

** Unedited **

Indexed as:

Leibl's Food Products Inc. v. Mpampas

Between

Leibl's Food Products Inc. and Fred Leibl, plaintiffs
(respondents), and
John Mpampas, Finest Foods Inc. and World Class Bakers
Corporation, defendants (appellants)

[1996] O.J. No. 4301

No. C18727

**Ontario Court of Appeal
Toronto, Ontario
Robins, Doherty and Austin JJ.A.**

Heard: December 5, 1996.

Judgment: December 6, 1996.

(3 pp.)

Brokers — Compensation — Right to compensation — Company law — Actions against corporations and directors — Actions for oppressive conduct — When available — Practice — Costs — Solicitor and client costs — Entitlement

This was an appeal by Leibel's Food Products and Leibel from a decision that the plaintiff was entitled to commissions with regard to sales made to certain customers. The judge also granted relief in the form of the oppression remedy and awarded costs on a solicitor and client scale. The defendants cross-appealed.

HELD: The appeal was allowed in part and the cross-appeal was dismissed. The judge was correct in holding that the plaintiff was entitled to commissions. There was no reason to resort to the oppression remedy as the breach of contract could be fully remedied by resort to the common law remedies of damages and an accounting. This was not one of the rare and exceptional cases warranting a departure from the usual scale of costs given that the defendants were clearly entitled to defend the action and the defence was not set up in bad faith. There was no merit in the cross-appeal

Counsel:

Robert G. Schipper for the appellants.

Theodore P. Charney and Marshall A. Schnapp for the respondents.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— We are all of the opinion that Lane J. correctly held that the contract should be construed so as to refer, not to sales actually made by the plaintiff, "but to sales made

by the company to customers who first became customers through the activities of the plaintiff's or Panimer". We also share the trial judge's view that the corporate defendants have no right to terminate their contractual obligations to pay commission to the plaintiff on all sales to this group of customers. The plaintiff is entitled to the commission so long as the defendants continue to sell the products in question to these customers.

¶ 2 Assuming, without deciding, that the oppression remedy is available to the plaintiffs, we see no reason to resort to this remedy in the circumstances of this case. The plaintiffs' right to damages arising out of the defendants' breach of contract can be fully vindicated by way of the usual common law remedy, that is, by way of the plaintiffs' action for damages and an accounting.

¶ 3 On the matter of costs, we are of the opinion that the trial judge erred in awarding costs on a solicitor and client scale. The defendants were clearly entitled to defend the action. The evidence, as the trial judge found, did not support a finding that the defence was set up in bad faith. Indeed, the defendants had an arguable position and succeeded in having the court narrow the claimed scope of their contractual obligations. Given these circumstances, we do not think that the defendant Mpampas' conduct, which was justifiably criticized, was such as to constitute this one of those rare and exceptional cases warranting a departure from the usual scale of costs.

¶ 4 We see no merit in the cross-appeal.

¶ 5 In the result, the appeal will be allowed to the extent that paragraphs 5, 6 and 7 of the judgment of Lane J. will be deleted and paragraph 8 will be amended so as to provide for party and party costs. In all other respects the appeal is dismissed and the judgment stands. The cross-appeal will be dismissed. There will be no costs of either the appeal or the cross-appeal.

ROBINS J.A.
DOHERTY J.A.
AUSTIN J.A.

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