

CANADA / JUDGMENT

Camada Technology Int.'l. Pty. Ltd. v. Thiessen-C.T.I. Cable Systems Ltd. et al.

2005 BCSC 1104

COURT

Supreme Court of British Columbia

DECIDED

23 August 2005

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2005 BCSC 1104 Camada Technology Int.'l. Pty. Ltd. v. Thiessen - C.T.I. Cable Systems Ltd. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Camada Technology Int.'l. Pty. Ltd. v. Thiessen-C.T.I. Cable Systems Ltd. et al.,

2005 BCSC 1104

Date: 20050823

Docket: S040382

Registry: Vancouver

Between:

Camada Technology International Pty. Ltd.

Plaintiff

And

Thiessen - C.T.I. Cable Systems Ltd., Thiessen

Equipment Ltd., Lawrence Thiessen and

Sandra Thiessen

Defendants

Before: The Honourable Mr. Justice E.R.A. Edwards

Reasons for Judgment

Counsel for the Plaintiff

S. R. Coval

A. Russell (Articled Student)

Counsel for the Defendants Thiessen Equipment Ltd., Lawrence Thiessen and Sandra Thiessen

O. P. L. Staplin

H. J. McCallum

Date and Place of Trial/Hearing

June 11-15, 2005

Vancouver, B.C.

Written submissions filed: July 21, August 10, 11, and 12, 2005

INTRODUCTION

[1] The plaintiff ("CTI") applies under Rule 18A for the following relief:

The Plaintiff Camada Technology International Pty. Ltd. ("CTI") seeks the following orders in this summary trial:

- (a) judgment against the Defendant Thiessen Equipment Ltd. ("TEL") in breach of contract, for overcharging for the sale price of "strand" (the "Strand Surcharge") which is a raw material used in the mining industry for the manufacturing of cablebolts;
- (b) an order that TEL pay CTI damages in the amount of \$478,777.18, representing the loss to CTI from the Strand Surcharge, plus pre-judgment interest to be calculated;
- (c) an order that CTI may collect this judgment in part from the dividends otherwise payable to TEL from the Defendant Thiessen-Cable Systems Ltd. (the "JVC");
- (d) costs of this application against TEL;
- (e) such further and other relief as this Honourable Court may deem just.

[2] The defendants applied on June 17, 2005, for a determination that CTI's application was unsuitable for determination under Rule 18A.

[3] Madam Justice Gill, in brief oral reasons, found they had not met the "heavy onus" on a party seeking to terminate a Rule 18A summary trial on a preliminary objection. That onus is to show it was "very clear from the outset" that the issues cannot be resolved summarily. Gill J. cited *Rieckhoff v. DC Diagnosticare Inc.* 2001 BCSC 850.

[4] Gill J. proceeded on the basis that paragraph 32 of the Amended Statement of Claim would be abandoned. It alleges oppression and unfair prejudice in the conduct of the affairs of the defendant Thiessen-C.T.I. Cable Systems Ltd. ("the JVC") and in the exercise of the powers of the personal defendants Lawrence and Sandra Thiessen as officers of the JVC.

- [5] At the outset of argument, counsel for CTI applied to delete paragraph 32 of the Amended Statement of Claim, conditional on the Court finding in CTI's favour on the Rule 18A application.
- [6] In other words, CTI's counsel sought to reserve the right to pursue paragraphs 32 and 33 if the case was found unsuitable for disposition under Rule 18A, but agreed to abandon those claims unconditionally if the Court concluded that it was necessary in order to render a decision on this Rule 18A summary trial application.
- [7] Defendants' counsel objected to the proposed conditional abandonment of paragraphs 32 and 33, and applied to amend the Statement of Defence to allege that the JVC, not CTI, was the proper party to seek the relief claimed and that the CTI must proceed, as a shareholder in the JVC, by derivative action to seek that relief.
- [8] Judgment was reserved on both applications to amend the pleadings and the Rule 18A summary trial proceeded.
- [9] Defendants' counsel argued that the issues raised in the Amended Notice of Motion, quoted above, were unsuitable for determination under Rule 18A. He reiterated the position taken before Gill J. that those issues were "inextricably interwoven" with others raised in the balance of the pleadings. He also argued that parts of the affidavits filed by CTI were inadmissible and that the credibility of witnesses could not be satisfactorily resolved unless they testified at trial.
- [10] A trial is scheduled six months hence.
- [11] The threshold question is whether the issues raised in the Amended Notice of Motion are suitable for determination under Rule 18A. This issue was not finally resolved by Gill J., who merely found that the suitability question could not be resolved in the defendants' favour on a preliminary objection.

SUITABILITY FOR DETERMINATION

- [12] CTI and the defendant TEL signed a joint venture agreement ("JVA") in 1994 under which they agreed to incorporate the JVC to manufacture Garford Cablebolt, a product used in the mining industry. CTI agreed to supply rights to a patented process and specialized machinery to be installed at TEL's plant in Saskatoon. TEL agreed to manufacture and market the product. Profits in the form of dividends of the JVC were to be shared 35% to TEL and 65% to CTI.
- [13] The main component of Garford Cablebolt is "strand", steel cable of standard dimension and quality available from a variety of sources world wide. TEL used strand for other products it manufactured at the Saskatoon plant, so it already had an established source or sources of supply.
- [14] Clause 18 of the JVA provides:

The JVC to initially source strand from Thiessen at cost plus interest expense (Royal Bank prime plus 1%). This method of sourcing strand to be re-evaluated at six month intervals, if required by either JVC party.

- [15] There is no evidence either CTI or TEL ever required the other to "re-evaluate" the sourcing of strand under Clause 18.
- [16] CTI's primary allegation is that TEL never supplied strand "at cost plus interest expense" to the JVC, but always charged the JVC more than TEL paid its suppliers for strand.
- [17] There was no written contract between TEL and the JVC for the supply of strand. Since TEL handled the accounting for the JVC, the price it charged the JVC was a bookkeeping entry for both TEL and the JVC.
- [18] TEL does not dispute it charged the JVC more for strand than it paid its suppliers for strand. I refer to this as "the differential".
- [19] The differential between the two prices is tabulated in an accounting prepared for this litigation by TEL for the period August 1994 to October 2003. It ranges week by week from a low of 3% of the price the JVC was charged by TEL for strand to a high of 28%.
- [20] Over the nine years in question TEL charged the JVC a total of \$5,090,267 for strand for which it paid \$4,353,707, for a total differential of \$736,560, an average of 14% of the price charged the JVC or an average "mark up", "premium" or "surcharge" of 16.9% over the price TEL paid its suppliers for strand.
- [21] In response to a question from the Court, defendants' counsel acknowledged he was unable to say what, if any, proportion of the surcharge represented interest, which is not accounted for separately in the tabulation.
- [22] There is no evidence of what, if any, interest expense TEL incurred in respect of the supply of strand to the JVC.
- [23] Even if TEL financed its strand purchases from its suppliers continuously with a line of credit at Royal Bank prime plus one percent and attributed to the JVC its appropriate share of that expense based on its proportional share of all the strand TEL purchased for nine years, there is no evidence that the interest averaged 16.9% of TEL's acquisition cost of strand or occasionally reached 39%, as the monthly differential did at its peak in January and February 2003.
- [24] There is no evidence that any of the differential, let alone the entire differential, represented interest expense. I infer the differential between what TEL paid for strand and what it charged the JVC for strand, if it included interest as provided for in Clause 18, also included a component not attributable to interest.

[25] Defence counsel did not deny there was such a component but argued it constituted part of TEL's cost of strand which TEL was entitled to recover under Clause 9(g) of the JVA. Clause 9 provides in part:

Thiessen is to supply the following on an infinitum basis at no cost to the JVC:

- a) Factory & office premises of sufficient size and type located at 2241 Spears Avenue, Saskatoon, Sask S7L 5X6 Canada in order to manufacture in the normal course, the Garford Cablebolts.
- b) An administrative & general management function to administer the JVC. Provision of banking, invoicing, ordering, stocktaking and preparation of financial and management accounts and reports to the JVC partners.
- g) Any associated direct costs of common services and any direct costs associated with Thiessen-CTI Cable Systems Ltd. is to account of the JVC.

[26] Since many expenses of handling strand such as general office operations, banking, preparation of financial statements, stocktaking, factory space (for storage), insurance, forklift and truck handling TEL agreed to provide "at no cost", it is unclear what further non-interest related expenses might be costs attributable to the provision of strand to the JVC recoverable under Clause 9(g).

[27] If there were such costs, they were to be "to account of the JVC" under Clause 9(g). This I interpret to mean specially accounted for and charged to the JVC by TEL. There is no evidence specifying such costs nor any evidence of any agreement that they were to be treated as part of TEL's cost of strand and included in a differential between the price TEL paid for strand and that it charged the JVC, rather than specifically charged to the JVC's account.

[28] There is no evidence or readily apparent explanation as to why such costs, if such there were, ranged from 3% to 28% of what TEL charged the JVC for strand. Further, while the price TEL charged the JVC for strand remained constant at \$0.40 per foot every week from October 1996 to October 2003, the differentials ranged week by week from 5% to 28%. During the same period the price TEL paid for strand ranged from \$0.38 down to \$0.29, so the highest differentials coincided with the lowest price TEL paid for strand.

[29] If the differential reflected variable costs other than what TEL paid for strand the price TEL charged the JVC could not have remained constant for years, but would have reflected weekly changes in those variable costs. Also, the weekly price TEL charged the JVC ought to have trended down with the price TEL paid for strand unless the variable costs tracked upward, coincidentally and identically, to offset exactly reductions in the price TEL paid for strand.

- [30] If the costs asserted to be included in the differential were fixed costs, the price TEL charged the JVC could be expected to go down with the price TEL paid for strand, but it remained at \$0.40 and the differential increased as the price TEL paid for strand fell.
- [31] This leads me to infer there was no link between the differential and any costs attributable "to account of the JVC" under Clause 9(g). The differential is demonstrably arbitrary at least after the price TEL charged the JVC was set at \$0.40 in October 1996.
- [32] There is no formal plea, nor any evidence to support a plea that TEL's "cost" of strand under Clause 18 included costs referred to in Clause 9(g). I therefore reject the argument that the differential between what TEL paid for strand and what it charged the JVC for strand reflected its "cost" of strand under Clause 18.
- [33] I find TEL charged the JVC more than cost plus interest at prime plus one for strand.
- [34] TEL's Statement of Defence pleads, in regard to this issue:
4. In further answer to paragraph 8 of the Statement of Claim, these Defendants say that any agreement set out therein with respect to the price of strand was for an initial six-month period and was done to assist the start up of the Defendant Thiessen-C.T.I. Cable Systems Ltd. (Thiessen-CTI").
 5. In further answer to paragraph 11 of the Statement of Claim, the said Defendants say that any changes in the price of strand were agreed to, ratified or accepted by the Plaintiff. Further, the Defendant Thiessen was entitled to change the price of strand in accordance with the JVA. The said Defendants further say that the Plaintiff was at all times aware of, or could easily obtain, the market cost of strand.
- [35] Counsel for the defendants argued that CTI must have known what TEL paid for strand and what it charged the JVC for strand and therefore must have agreed to the differential.
- [36] George Brown, CTI's former manager deposed that he was unaware of the differential until he was advised at a meeting on October 28 or 29, 2002, by TEL's CFO George Lim, that TEL had charged the JVC more than its cost plus interest for strand.
- [37] Counsel for the defendants argued that the issues in the present application are unsuitable for determination under Rule 18A essentially for two reasons: there are credibility issues which cannot be satisfactorily resolved and these issues are interwoven with the other issues arising from the pleadings which will be determined at the scheduled trial, so all issues should be tried together.
- [38] The credibility issues go to the question of whether the evidence on this Rule 18A application, consisting of 28 affidavits, excerpts from the examinations for discovery of Lawrence Thiessen, principal of TEL and Mr. Brown manager of CTI and the cross-examination before the Court of John Blackall, a principal of CTI, provides a sufficient basis for the Court to determine the questions of fact necessary to determine if Clause 18 was breached.

- [39] TEL's defence on the issues in the present application, reduced to its essentials, is not that no there was no differential, but that CTI must have known of the differential and accepted it.
- [40] The Statement of Defence pleads that "any changes in the price of strand were agreed to, ratified or accepted" by CTI and that TEL was "entitled to change the price of strand" in response to CTI's allegation that TEL charged the JVC "for strand at a rate higher" than provided in Clause 18 by charging more than TEL's cost of strand plus agreed interest.
- [41] It is not changes in the price of strand which CTI alleges constitute a breach of Clause 18. Indeed changes based on changes in the price TEL paid for strand and interest charges it incurred are implicitly contemplated by Clause 18.
- [42] Nor does the plea in the Statement of Defence that CTI "was at all times aware of, or could easily obtain, the market price of strand" answer CTI's allegation that the price TEL charged the JVC, by including the differential, exceeded TEL's cost of purchasing strand plus agreed interest and was higher than that provided for in Clause 18. There is no evidence that CTI ever explicitly agreed to the differential.
- [43] The defence plea is that CTI tacitly agreed to the price TEL charged the JVC for strand. From this TEL asks the Court to infer that CTI must have been able to deduce that the price TEL charged the JVC included the differential by comparing it to the market price of strand and to further infer that CTI did, in fact, deduce this and since CTI never objected to TEL, must have agreed to the differential.
- [44] Mr. Thiessen testified on examination for discovery that he was unaware of the differential until after CTI asserted a breach of Clause 18.
- [45] Two former employees of TEL, Gordon Escaravage and Larry Mackay, whose responsibilities within TEL and the JVC put them in a position to know of the differential, swore affidavits filed by CTI, to the effect they did not know of the differential.
- [46] Appended to one of Mr. Mackay's two affidavits is a faxed memo dated October 2, 1995, to Mr. Brown, copied to Messrs. Escaravage and Thiessen, which includes the following: "Funding of strand purchases: Thiessen-CTI (the JVC) purchases in roll lots as needed from Thiessen Equipment (TEL) at landed cost price."
- [47] Mr. Escaravage deposed that he did not set the price TEL charged the JVC for strand and was unaware of the differential, which he referred to as "the strand surcharge".
- [48] Mr. Thiessen testified on examination for discovery that between 1994 and 2003 he was unaware that there was a difference between what TEL was paying and what it charged the JVC for strand.
- [49] The quoted portion of Mr. Mackay's October 2, 1995 memo is consistent with his evidence and that of Messrs. Brown, Thiessen and Escaravage that they were unaware of the differential.

- [50] The issue is not whether TEL or its personnel knew of the differential, but whether CTI knew of and accepted the differential.
- [51] If the evidence of Messrs. Thiessen, Escaravage and Mackay, who all had direct access to TEL's and the JVC's accounting, that they did not know of the differential is accepted, it is difficult to accept the assertion made by counsel for the defendants that the Court should infer that CTI or its principals must have concluded that TEL was charging the JVC the differential and tacitly accepted it.
- [52] There is evidence CTI had information about the price the JVC was charged for strand. There is also evidence CTI had information on isolated occasions about the price TEL paid for strand, but there is no evidence that CTI had information which permitted it to continuously or effectively compare the price TEL paid for strand with the price it charged the JVC during the nine years the JVC operated.
- [53] There is no suggestion this information was requested by CTI but withheld by TEL.
- [54] Mr. Blackall was knowledgeable about the market for strand and knew how to source strand world wide. But there is no evidence that he was generally aware of TEL's cost of strand at Saskatoon or that he had information which enabled him to compare that cost contemporaneously with prices TEL charged the JVC.
- [55] Mr. Blackall was aware the price of strand was trending down while the JVC's gross margin did not improve as might be expected, which prompted him to suggest to TEL it should look to importing strand. TEL then imported strand. According to Mr. Blackall, the JVC's gross margin subsequently improved. He did not pursue the issue of the JVC's cost of strand.
- [56] Had Mr. Blackall asked TEL the right questions about the respective prices TEL paid and charged for strand he would have been able to determine that TEL charged the JVC the differential.
- [57] Mr. Blackall's explanation for failing to ask those questions was that he relied on the fact it was in TEL's interest to purchase strand for its own as well as the JVC's use as cheaply as possible so he need not concern himself with TEL's cost of strand. There was no reason for Mr. Blackall to expect or suspect TEL would charge the differential. I find that his explanation for not pursuing the inquiries necessary to determine if TEL was charging a differential is plausible.
- [58] Counsel for the defendants advanced the theory the reason CTI never made inquiries about the price TEL charged the JVC for strand, and accepted it at \$0.40 for years, was that since TEL was the major distributor of the Garford Cablebolt TEL produced for the JVC, TEL would simply demand a price reduction to reflect the JVC's lower cost of production, so a reduction of the JVC's cost of strand would result in no net improvement in the JVC's profit margin or CTI's dividends from the JVC. This theory is highly speculative and unsupported by any evidence.

- [59] On cross-examination at the hearing it was put to Mr. Blackall on the basis he "would have known" that if the JVC got a reduction in the price of strand there was a "probable risk" that TEL would have asked for a reduction in the price it paid as a distributor for Garford Cablebolt.
- [60] Mr. Blackall answered by repeating "A probable risk". I interpreted his answer as interrogatory, to express his surprise or confirm he understood the question, although there is no question mark after his answer as it appears in the transcript. He did not directly answer the question. The balance of this defence theory was not put to him.
- [61] Implicit in this theory is the proposition that CTI agreed by acquiescence that the JVC would continue to pay \$0.40 for strand no matter what TEL's cost of strand. Even accepting that was so, for the purpose of analysis, the theory does not hold up logically.
- [62] The question of whether CTI would be better or worse off, in terms of the dividends it would receive from its 65% share of the JVC's profits, if the JVC was not charged the differential and therefore had a reduced cost of strand, but received a lower price from TEL and the other distributor, Stewart, for Garford Cablebolt is a highly complex one.
- [63] CTI was entitled to a review of the strand price TEL charged the JVC as contemplated by Clause 18, based on a full disclosure of all relevant information about TEL's cost of strand, the price the JVC charged for Garford Cablebolt and the ability of the distributors to maintain or increase market share by reducing prices to customers, before agreeing to accept the differential.
- [64] It is impossible to infer, on the basis of no evidence, that CTI analyzed this hypothetical situation on its own, without information TEL could have supplied, and concluded that it was in CTI's best interest to, in effect, permit TEL to enjoy the entire benefit of any reduction in the cost of strand to TEL below \$.40 and then tacitly agreed to let TEL arbitrarily set the differential with no relationship to its cost of strand.
- [65] Counsel for the defendants argued that Messrs. Escaravage and MacKay were disgruntled former employees of TEL whose evidence that they did not know of the differential is impossible to accept. I agree if they did not know of it, it is hard to imagine who at TEL did. But even if their evidence on this point is disregarded, that does not strengthen the defendants' assertion that CTI must have known of the differential and accepted it. Therefore the credibility of these two witnesses on this point is not critical to CTI's case.
- [66] I find that whether TEL charged the differential intentionally or inadvertently, it did so contrary to Clause 18.
- [67] As noted above, there is no evidence the differential reflected interest expense or any fixed or variable cost incurred by TEL not otherwise provided for in Clause 9.
- [68] Charging the JVC the differential constituted a breach of Clause 18 unless the evidence supports a finding that CTI was aware of and accepted the differential.

- [69] Evidence that Blackall and Brown had some information from which it might be deduced that TEL was charging the differential does not establish that they made that deduction. Had they deduced there was an apparent breach of Clause 18, it defies belief that they would have tacitly agreed to it for years, notwithstanding its potential negative impact on the profit margin of the JVC, without expressly raising the issue for review as contemplated by Clause 18.
- [70] The defence theory that CTI knowingly stood by and permitted TEL to charge the differential, amounting to hundreds of thousands of dollars, for nine years without such a review or an express agreement to modify Clause 18, requires inferences for which there is no evidentiary basis.
- [71] There is no more evidence Messrs. Brown and Blackall knew of the differential before 2002 than there is that Mr. Thiessen knew of it.
- [72] I am unable to find it is more probable than not that Messrs. Brown and Blackall knew of the differential. There is therefore no basis to infer, in the absence of direct evidence, that they concluded the differential would have no impact on CTI's profit from the JVC, because a reduction of the JVC's cost of strand would inevitably result in a reduction in the price the JVC could charge TEL as a distributor of Garford Cablebolt.
- [73] I conclude that on the basis of the evidence presented on this Rule 18A application it is possible to determine that TEL charging the JVC the differential or "strand surcharge" as it is characterized by CTI, constituted a breach of Clause 18.
- [74] In short, I find this aspect of the case is suitable for determination under Rule 18A. Nevertheless, the question remains whether CTI's application for judgment on this issue ought to be granted.

WILL JUDGMENT UNDER RULE 18A ASSIST IN THE EFFICIENT RESOLUTION OF THE PROCEEDING?

- [75] Judgment under Rule 18A on one of several issues in a case will only be granted where the Court is satisfied that this would assist the efficient resolution of the proceeding and not become a hindrance to the just, speedy and inexpensive determination of the entire dispute between the parties on its merits. See *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited* (2000), 164 B.C.A.C. 300.
- [76] The Court ought not to grant judgment on one of several issues in a case if that issue is not "completely severable" from the remaining issues. See *Sinnott v. Westbridge Computer Corporation* (1993), 15 C.P.C. (3d) 376.
- [77] There are four possible reasons why granting judgment on the differential or "strand surcharge" issue might not be just or assist in the efficient resolution of the dispute as a whole:

- (1) The parties' applications to amend their pleadings.
 - (2) The assessment of damages arising from the differential.
 - (3) The question of whether the surcharge issues are "completely severable" from the remaining issues. The other issues are whether TEL breached Clause 11, the "confidentiality" provision of the JVA, whether CTI breached Clause 5, the "patent defence" provision and whether the breaches of Clauses 9, 11 and 18 CTI alleges entitled CTI to terminate the contract and whether the breach of Clause 5 TEL alleges entitled it to repudiate the contract and seek damages from CTI.
 - (4) Complications in the event of appeal.
- [78] With respect to the applications to amend the pleadings, there are two issues. Should they be allowed? If allowed, would they affect the severability of the issues on the present application from the balance of the issues in the case?
- [79] For the reasons which follow, I conclude that the applications to amend the pleadings do not militate against granting the relief sought on the Rule 18A application.
- [80] Defendants' counsel applied to amend the Statement of Defence by adding the following:
6. In further answer to paragraphs 11, 12 and 13 of the Statement of Claim, the Defendants say that the Plaintiff is not a proper party to bring such claims. If there was such an overcharge as alleged, such overcharge was to the Defendant Thiessen-CTI who is the only proper party to make such a claim. The Plaintiff was not a party to transactions it impugns and has no privity of contract.
 7. In further answer to paragraphs 11, 12 and 13 of the Statement of Claim, the Defendants say the claims of the Plaintiff are derivative in nature. The Plaintiff has not followed the required procedures under the Canada Business Corporations Act, Section 239 to properly constitute such a claim.
 8. In further answer to paragraphs 11, 12 and 13 of the Statement of Claim, the Defendants say the claims of the Plaintiff contravene the rule in *Foss v. Harbottle* [1842] 2 Hare, 461, 67 E.R. 189.
- [81] An application to amend pleadings will normally be granted unless it is "perfectly clear" that the proposed amendment discloses no reasonable claim or defence.
- [82] The JVC had no contract with TEL which included the "at cost" provision in Clause 18 of the JVA between CTI and TEL. Therefore there is no basis for an action by the JVC against TEL or a derivative action by CTI as a shareholder of the JVC against TEL.

- [83] CTI on the other hand, as party to the JVA, is the proper party to claim damages for TEL's alleged breach of that contract. TEL profited from the differential by increasing its revenues with a concomitant increase in the JVC's cost and reduction of its profit and CTI's share of the JVC's dividends.
- [84] I find it is perfectly clear the proposed amendment of the Statement of Defence discloses no reasonable defence. The application to amend is dismissed.
- [85] At the outset of the Rule 18A hearing CTI's counsel presented a Further Amended Statement of Claim which deleted paragraphs 22, 23, 24, 31, 32, 33 and 34 from the Amended Statement of Claim filed February 14, 2004.
- [86] This further amendment would of course reduce the issues in the case apart from those on the Rule 18A application and, if anything, make it more likely the remaining issues are completely severable.
- [87] Defendants' counsel did not oppose the application to further amend the Statement of Claim, except as to CTI's proposal that paragraphs 32 and 33 not be deleted if the Rule 18A application is dismissed. In light of my disposition of the Rule 18A application, that proposal is moot.
- [88] The application to further amend the Statement of Claim is granted.
- [89] CTI claims damages on the straightforward basis that it is entitled to 65% of the total differential of \$736,580.28 or \$478,777.18 representing its 65% share of the JVC's profits pursuant to the JVA.
- [90] Defendant's counsel argued that may not properly reflect CTI's share of the net profits of the JVC in light of taxes or other expenses.
- [91] Yet the defendants did not produce any evidence to support that argument, nor any evidence to support a claim for interest expense to which TEL was entitled under Clause 18.
- [92] CTI relies on Mr. Thiessen's examination for discovery testimony that Mr. Lim, TEL's CFO, may be correct that TEL incurred no interest expense in respect of providing strand to the JVC.
- [93] Mr. Thiessen agreed Mr. Lim might be correct but was not sure whether Mr. Lim's statement applied to the whole period TEL supplied strand to the JVC, because Mr. Lim had not been with TEL throughout the relevant period. Mr. Thiessen agreed there was a way to find out if Mr. Brown's understanding of Mr. Lim's statement was accurate. That understanding was that TEL had no such interest expense, except perhaps for a nominal amount at the beginning of the contract period.
- [94] Mr. Thiessen was then asked by CTI's counsel to let him know if he challenged Mr. Brown's position that TEL had, if anything, only nominal interest expense associated with the supply of strand to the JVC. Mr. Thiessen agreed he would.

- [95] CTI's counsel asks the Court to infer from the lack of evidence, in light of Mr. Thiessen's agreement to let CTI's counsel know if he challenged Mr. Brown's position that TEL incurred no interest that TEL cannot prove it had any interest expense it could charge the JVC under Clause 18. That lack of evidence and the fact TEL never provided any accounting for or claimed any interest expense under Clause 18 leads me to infer TEL had no such expense.
- [96] The Amended Notice of Motion sets out precisely the amount of CTI's claimed damages. TEL was therefore on notice that if it proposed an alternate basis for determining damages it would require evidence to support it. It has introduced no such evidence.
- [97] On my reading of the pleadings, the assessment of damages in respect of the issues on the Rule 18A application is entirely distinct from the assessment of damages which might be awarded on CTI's further claims or TEL's counterclaim. Each would have to be assessed independently if the whole case went to trial.
- [98] The assessment of damages on the Rule 18A application is entirely severable from the other issues in the case. I find that an award of damages on the Rule 18A application is not therefore precluded in this case.
- [99] The balance of the issues in this case, in light of the Further Amended Statement of Claim, involve CTI's claim under Clause 11 and TEL's counterclaim under Clause 5.
- [100] CTI pleads that TEL's breaches of Clause 18 and the "confidentiality" Clause 11 justified its repudiation of the JVA and entitle CTI to damages.
- [101] CTI obtained injunctive relief for TEL's alleged breach of the Clause 11 which resulted in the return of the specialized machinery to CTI and ultimately the winding up of the JVC. There is, I was advised, over \$200,000 in undistributed dividends of the JVC.
- [102] Clause 5 provides:
- CTI-Canada or CTI-Aust is to co-ordinate, manage and pay all costs of defending patent infringements relating to the Garford Cablebolt process.
- [103] The Clause 5 dispute arose because a competitor, Ground Control, was selling a product equivalent to Garford Cablebolt which the parties agree infringed the Garford patent which CTI as licensee had contributed to the JVC.
- [104] TEL counterclaims that CTI failed to meet its obligation under Clause 5 to protect the patent for the benefit of the JVC. CTI admits it spent no money on litigation in Canada to enforce the patent. Garford, which holds the patent, brought proceedings, still pending in the Federal Court, to do so.
- [105] TEL pleads that CTI wrongly repudiated the contract and that CTI breached Clause 5 of the JVA thereby entitling TEL to damages.

- [106] As I understand TEL's position, it is that the JVC foundered because CTI failed to act promptly to protect the patent and squelch Ground Control as a competitor.
- [107] That allegation was formally advanced in a Counterclaim filed April 1, 2004. CTI's allegations that TEL breached Clause 11 and Clause 18 were included in its original Statement of Claim filed January 21, 2004. On June 14, 2005, CTI raised the "strand surcharge" in its Statement of Defence to the Counterclaim. This sequence of pleadings belies the suggestion that CTI only raised the Clause 11 confidentiality and Clause 18 "strand surcharge" issues to counter TEL's claim that CTI had breached Clause 5 and so all were inextricably interwoven.
- [108] The defendants' submission that all issues in the case are inextricably interwoven was reiterated after the disclosure of further documents by CTI following the hearing of the Rule 18A application in June 2005.
- [109] During cross-examination at the hearing in June 2005, Mr. Blackall stated he had documents at his home which he had not sent to CTI's counsel and that he believed, but was not certain, were copies of documents CTI had already disclosed. He later sent these documents from Australia. Some 426 documents had not been previously disclosed.
- [110] In written submissions, CTI's counsel took the position that none of the previously undisclosed documents contained "any" new information relevant to the "strand surcharge."
- [111] The defendants' counsel responded that "a number" of the documents were relevant to the issues on the Rule 18A application and their late disclosure prejudiced the defendants in respect of the cross-examination of Mr. Blackall and in presenting argument.
- [112] CTI's counsel forwarded copies of the documents relating to strand and submitted "They are virtually identical to numerous documents previously produced and cross-examined upon in relation to Mr. Blackall's enquiries about sourcing imported strand".
- [113] The fact Mr. Blackall made such inquiries and persuaded TEL to use imported strand was established during the hearing. I agree these documents add nothing to that line of inquiry.
- [114] In response to these documents and the assertion by CTI's counsel that they added nothing to the evidence relating to strand, defendants' counsel offered no rebuttal. Instead, he contested the assertion by CTI's counsel that other documents were "completely irrelevant" to the "strand surcharge" issue, and argued they were relevant because they referred to "discussion with DSI."
- [115] "Discussion with DSI" relates, if anything, to CTI's allegation that TEL breached Clause 11, the confidentiality clause of the JVA.
- [116] Defendants' counsel submits these DSI-related documents potentially impugn the credibility of parts of Mr. Brown's affidavits which were in evidence on the Rule 18A application.

- [117] I have read the DSI-related documents and the parts of Mr. Brown's affidavits referred to by defendants' counsel. I am unable to relate either to any finding of fact necessary for the determination of the Rule 18A application.
- [118] For these reasons, I conclude that the defendants have not been prejudiced by the late disclosure of documents in presenting their response to this Rule 18A application.
- [119] Defendants' counsel strenuously argued that all issues in the case are inextricably interwoven, as he did before Gill J. when he attempted to forestall the hearing of the Rule 18A application on a preliminary objection.
- [120] Gill J. rejected that submission as follows:
- [5] There is obviously a link to the question of whether clause 18 has been breached insofar as the counterclaim and the defence to the counterclaim raise the question of whether the breach should lead to the conclusion that there has been a fundamental breach, but I do not understand how the trial judge in making that determination would be asked to make contrary findings to those which would be made on the question posed to the Court.
- [6] The defendants say in their written argument that the issue to be decided at the summary trial is inextricably interwoven with issues that must be determined at trial but as I have said, I am not able to conclude that that is so.
- [121] Having heard the Rule 18A application and considered the evidence presented and further submissions of counsel on the question of whether the "strand surcharge" issue is inextricably interwoven with the others, I have not been persuaded that is so.
- [122] Further, as noted above, damages flowing from the breach of Clause 18 are unrelated to any others which might arise from CTT's further claims or TEL's counterclaim.
- [123] I therefore conclude that the Clause 18 "strand surcharge" issue is completely severable from the other issues in the case.
- [124] In regards to possible complication of any appeal which might be occasioned by granting judgment on this Rule 18A application, the point was not pressed by counsel for the defendants but must nevertheless be addressed in light of *Bacchus*. Unlike *Bacchus*, this is not a case where it is evident or even suggested that the applicable law is in dispute or uncertain. This is a fact driven case.
- [125] I therefore conclude that the prospect that judgment on the Rule 18A application might complicate an appeal does not loom large in this case so as to militate against granting judgment.
- [126] The last consideration is whether granting judgment will in all the circumstances assists in the just, speedy and inexpensive determination of this dispute.

- [127] It would serve no purpose to require the parties to, in effect, retry the issues raised on this Rule 18A application at the trial scheduled six months hence.
- [128] In light of my conclusion that the issues raised on this application are suitable for determination under Rule 18A and the five hearing days that have been spent arguing the application, the case is more likely to be resolved on a timely and less expensive basis if the parties concentrate on the remaining issues.
- [129] I therefore conclude that granting judgment on the Rule 18A application will assist in the efficient resolution of this proceeding.
- [130] I find TEL breached Clause 18 of the JVA by charging the differential.
- [131] I assess damages payable by TEL to CTI in the amount of \$478,777.18.
- [132] Until the Counterclaim is determined it would not, in my view, be just to permit CTI to collect these damages from dividends payable to TEL from the JVC. I direct that neither party have access to these dividends unless by agreement of the parties or further order of the Court.
- [133] CTI is entitled to costs of the application on scale 3.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/05/11/2005bcsc1104.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/camada-technology-int-l-pty-ltd-v-thiessen-c-t-i-cable-systems-ltd-et-al-2005>

Prepared on 28 October 2026 · Esheria