluded. The issue between the parties was that the laptop did not perform as represented. Clearly the understanding between them was that the laptop was otherwise in working order; it was just that it was not working according to the specifications that Dell had represented. The second term was express. Dell made an offer on February 7th; Dr Lukacs accepted that offer. The third term, while implied, would again have been obvious to a bystander. Why would Dell offer to pay $600 in addition to a full refund if it was then to be sued? The fact that Dr Lukacs did not object to the clause 8 release in the draft evinces this common sense conclusion.

[28] Sanjay's comment at the end of his February 7th email—"Kindly, reply back with your acceptance and our Legal Team will proceed from there"—cannot not alter this conclusion. It simply reflects the obvious: the settlement of a claim generally results in a formal document that gives effect to the terms to which the parties had expressly and impliedly agreed.

[29] Such terms do not include a confidentiality clause where there had been no discussion of the need for such a clause prior to an agreement being reached. A confidentiality clause is a significant burden on a party. It represents a restriction of his or her freedom of speech. A party may agree to such a clause, but he or she must be asked for it. Dell did not ask for such a term in its offer of February 7th. If, as Ms Hong suggested in her email, "non-disclosure of settlement terms is Dell's

standard policy and non-negotiable" then Dell should have put that condition in its offer of February 7th. It did not. It cannot then seek to add that term to the agreement that was reached when Dr Lukacs accepted Dell's offer on February 8th.

[30] Nor is a confidentiality clause something that can be implied from the circumstances of the case. This was not a case, for example, involving a claim arising out of a doctor/patient relationship, or a solicitor/client relationship, or some other relationship or context that would suggest that confidentiality would be an essential part of any settlement agreement. This was simply an agreement respecting the return and refund of a consumer product.

Is the Claimant Entitled to Punitive Damages?

[31] The short answer to this question is "no." The Small Claims Court is a statutory court. It can do only what the legislation creating it gives it power to do. This court can award special damages (*i.e.* out of pocket loss) to a limit of $25,000.00 and general damages to a limit of $100.00. Punitive damages are not general damages. They are not special damages. So this court has no jurisdiction to make such an award. Even if it did, I was not satisfied that Dell's conduct came anywhere near the type of conduct required to justify an award of punitive damages. This was simply a dispute over whether a settlement agreement had been reached and, if so, its terms.

Conclusion

[32] I will accordingly make the following order:

a. Dr Lukacs shall return the laptop in reasonable working order to Dell;

b. Dell shall pay Dr Lukacs a total of $1,889.32, representing a return of the purchase price of $1,289.32 plus $600.00; and

c. Dr Lukacs shall release Dell from any and all further claims arising out of his purchase of the laptop.

[33] Dr Lukacs is entitled to his costs of $229.47

Augustus Richardson, QC
Adjudicator