

CANADA / JUDGMENT

Blackwell v. Found Aircraft Canada Inc.

2009 BCSC 296

COURT

Supreme Court of British Columbia

DECIDED

6 March 2009

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2009 BCSC 296 Blackwell v. Found Aircraft Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blackwell v. Found Aircraft Canada Inc.,

2009 BCSC 296

Date: 20090306

Docket: S074849

Registry: Vancouver

Between:

John Blackwell

Plaintiff

And

Found Aircraft Canada Inc., Found Aircraft Development Inc.

and N. K. (Bud) Found

Defendants

Before: The Honourable Madam Justice Wedge

Reasons for Judgment

Counsel for the Plaintiff

R. J. McDonell

A. C. Karlen

Counsel for the Defendants Found Aircraft Canada Inc. and Found Aircraft Development Inc.

R. W. Cooper

Counsel for the Defendant N. K. (Bud) Found

G. K. Steele, Q.C.

S. L. Hamilton

Date and Place of Trial/Hearing:

December 8 - 12, 2008

Vancouver, B.C.

I. Introduction

Overview

- [1] John Blackwell greatly admired a small aircraft known as the FBA-2C (the "2C"), designed in the early 1960s by Bud Found and manufactured by his company, Found Brothers Aviation ("Found Brothers"), in Ontario. Mr. Blackwell bought several 2Cs for use in the operation of his fishing lodges in northern British Columbia.
- [2] Many years later, Mr. Blackwell and Mr. Found began corresponding. Mr. Found told Mr. Blackwell that he dreamed of designing a new and better aircraft known as the Bush Hawk FBA-2E (the "Bush Hawk 2E") based, if possible, on the design of the original 2C. Mr. Blackwell thought he could help realize the dream. He had an old damaged 2C bearing the registration number CF-SVD ("SVD"). He offered SVD's parts to Mr. Found to develop the new Bush Hawk 2E.
- [3] In April of 1996, the two men entered into an agreement (the "Agreement") under which Mr. Blackwell would provide SVD's parts to Mr. Found. In return, Mr. Found would rebuild SVD to an airworthy condition, use it as a demonstrator, and then modify it to the new Bush Hawk 2E specifications. Failing success in that endeavour, Mr. Found would return SVD's parts to Mr. Blackwell, who would also have the benefit of any work performed on the aircraft.
- [4] Mr. Blackwell sent SVD's parts to Mr. Found in Ontario. Found Aircraft rebuilt SVD and used it as a demonstrator, but decided that it could not be modified to the specifications of the Bush Hawk 2E. Mr. Found offered to keep SVD and deliver a new Bush Hawk to Mr. Blackwell at a significantly reduced price. Mr. Blackwell declined that offer, preferring to have SVD returned. On July 4, 2001, after performing some additional work on SVD, Mr. Found advised Mr. Blackwell the aircraft was available for pick-up. Mr. Blackwell's son flew SVD back to British Columbia in May 2002.

- [5] On July 17, 2007, Mr. Blackwell commenced this action against Mr. Found and Found Aircraft.

The Dispute and Its Resolution

- [6] The narrow issue is the interpretation of the Agreement between Mr. Blackwell and Mr. Found.
- [7] Mr. Blackwell argued that Mr. Found was required by the terms of the Agreement to restore SVD to an airworthy condition and to the specifications of the Bush Hawk 2E. Once Mr. Found made SVD airworthy, which he did, he was obligated to provide Mr. Blackwell with a Bush Hawk, which he failed to do. Mr. Blackwell also argued that Mr. Found deprived him of the use of SVD in his business operations for several years.
- [8] Mr. Found, Found Aircraft Canada Inc., and Found Aircraft Development Inc. (collectively, the "Found Defendants") argued that Mr. Found's only obligation under the Agreement, in the event that he could not modify SVD to the new Bush Hawk 2E specifications, was to return SVD to Mr. Blackwell. Not only did Mr. Found return SVD, but he returned a rebuilt aircraft that far exceeded the worth of the badly damaged SVD parts Mr. Blackwell originally provided to him.
- [9] The Found Defendants argued further that Mr. Blackwell's action was untimely as a result of the Limitation Act, R.S.B.C. 1996, c. 266. According to the Found Defendants, the cause of action crystallized on July 4, 2001, when Mr. Blackwell was told he could take possession of the SVD. As the action was not commenced until July 17, 2007, it was time-barred.
- [10] For the reasons that follow, I have concluded the Found Defendants' interpretation of the Agreement is the correct one.
- [11] Having reached that conclusion, I have not addressed the timeliness issue raised by the Found Defendants.

II. Facts

History of the 2C Aircraft

- [12] Mr. Found, along with his two brothers, began Found Brothers in about 1945. He developed a prototype for a small, rugged bush plane. The first aircraft produced by Found Brothers, which was completed in about 1955, was known as "FBA-2A". The company then began working on the 2C, which was modelled on the first aircraft.
- [13] Found Brothers began marketing model 2C in 1964. Initially, the aircraft was well-received, capturing approximately 10% of the market for comparable aircraft across Canada. Mr. Found received several awards for the design of the aircraft.

- [14] The 2C was a labour of love. Although it enjoyed some popularity, it was not a money-making proposition. The company produced only 27 of the aircraft. Mr. Found left the company, unwillingly, in 1965. Found Brothers manufactured the Bush Hawks for three years before deciding to discontinue its production and focus on a new type of aircraft. The company did not do well, however, and closed its doors in 1969.
- [15] Mr. Found moved on to other business endeavours (which proved much more lucrative than aircraft design), but he never lost his enthusiasm for the aviation industry. In approximately 1992, Mr. Found began writing a book about his early years as an aircraft designer and the development of the Bush Hawk. Although the evidence is not entirely clear, it appears that he began contacting individuals who owned or operated a 2C. One of those individuals was Mr. Blackwell.

The Offer of SVD and the Agreement

- [16] Mr. Blackwell operates a "fly-in" fishing and hunting lodge, known as Moose Lake Lodge, approximately 45 miles north of Anahim Lake, British Columbia. He has operated the lodge since the late 1970s. He also owns a sister lodge at the mouth of the Dean River, approximately 70 miles west, which has been in operation since 1991. Both lodges are remote, accessible only by float planes.
- [17] Mr. Blackwell owns several 2Cs. He uses them to ferry clientele and supplies to his lodges.
- [18] In April 1988, Mr. Blackwell purchased SVD for \$13,000. It was old and bore the scars of much use. He planned to use SVD in his lodge operations. On April 23, 1988, as Mr. Blackwell was flying SVD from Manitoba to Moose Lake, British Columbia, he ran out of fuel and was forced to make a precautionary landing. SVD suffered significant damage to its undercarriage, airframe, tail, and wing.
- [19] As a result of the accident, SVD was no longer airworthy. Mr. Blackwell did not rebuild the aircraft. He learned of another aircraft in Manitoba, and purchased it. He stored SVD under a tarp near Fraser Lake, British Columbia, where it remained, untouched, for eight years.
- [20] In 1992, Mr. Found and his spouse took a road trip to Alaska. At various points on their way, they visited with individuals who had owned 2Cs. Many of those 2C owners remained enthusiastic about the aircraft, and urged Mr. Found to consider putting a modified 2C known as the Bush Hawk back into production. Mr. Blackwell was among the 2C enthusiasts that Mr. Found visited. It became apparent that Mr. Blackwell shared Mr. Found's dream of building a new Bush Hawk. Mr. Blackwell wanted an aircraft with a 300 horsepower ("hp") engine and newly designed wing flaps known as "Fowler Flaps". The 2C flew with a 260 hp engine and did not have Fowler Flaps.

- [21] The 2C had been out of production for so many years that it no longer had the required certification, known as a "Type Certificate", issued by Transport Canada. Moreover, Mr. Found knew the technology of the 2C was outdated. After some consideration, Mr. Found decided that the most expedient manner of proceeding was to take an existing 2C, reinstate the Type Certificate for it, and transfer it to a modified 2C prototype.
- [22] Mr. Found's plan was to design, from the 2C, the new Bush Hawk 2E. At the time, he did not know whether, in fact, it would be possible to build the new aircraft by simply modifying the 2C.
- [23] The first step was to locate an existing 2C. Mr. Found and Mr. Blackwell began exchanging correspondence. It was Mr. Found's recollection that the two men initially discussed using one of Mr. Blackwell's airworthy 2Cs. Eventually, the discussion turned to SVD, which was one of the last 2C models produced by Found Brothers. Mr. Blackwell told Mr. Found about the damage SVD had suffered many years earlier, and that it had remained under a tarp since the accident. Further discussion ensued, and eventually Mr. Blackwell offered SVD's parts to Mr. Found.
- [24] In early 1996, Mr. Found and Mr. Blackwell exchanged proposals concerning the use of SVD in the program to create the new Bush Hawk 2E. They did not seek legal advice at any stage of their discussions. Mr. Blackwell typed the Agreement reflecting the ongoing discussions between the two men, and sent it to Mr. Found for his review.
- [25] On April 9, 1996, Mr. Found faxed Mr. Blackwell a handwritten note which states, in part, the following:

I have your contract & everything is OK but would appreciate softening the delivery date in accordance with my suggestion on Apr. 5.

Second para would read:

At Dec. 30, 1997 (or a date to be mutually agreed). This is due to the extensive modifications we anticipate when we install the 300 hp.

P.S. If everything works out I expect to give you a new A/C & we will keep SVD as a prototype.

Can you describe the accident that damaged SVD. It will help understand the extent of the damage.

- [26] Both men contributed to the wording of the Agreement, which was signed April 18, 1996, by Mr. Found and returned to Mr. Blackwell with a note reiterating Mr. Found's request to "soften the December 30, 1997, delivery date".
- [27] The provisions of the Agreement material to the dispute are as follows:

Blackwell will supply Found with the damaged and used aircraft bearing the registration CF-SVD, a Found Brothers aircraft model FBA2C. It is recognized that all of this airframe will need some repair and overhaul to bring to an airworthy condition, and that some parts are missing.

Found will assemble and repair and overhaul the components supplied by Blackwell, and will supply additional parts as needed to make this aircraft airworthy by Transport Canada standards. Found will use the aircraft for a time as a demonstrator, then will modify it into a Model FBA2E. The FBA2E model will be stress tested for a 300 horsepower engine. At December 30, 1997* Found agrees to deliver the aircraft to Blackwell at no cost except for the cost of the engine, propeller, and instruments. These three components will be priced at the cost Found purchased the items for, less the percentage of value depreciated by the hours of use and age of the items.

Should Found fail to rebuild the components into an airworthy aircraft, all parts will be returned to Blackwell in a condition as good as when they were delivered to Found, or Found will pay Blackwell the sum of \$50,000.00. In the event that some repair and overhaul has been done when the parts are returned to Blackwell, there will be no compensation paid to Found unless Blackwell voluntarily agrees to pay for some costs incurred by Found in the repair and overhaul.

[28] There is a handwritten note at the bottom of the first page of the Agreement which states:

*As per letter of April 18, 1996,

Change to read

"At December 30, 1997 (or a date to be mutually agreed) Found agrees to deliver .etc."

[29] It was common ground that the estimated cost of the components for which Mr. Blackwell was responsible was as follows: \$61,000 for the engine, \$5,000 for the propeller, and \$5,000 for the instruments.

The Rebuilding of SVD

[30] Mr. Found created a new company known as Found Aircraft Development Inc. ("Found Aircraft"). He rented space in a hangar at Georgian Bay Airport, just south of Parry Sound, Ontario, where the work on SVD was to be performed.

[31] Mr. Blackwell arranged to have his son, Sid Blackwell, take SVD's parts by truck to Georgian Bay. The restoration of SVD required additional parts at a cost of approximately \$60,000. In accordance with the Agreement, the cost of the parts was borne by Found Aircraft. Sid Blackwell picked up the parts in Hudson, Ontario, on his way to Parry Sound.

[32] SVD's parts arrived on April 10, 1996, approximately a week before the Agreement was signed. Mr. Found discovered, when he inspected SVD's parts upon their arrival, that the damage to the aircraft was significantly greater than he had anticipated. The damage extended inboard from the wing to the fuselage area. Because of the damage to the centre wing, the aircraft was no longer a rigid load-carrying structure. There was also extensive damage to the undercarriage of the plane. Mr. Found was concerned about insidious damage

that the aircraft may have suffered as a result of the accident. However, Mr. Found decided he could repair SVD with additional parts Found Aircraft had purchased.

- [33] The first step in the plan was to rebuild SVD for use as a demonstrator. The original 2C had flown with a 260 hp engine. Mr. Found anticipated that the SVD would be used primarily to test the stability of the 2C model with engines of greater horsepower. Mr. Found hoped to design an aircraft that could fly with a 300 hp engine. Mr. Found's concern was that the design of the 2C might not accommodate the larger engine.
- [34] The rebuilding of SVD took approximately six months. On November 26, 1996, Found Aircraft began test flights with SVD. Shortly before that date, Mr. Blackwell and Mr. Found entered into a one-year lease agreement. The lease gave Mr. Found custody and control of SVD until November 18, 1997.
- [35] Mr. Found had also obtained the original 2C drawings from the estate of the individual who had taken over Found Brothers in 1966. He retained an engineer, William McKinney, to work with the 2C drawings to design the Bush Hawk 2E. Mr. McKinney and a team of engineers created a computer model from the 2C drawings from which they worked on the new design. That work was carried on simultaneously with Mr. Found's work rebuilding and test flying SVD.
- [36] Mr. Found's plan was to obtain the reinstatement of the 2C's Type Certificate, and then transfer it to the new Bush Hawk 2E when its design was complete. The 2C was certified under regulations that had, over time, been amended significantly. Mr. McKinney testified that SVD played no role in the reinstatement of the Type Certificate for the 2C. That was achieved by his engineering team, working from the drawings and reports, and ensuring compliance with the new regulations.
- [37] Mr. Found provided Mr. Blackwell with progress reports from time to time. As the termination date of the lease approached in November 1997, Mr. Found sought and obtained an extension to November 1998.
- [38] As the design work progressed on the Bush Hawk 2E, it became apparent to Mr. Found that SVD could not be modified to the new specifications. In order to give the aircraft greater weight-bearing capacity and the structural stamina to fly with a 300 hp engine, the engineering team concluded it was not possible to keep the old airframe design. The new Bush Hawk 2E required a completely redesigned airframe.
- [39] The wing of the new Bush Hawk 2E was newly designed. The 2C's wing was in three pieces; the wing of the new Bush Hawk 2E consisted of a single piece. The newly designed wing was attached to the fuselage in a different manner. The fuselage itself was completely redesigned to accommodate the new landing gear. Instead of one long steel tube, the fuselage was divided in half with the forward fuselage (the cabin) constructed from steel and the rear fuselage made from aluminum.

- [40] According to Mr. McKinney, there was a domino effect that occurred during the redesign. One change led to another, and then another. Structurally, the 2C (which included SVD) could not accommodate the design changes. At best, it could operate as an upgraded 2C (which was later called a "2C-1").
- [41] SVD was last used for test flights in September 1998. After that time, a newly designed prototype was used for test flights.
- [42] There may have been some telephone discussions between Mr. Blackwell and Mr. Found in 1998 about SVD, but neither could say with certainty when the discussions occurred or their contents.
- [43] The first correspondence of substance was a letter from Mr. Blackwell to Mr. Found dated November 30, 1998. In that letter, Mr. Blackwell asked to have SVD returned to him. He states, in part, the following:

I am happy to learn that the new Bush Hawk airplane is completed and flying, and very pleased that it is performing well.

Regarding the transfer of SVD to me, I suggest you should transfer the Aircraft Registration to me as soon as possible[.] I believe that all the one-off approvals that were issued for the modifications to the aircraft will remain in effect, and can be used by anyone operating the aircraft.

Our written agreement states that you will deliver SVD to me in flying condition. Since you obviously need the engines and props for demonstration of the new Bush Hawk, I suggest that you install the 260 [hp] engine and a serviceable prop (if available), and I will come to Gravenhurst and fly SVD to my home, remove the engine and prop and ship to you.

Our agreement also states that you will deliver the aircraft to me on December 30, 1997 or a date mutually agreed on. I knew you needed the aircraft to complete the testing and demonstrations, so I did not press you about it, I know what business can be like and knew that you had an enormous task to complete and did not need to be confronted with negotiating a return date.

On April 9, 1996, you faxed a letter to me that says in part "If everything works out, expect to give you a new aircraft & we will keep SVD as a prototype." Based on this statement and the fact that you were able to use SVD nearly a year longer than we had first projected with no complaint from me, I had assumed that if finances did not permit sending a new aircraft, you would be sending SVD back to me with a serviceable engine and prop at no cost to me.

Please transfer the registration as soon as possible, then consider the contents of this letter and reply at your convenience.

- [44] Mr. Found wrote to Mr. Blackwell on December 27, 1998. He first gave Mr. Blackwell the following progress report on the Bush Hawk 2E program:

We have nearly completed the current phase of our flight test program for the 3200 lb gross weight Bush Hawk configuration with the 260 hp and 300 hp engines. All test flights and performance assessment were at 3250.

Our regional division of Transport Canada has recommended Provisional Type Certification on wheels with 260 hp and hopefully Ottawa will sign it this week.

.

We talked to Transport Canada about transferring the STC [the Type Certificate] and they say it can be done. According to the attached letter it is not straight forward but we should have more on this when people return after January 4.

[45] On the issue of the return of SVD to Mr. Blackwell, Mr. Found explained that the aircraft could not be modified to the new Bush Hawk 2E specifications. He asked Mr. Blackwell to consider taking delivery of a new Bush Hawk and leaving SVD with Found Aircraft. On that issue, the letter states as follows:

Referring to your letter of November 30, I believe the best approach would be to trade SVD for a new Bush Hawk but I don't believe our slim resources will allow this without some compensation. However, I think we should really explore the merits of this.

Following are some of the negatives which should be considered about SV[D]:

It is airworthy for our requirement but it still shows the scars of hard use, which were visible when you bought it. Even though we spent over \$60,000 on additional FBA-2C components it would require considerably more money to make it acceptable for commercial service. (You should see our temporary mount for the right front seat).

...

SVD can operate only as an upgraded FBA-2C at 3000 lbs. It cannot be realistically modified into a Bush Hawk due to the extensive airframe modifications that have been designed into the new version.

When I set out to return SVD to you I didn't give much thought to the above but the more I think about it, I believe a new Bush Hawk with limited compensation to cover the purchased components will place you much further ahead.

[46] A new Bush Hawk was worth well in excess of \$200,000.

[47] Mr. Blackwell replied by letter dated February 14, 1999, advising Mr. Found of his decision to have SVD returned to him, and the reasons for his decision. His letter states, in part, as follows:

After giving it much thought, I have decided to bring SVD back to B.C. My decision is based on the dependence of the need for a spare machine in the event of a problem with one of my aircraft during the middle of a season. I would be able to carry on with little down time, which is why I purchased SVD in the first place. I would still be interested in negotiating a deal with you on a new Bush [H]awk when you are caught up on production.

I would like for you to see about registering SVD in my name, and I would like to fly it home with your engine and prop installed, I will remove and ship back to you the engine and prop immediately on arrival here. I would like to do this sometime between March 15 and April 20, but may fit in to your schedule if that is not a good time for you.

[48] On March 5, 1999, Transport Canada issued a Type Certificate for the 2C and an upgraded model known as 2C-1. The 2C-1 contained improved features and modifications to the 2C but it also flew with a 260 hp engine.

[49] Ultimately, Mr. Found did not develop a Bush Hawk 2E. Instead, he continued design and testing on an aircraft known as the Bush Hawk XP, which was to have a 300 hp engine and Fowler Flaps. The new flaps were an improvement because they contained a hinge which modified the shape of the wing during landing, thereby allowing for more precision when landing the aircraft.

[50] On March 18, 1999, Mr. Blackwell again wrote to Mr. Found to address the issue of the return of SVD. He asked Mr. Found for his thoughts on the following proposal:

It was good to visit with you about the progress of the certification of FBA2C and FBA2C1.

I may have come up with a solution to how to bring SVD back without putting either of us in a bind.

I could lease the aircraft to you again, you register it in your name so that we could fly it under the permit you had for testing it with the 300 [hp] engine, install the 300 [hp] engine and fly it home, remove the engine and prop on arrival here and ship them back to you, then register the aircraft back to me.

[51] Mr. Found responded on March 23, 1999:

Your idea of using the [300 hp] to fly SVD out may work. We are looking at the logistics of this and will contact you. Our first look has turned up all kinds of problem[s] you wouldn't expect but none insurmountable.

[52] On March 26, 1999, an employee of Found Aircraft by the name of J.W. McPhee wrote to Mr. Blackwell to say he had been advised by Mr. Found that SVD was to be returned to British Columbia. Mr. McPhee enclosed a form from Transport Canada to complete registration of SVD back to Mr. Blackwell, and asked that Mr. Blackwell return the form to him for processing with Transport Canada.

- [53] Mr. Blackwell's evidence, which was confirmed by Mr. Found, was that initially the parties agreed SVD would be flown back to British Columbia with a 260 hp engine. However, Mr. Found then advised him that the company required that engine for a Bush Hawk that was sold to a customer in Alaska. Mr. Blackwell proposed, as an alternative, that a 300 hp engine be installed, and Mr. Found agreed.
- [54] On July 11, 1999, Mr. Found faxed Mr. Blackwell a handwritten note to advise that Found Aircraft was installing the 300 hp engine in SVD and expected to have the aircraft ready to fly at the end of the month.
- [55] What occurred between July 1999 and June 2000 is unclear. No written communications passed between the two men during that time. Their memories were, to say the least, inexact. Mr. Blackwell testified that he placed telephone calls to Found Aircraft on several occasions to inquire about the return of SVD and grew tired of the delays. For that reason, he said, he decided in the spring of 2000 not to wait for the installation of a 300 hp engine. Instead, he removed the engine from one of his old 2Cs and shipped it to Found Aircraft for installation.
- [56] Mr. Found testified that he recalled Mr. Blackwell sending his own engine sometime in the spring of 2000, but that it required a different fuel injection system and other modifications to SVD to accommodate the engine. On June 1, 2000, Mr. Found faxed a note to Mr. Blackwell listing a number of parts he required for the installation of Mr. Blackwell's engine in SVD.
- [57] Mr. Blackwell did not sign the Transport Canada form for the transfer of SVD back to him until July 8, 2000, at which time he mailed the form back to Mr. McPhee.
- [58] On August 30, 2000, Mr. Blackwell faxed a note to Mr. McPhee advising that he had, on that day, mailed the required SVD parts by priority post. Mr. McPhee faxed a response on September 21, 2000, providing an update on the installation of the parts Mr. Blackwell had sent. He advised Mr. Blackwell that one of the parts he had sent for the propeller, a spinner, did not fit the SVD propeller. Mr. McPhee inquired about the availability of another spinner with a back plate matching the SVD propeller. He also advised Mr. Blackwell that once the work was completed, Transport Canada would inspect SVD for the purpose of issuing a flight authorization permit (a "Ferry Permit").
- [59] For various reasons, SVD did not qualify for what is known as a Certification of Airworthiness issued by Transport Canada. The Ferry Permit was issued for the sole purpose of returning SVD to British Columbia by its crew. The permit did not allow carriage of any passengers.
- [60] Mr. Blackwell's fishing and hunting operations are busiest from April 1 to November 1 of each year. Mr. Blackwell was too busy during those months to retrieve SVD or arrange for someone else in his business to do so. For that reason, the parties talked about a target date of March 31, 2001, for the return of SVD to British Columbia. Mr. Blackwell's son was to travel to Ontario and fly SVD back to Moose Lake Lodge.

- [61] The Ferry Permit for SVD was issued by Transport Canada on February 21, 2001.
- [62] In late 2000 or early 2001, Mr. Found sold his interest in Found Aircraft. By that time, the company had begun to produce the Bush Hawk XP, which had Fowler Flaps and flew with a 300 hp engine. By letter dated February 22, 2001, Mr. Found advised Mr. Blackwell of the change of ownership in the company.
- [63] One of the new owners, Tony Hamblin, began discussions with Mr. Blackwell about the return of SVD. On March 20, 2001, Mr. Blackwell wrote a lengthy letter to Mr. Hamblin describing his understanding of the Agreement.
- [64] Mr. Blackwell described his preliminary discussions with Mr. Found about the features he wanted to see in a new Bush Hawk, the most important being a 300 hp engine and Fowler Flaps. He chronicled the discussions leading to the Agreement, the delivery of SVD to Found Aircraft, his decision to seek the return of SVD, and the problems surrounding his request that an old 2C engine be installed in SVD for the flight back to British Columbia. Mr. Blackwell then described as follows the events that occurred in late 2000 and thereafter:

In October [2000], Bud asked me to come to Ontario and fly the new aircraft with Fowler flaps, he offered to pay my way there. He also stated he would repair SVD to minimum status to get a ferry permit to return to me, and sell me one of the new Bush Hawks already Built for \$40,000. I did not want to do this because the Bush Hawk with 260 hp engine without Fowler flaps would not do my job much better than my present Found's [2Cs]. I intended to go back and fly the new Found, look the factory over, and negotiate a settlement with Bud, but my wife's mother was very ill so I went to Oregon instead. [W]hen I began to get back to business I called Bud to see what was happening with SVD, and learned about the changes in company management.

It is now time to settle this. I have been promised a fully rebuilt aircraft, and a new aircraft.

I am entitled to have SVD totally rebuilt - this would take a year to do, now I would be six years into the deal. The solution is to repair SVD to C of A [certification of airworthiness] condition - one week in a good shop, give me a new Bush Hawk with 300 hp engine and Fowler flaps, and commission me to be your West Coast sales agent.

- [65] Mr. Found responded on April 16, 2001, upon his return from a trip abroad. He stated, in part, the following:

It is unfortunate that you rejected my offer in 1998 for you to acquire a new Bush [Hawk] which was available at that time. I believed we could establish this on terms favourable to you and you could begin operating an aircraft which is greatly superior to the FBA-2C even though it was certified for the 260 engine, but we knew the 300 H.P. engine could be installed when the certification could be completed.

At that time we couldn't comment on the flaps or cuffs because they had not been developed.

Following your request in your Feb[.] 1999 letter to have SVD instead of a new Bush Hawk, we proceeded to make it airworthy with the 260 hp engine and related systems installed[.] When you requested we use your 0540 & propeller, we removed the 260 engine, reworking the related systems back to the FBA-2C configuration proved to be very time consuming and costly (we couldn't properly test the system until we received your last spinner). We also had to confirm your particular engine and propeller system could be used in the FBA-2C.

[66] On July 4, 2001, Mr. Hamblin wrote to Mr. Blackwell on behalf of Found Aircraft. He advised Mr. Blackwell of his view that returning SVD to him, with a flight permit, was the fairest way to resolve the dispute. He went on to say the following:

Our view rests largely on the fact that Bud Found, in a letter to you dated December 27, 1998, offered to provide you with a new Bush Hawk with compensation from you to cover the purchased components, rather than return SVD to you.

Your response, in a letter dated February 14, 1999, stated: "After giving it much thought, I have decided to bring SVD back to B.C."

To Found Aircraft, that was a very clear decision on your part to pass on the offer of a new Bush Hawk with compensation, in favour of having SVD returned to you. As Bud Found indicated in his letter to you dated April 16, 2001, we spent a lot of time and money on SVD to follow your instructions.

At the present time, SVD is at the Muskoka Airport awaiting your pick-up.

[67] SVD had been at the Muskoka Airport, ready to be flown back to British Columbia, since late February 2001.

[68] Mr. Blackwell replied to Mr. Hamblin by letter dated August 1, 2001. Among other things, he indicated that he did not accept Mr. Hamblin's position and would be turning the file over to his lawyer. He wrote to Mr. Hamblin again on August 17, 2001. In that letter, he offered the following:

I will agree to absolve Found Aircraft Canada from all liabilities resulting from loss of use of SVD and from breach of original agreement if I am given a new Bush Hawk XP. I will act as sales agent in my area for sales commissions paid at the rate of 10% to pay off \$50,000 which I agree to pay as full purchase price of the aircraft. If the sales commissions do not total \$50,000 in five years, I agree to pay the balance in cash.

[69] Mr. Hamblin did not accept Mr. Blackwell's offer. In a letter dated September 4, 2001, he noted that Mr. Blackwell had rejected Mr. Found's offer of a Bush Hawk, with some compensation, and instead requested the return of SVD. Mr. Hamblin expressed the position of Found Aircraft as follows:

From our standpoint, it is important for all of us to remember that the pieces of SVD you sent, while appreciated, needed to be combined with major pieces from other sources to build a flyable airplane. In addition, the re-construction process required substantial financial resources and time on the part of Bud Found and the company.

- [70] Mr. Blackwell and Mr. Hamblin spoke by telephone on October 31, 2001. In the course of that conversation, Mr. Hamblin reiterated the position of Found Aircraft. He also sent a letter dated November 1, 2001, to Mr. Blackwell, repeating his position.
- [71] Mr. Blackwell retained legal counsel, who wrote to Found Aircraft in January 2002. Legal counsel for Found Aircraft responded in February 2002, denying any obligation under the Agreement and inviting Mr. Blackwell to retrieve SVD from the Muskoka Airport.
- [72] Mr. Blackwell's son travelled to Ontario in early May 2002 to fly SVD back to Moose Lake Lodge under the Ferry Permit. Because a used engine had been installed in SVD, Transport Canada regulations required that the aircraft receive further mechanical work before being flown.
- [73] Upon its return to British Columbia, SVD underwent further repairs to bring it to an acceptable standard for commercial use. Thereafter, SVD received a Certificate of Airworthiness from Transport Canada and was put to service in Mr. Blackwell's lodge operations in mid-October 2002.
- [74] Following the return of SVD to British Columbia, there was no further correspondence between Mr. Blackwell and the Found Defendants.
- [75] Mr. Blackwell commenced this action on July 17, 2007.

III. Discussion

The Wording of the Agreement

- [76] The plain wording of the Agreement suggests the two men agreed that Mr. Blackwell would supply the SVD parts in his possession, and Mr. Found would rebuild SVD to a flyable condition (contributing any necessary additional parts), use it as a demonstrator, and then modify it to the specifications of a Bush Hawk 2E. He would then return the aircraft to Mr. Blackwell, who would pay for the engine, propeller, and instruments.
- [77] It is also apparent that the parties foresaw the possibility that Mr. Found would not succeed in rebuilding SVD and modifying it into a Bush Hawk 2E. In that case, Mr. Found was to return SVD's parts in the same condition they were received, or pay Mr. Blackwell \$50,000. In addition, Mr. Blackwell was to receive the benefit of any repair or overhaul of SVD free of charge.

- [78] Somewhat less clear is the understanding of the parties as to what would occur in the event that Mr. Found succeeded in rebuilding SVD to a flyable condition for use as a demonstrator, but failed to modify the aircraft to the specifications of a Bush Hawk 2E.

Arguments of the Parties

- [79] The gist of Mr. Blackwell's argument was that once Found Aircraft rebuilt SVD to a flyable condition and used it as a demonstrator, the company was obligated to either modify SVD to a Bush Hawk 2E or give him a new Bush Hawk with the 2E specifications.
- [80] The Found Defendants argued, in the words of their counsel, that "while Mr. Blackwell did not get what he hoped for, he got what he bargained for." The bargain was a simple one: Mr. Blackwell would provide SVD's parts and Mr. Found would use SVD in his program and then, if possible, would modify it to the specifications of a Bush Hawk 2E. However, if SVD could not be so modified, Mr. Found would return SVD to Mr. Blackwell, who would benefit from any improvements made to the aircraft by Mr. Found.

The Law

- [81] Meaning is given to the words of a contract based on the intentions of the parties. Those intentions are to be determined objectively in the context of the circumstances in which the contract is made. In *Chitty on Contracts*, 29th ed., vol. 1 (London: Sweet & Maxwell, 2004) at para. 12-043, the learned authors said the following:

The task of ascertaining the intention of the parties must be approached objectively: the question is not what one or other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. ... "One must consider the meaning of the words used, not what one may guess to be the intention of the parties." However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.

See also: *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 207, 85 B.C.L.R. (4th) 237.

- [82] Consideration of the context of the contractual language was emphasized by Estey J., writing for the majority of the Supreme Court of Canada, in *Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance*, [1980] 1 S.C.R. 888 at 901, 112 D.L.R. (3d) 49:

[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.

- [83] The Court went on to say that the literal meaning of the contract should not be applied where to do so would lead to a result that would not have been contemplated in the commercial atmosphere in which the contract was made. The contract should be interpreted in a manner that promotes a sensible commercial result.
- [84] The court may consider extrinsic evidence of the parties' subsequent conduct where the words used in the contract are ambiguous. An ambiguity exists where, "after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations": *Re Canadian National Railways and Canadian Pacific Ltd* (1978), 95 D.L.R. (3d) 242 at 262, [1979] 1 W.W.R. 358 (B.C.C.A.). Where there is ambiguity, the court will interpret the contract "in a manner that accords with commercial reality and avoids commercial absurdity": *Chudy* at para. 207.

Analysis

- [85] The Agreement was negotiated and drafted by two individuals in the absence of any legal advice. I have considered its language in the context of the circumstances leading to the signing of the Agreement, the parties' expectations as disclosed by their communications, and their subsequent conduct.
- [86] When Mr. Blackwell and Mr. Found signed the Agreement, the new Bush Hawk 2E was little more than a dream. Its specifications were not yet developed. Both parties understood it may not be possible to modify SVD to the specifications of a Bush Hawk 2E. They included in the Agreement certain provisions to address that contingency.
- [87] My reading of the Agreement is as follows. Mr. Blackwell's obligation was to provide SVD's parts. Mr. Found's obligation was to make SVD airworthy, use it as a demonstrator, and then modify it into a Bush Hawk 2E. If Mr. Found succeeded in achieving those objectives, Mr. Blackwell was entitled to have SVD, in its new state, returned to him. However, if Mr. Found failed, Mr. Blackwell was entitled to the return of SVD and the benefit of any improvements Mr. Found made to it. If Mr. Found could not return the parts in their original condition, he would pay Mr. Blackwell \$50,000.
- [88] It is clear that Mr. Found was able to restore SVD to a flyable condition and used it as a demonstrator, but failed to modify the aircraft into a Bush Hawk 2E. It is equally clear that Mr. Found returned SVD to Mr. Blackwell in a much improved condition. In order to restore SVD, Found Aircraft invested \$60,000 in additional parts and six months of labour. Mr. Blackwell received the benefit of the parts and labour at no cost to him.

- [89] There was a dispute between the parties as to whether SVD was rebuilt into an "airworthy aircraft". Mr. Found succeeded in making SVD "airworthy" in the sense that it was flyable, and was used as a demonstrator in the Found Aircraft program to develop the Bush Hawk 2E, but SVD never received airworthiness to Transport Canada standards. However, I have concluded that the resolution of this dispute does not turn on whether SVD was rebuilt to airworthiness within the meaning of the third paragraph of the Agreement.
- [90] In my view, the intention of the parties was that if Found Aircraft was able to restore SVD sufficiently that it could be used as a demonstrator and then, modified to the specifications of a Bush Hawk 2E, it would be returned to Mr. Blackwell for the cost only of the engine, prop, and instruments (the cost of which totalled approximately \$70,000). In other words, Mr. Blackwell would receive a Bush Hawk 2E for substantially less than he would have to pay for a new one. However, if Mr. Found was unable to modify SVD into a Bush Hawk 2E, he would return the parts to Mr. Blackwell and bear the cost of any improvements to them. If he could not return the parts in a condition as good as that when the parts were delivered, Mr. Blackwell would receive \$50,000.
- [91] The subsequent conduct of the parties supports this reading of the Agreement. When it became apparent to Mr. Found that he could not modify SVD into a Bush Hawk 2E, he offered to provide Mr. Blackwell a new Bush Hawk, for a reduced price, rather than return SVD. However, Mr. Blackwell did not want to pay anything for the new Bush Hawk, particularly as it would not have the features that he wanted, which were a 300 hp engine and Fowler Flaps. He preferred to have the now much improved and flyable SVD returned to him, which he understood to be his right under the Agreement. Mr. Blackwell knew that he would be required to pay for the engine, props, and instruments, but would be required to pay nothing for the additional parts and labour contributed by Found Aircraft to make SVD flyable.
- [92] In late 1998 and again in early 1999, Mr. Blackwell insisted on the return of SVD. At the time, he did not suggest that he was entitled to both the return of SVD and a new Bush Hawk. In his evidence at trial, Mr. Blackwell said that one of the reasons he insisted on the return of SVD was that the Bush Hawk had not yet been issued a Type Certification and he was not willing to wait any longer for a useable aircraft. However, Mr. Blackwell did not mention any such concern in his correspondence at the time. Moreover, a provisional Type Certificate had been issued for the 2C and 2C-1 in November 1998, and the parties knew that it was only a matter of months until the full Type Certificate was obtained. In fact, it was obtained at the beginning of March 1999.
- [93] Mr. Blackwell argued that Found Aircraft unreasonably delayed the return of SVD between 1999 and 2000. It was impossible to test that assertion on the evidence presented at trial. There was no evidence of any written communications between the parties during that time. Found Aircraft had no use for SVD after September 1998, when it began using a new aircraft for its test flights. There was no benefit to Found Aircraft in delaying the return of SVD. Preparations were begun to return SVD with a Found Aircraft 300 hp engine.

Ultimately, Mr. Blackwell decided to send his own engine for installation in SVD. It was neither a 260 nor a 300 hp engine; its installation required additional labour and parts, which further delayed the return of SVD.

- [94] It was not until two years later, in March 2001, that Mr. Blackwell suggested to Found Aircraft that he was entitled to both the return of SVD and a Bush Hawk XP on terms favourable to him. There is nothing in the Agreement that would support such a claim.
- [95] Mr. Blackwell was advised in late February of 2001 that SVD was ready to be retrieved. SVD had been issued a Ferry Permit in early February 2001. Instead of retrieving SVD, Mr. Blackwell continued his attempts to negotiate more favourable terms than those contained in the Agreement. His son flew SVD back to British Columbia some 14 months later.
- [96] I have concluded Mr. Blackwell failed to establish that the Found Defendants caused any delay in the return of SVD.
- [97] The Agreement does not specifically address the issue of the cost of returning SVD to Mr. Blackwell. It does provide that Mr. Found was to deliver SVD, modified into a Bush Hawk 2E, at no cost to Mr. Blackwell other than the cost of the engine, prop, and instruments. Initially, when Mr. Blackwell opted for the return of SVD, he asked Mr. Found to bear the cost. At the time, SVD was to be returned with a 300 hp owned by Found Aircraft. Ultimately, however, Mr. Blackwell elected to send his own used engine for installation in SVD. The parties agreed that Found Aircraft would install the used engine at its cost. Installing the engine required significant changes to the fuel supply system, and the cost of doing so was significant. There was no discussion between the parties after that time as to who would bear the cost of returning SVD to Mr. Blackwell.
- [98] I have concluded that neither the Agreement itself, nor the subsequent conduct of the parties, entitled Mr. Blackwell to the cost of having SVD returned to him.

IV. Conclusion

- [99] In summary, modification of SVD into a Bush Hawk 2E was not feasible. That being the case, the obligation of Found Aircraft under the terms of the Agreement was to return SVD in at least its condition when delivered by Mr. Blackwell. Found Aircraft returned SVD to Mr. Blackwell in a condition that was significantly better than it was when Mr. Blackwell delivered it to Mr. Found. Found Aircraft repaired and assembled SVD at considerable expense to itself. Mr. Blackwell received the benefit of the improvements to SVD at no cost. Under the terms of the Agreement, Mr. Blackwell was not entitled to any greater compensation than he received.
- [100] For the reasons stated, Mr. Blackwell's claims must be dismissed.
- [101] Subject to any submissions by counsel, the Found Defendants are entitled to their costs.

The Honourable Madam Justice C. A. Wedge

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