Court File No. SC-13 -5329 -0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BRAMPTON
SMALL CLAIMS COURT

B E T W E E N:

NATIONAL LEASING GROUP INC.

Plaintiff

- and-

SKYE GRAHAM and 685532 ONTARIO LTD.

Defendants

Court File No. SC-13-5329-00D1

AND BETWEEN:

SKYE GRAHAM

Plaintiff by
Defendant's Claim

- and –

NATIONAL LEASING GROUP INC., 685532 ONTARIO LTD., MARCEL GELINEAULT, SIMON HAM and EQUILEASE CORP.

Defendants by
Defendant's Claim

AND

Court File No. SC-13-452-0000

BETWEEN:

CLE LEASING ENTERPRISES LTD.

Plaintiff

- and -

SKYE GRAHAM and ECOPAGES INC.

Defendants

Court File No. SC-13-452-00D1

AND BETWEEN:

SKYE GRAHAM and ECOPAGES INC.

Plaintiffs by
Defendant's Claim

- and –

CLE LEASING ENTERPRISES LTD., MARCEL GELINEAULT, A.K.A. MARCEL GELINEAUX, SIMON HAM, 685532 ONTARIO LTD., A.K.A. JAVAMAX, cob IPHOTO

Defendants by
Defendants by Defendant's Claim

Court File No. SC-13-452-00D2

AND BETWEEN:

MARCEL GELINEAULT, SIMON HAM, JAVAMAX and 685532 ONTARIO LTD.

Plaintiffs by
Defendant's Claim

- and -

SKYE GRAHAM and ECOPAGES INC.

Defendants by
Defendant's Claim

REASONS FOR DECISION

MARTEL, DEPUTY J:

Heard: May 4th, 5th, 6th, 7th, 8th, July 28th, August 17th and November 6th, 2015

Appearing:

For National Leasing & Equilease: D. Downs, counsel
For CLE Leasing: M. Seberras, paralegal
For Skye Graham & Ecopages: I. Ball, paralegal
For Marcel Gelineault, Simon Ham, Javamax & 685532 Ontario Ltd.: M. Gelineault (self represented and as agent for the others)

Overview

1. Two separate actions were commenced by two commercial leasing companies to recover payments due under their respective leases. Each leasing company financed two coffee vending machines sold to Skye Graham ("Graham") by Javamax. Javamax is a business name registered to 685532 Ontario Ltd. ("685532"). These actions were ordered consolidated for purposes of trial. In the consolidated action National Leasing Group Inc. ("National") seeks to recover payment due under a lease with Graham. CLE Leasing Enterprises Ltd. ("CLE") brings a similar action to recover payment due under a lease with Ecopages Inc. ("Ecopages"), which lease was guaranteed by Graham.

2. National has also sued 685532 seeking to recover payment under the lease should the lease itself be held void due to the actions of Javamax or its agents.

3. In National's action Graham issued a Defendant's Claim against National, Javamax, Simon Ham, ("Ham") the president and owner of Javamax, Marcel Gelineault ("Gelineault"), a sales representative for 685532 and Equilease Corp. ("Equilease"), the leasing broker in the subject transaction.

4. In the CLE action, Graham brought a Defendant's Claim against CLE, Gelineault, Ham and

685532, aka Javamax.

5. In the CLE action Gelineault, Ham, Javamax and 685532 brought a libel action against Graham and Ecopages.

6. Following the six days of trial and two days of closing argument, I was called upon to deliver Judgment in what amounts to five separate Claims. Each leasing company seeks judgment against Graham for $25,000. plus prejudgment interest at 24 percent per annum. The total judgment against Graham in the consolidated action (including prejudgment interest) could exceed $100,000.

Background

7. In 2012 Skye Graham, a registered nurse who was 62 years old at the time of trial, was looking for a business investment that would earn her additional income and form the basis of her retirement plan. She noticed a sign advertising a business opportunity and attended a sales meeting at the offices of Javamax/685532. At the meeting she was advised that Javamax was in the business of selling coffee vending machines to individuals such as herself looking for a secondary income.

8. Graham purchased four coffee vending machines. She ultimately financed two of them with National and two with CLE. Within a week of taking delivery of the machines she was stressed and suspicious of the situation she had got herself into. Within two weeks she determined that the enterprise had no chance of success and she sought to return the machines and terminate the leases.

9. Ultimately each leasing company repossessed the financed vending machines and sold them.

Each leasing company is seeking to recover the funds subsequently due pursuant to the terms of their respective leases.

10. In her Defendant's Claims in the CLE and National actions Graham pleads that she was the victim of a scam perpetrated by Javamax, Ham, Gelineault and Equilease. She argues that representations were made to her that induced her to enter into the agreement to purchase the subject machines, which representations were negligent or fraudulent. She also alleges a conspiracy between Javamax, Ham, Gelineault, Equilease, National and CLE and seeks to have the leasing companies' Claims dismissed on the basis that the contracts are null and void due to the fraud perpetrated upon her. She seeks recovery of all sums expended by her in this unfortunate venture as well as substantial punitive damages against all parties.

11. Equilease is a leasing brokerage. 685532, carrying on business under the name and style of Javamax, amongst others, was in the business of selling coffee vending machines.

12. Graham entered into a lease with National to finance two of the coffee vending machines she purchased from Javamax. She entered into a similar lease with CLE to finance the other two vending machines.

13. In the Defendant's Claim in the CLE action Gelineault, Ham and Javamax have sued Graham and Ecopages for 'defamation of character and libel', alleging Graham posted defamatory comments about them on the Internet. Among other reasons Graham defends the libel action on the basis that no notice was given as required by section 5(1) of the Libel and Slander Act.

National's Claim

14. National is a large leasing company that carries on business across Canada. Its head office is in Winnipeg, Manitoba. It purchased two vending machines from 'Startech' for $24,879.20, inclusive of HST. Startech is a business name registered to 685532. National then leased the machines to Graham. A Financing Statement was registered under the Personal Property Security Act ("PPSA"). Default occurred with the first payment. National repossessed and liquidated the two machines through a Toronto area liquidator, Benaco Sales Ltd. ("Benaco"). After payment of commission to Benaco National realized $1,760.00 from the sale. This was applied to the balance owing by Graham.

15. National received an initial payment of $5,836.74. There were 29 more monthly payments to be made under the lease in the amount of $797.26 each. Using the argument that she was a victim of fraud Graham sought to rescind the lease with National. She also alleged that all the defendants were engaged in a conspiracy, working in concert to harm her. She made allegations of breach of fiduciary duty and allegations of vicarious liability on the part of National and Equilease for the inappropriate actions of Gelineault and Javamax.

16. Graham also alleged that the lease with National was not dated and an executed copy of the lease was not provided to her in a timely manner. Graham pleaded and relied on the Consumer Protection Act ("CPA") and alleged as well that National failed to mitigate its damages as it disposed of the coffee machines for an unfair price. Graham also alleged that National failed to serve her with a Notice of Intention to Sell as required by the PPSA.

17. National's position is that neither National nor Equilease gave Graham any advice regarding this business venture. National relies on provisions in the lease, including acknowledgements that: Graham herself selected the equipment, National was not responsible for the actions of the supplier and the supplier was not an agent of National nor entitled to act on its behalf. National takes the position that no agency relationship was created that would make it liable for any

wrongdoings of Javamax. To add to the confusion Javamax invoiced Graham for the four machines. Startech invoiced national for two of them. While it becomes a moot point for reasons set out below it is unclear whether "supplier" as defined in the lease should properly refer to Startech or to Javamax. National maintains the Consumer Protection Act is not applicable as this was a business endeavor for commercial purposes.

18. On June 20, 2012 National sent a letter to Graham demanding $28,772.50 as the balance due and owing by her. National waived the excess due over $25,000. to bring its claim within the monetary jurisdiction of this court. National also seeks pre and post judgment interest at the contractual rate of two percent per month or twenty-four percent per annum. At today's date the total of principal and prejudgment interest owing to National would be in excess of $50,000.

19. National has also sued 685532, seeking judgment against it if the actions of 685532 in any way void the lease or result in an order rescinding the lease or relieving Graham of responsibility thereunder.

20. With respect to mitigation of damages, National takes the position that the lease sets out the consequences of default in the form of liquidated damages that relieve it of any obligation to mitigate.

CLE's Claim

21. CLE is a large commercial leasing company. Like National it funded the purchase of two coffee machines for Graham. CLE purchased two machines from Javamax (not Startech) for $24,879.20, inclusive of HST. CLE leased the vending machines to Graham's company, Ecopages. Graham personally guaranteed that lease. CLE received an initial payment of

$5,029.59, inclusive of tax. The lease provided for 35 additional monthly payments of $898.69, plus tax. The lease went into default in April of 2012 when Graham refused to make any further payments. CLE made arrangements to repossess the equipment and Benaco sold the two machines on behalf of CLE. The balance due and owing to CLE under the lease is $28,049.63. For the purpose of bringing the Claim within the monetary jurisdiction of this court CLE's Claim has been reduced to $25,000.00. CLE seeks pre and post judgment interest at the contractual rate of two percent a month, compounded monthly, or 26.82 percent per annum. At today's date the total of principal and prejudgment interest owing to CLE would be in excess of $55,000.

22. Like National, CLE takes the position that neither Gelineault, Javamax, nor Equilease were its agents, nor did CLE provide any advice to Graham on the equipment purchase or her proposed business venture.

23. Both leasing companies deny all allegations of conspiracy to defraud or in any way harm Graham.

The Position of Skye Graham

24.Graham maintains she was 'scammed' and that the defendants named in her two Defendant's Claims were either perpetrators of the scam, knowingly participated in the scam, or were knowingly or willfully blind to the scam.

25. Graham alleges she was the victim of a conspiracy. Graham, who was looking for a way to augment her retirement income, invested in the purchase of these coffee vending machines from Javamax. Javamax invoiced Graham for $48,284.90. The four machines cost $34,980. She was charged another $4,800. for four locations and $2,000. for installation. She was also

charged $950. for freight and HST was charged on the total.

26. Graham maintains that the representatives of Javamax were aggressive in their marketing, that they bullied her into purchasing four machines instead of one, that they misrepresented the purchase price and the funding and that they told her the initial $11,000.00 deposit would be refunded once financing had been secured.

27. Graham maintains Javamax promised to find her profitable locations. She purchased locations screened by Javamax so she was guaranteed a minimum return on her investment in terms of the numbers of cups of coffee sold on a daily basis. She maintains the value of the machines was inflated and that Equilease was acting as an agent of National and CLE. She also argues that the Defendants Gelineault and Ham should be personally responsible for her losses on the basis that they operated contrary to the Business Names Act and Business Corporations Act by not identifying the corporation they represented. As I have already stated Graham defends the libel action on the basis that no notice was given by the individuals advancing this Claim pursuant to the Libel and Slander Act. She also pleads justification and fair comment.

The Evidence

28. After seeing a sign posted in Brampton that said "Turn Key Operation Regarding Vending Machines" Graham arranged to meet a Javamax sales representative at their Ambler Drive location in Mississauga. On January 26th, 2012 she met first with a representative named Indira. Later that morning she also met with Gelineault and another employee named Pauline. She describes the environment as being candle lit and dark, with coffee on the table. Pauline and Indira were rushing to get her to try various types of coffee, telling her that their coffee was unbeatable in terms of taste, flavor and choice. The sales kit was on the table. When Graham told Indira that she was looking for a small retirement business that she could work at part time

she was told, "We've got just the bill to fit you because that is exactly what we do". She was shown a profitability and investment sheet illustrating the yield on the coffee vending machines. This sheet set out scenarios ranging from bare minimum expectations to up to a hundred cups a day. Graham recalls being specifically told by Indira that the coffee was so good, the locations so pre-qualified and the machines so modern and effective that a thirty-cup yield was "absolutely a no-fail operation." Neither Pauline nor Indira testified at trial.

29. The "Investment Sheet" presented to Graham and entered into evidence set out scenarios A, B, C and D. Scenario A illustrated a minimum expectation of $765. gross monthly profit for one machine, based on minimum sales of 30 cups a day at $1.00 a cup. Thirty cups a day is the minimum scenario presented, which in itself suggests this to be the minimum expectation for a vendor with one machine. Initially Graham wished to buy only one coffee machine but she was convinced to buy four because she was told that the funding would be done with other people's money, that four machines would yield her on average $4,000.00 a month, that the cost to carry the machines was only ten cents a cup and her business would grow. Graham stated she based her decision to purchase the machines on Scenario A, the minimum expectation of sales.

30. Graham did acknowledge that Indira told her Scenario A might not happen if Graham bought the machines, installed them herself and found her own locations, but that if she purchased qualified locations from Javamax Scenario A was a sure thing. Graham said she was very clear that a minimum guarantee was important to her because she simply could not afford to take a risk that there might be no sales at all. At trial she acknowledged the disclaimer on the Investment and Profitability Sheet that stated:

> "… earnings are potential projections only, not a guarantee, actual earnings varies depends on locations and services rendered by the operation which Javamax exercises no control over."

31. Graham acknowledged she read the disclaimer and that that prompted another discussion with Javamax representatives wherein she was told that these potential projections were not a guarantee but the disclaimer only applied if she sourced her own locations. Graham was unshakeable in her evidence that she was told that if she bought Javamax locations, sourced by them, she would enjoy Scenario A without a doubt. Based on Graham's financial position and her concerns I accept her evidence in this regard. To make the investment without such guarantees would have been extremely foolish and Graham did not impress me as a foolish or impulsive woman.

32. Following her discussion with Indira, Graham met with Gelineault who, she testified, validated and confirmed everything that Indira had said and then offered to start looking for funding for four machines. He prepared the Javamax invoice and asked her for a deposit. That day Graham provided Javamax with $11,000. by utilizing two of her credit cards. The payment was actually made to a company called IPhoto, which confused Graham. She was told that IPhoto was a division of the coffee company and it was standard to process payment through IPhoto. Graham signed the invoice for $48,284.90 (less the deposit) for four machines, four locations and installation of the machines, freight charges and HST. She read the invoice when she got home that night.

33. Graham left the January 26th meeting with a promise from Gelineault that he would set up the credit application and arrange funding. Gelineault later advised her that her initial application to RCAP for funding was declined.

34. Gelineault then utilized the services of a leasing broker, Equilease. Graham found this comforting because she had had experience with Equilease in the past. She knew Allan Abbot at Equilease and contacted him, saying she was interested in financing four coffee vending

machines. She was told that Equilease had someone who worked directly with Gelineault on that sort of funding. Her understanding was that the $11,000. deposit was going to be returned to her once funding was secured. She based this belief on statements made to her by Gelineault. In fact the $11,000. was never returned to Graham.

35. It wasn't until February 7th that Graham returned to the offices of Javamax where she was called to sign documents to activate the funding. She was simply passed documents across the table and told; "You need to sign here. Pauline is to witness." When she asked for a copy of what she had signed Gelineault told her; "No, this is just a preliminary document to get the funding going. We will send you documents once they are finalized".

36. It is clear that a credit application was prepared for Graham and executed by her but when she reviewed the credit application at trial she denied providing the specific information contained therein. Specifically she pointed out that her income was wrong, she did not make $180,000.00 a year, she made less than $80,000. a year. She testified she did not have $35,000.00 in RRSPs as stated, nor did she have the cash it stated. She was adamant she did not provide this misinformation to anyone. I accept her evidence in this regard. It would have been too easy for any lender to ask for verification. She had no motivation to lie. She believed this was a legitimate venture and relied on Gelineault and Equilease to arrange financing for her based on accurate information (not what was written on the application). I note that the numbers themselves are suspicious. On $180,000 income (as an employee) it reflects annual tax of $20,000., a rather implausible statement.

37. The next occasion Graham returned to Javamax offices was February 18th where she met with Iraj Fateh ("Iraj"), an employee of Javamax. The purpose of the visit was to scout locations. Iraj drove her to twelve preselected locations with a view to her selecting four. Graham's testimony was that she spent the day with Iraj, from 10:00 am. until approximately

5:00 pm. She testified she had lengthy discussions with him during this time saying that her expectation was a minimum 30 cups a day and that was the criteria for her decision on locations. Her evidence was that he told her of each location; "This is a sure bet, this is a good location." He continued to tell her; "These machines, there is motivation to buy coffee, everybody drinks coffee, it's great coffee and you will be having a great profit from this." At the end of the day Graham selected four locations.

38. On or about February 25th Graham was trained in filling, cleaning and servicing the machines during one session that took approximately two hours. Following the training session she had another discussion with Pauline expressing her enthusiasm for the locations and expressing again her expectation of selling thirty cups per day per machine. Pauline said nothing to correct this expectation. At this time the machines had not yet been delivered to Graham.

39. On or about March 11th Graham was told the machines had arrived and could be installed. On March 13th Graham signed a document that essentially confirmed that Javamax had performed its obligations under the purchase order and that she had approved specific site locations for the machines. That agreement contains a caveat: "Javamax does not guarantee income or assume any responsibility with regard to the vending machine or provide any new locations for the client's unfulfilled commitment." Graham recalls that she signed this document at Javamax's Ambler Drive location. That same day she received a phone call from an anonymous voice asking if the machines had been installed, to which she replied 'yes'.

40. At the suggestion of Iraj, in order to get her new venture 'kick-started', she offered free coffee for the first three days, in all four locations. Almost immediately she began receiving calls from her four customers complaining about difficulties with the machines. She was aware that to have a Javamax specialist come and affect repairs or examine the machines she would have to pay a $150.00 service call and she was initially reluctant to call on them for that reason. There

was no evidence however that Graham ever paid for service calls and in fact the evidence of Gelineault was that all of the service calls were free of charge.

41. Based on problems with the distribution of milk and quantity of coffee dispensed, complaints from the Sears location started almost immediately. The week after installation Sears stopped using Graham's machine and purchased a Keurig to provide coffee for its staff. Graham stated she earned less than $100.00 from the machine at the Sears location.

42. Behr was Grahams second location. Iraj sold Graham on this location by telling her that Behr had a good employee base and 15 to 20 plus customers a day. He told her the staff was motivated, they worked shifts and they drank coffee. Within several days of installation there were a number of hardware and software issues with that machine. The users complained that the coffee didn't taste right, the mix wasn't good and the components for sugar and milk weren't coming down when the selection was made. Graham estimates she earned $60.00 in two weeks at the Behr location.

43. The third location was the Tire Terminal that Graham was told would be the top biller of her locations. She testified that Iraj told her that the tire terminal had twenty employees and serviced forty customers a day. The coffee machine was installed in a very prominent location in the showroom. Initially when the machine was installed the installer put in the wrong plumbing and hydro and flooded the location. Graham eventually learned that the owner of the Tire Terminal was not particularly interested in the machine and he had the intention of discontinuing it in thirty days. He told Graham she had been scammed by Javamax. From March 15th to March 22nd Graham estimates she earned $106.00 from this location. Graham had continuing difficulties with this machine and the location was not successful.

44. The final location was J.S. Auto. Graham was introduced to this location by Iraj with the

explanation that there were only seven staff but they were big coffee drinkers who drank maybe five cups a day each. The owner was motivated to provide coffee service for his customers while they were waiting for their vehicles to be serviced. In two weeks Graham earned approximately $60. from this location. She said J.S. Auto started major renovations for their showroom in the customer waiting area so they covered up her machine. They used the machine for seven to ten days before they started renovations after which the machine was moved to a back corner.

45. Graham complained to Gelineault about the deficiency in revenue and complained that she still didn't have a copy of her lease or know what her monthly lease payments were. She expressed her concerns to Frank Small of Equilease who told her that she needed to be patient and let the business build.

46. On March 23rd Graham wrote Gelineault saying she wanted to cancel the contract and was told for the first time that the contract was non-cancellable. On April 3rd she met with Deloitte to get advice on her contract and was referred to a specialist with whom she on April 9th. It was at this time she discovered that there was a corporation behind Javamax, learned Marcel's last name and found that Simon Ham was connected with the company. She then googled 'Marcel Gelineault' and discovered numerous derogatory comments about him on the Internet.

47. Graham engaged in negotiations that gave her some hope she could undo the entire venture, void the lease, return the vending machines to Javamax and recover her investment. These negotiations were premised on Javamax buying the machines back. No resolution was reached with the result that CLE and National repossessed the machines.

48. At some point during her investigation Graham uncovered a website called "Live! Rip Off Report" regarding Ham and his activities with a previous company called Alpha Multi Media.

The comments were terribly derogatory, referring to Ham's unscrupulous activities in the vending machine business.

49. Graham introduced into evidence proof of a Javamax website with various promotions for the coffee vending business. It contained the statement; "Vending machines have generated billions in review. You can take advantage of this exciting industry part time… passive cash for life…" " the best part is … you can do it with very part time hours but earn a full time cash income." That website asked, " How much money do you want to earn?" It provided a calculator to allow people to calculate their expected profit.

50. The website also featured a section on customer feedback showing various favorable comments from customers. Glowing comments about the Javamax business were posted January 25th, February 16th, March 1st and March 16 of 2011. Evidence was introduced that showed conclusively the name Javamax was not registered to 685532 pursuant to the Business Names Act until May 19th, 2011 leading me to agree with Graham's argument that the testimonials on Javamax's website were fabricated. Ham acknowledged at trial that he is the owner, director and officer of 685532.

51. With respect to the execution of the actual leasing documents for National I find it entirely reasonable that Graham assumed Equilease to be an agent of National and/or Javamax. All of her meetings and attendances for execution of documents were in the offices of Javamax. The lease Graham signed for two machines for a 30 month term bears the name "Equilease: Equipment Leasing and Financing". Graham never spoke to or met with any representative of National or CLE prior to signing the leases. In terms of initiating and activating this business venture the Ambler Drive office of Javamax offered 'one stop shopping' to investors such as Graham.

52. Though the lease Graham signed with CLE on behalf of Ecopages bears the name "CLE Leasing Enterprise Ltd." Graham, as noted above, only dealt with Javamax and Equilease at the office of Javamax.

53. I found Graham to be an honest witness. She readily acknowledged she was given an opportunity to read the leasing documents, but declined. She admitted she did not ask for additional time to read the documents before signing.

54. In admitting that she did not read the documents, Graham also admitted that she should have read them. She acknowledged that she read the leases later and understood them, allowing me to come to the conclusion that if she had read the leases before signing them she would have understood the terms therein.

55. With respect to National's lease, counsel for National reviewed clause 4 with Graham in cross-examination. Clause 4 states; "This lease cannot be cancelled by you during the term for any reason including equipment failure, loss or damage. You may not revoke acceptance of the equipment. You acknowledge that you selected the equipment and the equipment supplier. We purchased the equipment at your request and on your instructions. We are not responsible for equipment failure or the equipment supplier's acts."

56. Clause 5 reads; "You are leasing the equipment as is. We do not make any warranty or representation whatsoever with respect to the equipment including without limitation as to durability, quality, condition or suitability of the equipment for your purposes. We shall not be liable for any loss, damage or expense of any kind caused directly or indirectly by the equipment or its use, operation or possession or by any interruption of service or loss of use or for any loss of business or damage whatsoever and howsoever caused. Where permitted we assign all manufacturers and suppliers warranties to you during the term". On the stand Graham

acknowledged understanding both of these clauses.

57. Graham also acknowledged an understanding of her obligation under the leases to insure the equipment. In fact the four machines were insured, premiums were paid and Graham did receive some proportionate rebate from the insurer once the insurance was cancelled.

58. Graham does acknowledge that she fell into default under both leases. With respect to National's lease she acknowledged one of the default provisions in that lease which reads; "In the event of default all rent and any other payments to the end of term shall immediately become due and payable on demand. You will immediately deliver the equipment to us at your own expense. We may without notice and without resort to legal process take immediate possession of the equipment. We may enter the premises where the equipment is located without incurring any liability to you. You shall pay our costs of collection, repossession or the equipment and of the enforcement of our rights including legal costs on a solicitor and client basis. Our remedies shall be cumulative and not alternative." On the stand Graham acknowledged understanding the ramifications of that clause and also acknowledged the entire agreement clause in National's lease.

59. With respect to the terms of the CLE Lease it is remarkably similar to that of National. The lessee acknowledges that: it (Graham) selected the equipment and that the lessor has not made any representations concerning the equipment. The lessee specifically promises to pay the lessor "regardless of the validity of the sale agreement". The lessor has the right to possess and sell the equipment if payments are not made and any default renders the whole amount due and owing under the lease immediately payable. The lease is non-cancellable and contains an 'entire agreement' clause.

<u>Graham's defences to liability under the leases</u>

Calculations

60. With respect to both leases Graham questioned the calculations and quantum claimed under each lease based on the detailed information introduced at trial, including the reconciliation of invoice amounts and reconciliation of the $11,000. deposit paid by her. I reviewed these calculations and I am satisfied that the sums claimed by each of CLE and National are properly calculated from an arithmetical point of view.

Sale of Goods Act

61. Graham, primarily in her Defendant's Claim, has pleaded section 15 of the Sale of Goods Act, the implied condition of fitness. She maintains that the vending machines did not work as intended. That is not a defence to either Plaintiffs' claims under the leases. Based on the terms of the lease documents themselves neither leasing company made any representations as to the fitness of the vending machines.

Jurisdiction

62. With respect to the CLE lease Graham challenges the geographic jurisdiction of this court. Paragraph 8 of this lease contains a provision that the lessor elects the jurisdiction of Trois Rivere. I would assume this is no more than a typographical error. This does not stand as a viable defence to CLE's Claim. Pursuant to the Rules of the Small Claims Court an action may be properly commenced where the cause of action arose or where one or more of the defendants resides. Graham is a resident of Mississauga. The Brampton Small Claims Court has geographic jurisdiction over Mississauga and accordingly, this court has jurisdiction to adjudicate the claim of CLE against Ms. Graham.

The Consumer Protection Act ("CPA")

63. While the CPA was pleaded, Mr. Ball conceded at trial that Graham did not fall within the

definition of 'consumer' under the Act nor was this a 'consumer transaction' to which the Act applies.

Conspiracy

64. Graham has pleaded she was a victim of a conspiracy in which all parties participated. The necessary elements to prove conspiracy are that all parties must be acting together, engaged in unlawful conduct, where the damages are foreseeable and damage in fact occurs. It is critical to succeed on a conspiracy claim to establish that harm was intended to the victim. In that regard I rely on the decision of the Court of Appeal for Ontario in *Harris v. GlaxoSmithKline Inc.* [2010] ONCA 872. In that decision Moldaver J. stated: "To make out a conspiracy to injure, the defendant's predominate purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral results of acts pursued predominantly out of self-interest." In this case there is absolutely no evidence before the court that either CLE or National intended any harm to Graham, nor is there any evidence upon which I could find as fact that the leasing companies were acting in concert with Javamax to cause harm to Graham and or Ecopages. While CLE and National may have been motivated by greed, they were not motivated by malice.

Mitigation

65. Both leases contain a 'liquidated damage' clause that relieves each of CE and National of an obligation to mitigate their damages. Even in the absence of that clause I find the placing of the machines for sale with Benaco to be commercially reasonable. The nominal price received for the machines appears to be more a factor of the poor resale market for vending machines (or perhaps the inflated purchase price, though I heard no independent evidence in that regard) than any defect with the sale process or unreasonable practice by Benaco.

Failure to deliver PPSA Notice by National

66. Graham challenges the receipt of notice of intention to sell from National. It appears that the

Notice was mailed to the wrong address through inadvertence. Graham denied receiving the notice. The burden of proof lies with National to satisfy the court that the Notice was properly served and National has not proved service on a balance of probabilities. However, in *Bank of Montreal v Charest* 52 O.R. (3d) 497, the court held that failure to give notice of an intention to sell does not prevent an action for a deficiency. Such failure does entitle Graham to compensation though for any proven loss or damage. As this issue is not one upon which I base my ultimate ruling I shall comment no further at this point.

Misrepresentations by Gelineault and 685532

67. *Queen v. Cognos Inc.*1993 CanLII 146 is the leading case on the tort of negligent misrepresentation. The court set out the five requirements for a successful claim:

> " 1) there must be a duty of care based on a 'special relationship' between the representor and the representee; 2) the representation in question must be untrue, inaccurate or misleading; 3) the representor must have acted negligently in making the representation; 4) the representee must have relied, in a reasonable manner, on the negligent representation; and 5) the reliance must have been detrimental to the representee in the sense that damages resulted."

68. Graham relied on the representations made by employees of 685532 that she was guaranteed the income set out in Scenario A. She relied on these representations to her detriment and suffered damages.

Fairness

69. Having commented on all of the defences put forward by Graham with respect to her liability under both leases, I turn now to a consideration of *Bhasin v. Hrynew* 2014 SCC 71. In this decision the Supreme Court sought to reconcile decades of "unsettled and incoherent" case law regarding the application of the doctrine of good faith at common law.

Justice Cromwell, writing for the Court, rejected the "wholesale adoption" of an "expansive duty of good faith" describing the ruling as a "modest, incremental change" to the existing law. Exactly how modest a change this decision represents remains to be seen as it is applied to contract cases across the country.

70. Bhasin marketed education savings plans to investors of behalf of Can-Am. When Can-Am chose not to renew its dealership agreement with Bhasin he brought suit. The agreement between the parties contained a clause that the contract was automatically renewed at the end of three years unless one of the parties gave six months written notice. Hrynew, a competitor of Bhasin, had also entered into an agreement with Can-Am and influenced Can-Am not to renew this agreement with Bhasin. The Alberta Securities Commission raised concerns about Can-Am's business and Can-Am appointed Hyrnew as a Provincial Trading Officer to review compliance among Provincial dealers, including Bhasin. Bhasin objected to a review of his records by Hrynew. Can-Am misled Bhasin into believing that the takeover he feared was not a fait accompli though it had already decided to force Bhasin into a merger with Hrynew. Bhasin refused to let Hrynew review his records. Can-Am gave notice of non-renewal of its agreement with Bhasin. Bhasin sued for the loss of value in his business. At trial the Court found that Can-Am had breached an implied term of good faith. This decision was overturned on appeal. Bhasin appealed. The Supreme Court allowed the appeal against Can-Am but modified the damage award.

71. Justice Cromwell found good faith contractual performance to be a general organizing principle of the common law of contract. He further recognized a common law duty applying to all contracts that requires parties to act honestly in the performance of their contractual obligation.

72. I quote from the headnote of that decision: "There is an organizing principle of good faith

that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states, in general terms, the requirement of justice from which more specific legal doctrines may be derived…It is a standard that helps to understand and develop the law in a coherent and principled way. The organizing principle of good faith exemplifies the notion that in carrying out his or her performance of the contract a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While 'appropriate regard' for the other parties' interest will vary depending on the context of the contractual relationship, it is does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligation of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first….The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives weight to the importance of private ordering and certainty in commercial affairs. "

73. The Court cautioned that, "…the development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or 'palm tree' justice. In particular, the organizing principle of good faith should not be used as pretext for scrutinizing the motives of contracted parties. The objection to C's (Can-Am's) conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance,

parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."

74. Based on this analysis, 685532, carrying on business as Javamax breached its general duty of honesty and good faith. The breach of contract of 685532/Javamax consisted of its failure to be honest with Graham about performance of the contract. 685532 is liable therefore for damages sustained by Graham.

75. I have reviewed a decision of this Court rendered by Deputy Judge M. Klein in the case of *Ryan Rohatom operating as Justin's Vending v. 2149978 Ontario Inc. trading as Starz Canada*. 2011 CanLII 100487 (ON SCSM). In that action Marcel Gelineault, director of sales for the defendant corporation, acted as its representative at trial. The facts in that case are remarkably similar to the case before me. The plaintiff bought vending machines from 2149978 (another company owned by Ham) and attended a presentation by Gelineault at the defendant's Mississauga office. Thereafter the plaintiff met with Ham, and others. Key to the plaintiff was the defendant's assurance that the locations offered by the defendant would produce decent income. As Graham alleges in her action, that plaintiff stated he was guaranteed a minimum monthly income for each vending machine. As with Graham, there were concerns with the operation of the machines and the unsatisfactory nature of the site. The day following installation Sears asked the plaintiff to remove the pop and vending machines and retained only the coffee machine.

76. I quote from paragraph 14 of Deputy Judge Klein's decision: "Based on the evidence given at trial…the plaintiff entered into the contract with the defendant based upon the representations made through the corporation's written materials … and the verbal representations that were made by Simon Ham the owner. What were the plaintiff's expectations after taking his life savings and investing in the defendant's product? He made it very clear. He wanted a sure

thing and in order to achieve this he understood he was going to be given good locations that would yield him decent profits and he would be given support. I find that he got neither. The fact that the Defendant was charged an additional $2,000.00 for two locations, which in the end amounted to dead ends, perhaps nothing is a better word, coupled with all the unanswered phone calls placed to the defendant corporation and Mr. Ham by the plaintiff truly gives this investment the appearance of a sham." Deputy Judge Klein found for the plaintiff in the amount of $22,000.00. It would appear that Mr. Ham paid attention to this case. He was very careful in the Graham negotiations not to put in an appearance and cannot be found responsible for making any representations to Graham directly.

Fundamental Breach

77. As acknowledged by Justice Price in *MCAP Leasing Limited Partnership v. Lind Furniture (Canada) Ltd.* [2010] O.J. No.1153, the common law generally allows a party to rescind a contract where the contract has been induced by fraud. The Court (including the Small Claims Court) has very broad equitable power to order the rescission of contracts. I find as fact that a fraud was committed. I find that Javamax extracted an unreasonable price from Graham. Gelineault, for whom 685532 is liable, induced Graham to enter into a contract based on promises of profit if she paid for pre-selected locations. Graham expected, and was promised, that she would make a minimum profit from these locations. She did not. The contract between Javamax and Graham cannot stand. I hereby order it be rescinded.

78. The question then arises as to whether or not CLE and National were aware or willingly blind with respect to this fraud. The evidence of National was very clear that it was not in the business of funding locations. There is a web of deceit spun around this venture starting with Javamax hiding the existence of one leasing company from the other. Javamax in fact perpetrated a fraud on both National and CLE by including the location price and other expenses in its invoice, leaving both leasing companies in the position of financing not just

equipment but location, freight and other charges. Both leasing agreements therefore were based on a fundamental misunderstanding of exactly what was being financed. In this regard both leasing companies were as much victims of fraud as was Graham. The leases were unfairly negotiated and based on a contract between 685532 (Javamax) and Graham that I have rescinded. Graham had no understanding of the terms of the lease at the time they were executed. She was misled and pressured by Gelineault. The leases were only approved based on an inaccurate credit application for which Graham should not be held responsible. At every turn Graham was manipulated by Gelineault and Equilease. The leases themselves are rescinded.

Graham's Defendant's Claims

79. In both Defendant's Claims Graham seeks payment of $17,493. and aggravated, punitive and exemplary damages of $10,000., waived to bring the total amount of the claim to $25,000. The payment sought is broken down as follows:

i. $11,000. paid as a deposit on the machines,
ii. $2,770. for supplies to fill the machines,
iii. $1,133. paid for insurance on the machines,
iv. $533. paid to fill the machines with change,
v. $1,800. for lost work,
vi. $100. for gas, and
vii. $150. in maintenance supplies.

80. There was no evidence led as to losses regarding the insurance, the maintenance supplies or gas. Graham recovered the change used to fill the machines. There was insufficient evidence led to allow me to assess damages for lost wages. Javamax took $11,000. from Graham. National received $5,836.74 and CLE received $ 5,020.59 for a total of $10,857.33. Javamax retained

$142.67 from the deposit. Graham purchased supplies from Javamax for $ 2,854.50. Javamax applied the $142.00 credit and accordingly Graham paid Javamax $2,711.83. As Graham's contract with Javamax is rescinded, National and Javamax (jointly and severally) owe Graham $5,836.74 and CLE and Javamax (jointly and severally) owe her $5,020.59. As Graham is entitled to receive a return of her entire deposit each leasing company is entitled to retain the proceeds they received from the sale of the machines by Benaco. Javamax owes Graham a return of the $2,854.50 she paid for supplies.

Liability of Gelineault/ Ham and 685532

81. In her Claim against Ham and Gelineault Graham argues the doctrine of vicarious liability, which quite simply stated, is that one may be legally responsible for the actions of another because of the relationship between them. This is a tort of strict liability. The law is set out clearly in *Strauss v. Decaire* 2011 ONSC 1157 CanLII. The policy considerations that justify the imposition of vicariously liability are found in *Bazley v. Curry*, [1999]. 2 S.C.R. 534. These considerations are fairness and deterrence. I have been asked to find that Javamax is vicariously liable for the representations of Gelineault. Gelineault was clearly an employee of 685532 Ontario Ltd. carrying on business as Javamax.

82. I accept the evidence of Graham that Gelineault, as well as Indira, promised her profits based on the purchase of pre-screened locations. Gelineault is personally responsible for the making of such a statement that I find was a misrepresentation of fact. It was this promise that induced Graham to enter into the agreement. Based on the evidence and application of the relevant jurisprudence I find 685532 vicariously liable for the statements of Gelineault. 685532 must also bear responsibility for the inaccuracy of the investment and profitability materials presented to unwary customers. I cannot find 685532 vicariously liable for the actions of Ham as Ham had no dealings with Graham.

83. On the stand Ham clarified that two of the directors listed in the corporate profile have no involvement in the operations of the company. One is his mother, who is deceased, and the other is his father, who Ham testified takes no active role in the corporation but through inadvertence or negligence failed to resign his position with the company. Mr. Ball argued that Ham should be personally responsible on the basis that he did not comply with s. 10(5) of the *Business Corporations Act*, R.S.O.1990, c.B.16. ("BCA"). Subsection 10(5) states: "despite subsection (4), a corporation shall set out its name in legible characters in all contracts, invoices, negotiable instruments, and orders for goods and services issued or made by or on behalf of the corporation…".

84. Graham thought she was contracting with an entity called Javamax and at no time was she made aware of the fact that this was simply a style for 685532 Ontario Ltd. There was no evidence that she was ever advised of the existence of the corporation and certainly none of the marketing materials or documents with respect to her particular transactions set out the corporate name or advised of its existence. The law is clear that failure to comply with section 10(5) of the BCCA does not create automatic personal liability. See *Truster v. Tri-Lux Fine Homes Ltd.* 1998 CanLII 3497 (ON CA).

85. In *Shoppers Drug Mart Inc. v. 6470360 Canada Inc*. 2014 ONCA 85 the Court of Appeal considered circumstances appropriate to piercing the corporate veil to find directors personally liable. The lower court declined to hold the director, Beamish, personally liable. The Court reversed this decision, exercising its inherent discretion to pierce the corporate veil where appropriate. The court affirmed its prior ruling in *642947 Ontario Ltd. v. Fleischer* (2001) 56 OR (3d) 417 as the leading case on piercing the corporate veil. Justice Laskin outlined the law. Typically the corporate veil can be pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in

control expressly direct a wrongful thing to be done."

86. Like Beamish in the Shoppers, case Ham was clearly the directing mind of 685532. As director he exercised final authority over the promotion of the Javamax venture, its advertising and sales material. Ham bears as much responsibility for the harm sustained by Graham as does Gelineault. I find Ham to be personally liable for damages sustained by Graham in this action.

The Defamation Action SC-13-452-D2

87. Ham, Gelineault, Javamax and 665532 seeking damages of $25,000 issued this Defendant's Claim April 8th, 2013. The pleading was short and stated as follows:

> "The Defendant Skye Graham posted false statements on the internet towards Marcel Gelineault, Simon Ham, Javamax aka 685532 Ontario Ltd. ("the plaintiffs"). The Plaintiffs are filing for defamation of character, libel. Skye Graham has posted derogatory, negligence and false information which is accessible to the public. The Plaintiffs have experience loss of revenue due to incomplete sales by their clients who have decided not to continue with the business opportunity after reading the derogatory posting as well as new clients who have declined to go farther into the business. Please see attached Exhibit "A" and attached Exhibit "B"."

88. Exhibit "A" consists of 3 pages from what appears to be a website found at http://java-max.pissed. It reads: "Javamax Mississauga is a scam beware". In the bottom right hand corner of each of the three pages is the date 12/03/2013. There appear to be fourteen separate comments on this page. Each individual posting contains comments about one or more of Ham, Gelineault, Javamax or the business. They are all derogatory comments that in essence describe Gelineault and Ham as scam artists and Javamax as a scam business. If any of those comments

are true Ham and Gelineault have committed egregious acts, duping innocent victims with promises of quick riches. There is no information on these postings, nor any evidence introduced by the Plaintiffs at trial linking either defendant to these postings.

89. Exhibit "B" to the Defendant's Claim is a posting from a website called Scam Book.com. It consists of a two page document, each page bearing the date 4/5/2013. This document is titled 'leasing complaint' and is signed S.G. It very closely documents circumstances similar to Graham's involvement with Javamax, CLE and Equilease. It mentions Frank Small and Marcel Gelineault by name as well as Iraj and Simon Ham. This posting essentially repeats the evidence given by Skye Graham during the trial. It concludes by warning parties: "buyer beware".

90. The last sentence of the posting reads: "Please contact me if you are a victim so we may initiate and/or join in the pending class action suit and set up loss and prevention strategies." This letter stands as a testimonial to the writer's involvement with Javamax and in several clear statements warns others not to pursue this venture or become involved with the operation.

91. Graham and Ecopages plead several defences. Their Defence alleges that the plaintiffs failed to comply with the notice sections of the Libel and Slander Act, pleads truth and justification, maintains that social policy calls for the encouragement of internet postings for the protection of the public and relies on the defences of qualified privilege, fair comment and/or responsible journalism.

The Motion for non-suit

92. At the close of the case by the plaintiffs the defendants Graham and Ecopages brought a non-suit motion asking that the Claim against them be dismissed.

93. The legal test to be met by a defendant bringing a motion for non-suit, or as it is sometimes called, a no evidence motion, has been considered by many levels of court across Canada. The simplest statement of the rule is that to succeed on a motion for non-suit a defendant must persuade the presiding Judge that no evidence had been led which was capable of proving one of the essential elements of the cause of action alleged. On a non-suit motion the presiding Judge must not weigh evidence or attempt to make findings of fact, nor assess credibility. Based on the case law, I am proceeding on the premise that if an inference, which is essential to the Plaintiff's case, would be mere speculation the defendants' motion should be granted. *Brooks v. Martin* [2010] BCSC 1708 CanLII

94. In the case of *410812 Ontario Ltd. and Her Majesty the Queen* 2002 CanLII, a Decision of the Tax Court, Chief Justice Bowman sets out a recommended procedure for non-suits. He notes however that the guidelines set out in paragraph 32 of that Judgment are not binding but simply an attempt to put the procedure in non-suits in the tax court in a comprehensive organized form.

95. In *Ontario v. Ontario Public Service Employees Union (OPSEU)* [1990] O.J. No. 635 the Divisional Court, on page 10, states that; "…on a motion for non-suit where the defendant calls no evidence a Judge may not make findings of fact." It clarifies that the standard of proof on a non-suit is that of a prima facie case, not a case on a balance of probabilities. If a prima facie case has been shown a non-suit must not be granted. It is erroneous to determine a non-suit on the basis of the higher onus of the balance of probabilities. A prima facie case is no more than a case for the Defendant answer.

96. If there is some evidence a motion for non-suit must be dismissed, if there is not it must be granted. In a case from the Court of Appeal in *Martin v. Canadian Pacific Railway* 1931 CanLII 138 (ON CA) Riddell J.A. said at pages 573 to 574:

> "The usual, indeed, almost universal case is a motion by the defendant; the judge may pursue any one of three courses. He may, (1) allow the motion and grant the non-suit… Or the judge may, (2), dismiss the motion, or (3), reserve his decision until the end of the trial; in either of these cases the defendant may, (a) close his case offering no evidence, in which case he is the same position of as the defendant in the case just mentioned; or, (b), give evidence, in which case the matter is decided on all the evidence offered… These are the rules of strict practice in our courts but they in no way interfere with the action of the Court 'in the exercise of its discretion'. "

97. The situation in this case is rather unique. I am not being asked to dismiss the defamation case in a 'vacuum'. I heard extensive testimony concerning the business venture between Graham and Javamax and her interactions with Gelineault. I cannot ignore this testimony and decide on the success or failure of the defamation claim based on the testimony of Gelineault and Ham alone. I propose then to consider all of the evidence in this action in determining whether the libel action can succeed. To do otherwise would be to ignore the mandate of this court as set out in section 25 of the *Courts of Justice Act*, being to "hear and determine in a summary way all questions of law and fact" and to "make such order as is just and agreeable to good conscience".

Overview of Defamation

98. Defamation is a difficult cause of action. The law distinguishes between defamatory comments made orally and those made in writing. The comments complained of by the plaintiffs in this action are written and therefore the charge is libel. Libel is an intentional tort and the law holds that a defendant is responsible to a plaintiff for any loss of their reputation for making untrue statements about them to others.

99. The Court of Appeal has set out a test for defamation in *Canadian Broadcasting Corp. v. Color Your World Corp*., 1998 CanLII 1983 (ON C.A.). It stated:

> "A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one…"

100. It is clear that corporations may sue for alleged damage to their reputation as well. This is a very different claim than one for intentional interference with economic relations. In that situation the plaintiff must prove the existence of a contract broken by the actions of the defendant. For libel to be found there must be communication or publication to one or more parties other than the defamed party. The posting on the Internet, being a comment on a website, certainly establishes that there was publication at common law. This is not an email directed to the plaintiffs only. Exhibit "B" to the Defendant's Claim very clearly identifies the plaintiffs. The comments concerning the plaintiffs are certainly defamatory statements within the definition set out the *Canadian Broadcasting Corp v. Color Your World* decision.

Admission

101. Graham admitted posting the allegedly defamatory letter on Scam.book.com. There was no evidence at all concerning the culpability of Ecopages. The plaintiffs in the defamation action have not made out a *prima facie* case against Ecopages and the non-suit motion must succeed in that regard. The defamation claim against Ecopages is dismissed.

Libel and Slander Act Notice

102. The defendants rely on Section 5(1) of the Libel and Slander Act ("the Act"), that provides:

> "No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of which will be served in the same manner as the statement of claim or by delivering it to a grown-up person at the chief office of the defendant."

103. In this action the defendants maintain that no notice was given. The plaintiffs have not produced such a notice nor given any evidence that the libel notice was given. The question I must determine is whether the complained of Internet posting falls within the description of a broadcast in section 5(1) of the legislation. Section 1(1) defines 'broadcasting' and 'newspaper': "broadcasting means the dissemination of writing, signs, signal, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations by means of, (a) any form of wireless radio electric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or, (b) cables, wires, fiber-optic linkages or laser beams and 'broadcast' has a corresponding meaning;".

104. Section 2 of the Act provides; "Defamatory words in a newspaper or in a broadcast shall be deemed to be published and to constitute libel." Is the publication of a statement on the Internet a broadcast or does such publication constitute a broadcast within the definition of the Act. If so, a libel notice must be delivered before an action can be commenced. If no such notice was delivered and the Internet posting constituted a broadcast the non-suit motion must succeed, as the plaintiff has not made a prima facie case. Unfortunately there is no clear answer

to the question of whether a publication on the Internet is considered broadcasting in this context. The Ontario Court of Appeal in *Bahlieda v Santa* 68 O.R. (3d) 115 was confronted with this issue. The motions judge in that case had struck a claim on the basis that publication on the Internet was broadcasting and the failure of the plaintiff to deliver a libel notice was fatal to his action. The Court of Appeal ultimately resolved that appeal without having to decide this point and to date the issue remains open.

105. I agree with the motions judge in *Bahlieda*. She found that material placed on a website and made available through the Internet was a broadcast within the meaning of the Act. That judge had the benefit of parties' expert reports defining the nature of the Internet. Reading their opinions on whether Internet postings constituted a broadcast she concluded; "the definition of broadcasting contained in the Libel and Slander Act deals with infrastructure and it deals with the effect of dissemination of information. She went on to hold that because the Internet used the same infrastructure as radio and television and because material on the Internet via a website could be accessed by a large audience that posting such material constituted broadcasting within the meaning of the Act.

106. I tend to agree with the motions judge and adopt her reasoning. Unfortunately the Court of Appeal found the motions judge erred in several respects in finding there was no genuine issue for trial and questioned her reasoning. The Court of Appeal noted in paragraph 6 of its decision that: "Section 7 of the Act provides that subsection 5(1) and s. 6 apply only to 'broadcasts from a station in Ontario'. She (the motions judge) makes no finding of fact, including no finding as to the essential question of whether the broadcasts were from a station in Ontario. On that basis alone, in our view, the application should have been dismissed… we note that the experts' opinions conflicted on a number of issues including whether the word 'dissemination' [page 117] can properly apply to information distributed by Internet and whether Internet publication is immediate and/or transient. Summary judgment applications are

not a substitute for trial and thus will seldom prove suitable for resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications."

107. The common sense reading that must be taken from the decision is that expert evidence is required to make a determination as to the origin of the broadcast. Not surprisingly, given the potentially prohibitive cost, in this case no expert evidence at all was called as to the origin of the complained of posting. In *Bahlieda* expert evidence was called and those experts could not agree. There was no evidence before the court in this matter that would allow me to make a determination as to the origin of the broadcast and that factor is crucial to deciding if in fact the internet posting constitutes a "broadcast" within the meaning of the Act.

108. My inability to make this determination however does not affect the strength or weakness of the plaintiffs' prima facie case. The issue of whether the alleged defamatory posting was "broadcast" relates to the strength or weakness of the defence relied on by Graham and Ecopages.

109. In *Shtaif v. Toronto Life Publishing Co. Ltd.* 2013 ONCA 405 the Ontario Court of Appeal was again faced with a situation where they had to consider Internet publication and the libel notice. In this situation the motions judge ruled that the Internet version of a Toronto Life Article was not subject to the notice or limitation provisions of the Act. He held that a website posting was not a newspaper and that he had no evidence that the website was a broadcast as defined by the Act. Moreover he found that as Toronto Life's server was located in Texas, the website was not broadcast from a station in Ontario. In this case both sides questioned the correctness of the motion judge's ruling. As the court commented in paragraph 20 of that decision: " The question whether or in what circumstances an internet publication is subject to ss. 5(1) and 6 of the Act is a difficult one. The Act was drafted to address alleged defamation

in traditional print media and in radio and television broadcasting. It did not contemplate this area of emerging technology, especially the wide spread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or through judicial interpretation of statutory language drafted in a far earlier era." In that case the court referenced its decision in *Bahlieda v. Santa* as well as a previous decision in *Weiss v. Sawyer* (2002) 61 O.R. (3d) 526.

110. In both *Bahlieda* and *Weiss* there was conflicting evidence introduced on whether an alleged defamatory letter was published over the Internet. As with the Toronto Life case the appellate court in Weiss did not decide whether the Internet publication was a broadcast.

Privileged Comment and responsible communication

111. In certain specific situations a defence of privilege attaches. Absolute privilege gives certain statements, based on where they are made, absolute exemption from actionability. Such statements include those made in legislative proceedings and judicial proceedings. There exists another class of privilege referred to as qualified privilege. In this case the alleged libel may be exonerated if certain conditions can be met. Qualified privilege fails if malice can be proven. In *Grant v. Torstar Corp.* 2009 SCC 61 CanLII the court considered the defence of fair comment. Chief Justice McLachlin, writing for the majority, considered the first the guarantee of freedom of expression in section 2 (b) of the Canadian Charter of Rights and Freedom.

112. While noting that such freedom is essential to a functioning democracy she qualified the comment, noting that freedom of expression is not absolute. She commented in paragraph 2 of that decision that "one limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault". She continued; "However, if the defences available to a publisher are too narrowly defined, the result may be 'libel chill', undermining

freedom of expression and of the press." The court's conclusion was that the common law should be modified "to recognize a defence of responsible communication on matters of public interest".

113. She noted, at paragraph 32, "Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom and expression in a free society."

114. In paragraph 98 of that decision the court formulates the test for responsible communication as follows: "First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s) having regard to all the relevant circumstances." At paragraph 99: "To be protected by the defence of responsible communication, the publication must be on a matter of public interest." Without quoting at length the courts' analysis on matters of public interest I find that protecting the public from potentially disastrous business ventures qualifies. There have always been unscrupulous persons seeking to make financial windfalls from the gullibility of consumers. The Internet has become one way for unfortunate victims to warn others of potential scams and fraudsters.

115. With respect to the complained of posting (Exhibit "B") I have considered both the reliability of the source (Graham) and the accuracy of the report, in the context of all of the evidence led at trial. Certainly Graham was intimately familiar with the venture in question and the activities and approach taken by Gelineault and Javamax. She had personal knowledge and can be said to have exercised due diligence in investigating the circumstances of this operation.

Graham's posting on Scambook.com is no more than responsible communication on a matter of public interest.

Justification

116. The ultimate defence to any defamation action, whether founded in libel or slander is that the alleged defamatory remarks are true. It is not the job of a judge hearing a non-suit motion to make findings of credibility. In the context of the defamation action the defendant Graham did not call evidence, however, as I stated previously, I cannot ignore the evidence of Graham in the other related actions. To do so could result in a multiplicity of conflicting decisions based on the same facts. Quite simply, if I accept the truth of Graham's allegations on the consolidated actions heard by me, I cannot then find that the allegations of defamation have any chance of success. I find as fact that misrepresentations were made to Skye Graham by Marcel Gelineault. I find that Javamax is vicariously liable for the actions and statements of Marcel Gelineault. I find that Simon Ham is a directing mind of Javamax and a knowing participant in the business operations and structuring of these ventures.

117. As I accept the comments made by Graham in the posting at Exhibit "B" of the Defendant's Claim as true then she has successfully defended against the action of the basis of justification. Put another way, the plaintiffs' case can only succeed if the complained of remarks are defamatory and the allegations against them are found to be false. Based on the evidence heard during the six days of trial I find the allegations made by Graham about Gelineault, Javamax, 6855232 and Ham concerning the "scam" to be true. I also find that this posting constitutes fair comment and the "responsible communication" described in *Grant v. Torstar Corp.*

In conclusion;

118. The plaintiffs in the defamation action did make out a *prima facie* case. I find the Scambook posting to be defamatory. I cannot dismiss the claim on the basis that notice was required under the Libel and Slander Act. Accordingly, Graham's motion for non-suit is dismissed.

119. However, while the non-suit motion must fail the Claim in SC-13-452-D2 against Skye Graham is dismissed, as the evidence supports the defences of justification, fair comment and responsible communication.

Graham's claim for damages

120. The purpose of damages for breach of contract is to place an innocent party in the position he or she would have occupied had the contract been performed. The purpose of damages in tort is to restore an innocent party to the position he or she would have occupied had the wrong not been committed. The purpose of rescission of a contract is to return an innocent party to the position he or she would have occupied had the contract not existed. As I have rescinded the contracts between Graham and National, Graham and 685532 (Javamax), and Ecopages and CLE then Graham must receive a return of funds she has proved were paid out by her in this unfortunate venture.

121. In *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 S.C.R. 1085 the Supreme Court of Canada considered whether punitive damages could be awarded in an action for breach of contract. The decision was clear that such damages cannot be imposed for mere conduct disapproved of by the Court. The Court held: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. In *Whiten v. Pilot Insurance*, 2002 SCC 18 the Supreme Court re-visited the issue, holding: "It is the nature of the remedy that punitive damages will

largely be restricted to intentional torts…but *Vorvis* itself affirmed the availability of punitive damages in the exceptional case in contract…a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss." 685532 breached this duty of good faith owed to Graham and the imposition of punitive damages is reasonable. As previously stated, Ham bears personal liability for the breaches of 685532.

122. For clarity (based on the foregoing reasons) I have set out my ruling in each of the Claims and Defendants' Claim individually as follows:

SC- 13-5329 National v. Graham and 68553

123. Based on the reasons set out in the preceding paragraphs National's Claim against Graham is dismissed. National shall have judgment against 685532 Ontario Ltd. in the amount of $ 23,119.20 representing the funds it paid to Startech less the sum it netted from the sale by Benaco. As there was no contract between Startech and National I am awarding National pre judgment interest at the Courts of Justice Act ("CJA") rate from March 9, 2012, to date of judgment and post judgment interest at the CJA rate thereafter.

SC-13- 5329-00D1 Graham v. National, 685532, Gelineault, Ham and Equilease

124. Graham is entitled to the return of her deposit. She shall have joint and several judgment against National and 685532 for $5,836.74. She shall have prejudgment interest on this sum from January 26, 2012 at the CJA rate and post judgment interest at the CJA rate. Graham shall be reimbursed for the amount she paid for supplies with judgment against 685532 for $2,854.50. She shall have prejudgment on the $2,854.50 at the CJA rate from February 7, 2012 (when she was invoiced by Javamax) and post judgment interest at the CJA rate thereafter. Graham is entitled to punitive damages against 685532, Gelineault and Ham based

on fraud and misrepresentation in the amount of $14,000. Graham relied on Equilease to prepare an accurate Credit Application on her behalf, which Equilease failed to do. Graham is entitled to punitive damages against Equilease and accordingly shall have judgment against it for $ 1,000. Graham shall have pre judgment interest on all punitive damages awarded to her from April 8, 2013, the date the Defendant's Claim was issued, and post judgment interest, both at the CJA rate.

SC-13-452 CLE v. Graham and Ecopages

125. CLE's Claim against Graham and Ecopages under the lease is dismissed.

SC-13-452-00D1 Graham and Eco Pages v. CLE, Gelineault, Ham and 685532

126. Graham is entitled to the return of her deposit. There was no evidence that Ecopages invested any money in this venture. Graham shall have joint and several judgment against CLE and 685532 for $5,020.59. In the National action Graham has judgment against 685532 for the return of funds she paid for supplies and cannot recover twice. Graham shall have pre judgment interest on the award of $5,020.59 from January 26, 2012, the date the deposit was paid, and post judgment interest thereafter, both at the CJA rate. Graham was awarded $14,000. in punitive damages in the National action based on the same facts. It is unnecessary and unjust to award double damages.

SC-13-452-00D2 Gelineault, Javamax, Ham and 685532

127. For reasons given the Claim for libel against Graham and Ecopages is dismissed.

128. I urge all parties to make every effort to resolve the issue of costs amongst themselves. If they cannot agree as to costs then I will receive written submissions from the parties in accordance with the following schedule:

129. Graham's submissions are due 15 days from the date of this Judgment and those of National, CLE, Equilease, Ham, Gelineault and 685532 are due 15 days thereafter. Graham has 10 days following receipt of those submissions to reply. I would ask that written submissions be restricted to 5 pages each. If there were any written offers to settle pursuant to the Rules, then I would ask that they be attached to the costs submissions. If I do not receive these submissions within this time frame then there will no order as to costs.

130. Finally, I would be remiss if I did not comment on the performance of Messrs. Down, Seberras and Ball throughout the trial. Their professionalism and courtesy were much appreciated, as was the voluminous case law they produced.

Dated this day of February 2016.

B. Martel

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Cases Cited:

1. Harris v. GlaxoSmithKline Inc. [2010] ONCA 87

2. Bank of Montreal v Charest 52 O.R. (3d) 497

3. *Queen v. Cognos Inc.*1993 CanLII 146

4. Bhasin v. Hrynew 2014 SCC 71

5. Ryan Rohatom operating as Justin's Vending v. 2149978 Ontario Inc. trading as Starz Canada. 2011 CanLII 100487 (ON SCSM).

6. MCAP Leasing Limited Partnership v. Lind Furniture (Canada) Ltd. [2010] No.1153

7. Strauss v. Decaire 2011 ONSC 1157 CanLII.

8. Bazley v. Curry, [1999]. 2 S.C.R. 534.

9. Truster v. Tri-Lux Fine Homes Ltd. 1998 CanLII 3497 (ON CA).

10. Shoppers Drug Mart Inc. v. 6470360 Canada Inc. 2014 ONCA 85

11. 642947 Ontario Ltd. v. Fleischer (2001) 56 OR (3d) 417

12. Brooks v. Martin [2010] BCSC 1708 CanLII

13. 410812 Ontario Ltd. and Her Majesty the Queen 2002 CanLII

14. Ontario v. Ontario Public Service Employees Union (OPSEU) [1990] O.J. No. 635

15.Martin v. Canadian Pacific Railway 1931 CanLII 138 (ON CA)

16. Canadian Broadcasting Corp. v. Color Your World Corp., 1998 CanLII 1983 (ON C.A.)

17. Bahlieda v Santa 68 O.R. (3d) 115

18. Shtaif v. Toronto Life Publishing Co. Ltd. 2013 ONCA 405

19. Weiss v. Sawyer (2002) 61 O.R. (3d) 526

20. Grant v Torstar Corp. 2009 SCC 61 CanLII

21. Vorvis v. Insurance Corporation of British Columbia [1989] 1 S.C.R. 1085

22. Whiten v. Pilot Insurance, 2002 SCC 18