
CANADA / JUDGMENT

AME Distribution Inc. v. Wang

2018 BCSC 426

COURT

Supreme Court of British Columbia

DECIDED

19 March 2018

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2018 BCSC 426 AME Distribution Inc. v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

AME Distribution Inc. v. Wang,

2018 BCSC 426

Date: 20180319

Docket: S153988

Registry: Vancouver

Between:

AME Distribution Inc.

Plaintiff

And

Yuanji Wang, carrying on business as

Coastal Metal Depot

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

Vincent Y. Guo

Counsel for the Defendant:

Simon Lin

Place and Date of Hearing:

Vancouver, B.C.

February 13, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2018

Introduction

- [1] The plaintiff, AME Distribution Inc. ("AME"), claims that it entered into a verbal contract with the defendant, Yuanji Wang, carrying on business as Coastal Metal Depot, in or about April 2014 (the "Contract"). The Contract related to six vacuum table machines (the "Machines") and required the defendant to do some upgrade work to the Machines (the "Upgrade Work").
- [2] This is a summary trial brought by the plaintiff for judgment for the sum of \$38,710 for breach of contract, for the defendant's negligence as a bailee or as an occupier under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA].
- [3] The defendant alleges that the Contract was made with a different corporate entity, claims that the Upgrade Work was performed, that the plaintiff failed to pick up the Machines, and pay the final price for the Upgrade Work performed.
- [4] In the counterclaim, the defendant seeks judgment for \$22,400 for the plaintiff's breach of the Contract for failure to pay the defendant after the completion of the Upgrade Work.
- [5] The defendant takes the position that the matter is not appropriate for a summary trial on a number of grounds, and that the summary trial should be delayed to permit cross-examination on affidavits.
- [6] There is no trial date set.

Background Facts

- [7] The plaintiff, AME, is a company registered under the laws of British Columbia with a registered office at 1415 Purcell Drive, Coquitlam, British Columbia. It is in the business of supplying industrial machines.
- [8] Jen Der Lin was the manager of AME and acted as an agent for AME at all relevant times.

- [9] The defendant, Yuanji Wang, is alleged to carry on business as Coastal Metal Depot, a business operating as a sole proprietorship with its registered office at 2130 Hartley Avenue, Coquitlam, British Columbia.
- [10] Nam Myong (also known as Nam Wang) was an employee and agent of the defendant. He is Mr. Wang's son.
- [11] The defendant is alleged to operate a workshop at 9434 193A Street, Surrey, British Columbia (the "Premises").
- [12] The plaintiff claims it entered into the verbal Contract with the defendant to do the following Upgrade Work on the Machines:
- a) remove the original mechanical arm system and install a new mechanical arm system on each Machine;
 - b) upgrade the internal vacuum system on each Machine; and
 - c) install a grounding cable on each Machine.
- [13] The plaintiff claims that the Upgrade Work on the six Machines was to be performed on the Premises for a payment of \$30,000 plus tax on the following terms:
- a) \$10,000 plus tax upon the delivery of the Machines to the defendant's Premises, entitling the plaintiff to pick up two updated Machines from the defendant; and
 - b) \$5,000 plus tax upon the plaintiff selling each of the third through sixth upgraded Machines to the plaintiff's customers, at which point the plaintiff would be entitled to pick up the Machines from the defendant.
- [14] In April 2014, the defendant picked up the six Machines from the plaintiff's rented storage facility and delivered them to the Premises.
- [15] On April 22, 2014, Coastal Metal Depot issued an invoice for the sum of \$10,000 plus tax in accordance with the terms of payment.
- [16] Mr. Lin deposes that AME paid the invoice in May 2014. Mr. Myong deposes that the invoice was paid in June 2014. It suffices to say that it was paid between May and June 2014.
- [17] In November 2014, Mr. Lin received a call from Mr. Myong, advising that the Upgrade Work was complete and requesting payment of \$20,000 for the remaining four Machines.
- [18] On November 24, 2014, Mr. Myong emailed Mr. Lin confirming that:
2. Your (Six) Vacuum tables, once you are satisfied with them, please set a deadline to move them out as well. I will accommodate storing it in my shop for the time being, but I need deadlines so that I don't store them indefinitely at no charge.
- (One) Vacuum table retrofit was estimated to be \$5,000.

\$10,000 has already been paid from AME in advance, for (Two) Vacuum tables, which you can take at any point.

3. I propose that you pay for the remaining (Four) Vacuum tables, at a cost of \$20,000 and take them. If you think otherwise, please let me know what you suggest.

[19] On December 8, 2014, Mr. Lin responded, noting that it had been six months since the \$10,000 had been paid and requesting a time to come and inspect the Machines.

[20] Mr. Lin inspected the six Machines in December 2014 and noted the following deficiencies:

- a. the vacuum valves did not close completely;
- b. there were leakages in the vacuum filter boxes and along the edges of the vacuum areas, causing a loss or significant diminishment of the vacuum function;
- c. the grounding cables were missing;
- d. the mechanical arms did not move freely across the vacuum table surfaces; and
- e. warning signs needed to be added to the brush protective lids.

(collectively, the "Deficiencies")

[21] On December 15, 2014, Mr. Lin emailed Mr. Myong and advised of the Deficiencies.

[22] Later on December 15, 2014, Mr. Myong advised that all leaks had been closed on the Machines. He requested that Mr. Lin come and see the Machines to advise what else needed to be done.

[23] Mr. Lin understood that the Premises were closed for business from December 19, 2014 until January 2015.

[24] On January 23, 2015, Mr. Myong advised that the six Machines were completed "last year", that he was running out of room at the shop, and that he may have to move them outside the following month.

[25] Later on January 23, 2015, Mr. Lin responded, requesting to attend at the Premises on January 29, 2015, so that he could check the six Machines. He advised that between August and October 2014 he had four inquires for the Machines but he had not had any inquires in the last two months. He reiterated that the arrangement was for the plaintiff to "pay \$5,000 each from the 3rd one if we take. That means you will keep machines well".

[26] On January 29, 2015, Mr. Lin attended at the Premises and inspected the Machines. The only remaining Deficiencies were missing grounding cables and hazard stickers.

[27] On February 4, 2015, Mr. Myong confirmed that the only missing Deficiencies were the hazard stickers and grounding cables and that these were to be dealt with. However, he disputed that the defendant ever agreed to store the Machines.

- [28] On February 5, 2015, Mr. Lin emailed Mr. Myong and reminded him that Mr. Wang had agreed that for the third Machine and "the followings", payment would only be needed when they were sold.
- [29] On February 18, 2015, Mr. Myong confirmed that the Upgrade Work was complete on the Machines and that the plaintiff could pick up two of the Machines immediately and the other four Machines upon the payment of \$5,000 each. Mr. Myong warned that he would be placing the Machines outside for storage by the end of February.
- [30] On February 19, 2015, Mr. Lin sought clarification on whether the defendant wanted all six units moved or only two units. He further confirmed that the \$5,000 per Machine would only be paid after each of the units were sold.
- [31] Later on February 19, 2015, Mr. Myong advised that he was not prepared to release all the Machines until payment was made. He threatened to remove the work that was done on the six Machines unless full payment was made. He further threatened to leave the Machines outside for pick up on the public road. He advised that the Machines would be left outside on February 23. He threatened to remove all the work performed on the Machines, and stated that he would sell the arms and other parts to the plaintiff for \$5,000, but after the plaintiff had made its sales.
- [32] On February 28, 2015, Mr. Lin attended at the Premises. He deposes that the Machines were not outside, in the workshop, or on the public road.
- [33] On April 6, 2015, Mr. Lin was advised by Mr. Wang that the Machines had been placed in the yard. Mr. Lin attended at the Premises and discovered the Machines had been placed outside in the yard exposed to the elements, and had suffered damage including rust and water damage. In addition, the upgraded mechanical arms had been removed from the Machines, and the original mechanical arms had not been replaced.
- [34] The plaintiff claims that the Machines were so extensively damaged that they were unsaleable and of no value, except as scrap metal.
- [35] The Machines have been kept by the defendant, who claims that they are still in full working order.

Issues

- [36] The issues raised by the pleadings, evidence and submissions are:
- Is the matter suitable for resolution by a summary trial?
 - Has the correct legal entity been sued?
 - What were the terms of the Contract?
 - Was there a breach of the Contract?

- e. Was the defendant a bailee, and if so, what is the nature of the bailment?
- f. Is the claim subject to the OLA?
- g. What damages has the plaintiff suffered?

Threshold Issue of Suitability for Summary Trial

Plaintiff's Position

- [37] The plaintiff claims that the factual issues are not complex and that the only two issues are the terms of the Contract respecting the storage of the Machines and the scope of the work completed.
- [38] The terms of storage provide for only two possibilities: either, (1) the plaintiff did not have to pay for Machines three to six until it sold them, but the defendant had to release the Machines to the plaintiff without receiving payment; or (2) the defendant had to keep the Machines on its Premises until the plaintiff sold them, and then the Machines would be picked up and the payment would be made.
- [39] The plaintiff's position is that the defendant breached the Contract regardless of the interpretation.
- [40] The plaintiff contends that the scope of the work to be completed is clear, and the only issue is when the work was completed. This does not warrant a full trial or a cross-examination on the affidavit evidence.
- [41] Furthermore, the plaintiff asserts that it would be further prejudiced if this matter is not determined by way of a summary trial, and that the amount at issue is such that a summary trial is the appropriate process.

Defendant's Position

- [42] The defendant submits that the court cannot find the necessary facts to decide the legal and/or factual issues, and that it would be unjust to determine the issues at a summary trial.
- [43] The defendant asserts that oral testimony is required to determine the oral terms of the Contract and to assess the credibility of Mr. Lin.

Legal Principles

- [44] Rule 9-7(15) of the Supreme Court Civil Rules [Rules] authorizes the court to grant judgment in favor of a party on the hearing of a summary trial application unless "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion it would be unjust to decide the issues on the application." The decision as to the suitability of a summary trial is discretionary.

[45] This Rule distills to a consideration of two critical factors:

1. Are there sufficient facts before the Court in which to make the necessary findings of facts or law?
2. Is it unjust to decide the case on a summary trial application?

[46] The concept of proportionality is codified in Rule 1-3, which states that:

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

- (a) the amount involved in the proceeding,
- (b) the importance of the issues in dispute, and
- (c) the complexity of the proceeding.

[47] The importance of the summary trial process is best captured in the comments of Karakatsanis J., in the opening paragraphs of *Hryniak v. Mauldin*, 2014 SCC 7 [Mauldin]:

- [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
- [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
- [3] Summary judgment motions provide one such opportunity.

- [48] The question to be asked is whether the expense and delay of a full trial is required to obtain a just result after a fair process. In considering this question, the factors mentioned in the oft-cited case *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), cited in *Davies v. Canada Shineray Suppliers Group Inc.*, 2016 BCSC 1853 at para. 32, should be considered:
- [32] *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) remains the leading authority on the principles to be applied in deciding the issue of suitability for summary trial. Chief Justice McEachern, writing for the Court of Appeal, identified some of the factors the court may consider in determining whether it would be unjust to give judgment, including the amount involved, the complexity and urgency of the matter, any prejudice likely to arise by reason of delay, the cost of taking the case forward to conventional trial, and the course of the proceedings to date. Other factors include whether the summary trial would take considerable time, whether credibility is a critical factor and has cross examination occurred, and whether the summary trial may create unnecessary complexity in the resolution of the dispute or "result in litigating in slices": *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369.

Analysis

- [49] In my view, this case is suitable for a summary trial disposition. The following factors support this finding:
- a. The amount at issue is just above the Small Claims Court's jurisdiction, and the procedure of a summary trial process is one that fits the nature of this claim.
 - b. The matter is not complex and has been outstanding since May of 2015. If a trial is now scheduled, it would likely be over a year away. Litigants are entitled to prompt judicial resolutions. There is some urgency to having the matter resolved, as the Machines are still being kept by the defendant at their Premises.
 - c. The cost of taking the matter forward to a conventional trial is out of proportion to the amount of the claim. The use of sworn affidavit evidence and submissions of counsel are legitimate means of arriving at a just result.
 - d. The summary trial was argued in less than a day.
 - e. There are some credibility factors but none that are critical to the findings to be made.
 - f. There is little that would be gained in permitting cross-examination of the affiants.
 - g. This summary trial will resolve the issues between the parties, and as such, the concern of "litigating in slices" does not arise.
- [50] I conclude that there is sufficient evidence before me to find that this is an appropriate case to make a determination by way of a summary trial process and it would be just to do so.

Correct Legal Entity

Defendant's Position

- [51] The defendant took the position at the summary trial that the plaintiff had sued the wrong entity, submitting that the plaintiff entered into the Contract with Mogil Modular Structures Corp. (now renamed Mogil Holdings Ltd.) ("Mogil").
- [52] It asserts that the defendant, Mr. Wang, is a retired businessperson, whose son, Mr. Myong, manages the day-to-day business of Mogil.
- [53] It was Mogil that at all material times operated out of the Premises and held a business licence, which was displayed on the Premises.
- [54] The defendant was acting as an agent for Mogil in entering into the Contract.

Plaintiff's Position

- [55] The defendant admitted as true, in the response to civil claim filed June 11, 2015, the following paragraphs of the notice of civil claim filed May 14, 2015:
- [3] The Defendant, YUANJI WANG, carrying on business as COASTAL METAL DEPOT, is a company operating as a sole proprietorship with its registered office at 2130 Hartley Avenue, Coquitlam, British Columbia.
- [4] The Defendant operates a workshop located at 9434 193A Street, Surrey, British Columbia (the "Premises")
- [5] In or about April 2014, the Plaintiff entered into an oral agreement (the "Agreement") with the Defendant in relation to six vacuum table machines belonging to the Plaintiff (the "Machines").
- [56] An amended notice of civil claim was filed on September 26, 2016, and the amended response to civil claim filed October 13, 2016 made the same admissions.
- [57] There was no issue raised in the response or in the amended response that the defendant was incorrectly identified.
- [58] The counterclaim filed June 11, 2015 repeated the statement of facts contained in paras. 1 to 20 of Part 1, Divisions 2 and 3 of the response to civil claim, which includes the admissions made at paras. 3, 4 and 5 of the notice of civil claim. In the counterclaim, the defendant further set out the legal basis of its claim as:

VI. Coastal Metal's claim against AME is for breach of contract. Coastal Metal and AME entered into the Agreement whereby Coastal Metal agreed to carry out the Upgrade Work and AME agreed to pay Coastal Metal for the same. Coastal Metal completed the Upgrade Work but AME failed to pay Coastal Metal.

- [59] There has been no application made by the defendant to withdraw the admissions made in the response and amended response, in accordance with Rule 7-7(5) of the Rules. Furthermore, there has been no amended counterclaim filed to amend the claim made by Coastal Metal Depot against AME.
- [60] The plaintiff takes the position that it is entitled to rely upon the admissions made by the defendant in the pleadings.
- [61] A statement of registration of sole proprietorship from the BC Registry Services confirms that Mr. Wang has, since April 7, 2010, registered as a business name Coastal Metal Depot, operating as a sole proprietorship. The plaintiff further points out that the invoice dated April 22, 2015, for the Upgrade Work for two of the Machines, was rendered by the defendant under the name of Coastal Metal Depot.

Legal Principles

- [62] The object and function of pleadings were well summarized by Voith J. in *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 16-20 [Sahyoun]:
- [16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...

- [17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."
- [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

- [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.
- [20] In *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170, Justice Parrett confirmed that the essential purpose of pleadings is to define the issues, giving the opposing parties notice of the case they have to meet and to provide the "boundaries and the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions" (para. 27).
- [63] Rule 7-7(5)(c) provides that:
- (5) A party is not entitled to withdraw
 - (c) an admission made in a pleading, petition or response to petition
- except by consent or with leave of the court.
- [64] *Goundar v. Nguyen*, 2013 BCCA 251 at paras. 21 and 28, Harris, J.A. discussed Rule 7-7(5):
- [21] The rule is of general application and there are no stated exceptions to, or limitations on, its application to these circumstances. The rule is one of the legal rules that govern the conduct of civil actions in the province to promote the object of the Rules. It is a part of the general law applicable to the conduct of actions and is part of the legal framework within which admissions may be made and, in the appropriate circumstances, withdrawn. The application was to withdraw an admission brought under and governed by the rule. I do not think that the fact that the genesis of the admission made in the pleading was an agreement limits the application of the rule permitting admissions in pleadings to be withdrawn.
- [28] Allowing the withdrawal of an admission is a discretionary matter

Analysis

- [65] The defendant has not sought to withdraw the admissions made in the response and amended response. As mentioned, the defendant admitted that it was the entity that entered into the Contract with the plaintiff. Moreover, the invoice issued was in the name of Coastal Metal Depot, which is a sole proprietorship operated by Mr. Wang. The argument of the defendant that the correct entity has not been sued has no merit in light of the admissions made in the pleadings and the evidence of the invoice.

Terms of the Contract

- [66] The terms of the Contract for the scope of the Upgrade Work and for the fee schedule is agreed between the parties. The scope of the Upgrade Work included among other things, "[g]eneral upgrades to the machines to conform to Canadian safety standards."

- [67] With respect to the terms of payment, of significance is the affidavit of Mr. Myong, in which he deposes at paras. 16 and 20 that:
16. The payment for AME's work order was that the upgrade work would be charged at \$5,000 per machine for six machines. The fees for the first two machines would be paid up front and Mogil would extend credit for the fees for the remaining machines, which would be paid to Mogil once AME sells each of the four machines.
 20. The arrangement with AME was the machines would be picked-up from Mogil's premises once they complete a satisfactory inspection of the machines.
- [68] I accept that this evidence accurately represents the payment terms of the Contract. It does not appear that the parties discussed the issue of storage costs if the Machines were not picked up on a timely basis.
- [69] The evidence supports that the Upgrade Work was not completed until February 4 to 18, 2015. Mr. Myong deposes that "[p]rior to the conversation on November 25, 2014, the upgrade work for all six machines were already completed", and that "Mr. Lin visited our premises again on or about January 29, 2015 and confirmed that the machines were satisfactory". These statements are inconsistent with email correspondence submitted into evidence. I note the following:
- a. In an email dated December 15, 2014, Mr. Lin wrote in part that, "[h]ope you could improve the leakages, and add the warning sign on the brush protective lid and the ground cable per the inspector's request last time".
 - b. In an email dated February 4, 2015, Mr. Myong wrote that, "I understand that a hazard sticker, and grounding cable is the only deficiency you came across--which will be taken care of".
 - c. In an email dated February 18, 2015, Mr. Myong wrote that, "I wish you would pick up your 2 units, and handle the rest of the 4 units--they are all complete with no deficiency."
- [70] I give weight to the email history, as it is contemporaneous and also consistent with the affidavit of Mr. Lin, in which he deposes that he inspected the Machines on January 29, 2015, and that "there were still some remaining Deficiencies with the Machines, including missing grounding cable attachments and hazard stickers, which are necessary to conform to safety regulations".
- [71] Unfortunately by February 18, 2015, the communications between the parties had become adversarial. What is clear is that by February 19, 2015, the defendant took the position, contrary to the Contract, that before the Machines could be picked up, the defendant would have to pay in full. Mr. Myong deposes that "[p]rior to preparing the machines for pick-up I removed the upgrade work done by Mogil from four of the machines and notified AME that we can immediately restore the upgrade work to the machine, upon payment of the \$5,000 fee for payment of that machine." This was not part of the initial bargain reached.

- [72] I am satisfied that the defendant breached the Contract by attempting to unilaterally change the terms, requiring the plaintiff to pay for all of the Upgrade Work prior to releasing the Machines and prior to the plaintiff selling the four Machines.
- [73] In hindsight the deal that the defendant reached may not have been a prudent business decision, but, as Mr. Myong deposes, the rationale for this payment plan was to "foster better business relations and to develop more goodwill with clients".
- [74] Mr. Myong admits in his affidavit that he decided to change the terms of the Contract because he became concerned that payment might not be made. He states that, "it became obvious to me that there was a significant risk that AME would not pay for our work should we release the machines. Thereafter, I determined that we should not extend further credit to AME and sought to make proper payment arrangements". It is not the right of the defendant to unilaterally change the Contract terms for payment.
- [75] As I have found that the defendant breached an express term of the Contract, I need not address the defendant's submissions on implied contractual terms, aside from the submission that there is an implied term that items brought in for repair are to be picked up within a reasonable time: see e.g. *Davis v. Henry Birk & Sons Ltd.* (1982), 41 B.C.L.R. 137 at para. 7 (C.A.). As the defendant breached the payment terms only a day after communicating the completion of the Upgrade Work, I do not find that the plaintiff's conduct has been unreasonable.
- [76] For the same reason, I reject the defendant's submission that Mogil is entitled to a repairer's lien. The case at hand, i.e., a contract in which a vendor has agreed to extend credit and postpone collection, is very factually different from the case cited by counsel for the defendant, *Rayner v. Corvette*, [1988] B.C.J. No. 320, in which the vendor billed an amount in excess of what was agreed, and then incorrectly sold the chattel. Moreover, the court in *Rayner* held that the vendor failed to comply with statutory requirements. This authority is not persuasive, and no other statutory or case authority has been submitted on the point.
- [77] I find that the defendant breached the terms of the Contract, and as such, the plaintiff is entitled to damages for the breach.

The Defendant as a Bailee

- [78] Although I have already found that the defendant breached the Contract, I will still address the plaintiff's submission that the defendant owed a duty of care as a bailee and that it breached the duty.
- [79] The plaintiff submits that the defendant was a bailee for reward, as it stored the Machines on its Premises as part of the overall Contract for the Upgrade Work: see *Robertson v. Stang*, 1997 CanLII 2122 at paras. 57 and 66 (B.C.S.C.) [Robertson]. The plaintiff submits that the defendant should be held to the standard of "due care and diligence" (at para. 66).

[80] As the defendant held the Machines for the benefit of both parties in the performance of the Contract, I find that the defendant was a bailee for reward, and the standard of care required in storing the Machines was due care and diligence. This entails that the defendant take reasonable steps to ensure that the property does not sustain damage while in its care. The evidence supports that the defendant breached this standard by leaving the Machines outside, exposed to the elements. I accept the statement of Mr. Lin that the "Machines contain sensitive electronic and mechanical parts" that are "not designed to be waterproof". Photographs submitted into evidence by the plaintiff show water on the Machines and visible rust spots. This is not mitigated by Mr. Myong's statement that "Mr. Lin did not advise me at any time that the machines cannot be placed outdoors".

Occupier's Liability

[81] On the basis of my bailee determination, and pursuant to s. 9(d) of the OLA, the plaintiff's claim under the OLA can not be maintained: see also Robertson at para. 84.

Damages

[82] The plaintiff seeks damages in the amount of \$38,710 for the breach of contract, or in the alternative for the defendant's failure to meet its standard of care as a bailee. The amount is composed of the following: replacement costs of the six original Machines (\$4,585 each), and the return of the deposit (\$11,200 including taxes).

[83] The fundamental principle in assessing damages for breach of contract is that the plaintiff is to be placed in the same position he or she would have been had the contract been performed. In *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129 at para. 23 (C.A.), the Court of Appeal quoted McLachlin J. (as she then was) in *Ritcher v. Simpson* (1982), 37 B.C.L.R. 325 at 327 (S.C.), for the following proposition:

The fundamental principle in assessing damages for breach of contract is that the plaintiff is to be placed in the same position he would have been had the contract been performed. A qualification on this principle is that he is not entitled to recover losses which he could have avoided by taking reasonable steps; that is, he is obligated to mitigate his loss. While damages are most often assessed as of the date of breach, this is not an absolute rule; the court has power to fix such other date as may be appropriate in the circumstances.

[84] The circumstances of the case at hand justify deviating from the usual approach of fixing damages at the date of the breach. In this case, the initial breach occurred on February 19, 2015, when Mr. Myong took the position that payment was required for the defendant to release the Machines. It is not precisely clear when the defendant began storing the Machines outside, but the evidence supports that it most likely began in late February or early March 2015. For example, on February 19, 2015, Mr. Wyong emailed the defendant that, "I will be leaving your machines outside this coming Monday 23rd Feb"; furthermore, the defendant has submitted into evidence historical precipitation records in Coquitlam for

February and March 2015. I do note, however, that Mr. Lin deposes that he visited the Premises on February 28, 2015 and did not see the Machines on the sidewalk or in the yard.

- [85] Therefore, at the time of initial breach on February 19, 2015, the damage for which the plaintiff now seeks a remedy may not yet have materialized. However, because of the nature of the breach, i.e., the defendant failing to relinquish possession of the Machines, the plaintiff was not in a position to adequately mitigate losses during the period in which the Machines were stored outdoors. As the Machines are still currently in the possession of the defendant, I find that damages are to be assessed based on the value of the Machines when inspected by Mr. Lin.
- [86] Mr. Lin deposes that the damage to the Machines "was so extensive that the Machines had no more commercial sale value except as scrap metal." In response, Mr. Myong deposes that he has tested the Machines since April 2015 and they are in full working order as of today. As Mr. Lin is in the business of sales and distribution for industrial equipment and the photo evidence shows rust on the Machines, I accept that the value of the Machines was significantly impacted by being placed outside unprotected from the elements.
- [87] The plaintiff submits that to be put in the same position it would have been in had the Contract been performed, the appropriate award is \$38,710. The circumstances of this case make it difficult to assess the plaintiff's economic position had the Contract been performed, as the full performance of the Contract was contingent on the sale of the four Machines to third parties, and I have insufficient evidence on the details of the potential sales. However, because the sought amount is limited to the import costs of the Machines, plus the deposit, I am satisfied that \$38,710 is sufficient to put the plaintiff back in the position it would have been in had the contract been performed and that it is a just result.
- [88] I find that the defendant is entitled to keep the Machines. If they are in the working condition that the defendant asserts it can take steps to sell the Machines. If they are not in working condition than the Machines can be scrapped. The defendant is entitled to keep whatever value it recovers from the selling or scrapping of the Machines.
- [89] Based on all of the above findings, I also dismiss the defendant's counterclaim.
- [90] The plaintiff is entitled to its cost on Scale B.

"The Honourable Madam Justice Forth"

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