

- [7.] Mr. Boutilier called Mr. Margeson and confirmed the date. Mr. Margeson did not cancel the order.
- [8.] On November 10, 2004 Mr. Margeson called Mr. Boutilier to introduce him to the new Project manager. Mr. Margeson was leaving. At that time he also asked Mr. Boutilier to confirm the delivery date of the meter in writing.
- [9.] On November 12, 2004 Mr. Boutilier sent Mr. Margeson written confirmation that the meter would not be delivered before December 2, 2004.
- [10.] On November 19, 2004 the new Project manager called Mr. Boutilier to cancel the order.
- [11.] The claimant then called its supplier to cancel the order. At that time Mr. Boutilier discovered that the meter had in fact arrived earlier than expected, and that his supplier had actually shipped the meter on November 16, 2004.
- [12.] The claimant's supplier then charged the claimant a restocking fee of \$2,394.88.
- [13.] The claimant in turn claims a restocking fee from the defendant of \$3,391.07. This represents 35% of the purchase price which had been quoted to the defendant. Mr. Boutilier in evidence says that restocking fees are common in the industry, and vary from 35% to 100%.
- [14.] The defendant resists the claim on the grounds that the claimant had broken its contract to deliver the meter within three to four weeks. It also says that the restocking fee is too high.
- [15.] In my opinion of the defendant is responsible for a restocking fee. Mr. Margeson placed an order on October 19, 2004 for the meter. At that time it was a term of the contract that the claimant would supply the meter within three to four weeks of the purchase order. When Mr. Boutilier called Mr. Margeson to tell him that the delivery date would be later, and would in fact be some time on or after December 2, 2004, Mr. Margeson had the option to cancel the contract. He did not do that. Instead, he elected to go ahead. By doing that he impliedly agreed to amend at the contract to provide for a delivery date of December 2.
- [16.] Accordingly, by canceling in the order on November 19, the defendant breached the contract. It is liable for damages.
- [17.] In my view the only damages flowing to the claimant as a result of the breach of contract was the restocking fees that it had to pay to its own supplier. While some attempt was made by Mr Boutilier to justify his claim as one for lost profit or overhead, he led no evidence to establish exactly what that profit or overhead would have been in respect of this particular sale. As well, as Mr. Mudge quite

rightly points out, there was nothing in the purchase order or the quote that provides for any particular restocking fee. Accordingly, the only direct loss that the claimant proved that flowed from the breach of contract was its own liability to its own supplier.

[18.] I am also satisfied that the amount of the fee is reasonable. Mr. Boutilier said that he was able to negotiate a reduction in the restocking fee that had originally been charged to him by his supplier to \$2,394.88. In my opinion that is the loss that flows naturally from the breach of contract of the defendant.

[19.] I accordingly order the defendants to pay to the claimant's \$2,394.88, plus costs.

Dated at Halifax)
this day of August, 2005)
)
)

ADJUDICATOR
W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)
262272.1