SMALL CLAIMS COURT OF NOVA SCOTIA
cite: *Lendcare Capital v. Lawlor*, 2018 NSSM 6

SCCH No.464855

BETWEEN:

Lendcare Capital Inc

Claimant

– and –

Donna Lawlor

Defendant

Adjudicator: Augustus Richardson, QC

Heard: February 27, 2018

Decision: March 1, 2018

Appearances: Heather Webb, by phone from Ontario, for the claimant
Donna Lawlor, Defendant, in person

DECISION

[1] Can a consumer finance company ignore the default or breach of contract of a retailer to whom it has advanced funds on behalf of a consumer purchaser? Can it insist on repayment of its loan even though the seller has failed to perform what it agreed to do? Can it do so by drafting agreements that are disguised as “applications”? Or that are contradictory, opaque or misleading in wording? Or that make statements that the finance company knows or ought to know are patently wrong? The claimant in this case says that it can. On the facts before me I say that it cannot.

[2] The claimant Lendcare Capital Inc (“Lendcare”) is a finance company with its head office in Ontario.

[3] The vendor or seller in this case was Micron Clean Air Inc (“Micron”). It is, or at least was at the material time, a direct sales company incorporated pursuant to the laws of Nova Scotia. Its director, president/secretary and recognized agent was one Lisa Dilent. It was incorporated in March 2016, and had its license revoked for non-payment on May 4, 2017.

[4] The defendant Donna Lawlor was a consumer.

[5] On July 7, 2016 Ms Dilent came to the door of Ms Lawlor's relative. She met with Ms Lawlor. She extolled the benefits of a vacuum cleaner sold by Micron. Ms Lawlor testified that she was an excellent salesperson. And indeed she was, because she persuaded Ms Lawlor to purchase a vacuum cleaner said to be wroth $6,585.00 for a discounted price of $4,588.50.

The Micron Sales Agreement

[6] The Micron sales agreement was headed "Micron Clean Air Inc." It was dated and signed July 7, 2016. There is a space for "delivery date" that was left blank. Ms Lawlor testified that the vacuum was left with her on July 7th. The total price, including HST, was $4,588.50. There are three lines on the form that are particularly relevant to the facts and issues in this claim, as follows:

Payment in full is due upon delivery of merchandise listed below		
METHOR [*sic*] OF PAYMENT	"Lendcare"	OR FINANCE (See attached finance agreement for terms and conditions)
All sales subject to credit approval. **For cancellations see reverse of this page**		

[7] The reverse page contained the following statement:

> Statement of Cancellation Rights
>
> You may cancel this contract from the day you enter into the contract until 10 days after you receive a copy of the contract or statement of cancellation rights. You do not need a reason to cancel.
>
> If you do not receive the goods or services within 30 days of the date stated in the contract, you may cancel this contract within one year of the contract date. You lose that right if you accept delivery after 30 days. There are other grounds for extended

> cancellation. For more information you may contact the provincial/territorial consumer affairs office.
>
> If you cancel this contract, the seller has 15 days to refund your money and any trade-in or the cash value of the trade-in. You must then return the goods.
>
> To cancel, you must give notice of cancellation to the office below or in the contract. You must give noticer of cancellation by a method that will allow you to provide [*sic* - prove?] that you gave notice, including fax, mail or personal delivery.

[8] There was no address or office "below" this statement. There was an address and phone number for Micron on the front of the agreement.

[9] The purchase price of $4,588.50 was steep and caused Ms Lawlor some concern.. Ms Lawlor had a gross monthly income of $1,500.00. She could not really afford such a purchase. She also told Ms Dilent before signing the Micron sales agreement that she was scheduled for a medical appointment in three days, and that there were concerns that her health would not permit her to continue working. Ms Dilent told Ms Lawlor that she had 15 days to cancel the Lendcare contract if she changed her mind or decided that the machine was not for her.

[10] Ms Delent also persuaded Ms Lawlor that she could finance the purchase. She had with her a Lendcare "Credit Application and Agreement" form that she got Ms Lawlor to sign..

[11] I pause here to note that it was not clear from Ms Lawlor's testimony whether she understood at the time that the financing to be provided by someone other than Micron. At one point she testified that the first time she heard of or about Lendcare was when it sent her a demand letter in April 2017; and that prior to that point all of her dealings were with Ms Delint. She did however understand at the time that the purchase was to be financed by monthly payments of $179.21; and that the payments were deferred for three months, to commence on October 7th, 2016. These are the terms found on the Lendcare form. (The total cost of the loan, including the principal and interest at 29.9%, would be $8,602.08.) And her signature does appear on the Credit Application and Agreement form.

The Lendcare Credit Application and Agreement Form

[12] The form is a two page document printed on legal size paper.

[13] The form describes Ms Lawlor as "Applicant." There are spaces for her address, date of birth, and residence and identification particulars. There are spaces for employment and gross monthly income information. There is a space for a personal reference. There followed a disclosure of the cost of the credit, and the payment schedule. All of this part of the form was printed in a relatively legible format and font. However, the rest of the first page, and all of the second (titled "Credit Agreement"), are printed in a faint, tiny font that is barely readable. (One finds a faint acknowledgement of the difficulty one might have in reading the terms and conditions in the following sentence at the bottom of the first page: "IF YOU CANNOT PROPERLY READ ALL OF THIS AGREEMENT DUE TO VISION PROBLEMS, LCI [Lendcare] WILL PROVIDE YOU WITH AN EXTRA LARGE FONT/PRINT VERSION UPON REQUEST.")

[14] The terms and conditions include a reference to Lendcare's privacy policy together with an invitation to view them on its web site at www.lendcare.ca.

[15] Then we have the following:

> **Your Credit Application**
>
> You [the applicant] acknowledge that the Vendor is our agent only for the purpose of assisting you in completing the Credit Agreement, and submitting it to us for approval after you have reviewed, approved and signed the Credit Agreement. The Vendor agrees and you hereby acknowledge that the Vendor cannot bind LCI [Lendcare] in respect of the financing of Goods under the Credit Agreement. The Vendor agrees to make no representation or warranties that are inconsistent with, or that expand the Terms and Conditions or any other written agreement with us. You acknowledge and agree that LCI is not selling you the Goods and owes you no warranties or any obligations whatsoever in relation to the Goods. Furthermore, if you have issues regarding the Goods, you must contact and settle such issues directly with the Vendor. Even if you have an issue with the Goods or the Vendor, you nevertheless agree to pay us the amounts and any outstanding

> balances owing which you agree to pay under this Credit Agreement.
>
> You are applying for and request LCI to provide credit under the Terms and Conditions, which for certainty are set out in this Credit Agreement. Credit will be provided to you only upon approval of your application by us. You acknowledge and agree that all information provided by you in connection with this Credit Agreement, or in any other form, format, and manner (including but not limited to oral, written or electronic) is true, accurate and complete in all respects. You have reviewed and confirmed the information prior to submitting this Credit Agreement and you acknowledge that you have been afforded the opportunity to seek independent advice with respect to this application process and to the Terms and Conditions. You acknowledge receipt of a copy of this Credit Agreement and you agree to be bond by all of its terms.

[16] There follows, at the bottom of this page, a space the "Authorized Representative of Vendor" (Lisa Delint") and for the "Applicant" (Ms Lawlor) to sign.

[17] The second page is titled "Credit Agreement" in a large, bold font. The rest of the page is printed in the same faint, tiny font found on portions of the first page. There is a preamble that states that "[i]n consideration of LCI considering and approving your application, entering into this Credit Agreement, and LCI extending you credit for the purchase of the goods and/or services as described on the application page of this Credit Agreement ("Goods"), you hereby agree to be bound by the Terms and Conditions specified below."

[18] There follow 24 lengthy clauses that crowd the full, legal-sized page. Clause 9 specifies that Lendcare has a security interest in the goods; clause 10 confirms that no one other than Lendcare has such a security interest; and that the "Applicant" will not sell the goods without the prior consent of Lendcare. Clause 14 contains the term or condition common in financing agreements:

> 14. Warranties. You acknowledged that you signed a purchase order with the Vendor to purchase the Goods for an amount equal to the Cash Price. You further acknowledge that we make no representations or warranties as to the merchantability,

> fitness for purpose, quality or performance of any of the Goods or the performance or fulfilment of any statement, representation, warranty or guarantee of the Vendor or manufacturer of the Goods. You hereby irrevocably authorize and direct LCI to pay the Cash Price to the Vendor. We have not made or given any warranties, representations, or conditions whatsoever with respect to the Goods or this Credit Agreement (whether express, implied, statutory or otherwise). If you encounter any problems with the Goods, your only claim will be against the Vendor and/or manufacturer of the Goods and you agree that LCI will not be liable to you for any damages whatsoever. If you have any disputes or problems with the Vendor or manufacturer of the Goods, you must continue to make your monthly payments and other payment obligations under this Credit Agreement.

[19] I pause here to note that the form is called an “application” and that on its face Lendcare’s approval appeared to be required before any funds could be advanced. However, at the hearing Ms Webb advised that Lendcare would have advanced the payment funds directly to Micron upon delivery of the vacuum cleaner to her. Since Ms Dilent left the vacuum cleaner with Ms Lawlor on July 7th I can only conclude that Lendcare advanced the funds directly to Mircon upon receipt of the completed Lendcare application form. (There was no evidence that Lendcare ever received a copy of the Micron sales agreement.) In other words, the advance of funds was automatic. It was not conditional on Lendcare first evaluating Ms Lawlor’s “application” and then providing its approval. By obtaining a signed sales agreement and leaving the vacuum with the customer Micron was, in fact if not in law, the entity that approved the loan. I am fortified in this conclusion by the fact that Lendcare did not provide any evidence of when, if at all, it (rather than Micron) had approved Ms Lawlor’s application for credit.

[20] Three days after meeting with Ms Dilent Ms Lawlor was examined by her physician. She was told that her health was not good and that further tests were required. Ms Lawlor was concerned about this news. She was afraid that her condition might lead to restrictions at work, and hence of her income. She decided to cancel the Micron contract. She called Ms Dilent, who told her to get a doctor’s note. Ms Lawlor’s doctor prepared a note dated July 25, 2016 stating that Ms Lawlor’s condition would not permit her to work more than 20 hours a week. Her condition worsened, and on August 6th, 2016 her doctor took her off work entirely for an indefinite period. Ms Lawlor called Ms Dilent repeatedly to cancel the Micron agreement. Ms Dilent, oddly, told her to call Micron. (I say “oddly” because the corporate registration records

reveal that Ms Dilent was Mircon.) Ms Lawlor called the number that Ms Dilent had provided to her. The number was out of service. She made repeated efforts to contact Micron in order to cancel the contract and return the vacuum, all of which came to nought. Micron appears to have disappeared.

[21] I pause here to say that I was satisfied on the evidence that Ms Lawlor did attempt to exercise the right given to her by the Micron sales agreement to cancel the contract within 10 days of July 7th. I am further satisfied that that effort was frustrated or ignored by Micron in breach of its agreement with Ms Lawlor.

[22] There things stood until on or about April 28, 2017 when Ms Lawlor received a demand letter from Lendcare. The letter sought payment of $5,531.47, being $4,988.02 in principal and $543.45 in interest. As already noted, Ms Lawlor testified that this was the first time she had heard anything from Lendcare. She called Lendcare to explain what had happened, and to explain her efforts the previous July and August to cancel the contract and return the vacuum. Lendcare was not interested. Its position was that its contract was with her; that it was not bound by any default on Micron's part; and that Ms Lawlor was liable for the full amount of the loan together with interest and costs. Ms Lawlor stood her ground, and Lendcare then commenced its claim for $4,988.02 plus costs.

[23] At the hearing, Ms Lawlor's position was that Micron (or rather, Ms Dilent) had told her that she could cancel the contract and return the vacuum within 10 days. Ms Dilent (and hence Micron) knew when she signed the agreement that there was a good chance she would have to cancel if her medical condition worsened. It had worsened. Ms Lawlor then tried, repeatedly, to cancel the contract and return the vacuum cleaner, but Micron had disappeared. She was still ready to return the vacuum.

[24] For its part Lendcare's position was that its contract was with Ms Lawlor. It had extended the financing to Micron based on that contract. It was not responsible for any complaint she might have about Micron. Micron was not its agent (or, at least, for anything other than filling out the Lendcare application). Ms Lawlor's remedy for Micron's breach of its agreement to take back the vacuum and cancel the purchase agreement within 10 days was against Micron, not Lendcare. Ms Webb did allow that if Ms Lawlor had returned the vacuum to Micron then Lendcare would have expected Micron to return to Lendcare the money it had received. But a refusal or failure of Micron to accept the vacuum for whatever reason was not the same situation. In that event Ms Lawlor's remedies were against Micron, not Lendcare. And Lendcare did not want the vacuum; it wanted repayment of its loan pursuant to its agreement with her.

The Lendcare Business Model

[25] As already noted, the Lendcare Credit Application and Agreement invites applicants to review its privacy policies on its web site at www.lendcare.ca. The web site also provides some information as to Lendcare's business and activities.

[26] The Lendcare Capital web site has two branches, one for "Merchant," the other for "Customer." Following the Merchant branch takes one to a page that contains several areas of "Speciality," including "Retail." Clicking on "Retail" takes one to a page that contains the following:

> MAXIMIZE PROFITS
> LendCare boasts some of the highest approval rates in the industry.
>
> LOANS THAT FIT
> Give financing that fits everyone's needs with loans from $500 to $10,000.
>
> UP TO FIVE YEARS
> Amortizations that give your customers the flexibility to pay off their purchase over a comfortable period of time.
>
> OPEN ENDED LOANS
> Our loans are open and can be paid in part or full at any time without penalty.

[27] Underneath these headings is the following:

> Become a LendCare Partner
> Grow your business by offering Point of Sale financing to your customers today.

[28] That is followed by an application form.

[29] If one returns to the top page and follows the "Customer" branch one finds first a page titled "Our Commitment to Customer Service." It contains the following statement: "We partner with local and national merchants and distributors to offer retail and direct financing programs to help consumers make purchases." Under that is a "Frequently Asked Questions" heading. Clicking on that leads the viewer to a page with several questions and answers, including the following:

> Why does your [*i.e.*Lendcare's] name, LendCare Capital, appear on my bank statement?
>
> It is likely that you have recently made a purchase on a monthly payment plan from a local merchant. LendCare Capital Services provides financing solutions to local and national merchants across Canada. Refer to any recent sales receipts for any references to LendCare Capital.

Relationship Between Micron (the Vendor), Lendcare and the Consumer

[30] In her submissions on behalf of Lendcare Ms Webb relied heavily on the clauses in the Lendcare Credit Application and Agreement that stated that the Vendor (*i.e.* Micron) was not its agent; that Lendcare was not responsible for any breach of contract on Micron's part; and that its only agreement was with the customer (*i.e.* Ms Lawlor).

[31] I was not persuaded by this argument. To have accepted it would have been to elevate form over substance. It would have been to ignore what on its face was clearly an attempt to baffle and confuse the "applicant," and to hide and obfuscate the true nature of the relationship between Lendcare and the vendors whose consumer sales it underwrote. In short, I was not persuaded that Lendcare could use its Credit Application and Agreement to shield itself from the default of Micron. I come to this conclusion for several reasons.

[32] First, the form is misleading. It is worded in such a way as to suggest that Lendcare would have to first review and then approve the proposed financing. The form is called an "application." The consumer is called "applicant." The preamble to the Credit Agreement part of the form speaks of Lendcare "considering and approving your application." But on the facts of this case it is clear that it was Micron, rather than Lendcare, that in effect approved the

application—and that the approval happened automatically on delivery of the vacuum to Ms Lawlor (which happened on at same time the application form was signed).

[33] Why is that significant? It is significant because had Lendcare actually been in control of the approval process there would have been time for Ms Lawlor to cancel her application for credit. Micron promised her that she had at least 10 days to cancel the contract “for any reason.” She tried to cancel the contract within that time period. Had her application been under consideration by Lendcare in Ontario one can conclude that Ms Lawlor would have been able to advise Lendcare that the application for credit was no longer necessary.

[34] The facts that the form was an “application” and that Lendcare’s “approval” was necessary would lull the consumer into the belief that he or she actually did have time to call a halt to the process. Lendcare’s apparent decision to let Micron be the one to approve the financing would and did frustrate a belief fostered by its document.

[35] Second, Lendcare could not have had any reasonable belief that any consumer would have read or understood the Credit Application and Agreement form. I note here again the tiny font, and the statement (in apparent recognition of the difficulty of reading such type face) that a larger print version was available on request. There is too the answer to the “frequently asked question” on Lendcare’s web site of why Lendcare’s name would be showing up on the consumer’s bank statement. The fact that Lendcare had to provide an answer—and that the answer had to be frequently given—supports a conclusion that in most cases the consumer would think that the financing was being provided by the vendor, not by an independent and separate company. Such questions and answers would not be necessary if Lendcare thought that it was clear to the consumer from the very beginning that he or she was dealing with someone other than the vendor. Nor is it surprising that a consumer would think that. After all, the financing was being provided at the point of sale. Lendcare itself acknowledged that “the Vendor is our agent only for the purpose of assisting you in completing the Credit Agreement.” But if the vendor was doing everything at the point of sale (that is, providing the sales agreement, the credit application and the goods being sold) is it any surprise that the consumer would consider the vendor to be the financer of the sale?

[36] Third, and notwithstanding Ms Webb’s submissions to the contrary, I am satisfied that Lendcare was in fact bound by the actions, representations and warranties of Micron, at least insofar as the ability to cancel the sale contract was concerned. Lendcare itself on its web site tells vendors that they can become “partners” with it: “Become a LendCare Partner — Grow your business by offering Point of Sale financing to your customers today tells vendors that it is

providing." Point of sale financing is, as its name suggests, financing that is provided at the moment of sale. In other words, it is the vendor who ends up controlling the process. It is the vendor who, presumably, explains the documents to the consumer; it is the vendor who, in effect, approves the extension of financing at the point of sale. All of this points to Lendcare and the vendor having an independent agreement or arrangement wherein Lendcare in effect agrees that it will provide financing whenever the vendor tells it to.

[37] All of this points to Lendcare reliance on the vendor, not the consumer (or even itself) to determine the financing process. By placing such reliance on the vendor Lendcare must in law be taken to have decided to authorize the vendor to act as its agent insofar as the actual sale is concerned. And in so doing it must also be taken as being bound by the representations about the sale contract made by the vendor at the "point of sale." It must be taken at the very least as being bound by the provision in the contract that entitled the consumer to cancel it for any reason within 10 days. I say this notwithstanding the statement in the Lendcare form that "the Vendor cannot bind LCI [Lendcare] in respect of the financing of Goods under the Credit Agreement." On the facts that is not correct. Lendcare has clearly conducted or arranged its relationship with the vendor in such as way as to permit itself to be bound by the vendor's decision at the point of sale to, in effect, authorize financing.

[38] Finally, even if clause 14 (Warranties) of the Lendcare agreement was binding on Ms Lawlor, I note that it says nothing about the contract terms of the vendor's sales agreement. It speaks of representations and warranties with respect to the "Goods." But that does not speak to a term in the sales agreement that speaks to the agreement itself (rather than to the object of the agreement).

[39] For all of these reasons then I am satisfied that Lendcare was in fact bound by Micron's promise and agreement that Ms Lawlor had 10 days to cancel the sales agreement. That being the case, the financing agreement executed on July 7th was cancelled at the same time. Lendcare cannot evade the effect of such a term by advancing the purchase price to Micron before the elapse of the 10 day period. If Micron failed to notify Lendcare that Ms Lawlor had cancelled—or attempted to cancel—the sales agreement then Lendcare has only itself to blame. It and not Ms Lawlor chose to rely on Micron to make decisions as to point of sale financing.

[40] I will accordingly issue an order dismissing the claim.

DATED at Halifax, Nova Scotia
this 1st day of March, 2018

Augustus Richardson, QC

Adjudicator