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(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

DAVID WILLIAM WRIGHT AND CARBERRY OIL & PARTS INC.,	)	Rhea Majewski for the plaintiffs
plaintiffs,	)	
- and -	)	
PETER BENJAMIN LEMKY AND BONNIE LYNN LEMKY,	)	Jamie Kagan for the defendants
defendants.	)	
	)	Judgment Delivered: September 27, 2023

LEVEN J.

SUMMARY

[1] The plaintiffs sued the defendants in contract and tort for an unspecified quantum of damages. The defendants counterclaimed for about $20,000 in contract. For reasons explained below, the Claim fails, and the Counterclaim succeeds (albeit with a reduced quantum).

[2] The defendants sold an oil store in Carberry, Manitoba ("Carberry") to the plaintiffs. The store also sold prepackaged oil and other items. The store made a modest profit. The defendants owned an oil tanker. They bought oil in bulk and then personally poured it into small, medium and large containers for resale. The defendants stored some inventory for the store in buildings on their farm. No one knew the precise value of the inventory on the farm.

[3] The parties signed a handwritten agreement about competition (drafted without lawyers). This agreement said the defendants would not "call on" new or existing customers within 200-miles of Carberry for five years. They also signed a handwritten agreement that the plaintiffs would buy the inventory on the farm at cost, by a deadline. "Cost" was never defined. The parties retained lawyers and signed a formal asset purchase agreement (APA).

[4] The plaintiffs declined to buy the oil tanker, which had a large amount of oil in it, although no one was sure exactly how much.

[5] After the sale, many aspects of the store's business changed dramatically. In simple terms, the store sold more product than ever, but operating expenses increased so much that the store lost money.

[6] For some reason, the plaintiffs suspected that the defendants were improperly competing with the store.

[7] After the litigation began, the defendants admitted that they continued to run a modest wholesale oil business after the sale. This business consisted mostly of pouring bulk oil into containers and selling the containers. The

plaintiffs were by far their biggest customer. Some of their customers were beyond the 200-mile limit. The wholesale oil business turned a modest profit.

[8] The plaintiffs bought a lot of oil and other products from the defendants. The plaintiffs thought they were buying the "old" inventory. In fact, the defendants were buying new products and selling them to the plaintiffs. The defendants thought the plaintiffs knew this. The defendants were apparently marking up the price of the oil to compensate them for their labour in pouring and packaging the oil. The plaintiffs felt these markups were improper. The Claim was for compensation for the alleged improper competition and the alleged improper markups.

[9] The final shipment to the plaintiffs was worth about $20,000. The plaintiffs accepted the products but, angry at the defendants for the alleged competition and the alleged improper markups, the plaintiffs decided not to pay. That is the subject of the Counterclaim.

[10] For reasons explained below, I conclude that the defendants did not breach any contracts. The APA (drafted by lawyers) was clearly for the sale of the store. The store is a retail business. It sells oil that is already in containers. The defendants continued to run a wholesale oil business, supplying their own labour. The plaintiffs were their biggest customers. The defendants did not violate the somewhat vague terms of the non-compete agreement.

[11] In the alternative, even if the defendants violated the non-compete agreement, the plaintiffs did not prove (on a balance of probabilities) any

damages. It is true that the store lost money but, under the circumstances, it is impossible to connect the losses to any competition that occurred.

[12] The parties disagreed on the meaning of "at cost". The parties (both represented by lawyers) saw fit not to define it. The plaintiffs did not prove on a balance of probabilities that the defendants violated any agreements in respect of "cost".

[13] The essential facts of the Counterclaim are not in dispute. The plaintiffs received valuable products but never paid for them. As the onus in respect of the Counterclaim is on the defendants, I will give the plaintiffs the benefit of the doubt and deduct 7.5% from the quantum of the Counterclaim.

FACTS

[14] This is not a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[15] At an early pretrial conference, the plaintiffs assured the defendants that their claim would ultimately be for more than $100,000, so King Bench Rule 20A would not apply.

[16] The defendants owned a retail store in Carberry called The Oil Guy (the "Store"). The Store sold oil and miscellaneous automotive and similar products. "The Oil Guy" was a registered business name (registered in 2019, showing the defendant Bonnie Lemky ("Bonnie") as registrant. The Companies Office showed the place of business to be 125 - 4th Avenue, Carberry. The defendant Peter

Lemky ("Peter") effectively managed the Store, doing most of the management tasks. Bonnie did a small number of management tasks.

[17] "BP Logistics" ("BP") was also a registered business name (registered in 2012). The Companies Office showed BP as a sole proprietorship, registered to Bonnie, with a place of business as Box 420, Austin, Manitoba. When customers bought products at the Store, they received receipts saying, "BP Logistics O/A the Oil Guy". The plaintiff, Dave Wright ("Wright") was one such customer. He was also the Lemkys' neighbour.

[18] In the Statement of Defence and Counterclaim, the defendants took the position that BP was Bonnie's registered business name and that Peter had "no legal or beneficial interest" in BP. In keeping with this position, the Counterclaim was a claim by "Bonnie t/a BP". It was not a claim by Peter. None of the pleadings were ever amended. However, at trial, defendant counsel essentially abandoned the original position. It became obvious that Peter was much more involved in controlling BP than Bonnie was.

[19] In addition to managing the Store, the Lemkys owned an oil tanker. Using the tanker, they bought bulk oil and brought it to their farm ("the Farm"). They transferred the oil from the tanker to totes, barrels and pails (large, medium and small containers). They sold oil in these containers at the Store. They also did "runs" around southern Manitoba, selling oil in containers, and other products, to a variety of customers. Apparently, they also had a few

customers in Saskatchewan. At trial, Wright said he didn't know about the Saskatchewan customers at the time he bought the Store.

[20] In the spring of 2019, Wright began talking to the Lemkys (mostly Peter) about the possibility of buying the Store. At the time, there was some inventory in the Store. There were also some products intended to be sold at the Store, being stored on the Farm. There was some oil in the Lemkys' oil tanker, but they were not sure how much (or what its value was). Eventually, the parties agreed that the Store would be sold, with a closing date of August 31, 2019. (I will call this "the Sale".) Wright incorporated Carberry Oil and Parts Incorporated ("COP") to operate the Store.

[21] The parties agreed that the plaintiffs would buy the Store but wouldn't buy the tanker. The plaintiffs would also buy some of the products being stored on the Farm. Eventually there was a dispute about whether the plaintiffs bought anything other than the Store and the products on the Farm (see below).

[22] The parties (without the help of their lawyers) drafted and signed a handwritten agreement about new and existing customers (the "Non-Compete Agreement" or "NCA"). It said that, after the Sale, the Lemkys would "not call on existing customers or new customers for the purpose of similar product sales" "within a 200-mile radius", for five years. It didn't define the term "call on". It didn't specify the centre of the radius (i.e. Carberry). These numbers were suggested by Peter and accepted by Wright. The handwritten agreement also contained a sentence: "This no compete agreement shall be null and void if the

Purchaser [Wright] discontinues the business, sells the business or for any reason is no longer the principle [sic] shareholder." The NCA was signed in August 2019, but backdated to July 29, 2019.

[23] In Discovery, Wright once referred to the NCA as "the non-solicitation agreement".

[24] At the trial, Peter testified that he didn't understand the difference between a non-compete agreement and a non-solicitation agreement.

[25] The parties both had lawyers (not the lawyers involved in this litigation). Wright's lawyer (not his lawyer today) drafted the APA. The APA included legal boilerplate, and included an "entire agreement clause" (clause 9.5). To be blunt, the APA was poorly drafted.

[26] The APA was between Peter and Bonnie (carrying on business under the firm name and style of "The Oil Guy"), and Wright (on behalf of a company to be incorporated). It never mentioned "BP". At trial, Peter was asked if he verbally told Wright that, after the sale, Peter was going to keep running BP. He replied, "I don't remember."

[27] Wright took the draft APA to the Lemkys. They all reviewed it and made a few small handwritten changes (not relevant to this litigation), which they all initialed. The APA was dated July 29, 2019.

[28] Schedule J to the APA consisted of portions of income tax returns from 2016, 2017 and 2018. The first pages of each return are missing. At trial, it became clear that these were the tax returns of Bonnie/BP. Clause 4.14 of the

APA originally identified Schedule J as the "Profit & Loss Statements" of the business for the periods ended on December 31, 2018. The APA defines "business" as meaning the Store (it explicitly references the land title description of the Store in Carberry). The words "The Income Tax Statements" were added to replace the "Profit & Loss Statements", as one of the handwritten changes to the APA. In Schedule J, the 2018 tax statement shows a net income of about $31,000. The 2017 tax statement shows a net income of about $25,000. The 2016 statement shows a net income of about $19,000. (In essence, Wright knew he was buying a business that made a modest profit.)

[29] The parties also signed a handwritten agreement (signed by Wright, Peter and Bonnie) about inventory at the Farm and other matters. For convenience, I will call this the "Inventory Agreement". It was dated July 29, 2019. It said:

> The purchaser [Wright] agrees that if there is any remaining inventory at the farm site above the valued $150,000 (combined locations) this remaining saleable inventory be stored at the farm site at no cost until May 1, 2020.
>
> The purchaser also agrees to purchase this remaining inventory at cost price on or before May 1/2020.

[30] "Cost price" is never defined. There is no list of inventory. Essentially, the parties guessed that the inventory was worth more than $150,000, but they didn't know the exact value.

[31] Despite the fact that "call on" and "cost" were never defined, Wright (who had a lawyer) signed the APA and concluded the Sale.

[32] Wright took possession of the Store. While the Lemkys had operated it in a hands-on fashion, with one employee who worked on commission, Wright had

a full-time weekday job, so he spent less time in the Store. He hired at least one new employee. He reduced the Store's hours. Other big changes happened. One of the Store's major customers went out of business. Two other major customers took their business elsewhere. The COVID crisis occurred, having an effect on almost all retail businesses.

[33] Wright also made a big change in the way he sold oil. Before the Sale, the Lemkys bought bulk oil and then personally poured it into various-sized containers for resale at a profit. They put their own labels on the containers. Their labour was a factor in the profit. Wright did not want to sell informally packaged and labelled oil. At trial, he testified that he was afraid of legal liability for this informally labelled oil. Therefore, he transitioned towards only selling formally packaged oil from suppliers such as Bluewave Energy.

[34] After August 31, 2019, the plaintiffs bought oil and other products from the Lemkys, to sell at the Store. Wright testified that he thought he was just buying the inventory that he had agreed to buy in the Inventory Agreement. He testified that, at some point he asked Peter for receipts for the things he was buying, but Peter never provided receipts. During the litigation, some receipts were eventually provided.

[35] At trial, Wright testified that he had catalogues of suppliers, showing wholesale prices for the sorts of products sold at the Store. However, Wright testified, the suppliers had a practice of giving volume discounts on larger

purchases. Without knowing the volume discount for a particular transaction, the catalogues would not always tell the whole story.

[36] Wright began to suspect that the Lemkys were continuing to compete with him, in violation of the NCA. He also suspected that they were not selling him products at "cost". Rather, he felt they were making an improper profit on such sales. He bought a total of about $134,000 of products from the Lemkys.

[37] At trial, Wright never did explain why he suspected that the Lemkys were competing with him. He never called any witnesses to testify that they bought oil or products from the Lemkys after the Sale. Neither counsel asked Wright exactly why he began to suspect that the Lemkys were competing with him.

[38] The Statement of Claim alleged:

> 14. COP began purchasing the Inventory at a price that Peter and Bonnie represented as the Wholesale Price. Relying on Peter's and Bonnie's representations, COP paid the price demanded by Peter and Bonnie in exchange for the Wholesale Articles. On or about September 1st, 2019, David in his capacity as President of COP, began suspecting that the price demanded by Peter and Bonnie was not the Wholesale Price. David demanded from Peter and Bonnie to disclose to COP the invoices from Peter's and Bonnie's suppliers pertaining to the inventory, but Peter and Bonnie refused and continue to refuse to disclose said invoices.

[39] When the Statement of Claim used the term "wholesale price", it meant "cost".

[40] At trial, Wright was asked when he stopped buying products from Peter. He replied:

> When it never ended. And we continued to ask for the receipts to prove what the price was. It was supposed to be at cost, and the price kept going up a little bit each time, the price was never the same twice, and the inventory never – we never got through the inventory. I continued to

> buy it that summer, thinking, okay, if I get through this inventory we're done with it, that's the end of it, Peter's retired. It never happened.

[41] Wright was asked why he stopped buying oil from Peter in November 2020. He replied:

> We had had a lot of discussion with Peter that summer over…not producing receipts to show what the cost was that he paid for it, and so at that point I just said enough's enough. We tried to buy the inventory and it just never seemed to end, and so there had to come a point where we just stopped doing it. Also, because we could get it cheaper from other suppliers, our new suppliers we had established outside of that.

[42] At trial, Wright was asked for his opinion about what constituted "cost". He was asked about bulk oil that the Lemkys bought in the United States, trucked into Canada in their tanker, and then eventually sold. Wright agreed that any GST paid by the Lemkys would be a part of their "cost". He was asked about the gasoline that the Lemkys consumed during their drive to and from the United States. Wright gave his opinion that the cost of this gasoline would not constitute part of "cost".

[43] It is common ground that COP bought a lot of oil from the Lemkys after August 31, 2019. In very simple terms, Wright thought he was just buying "old" oil, as he was required to do under the Inventory Agreement. In fact, much of what products he bought were "new" products that had not been part of inventory. Peter thought that Wright knew this. At trial, Peter testified, "I'm certain that at some point in time we told Dave [Wright] that this is all new product."

[44] At trial, Bonnie testified that the Lemkys had four old customers in Saskatchewan (more than 200-miles from Carberry). After the Sale, these

Saskatchewan customers contacted the Lemkys, asking to purchase some oil. The Lemkys agreed. The Saskatchewan customers decided to drive to the Farm (less than 200-miles from Carberry) to collect their purchases. The Lemkys never produced invoices or receipts for these sales. At the trial, Bonnie testified that receipts existed (the "Saskatchewan Receipts"). She estimated that there were about four or five customers. She did not provide the total value of all the sales to all the Saskatchewan customers.

[45] Curiously, when Peter was cross-examined, he was not asked about the value (or approximate value) of all the sales to the Saskatchewan customers.

[46] In November 2019, upon Wright's request, the Lemkys delivered some products to Wright. In January 2020, the Lemkys sent Wright a bill for $20,584.63 for these products. Angry at the Lemkys for allegedly violating the Non-Compete and the Inventory Agreements, Wright never paid the $20,584.63. This is the essence of the Counterclaim. The Counterclaim says it is a claim by Bonnie and BP (not by Peter).

[47] BP's income tax returns for recent years were filed. They showed Bonnie's name (and social insurance number) and BP's name (and business number). In 2019, the net business income was about $100,000. In 2020 (the first full year after the Sale), it was about $14,000. In 2021 it was about $7,000.

[48] In 2017, total expenses were about $63,000. In 2018, they were about $58,000.

[49] In 2019, gross sales were about $203,000. In 2020, gross sales were about $236,000. In 2021, they were about $95,000.

[50] The Lemkys didn't file separate income tax returns for The Oil Guy. The only business tax returns that they filed were for Bonnie/BP.

[51] COP's income tax returns were in evidence. COP's fiscal year was September 1 to August 31. In 2019 - 2020, COP had gross revenues of about $229,000, and expenses of $282,000. The difference between these two numbers is about $53,000 (the net loss for 2019 - 2020).

[52] In the second fiscal year (2020 - 2021), the net loss was about $63,000.

[53] In the third fiscal year (2021 - 2022), the net loss was about $72,000. Wright testified: "It's been almost impossible to make a profit, and we're finding out why. We were being competed with by the guy that…sold the business to us."

[54] Before the Sale, BP's annual expenses averaged about $40,000/year.

[55] At trial, Peter was asked about COP's gross sales of about $260,000 in 2020 - 2021. He testified that this number exceeded the gross sales of the Oil Guy in its best years. In other words, the Store sold more under the plaintiffs than it ever did under the defendants.

[56] At trial, Peter testified that, in 2020, COP was BP's best customer.

[57] The Statement of Claim was filed on April 23, 2021. The Statement of Defence and Counterclaim were filed on June 17, 2021. The Reply and Defence

to Counterclaim were filed on September 14, 2021. The trial took place from February 27 to March 1, 2023, inclusive.

The APA

[58] The APA was between Peter and Bonnie (carrying on business under the firm name and style of "The Oil Guy"), and Wright (on behalf of a company to be incorporated).

[59] The preamble begins: "WHEREAS the Vendor carries on the business of oil sales & distribution from the Premises (as hereinafter defined) in the Town of Carberry, Manitoba (the "Business")…"

[60] Article 1 lists definitions. It says: "'Non-Competition Agreement' has the meaning ascribed thereto in Section 7.1(g), and in substantially the form attached hereto at Exhibit 2".

[61] The definition of "Financial Statements" says the statements have "the meaning ascribed thereto at Section 4.16, a copy of which is attached hereto at Schedule J". In fact, the section number is wrong. It is section 4.14, not 4.16.

[62] Also, section 4.14 incorrectly refers to "Profit & Loss Statements". In fact, Schedule J includes portions of income tax returns, not profit and loss statements. The parties caught this error on their own before they signed the APA, and they handwrote and initialed the correction.

[63] The definition of "Goodwill" is "all business names, trade names and benefits under all contracts in respect of the customers of the Business and including, without limiting the generality of the foregoing, a list of all Existing

Customers, a complete list of which is attached hereto at Schedule "F"." Schedule "F" refers to Existing Customers and says, "List to be provided to Purchaser on or before the Closing Date." If such a list was ever provided, it was not before the court.

[64] The definition of "Premises" is the legal description of the land on which the Store sits. (Read in conjunction with the definition of "Business", it means that the APA is about the sale of the Store in Carberry).

[65] Article 2.4 is a sentence fragment. It is entitled "Excluded Assets". It says: "Any assets of the business owned by the Vendor and set out in Schedule K to this Agreement." (The fact that "business" is not capitalized is apparently a typographical error.) Schedule K lists two excluded assets: accounts receivables to August 31, 2019, and cash on hand.

[66] Article 3.2 deals with allocation of the purchase price ($350,000) among various items: $20,000 for goodwill; $150,000 for inventory/display units; $150,000 for the land in Carberry; and $30,000 for small tools, equipment, computers & software. Article 3.2 says:

> … For certainty, the Purchaser and the Vendor shall have entered into the Non-Competition Agreement (as hereinafter defined). The parties agree that none of the Purchase Price shall be allocated to any non-competition or non-solicitation covenant or agreement to be given by the Vendor in favour of the Purchaser.

[67] Article 6.7 of the APA deals with indemnification. Paragraph (b) explicitly mentions the NCA. It says: "The Vendor agrees to indemnify…the Purchaser…from all Losses…incurred by the Purchaser as a result of… (b) any breach or non-performance by the Vendor of any covenant to be performed by it

that is contained in this Agreement or in any agreement, certificate or other document delivered pursuant hereto including but not limited to the Non-Competition Agreement…"

[68] Clause 7.1(g) of the APA mentions competition:

> The Vendor [the Lemkys] shall execute and deliver to the Purchaser [Wright] a non-competition agreement ("the Non-Competition Agreement") in a form satisfactory to the Purchaser. Said agreement shall be for a period of 5 years and cover a 200 mile radius from the Town of Carberry.

[69] Clause 7.1 (j) mentions inventory: "The Vendor shall allow the purchaser to leave the inventory currently located at their farm location in the machine shop located at their farm location until May 1, 2020." (The fact that "purchaser" is not capitalized is another typographical error.)

[70] Article 9.3 says: "The preamble, all Schedules and the definitions form an integral part hereof." [underlining added]

[71] Article 9.9 deals with amendment:

> No amendment or waiver of any provision of this Agreement shall be binding unless consented to by the other parties in writing. No waiver of a provision of this Agreement shall constitute a continuing waiver unless otherwise agreed to in writing."
>
> [underlining added]

[72] Schedule B is a long, handwritten, partly legible list of large and small inventory items, and their values. Most values are less than $1,000. The largest value appears to be $32,590 for "134A cylinders 80 + 20 cylinders + 9". There was no evidence at trial about what that item was. None of the items was "oil in the tanker" or anything to that effect.

Peter's cell phone

[73] The Store had a landline, and there was no dispute about it. At trial, it emerged that there was a landline at the Farm. Peter had a cell phone, which he apparently used both for personal and for business purposes. At trial, Wright testified that when he wanted to phone Peter for business, he sometimes phoned the cell phone number. The Statement of Claim alleged that there was a contract between the parties that Peter would transfer that cell phone number to Wright as part of the Sale. Peter denied this. If there was a contract, it would have been an oral contract. In any event, in an early pretrial conference, the plaintiffs assured the defendants that they would not be claiming any remedies in respect of the cell phone dispute. Plaintiff counsel repeated this at trial. In any event, because of the plaintiffs' assurance, I will not comment upon the cell phone any further.

The agreed facts

[74] In the middle of the trial, in order to avoid needless delays, counsel agreed upon three agreed facts:

a. The parties agree that the asset purchase agreement with the attached inventory does not reference bulk oil or the amount of bulk oil or the value of the bulk oil in the tanker as of the date of close, which is September 1, 2019;

b. The parties agree that following September 1, 2019, some of the bulk oil in the tanker was repackaged and sold to Mr. Wright, who purchased it;

c. The parties agree that the tanker itself was exhausted and refilled on or about June of 2020.

Peter's January 2021 letter to Charlie Taylor

[75] The evidence included a handwritten letter from Peter to Wright's lawyer (at the time), dated January 29, 2021. It said:

> The purchaser [Wright] also agrees to purchase this remaining inventory @ cost $ on or before May 1/2020.
>
> Since the above has not yet happened and your client expressed NO intent to ever do so, we Peter & Bonnie Lemky are able to release Carberry Oil & Parts (David Wright) from the sales agreement obligations.

The Accountant

[76] The plaintiffs retained an accountant – Chase Critchlow ("Critchlow") – as an expert witness. He wrote an undated report (the "Report") and it was provided to the defendants in about December 2022. His C.V. was also provided. At a pretrial conference, plaintiff counsel read Critchlow's C.V. aloud, and I explained to the defendants what opinion evidence is, and what expert witnesses are. I asked the defendants if they intended to dispute that Critchlow was an expert in accounting matters. They advised that they would not dispute that fact.

[77] Later, the defendants retained their new lawyer, and the new lawyer requested a final pretrial conference. At that conference, he advised that he

wanted to cross-examine Critchlow. At that late date, no one knew if Critchlow was even available on the trial dates. Plaintiff counsel promised to contact him in order to ask about his availability. I ruled that, if he were available, he could testify by teleconference and out of sequence, if that should be less inconvenient to him.

[78] At trial, there was some discussion about whether Critchlow could testify by video or teleconference. Eventually, counsel agreed that he could testify by teleconference, and he did.

[79] At trial, Critchlow testified that he had a copy of the APA. However, it eventfully became clear that his copy of the APA didn't include the schedules (including Schedule J). He had never seen Schedule J. He had seen the 2019 - 2021 income tax returns for Bonnie/BP. He had seen the income tax returns for COP.

[80] At trial, Critchlow admitted that he used an approximation method to calculate receivables. The Report neglected to explain this.

[81] At trial, Critchlow revealed that he knew nothing about the Lemkys' Saskatchewan customers. In the Report, he never considered (even in a footnote), that the defendants could legally compete with the plaintiffs outside of the 200-mile radius.

[82] At trial, Critchlow revealed that he knew nothing about how the plaintiffs changed the way the Store was operated (e.g. reduced hours), or about how the

Store lost one of its largest customers when that customer went out of business. The Report didn't comment about these changes (even in a footnote).

[83] At trial, Critchlow initially attempted to argue that the Store's sales had nothing to do with the Store's profits. Eventually he conceded the obvious – that there is an obvious connection between sales and profits (e.g. if there are no sales, profits will not be more than zero).

[84] At trial, Critchlow revealed that the Report ignored the essence of the Counterclaim (i.e. that the plaintiffs received about $20,000 of products from the defendants but never paid for them.)

[85] The Report concluded that the defendants' improper competition with the plaintiffs will cost the plaintiffs about $253,000 over five years. The Report gets this number by looking at BP's 2021 income tax return. Using the numbers for sales and cost of goods sold, the Report calculates that BP's gross profit margin was 30%. The Report then assumes that this margin will continue in future years. It then looks at the Store's gross profit margin (15%). It then assumes that, if there had been no improper competition, the Store's gross profit margin would actually have been 30% in every year. It calculates "damages" accordingly.

Adam Wright

[86] Adam Wright (David Wright's son) testified by teleconference. He lives outside of Manitoba and the parties agreed that teleconference would be acceptable. He testified credibly, but his testimony added little to the trial. He

was present at one or two early meetings between Wright and the Lemkys. He honestly admitted that he didn't remember the details of those meetings very well. At the first meeting, there was some tentative discussion about the theoretical possibility that Adam would be involved in the Sale and that the Sale might include the tanker. Adam later decided not to be involved. Wright later decided not to buy the tanker. Neither of those facts was disputed.

Peter's strange communications style

[87] During the trial, it became apparent that Peter had a peculiar style of communication. The style was not actually dishonest, but it was annoyingly inefficient. A few examples will suffice.

[88] In cross-examination, Peter was asked if The Oil Guy sold any totes, barrels or pails [large, medium and small oil containers] to customers in southwestern Manitoba. He replied, "some of the above." That peculiar answer created a need for three follow-up questions. The Oil Guy did not sell totes. The Oil Guy did sell barrels. The Oil Guy did sell pails.

[89] Most witnesses would simply have answered, "barrels and pails, but not totes," instead of "some of the above."

[90] Another example involved Bonnie's role in a meeting between Peter and Wright. Later in the trial, Bonnie testified in a clear, lucid, verbally efficient way about her role. She came and went as Peter and Wright sat and talked. She overheard some, but not all, of their conversation. Today, she doesn't remember much about what she heard.

[91] Earlier in the trial, Peter was cross-examined about this:

> Q: Well, you had a discussion with Dave [Wright] alone, right? Adam [Wright] wasn't there.
>
> A: Well, Bonnie was in the same location.
>
> Q: You're suggesting Bonnie was there for that conversation?
>
> A: She was on the location.
>
> Q: Was she present at the conversation?
>
> A: Probably not.
>
> Q: You had a conversation with Dave alone, right?
>
> A: No, I disagree.
>
> Q: Okay. So nobody else was present at the conversation but you and Dave?
>
> A: Bonnie was present at the location.
>
> Q: She wasn't in the conversation, and she wasn't listening to the conversation, correct?
>
> A: Probably not, but I cannot definitely say.
>
> Q: So although she was on the location, she wasn't part of the conversation, right?
>
> A: I don't know the answer to that.

[92] Most witnesses would simply have said, "Bonnie was around, but she came and went, so she probably heard only part of the conversation."

[93] I don't know why Peter answered questions at trial in such an unusual manner. Perhaps he was overcome by a litigious spirit. In any event, Peter's unusual way of answering questions made the trial longer rather than shorter.

[94] I have no idea if Peter's unusual communication style at the trial was typical of his communication style outside of the courtroom. If it was, his odd

style might easily have led to many misunderstandings, particularly when the other party to the conversation was not a skilled litigator.

Pretrial events

[95] These events will be relevant to my discussion of "costs" below.

[96] When they filed their Statement of Defence and Counterclaim, and during the early pretrial period, the defendants had a lawyer. He retired for health reasons. In the summer of 2022, the defendants decided that they would be self-represented. They failed to disclose certain relevant documents, in violation of my orders as the pretrial judge. The plaintiffs were required to make certain motions and to request additional pretrial conferences, to deal with this improper lack of disclosure. I made certain costs awards in favor of the plaintiffs (in any event of the cause), for these extra pretrial conferences.

[97] At the first pretrial conference (March 9, 2022), the defendants were represented by their first lawyer. He advised that he would be withdrawing soon. Counsel discussed their positions, and the issues of the defendants' documents arose for the first time. As pretrial judge, I ruled that the invoices in the defendants' possession were relevant for Discovery purposes, and I ordered the defendants to share them. There were no meaningful settlement discussions.

[98] At the second pretrial conference (May 6, 2022), the defendants' first lawyer was still on record, and he represented them at the conference. He said he would cease to represent the defendants soon. There were no meaningful

settlement discussions. Counsel agreed that it would be prudent to set four days for trial. The conference was dominated again by the issue of the invoices in the defendants' possession. After the first pretrial, the defendants had shared some invoices from 2020 - 2021. At the second pretrial, plaintiffs' counsel said these were the wrong invoices. She specified that she wanted invoices from before July 29, 2019. She was willing to limit her request to invoices after January 1, 2014. The issue was whether or not the defendants sold inventory to the plaintiffs at cost. In order to determine what "cost" was, the plaintiffs would need to see documents showing what price the plaintiffs paid for the inventory when they bought it. I repeated that these documents were relevant for Discovery purposes, and I ordered the defendants to share them.

[99] The third pretrial conference was held on August 23, 2022. By then, trial dates had been set (February 27 to March 2, 2023). The defendants were self-represented, and they said they didn't intend to retain counsel for the trial. The plaintiffs had provided an Affidavit of Documents to the defendants' first lawyer. The defendants said they weren't sure they had seen it, so the plaintiffs' counsel said she'd send another copy to the defendants as a courtesy. The defendants had not yet produced an Affidavit of Documents. The plaintiffs had served the defendants with Interrogatories, and the defendants had answered some (but not all) of the Interrogatories. I repeated what I'd said previously about relevance of the invoices that would shed light on the relevant question of the cost of the inventory. With a September 23, 2022, deadline, I ordered the

defendants to serve the plaintiffs with an Affidavit of Documents; to answer all Interrogatories, and to provide legible copies of all invoices (the ones from January 1, 2014 to July 29, 2019). These issues filled the entire time allotted, so there were no meaningful settlement discussions. Because this conference would not have been necessary if the defendants had complied with all relevant Rules, I awarded the plaintiffs $500 in costs, in any event of the cause (essentially for an unnecessary conference).

[100] The fourth pretrial conference was held on October 31, 2022. It was initiated by plaintiff counsel because of certain failures by the defendants. Plaintiff counsel had filed case law and had argued in a legal brief that the proper remedy for the defendants' failure would be to strike out their Statement of Defense and Counterclaim. The defendants had not yet filed an Affidavit of Documents. They had never answered Interrogatories 12 and 17. They had provided some invoices, but others were obviously missing. Plaintiff counsel had served the defendants with a Notice of Discovery (she wished to examine the defendants for Discovery). I made certain orders about examination for Discovery. I also ordered the defendants to file a proper Affidavit of Documents by November 14, 2022. I further ordered that, at trial, the defendants wouldn't be allowed to file any documents other than the ones they had provided by November 2, 2022, without the consent of plaintiff counsel. These issues filled the entire time allotted, so there were no meaningful settlement discussions.

Because the defendants' failures had again created the need for an extra pretrial conference, I awarded the plaintiffs $1,500 in costs, in any event of the cause.

[101] The fifth pretrial conference was held on December 14, 2022. The plaintiffs initiated this conference because of certain trial preparation problems. By then, the defendants had been examined for discovery. The defendants had written to my assistant, requesting my legal advice. At the conference, I reminded them that I am not their lawyer, and I will not provide them with legal advice. Plaintiff counsel again requested that the Statement of Defense and Counterclaim be struck. I declined to do this, but I again issued a costs order against the defendants for $1,500, in any event of the cause. These issues filled the entire time allotted, so there were no meaningful settlement discussions.

[102] The sixth pretrial conference was held on January 25, 2022, in combination with a motion hearing. The defendants had begun discussions with a Brandon law firm that they wished to retain. They made a motion to adjourn the trial so that they could retain and instruct a law firm. A lawyer from the firm participated by teleconference as a friend of the court. He advised that his firm had spoken with the defendants, but was not free on the trial dates and had not been retained. I explained to the defendants that only the Chief Justice or his designate could cancel trial dates. Plaintiff counsel advised that she had already tried to explain this to the defendants. I dismissed the motion with costs of $1,250 to the plaintiffs. The defendants could write to the Chief Justice if they wished. I encouraged them to continue talking to law firms. We then began a

pretrial conference by agreement. Plaintiff counsel advised that the plaintiffs had retained a chartered accountant as an expert witness and he had prepared an expert report. The report and the expert's C.V. had been sent to the defendants. They claimed they had not received the C.V. Plaintiff counsel read the C.V. aloud. The defendants agreed to the expert's expertise in accounting matters. They said the report could go in as a consent document. Plaintiff counsel might still wish to call the expert as a witness. If she were to do so, the defendants could cross-examine him of course. I also encouraged the parties to try to file an Agreed Statement of Facts.

[103] In about early February 2023, the defendants hired a new lawyer, who represented them at the seventh pretrial conference on February 7, 2023, and at the trial. There was an extremely brief discussion about potential settlement. The new lawyer raised a variety of trial preparation issues, and they were dealt with. Among other things, Wright would be examined for discovery, and the expert might testify (if available).

CASE LAW

[104] The parties both relied on ***Sattva Capital Corp. v. Creston Moly Corp.,*** [2014] 2 SCR 633 ("***Sattva***"). The case dealt with the interpretation of contracts and the proper use of surrounding circumstances to help with interpretation. At paragraph 47, the court observed that, "the interpretation of contracts has evolved towards a practical, common-sense approach not

dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding'…"

[105] At paragraph 57, the court pointed out that:

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement… While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

[106] At paragraph 60, the court added that:

> The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[107] The Supreme Court of Canada referred to ***Sattva*** in ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32 ("***Teal Cedar***"). The court discussed contract interpretation in the context of judicial review. At paragraphs 54 - 64, the court explained the "overwhelming principle" (the principle that the factual matrix surrounding a contract should not overwhelm the words of the contract by being weighed excessively). In ***Teal Cedar*** at paragraph 57, the court observed that the goal of contract interpretation is to ascertain the objective intentions of the parties.

[108] Both parties referred to ***Filkow et al. v. D'Arcy & Deacon LLP***, 2019 MBCA 61. The court quoted from ***Sattva*** and followed it. At paragraph 31, the court (quoting from one of its 2017 decisions), noted that, "Courts are required

to consider the surrounding circumstances in interpreting a contract regardless of whether the contract may be ambiguous".

[109] Both parties referred to ***Rosenberg et al. v. Securtek Monitoring Solutions Inc***., 2021 MBCA 100. Again, the court quoted from ***Sattva*** and followed it. At paragraphs 105 - 117, the court referred to the relationship between contract interpretation and commercial efficacy. At paragraph 111, the court observed that:

> …assessing commercial efficacy should be done cautiously. A decision-maker should be slow to reject the ordinary meaning of a provision simply because it appears commercially unusual or imprudent to one side (even without the benefit of hindsight)… Absent some reason to doubt, it should be assumed that business people settled on wording that, in substance, made a "workable commercial deal"…

[110] At paragraph 112, the court added that, "Some bargains are one-sided." At paragraph 113, the court added that the "decision-maker cannot use the benefit of hindsight in the assessment of commercial efficacy".

[111] ***Motkoski Holdings Ltd. v. Yellowhead (County),*** 2010 ABCA 72 ("***Motkoski***") was a case about fraudulent misrepresentation. It outlined some general principles. At paragraphs 57 - 58, the court summarized the two branches of the test for fraud:

> [57] …Under the first branch, fraud is established if the defendant 'knew' that the statement was false, and made it with the knowledge or intention that the plaintiff would rely upon it.
>
> [58] Under the second branch, it is sufficient if the defendant did not actually know the statement was false, so long as the statement was made recklessly…

[112] At paragraph 60, the court discussed non-disclosure (or mere silence). "Absent a duty to disclose, non-disclosure generally has no legal consequences, except in those rare cases where the silence amounts to fraud." At paragraph 72, the court pointed out that the "law is clear that a party cannot sign a contract without reading it, and then later complain that he did not know what was in it." At paragraph 118, the court concluded, "it is not permissible to imply a term into a contract…if that implied term contradicts an express term of the contact".

[113] ***Motkoski*** was cited with approval in ***Bannerman Lumber et al. v Goodman***, 2021 MBCA 13 at paragraph 25.

[114] In ***Elias et al. v. Western Financial Group Inc.,*** 2017 MBCA 110, at paragraph 74, the court pointed out:

> Where a contract contains an 'entire agreement' clause, the case for exclusion of extrinsic evidence is strengthened…This is because the parties have specifically turned their minds to whether the prior agreements or negotiations should have any effect and intentionally excluded them.

[115] In ***Virden Mainline Motor Products Limited v. Murray et al.,*** 2018 MBCA 82, at paragraph 41, the court commented:

> [41] …Where the parties are experienced commercial parties, often negotiating with legal advisers and relying on independent financial advisors, the presumption in the case law is that the written agreement reflects the entire agreement of the parties and the entire agreement clause serves as confirmation of that presumption…

[116] In ***United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.***, [1993] 2 SCR 316, at paragraph 44, the court observed that one "of the exceptions to the parol evidence rule has

always been that where there is ambiguity in the written contract itself, evidence may be admitted to clarify the meaning of the ambiguous term."

[117] In ***Zippy Print Enterprises Ltd. v. Pawliuk***, 1994 CanLII 1756 (BC CA), at paragraph 41, the court noted:

> …apart from the application of an exclusion clause, a commercial enterprise cannot make an intentional oral representation designed to persuade a customer or other party to enter into a standard form contract of adhesion and then, by invoking the Parol Evidence Rule, rely on the fact that that the contract is in writing to escape liability flowing from the fact that the representation is untrue. In those circumstances the oral representation will be regarded as forming an essential element in the relations between the parties , either on the basis that the written contract document was not intended to form the entire agreement between the parties (the one contract theory), or, alternatively, on the basis that the oral representation, when it was acted upon by the person to whom it was made entering the written contract, became a separate or collateral contract on which liability may be found (the two contract theory).

[118] In ***Bhasin v Hrynew***, 2014 SCC 71, at paragraph 93, the court summarized certain principles of modern Canadian contract law.

> [93] A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> …
>
> (3) 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 <u>duty of honest performance</u>, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.
>
> [underlining added]

[119] In ***57134 Manitoba Ltd. v. Palmer***, 1985 CanLII 572 (BC SC), the court dealt with the issue of how to determine quantum of damages for breach of a

restrictive covenant, in an employment law context. At paragraph 22, the court commented:

> Damages for this type of wrongful behaviour may be measured in one of two ways, either by quantifying the profit gained by the wrongdoer and by ordering him to account for it as a trustee, or by quantifying the plaintiff's loss of profit, and awarding damages to compensate for it…Before me the plaintiff led extensive evidence in support of both methods of calculating damages. It is entitled to take advantage of whichever method shows the higher damages, but I have to decide whether the evidence supports either method of calculation. I have concluded that it would be unsafe on the evidence before me to quantify damages by making the defendants account for the profit they have made.

[120] The parties provided copies of other cases, and I've carefully considered all of them.

ARGUMENT

Plaintiffs

[121] When Wright testified, he repeatedly insisted that Peter told him, before they signed any agreements, that Peter intended to retire (except from farming). Indeed, Wright was extremely angry about this point and about the fact that the defendants did not retire after August 31, 2019. However, plaintiff counsel conceded in closing argument that the plaintiffs were not taking the position that the defendants had a legal obligation to retire. (Indeed, they had an obvious legal right to compete with the plaintiffs outside of a 200-mile radius around Carberry and/or after the passage of five years.) Therefore, I will say no more about this point.

[122] Plaintiff counsel argued that the NCA was more than a mere non-solicitation agreement. The Lemkys had a legal obligation not to sell any oil in

any form within the 200-mile radius, for five years. They did sell some oil. That amounted to breach of contract. It's not necessary to go beyond the words of the contract to find this breach.

[123] The Lemkys knew that BP existed, but never mentioned it to Wright. That amounted to fraud.

[124] The Lemkys agreed to sell oil and products to the plaintiffs at "cost". They violated this agreement by marking up the products they sold to the plaintiffs. That is a breach of contract.

[125] There are two proper options for deciding quantum of damages when a non-compete agreement has been breached. One option is to look at the plaintiff's losses arising from the improper competition. Plaintiff counsel conceded that it might be difficult to determine quantum this way in the case at bar (because there were so many other variables, including things from Wright's decision to reduce the Store's hours, to the fact that one of the Store's main customers went out of business, to the many effects of COVID).

[126] Therefore, plaintiff counsel argued that the proper way to determine quantum would be to look at the Lemkys' profits, taken from their post-sale income tax returns.

[127] Regarding the inventory, plaintiff counsel conceded that there might have been a mistake of fact. In other words, when the plaintiffs bought the $134,000 (approximately) of product from the defendants after August 31, 2019, the plaintiffs might have thought they were buying old inventory, while the

defendants might have honestly assumed that the plaintiffs knew they were buying new products, purchased by the defendants post-sale.

[128] In respect of the Counterclaim, plaintiff counsel initially defended the plaintiffs' behaviour. However, she eventually conceded that a possible outcome might be to award the defendants the amount counterclaimed, minus the improper markup, which should be set at 30% (the profit margin from the Critchlow Report).

Defendants

[129] Defendant counsel argued that it would be improper to go beyond the wording of the contacts. The "entire agreement" clause is crucial. The NCA said that the Lemkys would not "call on" new or existing customers. That amounted to a non-solicitation agreement. The defendants never violated such an agreement.

[130] The existence of BP was a matter of public record. The plaintiffs could have discovered it through the Companies Office. [I note that at trial, Wright tendered receipts predating the Sale that referred to BP. Therefore, the existence of BP was no secret.]

[131] Regarding the inventory, defendant counsel conceded that there might have been a mistake of fact. In other words, when the plaintiffs bought the $134,000 (approximately) of product from the defendants after August 31, 2019, the plaintiffs might have thought they were buying old inventory, while the

defendants might have honestly assumed that the plaintiffs knew they were buying new products, purchased by the defendants post-sale.

[132] The basic facts underlying the Counterclaim were never actually disputed. The plaintiffs received about $20,000 of products from the defendants and never paid for them. Defendant counsel never addressed the issue of whether the $20,000 claimed should be reduced by some percentage, in recognition of any improper markup.

FINDINGS

Competition

[133] Counsel spent a lot of time arguing about the case law. In fact, the cases are essentially consistent. It is not as if there are two lines of cases and no way of knowing for sure which line is good law. To determine disputes about contracts, courts should begin by looking at the words of the contract. Courts are not free to rewrite contracts. Parties are free to make unwise bargains. Courts can consider evidence about the factual background to a contract, but cannot let that background "overwhelm" the wording of the contract. Entire-agreement clauses are significant. Parties have a duty of honest performance of contracts.

[134] Despite the ambiguous wording in the handwritten NCA (that the Lemkys would not "call on" existing or new customers), the Lemkys did not argue in their Statement of Defense that the NCA was actually some sort of non-solicitation agreement (which would allow the Lemkys to compete without limit, as long as

the customer phoned them, rather than *vice versa*). The Statement of Defence did quote the handwritten NCA (i.e. the Lemkys would not "call on" new or existing customers). Paragraph 15(a) of the Statement of Defence says: "BP has never competed (retail) with COP and deals almost exclusively (wholesale) with COP at its request."

[135] At paragraph 15(b) of the Statement of Defence, the defendants took the position that "BP does not operate in breach of the Non-Compete Agreement as above explained". The pleadings have never been amended.

[136] The Lemkys should have provided Wright with copies of the Saskatchewan Receipts during the pretrial disclosure process. At trial, Bonnie admitted that these receipts existed. They were obviously relevant to the trial.

[137] The parties disagreed about the fact that the Saskatchewan customers came to the Lemky farm to get their product, rather than asking the Lemkys to travel to Saskatchewan. The plaintiffs submitted that this arrangement violated the 200-mile-radius provision. The defendants submitted that it did not (because the Saskatchewan locations were more than 200-miles from Carberry).

[138] During the pretrial process, the plaintiffs served the defendants with Interrogatories. Although some of the Interrogatories asked about the defendants' sales in recent years, none explicitly asked about any sales that the defendants might have made outside of the 200-mile radius. If the defendants were asked during examination for discovery about sales outside the radius, such questions and answers were never read in at trial.

[139] It is true that the handwritten NCA (drafted without the input of lawyers) said that the Lemkys would not "call on" new or existing customers within 200-miles, within five years. It did not actually mention Carberry, but no one suggested that it might be anything other than Carberry.

[140] In interpreting contracts, logical interpretations should be favored over absurd interpretations.

[141] To "call on" customers is not a legal term. It implies doing something active. Although neither party said so, I suspect they would both agree that "calling on" customers would include general advertising (e.g. in the Yellow Pages and/or media). In any event, no one suggested that the defendants ever advertised for BP after August 31, 2019. "Calling on" would also include actually initiating contact with a specific customer by any method (e.g. phone call, email, regular mail). There was no evidence that the defendants ever initiated contact with any specific customers after the Sale (August 31, 2019).

[142] What did the parties agree on? Did the parties agree that the Lemkys would be free to open a new oil store in Carberry after the Sale, selling the same products as the Store, as long as the new store did not advertise? In other words, would it be okay if customers walked into the new store and asked to buy products, and the Lemkys sold them the products, as long as the new store did not do any advertising (i.e. did not "call on" any new or existing customers)? With respect, that would be an obviously absurd interpretation. Although the handwritten agreement did not define the term "call on", it would be an absurd

interpretation if the agreement somehow allowed the Lemkys to open a new oil store down the block from the Store (within five years), as long as the new store did not advertise (and the Lemkys did not initiate contact with any individual customer).

[143] As noted above, the Statement of Defence did not argue that what existed was a mere non-solicitation agreement, which did not actually prohibit competition. Instead, the Statement of Defence argued that the defendants never competed.

[144] There is no polite way of saying this, but the lawyers who acted at the time the APA was signed were remiss in never defining with precision what sort of competition was okay and what sort was not.

[145] The only way to avoid an absurd interpretation would be to conclude that the parties intended to agree that the Lemkys would not be permitted to open any sort of new oil store down the block from the Store (within five years).

[146] The Lemkys never opened a retail store, but they did sell products at the Farm. The farm was less than 200-miles from the Store. Did the Lemkys violate any contracts (or commit fraud)?

[147] Paragraph 15(a) of the Statement of Defence says: "BP has never competed (retail) with COP and deals almost exclusively (wholesale) with COP at its request." This gets to the heart of the matter. The Lemkys continued to run a wholesale (bulk) oil business from the Farm after the Sale. The plaintiffs were their best customer. The defendants made a modest profit. The issue of

whether the defendants charged the plaintiffs some sort of improper markup is dealt with below. However, as for competition, selling something to the plaintiffs cannot possibly constitute "competing" with the plaintiffs.

[148] Although the defendants should have produced the Saskatchewan Receipts during the pretrial process, Bonnie testified credibly that the defendants did sell some products to about four Saskatchewan customers after the Sale. Plaintiff counsel never asked either of the Lemkys for the value (or approximate value) of all the Saskatchewan sales.

[149] I conclude that nothing turns on the fact that the Saskatchewan customers happened to drive to the Farm to pick up their products. Parties to a contract for sale of goods can make all sorts of different logistical arrangements for delivery of the goods. The Saskatchewan customers were situated more than 200-miles from Carberry, so the defendants did not breach any contracts by selling to them.

[150] It is not disputed that the defendants sold some bulk oil to some customers (other than the plaintiffs) who lived within the 200-mile radius. I use "bulk oil" in the sense of oil poured by the Lemkys from their tanker into containers for resale.

[151] The Statement of Defence distinguished between wholesale and retail sales. It essentially admitted that the defendants were prohibited from selling retail within 200-miles for five years, but were allowed to sell wholesale.

[152] It was common ground that, at the beginning of the negotiation process, the plaintiffs contemplated the possibility that they might buy the oil tanker. It was common ground that they never did.

[153] During the course of the litigation, it became clear to me that the parties did not see the decision about the tanker in the same way. Wright saw it as irrelevant to question of competition. The defendants saw it as crucial – in their eyes, the plaintiffs' decision to let the Lemkys keep the tanker implied that the plaintiffs wouldn't mind if the defendants continued their wholesale (bulk) oil business after the Sale.

[154] In simple terms, the parties never understood the transaction in the same way. Using legal jargon, they were never *ad idem* about bulk oil sales.

[155] I conclude that the APA and any handwritten agreements attached to it, applied to retail sales. This flows directly from the preamble, the definitions, and the text of the APA. The preamble says that the APA is about the sale of a "Business" which is linked to "the Premises". This is the retail store in Carberry. The land title description of the retail store is explicitly provided. The APA prohibited the defendants from opening up a retail store that sold more or less what the Store sold, within 200-miles, for five years. The parties who signed the APA had lawyers. The plaintiffs were not forced to sign the APA under duress. There was no inequality of bargaining power. The APA was subject to give and take – the parties literally made and initialed some handwritten changes at the last minute.

[156] In the event that I have erred, and the defendants did somehow breach the APA by selling bulk oil from the Farm, I find that the quantum of damages is zero.

[157] To begin with, I give the Critchlow report very little weight. Though Mr. Critchlow struck me as a pleasant man, who is no doubt a qualified accountant, his undated report left out so many crucial factors that its conclusions have little value.

[158] Before the Sale, the Store was a modest operation that had modest expenses and modest profits. There was no evidence about what competitors it had within 200-miles, before the Sale (e.g. were there retail stores in Brandon that sold similar products?) After the Sale, the plaintiffs made big changes completely unrelated to anything the defendants were doing. Some big changes occurred because of unrelated external factors (e.g. COVID). Sales increased a lot, but expenses increased even more. The defendants obviously bear no responsibility for the large increase in expenses such as salaries.

[159] It is true that the Store lost money after the Sale, but there is no persuasive evidence before me that the losses were causally connected to anything the defendants were doing. The evidence suggests that decisions made by the plaintiffs (e.g. to decrease store hours) combined with external factors like COVID were far more significant than the fact that the defendants were selling some bulk oil.

[160] If there was no breach of contract, it follows logically that there was no fraud.

[161] For these reasons, this aspect of the Claim fails.

The markup

[162] It was common ground that the plaintiffs bought a lot of products for the Store from the Lemkys after the Sale. Part of the plaintiffs' claim was that the Lemkys should have sold him these products at cost, but they improperly marked up some or all of the product. During the pretrial process, the plaintiffs asked the Lemkys to produce all the documents that would have shown how much the Lemkys would have paid for the items that they eventually sold to the plaintiffs. Despite several pretrial court orders, the Lemkys failed to provide more than a small sample of such documents. That was obviously improper, and the plaintiffs have already been awarded costs in any event of the cause, in respect of the extra pretrial conferences. I will also comment on this matter under "Costs" below.

[163] However, the plaintiffs physically received all the products in question and paid the Lemkys various sums of money for each of the products. They know precisely what they received and precisely how much they paid. The plaintiffs have suppliers' catalogues that would have shown prices for all such items (before any volume discounts). Wright might have provided more detailed testimony about volume discounts, and what sort of volumes might be required for various products, in order to trigger such discounts.

[164] In short, even if the Lemkys had deliberately destroyed *all* their invoices and receipts before the litigation began, the plaintiffs could still have produced very precise documentation about each item they purchased from the Lemkys, and what the catalogue price for each item would have been. Perhaps, some items would have been purchased in small volumes. If so, the plaintiffs would have known. Where the volume was large enough to trigger even a potential volume discount, again the plaintiffs would have had at least some idea.

[165] There is no dispute that the Lemkys had to pay GST when they bought oil. There is no dispute that, when they bought the oil in the United States, they had to pay the exchange rate at the date of purchase. If the catalogues did not indicate GST, the plaintiffs could easily have calculated it and shown their calculations to the court. If there was an exchange rate, the plaintiffs could easily have calculated the rate and shown their calculations to the court. This would have been simple mathematics.

[166] In short, even with no help at all from the defendants, the plaintiffs could have prepared very helpful documentation about what they actually paid the Lemkys, and approximately what they would have paid other suppliers (as per their catalogues). If the plaintiffs had done so, their documentation might have shown various things. In theory, it might have shown that the Lemkys charged less than catalogue price, even for items purchased in small volumes. It might have shown that the Lemkys charged approximately catalogue prices, but that some items were purchased in large volumes, so perhaps the Lemkys really did

mark up some items. Finally, it might have shown that the Lemkys consistently charged far more than catalogue prices for all items purchased in all volumes. That final possibility would have strengthened the plaintiffs' case.

[167] Unfortunately, the plaintiffs never tendered this sort of evidence. The plaintiffs argued that I should draw certain negative inferences from the fact that the Lemkys behaved improperly during the Discovery process. However, I cannot simply draw a negative inference that a contract has been breached when there is no evidence that a contact has been breached. (I will further comment upon the Lemkys' behavior under "costs" below.)

[168] The Counterclaim specifically refers to a 7.5% markup. It says that, on "or about May 1, 2020, Bonnie…agreed verbally with…Wright…that BP would wholesale to COP, at cost (U.S. Catalogue Wholesale price plus freight, duty and exchange) plus 7.5%, certain motor oil, oil filters, grease tire lubes, glue, fuel hoses, transmission and hydraulic fluids, and other similar related products."

[169] At trial, Bonnie was never asked why the figure "7.5%" was chosen. Nor was Wright. Wright never agreed with the notion that he ever agreed to pay a 7.5% markup on anything.

[170] Again, there is no polite way of saying this, but the lawyers who acted at the time were remiss in allowing the APA to be concluded without addressing the definition of "cost". There can be more than one logical definition of "cost" in the context of this litigation. The Lemkys bought oil, and obviously the amount

they paid (including any taxes and currency exchange rate) would be a part of their "cost".

[171] The Lemkys poured oil from their tanker into containers for eventual resale. Much of this oil was sold to the plaintiffs after the Sale. Did the parties intend that the Lemkys would supply their labour for free, as an act of charity? Did the parties intend that the Lemkys would receive some sort of modest compensation for their labour and that this modest compensation would be part of "cost"? If so, how would this component of "cost" be calculated? The evidentiary record is not particularly helpful.

[172] Although the Counterclaim refers to 7.5% (without using the word "markup"), no invoices were in evidence that showed a 7.5% markup on any product. Neither Peter nor Bonnie was asked at trial if any or all of their invoices showed specific markups (of 7.5% or any other number). If they were asked this question in Examination for Discovery, it was never read in.

[173] In closing argument, neither counsel addressed the question of whether or not the Lemkys were entitled to be compensated for their labour and, if so, exactly how.

[174] Wright testified: "…we continued to ask for the receipts to prove what the price was. It was supposed to be at cost, and the price kept going up a little bit each time, the price was never the same twice…" Wright never tendered into evidence any documents showing that the price kept going up, although he

would have known exactly what items he received each time, and exactly what he paid each time.

[175] With respect, if Wright's recollections were correct, and prices kept going up, that fact would shed no light on the issue of markup. If the defendants were marking up all products by a percentage (e.g. 7.5%), that would not result in prices continuing to go up. I suppose if the markup kept going up, that might lead to the final price going up, but Wright never alleged that.

[176] In very simple terms, the parties (who had lawyers) agreed to use the word "cost" without defining it, in a context that might support various reasonable definitions. Wright began to think that the defendants were using the wrong definition of "cost", but he couldn't explain why. The pleadings included one cryptic reference to a 7.5% markup, but the lawyers at trial did not ask pointed questions about where 7.5% came from.

[177] The onus is on the plaintiffs to prove their Claim on a balance of probabilities. If the plaintiffs had done some calculations and then tendered documents showing exactly what they bought from the Lemkys at exactly what prices, and approximately what the corresponding catalogue prices would have been, this evidence might have helped the court better understand the markup issue.

[178] However, the evidence before the court is what it is. In short, the notion that "cost" should have included some amount for the Lemkys' labour is just as reasonable as the notion that the labour should have been free. The plaintiffs

didn't prove (on a balance of probabilities) that the defendants applied the term "at cost" improperly, or that the defendants breached any contract (or committed any fraud) by imposing any improper markup. This aspect of the Claim must fail.

THE COUNTERCLAIM

[179] The essence of the Counterclaim was that the defendants (Bonnie and BP) provided the plaintiffs with about $20,584.63 worth of products for the Store and the plaintiffs refused to pay any part of this final invoice. The plaintiffs of course felt that, by then, they had good reason to be upset with the defendants. However, the uncontested fact is that the plaintiffs received goods of value and refused to pay for them.

[180] At the end of the trial, I asked the plaintiffs' lawyer if she would concede that, even if the plaintiffs' Claim were 100% successful, the plaintiffs would still owe the defendants $20,584.63 (which might be subtracted from a larger amount that the defendants owed to the plaintiffs). She argued that the $20,584.63 would have included an improper markup. However, she wisely conceded that, if the markup were deducted, the plaintiffs would indeed owe the defendants the $20,584.63 (less the improper markup). In light of that wise concession, the Counterclaim must succeed in essence, although the precise quantum of damages is in dispute.

[181] In short, there is no dispute that the plaintiffs received the goods but never paid for them. Therefore, the defendants are entitled to compensation on

the basis of *quantum valebant*, if not on the basis of contract. (In simple terms, if you get something of value and it's not a gift, you have to pay for it.)

[182] In respect of the Counterclaim, the onus is on the defendants. They never explained where 7.5% came from or why the defendants proposed 7.5%. There is no evidence before me that the plaintiffs ever agreed to pay a 7.5% markup on the final order of products from the defendants. Therefore, I am left to conclude that the $20,584.63 final invoice includes an improper 7.5% markup.

[183] If one were to set the improper markup at 7.5%, and reduce $20,584 accordingly, the proper quantum rounded to the nearest hundred dollars would be $19,000.

[184] Therefore, I conclude that the Counterclaim succeeds in the amount of $19,000 plus interest at the standard rate.

COSTS

[185] The most common outcome in civil litigation is that the successful party receives costs on a tariff basis. The defendants were successful. The Claim is dismissed, and the Counterclaim succeeds (albeit with reduced quantum). However, the *Rules* in respect of costs allow a court to consider other factors.

Court of King's Bench Rules, Man Reg 553/88, ***Rule*** 57.01(1) says:

> **57.01(1)** In exercising its discretion under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
>
> (a) the amount claimed and the amount recovered in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;

(d.1) the conduct of any party which unnecessarily complicated the proceeding;

(d.2) the failure of a party to meet a filing deadline;

(e) whether any step in the proceeding was improper, vexatious or unnecessary;

(f) a party's denial or refusal to admit anything which should have been admitted;

(f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;

(g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and

(h) any other matter relevant to the question of costs.

[186] The Statement of Defence asked for "Special costs with respect to the allegation of fraud and ordinary costs in any event." At trial, defendant counsel argued that allegations of fraud are very serious and, when those allegations are found to have no merit, solicitor-and-client costs should be awarded.

[187] I note that the Statement of Claim primarily alleged breach of contract, and then alleged fraudulent misrepresentation in the alternative. The essence of the trial was about whether or not any contracts were breached. The allegations about fraudulent misrepresentation, although eventually found to be without merit, were only alternative allegations. The defendants were successful in

respect of the Claim and were successful in respect of the essence of the Counterclaim. Therefore, the defendants are entitled to ordinary (tariff) costs.

[188] I awarded the plaintiffs various cost awards, in any event of the cause, at the pretrial stage. These awards were based on the fact that the defendants made an unsuccessful motion and forced the court to hold several extra pretrial conferences (that should not have been required). The plaintiffs had to request extra pretrial conferences; had to do extra case law research; and had to file extra briefs. It would be improper for me to "penalize" the defendants twice for the extra conferences.

[189] I did not make any special costs award in respect of the final pretrial conference (the one held because the defendants decided to hire new lawyers very late in the game, and the new lawyers decided to raise certain issues shortly before the trial started). Now that the trial is over, I can put the entire pretrial process into proper perspective.

[190] Normally, the pretrial process explores the possibility of settlement. If settlement isn't achieved, the process explores the possibility of narrowing the issues in dispute. That is all in keeping with the general philosophy summarized in the proportionality ***Rule***:

> **Proportionality**
>
> 1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:
>
> (a) the nature of the proceeding;
>
> (b) the amount that is probably at issue in the proceeding;

(c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

[191] Unfortunately, in this litigation, although there were seven pretrial conferences, there was almost no time for discussion of potential settlement and almost no discussion about narrowing the issues. The major reason was that the defendants stubbornly refused to obey the Discovery Rules and the court orders to obey the ***Rules***. Almost all of the pretrial time had to be spent on trying to force the defendants to obey the ***Rules***, and then penalizing them repeatedly for refusing to obey them. The defendants deliberately chose to be self-represented during most of the pretrial process. That was their right, but they must accept the consequences of their decisions.

[192] At the very last pretrial conference, once the defendants' new lawyers had been retained, there was some extremely brief (unsuccessful) discussion about potential settlement.

[193] There is no way of knowing what would have happened if the defendants had retained lawyers earlier in the pretrial process (perhaps shortly after their first lawyer had to step aside for health reasons). It is impossible to say with 100% certainty that the issues in dispute would have been narrowed, or that the entire dispute would have been settled. However, the odds would have been much better.

[194] It is a fair statement that the conduct of the defendants unnecessarily complicated the proceedings. Therefore, I will modify the typical costs award in two respects.

[195] Firstly, the parties shall each bear their own costs for the final pretrial conference.

[196] Secondly, a flat amount of $250 shall be deducted from the total costs payable by the plaintiffs to the defendants. This isn't a double penalty for the extra pretrial conferences. It is a general amount that reflects the general behaviour of the defendants throughout the litigation (for example, in not meeting filing deadlines). In all other respects, the defendants shall have ordinary (tariff) costs.

[197] If counsel can't agree on some aspect of costs, I remain seized for the limited purposes of resolving the matter.

_____J.