IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.,* 2009 BCSC 1499

Date: 20091103
Docket: S066198
Registry: Vancouver

Between:

Canadian Bedding Company Ltd.

Plaintiff

And

Western Sleep Products Ltd. and Sleep Country Canada Inc.

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff:	Daniel J. Barker Vista Pourbahrami
Counsel for the Defendant Western Sleep Products Ltd.:	D. Barry Kirkham, Q.C. Paul A. Brackstone
Counsel for the Defendant Sleep Country Canada Inc.:	Gordon C. Weatherill Kinji C. Bourchier Amy Nathanson
Place and Date of Trial:	Vancouver, B.C. October 6-10, 14-17, 20-24, 27-31, November 3-7, 17-21, 24-27, 2008, March 30-31, April 1-3, 6-9, 2009
Place and Date of Judgment:	Vancouver, B.C. November 3, 2009

[1] In the summer of 2004, Andrew Macdonald, the principal of Canadian Bedding Company Ltd. ("Canadian Bedding") learned of a business opportunity from Grant Hankin. Mr. Hankin previously worked in the mattress industry as a representative for the defendant, Western Sleep Products Ltd. ("Western"). Western holds the licence to manufacture and sell Serta mattresses in Western Canada. Serta is one of the three major mattress brands in North America along with Sealy and Simmons. Western sells Serta products to national retailers such as the Brick, Sears and the defendant, Sleep Country Canada Inc. ("Sleep Country"). In addition, it sells to independent regional and local retailers of Serta mattresses.

[2] The business opportunity that Mr. Hankin brought to Mr. Macdonald was the opportunity to open a retail outlet that sold only Serta mattresses and upholstery products. Mr. Hankin told Mr. Macdonald that Western was interested in supporting such a store. Mr. Macdonald had significant financial resources that he was prepared to invest in a new business and Mr. Hankin wanted to participate in such a venture with someone who could provide the financing. To further their mutual interest in the business, Mr. Hankin introduced Mr. Macdonald to Denis Jones, the Vice-President and General Manager of Western.

[3] There were two key meetings between Mr. Macdonald and Mr. Jones. The first meeting took place at Poets Cove on September 4, 2004 (the "Poets Cove Meeting"). The second meeting was held on October 7, 2004 at Western's premises in Burnaby (the "Burnaby Meeting"). Canadian Bedding says that it reached an oral agreement with Western during these two meetings (the "Agreement"). The nature and extent of the Agreement was a hotly contested issue at trial. Nevertheless, commencing in early 2005, Canadian Bedding opened retail stores under the name, Sit N' Sleep Gallery. Ultimately, it opened ten stores selling Serta mattresses and upholstery products. Canadian Bedding advertised the business as the Lower Mainland's exclusive dealer for Serta products. It held the stores out as selling only Serta products. It positioned the Serta logo in front of the Sit N' Sleep Gallery name

in all of its advertising and on its storefronts. In the terminology used throughout the trial, these were “Serta-only” stores.

[4] The stores were not successful. In April 2006, Canadian Bedding abandoned the Serta-only concept and began to sell mattresses from other manufacturers. Towards the end of 2006, Mr. Macdonald decided to shut down all of the stores. Most of the financing for the business operations was provided by way of a shareholder loan from Mr. Macdonald that was secured by a General Security Agreement. When the business was shut down, Western was owed in excess of $600,000 for inventory it had delivered to Canadian Bedding (the “Inventory Debt”). As a result of Western’s position as an unsecured creditor and the priority that Mr. Macdonald held as a secured creditor, Canadian Bedding made no payments to Western for the Inventory Debt.

[5] Canadian Bedding alleges that the failure of the Sit N’ Sleep Gallery stores occurred as a result of breaches of the Agreement. It says that Western breached its promise to place Canadian Bedding on a level playing field with its primary competitor, Sleep Country. In particular, Western failed to supply Canadian Bedding with the latest line of Serta products on a timely basis, and no later than those products were supplied to Sleep Country. In addition, Canadian Bedding says that Sleep Country induced the breaches of the Agreement, or alternatively that Western and Sleep Country conspired by unlawful means to injure Canadian Bedding and to cause it to shut down its Serta-only operations. Western denies these allegations and has advanced a counterclaim for the Inventory Debt.

[6] These allegations raise numerous issues. The central issue is whether Western breached the Agreement with Canadian Bedding. Of course, that involves consideration of the preliminary question: what were the terms of the Agreement. For the reasons set out below, I have concluded that Western did not breach any term of the Agreement. That conclusion effectively resolves most of the issues placed before the court. I have also considered whether Canadian Bedding suffered any loss because Western did not supply it with the latest line of Serta products at

the same time those products were supplied to Sleep Country. I have concluded that the timing of delivery of Serta products to Canadian Bedding was not the cause of any loss suffered by Canadian Bedding. These two conclusions preclude any finding that Sleep Country induced a breach of contract, or that Western and Sleep Country conspired to cause injury to Canadian Bedding. In the result, all of Canadian Bedding's claims against the defendants are dismissed.

Issue 1. What were the Terms of the Agreement?

Position of Canadian Bedding

[7] Canadian Bedding says the Agreement includes those terms set out in the Second Further Amended Statement of Claim:

> a) the plaintiff would invest the monies necessary to open ten or more such stores in Greater Vancouver and then open further such stores in Calgary and Edmonton;
>
> b) the plaintiff would have first right of refusal as to the opening of any such potential stores in all other parts of Alberta and British Columbia;
>
> c) the plaintiff would purchase "Serta" products of Western on terms that were to be at least as competitive as those offered to any other retailer of Western "Serta" products;
>
> d) Western would supply the plaintiff with latest line of "Serta" products on a timely basis for their first appearance on the market and no later than such products would be supplied to competitors of the plaintiff, including Sleep Country;
>
> e) Western would supply the plaintiff with first class quality "Serta" products;
>
> f) the plaintiff would have the exclusive right to use the "Serta" name and logo to advertise the said stores and could, again on an exclusive basis, hold the said stores out as being "Serta" only stores;
>
> g) Western would contribute to the cost of advertising for the said stores.

[8] Canadian Bedding argues that every key element of the contract was established by the evidence from the representatives of Western and, in particular, by the admissions of Mr. Jones. In argument it described the key elements in terms that are somewhat different from the terms set out in the Second Further Amended Statement of Claim. It says Mr. Jones agreed to all of the following key elements:

a) Canadian Bedding would have the exclusive right to operate Serta-only stores in Greater Vancouver, Calgary and Edmonton and would commit $2 million to the establishment of those stores;

b) Canadian Bedding would carry a full line of Serta products including coil mattresses;

c) The stores were intended to compete with Sleep Country and thus would be located in close proximity to Sleep Country stores;

d) Canadian Bedding would, in its contractual relations with Western, be put on a level playing field with Sleep Country so that it would be competitive in the market with Sleep Country;

e) Canadian Bedding intended to open a number of stores (the figure of ten was mentioned in the Burnaby Meeting) and there was no limit placed on the number that it could open.

[9] Canadian Bedding stresses that when examining the evidence of Mr. Jones and Mr. Macdonald regarding the two meetings, the proper approach is to look at the circumstances not in light of what the parties thought but by reference to what a reasonable person, external to the situation, would conclude from the facts. It also says that when construing the language of the parties it is important to give the Agreement the business efficacy that both parties must have intended. In the circumstances here, Canadian Bedding argues that the most important term of the Agreement was Western's promise to put Canadian Bedding on a level playing field with Sleep Country. It says this includes the commitment to deliver new products, and in particular the Perfect Sleeper mattress, to Canadian Bedding on a timely basis and no later than they were provided to Sleep Country. While it admits that there was no discussion about the timing of delivery of new Serta products at the two meetings, it says that a reasonable person, external to the situation, would conclude from the circumstances that such a provision in the Agreement was necessary to give it business efficacy.

[10] Western argues that it is the practice in the industry to deliver new product to competing retailers at different times throughout the year and says that it is impossible for it to release and deliver new product to all retailers at the same time. In response to this argument, Canadian Bedding says that Western must have known this when it promised Canadian Bedding it would be placed on a level playing field with Sleep Country. It also knew that Sleep Country would insist upon receiving new product earlier than Canadian Bedding. In these circumstances, Canadian Bedding argues that Western must bear the risk for its failure to do that which would have given the Agreement business efficacy: deliver new products to Canadian Bedding at the same time they were delivered to Sleep Country. In advancing this argument it relies on the decision in ***The Moorcock***, [1886-90] All E.R. Rep. 530 (C.A.) and says that the situation here is analogous to the situation in that case.

[11] Canadian Bedding also argues that when considering the terms of the Agreement it is important to consider the credibility of Mr. Jones. It says that his evidence lacked credibility on three important issues:

a) Western's promise to provide a written agreement;

b) His alleged belief that oral promises are not enforceable; and

c) His opposition to the opening of the Broadway Serta-only store in August 2005.

[12] Given his lack of credibility on those issues, Canadian Bedding says that wherever Mr. Jones' evidence differs from that of Mr. Macdonald, the evidence of Mr. Macdonald should be preferred.

[13] Canadian Bedding says the claim is based on the oral Agreement because Western failed to live up to its promise to provide a written contract. It argues that Western agreed at the Burnaby Meeting to prepare a written agreement. Mr. Macdonald subsequently asked Western to prepare the contract on a number of occasions but nothing was ever done to document the terms of the Agreement other than the delivery of the Customer Matrix, a standard document prepared by Western

that set out the terms pursuant to which it delivered product, provided advertising, and extended credit to Canadian Bedding. Mr. Macdonald subsequently prepared a draft written contract in November 2005 with some assistance from his corporate solicitors. Western did not accept that draft agreement and no further steps towards formalizing the Agreement were taken by either party after that time. Canadian Bedding says that Western's intentional failure to deliver a written contract is relevant to the consideration of the credibility of Western's witnesses.

Position of Western

[14] Western argues that Canadian Bedding has failed to prove an agreement containing any of the terms pleaded in the Second Further Amended Statement of Claim. It says that a distribution agreement which has the kind of exclusivity asserted by Canadian Bedding would require detailed terms setting out matters such as price, territory, and length of term. As with any contract, Canadian Bedding would have to satisfy the court as to the certainty of the essential terms. It says that the evidence presented falls far short of proving the alleged terms. Western says that the parties did not have a common intention to contract on the terms alleged. Western also argues that even if one or two of the alleged terms has been proved with sufficiently clarity, the agreement when considered as a whole is void for uncertainty.

[15] Western says that some of the individual terms alleged by Canadian Bedding were not discussed at all in either of the two meetings. In particular, the terms alleged at sub-paras. 5(b) and (d) were never discussed. It takes issue with the reliance by Canadian Bedding on ***The Moorcock*** decision because that case deals with implied terms and there is no allegation in the Second Further Amended Statement of Claim that the plaintiff is relying upon implied terms.

[16] Western also argues that credibility is a significant factor to be taken into account when assessing the evidence about the terms of the Agreement. It says that Mr. Macdonald admitted to making several statements that were not true. Further, his evidence was marked by inconsistent statements and an argumentative

attitude throughout. Western says that he testified to numerous inconsistent versions of some of the terms of the Agreement. He gave inconsistent and confusing evidence regarding the timing of and participants in the meetings. Western says that throughout the trial he gave misleading evidence concerning Canadian Bedding's financial position. He also misrepresented the company's financial position to prospective landlords.

[17] Western argues that the evidence of Leigh Harris, the other principal witness for Canadian Bedding, was even less credible than Mr. Macdonald's. Western says that he gave inconsistent evidence regarding the timing of the key meetings leading to formation of the Agreement and the discussions at those meetings. He admitted to exaggeration of his evidence. He participated in the misrepresentation of Canadian Bedding's financial situation to prospective landlords.

[18] Western asks the court to accept the evidence of Mr. Hankin with regard to the discussions at the Poets Cove Meeting and the Burnaby Meeting. It says that his evidence supports the evidence of Mr. Jones and Western's other witnesses. It also says that the industry practices, which were known to Canadian Bedding through Mr. Hankin, are relevant to consideration of the alleged contract terms. It says that those practices support the position of Western.

Analysis

[19] I agree with Western that an understanding of the mattress business is essential to consideration of this issue. While Mr. Macdonald and his brother-in-law, Mr. Harris, did not have any background in the mattress industry, Canadian Bedding had knowledge of how the industry operated because Mr. Hankin spent many years working in the business. Before commencing my analysis of the contract issue, I have set out my findings regarding the workings of the mattress industry. These findings are important because this is the background information known to both parties at the time of their discussions.

[20] After setting out the industry background, I begin my analysis of the contract issue by examining the credibility of the three primary witnesses to the Agreement. I

then set out the applicable law. Finally, I examine the terms alleged by Canadian Bedding and conclude with my findings regarding the terms of the Agreement.

The Mattress Industry

[21] The three largest manufacturers, Serta, Simmons and Sealy account for the majority of mattress sales in Canada. In 2003, it was estimated that over the previous five years they accounted for 70% of all mattress sales in Canada. At that time, the five largest mattress retailers, Sleep Country, Sears Canada, The Brick, The Bay, and Leon's collectively accounted for about 50% of all sales in Canada. Mattress retailers include shops like Sleep Country that specialize in mattresses, as well as furniture stores, small independent retailers, discounters, and warehouse clubs.

[22] One of the attractions of the retail mattress business is that it does not require a large capital commitment for the purchase of inventory. The only inventory required to be carried by retailers is the floor models of the mattresses they offer for sale. When a customer decides to purchase one of the mattresses, the retailer places an order with the manufacturer. The manufacturer then delivers the ordered mattress to the retailer within a period of a few days as specified by the agreement between the parties. The manufacturer charges the retailer who has a specified number of days in which to pay. The retailer then delivers the mattress and receives payment from the purchaser. This is another attractive feature of the business; the payment from the purchaser is often made before the retailer is required to pay the manufacturer.

[23] Serta, Sealy and Simmons mattresses are manufactured regionally by subsidiaries of those companies or by companies licensed to manufacture and distribute their products. At any given time a regional manufacturer, such as Western, will produce hundreds or thousands of different mattress models (or SKUs) each with its own name. This enables each of the large retailers, such as Sleep Country or The Bay, to have its own unique models. Those will differ from the SKUs carried by other large retailers and by the smaller independent retailers. The

independent retailers are offered a separate line of mattresses from which they choose the ones they wish to sell. Each of the large retailers and the independents have their own unique product lines so that a customer is not easily able to comparison shop for a particular mattress. Similar mattress models carried by competing retailers will look different: the fabric covering the mattress – the ticking – will be different as will the mattress name. There will also be differences in specifications for similar mattresses. These could include differences in the type, brand name or thickness of the foam, or differences in the mattress side supports or pillow top.

[24] Mattress models that have a similar design and price range are given the same "family" name. That name does not change for the different SKUs that are manufactured for the different retailers. The Serta families of mattresses at the relevant times included the Perfect Sleeper, Perfect Day, Perfect Night, International Touch, Perfect Slumber, Vera Wang and others. Accordingly, a consumer attempting to do some comparison shopping might find Perfect Sleepers at both Sleep Country and at Sit N' Sleep Gallery stores. However, the Perfect Sleepers would have different names and specifications as well as a different appearance.

[25] The variety of mattress SKUs allows retailers to present their own unique product line but it creates problems for the manufacturer. The factory must constantly change the materials used at any time for the production of individual mattresses. In addition, when the manufacturer wants to change its product lines, it must create a whole new line of models for each retailer or group of retailers. It must take all of the steps required to change its production line in order to make the new models. In the case of Western, which operates under a licence from Serta, it must obtain the permission of Serta to manufacture the new SKUs.

[26] Unlike automobiles, mattresses do not have model years. Periodically manufacturers produce a new line of models for their retailers. The impetus for producing new models is usually the manufacturer's wish to increase the price of its product. This is because of the way in which the line-up of models is marketed to

the retailers. Typically a large retailer or a group of smaller independent retailers is offered a number of potential mattress models at set prices. The retailer selects the mattresses it wishes to carry. The manufacturer then commits to deliver those mattress models for a fixed price in accordance with specific terms regarding payment, delivery and interest for so long as that model is available. In the past, new model line-ups were offered every 18 months to 2 years. In more recent years the new line-ups are offered every 10 to 14 months.

[27] A new line of mattress models is often similar to the old one but will have a new name and a higher price. If the new model does not have a price increase, it may have changes to the specifications such that it is a lower quality product. For example, the ticking fabric may be lower quality or there may be less foam or a thinner pillow top.

[28] Western, like other manufacturers, is not able to offer new product lines to all of its retailers at the same time. The new model line-ups are marketed and delivered separately to each large retailer or group of retailers. The manufacturer must design a line-up of models for each of the retailers. Once it has prepared a line-up, it shows the retailer numerous models in the line-ups it has designed for each of the families of mattresses. The retailer then chooses from the line-up those models it wishes to sell. Once the line-up is chosen, the manufacturer has to take all the necessary steps to secure the supply of materials, alter the production lines in the factory and make all of the internal changes required to make and sell the new product line. I accept the evidence of Western's witnesses that it is simply not possible for it, or any other manufacturer, to roll out new product lines for all of its retailers at the same time.

[29] In practice what Western did was stagger the rollout of its new model line-up for its major retailers (Sleep Country, The Bay, The Brick, etc.) and independents. The independent retailers, which include businesses that operate one or a small number of stores, were given a line-up of models from which to choose – described

as the “Independent Line”. Western treated Canadian Bedding as an independent retailer and offered it mattresses from the Independent Line.

[30] Even though manufacturers sell tens of millions of dollars worth of mattresses each year to large retail customers, it is not the industry practice for manufacturers and retailers to enter into detailed written agreements for the supply of mattresses. The business relationship between manufacturers and retailers is best described as a “purchase order” relationship. In other words, a separate contract is entered into for each mattress ordered by the retailer. The retailer delivers a purchase order and the manufacturer delivers the mattress for the agreed price, which must be paid within a specified number of days.

[31] Sleep Country does not have written agreements with its mattress manufacturers. Western does not have written agreements with its retailers. Once Canadian Bedding started selling mattress brands other than Serta, it did not enter into written agreements with those manufacturers. Employees or former employees of United Furniture Warehouse, Sandy's Furniture and The Brick gave evidence at trial. The witnesses indicated that those companies do not have written agreements with the manufacturers who supply their mattresses.

[32] Canadian Bedding asserted that purchasers of mattresses are motivated to buy the latest model of mattress with a new appearance and new technology. It is fundamental to Canadian Bedding’s claim that it was severely disadvantaged by not having the new 2006 line-up of Serta mattress models at the same time as Sleep Country did. I have rejected this assertion for the reasons described below. However, for background purposes it is worth noting that the retail mattress business is driven by sales events. Typically, those sales events offer some real or perceived price discount or advantage. The retailer offers price savings for particular models of mattresses. Certain models or brands may be offered at discounts. A retailer may offer discounts on the basis that it has to clear out its floor models or old stock, or because the box spring ticking does not match the mattress ticking. The sales events are limited only by the marketing imagination of the retailer. There was no

evidence that the introduction of a new line of mattresses is generally used by retailers as the marketing rationale for a sales event.

[33] From the consumer's perspective, it is likely that a mattress purchase is usually driven by the purchase of a new bed or the need to replace an old mattress. It is not an impulse buy triggered by the image or description of the latest model of mattress. As most consumers will have no knowledge of the different models of mattresses, the salesperson has a tremendous influence on the purchase of a mattress.

Credibility Generally

[34] As I have indicated above, both parties were critical of the credibility of the other party's principal witnesses. There was good reason for this; none of the witnesses had a particularly good recollection of the discussions that took place at either of the two meetings. This is understandable. The Poets Cove Meeting was a half hour discussion over coffee. The principal players, Mr. Jones and Mr. Macdonald, discussed the concept of the Serta-only stores for the first time. It took place at a resort in the midst of a boating trip that was arranged by Mr. Hankin. Canadian Bedding initially attempted to assert that a binding contract was reached at this meeting. However, that position was obviously unsustainable. The Poets Cove Meeting was an initial discussion that was exploratory in nature. None of the three participants made a note, wrote a memo or confirmed the discussions by letter. No agreement was reached by the parties at that meeting.

[35] The Burnaby Meeting was more formal. Messrs. Hankin, Jones and Macdonald, who had been at Poets Cove were in attendance as were Mr. Harris for Canadian Bedding and Jason Robinson, an account manager, for Western. There were discussions about particular matters. Mr. Harris prepared a memo following the meeting, which was given to some of the other attendees. I believe that the memo accurately reflects the tone of the discussions. The meeting did not involve detailed contract negotiations. The memo amounts to minutes of a meeting where the parties discussed a general understanding they had reached and set out a list of

tasks required to carry out the further establishment of a single Serta-only store that was already well underway.

[36] Quite simply, the parties did not focus on detailed terms of a formal agreement because they were content to proceed with an understanding of the general arrangement by which Serta products would be sold to Canadian Bedding. Western proceeded in this way because that is the practice in the industry. Canadian Bedding was content to proceed in this way because it felt it had a winning concept and it knew, through Mr. Hankin, that this was how the industry worked. The fact that Mr. Macdonald had signed offers to lease prior to any substantive discussions with Western reinforces this view.

[37] As the parties did not focus their attention on negotiating particular terms of a formal agreement when they were attending these two meetings, it was difficult for them to recall the content of the discussions. As a result, much of the evidence from Messrs. Harris and Macdonald was reconstructed rather than recollected. The reconstruction of the evidence after the fact explains the numerous inconsistencies and inaccuracies in their evidence. My reasons for finding that both lacked credibility are set out below along with my comments on the credibility of Mr. Jones.

[38] Mr. Jones also engaged in reconstruction of the evidence but, unlike Messrs. Harris and Macdonald, was ready to acknowledge his errors and inconsistencies when those were pointed out to him. Mr. Hankin also had a limited recollection of the discussions but unlike the other witnesses, he had no interest in the proceedings. As a result, I found his evidence on some of the substantive issues to be more reliable.

Credibility of Mr. Macdonald

[39] Mr. Macdonald's recollection of the key meetings was poor. In December 2006, when he swore a lengthy affidavit, he could not recall if Mr. Harris was present at the Poets Cove Meeting. He was incorrect on the timing and sequence of the meetings in relation to a separate meeting that he held with Mr. Hankin and Mr. Harris. His affidavit misstated the timing of discussions regarding a possible

right to open Serta-only stores in Edmonton and Calgary. His evidence regarding the nature of Canadian Bedding's option or right of first refusal was inconsistent.

[40] Mr. Macdonald insisted throughout his testimony that a binding agreement was reached at the Poets Cove Meeting. His insistence was illogical. He stuck to that version of events because that was the substance of the allegation in the initial statement of claim. He refused to concede that the terms of the Agreement were worked out at the Burnaby Meeting even though in his December 2006 affidavit he swore that "the purpose of the [Burnaby] meeting was to work out the precise terms discussed at the September 4th..." meeting. In mid-trial, Canadian Bedding applied to amend its statement of claim to assert that the Agreement was made at the Poets Cove and Burnaby Meetings. I granted that amendment even though it was inconsistent with Mr. Macdonald's continued assertion that the Agreement was reached solely at the Poets Cove Meeting.

[41] An example of the extent to which Mr. Macdonald reconstructed his evidence to support his case is illustrated by the assertion in his evidence in chief that the idea for a store in North Vancouver originated with Mr. Jones. Mr. Macdonald said that Mr. Jones indicated that Canadian Bedding should have a store in North Vancouver because Sleep Country's top performing store was in that municipality. He said that Mr. Jones told him what Sleep Country's monthly sales were at that store. These statements cannot be true. First, Mr. Jones testified, and I accept, that he did not know the sales figures for individual Sleep Country stores. This is because Western shipped mattresses to a distribution centre and not to individual Sleep Country stores. Second, Mr. Macdonald signed an offer to lease the premises for Canadian Bedding's North Vancouver store on August 13, 2004, three weeks before the Poets Cove Meeting with Mr. Jones. In other words, Mr. Macdonald was the one who decided he wanted to have a store in North Vancouver. He made that decision prior to any meetings with Western.

[42] Mr. Macdonald gave a surprising number of different versions of the alleged agreement regarding the nature and extent of the right granted to Canadian Bedding

to open Serta-only stores in Greater Vancouver and elsewhere. The versions of the agreement were inconsistent not only as to the geographical scope of the agreement but also as to the nature of the agreement. At different times he indicated all of the following:

- there was no discussion of a right of first refusal;
- there was an agreement that the right of first refusal applied to Greater Vancouver only;
- that the right of first refusal applied to Greater Vancouver and Alberta;
- that the right of first refusal applied to Greater Vancouver, Calgary and Edmonton; and
- that Canadian Bedding had an option to open in any areas in B.C., Alberta or elsewhere in Canada where Western delivers product, provided that Western granted its approval, which was not to be unreasonably withheld.

[43] Mr. Macdonald's statements regarding Canadian Bedding's finances demonstrated the extent to which he was prepared to reconstruct evidence to suit his case. In his affidavit of December 13, 2006, he said that in July 2005 the business made a small profit. That was certainly not correct. He eventually admitted that his statement was "technically" incorrect. In fact, the business never made a profit on a monthly basis or over a longer time period.

[44] At trial, his assertions that the business was doing well were stated somewhat differently. He no longer said the business was profitable but rather that the business was receiving sufficient revenues from sales to be in a breakeven position on a "normalized" basis. By normalized, he meant that the stores were earning sufficient revenues such that the business would be at the breakeven point if it was able to take advantage of the full economies of scale that he expected it would achieve once it had sufficient stores in operation. At best, he was seeing the business through rose coloured glasses. At worst, the evidence was misleading.

[45] The extent to which the business was not achieving the profitability expected can best be seen by comparing the expectations of Messrs. Macdonald and Harris with the actual results. In April 2005, Mr. Macdonald sent a memo to staff that set a sales target of $100,000 per store for the second quarter and $150,000 per store for the last half of the year. In fact, none of the stores ever achieved monthly sales of $70,000. The memo to staff indicated that the breakeven point for sales per store was $80,000.

[46] In addition, Mr. Macdonald actively misled others about the financial health of Canadian Bedding. For example, on September 14, 2005, he sent a letter to Eric Poon to provide information to support a possible lease of premises to Canadian Bedding in Langley. The e-mail contained many misstatements of important information. He stated that the company had shareholder equity of $1.25 million with an available line of credit of $750,000. This was far from the truth. Mr. Macdonald was lending funds to the company but his loan was secured by the General Security Agreement. There was no shareholder equity. He stated that since July 2005, the stores had been at breakeven or better and that the fourth quarter would be cash flow positive. Both of these statements were untrue.

[47] In addition to the difficulties with the substance of his evidence, Mr. Macdonald frequently failed to respond directly to questions and was often argumentative. In summary, I conclude that Mr. Macdonald was not a credible witness. I have rejected his evidence regarding the terms of the contract where that evidence is inconsistent with the evidence of Mr. Hankin, Mr. Jones or other witnesses.

Credibility of Mr. Harris

[48] Mr. Harris was an engaging and affable witness. Unfortunately, he had a self-admitted tendency to exaggerate. His evidence on several key issues was inconsistent. I have concluded that I must approach his testimony with great caution as it is simply not reliable.

[49] An example of the inconsistency was his testimony about the two key meetings and a planning meeting that Mr. Harris and Mr. Macdonald held in August 2004 at Ganges, B.C. prior to the Poets Cove Meeting. Mr. Harris gave different versions of the timing of the meetings and the content of the discussions. He initially said that his first involvement in the business was in a phone call with Mr. Macdonald after the Poets Cove Meeting. He also said that he and Mr. Macdonald discussed the terms of the Agreement at the Ganges meeting as those had already been settled at the Poets Cove Meeting. At trial, he conceded that his recollection was incorrect and that the Ganges meeting preceded any contractual discussions with Western and that he was involved with the project from its inception.

[50] Mr. Harris's recollection of the content of discussions was equally suspect. He said that Mr. Macdonald told him there was agreement at Poets Cove regarding numerous details about the provision of items for the stores such as neon signs, rugs and a computer bed. No one else suggested that this kind of detail was discussed at that meeting. Mr. Harris also alleged that the idea for a North Vancouver store originated with Mr. Jones. As noted above, this is not correct; Mr. Macdonald made an offer to lease in North Vancouver before any meeting with Western.

[51] In cross-examination, Mr. Harris agreed with Mr. Weatherill, counsel for Sleep Country, that he has a tendency to exaggerate. This tendency was evident throughout his testimony. The following are two examples of his overstatement or exaggeration:

> a) Mr. Harris exaggerated his sales ability in his evidence in chief. He said that when he worked in the North Vancouver store he personally sold between $50,000 and $60,000 of mattresses in June 2005. In fact, there were two other salespeople in that store and the total sales for the month were less than $35,000.

b) The Vera Wang was a new, high end, line of mattresses that Western sold only to Canadian Bedding in 2006, the first year the mattresses were available. Mr. Harris stated emphatically in his evidence in chief that the Vera Wang mattress line was forced on Canadian Bedding. However, his e-mails indicate that he and Canadian Bedding were excited about being given this line of mattresses on an exclusive basis. He said that the introduction of the line would be the biggest mattress event of the year. One of these positions is either an overstatement or simply not true. Unfortunately, it was difficult at times to determine the truth amidst his puffery.

[52] I have described the difficulties with Mr. Macdonald's evidence regarding the financial performance of Canadian Bedding. Mr. Harris was complicit in making the same kind of misrepresentations regarding the company's performance to prospective landlords. He also made similar misstatements to the court about the company's financial performance in its first year.

[53] In summary, Mr. Harris was not a credible witness and could not be relied upon to give accurate evidence. I have disregarded his evidence where it is inconsistent with that of other witnesses.

Credibility of Mr. Jones

[54] Canadian Bedding challenged Mr. Jones' credibility and focused on three areas of his evidence that it says highlight his lack of credibility. I have briefly examined those below. I have concluded that there is a simplicity or naivety to Mr. Jones that is surprising for a general manager of a large business. He was eager to agree with the questioner when being examined both in chief and in cross-examination. Like Messrs. Harris and Macdonald, he can be faulted for inconsistency and poor recollection regarding the key contract meetings. However, I found that on core issues involving the mattress industry and Western's business practices, his evidence was accurate and he was genuinely attempting to assist the court. While his evidence has to be viewed with caution, I found it to be more reliable than the evidence of Messrs. Harris and Macdonald.

[55] The plaintiff attacked three areas of his evidence:

a) Western's promise to provide a written agreement;

b) His alleged belief that oral promises are not enforceable; and

c) His opposition to the opening of the Broadway Serta-only store in August 2005.

I will deal with each in turn.

a) Western's promise to provide a written agreement

[56] Canadian Bedding says that Western promised to prepare a written agreement and that it did not deliver on its promise because of pressure from Sleep Country. It also says that the only explanation for Mr. Macdonald's repeated requests for a written agreement is that Mr. Jones must have promised to provide it. Canadian Bedding says there must have been discussion and agreement about the provision of a written agreement because it is mentioned in the Burnaby Meeting notes and in notes made for a meeting that was held on October 28, 2004.

[57] The Burnaby Meeting notes prepared by Mr. Harris read in part:

> Denis has the scaled floor layout and will present plan to us late October. Will also present the agreement listing our deal and a time line letter showing where we need to be at various milestones. Will name the range of mattresses and sofa beds and will supply a quarterly marketing strategy. Serta will deliver to our warehouse in West 6th free of charge every Friday for all orders received before Tuesday morning.

[58] The notes for the October 28th meeting include the following:

> 12. Alberta and GVRD - Letter
>
> ...
>
> 32. Serta CBC agreement - B.C. & Alberta.

[59] Canadian Bedding invites me to reject Mr. Jones' suggestion that the reference at the Burnaby Meeting to the "agreement listing our deal" was reference to the Customer Matrix. It submits that his suggestion is nonsensical. I cannot

agree. The Customer Matrix was prepared for every Western customer. It provides details regarding the delivery of mattresses, the discounts for floor models, the provision of co-op advertising, etc. There is no doubt that Mr. Jones intended to prepare and present to Canadian Bedding the Customer Matrix listing the terms that applied to the delivery of mattresses. I conclude that Mr. Harris's note is a reference to that document.

[60] The October 28th meeting notes regarding a letter and a Serta CBC agreement refer to the geographical extent of Canadian Bedding's right of first refusal. The geographical areas covered by the right of first refusal were not dealt with in the Customer Matrix. I infer from the notes that both parties saw a need to set out the terms of the right of first refusal in writing. I conclude that the notes refer to an agreement or letter to document that right.

[61] Mr. Jones gave inconsistent evidence about when the subject of a written agreement was discussed and what was said at the meetings. However, he was adamant that Western did not enter into written agreements with retailers and that he expressed this to Canadian Bedding. I accept that evidence. It accords with the industry practice and is consistent with the evidence of Jeff McKnight, Western's President. Mr. Hankin also agreed that Mr. Jones stated to the Canadian Bedding representatives at the Burnaby Meeting that Western did not enter into written agreements.

[62] In summary, while I do not accept all of Mr. Jones' evidence regarding the discussions about producing a written agreement, I accept that he was referring to the Customer Matrix when talking about the "agreement listing our deal". This is the "agreement" that Western provided to every one of its retailers. I also find that at the time of the Burnaby Meeting, the parties saw a need to document the right of first refusal. Finally, Mr. Jones' evidence about the subject of a written contract does not cause me to conclude that he lacks credibility.

b) Mr. Jones' alleged belief that oral promises are not enforceable

[63] Mr. Jones indicated that it was his understanding that oral promises are not enforceable. Mr. McKnight gave similar evidence. Mr. Jones agreed that he never told Mr. Macdonald that he was of the view that oral promises were not legally binding. Canadian Bedding invites me to find that this evidence shows duplicity on the part of Western and that it should influence my acceptance of any of the evidence of Mr. Jones and Mr. McKnight.

[64] I agree that Mr. Jones' view of the enforceability of oral agreements is surprising. However, it does not cause me to question his credibility. His belief appeared to be genuine and honestly held. It reinforces my view that he is naive. His naivety is perhaps explained by the fact that his only business experience was in the mattress industry. However, his belief that oral promises are not enforceable is ultimately irrelevant to either his credibility or the issues to be decided in this case.

c) Mr. Jones' opposition to the opening of the Broadway Serta-only store in August 2005.

[65] There is no question that Mr. Jones opposed the opening of a fourth Canadian Bedding store on Broadway in August 2005. Canadian Bedding asserts that this was done because of pressure that Mr. Jones received from Sleep Country. It asks me to reject Mr. Jones' two explanations for his opposition: 1) that the Western factory was behind on deliveries of coil inner spring mattresses to Sleep Country and others in August 2005; and 2) that he did not want to spend additional funds on awnings and advertising for the new store until 2006.

[66] I accept Mr. Jones' evidence about the circumstances that led him to oppose the Broadway store opening. He felt that Canadian Bedding was expanding too fast. He had set aside approximately $120,000 to contribute to the purchase of awnings for the three stores he understood would be opened in 2005. He had used up the budgeted funds and did not want to have to pay additional funds for a fourth store. This was the main reason for his opposition to the store opening.

[67] I also accept his evidence that he did not feel pressure from Sleep Country regarding the opening of a fourth store. He knew that inquiries were made by Sleep Country to other Western employees regarding the number of stores the plaintiff was planning to open, but he did not perceive these inquiries as pressure.

[68] He did experience some pressure from Sleep Country because of the delays that Western had in August in delivering product to Sleep Country. August is traditionally a very busy month and Western was falling behind in deliveries. Sleep Country is adamant about receiving deliveries within the promised timeframe because its customers become unhappy if deliveries are late. I accept Mr. Jones' evidence that he did not want to have to deliver coil inner spring mattresses to another Canadian Bedding store in August given his delivery problems. However, this must have been a minor reason for his opposition to the Broadway store. Indeed, when the store opened as scheduled, Western did supply the mattresses when ordered.

[69] In summary, while Mr. Jones' evidence must be considered carefully, it was generally reliable. In particular, I accept his evidence regarding the mattress industry and the standard practices of Western.

The Applicable Law

[70] There is no dispute between the parties as to the applicable law. The party alleging breaches of an agreement bears the onus of proving the terms of the agreement. The fact that an agreement was not reduced to writing does not alter the requirement to satisfy the court as to certainty of the terms agreed to by the parties.

[71] G.H.L. Fridman, in *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) summarizes the essential principles regarding certainty of terms:

> The court cannot make for the parties a bargain which they themselves did not make in proper time. This means in the first instance, that if a contract is not clearly created by the parties' language or conduct the court cannot construct one. It is for the parties to use such language or employ such

> conduct as will make plain that they intended to contract. [Footnotes omitted] [at 17-18]
>
> ...
>
> Uncertainty about some specific obligation may suffice to make impossible the conclusion that there is a contract in effect between the parties. The test would seem to be whether the term or terms in question relate to *essential* aspects of the alleged contract. Examples of this are the failure of parties to settle the purchase price for goods, the lack of agreement as to the date of commencement and term of a lease, or the amount of interest to be paid. [Footnotes omitted] [at 19]
>
> ...
>
> The underlying principle is that all the terms of the agreement between the parties must be settled. There must be nothing left for negotiation. [Footnotes omitted] [at 22-23]

[72] Of course, when determining the intentions of the parties to a contract, a court must look at the outward expression of the parties' intentions, not their personal knowledge or understanding which was not expressed. In other words, the question a court must ask is what a reasonable outside observer would conclude from the facts.

[73] In circumstances where the parties discuss preparation of a written agreement, but never prepare and sign a written contract, an issue that often arises is whether an agreement was ever reached. This issue was considered in ***Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*** (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-104. The court described the difference between an agreement to agree and a binding contract that precedes a signed contract:

> As a matter of normal business practice ... parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to

> the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. [References omitted]

[74] Another issue that is common in these cases is whether a term that was not discussed must be implied to give an agreement business efficacy. The following passage from the reasons of Bowen L.J. at 534-35 in ***The Moorcock*** nicely summarizes the approach taken by the courts to implied terms:

> It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. I believe that if one were to take all the instances, which are many, of implied warranties and covenants in law... it will be seen that in all these cases the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended it should have. ... [I]n business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from all the burdens, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for.

[75] Other cases have emphasized that only terms that a reasonable, objective observer would say must have been in the contemplation of the parties may be implied. Any term that will be implied must have been so obviously within the contemplation of the parties that an officious bystander would say “of course”, it goes without saying that such a term was intended to be included in the agreement: ***Shirlaw v. Southern Foundries (1926) Ltd.***, [1939] 2 K.B. 206 (as applied in ***Ring Contracting Ltd. v. Aecon Construction Group Inc.***, 2006 BCCA 304, 54 B.C.L.R. (4th) 292 at para. 7).

[76] Before dealing with the substance of the terms of the Agreement, I should note that Canadian Bedding did not plead reliance on implied terms. At trial it was

not disputed that the alleged term of the Agreement that Western would supply the plaintiff with the latest line of "Serta" products on a timely basis was not a term to which the parties expressly agreed at the two meetings. Western argued that the failure to allege that it was relying upon an implied term is fatal to Canadian Bedding's case. It relies on ***Greyline Trucking Ltd. v. Fletcher Challenge Canada Ltd.*** (1997), 45 B.C.L.R. (3d) 138 (C.A.), for the proposition that a failure to prove contractual terms as pleaded must result in a dismissal of the plaintiff's action.

[77] In ***Greyline***, the trial judge found that a contract which was partly oral had been formed and the parties were liable to its terms. The Court of Appeal overturned this decision because the "contract" found by the trial judge was substantially different from that alleged in the pleadings. In arriving at that decision, Esson J.A. stated at para. 28:

> I do not suggest that pleadings should be so strictly applied as to preclude the trial judge from finding an agreement which is not precisely that which was alleged by the plaintiff. But in this case, the difference between what was alleged and what was found to have emerged from the evidence was significant. The decision disregarded the fact of the plaintiffs' failure to prove the contractual terms as pleaded and resulted in the defendant being deprived of any opportunity to adduce evidence, cross-examine the plaintiffs' witnesses or make submissions as to the factual basis on which the case was decided.

[78] ***Greyline*** is of no assistance to Western. Here, the essential elements of the alleged Agreement were pleaded. The claims and defences of the parties to this case were exhaustively examined in the extensive pre-trial proceedings and the lengthy trial. Western had full opportunity to adduce evidence, cross-examine Canadian Bedding's witnesses and make submissions regarding the plaintiff's case. It had a full opportunity to challenge the plaintiff's submission that the term regarding delivery of the latest Serta products in a timely manner was specifically agreed upon or essential to give the agreement business efficacy. There is no reason here to so strictly apply the pleadings as to preclude the possibility of a finding that certain terms needed to be implied to give the Agreement business efficacy.

Alleged terms of the Agreement

a) Canadian Bedding would invest the monies necessary to open ten or more such stores in Greater Vancouver and then open further such stores in Calgary and Edmonton.

[79] It is not possible to find in the evidence of any witness a promise on the part of Canadian Bedding to "invest the monies necessary to open ten or more such stores in Greater Vancouver and then open further such stores in Calgary and Edmonton". The parties certainly did discuss the fact that Mr. Macdonald intended to invest money in Canadian Bedding to open Serta-only stores starting with the Cambie Street store in Vancouver. There is also no question that he wanted the exclusive right to open such stores in Calgary and Edmonton. However, the evidence does not support a finding of a mutual promise whereby Mr. Macdonald was bound to invest sufficient funds to open ten or more stores in Vancouver. Rather, the parties discussed their mutual intention to have Mr. Macdonald open Serta-only stores in Vancouver starting with the Cambie Store. Anything beyond the first store was speculative. Both sides had a desire for Mr. Macdonald to open more stores in the event that the Serta-only model was successful. However, nothing was ever said by the parties that could raise that desire to a binding obligation on the part of either party.

[80] The strongest evidence in support of the alleged terms of the Agreement came from Mr. Macdonald. He gave the following evidence regarding the discussions at the Poets Cove Meeting:

> A ... My -- my response to -- to what he said was positive. I -- I told him that I liked the idea of leveraging the brand. I said that what he said seemed to make sense to me. I told him that I would put up the capital to go forward with the idea. I mentioned an amount of $2 million to him. I specifically said, however, that I need his undertaking that there will be a level playing field. I told him that it's important that the -- that we remain competitive with regards to Sleep Country. He agreed to this point.
>
> The other thing that I mentioned to him was the Alberta market. I asked him to consider if he would include the exclusive areas to the greater cities of Calgary and Edmonton.
>
> ...
>
> A ... When I was mentioning to Mr. Jones that I would commit $2 million to -- to the project, I made it quite clear to Mr. Jones that I intended investing and

> competing on a significant scale with Sleep Country. I made it quite clear to Mr. Jones that this wasn't just to be, you know, a hobby store or -- or a one-off thing or anything like that. I was very serious in my discussions with Mr. Jones, and I made it clear to him that my intention was to seriously compete with Sleep Country.
>
> Q And what was Mr. Jones's reaction or response to that?
>
> A He accepted that.

[81] Mr. Macdonald testified that at the Burnaby Meeting the following matters were discussed:

> Q ... After we have the name and we have the logo, what else was discussed?
>
> A Mr. Jones confirmed that he would extend the exclusive arrangement to include the -- the two other cities in Alberta that we had discussed at Poets Cove; namely, Calgary and Edmonton.
>
> Q All right.
>
> A ... The other matter discussed was, I made mention of initially opening 10 stores. I made reference to the fact that eventually 10 of our stores would be the equivalent of the business Western does with 30 Sleep Country stores and meaning that they only have a one-third share of the business with Sleep Country because of the three large manufacturers.

[82] In cross-examination, Mr. Macdonald expressed the Agreement in these terms:

> Q ... So I just want you to tell me precisely what were the terms of this concluded contract that you made on September the 4th?
>
> A Mr. Jones offered to me an exclusive arrangement whereby my company could open Serta-only branded stores in the Greater Vancouver Region. This was later expanded to other cities in Alberta. However, this wasn't discussed at Poet's Cove. It was only confirmed by Mr. Jones on October the 7th.
>
> Mr. Jones agreed with me that there would be a level playing field in respect to SleepCountry and that pricing and delivery of product would be competitive in respect to SleepCountry. I accepted that and said that I would commit $2 million to the project.
>
> Q Anything else?
>
> A That was the nucleus of the agreement.

[83] As I have indicated, there were no notes, memorandum or correspondence setting out what was discussed at the Poets Cove Meeting. Mr. Harris's notes from the Burnaby Meeting contain the following notations relating to this issue:

> Canadian Bedding Company would get the three cities, Greater Vancouver, Calgary and Edmonton. The latter is unlikely as it is the hometown of The Brick and any competition in the town is trashed. No other centres likely to be big enough. Grant asked about Nanaimo and Campbell River but Denis didn't think the volumes were there. Could consider amalgamating with Victoria.
>
> ...
>
> Andrew noted that if Serta supplies 31 [Sleep Country] stores from Vancouver, it is the same as supplying 10 dedicated [Canadian Bedding] if we do the sales volume. Andrew said that [Sleep Country] couldn't drop Serta so Serta has to win from the relationship with [Canadian Bedding].

Much of the balance of the memo is concerned with details relating to the opening of the first Canadian Bedding store on Cambie Street in Vancouver.

[84] Mr. Hankin also gave evidence about the discussions at the first two meetings. He described the Poets Cove Meeting as a preliminary half hour discussion over coffee. When asked if there was any discussion about the number of stores he stated as follows:

> A We were just having general discussions about opening one store in Vancouver.
>
> Q And how did the meeting end?
>
> A Just had a cup of coffee, and we just -- it was -- the meeting was good.
>
> Q Was there a plan to go forward?
>
> A We planned to meet again but nothing had been decided. It was left open.
>
> Q Was any firm agreement reached at that meeting as to what was going to happen in the future?
>
> A None whatsoever.

[85] In cross-examination, Mr. Hankin gave the following evidence regarding the number of stores and Mr. Macdonald's commitment to invest in the business:

> Q Now, if I put to you that Mr. Macdonald mentioned 10 of the plaintiff's stores at the October 7th meeting, would you agree with that?
>
> A No.
>
> Q There was no mention of 10 stores in any context?
>
> A No. It was just the options of stores that were a possibility to open after we proved that we were capable of opening more stores. That might have been part of the option, I guess. But I don't remember the 10 stores.

Q Okay. So just in terms of -- let's just take your evidence as it is. Your evidence is that it was made clear to Macdonald that he should open one store and prove that before he ever thought about opening additional stores; correct? That's your evidence as to what was agreed?

A My evidence is that we -- we had the approval from Western Sleep to go ahead and open one store --

Q M'mm -- hmm.

A -- in Vancouver area, and we had the possibility of options to open other stores in the Lower Mainland and an option of possibly opening up a store in Calgary if we proved ourselves and were successful in our business.

Q You understood that Mr. Macdonald -- let's just accept that for the moment. But you understood Mr. Macdonald's intention, with his willingness to risk $2 million, was to open a large number of Serta-only stores, did you?

A Not true.

Q He never told you that?

A No.

Q What did you think he was prepared to risk $2 million in relation to?

A The limit of money that he wanted to extend doesn't mean he has to spend it all at once.

Q Okay. But was that in relation to one store?

A That was the limit he was going to go to.

Q Okay. In relation to what?

A The business.

Q Yes. How many stores?

A No mention of how many stores.

[86] There is considerable merit to Western's argument that the alleged term that Canadian Bedding "would invest the monies necessary to open ten or more" stores is too vague. How much must Canadian Bedding invest? Who decides what is necessary to open ten or more stores? It is difficult, if not impossible, for a court to enforce any such term. However, I do not have to rest my rejection of this term of the Agreement on a finding that it is not sufficiently certain. Rather, I accept the evidence of Mr. Hankin as to the extent of the discussion between the parties. The plaintiff did not commit to invest the money necessary to open ten or more stores. Rather, Mr. Macdonald indicated in his discussions that he would invest funds to open up a store, or a number of stores, to pursue the concept of Serta-only retail stores. As Mr. Hankin stated, Mr. Macdonald had set a $2 million limit as the

maximum amount he was prepared to invest or lose on this project. However, Mr. Macdonald did not commit to invest all of that, let alone to open ten stores. He could stop at any time he wanted.

[87] While it is evident from Mr. Harris's notes that Mr. Macdonald referred to ten stores at the Burnaby Meeting, (and I accept those notes as accurate), all that Mr. Macdonald said was that sales of Serta products to ten Canadian Bedding stores would be the same as the sales of Serta products to approximately 30 Sleep Country stores. This is because Sleep Country carried all three major brands and Canadian Bedding only carried Serta. Furthermore, I accept the evidence of Mr. Hankin and the evidence of Mr. Jones that there was no discussion about the total number of stores that Mr. Macdonald would open. As of the Burnaby Meeting, the parties were focusing on opening one store. Mr. Macdonald had aspirations to open more stores, and indeed, was very keen to do so. However, there was no agreement that Canadian Bedding would open ten stores or that it (or Mr. Macdonald) would invest the funds necessary to do that. The statement at the Burnaby Meeting about ten stores being the equivalent of 31 Sleep Country stores could not be interpreted as a commitment by Canadian Bedding to open ten stores.

> b) Canadian Bedding would have first right of refusal as to the opening of any such potential stores in all other parts of Alberta and British Columbia.

[88] My discussion above sets out some of the evidence relating to the alleged right of first refusal. I have also indicated in my discussion of Mr. Macdonald's credibility how his evidence about the alleged right of first refusal varied over the course of the litigation. Given the variations and inconsistencies in Mr. Macdonald's versions, I cannot accept his evidence of the discussions regarding the extent of the exclusive right to open Serta-only stores.

[89] Instead, I accept the evidence of Mr. Hankin and the language in Mr. Harris's memo from the Burnaby Meeting as accurately describing the discussion about the right of first refusal. All of the witnesses agreed that Canadian Bedding asked for and was promised the exclusive right to open Serta-only stores in the Greater

Vancouver area. The witnesses also agreed there was discussion about Western granting to Canadian Bedding the exclusive right to open Serta-only stores in Calgary and Edmonton. As indicated by Mr. Hankin and noted in Mr. Harris's memo, no one thought that the stores would be successful in Edmonton. The perception was that it would be too difficult to take on The Brick in its hometown. There was also discussion about opening in other locations in B.C. but Western again felt that this was not viable as the other cities and municipalities were not large enough to support a store.

[90] There is no credible evidence to support a finding that there was any agreement regarding a right of first refusal outside of the three cities mentioned in the discussions: Greater Vancouver, Calgary and Edmonton. With regard to those cities, the issue is whether the discussions reached the point where there was sufficient certainty of the terms. Western argued that the essential terms for a distribution agreement include: scope of territory, term of the agreement, and price (including volume rebates and advertising contribution). It relies on ***Delisle Foods Ltd. v. Glen S. Case Investments Inc.*** (1998), 37 B.L.R. (2d) 174 (Ont. C.A.) for the proposition that where parties are negotiating a distribution agreement they will not be found to be *ad idem* merely because they have an oral understanding. They need to agree on essential terms. Here, Western stresses that there was no agreement on the following matters:

a) Was Canadian Bedding receiving a right of first refusal or an option?

b) Did Canadian Bedding have to seek Western's approval with regard to the opening of any particular store?

c) What was the term of the agreement?

d) What prices were offered for mattresses and other products? What volume rebates and contributions to advertising was Western obligated to provide?

[91] There is merit to the argument that there were significant terms of the Agreement that were not discussed at the two meetings. However, this is one of those cases where the parties each believed that some form of agreement was reached after the meetings. They moved forward with their business relationship and governed themselves in accordance with their understanding of the arrangement for almost two years. In these circumstances courts look to the subsequent conduct of the parties to assist in determining what agreement was reached. That is what the court did in ***Delisle***, although in that case the court also had the benefit of an exchange of draft written agreements.

[92] Here, Western sold mattresses and other products to Canadian Bedding for almost two years at agreed prices and on terms set out in the Customer Matrix. Western did not permit anyone else to open a Serta-only store in the Greater Vancouver area. No Serta-only stores were opened by Canadian Bedding or anyone else in Calgary or Edmonton.

[93] In these circumstances, I do not have to critically analyze the certainty of the terms relating to the right of first refusal. It is sufficient to conclude that Western did grant to Canadian Bedding the exclusive right to operate Serta-only stores in Greater Vancouver, Calgary and Edmonton. In doing so the parties agreed that Canadian Bedding would purchase mattresses at prices and on terms offered by Western in accordance with the Customer Matrix. The parties did not agree on the period of time that Canadian Bedding would have the right of first refusal. In the circumstances of this case there is no basis to imply any such term. The mattress sales were based on a purchase order arrangement. As long as Canadian Bedding paid for the mattresses in a timely manner, Western would continue to sell to it. I conclude that the right of first refusal had the same condition attached to it. As long as Canadian Bedding kept its accounts in good standing, it would have the right of first refusal to open new Serta-only stores in the three cities.

c) Canadian Bedding would purchase “Serta” products of Western on terms that were to be at least as competitive as those offered to any other retailer of Western “Serta” products.

[94] I have set out Mr. Macdonald’s evidence regarding the promise of a level playing field. Mr. Jones’ evidence on that issue is set out in the following passage:

Q All right. And you agreed with Mr. Macdonald that he would be on a level playing field with Mr. -- with Sleep Country, didn't you?

A Yes.

Q And you understood that by -- and, Mr. Jones, I'm not trying to suggest that it was only Sleep Country. Your -- am I right to state that your evidence would be that Mr. Macdonald expected -- and you agreed with him -- that he would also be on a level playing field with other retailers that you supplied?

A I said that I make sure that all of my customers are competitive in the marketplace.

Q And that's what you meant when you said that he would be on a level playing field, is that he would be competitive with his competitors?

A Correct.

Q And that goes for Sleep Country as well, doesn't it?

A Correct.

Q That the plaintiff would be competitive with Sleep Country in the marketplace; correct?

A Correct.

Q That is what you agreed to, isn't it?

A Correct.

[95] As Western argues, the difficulty with the discussions between the parties at the two meetings is that they spoke in extremely general terms. Mr. Macdonald wanted Canadian Bedding to be on a level playing field, and Mr. Jones assured him that Western would provide Canadian Bedding with Serta products on terms that would make it competitive in the marketplace.

[96] The first difficulty with this alleged term is that there was no agreement that Western would offer products on terms that were “<u>at least</u> as competitive as those offered to any other retailer of Western...” (emphasis added). In either side’s version of the discussion, there was no commitment that the terms offered by Western would be equal to or better than those offered to other competitors. Western did not

propose that any terms offered would be “at least” as competitive as those offered to others.

[97] The second difficulty is that in order for an agreement to be reached the parties must have agreed on the essential terms. Essential terms for the sale of mattresses would include price, terms of payment, delivery and contributions to advertising. Given the way the mattress industry operates, the parties knew that those matters would be agreed upon on a yearly basis. They knew that Western would offer a line-up of mattresses from which Canadian Bedding could choose. At the same time, Western would indicate the prices, time of delivery once ordered, terms of payment and terms of contributions to advertising. Canadian Bedding would negotiate those matters on an annual or continuing basis.

[98] At the Burnaby Meeting, two of those matters were specifically discussed as set out in Mr. Harris’s notes:

> ... [Western] [w]ill name the range of mattresses and sofa beds and will supply a quarterly marketing strategy. Serta will deliver to our warehouse in West 6th free of charge every Friday for all orders received before Tuesday morning.

[99] The parties knew that they would discuss the “range of mattresses and sofa beds” and negotiate an agreement on the prices. At some time after October 7, 2004, this was done for the 2005 sales year. It was also done in late 2005 for the 2006 sales year. It was anticipated, in the ordinary course of the mattress industry, that it would be done again in subsequent years. However, both parties understood when they sat down to negotiate which mattresses to purchase each year, there was no obligation on the part of Canadian Bedding to agree to purchase any type or number of mattresses. Of course, the only time that Canadian Bedding was ever obliged to purchase a mattress was after it delivered a purchase order.

[100] These circumstances must be looked at in the context of the analysis set out in ***Bawitko Investments***: did the parties contract to arrive at an agreement containing specific terms and conditions at a later date? In other words, were all the requisites for the formation of a contract fulfilled at the time of the oral discussions?

Alternatively, was this a situation where the essential provisions intended to govern the contractual relationship were not settled or agreed upon or were too general or uncertain to be valid without further negotiation and refinement?

[101] The circumstances here are better described by the latter situation than the former. The parties knew that further negotiations and agreements would be required and would continue to be required as long as the relationship was in place. That is the nature of the business. At the same time, there certainly was an offer which was accepted by Canadian Bedding, that Western would provide mattresses for sale to it on competitive terms. However, this offer and acceptance was simply too general to form the basis of an enforceable agreement, especially since Canadian Bedding had no obligation to purchase anything, or indeed, to remain a Serta-only store.

[102] A further difficulty with the alleged term is that it would be impossible to enforce given the peculiarities of the industry. Western did not sell the same products to Sleep Country, the Brick, or the Bay that it sold to Canadian Bedding. While the mattresses had many similarities, they had different names, specifications and appearances. When the products are different, it is difficult to compare the competitiveness of the terms offered.

[103] In summary, Western did agree to offer Serta products to Canadian Bedding on competitive terms. That offer, and its acceptance by Canadian Bedding, does not result in an enforceable agreement. In any event, there is no suggestion that the terms offered to Canadian Bedding for the purchase of Serta products were not competitive with terms offered to other retailers.

> d) Western would supply Canadian Bedding with the latest line of “Serta” products on a timely basis for their first appearance on the market and no later than such products would be supplied to its competitors, including Sleep Country.

[104] This is the most critical term of the Agreement. Canadian Bedding says that Western’s failure to live up to this commitment resulted in the failure of its stores.

The only support for this alleged term in the evidence was in Mr. Macdonald's testimony in chief:

> A ... My -- my response to -- to what he said was positive. I -- I told him that I liked the idea of leveraging the brand. I said that what he said seemed to make sense to me. I told him that I would put up the capital to go forward with the idea. I mentioned an amount of $2 million to him. I specifically said, however, that I need his undertaking that there will be a level playing field. I told him that it's important that the -- that we remain competitive with regards to Sleep Country. He agreed to this point.
>
> ...
>
> Q Do you recall anything that was said as to this issue of "a level playing field" by you and by Mr. Jones, in addition?
>
> A I recall saying that it was important if I was going to commit $2 million that Western ensure that the business is always competitive. By that, I meant, and I possibly said, that the business must pay the same for the product, must get product at the same time, and must receive all the advantages and benefits that Sleep Country receive.
>
> Q Okay. What do you mean by "I possibly said"?
>
> A Well, when I said "a level playing field" to Mr. Jones, Mr. Jones immediately understood what I was talking about.

[105] The frailty of Mr. Macdonald's testimony on this issue is highlighted by his statement that he "possibly said" something about receiving the same product at the same time. This is the only evidence that there was ever any discussion about the timing of delivery of new products. I accept that there was a discussion about Canadian Bedding competing on a "level playing field". However, I reject Mr. Macdonald's evidence that there was any discussion about the timing of delivery of new products. My reasons for rejecting his evidence include the following:

a) Mr. Harris's notes of the Burnaby Meeting do not contain any reference to a discussion, let alone an agreement, about this issue.

b) Mr. Jones and the other Western witnesses denied any discussion or agreement about the timing of delivery of new products.

c) Mr. Hankin did not recall any discussion about a level playing field or the timing of delivery of new products.

d) The suggestion that Canadian Bedding would receive its new line of products at the same time that Sleep Country received its new products is contrary to Western's long-standing business practice. The new product lines were rolled out to different retailers or retail groups at different times.

e) It would have been extremely difficult, if not impossible, for Western to have rolled out new product to Sleep Country and the independents, such as Canadian Bedding, at the same time. As I indicated above, Western produces more than 1,000 different SKUs in its factory at any one time. The time and effort involved in rolling out a new line of products for each of its different retailers or retail groups requires it to stagger the rollout dates.

f) It was also contrary to the practice in the mattress industry to roll out new product lines to different retailers or retail groups at the same time.

[106] Mr. Macdonald's suggestion that he "possibly said" something about getting new product at the same time as Sleep Country was seriously challenged in cross-examination. He agreed that there was in fact no discussion about the industry practice of staggering the rollout of new products or the timing of delivery of new products to independent retailers like Canadian Bedding. If the subject was not raised, it is extremely unlikely that Western committed to deliver new products to Canadian Bedding at the same time that they delivered new products to Sleep Country.

[107] It is also telling that when Mr. Macdonald delivered a draft contract to Mr. Jones in November 2005, there was no mention of this term. If there was any such agreed upon term, I would have expected Mr. Macdonald to include it in that draft agreement.

[108] The evidence of Mr. Harris is also contrary to Mr. Macdonald's assertion. Mr. Harris said that the agreement reached with Western was that Canadian Bedding would receive the Independent Line of new mattresses at the same time as other independent retailers. He also agreed that Sleep Country would receive its new line of mattresses either before or after the independent retailers received the Independent Line. In other words, the agreement was that Canadian Bedding would be treated as an independent and would receive the new line of mattresses at a different time from Sleep Country.

[109] I conclude that the parties did not agree to this alleged term. Indeed, I find that Canadian Bedding was aware of the practice in the mattress industry whereby suppliers would deliver new lines of products to different retailers at different times. Canadian Bedding knew of this through Mr. Hankin. Mr. Harris also understood this at the time that the two meetings were held. With that knowledge, Canadian Bedding accepted that it would receive new mattress lines at the same time as other independent retailers and at a different time than Sleep Country received their new lines.

[110] Given my conclusions on this issue, I do not need to consider Canadian Bedding's argument that such a term should be implied in the Agreement on the basis of the principles set out in ***The Moorcock*** and similar cases. However, I should note that my findings regarding Western's practice and the industry practice of the timing of delivery of new lines to independents and major retailers precludes a conclusion that business efficacy requires the alleged term to be included in any agreement reached between the parties.

e) Western would supply Canadian Bedding with first class quality "Serta" products.

[111] Mr. Macdonald believed that Serta products, manufactured by Western, were good quality products. This was one of the reasons that Canadian Bedding proceeded with its plan for Serta-only stores. However, there was no evidence of any discussion about such a term of the Agreement. There were no promises or

representations about the quality of the Serta products. Canadian Bedding does not rely upon any implied term as to quality of the products. There is no substance to the assertion that this term formed part of the Agreement. In any event, the evidence established that Western replaced any products that were defective. Further, its return rate for defective product was lower than the return rates for other retailers, including Sleep Country.

> f) Canadian Bedding would have the exclusive right to use the "Serta" name and logo to advertise the said stores and could, again on an exclusive basis, hold the said stores out as being "Serta" only stores.

[112] Western was prohibited under the terms of its agreement with Serta International from authorizing any retailer to use the Serta name outside of the logo. At the Burnaby Meeting it was agreed that Canadian Bedding could use the Serta logo but not the Serta name without the logo. This is reflected in Mr. Harris's notes of that meeting:

> Name settled as Serta Sleep Gallery. Can use entire Serta logo and Sleep Gallery in the same font, but not the word Serta without the balance of the logo. Can put logo on letterheads and business cards.

[113] The suggestion that it was agreed that Canadian Bedding had "the exclusive right to use the "Serta" name and logo" is without any substance. Every retailer who purchased Serta mattresses was permitted to use the Serta name and logo to assist in marketing Serta products. There was never any discussion that Canadian Bedding would be granted the exclusive right to use the Serta name and logo.

[114] The allegation that Canadian Bedding could, on an exclusive basis, hold its stores out as Serta-only stores, more accurately expresses the understanding of the parties. As indicated above, Canadian Bedding was given a right of first refusal to open Serta-only stores in Greater Vancouver, Calgary and Edmonton. Within that geographical area Western agreed that it had the exclusive right to hold its stores out as being Serta-only stores.

[115] One issue that arises in relation to this alleged term is whether Canadian Bedding was required to hold itself out as a Serta-only store. Western argues, and I

agree, that the understanding reached between the parties did not require Canadian Bedding to do that. The parties did not agree at the two meetings that Canadian Bedding was prohibited from carrying competing products. In 2006, Canadian Bedding considered that it had the right to purchase products of other manufacturers and it did so. That evidence of subsequent conduct is consistent with the Agreement reached in 2004; Canadian Bedding was free to conduct its business in any way it saw fit and could purchase products from any manufacturer. Of course, as soon as it began to sell products from competing manufacturers, it lost the right to hold itself out as a Serta-only retailer, and the right of first refusal to open Serta-only stores.

g) Western would contribute to the cost of advertising for Canadian Bedding's stores.

[116] There is no question that Western agreed to contribute to the cost of advertising for Canadian Bedding's operations. This is something that Western does for all of its retailers. While there is no doubt that Western agreed to contribute to Canadian Bedding's advertising expenses, there was no agreement as to the amount of any such contribution. It was left to the discretion of Western. More specifically, the parties both understood that Western would indicate each year the amount of co-operative advertising it would provide when it reduced the annual terms to writing in the Customer Matrix and this is what in fact occurred.

[117] Western argues that this term of the Agreement is void for uncertainty. I disagree. Western agreed to provide funding for advertising so long as Canadian Bedding kept its accounts in good standing. The difficulty for Canadian Bedding with this term of the Agreement is that Western could determine, at its discretion, the amount of the funding provided. As I have set out below, Western did in fact provide significant amounts of advertising support to Canadian Bedding. Indeed, its co-operative advertising terms were better than those offered to other retailers.

Conclusions on Issue 1

[118] In summary, Canadian Bedding and Western entered into an Agreement containing the following terms:

1. Western granted to Canadian Bedding the right of first refusal to open Serta-only stores in Greater Vancouver, Calgary and Edmonton. It held that right as long as it maintained its accounts in good standing and operated its outlets as Serta-only stores;

2. Western agreed to support Canadian Bedding by selling Serta mattresses and other products to it on terms set out in a Customer Matrix;

3. Western also agreed to contribute funds to support Canadian Bedding's advertising of Serta products;

4. There was no agreement as to the length of term of the Agreement. Rather, Western agreed to continue to sell products to Canadian Bedding so long as its accounts remained in good standing;

5. Canadian Bedding had the non-exclusive right to use the Serta name with the logo in its advertising and on its store awnings and store fronts;

[119] There was no agreement to provide the latest line of "Serta" products to Canadian Bedding "on a timely basis for their first appearance on the market and no later than such products would be supplied to competitors of the plaintiff, including Sleep Country".

Issue 2. Did Western breach any term of the Agreement?

[120] It will be immediately apparent from my findings regarding the terms of the Agreement that there are no serious issues about possible breaches of the Agreement. The mutual obligations assumed by the parties to the Agreement were not onerous. Western agreed to provide support to Canadian Bedding by offering

competitive terms pursuant to its usual Customer Matrix including co-operative advertising. In exchange, Canadian Bedding agreed to keep its accounts in good standing. The promise that Canadian Bedding believed to be of value – the right of first refusal to open Serta-only stores in Greater Vancouver, Calgary and Edmonton – was only of value if the concept proved successful. Both parties hoped that it would be successful, but if it wasn't successful, Canadian Bedding's only obligation to Western was to pay for product it had purchased. Of course, this agreement was consistent with the agreements that other retailers had with Western and other manufacturers.

[121] It is also immediately apparent that Western did not breach any of the terms of the Agreement. Western did support Canadian Bedding by selling Serta mattresses and other products to it on terms set out in the Customer Matrix. Those terms were competitive with terms offered to other retailers. No other Serta-only stores were opened with the support of Western in any of the three cities covered by the right of first refusal agreement. Western provided advertising funds to Canadian Bedding. It was not obligated to provide more funding for advertising to Canadian Bedding than it did to other retailers, but it did so during the course of the dealings between the parties. Canadian Bedding was permitted to use the Serta name and logo as agreed between the parties. Given my finding that there was no specified length of time to the Agreement, Canadian Bedding cannot complain that Western withdrew support once it fell behind with its accounts receivable. I should note that even in that regard, Western supported Canadian Bedding much longer than it was obliged to do.

Issue 3. Did Canadian Bedding suffer any loss because Western did not supply it with the latest line of Serta products at the same time those products were supplied to Sleep Country?

[122] The lynch pin of Canadian Bedding's case is the allegation that it suffered losses because it did not receive the 2006 line of Serta mattresses at the same time as Sleep Country. Canadian Bedding complained that Sleep Country received the 2006 Perfect Sleepers in late 2005 while it did not receive them until May or June

2006. I have concluded that Western was not obliged under the terms of the Agreement to deliver the 2006 line of mattresses to Canadian Bedding at the same time that it provided the new 2006 line of mattresses to Sleep Country. However, even if I am wrong in that conclusion, I find that Canadian Bedding suffered no loss as a result of any failure on the part of Western to deliver the latest line of Serta mattresses to it at the same time it delivered those products to Sleep Country.

[123] I have arrived at this conclusion for two reasons. First, the evidence from those individuals with experience in the mattress industry compels the conclusion that early receipt of new models is of no advantage to a retailer in the mattress industry. Without exception, the witnesses with industry experience indicated that retailers do not market mattresses on the basis of new models and that the early receipt of new models of mattresses is not a competitive advantage. Second, an examination of Canadian Bedding's actions in early 2006 and the surrounding circumstances also leads to the conclusion that it suffered no loss or disadvantage by not having the 2006 Perfect Sleeper models available earlier.

Canadian Bedding's Arguments

[124] Mr. Harris and Mr. Macdonald asserted that it is important for any mattress retailer to have the latest model of mattress. In addition, they said that Canadian Bedding was placed in an untenable position by being a Serta-only store without the latest Serta mattresses. Canadian Bedding argued that it was analogous to running a car dealership without the current models when your main competitor has them.

[125] The assertion by Mr. Harris and Mr. Macdonald that new models were critical for Canadian Bedding did not stand up to the evidence from knowledgeable people within the industry. There was no credible industry evidence that supported the position. Mattresses are simply not marketed in the same way as cars. The retailers and manufacturers have established a sophisticated system to prevent customers from comparison shopping. That system makes it difficult for a consumer to compare one retailer's products with those from another retailer. The same system makes it difficult to compare last year's models with the new models. The

nature of the product also contributes to the lack of importance of new models; a Perfect Sleeper mattress remains very similar from year to year.

[126] Mr. Harris's attempts to argue that the 2006 Perfect Sleepers with "Whisper Foam" were an important technical advance that could be successfully used to market the products were unconvincing. The foam may have had a new name but it was no different and no "quieter" than the old foam; it was just thinner. His evidence in this regard was mere puffery. It served to highlight an important truth about the industry; mattresses can be marketed on any basis available to the salesperson. In such a market a retailer's success is dependent on competitive pricing combined with superior marketing and salesmanship.

Industry Evidence

[127] The industry evidence on this issue was compelling, starting with the evidence of the witnesses from Western. They indicated that where there is no significant technological advancement in a new line of mattresses, having the new models is not an advantage for retailers in the marketing of mattresses. Rob Vickers, Western's sales manager for B.C., has worked in the mattress industry all of his working life. He had several years' experience in retail marketing of mattresses prior to working with Western. He indicated that the key to success for retailers is to have a good selection of mattresses at attractive price points. I accept his statement that retailers would prefer to have an older model mattress at a lower price to use as a marketing point than to have a new model mattress. Typically, the new models must be sold at a higher price. The only exception to this preference is when a manufacturer comes out with a mattress with a new technology. However, that is a relatively infrequent event. There were no new features incorporated in the 2006 Serta Perfect Sleeper mattresses. Indeed, the Perfect Sleeper line of mattresses has remained substantially unchanged since the mid-1980s.

[128] Mr. Jones and Mr. McKnight confirmed and reinforced the evidence of Mr. Vickers. They also testified that the 2006 model Perfect Sleepers were lower quality mattresses compared to the 2005 Perfect Sleepers because of the reduction

in the amount of foam used in the mattresses. As a result, Canadian Bedding was in an advantageous position as a retailer because it had the 2005 model which was a better mattress at the same price as the new model which had less foam.

[129] Mr. Gunn, one of the founders of Sleep Country, has extensive knowledge and experience in the retail side of the mattress industry. He is the senior Sleep Country employee responsible for product selection, retail strategy and dealings with manufacturers. He indicated that Sleep Country does not use the new mattress model year as a basis for marketing mattresses. He said that Sleep Country does not insist that manufacturers provide new models to it prior to giving the new models to competitors. He agreed that in some years Sleep Country would get the new models first and at other times they would receive them after other retailers. Typically, they use the arrival of a new line of mattresses as an excuse to market last year's models at a discount. I accept Mr. Gunn's evidence on these issues in preference to the statements of Mr. Antonuk that were made out of context and out of his main area of expertise.

[130] Mr. Gunn testified that he would have considered it a retail advantage to have the old model 2005 Perfect Sleeper mattress at the 2005 price available to Sleep Country in 2006. He was not cross-examined on the following evidence:

> Q So when Serta came to you with an inferior bed at the same price, what was your reaction?
>
> A Number one, I wasn't surprised because there had been a big spike in the cost of foam and we hadn't allowed them to pass -- that happened the fall of 2005. We hadn't allowed them to pass that on to us. So at the new bake-off, they had one of two choices as a manufacturer: to increase the price -- keep the foam the same and increase the price of the product or to keep the price of the product the same and decrease the foam. They chose the latter. That's their prerogative. And we simply compared that to offers from other manufacturers and made our decisions in the normal way.
>
> Q If they offered to continue to provide the '05 Perfect Sleepers to you, would you have --
>
> A At the '05 price?
>
> Q At the '05 price. -- what would your reaction have been?
>
> A I would have preferred that. That would have been better value for us.

> Q All right. And if you had a large inventory of 2005 Perfect Sleepers on hand when the '06 models became available from Western, would you consider that a disadvantage to your business?
>
> A Just the opposite. I would have considered it an advantage. As a retailer in a competitive category, you want to have two things. You'd rather have superior product at a given price, and you'd love to have a reason to communicate a sense of urgency to the customer.
>
> One of the things you're trying to do is to get the customer to buy from you and buy from you today. And so if you have a -- if you stocked up on a supply of a superior product and yet it's limited, then that's best of both worlds.
>
> You say, I've got this great product; but don't wait because I don't have it forever; this is last year's; and I've only got this much inventory; and it's about to disappear. So you've got a superior product, and the urgency is a big deal because you want to get them to buy today before leaving your store.

[131] The independent witnesses from other mattress retailers agreed with the evidence of the witnesses from Sleep Country and Western. John Forest is the merchandising manager for mattresses at the Brick. He decides what mattress models the Brick and United Furniture Warehouse (a subsidiary) purchase and display in their retail stores across the country. The Brick sells approximately $180 million in mattress sales each year and is the second largest retailer in the country behind Sleep Country. He testified that he regards the rollout of a new line of mattresses from manufacturers as a way for the manufacturer to increase prices. It is not a welcome event for the retailer. Mr. Forest does not regard the receipt of a new line of mattresses as a retail opportunity to market new and improved features or technology. He said that neither the Brick nor its customers request new models. The Brick has never complained to manufacturers about the timing of delivery of new lines to them compared to their retail competitors. He is not aware of any competitive disadvantage to getting a new line of mattresses later than Sleep Country or its other competitors.

[132] Sandy Seney is the owner of Sandy's Furniture, a furniture and mattress retailer with two stores; one in Coquitlam and one on Vancouver Island. His stores sell more than $1 million in mattresses each year. He also indicated that he does not consider it an advantage or opportunity for the retailer when a manufacturer rolls out a new line of mattresses. Indeed, he considers it an annoyance as it means that

he has to buy new floor models, usually at a higher price. In 2006, Sandy's Furniture did not get the new 2006 Perfect Sleeper until May 2006, five or six months after Sleep Country. He testified that his business did not suffer as a result of receiving the new line of Perfect Sleepers long after Western provided them to Sleep Country.

[133] The evidence of Mr. Seney and Mr. Forest was compelling. They had no reason to mislead the court. They were not seriously cross-examined on these issues.

[134] Mr. Vickers and Mr. Jones also gave evidence about Western's long standing practice of rolling out the new lines of mattresses to different retailers at different times. They indicated that none of Western's customers have ever complained about the staggered rollouts. They indicated that every retailer, at some time, had received its new lines of mattresses later than its competitors, but none of them complained when that happened. Some of the retailers consistently received its new line of mattresses later (e.g. Sandy's Furniture) and did not see this as a disadvantage. If there was an advantage to receiving the new mattresses first, there would be a scramble amongst the retailers to be first in line and there would be a history of complaints to manufacturers from those who did not get the early rollout. There was no evidence of either of these things happening within the industry.

[135] If there was an advantage to selling the new models, Canadian Bedding should have been able to show examples of retailers marketing the arrival of the new model line. In particular, if it was such an advantage, one would have expected Sleep Country to advertise the arrival of the new 2006 line of Perfect Sleepers. They did not do so. In fact, there was no evidence of any retailer doing that in the years that Canadian Bedding was in business. I infer that retailers do not market the new models because of the fact that manufacturers raise the prices on the new line of mattresses. Mattresses are primarily marketed on the basis of some price advantage. Retailers do not focus their marketing efforts on the new mattresses because those are the models with higher prices or poorer specifications.

[136] In summary, the witnesses with extensive experience in the mattress industry were unanimous in their view that the early delivery of a new mattress line to a retailer does not provide that retailer with a competitive advantage.

Canadian Bedding's Actions

[137] The actions of Canadian Bedding in early 2006 are not consistent with the assertion that the lack of new 2006 Perfect Sleepers seriously affected their business. Canadian Bedding did not complain about the planned late rollout of 2006 models to it and the other independents from January to the end of March. I reject Mr. Harris's suggestion that he made any such complaints prior to early April 2006.

[138] Western presented the new line of Perfect Sleepers to Canadian Bedding and the other independent retailers at the end of March. At the same time, Western offered Canadian Bedding an exclusive on the Vera Wang mattresses; a new, high end line of mattresses that were of Perfect Sleeper design. No other store in Greater Vancouver was offered this new line. Western believed, reasonably, that Canadian Bedding would prefer to market this line of mattresses rather than the Perfect Sleeper line. However, Canadian Bedding decided to order a line of Perfect Sleeper mattresses as well as the Vera Wang line. Between April 10 and 13, 2006, Mr. Harris wrote three e-mails complaining about a delay in the new line of Perfect Sleepers. However, these were the only complaints ever made by Canadian Bedding about late delivery of 2006 mattresses. In response to the complaints, Western indicated that Canadian Bedding could continue to sell the old Perfect Sleepers until the new ones were delivered.

[139] Western did continue to make the old Perfect Sleepers available. Canadian Bedding also received the new Vera Wang line of mattresses. In addition, it received three new Perfect Sleeper SKUs in late 2005 (two "cure" mattresses and the "Temagami"). As a result, it had a broader range of Perfect Sleeper mattresses than any other retailer in Greater Vancouver. It had more Perfect Sleepers available for sale than Sleep Country. It continued to order Perfect Sleeper mattresses from Western throughout 2006 and continued to receive every mattress it ordered. As

noted by Western in argument, Canadian Bedding's most popular Perfect Sleeper throughout 2005 and into 2006 was, in fact, a 2004 model, the Claymont. In other words, it had a wide range of Perfect Sleeper mattresses but still had good results from selling the older models.

[140] While Mr. Harris testified that Canadian Bedding was so desperate for the new models that they would have ordered them sight unseen, they did not do so. Rather, Mr. Carruthers, one of their employees, insisted on viewing the available mattresses to select the line-up they wanted. The new mattresses were ready to order on June 5, 2006. However, Canadian Bedding did not order a single new 2006 Perfect Sleeper for at least a month. They continued to order the old 2005 mattresses. Finally, Western had to discontinue the old mattresses to get Canadian Bedding to start ordering the new ones. This evidence completely undermines the assertion that Canadian Bedding was desperate for the new mattresses. It supports the conclusion that the older Perfect Sleepers were better value and easier to market than the new ones.

[141] In summary, Canadian Bedding did not suffer any loss because it did not have the new 2006 Perfect Sleepers in the first part of 2006. It had a broad range of Perfect Sleeper mattresses available to market. It had the better quality 2005 Perfect Sleepers. It also had the new line of Vera Wang mattresses. It had ample product to sell. The 2006 Perfect Sleepers were of so little consequence to Canadian Bedding that it did not even order them once they were available.

[142] Canadian Bedding's business failed for other reasons. Given my conclusions, I do not need to analyze the reasons for the failure. However, it was evident that there were five main reasons:

a) The expansion of the business to ten stores was carried out with little or no planning;

b) The heavy reliance on print advertising was a mistake and the overall marketing was inadequate;

c) The single source niche mattress store model was not a good idea. Both United Furniture Warehouse and Sandy's Furniture had attempted this approach with poor results;

d) Canadian Bedding's management and business planning were woefully inadequate; and

e) The most important factor in mattress sales, after marketing, is having top quality sales staff. Sleep Country has a sophisticated training program that has been critical to its success. Canadian Bedding had very few experienced salespeople. It provided no training and inadequate management for its sales employees.

Issue 4. Has Canadian Bedding proved an actionable civil conspiracy?

[143] Given my finding that there was no breach of the Agreement, there is no need to consider the allegation that Sleep Country induced a breach of contract by Western. The conclusions I have reached on Issues 2 and 3 also mean that Canadian Bedding cannot succeed with its claim based on the tort of conspiracy.

[144] To establish a claim in conspiracy, the test set out in ***Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.***, [1983] 1 S.C.R. 452, at 471-72 must be met:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the

> defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[145] Canadian Bedding's case is based on the second branch of the test. It alleged that Western and Sleep Country conspired to engage in unlawful conduct towards Canadian Bedding, knowing that, in the circumstances, injury would likely result to it. The unlawful conduct alleged against Sleep Country was the actions it took to induce Western to breach the Agreement. Those alleged breaches were the wrongful conduct engaged in by Western. Given my finding that Canadian Bedding has not proved any breaches of the Agreement, it cannot succeed with a conspiracy claim based on the second branch of the test in ***Canada Cement***. There is no unlawful conduct that it can rely upon to form the basis of the conspiracy claim.

[146] At the start of the trial, Mr. Barker, counsel for Canadian Bedding, advised that it would be difficult to prove conspiracy based on the first branch of the test, even though the pleadings allege a conspiracy on that basis. He said that Canadian Bedding could not prove that the predominant purpose of the defendants' actions was to cause injury to it. Canadian Bedding made no attempt during the trial to prove that the predominant purpose of any of the actions of the defendants was to cause injury to Canadian Bedding. This is understandable. The actions of Sleep Country and Western, however those actions are regarded, had the obvious business purpose of furthering their own interests, rather than causing injury to Canadian Bedding. In these circumstances, Canadian Bedding did not attempt to prove, and did not prove, that the predominant purpose of the defendants' conduct was to cause injury to it.

[147] There are two other reasons why Canadian Bedding has not proved conspiracy under the first branch of the test in ***Canada Cement***. First, my conclusion that Canadian Bedding suffered no loss as a result of the delay in delivery to it of the 2006 line of Serta mattresses precludes any finding of a conspiracy. In order to prove conspiracy, the claimant must prove actual damage resulting from the conduct of the conspirators. In the Second Further Amended

Statement of Claim, the particulars of the conspiracy are all premised on the alleged late delivery of the new 2006 line of Serta mattresses to Canadian Bedding. It is alleged that the defendants conspired to release the new line of Serta mattresses to Sleep Country late in 2005 and to delay the supply of those mattresses to Canadian Bedding for several months. I have found that this delay did not cause any loss to Canadian Bedding. It cannot prove an actionable conspiracy because it cannot show any loss caused by the conduct of the defendants.

[148] Second, my finding that Canadian Bedding agreed it was to receive the Independent Line of mattresses at the same time as the other independents, precludes any finding of a conspiracy. This is the only conclusion possible from the way in which the conspiracy is pleaded. The actions that form the basis of the conspiracy all relate to the timing of the delivery of the new lines of mattresses. If those lines were delivered to Canadian Bedding at the times that it expected to receive those mattresses, it cannot complain that there was a conspiracy to injure it by that conduct. That conduct was exactly what it expected having entered into the Agreement with Western.

[149] In summary, the claims advanced by Canadian Bedding under both branches of the conspiracy test against Sleep Country and Western are dismissed.

Summary

[150] I have concluded that Western and Canadian Bedding entered into an oral Agreement as a result of the two meetings between the parties in the fall of 2004. However, the mutual obligations of the parties were very limited in nature. Western did not breach any of the terms of the Agreement.

[151] In addition, Canadian Bedding did not suffer any loss because it did not have the 2006 line of Serta mattresses delivered to it at the same time as Sleep Country received the 2006 line of Serta mattresses.

[152] All of Canadian Bedding's claims against Western and Sleep Country are dismissed, whether based on breach of contract, inducing breach of contract or conspiracy.

[153] Finally, Western is entitled to judgment against Canadian Bedding on its counterclaim for the Inventory Debt in the amount of $621,430.05 plus contractual interest at 24%.

[154] Western and Sleep Country are also entitled to costs. If the parties cannot agree on the scale of costs, they can make arrangements through trial scheduling to make submissions in writing or, alternatively, to obtain a date to appear before me to make oral submissions.

"Butler J."